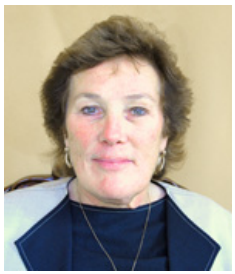
Legal Analysis

The Seal Of Approval: When is it Appropriate To Impound?

By Judge Linda E. Giles



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The notion that court records should be open to the public was enshrined 370 years ago in the Massachusetts Body of Liberties, the first legal code of the colonists in New England and the precursor to our Constitution and General Laws: "Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office …" Massachusetts Body of Liberties, art. 48 (1641). Thus, courts across the nation long have recognized a presumptive right of the public to inspect and copy court records and documents. *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 599 (1978). See *F.T.C.* v. *Standard Financial Management Corp.*, 830 F.3d 404, 409 (1st Cir. 1987). The strong presumption of access aids the citizenry's desire to keep a watchful eye on the workings of its government, *Nixon*, 435 U.S. at 598, and fosters the public's desire to know whether public servants are carrying out their duties properly, *George W. Prescott Publ. Co.* v. *Register of Probate for Norfolk County*, 395, 274, 279 (1985); see *Globe Newspaper Co.* v. *Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989).

"In Massachusetts, the right of public access to judicial records is governed by overlapping constitutional, statutory, and common-law rules." *Commonwealth* v. *Silva*, 448 Mass. 701, 706 (2007). Records of judicial proceedings[1] are subject to the "general principle of publicity," *New Bedford*

Standard-Times Pub. Co. v. *Clerk of the Third Dist. Ct. of Bristol*, 377 Mass. 404, 410 (1979); *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977); and laws denying access to judicial proceedings must "be strictly construed in favor of the general principle of publicity," *Commonwealth* v. *Blondin*, 324 Mass. 564, 571 (1949). Court clerks are bound ethically to facilitate the public's right of access. Code of Professional Responsibility for Clerks of the Court, S.J.C. Rule 3:12, Canon 3(A)(6). Furthermore, "public" means *everyone*, not just attorneys, Trial Court Administrative Directive No. 2-93, "Public Access to Court Records of Criminal Proceedings" ("Access to public records shall not be restricted to any class or group of persons"); accord, Trial Court Administrative Directive No. 1-84, "Public Access to Court Records, or non-commercial users, see, *e.g.*, *Lanphere & Urbaniak* v. *Colorado*, 21 F.3d 1508 (10th Cir. 1994); *Speer* v. *Miller*, 15 F.3d 1007 (11th Cir. 1994); and the right of access includes the right to photocopy, *Nixon*, 435 U.S. at 597; *New Boston Garden Corp.* v. *Board of Assessors of Boston*, 24 Mass. App. Ct. 122, 125 (1987), and to make use of audio recordings and transcripts of court proceedings open to the public, Superior Court Standing Order 2-87(6); District Court Special Rule 211(A)(5)(a); *Republican Co.* v. *Appeals Court*, 442 Mass. 218, 223 n.8 (2004).

Because the media have no less a right to gain access to judicial records than any other member of the public, *The Boston Herald, Inc.* v. *Superior Court Dept. of the Trial Court*, 421 Mass. 502, 505 (1995), the right of access to certain court documents also is secured by the guarantee of freedom of the press under the First Amendment, which functions as an "effective check" on the judiciary, *Globe Newspaper Co.*, 868 F.2d at 502. "[O]nly in the most extreme situations, if at all, may a State court constitutionally forbid a newspaper (or anyone else) to report or comment on happenings … which have been held in open court; and a similar rule would apply to court files otherwise unrestricted." *Ottaway Newspapers*, 372 Mass. at 547-48. The United States Supreme Court has articulated a two-part test for determining whether a First Amendment right of access obtains in a particular criminal case: "[f]irst, the proceeding must have an historic tradition of openness, and second the public's access must play 'a significant positive role in the functioning of the particular process in question.'" *Newspapers of New England, Inc.* v. *Clerk-Magistrate of the Ware Div.* of the Dist. Court, 403 Mass. 628, 635 (1988), quoting *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8 (1986). The Supreme

Court has held that the First Amendment requires courts to consider on a case-by-case basis whether the denial of public and press access to the courtroom and, axiomatically, court records is warranted, especially in light of the strong presumption in favor of a public trial. *Globe Newspapers Co.* v. *Superior Court*, 457 U.S. 596 (1982). See *Commonwealth* v. *Baran*, 74 Mass. App. Ct. 256, 294 (2009). As the Court observed: "[T]he State's justification in denying access [to the public] must be a weighty one. Where … the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 606-07. See *Baran*, 74 Mass. App. Ct. at 294. In the only Supreme Court decision dealing with a constitutional right of access to court records in a non-criminal proceeding, however, the Court concluded that the release of the "Watergate tapes" played at trial was not required by the First Amendment right of freedom of the press. *Nixon*, 435 U.S. at 608-10. See *Newspapers of New England*, 403 Mass. at 636.

