

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 02-CF-1476

BRIAN B. BURKE,

Defendant.

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**NOTICE OF MOTION AND  
MOTION TO INTERVENE AND TO OBTAIN  
PUBLIC ACCESS TO COURT RECORDS**

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**NOTICE**

TO:

Brian W. Blanchard  
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**PLEASE TAKE NOTICE** that Journal Sentinel, Inc., the *Wisconsin State Journal*, and WisPolitics.com, by their counsel, LaFollette Godfrey & Kahn, move the Court pursuant to section 803.09(1), Stats., to intervene in this matter for the sole purpose of obtaining public access to court records. This motion will be heard at a time, date, and place to be set by the court.

**MOTION**

Journal Sentinel, Inc., the *Wisconsin State Journal*, and WisPolitics.com (collectively, "the intervenors"), by their counsel, LaFollette Godfrey & Kahn, move the Court to intervene in this case for the sole purpose of this motion and any related proceedings and to give the public

immediate access to a supplemental appendix filed in support of his dismissal motion on grounds of selective prosecution by defendant, Brian B. Burke, in this matter on April 15, 2004.

In support of the motion, the intervenors assert their rights -- under the First Amendment, under Article I, section 3, of the state constitution, under Wisconsin's Open Records Law and under common law -- to have complete access to materials and documents in the possession and control of this Court filed by any party. The intervenors further state that:

### **GROUND**

1. Journal Sentinel, Inc. publishes the *Milwaukee Journal Sentinel*, a daily newspaper that circulates statewide.
2. The *Wisconsin State Journal* is a daily newspaper that circulates statewide.
3. WisPolitics.com hosts an Internet site dedicated to daily circulation of Wisconsin's political news.
4. The public record of this proceeding (electronically accessible through the WSCCA website) discloses that it began on June 26, 2002 with a complaint against Brian B. Burke, alleging eighteen felony counts involving misconduct in public office and related offenses. The charges in this case arise, in part, out of a John Doe proceeding in Dane County court before the Hon. Sarah B. O'Brien.
5. On December 15, 2003, Mr. Burke filed a motion to dismiss the complaint on various grounds. On January 12, 2004, the court held a pre-trial conference and ordered that the State respond to Mr. Burke's motion by February 27, 2004, and that Mr. Burke reply by April 15, 2004.
6. On February 18, 2004, in the John Doe proceeding Judge Sarah O'Brien issued an order permitting use of the John Doe transcripts in preparation for trial, to conduct investigations

related to litigation and to compare against other discovery. The order states: “The information contained in those transcripts should not be disclosed to others except as necessary for use in that litigation.”

7. Pursuant to this Court’s scheduling order, on April 15, 2004, Mr. Burke filed a reply brief and a supplemental appendix. On information and belief, Mr. Burke included in his supplemental appendix portions of the John Doe transcripts provided to him pursuant to Judge O’Brien’s February 18, 2004 order. Mr. Burke did not file the supplemental appendix under seal and nothing in Judge O’Brien’s order required him to do so.

8. Pursuant to the Open Records Law, on April 16, 2004, the intervenors requested of the Court the opportunity to inspect and copy Mr. Burke’s supplemental appendix.

9. In response to the intervenors’ requests, this Court contacted Judge O’Brien for her position on whether the materials in the supplemental appendix should be subject to public inspection. In an email to this Court on April 16, 2004, Judge O’Brien described the order she issued on February 18, 2004 and requested that the documents be sealed until District Attorney Blanchard has an opportunity to object to public disclosure.

10. On April 19, 2004, District Attorney Blanchard submitted a letter to this Court noting his “understanding that the court . . . placed under seal the voluminous exhibits that defense counsel filed with his April 15<sup>th</sup> pleadings.” He noted, however, that the supplemental appendix contains more than transcripts of the John Doe proceedings. Specifically, documents received from the Ethics Board also were included in Mr. Burke’s supplemental appendix and were not addressed by Mr. Blanchard’s letter. Accordingly, no party has objected to releasing those documents to the intervenors pursuant to their open records requests.

