



# Communications Lawyer

Publication of the Forum  
on Communications Law  
American Bar Association  
Volume 35, Number 1, Fall 2019

THE JOURNAL OF MEDIA, INFORMATION, AND COMMUNICATIONS LAW

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## Transparency and Access: Postcards from Chicago

BY GREGORY NARON AND NATALIE SPEARS

**H**ope springs eternal in the Second City, as any Cubs fan will attest. In April, the city elected a new mayor, Lori Lightfoot, who campaigned on a reform agenda that included a strong commitment to government transparency. That would contrast vividly with the prior administration, which did not exactly cover itself in glory on that score. In the past few years, Mayor Emanuel and city agencies (including the Chicago Police Department) have tenaciously resisted requests for information under the Illinois Freedom of Information Act (FOIA)<sup>1</sup> concerning police misconduct and other matters of public importance, necessitating costly litigation. At the same time, some of the city’s criminal court judges have sealed court records and denied access to proceedings in high-profile cases, in disregard of the First Amendment and common law rights of access. On the other hand, aside from the hopes pinned on the new Lightfoot administration, the news media can be buoyed by some significant and hard-won court victories, strongly vindicating the transparency policy enshrined in the Illinois FOIA, the U.S. Constitution, and the common law of access.

### The Struggle to Enforce Freedom of Information Law under the Emanuel Administration

*During the campaign I promised to have the most open, accountable and transparent government*

*that the City of Chicago has ever seen.*  
—Rahm Emanuel

In responding to the ACLU’s questionnaire to Chicago mayoral candidates on the subject of transparency in government, then candidate Lori Lightfoot pulled no punches: “The current administration flouts its obligations under FOIA in an effort to keep people from gaining access to important information about how city government functions” and “to avoid disclosing embarrassing or harmful records.”<sup>2</sup> Lightfoot came with receipts:

This happened recently with this administration and [Chicago Public Schools (CPS)], which for months ignored, delayed and denied requests from the Chicago Tribune for documents that proved instrumental in uncovering sexual abuse in Chicago public schools. CPS attempted to thwart the Tribune’s requests even though CPS lacked any legal basis for withholding most documents. The school district relented and produced documents only after the Tribune threatened to sue. Fortunately, the Tribune had the resources to fight CPS’ repeated attempts to avoid its statutory obligations.

Other public bodies, like the Chicago Police Department (“CPD”), simply ignore FOIA requests. CPD

*Continued on page 15*

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# Back to the Future . . . The Forum’s Annual Conference at 25

BY DAVE GILES

As a group, the Forum on Communications Law seems to have an affinity for anniversaries. Traditionally, our annual conferences have always included at least one plenary session where we take a look back in the archives to see how a seminal Supreme Court decision has impacted free speech, a free press, libel, privacy, or one of the other legal battles involving the media business.

That tradition has been heavy on my mind as we prepare for our 25th annual conference in Austin, Texas. Not only will we analyze the 25th anniversary of the Supreme Court’s decision in *McIntyre v. Ohio Elections Commission*—and its impact on anonymous speech—but we will also celebrate the fact that we as a Forum have been gathering annually for 25 years to network, develop new friendships and rekindle old ones, have some fun, and learn something along the way.

Although the Forum has been an active part of the ABA since February 1979, the first conference was held in January 1996. There was no fancy title. The brochure just called it “1st Annual Conference”—a title that would have made my old editing professor’s head pop, as to him nothing could be considered to happen



David Giles

“annually” until it happened at least twice . . . in successive years. “It’s ‘inaugural’ dammit!” he’d bellow.

The conference was the brainchild of George Freeman, Barbara Wall, and Lee Levine. As Freeman put it, the conference was intended to provide a place where folks in the media bar could “get out

of their seats and have some fun” in addition to keeping current on the legal issues of the day. “I thought that having some informal contact would help with the cohesiveness of the bar,” Freeman said. “I’d been to media conferences for many years where the presentations went from breakfast to dinner with little time for bonding.”

The idea of a conference that mixed learning with social activities was borne from Freeman’s participation at the ABA’s Corporation Counsel meeting back in the mid-1990s, where the sessions were in the morning and social activities during the afternoon. Not surprisingly, that meeting was held at the Boca Raton Resort and Club, that pink stucco oasis where we would return time and again until it was refurbished and priced beyond our means.

Freeman said the goals he, Wall, and Levine set for the inaugural conference were relatively basic: create a more amicable and cohesive relationship among media lawyers, be creative with the curriculum “so that it is more eclectic and interesting than ‘what’s the latest case,’” and have a little fun.

The world was a far different place back in 1996. Obviously, we were all a lot younger and some of

us a little less jaded. The Forum and the conference were a bit different back then too.

The brochure for that first meeting reveals many of those changes—for example, the once-familiar cover of silhouetted palm trees on the beach at sunset beckoning all to “The Boca Conference,” which served as the location for five of the first seven annual conferences. There was no website to direct folks to for more information and an opportunity to sign up electronically. In fact, the only ways to register were by mail or fax (although, come to think of it, given all the problems the ABA has had with its website over the past year, those are still the only ways to register!).

The plenaries and cast of speakers featured some familiar names—Kelli Sager, Chuck Tobin, and Jerry Birenz—taking on weighty subjects like “The First Amendment in Cyberspace,” “O.J. Simpson,” and “The Pentagon Papers 25 Years Later,” a session that C-SPAN aired featuring a young[ish] George Freeman as the moderator, still

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*Communications Lawyer* (ISSN: 0737-N7622) is published four times a year by the Forum on Communications Law of the American Bar Association, 321 North Clark St., Chicago, IL 60654-7598. POSTMASTER: Please send address corrections to ABA Service Center, 321 North Clark St., Chicago, IL 60654-7598. The opinions expressed in the articles presented in *Communications Lawyer* are those of the authors and shall not be construed to represent the policies of the American Bar Association or the Forum on Communications Law. Copyright © 2019 American Bar Association. Produced by ABA Publishing.

available in their archives (<https://www.c-span.org/video/?69445-1/pentagon-papers-25-years>).

The workshops (there were only four back then as opposed to the 12 we have now) harken back to a simpler time, focused on electronic media, print media, legislation, and a session with the ominous title: “The Client Speaks.”

In the intervening two-plus decades, Forum leadership has tried to mix things up to balance the serious learning with the networking and the fun (to wit: “Journalism Jeopardy,” kids moot court, and Steve Zansberg’s talent show!). We’ve also added a lot of great substance and opportunity for young lawyers to grow.

Over the years as our culture, our businesses, and our legal practice have evolved, the Forum has worked hard to keep up. We have mixed up the locations of the conference, branching out to places such as New Orleans and Austin. My predecessors

created a day-long training program for young lawyers that has been going for 13 years and developed a diversity moot court competition that has created a legacy of its own over the past 11 years. The “Media Advocacy Workshop” and “Diversity Moot Court Competition” provide a chance for students and lawyers to stand on their own, connect with each other, and develop relationships that will help them in their practices. Many members have participated in one or both of these great programs.

We have added more workshops to provide more CLE (and more bang for your buck) and started “Cocktails, Conversations and Connections” last year to provide more opportunity to casually network.

The upcoming Annual Conference is February 6–8, 2020. The Forum’s Planning Committee has created a good mixture of celebrating our past and those who created it with looking forward to where the Forum fits in today’s complex

and fast-paced media legal landscape. And in an attempt to be true to its original mission, the plan is for learning, networking, and fun. The legal discussion will focus on subjects ranging from deep fakes and fake news to anonymous speech and access. The networking opportunities will include the lunches, our annual dinner, closing reception . . . and hopefully a tennis tournament.

The fun will be spread throughout the conference. We’ll start with an opening reception at the historic original studio for Austin City Limits, complete with a barbecue cook-off and live entertainment. You’ll also have a chance to spend time at the LBJ Presidential Library and the Lady Bird Johnson Wildflower Center, as well as to sample the best of Austin on a brewery tour.

By the time this column hits your inbox, you’ll likely already have received at least one email asking you to participate in the conference. Please join us in Austin! ■

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### WOMEN IN COMMUNICATIONS LAW

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# Pro Se Access Plaintiffs: Helpful, If Imperfect, Agents for Change

BY KRISTEL TUPJA

On the defense side, pro se plaintiff cases often are cumbersome, rambling, and unfocused. They present unique challenges to litigators.<sup>1</sup>

On the other hand, pro se plaintiffs in access cases—even if they are sometimes imperfect messengers—can provide welcome opportunities to press for reform. For example, in *Linn v. U.S. Department of Justice*, the court granted partial summary judgment to Kenneth Linn, a pro se plaintiff and federal prisoner, and ordered the release of documents withheld by the Bureau of Prisons, concluding that the bureau improperly withheld the identities of witnesses who had testified against him.<sup>2</sup> Linn had been convicted of operating a continuing criminal enterprise in Louisiana.

Similarly, Charles Neuman, the successful pro se plaintiff in *Neuman v. United States*, was a convicted felon, and federal prisoner, for crimes related to a counterfeiting ring.<sup>3</sup> The court ordered the defendants, the U.S. Department of Justice and U.S. Immigration and Customs Enforcement, to submit redacted documents for in camera review that would permit the court to rule on the withholdings that the defendants had made under a Freedom of Information Act (FOIA) exemption. The defendants ultimately produced to Neuman the additional documents they previously withheld under the FOIA exemption, and the case was

dismissed.

