

March 22, 2024

VIA EMAIL

The Honorable Juan M. Merchan
Supreme Court of the State of New York
County of New York: Part 59
100 Centre Street
New York, NY 10013
jmerchan@nycourts.gov

Re: Letter from News Organizations Regarding Defendant's Motion for Public Proceedings in *People v. Trump*, Indictment No. 71543/2023

Dear Justice Merchan:

We write on behalf of the following news organizations: Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, The Atlantic Monthly Group LLC (publisher of *The Atlantic*), Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting Inc. d/b/a CBS News, The Daily Beast Company LLC, Daily News LP (publisher of the New York *Daily News*), Dow Jones & Company, Inc. (publisher of *The Wall Street Journal*), Law360, National Public Radio, Inc., NBCUniversal News Group, The New York Times Company, *The New Yorker*, Newsday LLC, NYP Holdings, Inc. (publisher of the *New York Post*), Vox Media, LLC (publisher of *New York Magazine*), and WP Company LLC (publisher of *The Washington Post*) (collectively, the “News Organizations”).

We write regarding Defendant Donald J. Trump’s pre-motion letter and accompanying Motion for Public Proceedings, dated March 10, 2024 (the “Motion”). The Motion requests that the Court “(1) unseal and docket all pleadings, orders, and substantive written communications that have involved the Court and the parties, including communications sent by letter and email, and (2) require simultaneous public access of all future pleadings, orders, and written communications except to the extent redactions are required by the protective order and law.” Motion at 8. The News Organizations write to reiterate that these proceedings—and substantive filings in connection with them—are presumptively open and to urge the Court to take the measures outlined in the Motion to ensure timely public access to these proceedings and filings.

The law leaves no ambiguity on this matter. It is a pillar of our justice system that “the press and general public have a constitutional right of access to criminal trials.” *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 603 (1982). This right is “implicit in the guarantees of the First

Amendment.” *ABC, Inc. v. Stewart*, 360 F.3d 90, 98 (2d Cir. 2004) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980)). New York courts have long understood the right of access to extend beyond “the criminal trial itself . . . to other phases of a criminal action.” *Associated Press v. Bell*, 70 N.Y.2d 32, 37 (1987). In particular, the right of access attaches to “judicial documents,” such as “written documents filed in connection with pretrial motions” and proceedings. *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987). Indeed, courts have “consistently held that **documents filed in criminal cases used to determine a litigant’s substantive legal rights are judicial documents**,” *United States v. Donato*, 714 F. App’x 75, 76 (2d Cir. 2018) (emphasis added), “to which a strong presumption of access attaches, under both the common law and the First Amendment,” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006). *See also, e.g., United States v. Suarez*, 880 F.2d 626, 630 (2d Cir. 1989) (“This presumption . . . applies to documents filed in connection with criminal proceedings.”); *People v. Burton*, 189 A.D.2d 532, 535 (3d Dep’t 1993) (granting press access to motion papers); *Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep’t 2010) (“The right of access to court proceedings and records . . . is firmly grounded in the common law, ‘and the existence of the correlating common-law right to inspect and copy judicial records is beyond dispute.’”).

Where the right of public access attaches, courts consistently stress the importance of “immediate” and “contemporaneous” access to those documents. *Lugosch*, 435 F.3d at 126–27 (“Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found.”).¹ There can be no doubt that in this case—in which a former President of the United States and presumptive Republican nominee for the Presidency is a criminal defendant—the public right of access is at its zenith. As this Court aptly noted at the beginning of this case, “[t]he populace rightly hungers for the most accurate and current information available.” Decision & Order at 3 (Apr. 3, 2023).

¹ *See also, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (“[E]ven a one to two day delay impermissibly burdens the First Amendment”); *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008) (“[T]he value of the right of access would be seriously undermined if it could not be contemporaneous.”); *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (Even a “minimal delay” in access to judicial records “unduly minimizes, if it does not entirely overlook, the value of ‘openness’ itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure.”); *Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (“Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we take this opportunity to underscore the caution of our precedent and emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies.”); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (“It is irrelevant that some of these pretrial documents might only be under seal for, at a minimum, 48 hours under the . . . order. The effect of the order is a total restraint on the public’s first amendment right of access even though the restraint is limited in time.”); *People v. Williams*, 29 Misc. 3d 1222(A), at *2 (Sup. Ct. Nassau Cnty. 2010) (“The common law right to inspect and copy judicial records . . . requires contemporaneous public access,” absent compelling circumstances.); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

The News Organizations are troubled that, according to the Motion, “[t]hroughout this case, the Court has communicated with the parties via emails and letters that contain substantive rulings but do not appear to be docketed or otherwise available to the public,” and that the public filing of motion papers has been “delayed . . . well past the time they are submitted to the Court via email.” Motion at 1. While we understand that this practice is not unusual in New York State criminal courts and that prompt public access to criminal dockets and filings is too often frustrated by the lack of a publicly accessible electronic filing system,² that is all the more reason that the Court and the parties in this case of national importance must take special care to ensure that all judicial documents are contemporaneously and consistently made publicly available.³ Open proceedings and filings will give the public “confidence in the administration of justice,” “a more complete understanding of the judicial system and a better perception of its fairness.” *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993)).

