IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	No. 19 CR 3104
	)	
vs.	)	Hon. Steven G. Watkins
	)	
JUSSIE SMOLLETT	)	

MEMORANDUM OF LAW IN RESPONSE TO MEDIA INTERVENORS' EMERGENCY MOTION TO INTERVENE FOR PURPOSES OF OBJECTING TO AND VACATING THE SEALING ORDER

Jussie Smollett, by his attorneys, Geragos & Geragos, APC, specially appears to oppose the Media Intervenors' Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order.

Factual Background

1. On March 7, 2019, a felony indictment was filed against Mr. Smollett in the Circuit Court of Cook County, case number 19 CR 3104, alleging 16 counts of disorderly conduct, namely filing a false police report in violation of Chapter 720, Act 5, Section 26-1(a)(4) of the Illinois Compiled Statutes Act of 1992 as amended.

2. On March 12, 2019, the parties appeared in Court for a hearing on the media's request for extended media coverage. In light of the substantial misinformation in the case, the defense stated that it had no objection to the media's request and would welcome cameras into the courtroom so the media and the public could see the actual evidence, and lack thereof, against Mr. Smollett.

3. On March 26, 2019, the State Attorney's Office moved to *nolle pros* all 16 counts in the Indictment. The Court granted the motion and dismissed the case against Mr. Smollett. The Court also ordered the records in this matter be immediately sealed.[1]

4. On March 27, 2019, Media Intervenors Chicago Tribune Company, LLC, Cable News Network, Inc., ABC News and WLS Television, Inc., NBC News, a division of NBCUniversal Media, LLC, CBS Broadcasting, Inc., on behalf of CBS News and WBBM-TV, The Associated Press, and Univision Communications Inc., representatives of the local and national news media, filed an Emergency Motion of News Organizations to Intervene for Purposes of Objecting to Expedited Destruction of Public Records Pursuant to Expungement Order.

5. On April 1, 2019, Media Intervenors Chicago Tribune Company, LLC, Cable News Network, Inc., ABC News and WLS Television, Inc., NBC News, a division of NBCUniversal Media, LLC, CBS Broadcasting, Inc., on behalf of CBS News and WBBM-TV, WGN Continental Broadcasting Company, LLC, The Associated Press, The New York Times Company, Univision Communications Inc., Fox Television Stations, LLC, The Hollywood Reporter, LLC, National Public Radio, Inc. and WBEZ, Sun-Times Media,

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[1] The Criminal Identification Act authorized the immediate sealing of the records in this case. *See* 20 ILCS 2630/5.2(g). The Court, State's Attorney, and Mr. Smollett complied fully with the law, and neither the State's Attorney, the Department of State Police, the arresting agency, nor the chief legal officer of the City of Chicago (the unit of local government effecting the arrest) has objected to the sealing order or moved to vacate, modify, or reconsider the sealing order. *See* 20 ILCS 2630/5.2(g)(5)(K); 20 ILCS 2630/5.2(b)(d)(5). Furthermore, an order granting an immediate sealing petition shall not be considered void because it fails to comply with the provisions of 20 ILCS 2630/5 or because of an error asserted in a motion to vacate, modify, or reconsider. *See* 20 ILCS 2630/5.2(g)(5)(L).

LLC, Gannett Satellite Information Network, LLC, on behalf of USA Today, and Dow Jones & Company, publisher of The Wall Street Journal (hereafter "Media Intervenors") filed an Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order, in which they seek leave to intervene in this action and move the Court to reconsider and vacate its March 26, 2019 sealing order (hereafter ("Motion").

6. On March 28 and April 2, 2019, the parties appeared before the Court to address the motions which had been filed. The Court found that the motion filed on March 27, 2019 was moot, since no petition for an expungement had been filed by Mr. Smollett. As to the motion filed on April 1, 2019, the Court found there was no emergency necessitating a decision that day and set a briefing schedule on the Motion.

7. Pursuant to the Court's briefing schedule, Mr. Smollett, through his attorneys, hereby submits his Memorandum of Law in opposition to the Media Intervenors' Motion. As explained below, the media does not have a presumptive right of access to the records it seeks, namely pretrial documents and discovery which have not been admitted into evidence and which will not be admitted at trial or at another proceeding in this matter, since the case against Mr. Smollett has been dismissed. As for the court file, the Media Intervenors have failed to establish good cause, let alone a compelling reason, to unseal records which were open to the public for inspection and copying since the inception of this case.

