

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE CARROLL COUNTY CIRCUIT COURT
CAUSE NO. 08C01-2210-MR-000001

STATE OF INDIANA)
)
 Plaintiff,)
)
v.)
)
RICHARD M. ALLEN)
)
 Defendant.)

MEDIA INTERVENORS’ PRE-HEARING BRIEF SEEKING PUBLIC ACCESS TO PROBABLE CAUSE AFFIDAVIT AND CHARGING INFORMATION

The Media Intervenors¹ submit this Pre-Hearing Brief pursuant to the Court’s November 2, 2022 *Order Acknowledging Public Hearing* and urge this Court to grant public access to the Probable Cause Affidavit and Charging Information because the public interest is best served by public access to a prosecutor’s basis for filing criminal charges. It is impossible to know what basis the State has alleged to support its Verified Request to Prohibit Public Access to a Court Record (the “Motion”) because the Motion itself is excluded from public access pending the November 22, 2022 public hearing in this matter. However, it is unlikely that there is any justification to warrant sealing the entire factual basis for charging the Defendant—particularly given the substantial public concern regarding the unsolved and high-profile murder of two minors over five years ago.

¹ The “Media Intervenors” refer to the following entities collectively: Indiana Broadcasters Association, Inc.; Hoosier State Press Association, Inc.; The Associated Press; Circle City Broadcasting I, LLC d/b/a WISH-TV; E.W. Scripps Company d/b/a WRTV; Nexstar Media Inc. d/b/a WXIN/WTTV; Neuhoff Media Lafayette, LLC; Woof Boom Radio LLC; TEGNA Inc. d/b/a WTHR; Gannett Satellite Information Indiana Newspapers, LLC d/b/a The Indianapolis Star; and American Broadcasting Companies, Inc. d/b/a ABC News

This Court should grant public access and lift the provisional exclusion from public access and sealing of the Probable Cause Affidavit and Charging Information. Doing so would further the public’s right to access judicial records, which is particularly acute in these circumstances.

I. The Public and the Media Have a Substantial Right to Access Judicial Records Based in Indiana Policy and the Federal and Indiana Constitutions.

In seeking public access, the media acts as “surrogates for the public.” *Richmond Newsp., Inc. v. Virginia*, 448 U.S. 555, 573 (1980). The United States Supreme Court has aptly explained the media’s important role:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. . . . **With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.**

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (emphasis added). Media Intervenors, on the public’s behalf, seek access to the Probable Cause Affidavit and Charging Information to ensure government transparency and accountability—which is especially critical in criminal matters. *See Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 560 (1976) (explaining that the press is “the handmaiden of effective judicial administration, especially in the criminal field” and a “guard against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism”).

Consistent with these principles, the General Assembly expressly recognizes Indiana’s “public policy . . . that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.”

Ind. Code § 5-14-3-1 (further explaining that the Access to Public Records Act (“APRA”) will be “liberally construed to implement this policy” and that the burden for nondisclosure falls on the public agency). Access to Court Records Rule 6 (hereinafter “Rule 6”), promulgated by the Indiana Supreme Court, likewise “presume[s] . . . openness and requires compelling evidence to overcome this presumption.” Commentary to Rule 6.

Apart from well-reasoned policy considerations, the public interest in accessing judicial records has constitutional dimensions. Media Intervenors, as members and representatives of the public, are presumptively entitled to judicial documents and proceedings under the First and Fourteenth Amendments to the United States Constitution. *See, e.g., Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 11–12 (1986); *see also Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents”).

The Indiana Constitution similarly (and perhaps more so) protects public access and key newsgathering activities. *See* Ind. Const. Article 1, Section 9 (“No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatsoever[.]”); *Mishler v. MAC Systems, Inc.*, 771 N.E.2d 92, 97 (Ind. Ct. App. 2002) (recognizing that the Indiana Constitution “more jealously protects freedom of speech guarantees than does the United States Constitution”). In light of Indiana’s Constitutional protection of the free interchange of ideas, the Supreme Court has assumed that a “material burden” on newsgathering ability could violate the Indiana Constitution. *In re WTHR-TV*, 693 N.E.2d 1, 15–16 (Ind. 1998).

Considering Indiana’s policy favoring public access and the constitutional implications of restricting access to judicial records, the public’s and media’s interest in accessing judicial records

is not something to be taken lightly, and certainly should not be dismissed as a nuisance. This strong public interest must be a primary consideration in resolving the State's Motion.

II. The Public Interest Is Best Served When Probable Cause Affidavits and Charging Information Are Made Available for Public Scrutiny.

Against this backdrop of deeply-rooted public access rights, probable cause affidavits and associated charging information (such as those presently shielded in this case) are essential judicial records uniquely worthy of disclosure. They contain key facts uncovered in criminal investigations which are insulated from public involvement and ultimately result in the State's charging decisions. The public has a strong interest knowing *why* the State is charging a particular member of the community for alleged crimes. *See Greenwood v. Wolchik*, 544 A.2d 1156, 1157 (Vt. 1988) (“Public access to affidavits of probable cause is all the more important because the process of charging by information involves no citizen involvement, such as is present with juries and grand juries[.]”). Access gives the public answers to these vital questions.

Public access also serves as an important accountability tool, ensuring the fundamental requirement of probable cause supports the arrest. *See Com. v. Fenstermaker*, 530 A.2d 414, 418 (Pa. 1987) (explaining that access to probable cause affidavits “would enhance the performance of police and prosecutors by encouraging them to establish sufficient cause before an affidavit is filed, would act as a public check on discretion of issuing authorities thus discouraging erroneous decisions and decisions based on partiality, and would promote a public perception of fairness in the arrest warrant process”); *see also Nebraska Press Association v. Stuart*, 427 U.S. 539, 587 (1976) (stating that “[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges” and “free and robust reporting, criticism, and debate can . . . subject[] [the criminal justice system] to the cleansing

efforts of exposure and public accountability”) (Brennan, J., concurring). Accountability, in turn, promotes public trust, which is key to democratic society.

