

Attorney's submission that the search warrants should remain sealed, the existing sealing order should be modified to include specific findings and conclusions and to narrowly limit its scope and duration.

The Sealing Order

The Cary Police Department has announced that the search warrants issued in connection with the investigation into the death of Nancy Cooper were obtained at 2 a.m. on July 16, 2008. The order sealing them (Exhibit A to the Motion to Unseal Search Warrants) does not state specifically who applied for it; rather, the order recited that it was issued in response to a motion by "the State." The movants have assumed that the motion was made by representatives of the Cary Police Department and/or the District Attorney, but as of the date of this memorandum the movants have not confirmed precisely who sought and obtained the sealing order; accordingly, this motion refers to the requester(s) as "law enforcement agencies." In a telephone conversation with the movants' undersigned counsel, however, the District Attorney for the Tenth Prosecutorial District acknowledged that he should be served with this motion and would assume responsibility for responding to it.

The movants have confirmed that no written motion was filed, even under seal; therefore the only available explanation for the sealing is contained in the order itself, which simply concludes that public release of the search warrants "will jeopardize the right of the State to prosecute a defendant or the right of a defendant to a fair trial or will undermine ongoing or future investigation within the meaning of NCGS 132.1.4.(e)." Based on this scant record, the public is left to assume that specific reasons or factors for this decision either were provided to the court orally and *ex parte*, or were not presented to the court at all. Because the order includes no factual findings, the order rests entirely on the unsupported conclusion that disclosure of the search warrants *will* "jeopardize the right of the State to prosecute a defendant or the right of a defendant to a fair trial" or *will* "undermine an ongoing or future investigation."

The absence of any written motion, coupled with the scant and unsupported conclusions set forth in the sealing order, effectively negates any opportunity for meaningful review of the sealing order. Unless these deficiencies are cured, neither the public nor an appellate court reviewing the order will be able to assess the propriety of the sealing order, because the basis for it will not be disclosed even if and when the search warrants are unsealed.

As the court is well aware, the death of Nancy Cooper, a Cary resident and mother of two, has become a high profile case locally, nationally and in Canada, where Ms. Cooper was a citizen. As such, it poses special challenges for the police, the District Attorney, the lawyers representing Ms. Cooper's husband and other family members, the court and the news media. But although the special challenges of a high-profile case always warrant special care, they do not inherently or automatically justify the sealing of documents which, by law and tradition, routinely are made available to the public in homicide cases. To the contrary, the search warrants in this case, and in any case, should not be sealed unless the party who moves to seal them presents the court with clear, convincing and compelling reasons to do so in the form of a written motion, and the court embodies the reasons for granting the motion in specific written findings.

A. The search warrants subject to the court's order are public record and thus may be sealed only for compelling reasons.

In furtherance of North Carolina's well-established public policy of providing the people with liberal access to information generated or received by government agencies and officials, the General Assembly has declared that the search warrants and return results thereof issued in the investigation of Nancy Cooper's death are public record. The North Carolina Public Records Law ("the Public Records Law") is codified at N.C. Gen. Stat. §§ 132-1 through 132-10. The public policy underlying the Public Records Law is set out in G.S. § 132-1(b), which provides:

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, 'minimal cost' shall mean the actual cost of reproducing the public record or public information.

The Public Records Law also provides, in G.S. § 132-1.4(k), that

The following court records are public records and may be withheld only when sealed by court order: arrest and search warrants that have been returned by law enforcement agencies

The search warrants at issue are manifestly and unequivocally public records as a matter of law, which can only be sealed by court order after the requesting law enforcement agency satisfies the burden of “showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation.” N.C. Gen. Stat. § 132-1.4(e).

Moreover, the fact that the search warrants may have relevance to an on-going criminal investigation does not affect its status as a public record, because the Public Records Law expressly provides, “The use of a public record in connection with a criminal investigation or the gathering of criminal intelligence shall not affect its status as a public record.” G.S. §132-1.4(f).

Because the sealing order at issue was not supported by a written motion and was issued *ex parte*, the record apparently is devoid of **any** evidence -- even under seal -- supporting this court’s conclusion that release of the information contained in the search warrant, application and return “*will* jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or *will* undermine an ongoing or future investigation.” Thus the sealing order manifestly was not issued in compliance with the procedure specified by the Public Records Law.

B. The search warrants subject to the Court's order are judicial records and are presumptively open to public inspection pursuant to the First Amendment and common law.