8. Furthermore, since the defense only received a small portion of the discovery prior to the dismissal of the charges and sealing of the records, Mr. Smollett does not even know the universe of documents which constitutes the discovery in this case, which likely

includes confidential medical and financial information, and other private communications unrelated to the incident, obtained by the Chicago Police Department, the Cook County State Attorney's Office, and/or other agencies. Thus, even if the media had a presumptive right of access to the discovery in this case, such right is outweighed by Mr. Smollett's right to privacy.

Argument

A. The Media Does Not Have a Presumptive Right of Access to the Records It Seeks.

The Supreme Court of Illinois has recognized that the first amendment to the United States Constitution embodies a public right of access to court records.[2] *See Skolnick v. Altheimer & Gray,* 191 Ill.2d 214, 231–32, 246 Ill.Dec. 324, 730 N.E.2d 4, 16 (2000); *see also LaGrone,* 361 Ill.App.3d at 535, 297 Ill.Dec. 655, 838 N.E.2d at 145 (recognizing a right of access to criminal proceedings in general). The constitutional presumption applies to court proceedings and records (1) which have been historically open to the public; and (2) which have a purpose and function that would be furthered by disclosure. *Skolnick,* 191 Ill.2d at 232, 246 Ill.Dec. 324, 730 N.E.2d 4; *Pelo*, 384 Ill.App.3d at 780, 323 Ill.Dec. 648,

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[2] In addition to the constitutional right of access, the Supreme Court of Illinois recognizes a "parallel common-law right of access." *Pelo,* 384 Ill.App.3d at 780, 323 Ill.Dec. 648, 894 N.E.2d at 418-19 (citing *Skolnick,* 191 Ill.2d at 230, 246 Ill.Dec. 324, 730 N.E.2d at 15). The state legislature has also created a statutory right of access as part of the Clerks of Courts Act. *See* 705 ILCS 105/16(6). Like the first amendment right of access, the common-law and statutory rights of access to judicial records are not absolute. *See Skolnick*, 191 Ill.2d at 231, 246 Ill.Dec. 324, 730 N.E.2d 4. And while the common-law and statutory rights have different sources, the Supreme Court of Illinois has held they are "parallel" to the first amendment presumption and it has analyzed the three presumptions together. *See Skolnick,* 191 Ill.2d at 231–33, 246 Ill.Dec. 324, 730 N.E.2d at 16-17. We will do the same here.

894 N.E.2d 415; *Press–Enterprise Co. v. Superior Court of California,* 478 U.S. 1, 8, 106 S.Ct. 2735, 2740, 92 L.Ed.2d 1, 10 (1986) (*Press–Enterprise II*).

The determination of whether a first amendment right of access attaches to a particular record requires a two-step process under what is typically known as the "experience and logic test." *Press-Enterprise II*, 478 U.S. at 9-10, 106 S.Ct. 2735 (1986); *see also Skolnick*, 191 Ill.2d at 232, 246 Ill.Dec. 324, 730 N.E.2d 4. First, under the "experience" prong, the court must consider whether the document is one that has historically been open to the press and general public. *Press-Enterprise II*, 478 U.S. at 8, 106 S.Ct. 2735. Second, under the "logic" prong, the court must consider whether public access to the document plays a significant positive role in the functioning of the particular judicial process in question. *Id.*

In *People v. Pelo*, 384 Ill. App. 3d 776, 894 N.E.2d 415 (2008), a newspaper and reporter filed a petition to intervene and gain access to an evidence deposition in a criminal case. In holding that the media did not have a presumptive constitutional, common-law, or statutory right of access, the court explained:

> the evidence deposition at issue here is a "judicial record" or part of the "criminal proceeding itself" to which the public has a constitutional, common-law, or statutory right of access. As stated by the trial court, the unedited evidence deposition at issue here has not been submitted into evidence and has not been played in open court.

Id. at 781.

