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Issue Date: 06 September 2012

CASE No: 2012-AIR-00008

In the Matter of:

DANIEL FORRAND,
Complainant,

v.

FEDEX CORPORATION,
Respondent.

Order Striking the FedEx Redacted Filings

FedEx redacted materials it filed with its motion for summary decision.¹ No compelling reason to redact anything was mentioned, and a redaction request likely would be futile. The federal courts presume under the First Amendment that all proceedings in court and in administrative matters, federal and state, and filings offered to support dispositive motions, are public. Redaction requests are subject to such exacting standards that they are rarely, if ever, granted. Much the same is true under the statutory access provision of the federal Administrative Procedure Act² (APA) and the Freedom of Information Act³ (FOIA). Even then an unredacted copy of materials that manage to qualify for redaction must be offered under seal. Having done none of these things, all redacted FedEx filings are stricken.

¹ See, e.g., the Declaration of William Cusato, Ex. B, C, D; Declaration of Jack Earls, Ex A, C, D; Declaration of George Hanniff, Ex. A, B.

² Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706).

³ Pub. L. No. 90-23, 81 Stat. 54 (1967), significantly amended for example by Pub. L. No. 93-502, 88 Stat. 1561 (1974) and other amendments (codified as amended at 5 U.S.C. §§ 551–559, 701–706).

I. Filings on Summary Judgment Motions Are Presumptively Available to the Public under the First Amendment.

The federal courts of appeal routinely apply two robust presumptions to judicial proceedings: (1) that civil adjudications are public events, and (2) all material filed in connection with a request for judicial action is available for public inspection.⁴ The transcript of testimony given and documents or things received in Article III civil adjudications presumptively are public.⁵

⁴ *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (determining that “[T]he First Amendment presumes that there is a right of access to proceedings and documents which have ‘historically been open to the public’ and where the disclosure of which would serve a significant role in the functioning of the process in question.”); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 (4th Cir. 1988) (holding that summary judgment motion documents are presumptively public because the motion “adjudicates substantive rights and serves as a substitute for trial” and the “rigorous First Amendment standard [of access] should also apply to documents filed in connection with a summary judgment motion in a civil case”); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (asserting that “the First Amendment does secure to the public and to the press a right of access to civil proceedings”); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm’n*, 710 F.2d 1165 (6th Cir. 1983) (releasing documents filed in the district court under the strong common law presumption of open access; the cigarette manufacturer’s claim that disclosure would harm its reputation failed to override the presumption); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661–64 (8th Cir. 1983) (court finding a First Amendment right of access to a proceeding to hold a lawyer in contempt for selling material obtained in discovery that was covered by a protective order, and affirming orders that closed the portion of that proceeding where the trade secrets were discussed by sealing two exhibits and 62 pages of a 649-page transcript); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (granting access to pretrial and posttrial proceedings in a civil class action challenging prison conditions, including press access to a list of prisoners who might be released to relieve overcrowding).

⁵ *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 678–80 (9th Cir. 2010) (reversing a trial court’s indication that if it had jurisdiction, it would seal documents a defendant claimed describe its confidential and proprietary procedures, documents the plaintiff had appended to a motion for summary judgment; the trial court failed to make the specific findings that might justify sealing under the “compelling reasons” standard described in *Kamakana v. City of Honolulu*); *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006) (affirming the unsealing of evidence that was offered to support a motion for summary judgment); *United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994) (granting access to transcripts of juror voir dire examinations, observing that “[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?”); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) (refusing to protect from public disclosure interrogatory answers read to a jury and a video tape shown to the jury, although the case settled before a verdict); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (granting a litigant in a separate lawsuit access to filings in business litigation, including an exhibit to the complaint, materials offered on a motion for a preliminary injunction, and a combined