The events surrounding the Motion itself and other recent proceedings crystallize the very issues that have frustrated public access in both this case and New York criminal cases in general. For example:

- Neither the People’s response to Mr. Trump’s March 10 pre-motion letter nor the Court’s ruling on the pre-motion letter is in the public court file, based on the News Organizations’ review of the Central Clerk’s file on March 21. That same day, the News Organizations obtained via email a copy of the People’s March 12 response letter (bearing a Part 59 file-stamp dated March 19) and learned that the Court had granted leave to file the Motion, but the News Organizations cannot locate the response letter or order in the public Central Clerk’s file.
- The News Organizations only learned of Mr. Trump’s March 10 pre-motion letter on March 19, *nine days* after its submission. As noted above, the News Organizations then obtained the People’s March 12 response letter on March 21, another nine days after the date of the letter (and two days after its filing in Part 59), and on the same day that they learned that the Court had already granted leave to file the Motion. Consequently, the News Organizations and the public at large have been largely left in the dark about the status of Motion, have only belatedly come to learn of it, and have been deprived of the opportunity to be heard on the matter until now.
- The People’s March 12 response letter repeatedly references “the Court’s May 4, 2023 Order regarding filing procedures.” The People’s letter also references Court orders dated

² See Frank G. Runyeon, *Trump’s Mystery Docket: Inside NY’s Secretive Filing System*, LAW360 (Mar. 21, 2024, 6:38 p.m.), <https://www.law360.com/articles/1812514>.

³ At a bare minimum, the *fact* that a document was filed should be publicly, contemporaneously, and consistently made known to enable the public to timely petition the Court to inspect and copy the filed document in exercise of their First Amendment and common-law right of access.

December 6, November 28, November 15, and October 16, 2023. However, based on the News Organizations' review of the Central Clerk's file, *none* of these Court orders are in the public file. This has prevented the News Organizations from reporting on numerous rulings in this case, in derogation of the public's right to this information.

- During the motions hearing on February 15, 2024, the Court and the parties had a lengthy colloquy regarding the Court's October 4, 2022 "email that made [a] ruling" interpreting the scope of statutory discovery obligations in *People v Trump Corp.*, Indictment No. 1473/2021. Feb. 15, 2024 Tr. at 60:2–65:21. The People stated that the Court's October 4, 2022 email ruling was in a packet of materials submitted at the February 15 hearing. *Id.* at 57:3–4, 60:9–11. However, again, the News Organizations were unable to locate this email ruling in the public Central Clerk's file for this case or the *Trump Corp.* case.

In light of the above, which is only a recent sampling of access issues, the News Organizations believe that a clear, transparent, and contemporaneous filing process is critically necessary here. Public filings must include not only formal pleadings, but also substantive rulings transmitted by email and the communications on which they are predicated—all of which constitute "judicial documents" that the public and press have the right to access. *Donato*, 714 F. App'x at 76; *see also, e.g., Suarez*, 880 F.2d at 630–31; *N.Y. Times*, 828 F.2d at 114; *Burton*, 189 A.D.2d at 535. Otherwise, the people of New York, the United States, and the world will be in the dark about substantive motions and decisions governing the criminal prosecution of the presumptive Republican nominee for President. Such a result would be constitutionally unsound and detrimental to the body politic.

The News Organizations stand ready to work cooperatively with the Court and the Office of Court Administration (OCA) to ensure that the public receives timely, accurate, and comprehensive information regarding filings in this case. We applaud OCA's recent publication of a webpage containing links to several court filings, and we recommend the continuation and expansion of such publication.⁴ But whether they are posted online or filed in the Central Clerk's Office, the right of access requires that judicial documents be immediately accessible to the public. "Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984). Given the stakes of this trial, the importance of maintaining, and indeed, *enhancing*, public confidence in the system cannot be overstated.

We thank the Court for its attention to this matter.

⁴ Public Information, *People v Donald J. Trump (Criminal)*, <https://ww2.nycourts.gov/people-v-donald-j-trump-criminal-37026>.

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Court File