11. In his April 19, 2004 letter to this Court, District Attorney Blanchard requested only “that the Doe transcripts remain under seal.” He contends that (1) the documents should be sealed to protect the reputational interests of persons referred to in the transcripts who have not been charged with any crime, and (2) unnecessary public release of the transcripts would undermine the value of John Doe proceedings because only secrecy encourages truthful testimony.

12. To date, the Court has not responded to the intervenors’ open records requests, nor has the Court issued an order sealing documents in the supplemental appendix from public inspection.

13. The Court’s maintenance of secret records filed in support of a defense motion for dismissal on grounds of selective prosecution, without any findings to justify that procedure, violates the intervenors’ procedural and substantive rights.

### **INTERVENTION**

14. Journal Sentinel, Inc., the *Wisconsin State Journal* and WisPolitics.com move to intervene under section 803.09(1), Stats., for the sole purpose of opening court files to public examination. In the alternative, the intervenors seeks permissive intervention. The intervenors assert this right on their own behalf and that of the public. *See State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 308, 168 N.W.2d 836 (1969).

15. The Wisconsin Supreme Court has expressly recognized that the media has “a protectable legal interest in opening [court] documents to public examination” that can only be advanced by permitting intervention. *State ex rel. Bilder v. Delavan Township*, 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983).

16. “The right to intervene to challenge a closure order is rooted in the public’s well-established right of access to public proceedings....Having roots in both common law traditions and the First Amendment, the right ‘serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding.’ *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (*Jessup I*) (citations omitted).

A. “[T]he First Amendment provides a presumption that there is a right of access to proceedings and documents...,” like judicial records, that “have historically been open to the public...” *Id.*

B. “[T]o preserve the right of access, ‘those who seek access to [sealed] material have a right to be heard in a manner that gives full protection to the asserted right.’” *Id.* (citations omitted).

17. The intervenors have established the right to intervene:

A. The intervenors’ interest is directly related to the disposition of this case. The maintenance of secret pleadings and supporting evidence impairs their ability to inform the public and impedes the public’s ability to evaluate the judicial system’s procedural and substantive exercise of authority.

B. This Court’s failure to respond to the intervenors’ open records requests “clearly impairs the newspaper’s ability to examine those documents.” *C.L. v. Edson*, 140 Wis. 2d 168, 177, 409 N.W.2d 417 (Ct. App. 1987).

C. None of the original parties adequately represent – nor could they adequately represent – the intervenors’ interests in attaining access to the documents in the supplemental appendix.

18. Intervention by the news media, asserting their rights particularly and the public's right of access generally, is the appropriate procedure for enforcing constitutional and statutory rights of access. *See Bilder*, 112 Wis. 2d at 549; *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998).

19. In addition to the procedural right to intervene, the intervenors have a substantive statutory, common law and constitutional right of access to judicial records filed by parties with the Court.

### CONSTITUTIONAL RIGHTS TO PUBLIC ACCESS

20. The U.S. Supreme Court has established the general rule that the records of a judicial proceeding, state or federal, are presumptively public under the common law and the First Amendment. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 509-10 (1984) (*Press-Enterprise I*); *see Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

21. This rule is premised on the fact that “[court] records often concern issues in which the public has an interest, in which event concealing the records disserves the values protected by the free-speech and free-press clauses of the First Amendment.” *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (*Jessup II*).

22. Moreover, when court records are kept secret, “the public cannot monitor judicial performance adequately.” *Id.* While “[p]eople in an open society do not demand infallibility from their institutions,..it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

23. The constitutional presumption that documents in judicial files are open to the public “may be overcome only by an overriding interest based on findings that closure is

essential to preserve higher values and is narrowly tailored to serve that interest.”

*Press-Enterprise I*, 464 U.S. at 510.