In these rulings federal courts have applied the reasoning and holdings of the U.S. Supreme Court's canon of First Amendment decisions to require public access not only to civil judicial proceedings and to the evidence offered in them, but to a broad range of governmental hearings and meetings.⁶ Courts have found rights of public access to bankruptcy proceedings,⁷ which are Article I rather than Article III

motion to dismiss and for a more definite statement); *Republic of Philip. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) (affirming a district court decision to unseal documents that had been filed with a motion for summary judgment); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1070, 1074 (3d Cir. 1981) (holding that “the First Amendment embraces a right of access to [civil] trials” and to transcripts of civil proceedings) (citation and internal quotation marks omitted)). *See also*, *Fed. Trade Comm’n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) (holding that under the common law “documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies,” and granting public access to financial statements the defendants submitted to induce the agency to seek court approval of a consent decree that would limit their personal liability; the FTC had accused the defendants of defrauding purchasers by deceptive marketing of rare coins); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (recognizing the long-standing common law presumption that the public may inspect judicial records, but denying public access to material merely exchanged in discovery). *See generally*, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (March 2007), available at www.thesedonaconference.org/dltForm?did=Guidelines.pdf.

⁶ The Committee on Communications and Media Law of the Association of the Bar of the City of New York, “*If it Walks, Talks and Squawks . . .*” *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L.J. 21 (2005).

⁷ *Baltimore Sun Co. v. Astri Inves. Mgmt. & Sec. Corp.*, 88 B.R. 730, 741 (D. Md. 1988) (reversing a bankruptcy judge’s closure order entered when the debtor objected to the presence of the press at a meeting of creditors; finding a presumptive First Amendment right of access to the creditors’ meetings that cannot be restricted unless limiting access is “essential to preserve higher values and is narrowly tailored to serve that interest”); *In re Symington*, 209 B.R. 678, 692–95 (Bankr. D. Md. 1997) (withdrawing a consent protective order after the news media intervened to challenge it. The request for production of documents related only to financial dealings between the Chapter 7 debtor, a former Governor of Arizona, and his mother. The harm of releasing private financial information in the course of a bankruptcy examination into the debtor’s financial dealings with his mother was outweighed by the public’s right of access. The public interest in maintaining confidence in bankruptcy system and right to know the truth about corruption allegations against the former governor outweighed his mother’s privacy interests. The mother’s personal representative (who had been substituted after her death) had no interest in protecting her financial information during the bankruptcy examination, because most of the information was public due to the probate of her estate).

adjudications; immigration removal proceedings;⁸ federal inquiries into mining disasters,⁹ city council meetings,¹⁰ and municipal planning meetings.¹¹

Parties don't control what information belongs to the public. The adjudicator is responsible to determine whether a litigant has made the showing required to justify sealing evidence.¹²

The courts are not alone in the view that civil litigation is to be conducted publically. The Department of Justice also strongly opposes the government entering into sealed settlements or consent decrees. It doesn't contend its policy is based on the First Amendment, but relies on "the public's strong interest in knowing about the conduct of its Government and expenditure of its resources."¹³

⁸ *North Jersey Media Group, Inc., v. Ashcroft*, 308 F.3d 198, 208–09 (3rd Cir. 2002) (holding the "*Richmond Newspapers* [*Inc. v. Virginia*, 448 U.S. 555, 580 (1980)] test broadly applicable to issues of access to government proceedings"); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002) (rejecting "the Government's assertion that a line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not to the latter").

⁹ *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 572, 578 (D. Utah 1985) *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987) (holding that while Articles I and II of the Federal Constitution do not "expressly require either Congress or the Executive to hold any of their meetings in public," the First Amendment test of *Richmond Newspapers* required that "the press and public have a constitutional right of access" to formal fact-finding hearings conducted by the Mine Safety and Health Administration to investigate the cause of a coal mine fire in which miners died).

¹⁰ *WJW-TV Inc. v. City of Cleveland*, 686 F. Supp. 177, 180–81 (N.D. Ohio 1988), *vacated as moot*, 878 F.2d 906 (6th Cir. 1989) (after the city council refused to admit the public or press to a session claiming the prerogative to do so even when no privileged or confidential matters were under consideration, district court enjoined the closure under the First Amendment; the court of appeals vacated the injunction after an intervening Ohio Supreme Court decision found the closure violated the city charter, thereby mooting the federal constitutional issue).

¹¹ *Whiteland Woods, L.P. v. W. Whiteland Township*, 193 F.3d 177 (3d Cir. 1999) (holding a zoning applicant had a First Amendment right to attend, but not videotape, the meeting of a planning commission that advised the Township's governing body).