Kaleb Basey may be another such helpful, if imperfect (to say the least), plaintiff. Basey was the subject of a criminal investigation conducted, in part, by Alaska State Troopers. He filed police misconduct records requests, which the government denied on the basis that the requested information pertained to a pending criminal prosecution.<sup>4</sup> After the superior court ultimately held that such disciplinary records were also exempt from disclosure as “personnel records,” Basey appealed, and the Alaska Supreme Court invited amicus briefs. The case remains pending.

Police misconduct is under high scrutiny as a result of recent developments in cell phone technology that allow bystanders to videotape police interactions, especially with minorities.<sup>5</sup> As a result, police misconduct records have become the subject of FOIA requests nationwide. A reversal of the superior court’s holding in Basey’s case will affect more than just Basey: Alaska police misconduct and disciplinary records will be available to the public and media alike. Access to such records is imperative in order to hold accountable those law enforcement officials who fall short of their duties.

Basey’s case, we hope, may join the roster of helpful precedents and move at least one state forward.

## Facts and Procedural Background

Kaleb Basey was charged and convicted for distributing and transporting child pornography.<sup>6</sup> Alaska State Troopers (AST) and the Fort Wainwright Criminal Investigation Division conducted the investigation that led to these charges and the subsequent conviction. In September 2016, Basey filed a public records request with AST, requesting the disciplinary records of two state troopers

involved in the investigation.

AST denied the request, justifying nondisclosure by claiming an exemption of the requested records under the Alaska Statutes section 40.25.122 “litigation exception.” Basey appealed AST’s denial to the commissioner of the Department of Public Safety, who agreed with AST, stating that under section 40.25.122, because the records pertained to a matter that was the subject of an ongoing civil and/or criminal litigation to which Basey was a party, the records could not be obtained through a public records request. Instead, Basey had to obtain them “in accordance with court rules.”<sup>7</sup>

The superior court upheld AST’s denial of Basey’s request for the disciplinary records. The state maintained the records were exempt from disclosure under section 40.25.122, and also asserted the records fell under section 40.25.120(a)(6)(A), which exempts records from disclosure when they pertain to an ongoing criminal prosecution. The Alaska Supreme Court held that the state’s reliance on the State Personnel Act exceptions was “unavailing.”

The supreme court found that the litigation exception in section 40.25.122 applied “only when the requestor is involved in litigation ‘involving a public agency.’”<sup>8</sup> Basey’s criminal case was being prosecuted by the federal government, not the state, and the court found that the federal government was not a “public agency” as defined in the Public Records Act. With regard to the pending criminal prosecution exemption, the court found that the state failed to “offer any evidence showing—and did not even allege—that disclosure of the requested records could reasonably be expected to interfere with enforcement proceedings.”<sup>9</sup>

The supreme court then remanded

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the case for “further proceedings consistent with” its opinion. On remand, the superior court held that disciplinary records were exempt from disclosure as “personnel records.” That prompted Basey’s second appeal to the Alaska Supreme Court.

### Relevant Alaska Law

In this appeal, the Alaska Supreme Court has been asked to decide whether police misconduct records should be exempt from disclosure under the State Personnel Act as “personnel records,” and whether there is a constitutional privacy interest in such police misconduct records. Its path to find that police misconduct records are not exempt as “personnel records,” and that there is no privacy interest in police misconduct records, is well laid out in state precedent.

In *Alaska Wildlife Alliance v. Rue*, the Alaska Supreme Court limited the definition of personnel records under the State Personnel Act to records that reveal information about an employee’s *private* life.<sup>10</sup> Under Alaska’s Public Records Act, the public is guaranteed use and inspection of all public records<sup>11</sup> unless an exemption listed in the State Personnel Act is applicable.

*International Ass’n of Fire Fighters, Local 1264 v. Municipality of Anchorage*<sup>12</sup> established the following balancing test applicable after determining a record merits certain constitutional protections:

1. whether the party seeking to withhold constitutionally protected information has a legitimate expectation of privacy;
2. whether the state has a compelling interest in disclosure; and
3. whether disclosure occurs in a manner that is least intrusive with respect to the right to privacy.

### Amici Argument

Upon invitation from the Alaska Supreme Court, Gray Media Group stations KTUU-TV in Anchorage and KTVF-TV in Fairbanks, the Reporters Committee for Freedom of the Press, and the *Anchorage Daily News* filed an amicus brief in support of Basey’s appeal.<sup>13</sup> Amici argue that in order for misconduct concerns and

inquiries to be properly answered, misconduct records must be released to the public.

The crux of the joint amici brief is that disciplinary records do not reveal information about an employee’s private life, and thus are not exempt as “personnel records” under either the Alaska Public Records Act or the State Personnel Act. The brief points out that the records Basey is seeking consist of state trooper misconduct in performing *public* duties, and Alaska Supreme Court precedent leans in favor of releasing the subject disciplinary records, as they do not pertain to the matters of private life and are not exempt under the State Personnel Act.<sup>14</sup>

Amici further argue that even if disciplinary records are considered personnel records, there is no privacy interest under the Alaska Constitution in such records. The records do not warrant any expectation of privacy, as they pertain to matters of public interest that affect the public itself. The amici argue that such privacy expectations can only apply if the records contain private information about the employee.

Court precedent in Alaska has deemed “sex, religion, politics, acquaintances, personal finances and even one’s innermost thoughts” as “private information.”<sup>15</sup> However, there is no precedent that has deemed employee disciplinary records as “private.” Even if such records are deemed to have some sort of expectation of privacy, amici assert that the state has a compelling interest in disclosing such records nonetheless: “State troopers are public employees paid by public dollars to protect and to serve the public, and it is axiomatic that the public has an interest in overseeing their official actions.”<sup>16</sup>

### Future Implications

According to the Alaska Department of Public Safety, AST pledges to a mission of preserving the peace, enforcing the law, preventing and detecting crime, and protecting life and property. In an effort to meet this mission, they are expected to “[r]espond to the concerns and inquiries of citizens.”<sup>17</sup> But what happens when said concerns and inquiries are about the state troopers themselves,

particularly about their professional misconduct?

Largely because of high-profile incidents calling police conduct into question, many states and police departments alike have adopted better procedures and transparency in connection with police misconduct inquiries. For example, in 2016, the First District Appellate Court of Illinois vacated the circuit court’s grant of preliminary injunctions enjoining the release of certain information contained in complaint registers—records containing investigations of citizen complaints of alleged police misconduct.<sup>18</sup> Similarly, under a consent decree signed in 2017, the Baltimore Police Department must provide detailed summaries with prominent language that clearly indicates to the public information about misconduct investigations by its offices. The Alaska amicus brief in *Basey* highlights that even states with more restrictive access to disciplinary records, such as Kentucky<sup>19</sup> and Maine,<sup>20</sup> have taken the position that the public has a right to view such disciplinary records after final actions have been taken.

### Conclusion

Access to police misconduct records—whether sought by a pro se plaintiff or a media coalition—not only helps to foster better trust between the public and those who protect and serve the public, but it also allows journalists to more effectively and accurately report on matters of public concern. Hopefully, the Alaska Supreme Court will join the states that have made this category of records public. ■

### Endnotes

1. For an amusing collection of war stories about defending pro se cases against the media, see Len Niehoff, *Here Comes the Pro Se Plaintiff*, 32 *LITIG.*, no. 4, Summer 2006, at 12, 16.
2. No. 92-1406 (GK) (D.D.C. May 29, 1997).
3. 70 F. Supp. 3d 416 (D.D.C. 2014).
4. *Basey v. State*, 408 P.3d 1173, 1174 (Alaska 2017).
5. See Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, *N.Y. TIMES* (Apr. 19, 2018), <https://www.nytimes.com/>

interactive/2017/08/19/us/police-videos-race.html.

6. Basey is currently serving a 15-year prison sentence in federal prison.

7. *Basey*, 408 P.3d at 1175.

8. *Id.* at 1178.

9. *Id.* at 1180.

10. 948 P.2d 976, 980 (Alaska 1997).

11. ALASKA STAT. § 40.25.110.

12. 973 P.2d 1132, 1135 (Alaska 1999).

13. *Amicus Curiae* Brief of Gray Television, Inc., dba KTUU-TV & KTVF-TV, Anchorage Daily News & Reporters Committee for Freedom of the Press, *Basey v. State*, No. S-17009 (Alaska May 31, 2019) [hereinafter *Amicus Brief*].

14. *See Alaska Wildlife Alliance*, 948 P.2d at 980 (holding that records that

“tell[] little about the individual’s personal life” are not personnel records under the State Personnel Act); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990) (holding that a head librarian’s performance evaluations did not “in any way deal with the personal, intimate, or otherwise private life” of the employee, and were thus not exempt from disclosure under the Public Records Act).

15. *Int’l Ass’n of Fire Fighters*, 973 P.2d at 1135.

16. *Amicus Brief*, *supra* note 13, at 32; *see Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990) (“The cornerstone of a democracy is the ability of its people to question, investigate and monitor the

government.”); *see also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (“The press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”).

17. *See Division of Alaska State Troopers*, ALASKA DEP’T PUB. SAFETY, <https://dps.alaska.gov/AST/Home> (last visited Aug. 29, 2019).

18. *Fraternal Order of Police, Chi. Lodge No. 7 v. City Chicago*, 2016 IL App (1st) 143884.

19. *See City of Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658, 659–60 (Ky. Ct. App. 1982).