24. The public’s right of access to the records at issue is entitled to full First Amendment protection because records of judicial proceedings -- especially in criminal cases -- “have historically been open to [the] press and the general public” and because “public access plays a significant positive role in the functioning” of this process. *State v. Cummings*, 199 Wis. 2d 721, 739, 546 N.W.2d 406 (1996), quoting *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*).

25. Before excluding public access to criminal proceedings and records the First Amendment requires a three-part analysis. “[C]riminal proceedings may be closed to the public without violating First Amendment rights only if (1) closure serves a compelling interest; (2) there is a ‘substantial probability’ that in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest.” *In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986), quoting *Press-Enterprise II*, 478 U.S. at 14. Furthermore, the Court’s analysis must be grounded in “specific factual findings” and not “conclusory assertions.” *Id.*

26. The rights guaranteed by Article I, section 3, of the state constitution are at least as extensive as the rights guaranteed by the First Amendment. In light of the state’s historic commitment to open government, the public’s state constitutional rights should be construed at least as broadly as the First Amendment right, providing yet another basis for full access to the records at issue in this case.

27. “The courts have been the great repositories of personal liberty, and their obligation is not only to see that the conduct and performance of executive and legislative

officials is open to public scrutiny, but to maintain for themselves the high standards that they prescribe for others.” *State ex rel. Journal Co.*, 43 Wis. 2d at 312-13.

### **STATUTORY AND COMMON LAW RIGHTS TO PUBLIC ACCESS**

28. The records in this case are presumed public under Wisconsin’s Open Records Law, which expressly applies to “any court of law.” Sec. 19.32(1), Stats. To enforce this “presumption of complete public access,” the state’s official policy provides that “[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.” Sec. 19.31, Stats.

29. Wisconsin law has provided since 1849 that “[t]he sittings of every court shall be public and every citizen may freely attend the same.” Sec. 757.14, Stats. The presumption of openness arising from this statute can be overcome only when the “court determines, after hearing and the making of explicit findings, that overwhelming public values connected with the administration of justice will be subverted by public trial.” *State ex rel. LaCrosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 241-42, 340 N.W.2d 460 (1983).

30. These statutory presumptions of openness apply equally to this Court and the records filed as part of this proceeding. “[T]he great virtue in our Anglo-American court system is that it is open to the public so that all will know that the courts, as instruments of government, are defending the rights of the people and are not suppressing them.” *Id.*

31. Wisconsin’s common law also protects the public’s right of access to court records. “[T]he court must balance the harm to the public interest from public examination of the records against the benefit to the public interest from opening these records to examination, giving much weight to the beneficial public interest in open public records.” *Bilder*, 112 Wis. 2d

at 553. Even a search warrant issued by a John Doe judge during an ongoing criminal investigation is presumptively public:

[B]efore a judge decides to seal a search warrant, he must balance the State's reasons for desiring secrecy against the public's right of access. Due to the fact-specific nature of such an inquiry, this balancing is appropriately committed to the sound discretion of the circuit court. The court, though, must make specific enough findings of fact on the record to allow for appellate review.

*State v. Cummings*, 199 Wis. 2d at 741-42 (citations omitted).

### **FACTUAL AND LEGAL GROUNDS**

32. This criminal prosecution arises out of a John Doe proceeding before Judge O'Brien. As part of that proceeding, Judge O'Brien exercised her discretion and closed the proceedings to the public. See *In re John Doe Proceeding*, 2003 WI 30, ¶ 59, 260 Wis. 2d 653, 660 N.W.2d 260; *State v. Unnamed Defendant*, 150 Wis. 2d 352, 358-59, 441 N.W.2d 696 (1989).

33. On February 18, 2004, Judge O'Brien issued an order creating an exception to the previous secrecy order. By her own description to this Court, the order permitted use of the John Doe transcripts in preparation for trial in this case, to conduct investigations related to litigation, and to compare against other discovery. The order also stated that "The information contained in those transcripts should not be disclosed to others except as necessary for use in that litigation." The order, however, does not require that the documents be filed under seal when used as necessary for litigation.