¹² *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal."); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (criticizing a broad confidentiality order that gave litigants unfettered right to file documents under seal, pointing out that "[t]he District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public."); *see also, In re Krynicki*, 983 F.2d 74 (7th Cir. 1992) (Chambers opinion) (highlighting why motions to seal entire appellate briefs and/or records are virtually certain to fail).

¹³ 28 C.F.R. § 50.23(b) (2012), published at 64 Fed. Reg. 59122 (Nov. 2, 1999) available also at 1999 WL 986637 (F.R.).

Rare circumstances may warrant an exception to the strong aversion to secrecy¹⁴ “because privacy or other interests so outweigh the public interest.”¹⁵ Accordingly:

It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents.¹⁶

II. Only in Narrow Circumstances do Article III Courts Restrict Access to Proceedings and Records

Despite the strong presumption of public access to judicial records, the right isn't absolute: for important reasons evidence offered in a court can be redacted or withheld from public view. This is why cases and commentators refer to a “qualified” or “limited” right of access. After relying for many years on common law as the reason courts must act openly, the Supreme Court held in 1980 that the right of the public and the press to attend criminal trials also “is implicit in the guarantees of the First Amendment.”¹⁷ The determination whether the First Amendment, in addition to the common law, applies to any adjudication has two prongs: the “experience” and “logic” tests, of which more will be said later.

A. Access to Evidence Offered in the Article III Courts

Courts may redact documents, even those filed in criminal prosecutions, for compelling reasons.¹⁸ But few documents that undergird a civil judgment are kept

¹⁴ Then “[t]he existence of such circumstances must be documented as part of the approval process, and any confidentiality provision must be drawn as narrowly as possible.” 28 C.F.R. § 50.23(b) (2012).

¹⁵ 64 Fed. Reg. 59122 (Nov. 2, 1999), under the heading “Supplementary Information.”

¹⁶ 28 C.F.R. § 50.23(a), entitled “Policy against entering into final settlement agreements or consent decree that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents,” published at 64 Fed. Reg. 59122 (Nov. 2, 1999).

¹⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (involving a murder prosecution where the trial judge cleared everyone but witnesses from the courtroom).

¹⁸ *U.S. v. McVeigh*, 119 F.3d 806, 815 (10th Cir. 1997) (affirming the trial judge’s decision to hold hearings on suppression and severance motions in open court, and to make available to the public redacted versions of the supporting documents, with redactions narrowly tailored to the compelling fair trial interests at stake); *U.S. v. Jacobson*, 785 F. Supp. 563 (E.D. Va. 1992) (doctor was prosecuted for fraud and perjury for inseminating women with his own sperm, contrary to his representations that sperm from anonymous donors would be used. A compelling and overriding governmental interest in the psychological health and welfare of those children required keeping their identities and those of their parents secret, but the request to close the courtroom during parents’ testimony was rejected because lesser safeguards tailored to those governmental interest would suffice. The court referred to parent witnesses by pseudonyms, precluded sketch

secret by Article III courts. Courts secrete the least information necessary to protect things like trade secrets for reasons similar to the ones articulated in the open access policy the Department of Justice champions. One Court of Appeals put it this way:

[D]ispositive documents in any litigation enter the public record notwithstanding any earlier [confidentiality] agreement. How else are observers to know what the suit is about or assess the judges' disposition of it? Not only the legislature but also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing. These are among the reasons why very few categories of documents are kept confidential once their hearing on the merits of a suit has been revealed.¹⁹

Only “compelling reasons” justify an order to seal judicial records attached to a dispositive motion like a motion for summary judgment.²⁰ Courts seal things like “trade secrets, the identities of undercover agents, and other facts that should be held in confidence”²¹ because the reasons to secrete them overcome the right of public access. It is not enough that one or more parties “strongly prefer secrecy,”²² where they cannot go the next step, and prove the compelling reason required to seal proof. Redacted versions of documents that merit protection remain public, however, when the protected documents are sealed. Briefs that refer to the protected material also have parallel versions: the public one redacted to the least extent required to protect the safeguarded evidence, and a sealed version that

artists from the courtroom during their testimony, and redacted identifying information regarding parents or their children from documents in the court file that the public and press could view.)

¹⁹ *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002).