In *People v. Kelly,* 397 Ill. App. 3d 232, 259, 921 N.E.2d 333, 358 (2009), members of the media petitioned to intervene in high-profile child pornography prosecution and moved to obtain access to certain closed pretrial proceedings and records. After the court

denied the motion for access, the media members appealed. The appellate court held that the trial court did not abuse its discretion in denying access to closed proceedings and records, explaining that

> the presumption did not attach to the hearings, to the State's motion concerning potential evidence, to the State's discovery, or to the parties' witness lists. As in *Pelo*, the media intervenors did not have a right to a potential exhibit that had not yet been introduced into evidence; similarly, in the case at bar, the media intervenors did not have a right to discovery, other crimes' evidence, or a list of witnesses, because none of it had been introduced into evidence.

Id. at 259 (citing *Pelo*, 384 Ill. App. 3d at 782-83).

More recently, in *People v. Zimmerman,* 2018 IL 122261, ¶ 32, media intervenors filed a request to open for public inspection defendant's motions *in limine* filed under seal in a murder prosecution. In reversing the appellate court's order that the trial court erred in finding that the "presumption of access" did not attach to the motions, the Supreme Court of Illinois held that both the "experience" and "logic" prongs weighed **against** a first amendment right of access. The court began by noting that "there is no tradition of access to discovery material not yet admitted at trial" and recognizing that "[i]nformation that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause." *Id.* ¶ 33 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)). The court further noted that "[w]hether in a civil or criminal case, discovery is 'essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist in trial preparation.'" *Id.* (quoting *Courier-Journal, Inc. v. McDonald-Burkman*, 298 S.W.3d 846, 848 (Ky. 2009)). The court explained that because documents themselves do contain any evidentiary value until

admitted into evidence at trial or other proceedings, "[p]ublic access to such material would therefore not play a significant role in the administration of justice in the case." *Id.* (quoting *Courier-Journal, supra*, 298 W. 3d at 849). Therefore, as to the "experience" prong, the court held that "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Id.* (quoting *Seattle Times, supra*, 467 U.S. at 33) (internal quotation marks omitted).

The court also found that the "logic" prong weighed against a first amendment right of access. The court stated that the intervenors had not provided any authority to support a finding that public access to the type of pretrial discovery at issue in *Zimmerman* would play a significant positive role in the judicial process. *Id.*, ¶ 36. The court explained that "[t]he discovery process often generates a significant amount of irrelevant and unreliable material that plays no role in the criminal proceeding" and that such material "generally does not become public because there is no intention of offering it into evidence." *Id.* Thus, the court concluded that the constitutional, common-law, or statutory presumption of access did not attach to defendant's motions in this case. *Id.*, ¶ 38. *See also In re Gee*, 2010 IL App (4th) 100275, 956 N.E.2d 460 (holding that presumption of public access did not attach to sealed search warrant affidavit and inventory in prosecution for murder of a family where the warrant application process had not been historically open to the public).

As explained in the cases above, there is no presumptive right of access to pretrial discovery, including documents and records which have not been introduced into evidence or otherwise shown in open court. And here, like in *Zimmerman, supra*, both the "experience" and "logic" prongs weigh against a right of access to the records in question.

Since the case against Mr. Smollett has been dismissed, the information contained in the discovery will not be admitted at trial or at another proceeding in this matter. Thus, it is not subject to a tradition of access.

To the extent the Media Intervenors are seeking access to the court records, they have failed to establish good cause to unseal such records. Indeed, the court file was open to the public for copying and inspection from the inception of this case until the record was sealed on March 26, 2019. And the media has access to the only documents filed in relation to the dismissal of the case, which are the sealing order and the transcript of the March 26, 2019 hearing, both of which the Media Intervenors possess and attach as exhibits to their Motion.

Furthermore, the Media Intervenors have not provided any authority to support a finding that public access to the records in question would play a significant positive role in the judicial process, since the case against Mr. Smollett has been dismissed.

Because the media does not have a presumptive right of access to the records it seeks, the inquiry should end here without a balancing of competing interests. *See, e.g., In re Gee,* 2010 IL App (4th) 100275, ¶ 26, 956 N.E.2d 460, 464 ("If the presumption [of access applied to the court proceedings and records] did not apply, our analysis ends there.").