The history leading to the Defendant’s arrest, coupled with the nature of the underlying alleged crimes (the murder of two children), underscores the need for transparency. *See Matter of T.B.*, 895 N.E.2d 321, 342 (Ind. Ct. App. 2008) (“[T]he death of any child is a matter of the keenest public interest[.]”) (internal quotations omitted). These crimes have gone unresolved for years and, apparently only recently, the investigation has gained traction. Yet the public has no idea how or why the Defendant was arrested for the alleged crimes, no less how the investigative process led to the Defendant’s arrest, or even how the State alleges the Defendant was involved in the murders. These are critical issues squarely affecting the public interest. To the extent there is a concern that the Defendant’s arrest was an unwarranted effort to satisfy public demand, making the charging records available to the public will promote continued accountability and public trust in the process. The public has a right to answers. *See Richmond*, 448 U.S. at 572 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing”).

III. The State Cannot Meet Its Burden to Seal the Records or Exclude them from Public Access.

Rule 6 imposes a heavy burden on the State to exclude the Probable Cause Affidavit and Charging Information from public access. In these “extraordinary circumstances,”² the State must show by “clear and convincing evidence” one of the following:

² Rule 6 applies in “extraordinary circumstances” where a court record “that otherwise would be publicly accessible” is requested to be excluded from public access. *See* Rule 6(A). The Court’s *Order Acknowledging Public Hearing* dated November 2, 2022 explained that the public hearing will be conducted pursuant to Rule 6 and Indiana Code § 5-14-3-5.5, the latter of which applies when the court receives a request to seal a public record that is “not declared confidential under [Ind. Code § 5-14-3-4(a)]” (i.e. public records that are mandatorily excepted from disclosure).

- (1) The public interest will be substantially served by prohibiting access;
- (2) Access or dissemination of the Court Record will create a significant risk of substantial harm to the requestor, other persons or the general public; or
- (3) A substantial prejudicial effect to on-going proceedings cannot be avoided without prohibiting Public Access.

Rule 6(A), (D). To the extent the State seeks to go beyond exclusion from public access and seal³ the records under the Indiana Access to Public Records Act, the State must demonstrate all five statutory factors by a preponderance of the evidence:

- (1) a public interest will be secured by sealing the record;
- (2) dissemination of the information contained in the record will create a serious and imminent danger to that public interest;
- (3) any prejudicial effect created by dissemination of the information cannot be avoided by any reasonable method other than sealing the record;
- (4) there is a substantial probability that sealing the record will be effective in protecting the public interest against the perceived danger; **and**
- (5) it is reasonably necessary for the record to remain sealed for a period of time.

Ind. Code § 5-14-3-5.5 (emphasis added); *see also* Ind. Code § 5-14-3-1 (burden for nondisclosure falls on the public agency).

Accordingly, Media Intervenors glean that the State is not claiming that the Probable Cause Affidavit and the Charging Information must be sealed pursuant to a mandatory statutory exception.

³ The Indiana Public Access to Court Records Handbook explains the difference between records “not accessible for public access” and those “sealed under statutory authority” (such as under Ind. Code § 5-14-3-5.5): “Records sealed under statute are more secure because no one is entitled to view the records without court authorization. Records ‘not accessible for public access’ are only secure from public access but may be viewed by court or Clerk staff and the parties to the case and their lawyers.” *Access to Court Records Handbook* at p. 53, Q1 (2020), available at: <https://www.in.gov/courts/iocs/files/PublicAccessHandbook.pdf>.

Though Media Intervenors do not have the benefit of reviewing the basis for the State's Motion to Seal, the Media Intervenors highly doubt that the State could meet its burden under either Rule 6 or Indiana Code § 5-14-3-5.5 for two reasons. First, for the reasons stated above, the presumed public interest in disclosure is paramount. The State must present clear and compelling evidence favoring nondisclosure to rebut the presumption of access. Second, the Motion to Seal apparently requests broad relief; the Probable Cause Affidavit and Charging Information are currently excluded from public access and sealed in their entirety without even a redacted, public version available on the Court's docket. Yet both Rule 6 and Indiana Code § 5-14-3-5.5 contemplate that any exclusion or sealing order must employ the least restrictive means, and only when absolutely necessary. *See* Rule 6(D) (order prohibiting public access must include, among others, "[u]ses the least restrictive means and duration when prohibiting access"); Ind. Code § 5-14-3-5.5(d)(3) (the State must show, among others, that "any prejudicial effect created by dissemination of the information cannot be avoided by any reasonable method other than sealing the record"). Even if the Court concludes that clear and compelling evidence requires certain *portions* of the Probable Cause Affidavit and Charging Information to be sealed, a public, redacted version should be released to the extent possible.

IV. Media Intervenors Request Expedient Unsealing.

Should the Court conclude that the State has not rebutted the presumption of public access, the Media Intervenors respectfully request that the Court unseal the Probable Cause Affidavit and Charging Information and make them available for public access as soon as possible. A loss of First Amendment rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Neb. Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) ("[E]ach passing day may constitute a separate and cognizable

infringement of the First Amendment.”). Accordingly, the Media Intervenors request expeditious unsealing following the November 22, 2022 hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, the foregoing was filed with the Clerk of the Carroll County Circuit Court and served to all counsel of record via IEFS.

/s/ Margaret M. Christensen