34. On information and belief, Judge O'Brien had previously authorized the state to use John Doe records and testimony in the prosecution of this case and the complaint against Mr. Burke includes extensive references to that material.

35. On information and belief, there are no “compelling reasons” that justify maintaining in secret the documents included in the supplemental appendix filed by Mr. Burke on April 15, 2004. *See State v. Unnamed Defendant*, 150 Wis. 2d at 359.

A. No party has objected to release of documents in the supplemental appendix other than the John Doe transcripts. Portions of Mr. Burke’s supplemental appendix not identified as John Doe transcripts, therefore, should be immediately provided to the intervenors for public inspections pursuant to their open records requests.

B. The newspapers and the public are entitled to immediate access to the John Doe transcripts because disclosure would not inhibit or prevent witnesses in future John Doe proceedings from being “free in their disclosures.” *State v. O’Connor*, 77 Wis. 2d 261, 279, 252 N.W.2d 671 (1977). Witnesses in Joe Doe proceedings must testify under oath. Accordingly, disclosure of the John Doe transcripts submitted with Mr. Burke’s supplemental appendix would not undermine the general goal of encouraging truthful testimony.

C. Reputational interests will not be diminished by disclosure of the John Doe transcripts. Several individuals identified by name in the John Doe transcripts already have been identified to the public. Any reputational concerns, therefore, are not “compelling” to overcome the presumption of access to court records.

D. The John Doe judge already has ordered that the transcripts may be used in preparation for trial, to conduct investigations related to litigation, and to compare against other discovery. In her order, Judge O’Brien authorized disclosure of the transcripts to others “as necessary for use in that litigation.” Mr. Burke filed the John Doe transcripts as an exhibit to his motion to dismiss. Accordingly, Mr. Burke used the transcripts as necessary in this litigation. Judge O’Brien did not require that the transcripts be filed under seal to prevent public access

consistent with their use in “litigation.” Disclosure of the John Doe transcripts to the intervenors is consistent with the scope of Judge O’Brien’s February 18, 2004 order.

E. Public disclosure of the John Doe transcripts is consistent with the uses specifically contemplated in section 968.26, Stats., and constitutionally mandated in *State v. Myers*, 60 Wis. 2d 248, 208 N.W.2d 311 (1973). The John Doe statute, section 968.26, Stats., provides that even if the proceeding is conducted in secret, the transcripts may be used “at the preliminary hearing or the trial of the accused.” In *Myers*, the Supreme Court concluded that a defendant has a constitutional right to use a witness’ prior statements at the John Doe proceeding for impeachment purposes. 60 Wis. 2d at 263-64. Accordingly, the legislature and the Supreme Court contemplated use of John Doe transcripts in subsequent criminal prosecutions. Mr. Burke’s use of the transcripts as exhibits to his motion to dismiss, therefore, is consistent with those uses and there is no compelling reason to deny public access.

F. Several pages of the John Doe transcripts already have been disclosed to the public through other sources. On April 20, 2004, the *Wisconsin State Journal* published an article including quotations from portions of the John Doe transcript “obtained by the state Republican Party and given to the *Wisconsin State Journal* on Monday.” Phil Brinkman, *Krug Implicated in Caucus Case*, *Wisconsin State Journal*, April 20, 2004, at A1. Since the public already has access to portions of the transcripts there is no “compelling need” for secrecy.

**WHEREFORE**, for the reasons stated above, the *Milwaukee Journal Sentinel*, the *Wisconsin State Journal* and WisPolitics.com, for themselves and the public, asserting a right of access to judicial records, move the Court to permit them to intervene and to enter an order – after oral argument – directing the immediate release of those records.

Dated: April 21, 2004.

LA FOLLETTE GODFREY & KAHN

By: \_\_\_\_\_

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