

ORDER TO UNSEAL GRANTED MOTIONS FOR RELEASE FROM CUSTODY DUE TO COVID-19 PANDEMIC

On March 22, 2020, the Criminal Division issued a Standing Order Establishing Procedures, Effective Immediately, for Filing Emergency Motions for Release from Custody Due to the COVID-19 Pandemic [“Standing Order”]. The Order required that motions filed following its issuance strictly comply with the requirements set forth in the Order. Among other questions to be addressed, the Standing Order required that counsel answer the following:

“Does the defendant have a documented health condition that puts them especially at risk with respect to COVID-19? If so, specify the health condition and provide details about how the health condition is documented.”

In a footnote, the Standing Order provided that “[if] the defendant has such health conditions, counsel may answer ‘See Filed Exhibit 1’ and file the detailed answer and any supporting documentation in a sealed exhibit to the motion, labeled ‘Exhibit 1: Answer to Question A.’” Other than permitting this limited portion of the motion to be placed under seal, the Standing Order did not authorize counsel to file the motion itself under seal, or to file a redacted copy of the motion with the court.¹

Over the past four months, well over one thousand emergency motions for bond review, Compassionate Release motions, and emergency motions for sentence reduction have been filed in the Criminal Division. Many of those motions failed to adhere to the requirements of the Standing Order in that the entire motion was filed under seal without prior leave of court, or a redacted filing was submitted. For the reasons set forth below, to the extent that a motion was ultimately granted and the defendant released from custody, the undersigned now direct that the

¹ This Order was subsequently amended on May 15 to require additional information to aid in the scheduling of a hearing on such motion and the question was reordered to become Question B, but the substantive requirements above remained the same.

Criminal Division Clerk's Office unseal and/or docket a unredacted copy of the motion.

Exhibits placed under seal shall remain under seal, consistent with the provisions of the previous standing orders, absent a case specific order unsealing the exhibit. Effective July 20, 2020, a further amended Standing Order was issued, governing the filing of pleadings going forward, requiring that a written motion must be filed with the court prior to an exhibit being placed under seal.

I. Motions requesting release from custody constitute a “judicial record.”

Whether something is a judicial record depends on “the role it plays in the adjudicatory process.” *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997); *see also Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 8 (1986). “A judicial document or judicial record is a filed item that is relevant to the performance of the judicial function and useful in the judicial process.” *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F. 3d 132, 139 (2d Cir. 2016) (holding that pleadings clearly qualify as judicial records) (internal quotations and citations omitted). In determining whether a document is a judicial record, courts evaluate the “relevance of the document’s specific contents to the nature of the proceeding” and the degree to which “access to the [document] would materially assist the public in understanding the issues before the . . . court, and in evaluating the fairness and integrity of the court's proceedings.” *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 166-67 (2d Cir. 2013).

Emergency motions for immediate release from custody due to the COVID-19 pandemic clearly meet the *Newsday* test for obvious reasons. When a court reviews or relies on a particular document in rendering a judicial decision, that document constitutes a “judicial record” because “the meaning and legal import of a judicial decision is a function of the record upon which it was rendered.” *El-Sayegh*, 131 F.3d at 162. In cases in which such motions have been granted, the

Court relied on representations set forth in the motion, including information about how the defendant's health condition put them especially at risk for infection with the coronavirus, as well as the government's response and additional documents contained in the record. Because the defense motion played an integral role in the court's decision, the report is a judicial record. *See In re Jury Questionnaires*, 37 A.3d 879, 886 n.3 (D.C. 2012).

II. As a judicial record, pleadings submitted to the court are subject to a right of public access.

The D.C. Court of Appeals has recognized a presumptive right of public access under the common law to view documents, such as motions and oppositions, filed with the court. *See Mokhiber v. Davis*, 537 A.2d 1100, 1102 (D.C. 1988) (finding public right of access to court records even following settlement of civil suit). The right of public access to judicial materials, including court records, is indisputable as it serves the important function of ensuring the integrity and legitimacy of judicial proceedings. *See Nixon v. Warner Communications*, 435 U.S. 589, 597 n.7 (1978); *In re New York Times Co.*, 585 F.Supp. 2d 83, 89 (D.D.C. 2008) (“[T]here is an historic common law right of access to judicial records and documents that has been recognized in United States courts for well over a century.”); *United States v. Hubbard*, 650 F.2d 293, 314–15 (D.C. Cir. 1980) (“Access to records serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.”); *El-Sayegh*, 131 F.3d at 161 (“The common law right of access to judicial records antedates the Constitution”) (internal citations omitted).

