IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF DOCKETING PROCEDURES WHICH IDENTIFY COOPERATORS

GENERAL ORDER NO. 2018-02

This general order explains the procedures followed by the Nebraska District Court when filing judicial records, motions, and orders which could identify cooperators and confidential informants, and the factual and legal basis for those procedures.

FACTUAL FINDINGS

Nebraska began electronic docketing of criminal cases in 2002. Electronic docketing made court files far more accessible to the public and substantially enhanced court transparency. Information gathering from court records can promote the laudable goals of apprising the public of court practices and maintaining the public's supervision and engagement in court processes. But absent implementing protective practices, electronic docketing in criminal cases can be used to identify cooperating witnesses, which poses an increased risk of harm to cooperators and their family members and friends, disrupts institutional security, and interferes with law enforcement investigations and criminal trials.

Using the court's electronic filing system (CM/ECF), documents can be filed under seal. To do so, the filing party must file a motion to seal along with the provisionally sealed document. If upon review, the court grants the motion to seal, the provisionally sealed document remains filed under seal absent further order of the court. For sealed filings, only court users can see the docket text and open the filed document. While the court can enter text orders without an assigned docket number, the CM/ECF software is programmed to always assign a docket number if a document is filed. So when a sealed document is filed, from the public's viewpoint, filing numbers are skipped

on the docket sheet with no accompanying explanation. For those attempting to determine who is cooperating, many of whom are defendants or offenders currently in custody or their family members and friends, those skipped docket numbers—particularly skipped numbers following a plea hearing—are being used to identify which defendants are cooperating.

In March of 2015, the Federal Judicial Center (FJC) embarked on a study to assess whether and to what extent government cooperators are exposed to harm or threats of harm for providing information or testimony on behalf of the government. The FJC surveyed federal district judges, United States Attorney's Offices, federal defenders, Criminal Justice Act (CJA) district panel representative's offices, and chief probation and pretrial services officers, asking them to report harm to defendants/offenders and witnesses which occurred over the prior three years. Having received a 71% response rate to the survey, the FJC statistically evaluated and reported its findings in a 2016 report entitled, "Survey of Harm to Cooperators: Final Report."

As stated in the FJC's report, 571 cases of harm or threats of harm to defendants/offenders and witnesses were reported in response to the survey; 31 cooperating defendants/offenders were murdered. The reported cases occurred both during criminal prosecutions and when defendants (whether they cooperated or not) began serving custodial sentences. Due to the risks and threats of harm, hundreds of defendants/offenders and witnesses have reportedly withdrawn offers to cooperate or refused to cooperate with law enforcement investigations and government prosecutions.

The FJC's study found that court documents and proceedings were overwhelmingly the source for identifying cooperators, noting the primary sources are plea agreements, Rule 5K1.1 motions, and general docketing practices, especially the presence of a number of sealed CM/ECF docket entries or a sentencing reduction. In 363 instances, court documents served as the source for identifying cooperators subjected to harm or threats of harm.

The FJC's study confirmed Nebraska's longstanding concern: When sealed filings are placed on the public docket, gaps in docket sequence numbers are used to identify and then target cooperators. Defendants entering prison often ask for copies of court documents and their case docket sheets to prove they did not cooperate, a request that was reportedly made over 1,900 times during the three years covered by the FJC's survey. Nebraska's Federal Public Defender reports that when prisoners enter the Bureau of Prisons, they use their paperwork to prove that they were not cooperators. For this reason, his office is inundated with requests from prisoners for copies of docket sheets, plea agreements, and transcripts.

LEGAL ANALYSIS

The Nebraska District Court recognizes that judicial proceedings and court records are presumptively open to the public under both the common law and the First Amendment of the United States Constitution.[1] However, this court must balance those First Amendment and common law rights against the interest of safety to cooperators, their family members and friends, the public's interest in investigation and prosecution of criminal activity, and the interest of security within penal institutions. This balancing begins with identifying whether the document is a "judicial record" and therefore subject to a presumption of disclosure.[2] If so, the court must determine: 1) whether sealing the document will serve a compelling interest and absent sealing, this compelling interest will likely be harmed; and 2) if there are alternatives to sealing that would adequately protect the compelling interest.[3]

Documents filed with the court are "judicial records" if they play a role in the adjudicative process or adjudicate substantive rights.[4] This broad definition encompasses an expansive list of court filings and exhibits, including plea agreements.[5] As such, the cooperation provisions of any plea agreement are judicial documents which must be accessible to the public absent finding a compelling interest is served by sealing the document. In contrast, motions to transfer custody to attend a proffer

interview and motions to permit a defendant or offender to cooperate while under supervision are investigative documents: While the court enters orders on these motions, the orders are used to further law enforcement investigations and do not provide a basis for legal decisions entered in the pending criminal case.