20. ME. STAT. tit. 5, § 7070(2)(E).

# Reporting on NDAs and #MeToo: How the Press May Obtain Standing to Challenge NDAs

BY RACHAEL L. JONES AND VIRGINIA HAMRICK

With the dawn of the #MeToo movement, it's no secret that individuals accused of sexual harassment have used nondisclosure agreements (NDAs)—contracts in which parties agree that they will not disclose information listed in the agreement (such as the terms of a settlement offer)—to conceal details of the alleged wrongdoing. Disgraced former film producer Harvey Weinstein, for example, used NDAs to escape public scrutiny of his sexual misconduct for decades.<sup>1</sup> His former personal assistant, Zelda Perkins, described nearly constant sexual harassment while working for Weinstein.<sup>2</sup> The harassment was so severe that she eventually quit and sought damages against Weinstein.<sup>3</sup> In exchange for a payment of \$316,000 split with a coworker, Perkins signed an NDA that prohibited her from speaking about the harassment with anyone, including her friends, family, and doctors, unless they also signed an NDA.<sup>4</sup> The agreement also limited her ability to speak to law enforcement.<sup>5</sup>

Weinstein is not the only notable figure who employed NDAs in the wake of sexual harassment allegations. Bill Cosby, Bill O'Reilly, and Leslie Moonves used NDAs to resolve accusations of sexually abusive behavior in secret.<sup>6</sup> Further, use of NDAs is not limited to those in the entertainment and media industries; members of Congress as well as state governments have also been known to use confidential settlements to silence harassment victims.<sup>7</sup> While NDAs are commonly

(and harmlessly) used across the business world to safeguard competitively advantageous information, significant legal and public policy questions arise when the agreements are used to conceal potentially hazardous wrongdoing. In workplace sexual harassment cases, NDAs restrict one's ability to warn colleagues about the risks of harassment and warn others about matters of public concern. By silencing would-be speakers, these NDAs restrict journalists' ability to gather news.

This article explores the effect of NDAs on the news media's right to engage in newsgathering. Because NDAs are increasingly employed to silence would-be speakers who could provide information valuable to the public on matters of great concern, courts must understand the nature of the injury to the news media caused by such agreements and the First Amendment implications that plague both the victim, the press, and the public—especially the right to receive information.

## The Problem with NDAs

There are two main types of NDAs: contracts that serve as a condition of employment, and contracts that stem from settlement agreements.<sup>8</sup> For this article we focus on the latter. A party may wish to keep the details of the settlement confidential over fear of retaliation or privacy concerns. However, depending on the nature of the issue leading to the suit and settlement agreement, an aggrieved individual may want to advise the public about hostile work environments to protect others from falling victim to the same practices. Under settlement agreement-based NDAs, such a person would be precluded from speaking to the public, including journalists. Further, the individual would be unable to alert coworkers or future employees about the risk of harassment. Worse, such an NDA often restricts individuals from discussing their cases with friends and

family. For example, under the confidential settlement Perkins reached with Weinstein, she was prevented from speaking about the harassment with her friends and family, unless they too signed NDAs.

A party who violates the terms of an NDA is at risk of legal and financial repercussions, regardless of the reason for doing so. Perkins violated her NDA—despite the consequences—because she believed that such agreements are egregious and that she had a moral duty to end hers to bring awareness to the detrimental effect of her harassment (and of NDAs, generally).<sup>9</sup> Damages assessed against those who break NDAs are often considerable: notably, Olympic gymnast McKayla Maroney faced a \$100,000 forfeiture for breaking an NDA and speaking about the harassment by USA Gymnastics team doctor Larry Nassar.<sup>10</sup> The organization ultimately dropped the fine against Maroney, but only after celebrities offered to pay her fees for coming forward.<sup>11</sup> Even if a speaker successfully avoids paying damages, the cost of fighting the legal battle (particularly against a powerful and well-funded opponent) can itself serve as a deterrent to speaking out.

By restricting would-be speakers, NDAs impair newsgathering on matters of public concern. Journalists are unable to speak to victims who sign NDAs about their experiences due to the penalty the speaker may face in doing so. Reporters may not even be able to ask witnesses about wrongdoing: some employees of Weinstein told journalists that, while they had not themselves settled claims against Weinstein, they were bound by pre-employment NDAs to refrain from speaking about any suspicious behavior observed on the job.<sup>12</sup>

In cases involving government officials, such as one that belatedly came to light three years later involving former Texas congressman Blake Farenthold,<sup>13</sup> NDAs can prevent

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journalists from reviewing government action, and scrutinizing the use of taxpayer funds to litigate and settle claims. Thus, while NDAs have a significant impact on the rights of victims, they also inflict a blow in limiting the media's watchdog role to the public.

### Treatment of NDAs by the Courts

Where a speaker wishes to share information, First Amendment protections apply to both the speaker and the intended recipient of the speech. In other words, freedom of speech protects one's right to receive information.<sup>14</sup> This right is a separate, independent corollary of the First Amendment speech and press freedoms. An "informed citizenry" is "vital to the functioning of a democratic society,"<sup>15</sup> and thus "the First Amendment protects the news agencies right to receive protected speech."<sup>16</sup>

NDAs cut against these well-established principles, especially where government is involved as either a party or (when a dispute reaches the courts) an enforcer. NDAs are typically shrouded in secrecy, which inevitably thwarts both the right to speak and to receive information. While it cannot be denied that certain agreements do implicate privacy concerns of those involved, NDAs particularly place certain rights at risk as well as potentially limit the availability of information beneficial to the public. In such scenarios, courts have been known to weigh the public interest heavily—especially where matters that may affect the public at large are concerned.

Traditionally, courtrooms have been open to the public and there is a presumptive right of access to judicial records.<sup>17</sup> Even when parties have reached a confidential settlement, courts have granted journalists access to judicial documents or granted journalists standing to intervene and modify confidentiality orders. The argument for news media standing is strongest in cases involving matters of public concern and cases involving government officials or public officers. In *Pansy v. Borough of Stroudsburg*, for example, the U.S. Court of Appeals for the Third Circuit found that newspapers had standing to intervene and

challenge a confidentiality order in a civil rights case between a former police chief and the city.<sup>18</sup> The court determined that the trial court did not properly balance the interests of the public and the privacy interests of the parties in granting the confidentiality order. More specifically, the court reasoned that the public has a *legitimate* and *important* interest when at least one party is a public official or public entity.<sup>19</sup> While parties' privacy interests are important, the court explained that privacy interests diminish "when the party seeking protection is a public person subject to legitimate public scrutiny."<sup>20</sup>

Courts have also granted journalists standing to intervene and access to settlement agreements in cases of public concern. The U.S. District Court for the District of Columbia in *In re Fort Totten Metrorail Cases* granted the *Washington Post* standing to intervene and access settlements between minors and the Washington Metropolitan Area Transit Authority (WMATA).<sup>21</sup> The settlements arose out from a Metro train crash that killed nine people and injured 80 others. The court found that the settlement documents were judicial records and were therefore presumptively open, ultimately holding that sealing the court records was not justified.<sup>22</sup> In its opinion, the court explained that the case involved a public entity and some of the records indicated how WMATA used taxpayer funds.<sup>23</sup> Although the records did not reveal the cause of the crash, the significance of the underlying event—the deadliest crash in WMATA history—weighed on the court's decision in making the records public.<sup>24</sup> Finally, the court explained that allowing scrutiny of settlement documents and the court's decisions approving them would protect minors from disadvantageous settlements.<sup>25</sup>

Similarly, the U.S. Court of Appeals for the Fourth Circuit found that court documents were subject to the public's right of access under the First Amendment in a consumer protection case involving a government agency.<sup>26</sup> In *Company Doe v. Public Citizen*, a company tried to enjoin the Consumer Product Safety Commission from publishing a report about one of its products linked to an infant's death. The district court

allowed the entire case to be sealed and released an opinion, ruling in favor of the company, with most facts, analysis, and evidence redacted.<sup>27</sup> When consumer advocacy groups moved to intervene, challenging the sealing order and decision to let the company use a pseudonym, the Fourth Circuit agreed, reasoning that the company's interest in its reputation *did not* outweigh the public's interest in access to the record and court's decision.<sup>28</sup> Moreover, the interest in access was especially high because a government agency was a party. The court opined that "the public has a strong interest in monitoring not only functions of the courts but also the positions that its elected officials and government agencies take in litigation."<sup>29</sup>

Additionally, courts have refused to enforce NDAs that interfere with ongoing investigations. Notably, Bill Cosby tried to enforce a confidential agreement signed by Andrea Constand and her attorneys arising from a 2005 sexual assault case.<sup>30</sup> A judge refused to enforce the NDA to the extent Constand and her attorneys were reporting a *crime*, reasoning that the agreement was unenforceable as a matter of public policy.<sup>31</sup> The court explained that agreements cannot prevent parties from either voluntarily talking to law enforcement or answering subpoenas.<sup>32</sup> Similarly, courts have refused to enforce NDAs that interfere with civil investigations, including inquiries by the Equal Employment Opportunity Commission.<sup>33</sup>

Courts, however, are likely to enforce a confidentiality agreement (and deny journalists standing) in cases involving private interests that are not matters of public concern. The Third Circuit in *Pansy* explained that confidential settlements between private parties, or the lack of a strong public interest or concern in the underlying case, would weigh in favor of maintaining a confidentiality order.<sup>34</sup> Additionally, an NDA included in an employment contract, rather than a settlement agreement, is likely to be enforced.

### Challenging NDAs and News Media Standing

As *Branzburg v. Hayes* famously tells us, "without some protection for seeking out the news, freedom of the press



could be eviscerated.”<sup>35</sup> As discussed above, NDAs pose a unique threat to the newsgathering process due to their effect on both would-be speakers and recipients of often-vital information on matters of public concern. Part of the problem is that, until recently, there has been a question regarding the standing of news media organizations in challenging NDAs (or decisions pertaining to them) in court.

