

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

**In Re: SEALED FILINGS
RELATED TO COOPERATION IN
CRIMINAL CASES**

GENERAL ORDER NO. 428

The Federal Judicial Committee has concluded that there is “a substantial amount of harm, to both defendants and witnesses, resulting from use of court documents to identify cooperators.” Fed. Judicial Ctr., Survey of Harm to Cooperators: Final Report (2016) at 31.¹ Further, “[t]he plea agreement or plea supplement was the document most frequently used to identify a defendant/offender as a cooperator,” *id.* at 13, and “the presence of sealed documents and gaps in docket sequence numbers by themselves are considered enough by other inmates to identify cooperators and put them at risk of harm,” *id.* at 30–31.

The Committee on Court Administration and Case Management of the Judicial Conference of the United States (CCACM) issued a report highlighting the grave threats faced by defendants who cooperate with the government in the era of

¹ <https://www.fjc.gov/content/310414/survey-harm-cooperators-final-report> .

remote electronic access to court files and noted that the threat to cooperators “interferes with the gathering of evidence” and “the presentation of witnesses.” Comm. on Ct. Admin. & Case Mgmt. of the Judicial Conference of the U.S., *Interim Guidance for Cooperator Information* (June 30, 2016).² The report acknowledges that the Electronic Case Filing (ECF) system has made it easier for inmates to access another inmate’s criminal pleadings, and to review the docket for pleadings suggesting the inmate cooperated in the investigation or prosecution of others.

While the CCACM report recommends that all criminal cases include a sealed supplement to any document that typically contains cooperation information, the Court finds that such a procedure would not comply with the public’s qualified First Amendment right of access to pretrial document filings. *See In re Copley Press, Inc. v. Higuera-Guerrero*, 518 F.3d 1022, 1028 (9th Cir. 2008), *United States v. Doe*, 870 F.3d 991, 1000 (9th Cir. 2017) (“[A] presumption of closure for all court filings would not be consistent with our circuit’s case law.”). Rather, in order to justify sealing a filed document, the Court must make case-specific factual findings that (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately

² http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf

protect the compelling interest. *See Oregonian Publ'g Co. v. U.S. Dist. Ct. for Dist. Of Or.*, 920 F.2d 1462, 1466 (9th Cir. 1990).

The filing of cooperation-related documents under seal can serve a compelling interest in protecting the safety of cooperators and the Government's interest in the integrity of ongoing investigations. *See Doe*, 870 F.3d at 1000. “[N]othing in our precedent prevents district courts from adopting some variation of the practices recommended by the CCACM Report, as long as district courts decide motions to seal or redact on a case-by-case basis.” *Id.* “[D]istrict courts could include cooperation information in a sealed supplement if the presumption of openness is overcome.” *Id.*

The Court finds that a procedure for sealed filings related to a criminal defendant's cooperation is necessary to balance the public's qualified First Amendment right of access to pretrial document filings with the compelling interest in protecting the safety of cooperators and the government integrity in ongoing investigations. Accordingly,

IT IS HEREBY ORDERED that the Court Clerk's Office create a “Master Sealed Event” (MSE) in the ECF docket in each criminal case. The MSE will not be visible on the public ECF docket and will be used only to house pleadings the Court has ordered sealed in the MSE.

IT IS HEREBY ORDERED that no filing shall be placed in the MSE absent the Court's order to seal based on a case-specific finding that (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest. The Court's order to seal shall not prevent a subsequent motion or order to unseal the documents, based on good cause shown.

IT IS HEREBY ORDERED that a party seeking to file a pleading in the MSE shall send the pleading with a motion and proposed order to seal, justifying the closure based on case-specific facts, via e-mail to the Court Clerk's Office (IDml_Docketing@id.uscourts.gov). The party seeking to file the pleading in the MSE shall copy counsel for the opposing party and the assigned District Judge's orders e-mail address on the e-mail to the Court Clerk's Office.³ Upon the Court granting the motion to seal, the Court Clerk's Office shall file the motion to seal, the order to seal, and the pleading in the MSE. If the Court denies the motion to seal, the Court Clerk's Office will notify the filing party, who can then either withdraw the pleading, file the pleading without sealing, or amend the motion to seal.

³ Each district judge has a proposed orders email address that begins with the judge's initials and ends with orders@id.uscourts.gov. For example, Chief Judge David C. Nye's orders email address is dcn_orders@id.uscourts.gov

IT IS HEREBY ORDERED that the party filing sealed documents in the MSE shall notify the United States Probation Office of the sealed filings for inclusion in the Presentence Investigation Report.

DATED: February 28, 2023

A handwritten signature in black ink, appearing to read "David C. Nye", written over a horizontal line.

David C. Nye
Chief United States District Judge

A handwritten signature in black ink, appearing to read "Raymond E. Patricco, Jr.", written over a horizontal line.

Raymond E. Patricco, Jr.
Chief United States Magistrate Judge