²⁰ *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 678–80 (9th Cir. 2010) (dealing with a defense application to seal evidence attached to an plaintiff's motion for summary judgment, materials the defense regarded as confidential and proprietary); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (treating summary judgment as equivalent to a trial, and stating that “the presumption of [public] access is not rebutted where documents which are the subject of a protective order are filed with the court as attachments to summary judgment motions,” and that “to retain any protected status for documents attached to a summary judgment motion, the proponent must meet the ‘compelling reasons’ standard and not the lesser ‘good cause’ determination”).

²¹ *Hicklin Eng'g, L. C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

²² *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) (refusing to seal an indemnity agreement and other documents that AT & T Mobility and Google had attached to their filings opposing the plaintiff's effort to add AT & T Mobility as a party to the case, and rejecting the contention that disclosure of the documents might allow others to “obtain a negotiating advantage by knowing their terms”).

discusses it.²³ Should redaction yield a page almost entirely backed out, however, there is no point to the exercise. A judge could dispense with it—but those situations would be exceedingly rare.

B. Access to Evidence Offered in Administrative Proceedings

1. The Supreme Court’s “Experience” and “Logic” Tests for First Amendment Access to Administrative Proceedings

Under *Richmond Newspapers, Inc. v. Virginia*²⁴ the courts look to both “experience” and “logic” as they decide whether a First Amendment right of access attaches to a governmental event. All courts that have recently examined whether administrative proceedings qualify for First Amendment access employ this *Richmond Newspapers* analysis. Federal administrative adjudications must be open events that have open records, as state administrative adjudications must be too.

2. The Tests Themselves

The “experience” (sometimes referred to the history prong of the test) considers whether a tradition of access to an event has developed that reflects “the favorable judgment of experience.”²⁵ The question becomes whether “the place and process” under consideration “have historically been open to the press and the general public.”²⁶

A tradition of access need not have ancient roots for a proceeding to be open or for its underlying documents to be accessible under the First Amendment. Forms approving payments for criminal defense costs under the Criminal Justice Act were available to a newspaper even though that program only began in 1964.²⁷ The Third Circuit found a right of access to attend post-conviction proceedings to inquire into potential juror misconduct when the tradition of openness for those inquiries could be traced no earlier than 1980.²⁸

The “logic” prong of the *Richmond Newspapers* access test asks whether public access to a particular proceeding would “enhance the functioning of that proceeding.”²⁹ The factors that have led courts to find First Amendment rights of access to proceedings in Article III courts under the logic prong suggest First Amendment rights of access to adjudications by the Secretary of Labor too. This forum conducts adversarial, trial-type proceedings where trial judges act with

²³ *Hicklin*, 439 F.3d at 348 (mentioning that a litigant filed a sealed brief containing a trade secret diagram that was omitted from the brief’s public version).

²⁴ 418 U.S. at 555.

²⁵ *Press-Enterprise II*, 478 U.S. at 8.

²⁶ *Id.*

²⁷ *U.S. v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989).

²⁸ *U.S. v. Simone*, 14 F.3d 833, 838 (3d Cir. 1994).

²⁹ *Id.* The Supreme Court put the question somewhat more opaquely in *Press-Enterprise II*, asking “whether public access plays a significant positive role in the functioning of the particular process in question.” 478 U.S. at 8.

neutrality and independence from the parties. The Third Circuit has articulated six values open adjudications serve:

“(1) promotion of informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system; (2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; (3) providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; (4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny; (5) enhancement of the performance of all involved; and (6) discouragement of perjury.”³⁰

The Sixth Circuit saw that similar values would be served if the public had access to administrative proceedings under the immigration laws to remove aliens. Openness would serve to check arbitrary exercises of executive power; help yield accurate results; allow the proceedings to serve as a forum for community catharsis; assist in showing the proceedings are fair; and promote knowledge of how the government operates.³¹ Those reasons influenced the court’s conclusion that the public and press were entitled to access to removal proceedings under the First Amendment.