Standing poses a unique problem for news media. A litigant presents no constitutionally justiciable question if there is no “case or controversy” for the judiciary to redress.<sup>36</sup> At times, courts have permitted standing for litigants in a representational capacity on behalf of others who are more directly injured but are unable to assert their own interests,<sup>37</sup> such as abortion doctors standing in for prospective patients.<sup>38</sup> However, to receive standing, a party generally must be able to meet the standard of proving a substantial likelihood that the injury is redressable by an available remedy.<sup>39</sup>

News media have managed to establish standing in cases pertaining to gag orders on trial participants, a sibling of NDAs. Although a would-be speaker faces the greatest personal jeopardy from a judicial gag order, courts have consistently found that journalists have a sufficiently concrete interest in access to lawyers, parties, and witnesses to establish standing—whether the injury is conceived as one directly to the journalist or as derivative of the injury to the speaker at risk of contempt.

However, some courts have found that gag orders on trial participants do not deprive journalists of constitutionally protected rights because there is no constitutional entitlement to interview a particular source. Such courts apply a lower level of scrutiny when gag orders are challenged by news media intervenors rather than by would-be speakers themselves.<sup>40</sup> This line of reasoning has been influenced by the Supreme Court’s observation in *Nebraska Press Ass’n v. Stuart* that orders limiting what lawyers and witnesses may say to anyone outside of the proceedings do not amount to prior restraints and are more constitutionally tolerable.<sup>41</sup> This view was illustrated by the U.S. Court of Appeals for the

Second Circuit in *In re Dow Jones & Co.*, where the court found that news organizations had standing to challenge the order because they were the prospective recipients of speech, but declined to characterize the order as a “prior restraint” on the media plaintiffs, noting that there is a fundamental difference between a challenge of a gagged individual and a third party.<sup>42</sup>

It follows that some courts view gag orders—and most likely NDAs—as potentially injuring the rights of the potential speaker, rather than any right to newsgathering or right to receive information afforded to the news media. As demonstrated in the analogous prison access case, *Pell v. Procunier*, a prison system’s policy of limiting prisoners’ ability to grant interviews could be justified by reasonable safety concerns and did not violate the rights either of inmates or of the journalists who sought to interview them.<sup>43</sup> As the Supreme Court noted:

It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.<sup>44</sup>

The takeaway is that journalists may have only the benefit of the First Amendment protection afforded to their sources—which may be none, depending on the circumstances.

Against this body of analogous precedent, strong considerations support recognizing standing for journalists to challenge employer policies and NDAs that restrain would-be speakers from speaking to the media, whether in the journalists’ own right or as stand-ins for the speakers themselves. The Supreme Court

has recognized that third-party standing is compelling when the fear of harm from penalty deters a party from suing.<sup>45</sup> This is extremely compelling for individuals subject to NDAs—particularly NDAs that stem from instances of sexual assault or other civil rights-based harms—who but for the threat of penalty under the NDA would supply information to journalists, fellow employees, and the public at large.

### **Recent Development: The *Baltimore Brew* Case**

In July 2019, a federal appeals court confronted media standing and the enforceability of NDAs head-on, ruling that the city of Baltimore’s use of NDAs with individuals in the process of settling claims against the city for police misconduct was unconstitutional.<sup>46</sup> In *Overbey v. Mayor of Baltimore*, the Fourth Circuit highlighted the fact that subjecting speakers to NDAs runs afoul of the “public’s well-established First Amendment interest in ‘uninhibited, robust, and wide-open’ debate on ‘public issues.’”<sup>47</sup> The Fourth Circuit’s encouraging holding centers on the rights of the *Baltimore Brew*, the newspaper that brought suit along with plaintiff Ashley Overbey, who challenged the NDA she signed following her settlement with the city after she was the victim of a wrongful arrest and police misconduct.<sup>48</sup> Overbey lost nearly half of her settlement with the city after she responded to comments about her case on a blog pertaining to race and police brutality, prompting her challenge of the NDA.<sup>49</sup> The *Brew* joined the case to challenge the city’s use of NDAs based on its interference with the paper’s ability to engage in newsgathering.<sup>50</sup>

Ultimately, the Fourth Circuit found that the city failed to identify “a comparably compelling public good or other legitimate governmental aim that was, or could be, furthered by enforcement of the non-disparagement clause (other than a general interest in using settlements to resolve lawsuits).”<sup>51</sup> Moreover, the court examined the *Brew*’s standing by challenging the city’s definition of a willing speaker, noting that a willing speaker “would be willing to provide information on a matter of public significance

to the news media but chooses not to because she does not want to violate a settlement agreement with the government.”<sup>52</sup> In clarifying this definition, the court determined that those subject to the city’s NDAs would qualify as willing speakers and therefore should not be barred from speaking on matters of public concern. Thus, the court found that the city’s NDAs injured the *Brew* by directly interfering with the paper’s right to receive information from willing speakers.<sup>53</sup> Further, the court held that the mere fact that public records may exist regarding a case does not negate a journalist’s need or desire to obtain information from a source firsthand or that the forced refusal of would-be speakers to speak to the media in light of such records would not have a deleterious effect on newsgathering.<sup>54</sup>

Importantly, the Fourth Circuit also addressed a potential roadblock for news media standing: the question of ongoing or imminent harm for standing to bring a claim for injunctive relief. Typically, injury implies monetary relief, which, in most cases, news media plaintiffs do not seek. Rather, news media often pursue injunctive relief to allow for proper newsgathering. In the *Overbey* case, the *Brew* specifically sought injunctive and declaratory relief, which (like all plaintiffs seeking redress in this fashion) required the paper to establish “ongoing or future injury in fact” that was not dependent on any prior harms.<sup>55</sup> Thankfully, the court recognized the potential for the continual harm to newsgathering posed by NDAs, holding that the *Brew* was able to establish an ongoing or imminent injury based on its allegation that the city’s “pervasive use of non-disparagement clauses in settlements with police brutality claimants ‘impedes the ability of the press generally, and *Baltimore Brew* specifically, to fully carry out the important role the press plays in informing the public about government actions.’”<sup>56</sup>

*Overbey* is, indeed, a huge victory for the First Amendment and for newsgathering generally. The Fourth Circuit’s analysis on news media standing correctly struck the balance of interests at play and brought home the principle that the right to speak and the right to receive information

are paramount where a matter of public concern is at issue. The court correctly found and gave credence to the fact that NDAs (and similar gag orders) cause injury to the news media and thwart the media’s protected right to gather information from willing speakers.

While the *Overbey* holding stemmed from government action, the analysis can arguably apply to civil matters where matters of public concern are at stake. If courts continue to recognize the injury in fact sustained by the news media when NDAs silence would-be speakers, we may see a much-needed shift in judicial treatment of such cases. This is especially true considering courts’ historical treatment of NDAs regarding issues that directly affect the public and the public’s right to know.

#### Looking Forward: Challenging and Reporting on NDAs

In the wake of the #MeToo movement, journalists are eager to amplify the voices of those who have suffered in silence. And rightfully so; it is, after all, the task of the news media to disseminate information needed by society for political, social, and even emotional growth. As the stories emerge, though, journalists (and their lawyers) must be conscious of NDA litigation and be prepared to combat it accordingly.

Thankfully, the #MeToo movement’s effect has reached far beyond headlines and hashtags. As of August 2019, 15 states have passed legislation fortifying legal protections that forbid sexual harassment at work.<sup>57</sup> As many as 12 states have put forward bills to curb the use of NDAs in cases regarding sexual harassment.<sup>58</sup> Legislators appear to be realizing that while NDAs do serve to protect trade secrets and other business interests, they can also be used to silence sexual harassment victims and would-be whistleblowers who could shed light on very alarming practices.<sup>59</sup> Thus, some states are seeking to ban the use of NDAs in sexual harassment cases altogether.<sup>60</sup>

Regardless of such legislation, which is subject to both praise and scrutiny,<sup>61</sup> courts and legislators should remain aware of First Amendment implications when it comes to NDAs. As the D.C. district court noted in *In*

*re Fort Totten Metrorail Cases*, the public does maintain a significant interest in access to documents that provide information that affects the public. Similarly, the public does have an interest in hearing from survivors of sexual harassment as well as those who suffered from police brutality. It is for this reason that the news media must be able to engage in effective newsgathering; after all, the Supreme Court has designated the news media as a surrogate for the public when it comes to attending and reporting on matters of public concern.<sup>62</sup>

In light of the Fourth Circuit’s decision in *Overbey*, media lawyers should carefully craft their arguments to stress the ongoing or imminent injury sustained by the news media when challenging NDAs. Because NDAs serve as an impediment to obtaining information from sources on matters of public concern, it is easy to stress the actual harms suffered by the public and press. It must also be stressed that—legislation notwithstanding—use of NDAs will perpetually thwart newsgathering on matters of great public concern while they are deemed viable. Courts have proven that they are more than capable of striking the balance between actual privacy or business concerns and access to information that speaks to matters of great public interest. In allowing for news media standing in cases like *Overbey*, courts embrace the First Amendment protections guaranteed to speakers and bolster the right to receive information. And, most importantly, they will allow more journalists to tell more stories of survival and allow more abusers to be held accountable to the public. ■

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# How a Failed TV Megamerger Changed American Broadcasting

BY JENNIFER CARSTENS

**W**ith more competition for advertising dollars than ever before, television advertising is an incredibly popular way to advertise and reaches the largest audience base; and it is going nowhere anytime soon.<sup>1</sup> In 2017, as part of its review of the proposed (and ultimately unsuccessful) Sinclair-Tribune merger, the Department of Justice (DOJ) alleged that some of the United States' largest multimedia conglomerates had been discussing information relating to pricing and other competitively sensitive information (CSI) with one another, allegedly violating American antitrust laws. These allegations resulted in the DOJ entering into consent decrees with many large broadcasters that initiated safeguards and additional compliance measures that may change the broadcast advertising business.