Preserving institutional security, protecting confidential informants from acts of retaliation for giving evidence, and promoting the government's ability to investigate and prosecute criminal conduct are compelling interests.[6] For the reasons stated in the FJC's survey, which fully supports and confirms this court's own experience, these interests are undermined when information regarding cooperating defendants is placed on the public docket or can be surmised from missing docket numbers on a defendant's docket sheet. This compelling interest may necessitate sealing portions of the court's record or placing filings in a separate docket which cannot be seen by the public,[7] with the compelling interest in promoting cooperator safety and institutional security remaining even after the sentencing and judgment in a criminal case is complete.[8] To the extent possible, cooperator identities must remain confidential. Simply stated, there is a compelling interest in minimizing the public's ability to mine court files for the identity of cooperators.

This court has considered whether less restrictive means than sealing will adequately serve this compelling interest. Specifically, the court has considered filing documents with any cooperation information redacted, filing only those plea agreements which do not have cooperation language, and restricting public access to the court's electronic criminal docket to the public terminals in the clerk's office. However, unsealing only those plea agreements that do not contain cooperating language would, by process of elimination, identify as a cooperator every defendant whose plea agreement was sealed, and blank spaces left by redaction of cooperation clauses from plea agreements would clearly identify those who cooperated.[9] A line-by-line redaction which eliminates substantial amounts of text is not practicable.[10] Allowing only public terminal access to criminal files may minimize the use of the court's electronic docket to identify cooperators, but it would also substantially burden the attorneys and it may

actually advance website industries which, using the court's public terminals, would collect the names and related documents of informants and cooperators and publish this information for a fee. None of these less restrictive means sufficiently minimize the risk of harm to cooperators, government investigations, and institutional security caused by public disclosure of cooperator information.

DOCKETING PROCEDURES

For the foregoing reasons, the Nebraska court has implemented the following docketing procedures:

1) Cooperation provisions of any plea agreement are set forth in a separately signed document commonly entitled a "Supplemental Plea Agreement." To file a Supplemental Plea Agreement under seal, a cooperating defendant and defense counsel must complete and sign a Motion to Seal Supplemental Plea Agreement and present it to the court at the plea hearing. If the court grants the motion to seal, the motion, order to seal, and Supplemental Plea Agreement are filed in the court's sealed miscellaneous docket.

2) Motions to transfer custody to attend a proffer interview are filed as sealed text-only motions with no assigned docket number, and they are granted by a sealed text-only order with no assigned docket number.

3) Motions to permit a defendant or offender to cooperate while under supervision are filed as sealed text-only motions with no assigned docket number, and the written orders granting the motions and outlining the cooperation provisions as required under Nebraska Criminal Rules 46.3 and 46.4[11] are filed in the court's sealed miscellaneous docket with a non-public remark placed on the docket sheet for the criminal case.

Dated this 29th Day of January, 2018.

BY THE COURT:

s/ Laurie Smith Camp
Chief United States District Judge

[1] Press-Enter. Co. v. Superior Court of California for Riverside Cty., 478 U.S. 1, 8 (1986) (Press-Enterprises II) (holding the First Amendment right of access applies to preliminary hearings in criminal cases) Press-Enter. Co. v. Superior Court of California, Riverside Cty, 464 U.S. 501, 510 (1984); (Press-Enterprises I) (holding the First Amendment right of access applies to not only the trial itself, but also to voir dire proceedings for selecting jurors in criminal cases). Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978) (finding common law right of access to criminal proceedings).

[2] Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001).

[3] Washington Post v. Robinson, 935 F.2d 282, 290 (D.C. Cir. 1991) (quoting Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon, 920 F.2d 1462 (9th Cir. 1990)); see also Fed.R.Crim.P. 11(c)(2) ("The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.").

[4] In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 290 (4th Cir. 2013).