The history prong appears to carry the greater weight. When history goes against asserting First Amendment access rights, the claim invariably fails. Three decisions of the courts of appeals that deal with what broadly can be termed administrative law matters are illustrative. In the first, the Sixth Circuit held that because “[s]tudent disciplinary proceedings have never been open to the public”³² the First Amendment grants no access to them at public universities. In the second, the Third Circuit upheld part of the Pennsylvania constitution that opened allegations of misconduct against a state judge only when its Judicial Inquiry and Review Board recommended discipline to the state supreme court.³³ The Board had no disciplinary authority of its own. The court of appeals analogized the practice to that grand juries historically have followed: proceedings and transcripts of testimony become public when any indictment is handed down, not when the grand jury begins to investigate. Without the support of historical antecedents, the First Amendment did not require that matters in which no judicial discipline was

³⁰ *North Jersey Media Group, Inc., v. Ashcroft*, 308 F.3d at 217 (quoting *U.S. v. Simone*, 14 F.3d at 838, where that court had found a First Amendment right of access to post-conviction proceeding convened to inquire into allegations of juror misbehavior).

³¹ *Detroit Free Press v. Ashcroft*, 303 F.3d at 704–05.

³² *U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002).

³³ *First Amendment Coalition v. Judicial Inquiry & Rev. Bd.*, 784 F.2d 467, 474, 477 (3d Cir. 1986) (*en banc*).

recommended be public. In the third, the Third Circuit found no “unbroken, uncontradicted history”³⁴ of access to hearings to remove aliens from the country that *Richmond Newspapers* and its progeny would require to sustain a First Amendment right of access. It emphasized that administrative agencies should be free to fashion their own rules of procedure.³⁵ The significance of that freedom isn’t clear, since INS regulations presumed that removal proceedings “shall be open to the public,”³⁶ although they could be closed.³⁷ The Third Circuit also credited the government’s contention that on balance, under the logic prong, open deportation hearings would threaten national security.³⁸

The U.S. Supreme Court has yet to weigh in on whether federal administrative adjudications are presumptively open for constitutional reasons, but the way it analyzed a related issue appears to presage its approach. The Court recognized that the sovereign immunity a state enjoys bars an administrative agency from adjudicating a private party’s complaint against a non-consenting state.³⁹ In reaching this conclusion the Court acknowledged that “formalized administrative adjudications were all but unheard of” when the Constitution was framed.⁴⁰ It nonetheless found that because Federal Maritime Commission adjudications “walk [], talk [], and squawk [] like a civil lawsuit,”⁴¹ (quoting the court of appeals decision below), “they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union.”⁴²

The Secretary of Labor’s proceedings closely resemble a bench trial in civil lawsuits; similar constitutional presumptions about openness and access to evidence and testimony likely apply. Equally compelling reasons ought to be demonstrated, that provide a basis for factual findings, to redact (or in an extraordinary case to entirely seal) evidence from the public that has been offered as the basis for a Secretarial adjudication.

Since administrative adjudications became common in the 20th century they have been public events with open records, so much so that those that aren’t, such

³⁴ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d at 211–15, 220.

³⁵ *Id.* at 216, relying on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978) (rejecting the idea that federal courts could require an agency to offer greater procedural safeguards, such as discovery or cross-examinations in the course of informal rulemaking proceedings, than the APA imposes).

³⁶ 8 C.F.R. § 3.27 (2002).

³⁷ “For the purpose of protecting . . . the public interest, the Immigration Judge may limit attendance or hold a closed hearing.” 8 C.F.R. § 3.27(b).

³⁸ *Id.* at 218–20.

³⁹ *Fed. Maritime Comm’n v. South Carolina Ports Authority*, 535 U.S. 743 (2002).

⁴⁰ *Id.* at 755.

⁴¹ *Id.* at 757.

⁴² *Id.* at 756 (internal quotations omitted).

as Social Security hearings about whether to grant disability benefits, are immediately recognized as exceptions to a general rule of access.⁴³ On that historical basis, the sort of proceedings that culminate in a final order of the Secretary are likely to qualify for First Amendment access, both to the trial as an event, and to its record, including evidence offered on summary judgment.

The logic prong suggests a First Amendment right of openness too. Many proceedings before the Secretary of Labor effectively substitute for civil trials whose records and evidence would be open to public view under First Amendment principles. Longshore benefits proceedings, for example, substitute for what had been personal injury tort actions.⁴⁴ Whistleblower protection claims have much in common with actions for retaliation under federal anti-discrimination laws, and with actions for breach of an employment contract, although the two aren't identical. The reasons civil actions are conducted openly in Article III courts apply comfortably to the Secretary's proceedings.