## The Fallout

Typically, companies have to be careful when making acquisitions and merging with one another due to America's antitrust (competition) laws. Most countries have broad laws that protect consumers and regulate fair business practices. However, in the United States, antitrust laws go beyond controlling how much of a market a single company can control (market allocation) and extend to such things as bid rigging, price fixing, and several other aspects of business practices, with the effort to best protect the individual consumer.<sup>2</sup>

As a rule of thumb, courts typically find that a company has a monopoly over market share if its

market share is over 50 percent.<sup>3</sup> A market can be any products that are interchangeable in use, or identical in what they are.<sup>4</sup> There are few companies that can be considered major players in the multimedia conglomerate world, some of which include Sinclair Broadcasting Group, Nexstar Media Group, TEGNA, Meredith Corporation, and Tribune Media. Most of these companies have diversified themselves into television, internet, and print media. Maryland-based Sinclair is one of the largest players in the multimedia conglomerate game, having stations that are available in approximately 39 percent of American households.<sup>5</sup>

Early in 2017, it was reported that Sinclair was in discussions to acquire Tribune. The deal was shaky from the beginning. Many questioned whether the deal would effectively result in an oligopoly on the television broadcasting industry, violating American antitrust laws.<sup>6</sup> The merger of Tribune and Sinclair would have put Sinclair in 70 percent of all households with a television set in the United States.<sup>7</sup>

However, there seemed to be some hope for the companies to merge. In the beginning of these talks, Ajit Pai, the chairman of the Federal Communications Commission (FCC), seemed open to the deal. Additionally, some market analysts argued that this would be a great way for Sinclair to expand, and that because Sinclair is primarily located in smaller markets, while Tribune is primarily located in larger markets, the deal might work and benefit consumers in some ways.<sup>8</sup> Statistically, the deal would have placed Sinclair with 233 television stations, equating to 72 percent of coverage in the United States.<sup>9</sup> Without any divestitures or application of the so-called UHF discount, this number would have exceeded the national ownership cap designated by FCC law.<sup>10</sup> The deal

seemed to be saved, however, when Sinclair expressed its plans to sell several of Tribune's stations once they were acquired, as well as some of its own, in order to stay below the threshold of American antitrust laws.<sup>11</sup>

During the negotiations between Sinclair and Tribune, the potential of any deal between the two blew a fuse. Chairman Pai began to express serious concerns regarding the plan between the two and circumventing challenges that this deal would have faced.<sup>12</sup> Tribune made the decision to terminate what would have been a \$3.9 billion deal, and is now instead suing Sinclair for breach of contract.<sup>13</sup>

It was alleged that Sinclair had no intention to give up control of any of its own stations, nor did it intend to give up control of any of the Tribune stations once they were acquired. Instead, it was alleged that Sinclair had planned to transfer ownership to individuals close to the company in order to retain control. For example, it was discovered that Sinclair had plans to sell a Chicago station to Steven Fader, a Maryland car salesman, who happened to be a business associate and friend of David Smith (Sinclair's chairman).<sup>14</sup>

With some of the information that was turned over to the DOJ concerning the potential Sinclair-Tribune merger as part of the Hart-Scott-Rodino process also came correspondence concerning alleged business practices of some American broadcasting companies.<sup>15</sup> This included allegations of information sharing of pricing information and certain other CSI.<sup>16</sup> The allegations, however, did not include price fixing or any other unscrupulous behaviors by these broadcasting companies.<sup>17</sup> As of June 2019, and as a result of the DOJ's investigation of the Sinclair-Tribune merger, several broadcasters and sales representative

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firms have signed consent decrees with the DOJ that include no fines and no admissions but put into place additional compliance measures to be followed going forward.

### **Business as It Used to Be**

In the complaint by the DOJ, the government alleges that several American broadcasting companies had potentially shared certain CSI with one another, through communications with each other and through third-party companies.<sup>18</sup> CSI includes information concerning business practices, marketing techniques, and, generally, information about a company that remains private to the specific company.<sup>19</sup> This CSI allegedly included information referred to as “pacing.” Pacing compares revenue at one point of time against revenue at another point of time.

### **What the Consent Decree Entails**

A consent decree is a final order of a judge, based upon a written agreement between the parties, which terminates continuous litigation.<sup>20</sup> A consent decree is a final, legally binding agreement, commonplace when the government is the plaintiff suing a private corporation, and takes the place of potential penalties.<sup>21</sup> Oftentimes, it is simply better business for a company that finds itself up against a government investigation to enter into a consent decree, rather than continuing with litigation. This was the course several media conglomerates chose to take.

As of June 2019, 11 companies have agreed to sign the consent decree: Sinclair, Raycom Media, Tribune, Meredith, Griffin Communications, Nexstar, Dreamcatcher Broadcasting, CBS Corporation, Cox Enterprises, E.W. Scripps Company, and Fox Corporation.<sup>22</sup> The consent decree is simple when broken down.

### **Prohibited Conduct**

Essentially, the consent decree forbids the sharing of CSI. The decree specifies that members of the sales staff and management are forbidden from communicating CSI with individuals in their same designated market area (DMA). This CSI

includes things like pacing information. Sales staff and management cannot communicate CSI with someone who is in the same DMA either directly (e.g., via email) or indirectly (e.g., with a wink and a nudge or some other nonverbal communication). The theory is that if stations cannot communicate this information, the chance of potential market effect will decrease significantly.

Both sales and management are also forbidden from sharing or attempting to share CSI with third parties, such as a television representative company like CoxReps or Katz. CoxReps has now entered into its own consent decree, which is pending approval of the court. With the consent decree, a station cannot use a third party to find out CSI about another station in the same DMA, and the third party cannot share with the station any CSI that it might have come across in its work.

### **Acceptable Conduct**

The introduction of the consent decree does not mean that CSI can never be discussed. The discussion of this information is very much something that is essential to the industry, and business must continue. CSI, although not allowed to be discussed with stations in the same DMA, can be freely and openly discussed with advertisers when reasonably necessary to negotiate the sale of spot advertising. In practice, this would come about when negotiating spot deals, when the advertiser could give the station a price to beat (i.e., the price of a spot that another station is charging).

Additionally, subject to certain procedural requirements, CSI can be freely discussed between the sales team, the station’s legal team, and the antitrust compliance officer. This establishes a “clean team” of individuals who may use this material to evaluate an acquisition or disposition, or to achieve a legitimate business negotiation or collaboration.

### **Additional Safeguards**

There are additional safeguards built into the decree that are notable to mention. The parties involved have all appointed an antitrust

compliance officer. The antitrust compliance officer must have certain qualifications, such as past experience with antitrust matters (or have access to attorneys with such experience), be a practicing attorney for at least five years, and be in good standing with the bar. It falls onto the shoulders of the appointed antitrust compliance officer to communicate with the employees the changes that have been brought about by the consent decree, to ensure new employees have the proper training, are aware of the consent decree, and are responsible for all documentation.

With the consent decree, additional documentation must be kept, which falls under the purview of the antitrust compliance officer. For example, documentation of specific transactions or proposed transactions that involve the sharing of CSI, dates when the sharing of CSI occurred, and what exactly was communicated must all be kept by the company for five years, or until the expiration of the final judgment (whichever is shorter). The documentation must be logged and provided to the government within 30 days of request.

The antitrust compliance officer also is responsible for addressing all inquiries posed by employees concerning the potential communication of CSI. Companies are encouraged to promote an open door policy, which facilitates communication between sales employees and the antitrust compliance officer and legal team, to discuss potential consent decree violations. This is all in order to prevent potential violations. Additionally, the consent decree requires each company to establish a whistleblower protection policy, in which any employee may disclose, without reprisal, any violation or potential violation of the consent decree or antitrust laws.

### **What This Means for Future Business**

The consent decree ensures that each station’s sales department cannot communicate CSI with stations located in the same DMA. Already, several companies have been diligent with training and retraining their employees on what can be considered acceptable conduct, and what

is now prohibited by the consent decree. Management and sales staff, specifically, have taken new measures to ensure that there will not be communication of CSI, directly or indirectly, to any station that is in the same DMA as their own. Additionally, CSI cannot be communicated through a third party, such as CoxReps.

Sales representatives and management are highly encouraged to discuss the policy, as well as any questions, with their newly appointed antitrust compliance officer. This is an added layer of protection and assurance for all parties involved. Day-to-day business will function the same. Business will carry on as usual. The difference now is that there are additional government limitations regulating the communication of sales teams. Sales representatives must think twice before sharing information, but for the TV and broadcast industry, life very much continues on as it has for the last 90 years. ■

#### Endnotes

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## Transparency and Access: Postcards from Chicago

*Continued from page 1*

can avoid complying with its FOIA obligations because it knows requestors typically lack the time and resources to hold CPD accountable. My administration will follow and comply with the FOIA statute and will not seek to shift the burden of enforcing compliance onto the requestor.<sup>3</sup>

The authors, who represent the Chicago Tribune Company and other news media in FOIA matters, can bear witness to this pattern of (non)compliance under the Emanuel administration. Contrary to Mayor Emanuel's campaign promises, CPS, CPD, and the office of the mayor itself routinely ignored or denied legitimate FOIA requests for information crucial to the public's right to know. In some cases, as Mayor Lightfoot notes, the threat of litigation was sufficient to jar information loose; in others, FOIA enforcement lawsuits had to be filed—and were vigorously litigated by the administration, with the taxpayer footing the bill.