B. Even if There Was a Presumptive Right of Access, It Is Outweighed in this Case by Mr. Smollett's Interest in Privacy.

Even where the media has a presumptive right of access, the right is not absolute, and the court has the supervisory power to deny access at its discretion where the court

files may become a vehicle for improper purposes. *Skolnick,* 191 Ill.2d at 231, 246 Ill.Dec. 324, 730 N.E.2d at 16. Specifically, the presumptive right of access can be rebutted by demonstrating that suppression of the public record is necessary to protect a higher value and is narrowly tailored to serve that interest. *Skolnick,* 191 Ill.2d at 232, 246 Ill.Dec. 324, 730 N.E.2d at 16. Here, even if the media had a presumptive right of access, **which it does not**, that right would be outweighed by Mr. Smollett's right to privacy.

The Supreme Court of Illinois has recognized a "right of privacy, a right many years ago described in a limited fashion by Judge Cooley with utter simplicity as the right 'to be let alone.'" *See Leopold v. Levin*, 45 Ill.2d 434, 440-41, 259 N.E.2d 250 (1970). As the court has explained, "[p]rivacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law." *Id.* Article I, section 6, of the Illinois Constitution of 1970 also recognizes privacy rights, and Article I, section 12, expressly recognizes a right to a remedy against all injuries to privacy or reputation. *See* Ill. Const.1970, art. I., §§ 6 & 12.

The right to privacy is also recognized and embodied in the Freedom of Information Act ("FOIA"). Indeed, FOIA expressly exempts from disclosure investigatory records compiled for law-enforcement purposes to the extent that production of such records would, among other things, constitute an unwarranted invasion of privacy. *See* 5 ILCS 140/7(1)(c). The Act defines "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." *See id.* If requested information falls within a *per se* exemption to FOIA,

the court shall conduct no further inquiry and must uphold the body's decision not to disclose the information. *See Chicago Tribune Co. v. Board of Educ. of City of Chicago*, App. 1 Dist.2002, 265 Ill.Dec. 910, 332 Ill.App.3d 60, 773 N.E.2d 674, *appeal denied* 271 Ill.Dec. 923, 201 Ill.2d 562, 786 N.E.2d 181; *see, e.g., McGee v. Kelley,* 2017 IL App (3d) 160324, 95 N.E.3d 1179 (where requester filed a complaint for injunctive or declaratory relief against sheriff seeking disclosure of records related to his indictment and conviction pursuant to FOIA, the court held that the release of unredacted police reports were exempt from FOIA disclosure because they would constitute an unwarranted invasion of personal privacy).

On January 29, 2019, Mr. Smollett was the victim of a crime. Although he was later charged as a defendant in this case, all 16 counts against him were dismissed only two and a half weeks after the indictment was filed. Since Mr. Smollett has not been convicted of any crimes and is no longer charged with any crimes, he is entitled to the right of privacy just like any other citizen.

While there have been allegations of "celebrity justice" or preferential treatment in this case, in fact, Mr. Smollett has been treated far **worse**, not better, than your ordinary citizen. If he had been treated as an ordinary citizen, Mr. Smollett would likely never have been charged with any crimes.[3] If he had been treated as an ordinary citizen, the Police Superintendent and lead prosecutor would not have held press conferences detailing the

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[3] *See, e.g.,* https://chicago.suntimes.com/news/woman-23-stabbed-by-robber-in-grant-park/ (23-year old Columbia College student who police say falsely reported a robbery and stabbing in Grant Park has not been criminally charged).

alleged evidence against Mr. Smollett before he ever stepped foot in a courtroom. If he had been treated as an ordinary citizen, 16 separate counts would not have been alleged against him for the same incident. If he had been treated as an ordinary citizen, the Mayor and Police Superintendent would not have publicly adjudged him guilty, **after** all charges against him were dismissed by the State Attorney's Office. If he had been treated as an ordinary citizen, the City of Chicago would not have promptly filed a civil lawsuit against Mr. Smollett to try to recoup its investigative costs, when it was never proven that Mr. Smollett filed a false police report or planned a hoax attack, as had been alleged. Finally, if Mr. Smollett was being treated as an ordinary citizen, like the more than 3,000 other citizens who had their records sealed or expunged under the law last year by this Court, the media would not be attempting to intervene in this matter now and unseal his arrest and other records, which were properly sealed upon the dismissal of all charges against him.