As the next section demonstrates, the openness the First Amendment demands applies to state administrative proceedings too, even those to determine petty infractions where as little as \$100 are at stake.

3. The “Experience” and “Logic” Tests Even Apply to State Administrative Proceedings

A recent decision of the Second Circuit affirmed the District Court for the Southern District of New York in enjoining the N.Y. City Transit Authority from closing administrative proceedings to the public, after applying *Richmond Newspapers* First Amendment analysis.⁴⁵ The New York City Transit Authority operates a Transit Adjudication Bureau that the New York Legislature created in 1984. Violations of transit rules of conduct may be adjudicated there, or remain petty criminal prosecutions, as they historically had been.⁴⁶ Transit police may issue “notices of violation and hearing” for fare evasion, vandalism, unauthorized commercial activity, carrying liquids in open containers, littering, smoking, gambling, drinking alcohol, carrying dangerous instruments or weapons, entering

⁴³ The only persons who attend hearings to determine eligibility for disability benefits under the Social Security Act's Title II (insured disability) and Title XVI (Supplemental Security Income benefits) are the parties and other persons the presiding ALJ “considers necessary and proper.” 20 C.F.R. §§ 404.944; 416.1444. The government goes unrepresented at those non-adversarial hearings. *See* 20 C.F.R. §§ 404.929, 416.1429. Much of the proof offered on those claims is unavailable. “Medical information about individuals who have filled a claim for disability benefits” is withheld by the Commissioner of Social Security from the public. 20 C.F.R. § 402.100(c).

⁴⁴ *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 281–82 & n.24 (1980) (describing the trade-offs from tort liability workers' compensation programs entail).

⁴⁵ *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 675 F. Supp. 2d 411 (S.D.N.Y. 2009), *aff'd* 684 F.3d 286 (2d Cir. 2012).

⁴⁶ N.Y. Pub. Auth. Law 1209-a.

restricted areas or riding on the platform between subway cars.⁴⁷ Police retain the option to issue a summons to the New York Criminal Court that can lead to imprisonment for 10 days or a fine of \$25, after a public trial.⁴⁸

The Transit Adjudication Bureau, which conducts about 1,750 hearings a month, may impose civil penalties of up to \$100 for infractions of the Authority's Rules of Conduct that first were published in 1966 in the N.Y. City Official Compilation of Codes, Rules and Regulations.⁴⁹ Those accused of violations may have lawyers. Bureau hearings have no discovery, but the accused violator can ask the hearing officer to require the Transit Authority to produce records, and any motions are considered at the final hearing.⁵⁰ The hearing officers are lawyers independent of the Transit Authority, who regulate the course of the hearing, consider motions, take testimony, make a record, and issue written dispositions that determine whether the Authority proved the violation by clear and convincing evidence.⁵¹

The district court found a right to attend these “adjudicative, adversarial, trial-type proceedings.”⁵² They met the experience and logic tests to be open under the First Amendment. No statute or regulation governed access to the administrative hearings; a written policy presumed public access,⁵³ but ceded to the alleged violator the unfettered, unilateral right to bar the public or press from a hearing.⁵⁴ If transit police choose to initiate a matter as criminal proceeding using a summons, those trials always would be public. The values served by openness of the administrative adjudications were the same that apply to any civil trial. A respondent's ability to exclude the public and press from the administrative hearing wasn't narrowly tailored to serve some higher governmental value, so the federal trial court enjoined the agency's access policy.

The Second Circuit rejected the Transit Authority's argument that administrative proceedings, which were unknown at the Founding of the Republic, aren't subject to the presumption of public access that applies to courts.⁵⁵ The presumption applies broadly to government proceedings, and especially trial-type administrative proceedings closely analogous to the adjudicatory work of courts. The procedures the Transit Authority used were modeled after those of courts. A neutral adjudicator determines with the force of law whether a person violated a Transit Authority rule and imposes consequences. The violations also could be heard

⁴⁷ N.Y. Comp. Codes R. & Regs. tit. 21 § 1050 *et seq.*, which began in 1966 as § 701.