One notable example involved the records of Mayor Emanuel himself. It having come to the attention of reporters at the Chicago Tribune that the mayor was conducting public business on private cell phones and email accounts, they made a FOIA request in June 2015 for certain categories of documents—specifically including all communications sent to or from the mayor on any “personally funded line, account, or device.” The mayor's office refused to search for, much less produce, any communications from the mayor's “private, non-City email and telephone accounts” on grounds that the “FOIA is limited to producing information possessed by a public body; it does not impose an obligation to locate and search private email accounts.”<sup>4</sup> The Tribune sued on September 24, 2015, seeking declaratory and injunctive relief under the FOIA.<sup>5</sup> The mayor hired outside counsel and litigated the case to the hilt for over three years.

Moving to dismiss the FOIA complaint, the mayor argued—against

reasoning in Illinois precedent<sup>6</sup> and the weight of authority in other jurisdictions<sup>7</sup>—that the documents on his private devices and accounts were not “public records” within the meaning of the FOIA. The circuit court had none of it and denied the motion, decisively holding that there was “no merit to Defendants' argument that the mere storage of communications pertaining to the transaction of public business on personal electronic devices (or in personal email accounts) categorically shields those communications from the FOIA.”<sup>8</sup> To emphasize the point, in denying the defendants' motion to certify issues for immediate appeal, the court reiterated there was no “substantial ground for difference of opinion” as to whether public records may reside on personal devices; “[n]o Illinois court has held that mere ownership of a device ultimately determines if a record is subject to the FOIA,” and other jurisdictions “overwhelmingly agree that public records on public officials' privately owned electronic devices and accounts must be disclosed to the public.”<sup>9</sup>

Only after having litigated at that point over a year to avoid producing any records (or denying they existed), and with the writing on the wall, did the mayor release, “in the interests of resolving this litigation,” selected public records from his “non-City email accounts that pertain to the transaction of City business” and were responsive to the Tribune's request.<sup>10</sup> There were hundreds of responsive public records on the mayor's personal accounts; those records involved significant civic issues—including instances of illegal lobbying that led to record fines against those involved.<sup>11</sup>

Subsequently, the Tribune moved for summary judgment seeking, among other relief, a ruling on its request for declaratory judgment that the mayor violated the FOIA. The mayor contested even that, arguing that the FOIA claim was “moot”—while at the same reiterating the rejected position that communications pertaining to

public business found on his personal accounts and devices are not subject to the FOIA. Once more, the court conclusively rejected those arguments, holding that the case and issues were not “moot,” that the Tribune was entitled to a declaration that public records on private devices are subject to the FOIA, and that the defendants “violated the FOIA by their belated production of non-exempt documents.”<sup>12</sup>

Other decisions followed suit; for example, in August 2016, CNN obtained a binding decision from the Illinois attorney general's public access counselor (PAC), holding that CPD wrongfully denied CNN's January 2016 FOIA request for police officers' private emails about the shooting of a black teenager, Laquan McDonald, by a CPD officer.<sup>13</sup> CPD appealed that decision to the circuit court, and lost. In a September 2017 ruling, Judge Pamela McLean Meyerson followed the reasoning in the *Tribune* case “involving release of emails from Mayor Emanuel's personal account,” emphasizing that “[g]overnment operations in a free society must not be shrouded in secrecy. Law enforcement operations, especially, must not be shrouded in secrecy.”<sup>14</sup> Nevertheless, the city continued to stonewall; after CNN went back to court to force the city to comply with the judge's order, “the city argued that all it could do was ask the officers to have their personal email accounts searched,” and “each officer either refused, denied having any relevant messages or simply ignored the request.”<sup>15</sup>

A December 2018 ProPublica report demonstrates that CNN's experience with CPD was not unique: “Over the last four years, reporters and citizen activists have filed at least 10 appeals with the attorney general's office after Chicago officials blocked their requests for video, police reports, emails and other materials tied to the [McDonald] shooting,” and “most of the McDonald-related appeals dragged on for months or years,” at the cost of transparency, justice, and taxpayer money.<sup>16</sup> “Since 2013, as more

journalists have turned to the courts for help, the city has paid more than \$1 million in attorneys' fees in FOIA cases."<sup>17</sup>

That does not even include what the city has paid its own lawyers to defend these cases. Just this year, in the course of litigating the Tribune's petition for its attorney fees in the case against the mayor (which Tribune won in full for three-plus years of bitterly contested litigation), a FOIA request to the city for defense counsel's billing invoices revealed that the city paid *in excess of* \$750,000 to fight the Tribune's lawful FOIA requests.

### **The Adventure of Asserting the Press and Public's Right of Access in Cook County Criminal Court**

*Scrutiny? What else do you want? Do you want to take my shorts? Give me a break. How much scrutiny do you want to have? Go scrutinize yourself!*  
—Richard M. Daley

The home of the Cook County Circuit Court's Criminal Division, the George N. Leighton Criminal Courthouse—colloquially known as “26th and Cal”—has been a press access minefield. Generally unfamiliar with the First Amendment's particular and rigorous mandates, the criminal court judges frequently dismiss access concerns by citing the specter of a media “circus” that could prejudice the parties. These problems have intensified with a slew of incendiary, high-profile cases—including most notably the murder prosecution of Jason Van Dyke, the police officer ultimately convicted of fatally shooting Laquan McDonald.

As widely reported, Van Dyke shot McDonald 16 times in an October 2014 incident recorded by a police “dash-cam” video camera. Van Dyke was prosecuted for murder by a court-appointed special prosecutor under an indictment returned in March 2017. The McDonald shooting, and the Van Dyke prosecution, were the subject of intense local and national interest, in an era when urban policing, and officer-involved shootings in minority communities, are the subject of scrutiny and

heated public debate.

In February 2017, the judge assigned to the Van Dyke case, Vincent Gaughan, entered an order providing that “any documents or pleadings filed in this matter” were to be filed in chambers.<sup>18</sup> Of course, settled precedent holds that judicial records filed in civil and criminal proceedings are subject to a presumption of access under the First Amendment and common law.<sup>19</sup> By requiring documents to be filed in chambers and not with the clerk, the February order effectively closed the court file to public review, in clear violation of not only the constitutional and common law access rights, but also an Illinois statute, the Clerks of Court Act.<sup>20</sup>

A coalition of local news media organizations<sup>21</sup> and the Reporters Committee for Freedom of the Press moved to intervene to assert their and the public's right of access to judicial documents and proceedings—including moving to modify the February order so that documents would be filed publicly in the clerk's office, as the law requires.

Rejecting the intervenors' attempts to explain that, as explicitly recognized by Illinois and federal law, the constitutional and common law access presumptions apply to any document filed in the proceedings, whether in chambers or with the clerk, Judge Gaughan concluded in a circular fashion that documents filed under his chambers-filing procedure were never made public and as such were not subject to the right of access:

THE COURT: Have you seen the file? . . . Of course you have not. So, nobody in the public has seen the file. So, it is not open to the public. So, your premise that it's open to the public, because it's in the file, now, is false, all right, because if it's now open, otherwise, you wouldn't be here. Do you understand that? . . . [T]he file has not been opened to the public. This has not been disseminated to the public.<sup>22</sup>

Eventually, the court released a public docket sheet of previously

filed documents; the prosecution agreed there was no basis to withhold about half of them. As to the documents the prosecution objected to disclosing on various grounds, the court continued to maintain its fixed belief that the presumption of access could not apply since the February order barred public access in the first instance:

MR. FUENTES [counsel for intervenors]: So, we're asking the Court to follow [*Skolnick v. Altheimer & Gray*, which] says once it is filed publicly with the Court, whether it's in this room or some other room, it's public.

THE COURT: Will you get off—this has not been filed publicly, otherwise, you wouldn't be here. Do you understand how illogical your presentation is, when you say, once it's been filed publicly? It has not been filed publicly, all right? Thank you.<sup>23</sup>

Refusing to permit release of most of the contested documents, and disregarding the standards required by the constitution and common law, the trial court's rationales for non-disclosure were troubling to say the least. For example, the court indicated that Van Dyke's motions to dismiss the indictment for alleged prosecutorial misconduct should not be released because, it believed, the allegations in those motions were unfounded and “slandered” unnamed public officials.<sup>24</sup> The court also suggested at one point that access to these documents should be denied unless the media intervenors waived their fair report privilege to defamation in reporting on court proceedings.<sup>25</sup>

In the face of those decisions, and with trial imminent, the media intervenors took the unusual step of moving the Illinois Supreme Court to issue a “supervisory order,” which is used “when the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice.”<sup>26</sup> The intervenors argued that exercise of the court's rarely used supervisory authority



was necessary because the procedure instituted by Judge Gaughan’s February order

is the inverse of how litigation is conducted in this State (or anywhere else) and the opposite of what the First Amendment and common law access presumptions require. . . . If the media lack any meaningful access to the court file in the weeks and months leading up to and including the trial, their ability to inform the public about this case will be irreparably stymied.<sup>27</sup>

On May 23, 2018, the Illinois Supreme Court allowed the media intervenors’ motion and entered a supervisory order that directed the trial court to vacate the February order, and ordered that “all documents and pleadings shall be filed in the circuit clerk’s office.”<sup>28</sup>