The Sixth Amendment also serves to guarantee criminal defendants the right to a public trial and, inherently, access to the records of that trial: "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984). Public criminal trials ensure that prosecutors and judges perform their duties responsibly, encourage unknown witnesses to come forward, and discourage perjury. *Id.*

The principle of publicity of judicial records is not absolute, however. See *Ottaway Newspapers*, 372 Mass. at 548. First, there are a number of statutes that limit access to judicial proceedings and records, permit reasonable cloture, and restrict the use of court records by the judiciary itself. *New Bedford Standard-Times Pub. Co.*, 377 Mass. at 410, 411. See *Ottaway* Newspapers, 372 Mass. at 549[2]. In addition, "a court possesses 'inherent equitable power to impound its files in a case and to deny public inspection of them … when justice so requires.'" *The Boston Herald, Inc.* v. *Sharpe*, 432 Mass. 593, 604 (2000), quoting *George W. Prescott Publ.* Co., 395 Mass. at 277. "Impoundment" means "the act of keeping some or all of the papers, documents, or exhibits, or portions thereof,

in a case separate and unavailable for public inspection." Rule 1, Uniform Rules on Impoundment Procedure[3]. Consistent with these tenets, the Uniform Rules on Impoundment Procedure were promulgated by the Supreme Judicial Court, effective January 1, 1988, for use in every Department of the Trial Court. Rule 1, Uniform Rules on Impoundment Procedure. See also S.J.C. Rule 1:15.

The Rules on Impoundment Procedure incorporated many of the rules in prior S.J.C. cases, including the requirement that an order of impoundment be entered only on a showing of "good cause." *H. S. Gere & Sons, Inc.* v. *Frey*, 400 Mass. 326, 332 (1987). See Rule 7, Uniform Rules on Impoundment Procedure. "In determining the existence of 'good cause' for impoundment, the trial judge is required to balance the privacy interests at issue, against the competing 'principle of publicity,'" *George W. Prescott Publ. Co.*, 395 Mass. at 278; see Podolski, Impoundment v. Publicity, 2 Mass. Fam. L.J. 54 (1984), based on the relevant facts and circumstances of each case, *Nixon*, 435 U.S. at 599. The protection of privacy interests and the avoidance of "annoyance, embarrassment [or] oppression" have been deemed to constitute sufficient good cause to justify impoundment. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 35 n.1, 36-7 (1984). Venirepersons in a high-profile trial, see *Commonwealth* v. *Jaynes*, 55 Mass. App. Ct. 301, 314 (2000); grand jury witnesses, see *In the Matter of Grand Juror Subpoena*, 411 Mass. 489, 498 n.10 (1997); jurors in a murder trial involving gang violence, see *Silva*, 448 Mass. at 708; divorce litigants, see *Adams* v. *Adams*, 459 Mass. 361, 362 n.1 (2011); and juveniles, see *News Group Boston, Inc.* v. *Commonwealth*, 409 Mass. 627, 634 (1991), for example, have been found to enjoy legitimate expectations of privacy. Against any such expectation of privacy, the court must weigh the public's interest in learning "whether public servants are carrying out their duties in an efficient and law-abiding manner." *George W. Prescott Publ. Co.*, 395 Mass. at 279, quoting *Attorney General* v. *Collector of Lynn*, 377 Mass. 151, 158 (1979). Another factor that the court should consider is whether the subject matter of publicity is of legitimate public concern. *Boston Herald* v. *Sharpe*, 432 Mass. at 611.

In view of the strong presumption of openness in judicial proceedings, however, "impoundment is always the exception to the rule," *Republican Co.*, 442 Mass. at 223, and "will not be routinely granted," *H. S. Gere & Sons*, 400 Mass. at 332. For this reason, an order of impoundment must comply with the

procedures and requirements set out in the Rules on Impoundment Procedure. *Id.* A request for impoundment must be made by written motion accompanied by a supporting affidavit. Rule 2, Uniform Rules on Impoundment Procedure. An order of impoundment may be made only upon written findings by the court; and the order shall state specifically what material is to be impounded and, where appropriate, how impoundment is to be implemented. Rule 8, Uniform Rules on Impoundment Procedure. See *Globe Newspaper Co*., 457 U.S. at 510. Moreover, the court must tailor narrowly the scope of the impoundment order "so that it does not exceed the need for impoundment." *Boston Herald* v. Sharpe, 432 Mass. at 605. The impoundment order remains an interlocutory order and carries no continuing presumption of validity. *Republican Co.*, 442 Mass. at 223-24.

Conclusion

The common-law right of public access to judicial records is bedrock but not absolute. That right must yield to the court's discretionary power to impound records for "good cause." The balance of these competing rights underlies the Uniform Rules on Impoundment Procedure. Nevertheless, it must be remembered that public access to judicial records is favored and that impoundment remains the exception to the rule. In the words of the great Justice Louis Brandeis, "sunlight is said to be the best of disinfectants." ■

Endnotes

1. Public records statutes, *e.g.*, G. L. c. 4, § 7; G. L. c. 66, § 10; and G. L. c. 66A, do not apply to court records.

2. However, the restrictions found in the Criminal Offender Record Information (CORI) Act relative to the dissemination of criminal records is inapplicable to records maintained by a clerk's office. G. L. c. 6, §§ 167-178B.

3. The term "impounded" should not be confused with the term "sealed," which is applied to a document to which only the court has access, unless the court orders otherwise. *Pixley* v. *Commonwealth*, 453 Mass. 827, 836 n.11 (2009).