⁴⁸ N.Y. Judiciary Law § 4.

⁴⁹ *N.Y. Civil Liberties Union*, 675 F. Supp. 2d at 415–420.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 435.

⁵³ *Id.* at 434.

⁵⁴ *Id.* at 421, 434.

⁵⁵ *N. Y. Civil Liberties Union*, 684 F.3d at 299.

as petty criminal matters which surely would be open to the public, so the history prong of *Richmond Newspapers* analysis was satisfied.⁵⁶ On the logic prong, the court found that open hearings would do three things: act as a check on the fairness of the proceeding; show that the Transit Authority penalized violators in a fair way in order to maintain public confidence in its adjudications; and inform citizens of the workings of government so the public could effectively participate in and contribute to self-government.⁵⁷

The Transit Authority failed to show the four factors that would justify a closure.⁵⁸ Those are: that the party seeking to close the hearing advanced an overriding interest prejudiced if the hearing were open; any closure was no broader than necessary to protect that interest; that the presiding official considered reasonable alternatives to closure; and the official made findings adequate to support any closure.⁵⁹ The Transit Authority allowed a private party, the accused violator, complete and arbitrary discretion over whether to close the hearing.⁶⁰ The court found the First Amendment applied, and affirmed the injunction.⁶¹ The Transit Authority is limited to narrowly tailored closures justified by on the record findings that demonstrate why a particular level of closure is required.⁶²

Given this analysis, the First Amendment likely requires the public and press have access to the Secretary's adjudications and the evidence they rely on. This includes the right to view all documents offered to support dispositive motions, unless a compelling interest that arises in a specific case outweighs it. Then a restriction may be imposed, to the limited extent required to vindicate that interest.

4. Statutory Access to Transcripts and Evidence: APA and FOIA

Evidence offered in the Secretary's adjudications is no less available to the public than evidence offered in Article III courts. In addition to the First Amendment, the federal APA guarantees parties access to transcripts and exhibits.⁶³ The Administrative Review Board has held what is obviously true: hearing transcripts and exhibits are available to the public under FOIA.⁶⁴

⁵⁶ *Id.* at 302.

⁵⁷ *Id.* at 303.

⁵⁸ *Id.* at 305.

⁵⁹ *Id.* at 304–305.

⁶⁰ *Id.* at 305.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 5 U.S.C. § 556(e).

⁶⁴ *Paine v. Saybolt, Inc.*, ARB Case No. 97-136, OALJ No. 1997-CAA-4, slip op. at 2 (ARB Sept. 5, 1997) (refusing to approve a settlement agreement that designated the entire whistleblower file as confidential commercial information; the Board found this did “not constitute a good faith designation” because the combination of the entire transcript plus all exhibits “would not qualify for FOIA exemption under any circumstances.”).

In the Article III courts the need to protect trade secrets (as broadly understood) is a sufficiently compelling reason to close the relevant portion of a hearing and to seal the exhibits that contain the trade secret and the pages of the transcript that discuss them.⁶⁵ The same considerations would support non-disclosure under FOIA Exemption 4.⁶⁶

FOIA exemptions and exclusions may not be enough to withhold evidence offered in APA proceedings, however. Papers that came into federal government files for reasons unrelated to litigation may be disseminated or withheld under orthodox FOIA principals. Once those writings become evidence at APA trials or their substitutes (like dispositive motions), an overarching, additional level of First Amendment analysis comes into play.

⁶⁵ *In re Iowa Freedom of Info. Council*, 724 F.2d at 664 (the record included what the court of appeals characterized as “clear and convincing testimony that the marketing and distribution plans” two exhibits discussed “could be of substantial use to competitors anxious to learn what [the business entity’s] plans might be as to other, similar products now being marketed”).

⁶⁶ 5 U.S.C. § 552(b)(4); 29 C.F.R. §§ 70.26(d)(2), (g)(1) (2012) (an order sealing the material as confidential commercial information gives the Department’s disclosure officer a basis to determine that the information should not be disclosed to third parties under FOIA Exemption 4).

FedEx never attempted to justify its redaction of documents it offered with its motion for summary decision under the First Amendment, the APA, or under FOIA. Having made no showing at all, the redacted filings cannot be considered.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California