Notwithstanding the intervenors obtaining this extraordinary relief, the trial court did not back down and the saga did not end. The judge “terminated” the February order, but did not permit unrestricted filing of documents with the clerk, as the supreme court ordered. Instead, without notice to the intervenors, he instituted a new protocol, also constitutionally infirm, prohibiting the parties from filing documents with the clerk until after giving the other party advance notice (to enable the nonfiling party to move to seal if the filing party did not do so).<sup>29</sup> Further, in response to the intervenors’ request for access to filings that had been previously sealed—at least partially based on the judge’s continued view that documents filed in chambers were not subject to the presumption of access—the judge announced that the supervisory order did not apply to those documents because it “doesn’t say it’s retroactive.”<sup>30</sup>

The media intervenors went back to the Illinois Supreme Court with a motion for supplemental supervisory order. In addition to seeking relief from the trial court’s improper sealing procedure (under which documents could be kept under seal indefinitely without a motion to seal

ever being filed, with no notice to the press and public) and improper determination that the supervisory order did not extend to the previously sealed documents, the supplemental motion noted that the trial court had improperly held closed hearings and made sealed rulings without giving the intervenors notice and an opportunity to object to closure, and without making the necessary findings—and had gone so far as to bar one of the intervenors’ lawyers from speaking in the courtroom!<sup>31</sup>

Unfortunately, on September 12, 2018, the Illinois Supreme Court dismissed the motion for supplemental supervisory order, because two justices had recused themselves and the remaining members of the court were divided.<sup>32</sup>

### Challenging a Celebrity’s (Mis)use of the Illinois Expungement Law

*I am sick and tired of publicity. I want no more of it. It puts me in a bad light. I just want to be forgotten.*

—Al Capone

One would have to be living well off the grid to be unaware of this year’s controversy surrounding *Empire* television star Jussie Smollett. On January 29, 2019, Smollett reported to CPD that two men attacked him, shouting racist and homophobic slurs—and that Chicago was “MAGA country”—while striking him and putting a noose around his neck. CPD investigated the case as a possible hate crime, then later said they believed the attack was staged by Smollett to bolster his profile and career. A grand jury indicted Smollett in early March 2019 on 16 felony counts.

In an extraordinary and unexpected turn of events, on March 26, 2019, without any advance notice to the public, the state made an oral motion to dismiss (technically, *nolle prosequi*) all charges against Smollett.

The state’s abrupt dismissal triggered a firestorm of controversy. Mayor Emanuel immediately blasted it as a “whitewash of justice” and “not on the level,” and

police Superintendent Eddie Johnson commented that Smollett “chose to hide behind secrecy and broker a deal to circumvent the judicial system.”<sup>33</sup> The city sent Smollett a letter noting that CPD’s “investigation revealed that you knowingly filed a false police report and had in fact orchestrated your own attack,” and demanding “immediate payment of the \$130,106.15 expended on overtime hours in the investigation of this matter.”<sup>34</sup> Subsequently, the city sued Smollett to recoup the overtime costs, alleging violation of the False Statements Ordinance.<sup>35</sup> The Cook County inspector general is investigating the state’s attorney’s handling of this case, and there have been calls for appointment of a special prosecutor.

Compounding the outrage, at the same March 26 hearing at “26th and Cal” in which the case was dismissed, the circuit court granted Smollett’s oral motion for a sealing order pursuant to the Illinois expungement statute, the Criminal Identification Act.<sup>36</sup> The section of the act Smollett relied upon allows, but does not require, a court to seal records upon final disposition of a case.<sup>37</sup> The sealing order not only had the effect of sealing the entire court file from the public, but it also was preventing other government agencies—namely, the CPD and Cook County State’s Attorney’s Office—from responding to valid FOIA requests for public files, records, and evidence related to this case.

As State’s Attorney Kim Foxx noted, in view of the “considerable evidence, uncovered in large part due to the investigative work of the Chicago Police Department” in this case and “[i]n the interest of full transparency,” she “would prefer these records be made public” but perceived constraints based on the sealing order.<sup>38</sup> CPD was also eager to open its files on the matter, and in fact responded to some document requests until it was “advised of a court order prohibiting such release [and] . . . the formal directive which stipulates that no further records can be released.”<sup>39</sup> Apparently with a new ardor for transparency, Mayor Emanuel directed this comment to Smollett: “If I remember correctly,

somebody wanted to have evidence and . . . their day in court so all of the evidence could be made public. Because of the judge's decision, none of that evidence will ever be made public. None of it."<sup>40</sup>

Earlier in the year, the Illinois Supreme Court issued an opinion holding that a trial court's order barring disclosure of records was a "state law" that exempted compliance with the FOIA.<sup>41</sup> Since CPD and the state's attorney were viewing the sealing order as such, thwarting the operation of the FOIA, a coalition of local and national news media organizations moved in the circuit court to intervene and vacate the sealing order.<sup>42</sup>

The media intervenors, represented by the authors, argued that sealing the court file did not comply with constitutional and common law access standards, and that the order in general was not even supported by a showing of good cause. After all, the Criminal Identification Act under which it was entered is aimed at providing a "fresh start" for acquitted defendants whose encounter with the criminal justice system is unknown to potential employers and others. The directive of the sealing order (on a printed form) was to "seal the arrest"—impossible in the circumstances since Smollett's arrest had already been the subject of national headline news for weeks. Moreover, he and his lawyers had repeatedly taken to the airwaves and print to comment on the evidence and proclaim his innocence. Accordingly, the intervenors argued, regardless of how the Criminal Identification Act operates in the mine run case, sealing would not serve its intended purpose, and was simply unwarranted under these unique circumstances.

Attempting to defend the sealing order, Smollett all but ignored the act and its purpose. He instead analogized the sealing order to a protective order limiting dissemination of pretrial discovery and argued that his interest in privacy supported nondisclosure. But, in evaluating whether "good cause" exists for such orders under the *Seattle Times* case, "it is necessary to consider whether the 'practice in question [further] an important or substantial

governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'"<sup>43</sup>

Again, Smollett could not justify the sealing order as effectuating the governmental interest reflected in the Criminal Identification Act, and his appeal to privacy as justification was a nonstarter. In Illinois as elsewhere, the right of privacy is severely limited in matters of public interest or involving public figures.<sup>44</sup> As a celebrity at the center of one of the most explosive controversies Chicago has witnessed in recent years, Smollett had no legally protected right of privacy—particularly since the subject of the controversy was not just Jussie Smollett but also the performance of public officials' duties.

Equally important, the intervenors argued, Smollett and his team of attorneys had been commenting extensively in the press about what the evidence purportedly showed—and attacking the Osundairo brothers, the individuals who allegedly staged the attack at Smollett's behest—while asking the court to keep the public from actually seeing and understanding that evidence.<sup>45</sup> "[B]y his counsel's public statements about the evidence relating to his arrest, he has waived privacy or any other purported basis for preventing the public from seeing what the facts actually are—and how they were evaluated by government officials."<sup>46</sup>

The circuit court agreed with the intervenors and vacated the sealing order on common law grounds, in a thoughtfully worded opinion by Judge Steven Watkins that while avoiding the First Amendment also avoided any issues regarding the potential constitutional infirmity of the Criminal Identification Act sealing procedure.<sup>47</sup> The court held that the common law right of access required a showing of good cause for continued sealing, and there was none because Smollett and his lawyers sought media attention themselves.<sup>48</sup> Judge Watkins could not "credit [Smollett's] privacy interest" when he stepped up before the cameras after the initial incident

and even after the charges were dismissed, and his lawyers, presumably with his authorization, appeared on various media outlets speaking about the case. These are not the actions of a person seeking to maintain his privacy or simply be let alone. . . . When balanced against the value of openness, the Defendant has not shown good cause to rebut the common-law presumption of access.<sup>49</sup>

Smollett did not attempt to appeal the order vacating the seal. The state's attorney and CPD began releasing scores of newsworthy documents; and journalists were able to do their jobs, shining a light on how prosecutors' decisions were made and the interaction between CPD, Smollett, and the state's attorney's office.<sup>50</sup>

## Conclusion

*Four hostile newspapers are more to be feared than a thousand bayonets.*  
—Napoleon Bonaparte

As this brief review illustrates, nothing worth fighting for ever comes easy—and certainly not for the news media in the Circuit Court of Cook County. But even under the administration of a secretive executive, and in the face of a sometimes hostile judiciary, in the battle for transparency the truth often wins, particularly when the news media band together to demand it. And only by persistently challenging infringements of the public's right to know will the courts and other branches of government be educated about their constitutional and statutory obligations. Again, hope springs eternal. ■

## Endnotes

1. 5 ILL. COMP. STAT. 140/1 *et seq.*
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3. *Id.*
4. Complaint at 10, *Chi. Tribune Co. LLC v. City of Chi. Office of the Mayor*, No. 15 CH 14058 (Ill. Cir. Ct. Sept. 24, 2015).
5. The Tribune was represented by the

authors, along with Tribune Publishing Company deputy general counsel Karen Flax.

6. See *City of Champaign v. Madigan*, 2013 IL App (4th) 120662; see also 2016 PAC 40576 (Ill. Att’y Gen. May 27, 2016) (affirming that communications “pertaining to the transaction of public business sent or received on the personal cell phones and personal email accounts of City of Chicago employees and officials” are subject to the FOIA).

7. See, e.g., *Nissen v. Pierce County*, 357 P.3d 45 (Wash. 2015); Joey Senat, *Whose Business Is It? Is Public Business Conducted on Officials’ Personal Electronic Devices Subject to State Open Records Laws?*, 19 COMM. L. & POL’Y 293, 299 (2014) (noting that, as of 2014, 15 of the 18 jurisdictions to have addressed the question held that records on public officials’ privately owned electronic personal accounts must be disclosed).