Public access “discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality,” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980), in addition to “promot[ing] the ‘appearance of fairness so essential to public confidence in the system,’” *In re Access to Jury Questionnaires*, 37 A.3d at 885 (quoting *Press-Enterprise Co. v.*

Superior Court of Cal., 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”). The D.C. Court of Appeals has noted that such “public scrutiny can serve to inform the public about the true nature of judicial proceedings, and public knowledge of the courts is essential to democratic government because it is essential to rational criticism and reform of the justice system.” *Mokhiber*, 537 A.2d at 1110 (citations omitted).

While courts have generally recognized a strong presumption in favor of public access, such a right is not absolute. *See Nixon*, 435 U.S. at 598. The right of access requires a balancing of a legitimate need for secrecy against the public’s strong interest in disclosure. *See In re Nat’l Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981). “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise I*, 464 U.S. at 510. The Supreme Court acknowledged the inherent difficulties that will arise in sealing requests and subsequently concluded that “[t]he decision as to access [to judicial records] is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Nixon*, 435 U.S. at 598–99.²

² The D.C. District Court further elaborated:

Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court. This discretion, however, is not open-ended. Rather, access may be denied only if the district court, after considering ‘the relevant facts and circumstances of the particular case’, and after ‘weighing the interests advanced by the parties in light of the public interest and the duty of the courts’, concludes that ‘justice so requires’. The court’s discretion must ‘clearly be informed by this country’s strong tradition of access to judicial proceedings’. In balancing the competing interests, the court must also give appropriate weight and consideration to the ‘presumption however gauged in favor of public access to judicial records.’

In re Nat’l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981) (internal citations omitted).

In filing a motion for bond review or compassionate release, or motion to reduce sentence based upon the Defendant's health condition, the Defendant has placed their medical status directly at issue, requiring the court to consider otherwise private and potentially sensitive information in order to evaluate and rule upon the request for immediate release from incarceration. Analogous situations establish that when an individual places their physical or mental health at issue they waive any claim of medical privilege or confidentiality. *See* D.C. Code § 14-307. For example, when a defendant raises the defense of competency or insanity to avoid criminal prosecution, D.C. Code § 14-307(b)(2) specifically excludes such evidence from privacy protections. *See Clifford v. United States*, 532 A.2d 628, 637 (D.C. 1987) (citing § 14-307 and holding that placing mental health at issue “constitute[s] a constructive waiver of the [doctor-patient] privilege”). *See also* D.C. Code § 7-1204.03(a) (“[m]ental health information may be disclosed in a civil or administrative proceeding in which the client . . . initiates his mental or emotional condition . . . as an element of the claim or defense.”)

Here, the Standing Order strikes the appropriate balance between public access and medical privacy by requiring that the defendant identify the nature of the health condition that places them at increased risk due to COVID-19 and state how such condition is documented, while allowing for more detailed information and any supporting documentation, such as medical records, to be filed as a sealed exhibit to the motion.

As indicated, the public presumptively has the right of access to pleadings considered by the court that served as the basis of the court's decision. *See MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 668 (D.C. Cir. 2017) (“The issuance of a completely public opinion contributes significantly to the transparency of the court's decision-making process. . . . Without access to the sealed materials, it is impossible to know which parts of those materials

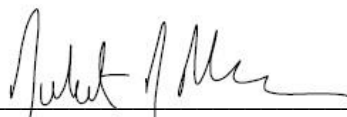
persuaded the court and which failed to do so (and why).” (internal quotations and citations omitted)). This may be particularly true of court decisions to release individuals pending trial on criminal charges or serving a sentence following a conviction in order to preserve public confidence in the criminal justice system. Disclosure of the basis for important judicial decisions, such as here, should be made public and not kept secret.

Wherefore, for the reasons stated, it is this 20th day of July 2020, hereby

ORDERED, that in all cases within the Criminal Division in which a motion to release a defendant due to the COVID-19 pandemic has been granted, motions previously filed under seal or redacted without prior leave of court shall be unsealed or replaced with an unredacted copy of the motion.³ It is further

ORDERED, that exhibits placed under seal shall remain under seal, consistent with the provisions of the March 22 Standing Order, as amended May 15, absent a case specific order unsealing the exhibit. It is further

ORDERED, that pursuant to the July 17th Amended Standing Order, effective July 20, 2020, a written motion must be filed with the court prior to an exhibit being placed under seal.



Judge Juliet J. McKenna
Presiding Judge, Criminal Division
Signed in chambers



Judge Danya A. Dayson
Deputy Presiding Judge, Criminal Division
Signed in chambers

³ This includes the initial and any supplemental motion, as well as government response or opposition thereto.