While we are cognizant that Mr. Smollett is a public figure and there is a tremendous amount of public interest in this case, that does not change the fact that Mr. Smollett is a crime victim who has always wanted to and still wants to maintain his privacy. Mr. Smollett did not want to call the police following the January 29, 2019 nor did he want to even go to the hospital. He specifically asked police officers who responded to the incident to turn off their body cameras in an effort to maintain some degree of privacy. And now that the charges against him have been fully dismissed, he would like to try to resume a normal life without details about his private life being disclosed to the entire world, particularly at a time when his physical safety is already in grave danger.

Significantly, the defense only received a small portion of the discovery prior to the dismissal of the charges and sealing of the records. Thus, Mr. Smollett does not even know the universe of documents which constitute the record in this case, which likely include confidential medical and financial information, as well as many other private communications unrelated to the incident, obtained by the Chicago Police Department, the Cook County State Attorney's Office, and/or other agencies. Thus, even if the media had a presumptive right of access to the discovery in this case, such right is outweighed by Mr. Smollett's right to privacy. *See, e.g., Coy v. Washington Cty. Hosp. Dist.,* 372 Ill. App. 3d 1077, 1084, 866 N.E.2d 651, 658 (2007) ("[T]he circuit court properly determined that the public's right of access . . . did not outweigh the compelling interest, as reflected in our public policy, of the privacy rights of those individuals regarding their medical treatment by Dr. Coy."); *Lopez v. Fitzgerald,* 76 Ill. 2d 107, 117, 390 N.E.2d 835, 838 (1979) ("Financial records are available only at certain times, in certain places, and as expressly limited by the right to privacy."). Furthermore, contrary to the Media Intervenors' position, disclosure in this case would actually be contrary to the public interest, as it will discourage crime victims from filing reports and/or giving information to police.

Thus, even if a balancing of competing interests was required in this case, there are compelling reasons not to unseal the records, which trump any public right of access to

such information. Since the Media Intervenors have failed to establish that the records in this case should be unsealed, their Motion should be denied.[4]

WHEREFORE, Jussie Smollett, by his attorneys, Geragos & Geragos, requests that this Court deny the Media Intervenors' Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order, and adopt the arguments of the State as to the constitutionality of the Criminal Identification Act.

Dated: April 23, 2019

Respectfully submitted,

/s/ Mark J. Geragos

Mark J. Geragos, Rule 707 Admitted
Tina Glandian, Rule 707 Admitted
Geragos & Geragos, APC
644 South Figueroa Street
Los Angeles, CA 90017-3411
(213) 625-3900
&
Geragos & Geragos, APC
256 5th Avenue
New York, NY 10010
mark@geragos.com
tina@geragos.com

CERTIFICATE OF SERVICE

The undersigned attorney certifies on April 23, 2019, these papers were served to the attorneys of record.

Risa Lanier
Cook County State's Attorney's Office

[4] In the event the Court is inclined to grant the Motion, in whole or in part, Mr. Smollett respectfully requests that the Court first review *in camera* any records it intends to unseal to determine whether any redactions are necessary to protect Mr. Smollett's safety and privacy.

2650 S. California Avenue, 11D40
Chicago, IL 60608
risa.lanier@cookcountyil.gov

Natalie J. Spears
Samuel Fifer
Jacqueline A. Giannini
Gregory Naron
Dentons US LLP, Firm No. 56309
233 S. Wacker Drive, Suite 5900
Chicago, Illinois 60606
natalie.spears@dentons.com
samuel.fifer@dentons.com
jacqui.giannini@dentons.com
gregory.naron@dentons.com

/s/ Brian O. Watson
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ORDER

This cause coming before the Court on the Media Intervenors' Emergency Motion to Intervene for Purposes of Objecting to and Vacating the Sealing Order, in which they seek leave to intervene in this action and move the Court to reconsider and vacate its March 26, 2019 sealing order ("Motion"), due notice having been given and the Court being fully advised in the premises, IT IS HEREBY ORDERED that the Motion is denied.

IT IS SO ORDERED.

ENTERED:

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Circuit Court of Cook County
Criminal Division