8. Order at 6, *Chi. Tribune*, No. 15 CH 14058 (Ill. Cir. Ct. May 31, 2016).

9. Order at 3, *Chi. Tribune*, No. 15 CH 14058 (Ill. Cir. Ct. Dec. 1, 2016).

10. See Defendants’ Notice of Production at 3, *Chi. Tribune*, No. 15 CH 14058 (Ill. Cir. Ct. Dec. 22, 2016).

11. See, e.g., Bill Ruthhart, *Emanuel Friend, Alderman’s Husband Both Illegally Lobbied Mayor via His Personal Email, Ethics Board Finds*, CHI. TRIB. (June 16, 2017), <https://www.chicagotribune.com/politics/ct-chicago-lobbying-violations-met-0616-20170616-story.html>; Bill Ruthhart, *Five More Lobbying Violations Tied to Emanuel Personal Emails*, CHI. TRIB. (July 19, 2017), <https://www.chicagotribune.com/politics/ct-rahm-emanuel-chicago-lobbying-violations-met-0720-20170719-story.html>; Bill Ruthhart & Hal Dardick, *Emails to Emanuel Raise Questions about Dozens of Possible Lobbying Violations*, CHI. TRIB. (Mar. 21, 2017), <https://www.chicagotribune.com/politics/ct-rahm-emanuel-emails-lobbyists-registration-met-20170321-story.html> (reporting that “Mayor Rahm Emanuel’s personal email accounts have served as a private avenue of influence where executives and investors sought favorable action from City Hall”).

12. Order at 5–8, 11–19, *Chi. Tribune*, No. 15 CH 14058 (Ill. Cir. Ct. May 14, 2018).

13. Pub. Access Op. 16-006 (Ill. Att’y

Gen. Aug. 9, 2016).

14. Order at 4–5, *City of Chicago v. Attorney Gen.*, No. 16 CH 12085 (Ill. Cir. Ct. Sept. 20, 2017). CNN was represented by the authors, along with Drew Shenkman of CNN.

15. Mick Dumke, *The Laquan McDonald Shooting Keeps Exposing Critical Flaws in Illinois’ Freedom of Information Act*, PROPUBLICA (Dec. 19, 2018), <https://www.propublica.org/article/illinois-foia-flaws-freedom-of-information-act-public-records-laquan-mcdonald-chicago>.

16. *Id.*

17. *Id.*

18. Order, *People v. Van Dyke*, No. 17 CR 0428601 (Ill. Cir. Ct. Feb. 3, 2017). Judge Gaughan described this order as intended “[t]o be in compliance with” an earlier “decorum order” prohibiting the lawyers and their agents from releasing, or publicly referring to the existence or possible existence of, “any documents, exhibits, photographs, or any evidence, the admissibility of which may have to be determined by the Court.” See *id.*; *Decorum Order, Van Dyke*, No. 17 CR 0428601 (Ill. Cir. Ct. Jan. 20, 2016).

19. See, e.g., *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978); *Skolnick v. Altheimer & Gray*, 730 N.E.2d 4, 15–18 (Ill. 2000).

20. See 705 ILL. COMP. STAT. 105/16(6).

21. The intervenors were the Chicago Tribune, Chicago Public Media, Chicago Sun-Times, WFLD Fox 32 Chicago, Associated Press, WLS, and WGN.

22. Transcript of Proceedings at 13–15, *Van Dyke*, No. 17 CR 0428601 (Ill. Cir. Ct. Apr. 18, 2018).

23. *Id.* at 27.

24. Transcript of Proceedings at 35, 77–78, *Van Dyke*, No. 17 CR 0428601 (Ill. Cir. Ct. Apr. 28, 2018).

25. *Id.*

26. ILL. SUP. CT. R. 383.

27. Motion for Supervisory Order at 5, *Chi. Pub. Media, Inc. v. Gaughan*, No. 123569 (Ill. May 11, 2018).

28. Order, *Gaughan*, No. 123569 (Ill. May 23, 2018).

29. Order, *Van Dyke*, No. 17 CR 0428601 (Ill. Cir. Ct. May 24, 2018).

30. Transcript of Proceedings at 19–20, *Van Dyke*, No. 17 CR 0428601 (Ill. Cir. Ct. May 31, 2018).

31. Motion for Supplemental

Supervisory Order, *Gaughan*, No. 123880 (Ill. Aug. 7, 2018).

32. Order, *Gaughan*, No. 123880 (Ill. Sept. 12, 2018).

33. See, e.g., Megan Crepeau et al., *In Latest Plot Twist, Cook County Prosecutors Abruptly Drop All Charges against Jussie Smollett*, CHI. TRIB. (Mar. 26, 2019), <https://www.chicagotribune.com/news/breaking/ct-met-jussie-smollett-charges-dropped-20190326-story.html>; Faith Karimi & Melissa Alonso, *The Prosecutor Who Dropped Jussie Smollett’s Charges Says He Believes the Actor Lied to the Police*, CNN (Mar. 27, 2019), <https://www.cnn.com/2019/03/27/entertainment/jussie-smollett-wednesday/index.html>.

34. Brian Pascus, *Jussie Smollett Asked to Pay City of Chicago \$130,000 for Cost of Investigation*, CBS NEWS (Mar. 28, 2019), <https://www.cbsnews.com/news/jussie-smollett-pay-city-of-chicago-130000-cost-investigation-today-live-updates-2019-03-28>.

35. Complaint, *City of Chicago v. Smollett*, No. 19 L 003898 (Ill. Cir. Ct. Apr. 11, 2019).

36. 20 ILL. COMP. STAT. 2630/1 *et seq.*

37. See *id.* 2630/5.2(g)(2) (providing that eligible records “may be sealed immediately if the petition is filed with the circuit court clerk on the same day and during the same hearing in which the case is disposed”).

38. Kim Foxx, *I Welcome an Outside Review of How We Handled the Jussie Smollett Case*, CHI. TRIB. (Mar. 29, 2019), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-kim-foxx-jussie-smollett-20190329-story.html>.

39. Anthony Guglielmi (@AJGuglielmi), TWITTER (Mar. 27, 2019, 7:09 PM), <https://twitter.com/AJGuglielmi/status/1111087816073711618>.

40. *Read Mayor Emanuel, Chicago Top Cop’s Comments about Jussie Smollett Charges Being Dropped*, CHI. TRIB. (Mar. 26, 2019), <https://www.chicagotribune.com/news/breaking/ct-met-jussie-smollett-emanuel-johnson-transcript-20190326-story.html>.

41. *In re* Appointment of Special Prosecutor, 2019 IL 122949; see 5 ILL. COMP. STAT. 140/7(1)(a).

42. The intervenor group included local and national publishers and broadcasters: Chicago Tribune, CNN, ABC News and WLS, NBC News, CBS News and WBBM-TV, WGN, Associated Press, New York Times, Univision, Fox

Television Stations, Hollywood Reporter, National Public Radio and WBEZ, Chicago Sun-Times, USA Today, and Dow Jones, publisher of the *Wall Street Journal*. Media Intervenors' Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order, *People v. Smollett*, No. 19 CR 0310401 (Ill. Cir. Ct. Apr. 1, 2019).

43. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (alterations in original) (quoting *Procurier v. Martinez*, 416 U.S. 396, 413 (1974)); *see also* *Cummings v. Beaton & Assocs., Inc.*, 192 Ill. App. 3d 792, 797 (1989) (finding that the “defendants have not demonstrated what important or substantial governmental interest is at stake in need of protection by the gag order,” where “[t]he matters suppressed are matters that have already received press coverage,” including a “scurrilous” rumor about a murder plot).

44. *See, e.g.*, *Leopold v. Levin*, 45 Ill. 2d 434, 441 (1970); *Adreani v. Hansen*,

80 Ill. App. 3d 726, 730 (1980) (concluding that an individual “in the midst of [a] public controversy” with the city could not claim a privacy right); *Buzinski v. DoAll Co.*, 31 Ill. App. 2d 191, 194–95 (1961).

45. *See, e.g.*, Jason Meisner & Megan Crepeau, *Mystery Remains over Why Kim Foxx's Office Dismissed Hoax Charges against Jussie Smollett*, CHI. TRIB. (Apr. 8, 2019), <https://www.chicagotribune.com/news/ct-met-jussie-smollett-controversy-20190404-story.html>. For their part, the Osundairo brothers filed a defamation complaint against Smollett's lawyers at the Geragos law firm, alleging that they made public statements falsely accusing the brothers of committing “a criminally homophobic, racist, and violent attack against Mr. Smollett” in order “to distract from Mr. Smollett's farce and to promote themselves.” Complaint ¶ 23, *Osundairo v. Geragos*, No. 19-cv-02727 (N.D. Ill. Apr. 23, 2019).

46. Reply in Support of Media Intervenors' Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order at 13, *Smollett*, No. 19 CR 0310401 (Ill. Cir. Ct. May 7, 2019).

47. Order, *Smollett*, No. 19 CR 0310401 (Ill. Cir. Ct. May 23, 2019).

48. *Id.* at 6–9.

49. *Id.* at 9.

50. *See, e.g.*, Megan Crepeau & Jason Meisner, *Kim Foxx's Office Releases Records Shedding Light on Behind-the-Scenes Negotiations in Jussie Smollett Case*, CHI. TRIB. (May 31, 2019), <https://www.chicagotribune.com/news/breaking/ct-met-jussie-smollett-document-20190531-story.html>; *With Seal Lifted, Police Release Hundreds of Pages of Reports in Jussie Smollett Case*, CHI. TRIB. (May 31, 2019), <https://www.chicagotribune.com/news/breaking/ct-met-jussie-smollett-chicago-police-reports-20190530-story.html>.



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