[5] In re Copley Press, Inc., 518 F.3d 1022 (9th Cir. 2008) (holding the public has a qualified First Amendment right to access a plea colloquy transcript and plea documents); Robinson, 935 F.2d at 288 (holding there is a First Amendment right of access to plea agreements); Oregonian Pub. Co., 920 F.2d at 1465 (holding the press and public have a qualified right of access to plea agreements and related documents under the First Amendment: "Were we to hold that no right of access to plea agreements exists, we would effectively block the public's access to a significant segment of our criminal justice system."); United States v Haller, 837 F2d 84 (2d Cir 1988) (concluding that a qualified First Amendment right of access extends to plea hearings and to documents filed in connection with those hearings); In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986) (holding the newspaper had a First Amendment right of access to plea and sentencing hearings and to documents filed in connection with those hearings).

[6] In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988).

[7] Goff v. Graves, 362 F.3d 543, 550 (8th Cir. 2004); see also In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d at 294) (sealing 2703(d) orders where the "sealed documents at issue set forth sensitive nonpublic facts, including the identity of targets and witnesses in an ongoing criminal investigation"); United States v. Bus. of Custer Battlefield Museum and Store, 658 F.3d 1188, 1195 n. 5 (9th Cir. 2011) (collecting cases and noting that the need to "protect the identities and safety of confidential informants," "protect an ongoing investigation," "safeguard the Sixth Amendment fair trial rights of the accused," and protect the secrecy of grand jury proceedings," may require redaction of warrant materials, post-indictment, or sealing them entirely); Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 929-30 (D.C. Cir. 2003) (noting potential witnesses or informants may "close up like a clam" if they believe their names will be made public); United States v. Wright, 343 F.3d 849, 858 (6th Cir.2003) (finding an indictment may be sealed for the legitimate prosecutorial purpose of protecting the identity of a government informant who may provide

substantial evidence in an unrelated investigation); United States v. Yousef, 327 F.3d 56, 168 (2d Cir.2003) (affirming the sealing of documents to protect confidential informants and conceal how the government investigates and responds to terrorist threats); United States v. Hickey, 767 F.2d 705, 706, 708–09 (10th Cir. 1985) (holding sealing a criminal defendant's plea bargain was proper where the defendant's future safety could depend on his continued anonymity in the witness protection program); CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of California, 765 F.2d 823, 825-26 (9th Cir. 1985) (stating information relating to cooperating witnesses and criminal investigations should be kept confidential in some cases, but not when alternatives to sealing have not been considered and rejected as insufficient, or when the alleged confidential information has already been released to the public domain); Matter of the Application of WP Company LLC, 201 F.Supp.3d 109, 127 (2016) (stating "the notion that, by assisting investigators and agreeing to serving as a potential witness in a high-profile criminal investigation, an individual's intimate life and unrelated personal conduct become fodder for public inspection is simply inconsistent with the government's recognized interest in preserving its ability to work with the public to root out criminal behavior."); United States v. McCraney, 99 F. Supp. 3d 651, 659 (E.D. Tex. 2015) (ordering plea agreement to be filed under seal where based upon the testimony of record, the court was convinced that disclosing information in plea agreements which identifies defendants who have assisted the Government by cooperating against others, or who agree to do so in the future, puts those defendants at risk of extortion, injury, and death and their family members at risk, and would jeopardize ongoing criminal investigations); United States v. Milken, 780 F. Supp. 123, 127 (S.D.N.Y. 1991) (explaining the public should have access to information as to the general nature and extent of a defendant's cooperation if that disclosure can be made without jeopardizing ongoing or future investigations, but information that identifies the target, subject or status of a particular government investigation must be redacted if the information has not previously been publicly revealed); Roviaro v. United States, 353 U.S. 53, 59–62 (1957) (discussing the government's privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law" in order to further "the public interest in effective law enforcement").

[8] United States v. Armstrong, 185 F. Supp. 3d 332, 335 (E.D.N.Y. 2016) (citing Survey of Harm to Cooperators at p. 27); see also, United States v. McCraney, 99 F. Supp. 3d at 659-60 (stating "[t]he court rejects the argument that some or all [plea agreement] addenda should be unsealed after sentencing. . . . the reach of criminal gangs extends beyond the prison walls and . . . gangs seek revenge even after prisoners are released").

[9] McCraney, 99 F. Supp. 3d at 660.

[10] In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d at 574.

[11] NECrimR 46.3 and NECrimR 46.4

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