In addition to being defined as "public records" by the North Carolina Public Records Law, search warrants also have been determined by many courts to be "judicial records" and thus subject to the constitutional standards outlined above. Although the Supreme Court of the United States has not spoken directly to the status of search warrants and related documents, numerous federal courts have held that the First Amendment and/or common law principles make such materials presumptively open to inspection. See, e.g., *In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn*, 855 F.2d 569 (8th Cir. 1988) (recognizing qualified First Amendment right to inspect search warrant supporting affidavits); *In re Sealed Documents*, 15 Media L. Rep. 1983 (D.C.D.C. 1988) (recognizing First Amendment right of access to search warrants that can be overcome by showing of a "compelling government interest" embodied in "narrowly tailored" order); *In the Matter of Search Warrants Issued on June 11, 1988 for the Premises of Three Buildings at Unisys, Inc.*, 15 Media L. Rep. 1980 (D. Minn. 1988) (same).

The Fourth Circuit has recognized a common law right of access to search warrant documents rather than a First Amendment right. In *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), the court vacated a magistrate judge's order sealing the affidavits supporting a search warrant, holding that such affidavits are judicial records to which public access can be denied only "when sealing is 'essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* at 65-66 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986)). To effectuate its holding the Fourth Circuit imposed procedural requirements that courts must follow in sealing search warrants and related materials. The court ruled that the public has a right to notice of a sealing order and an opportunity to voice objections. Moreover, the court must make findings of fact and conclusions of law concerning the public interest in

openness versus closure, and the sealing order must be tailored sufficiently to allow for appellate review. *Baltimore Sun*, 886 F.2d at 65-66. In such orders, the court said, "conclusory assertions are insufficient; specificity is required." *Id.* at 66.

In *U.S. v. Blowers*, 2005 WL 3830634 (W.D.N.C., 2005), Judge J. Carlton Tilley acknowledged the Fourth Circuit's common law right of access and applied the standards outlined above in allowing a motion by *The Charlotte Observer* and a Charlotte television station to unseal search warrants issued in connection with the prosecution of an FBI agent charged with making fraudulent statements. See also, *In re Search Warrants*, 26 Media L. Rep. 2564 (M.D.N.C. 1998) (Order sealing search warrant affidavit vacated because general fear of reprisal or retaliation against informant was not sufficient to overcome common law right of public access, and government made no specific showing of how ongoing investigation would be jeopardized by unsealing the affidavit.)

C. An order sealing judicial records is subject to strict scrutiny.

In addition to the presumption of openness that attaches to the search warrants under the Public Records Law, the constitutions of both the United States and North Carolina create strong presumptions of openness with respect to judicial records and proceedings that can be overcome only in the rarest of circumstances, and then only on the basis of *factual* findings supported by sound *evidence*; accordingly, this court must carefully scrutinize the sealing order and whether it was based on a strong showing of necessity required to overcome the presumption.

The constitutional presumption of openness at issue is grounded in the recognition by state and federal courts that public confidence in the administration of justice depends upon public understanding; people cannot be expected to accept and approve the outcome of judicial proceedings unless they can see and hear what goes on in their courtrooms. As the Supreme Court of North Carolina has observed:

The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. See, N.C. Const., Art. I, §18. "The public . . . are entitled to see and hear what goes on in the court. [That courts are open is one of the sources of their greatest strength.] *Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957).

In re Edens, 290 N.C. 299, 306, 226 S.E.2d 5, 9-10 (1976).

Similarly, the Supreme Court has admonished that "[a] trial is a public event." *Craig v. Harney*, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947), and has noted that openness is desirable because "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980). The Court also has explained that

the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed.2d 248 (1982).

In a quartet of cases the Supreme Court has laid out and applied the principle that absent extraordinary circumstances, the judicial process must be open because a qualified right of the public to observe and scrutinize criminal proceedings is implicit in the First Amendment. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07, 104 S. Ct. 819, 78 L. Ed.2d 629 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980).

Both the First Amendment to the United States Constitution and common law afford the public a presumptive right of access to judicial records and judicial proceedings. “[T]here is an ingoing presumption in favor of openness.” *In re Charlotte Observer*, 882 F.2d 850, 853 (4th Cir. 1989). “Only the most compelling reasons justify non-disclosure,” and any party seeking closure bears the “heavy burden of overcoming the presumption of open judicial records.” *Pratt & Whitney Canada v. U.S.*, 14 Cl. Ct. 268, 275, 15 Media L. Rep. (BNA) 1033, 1037 (1988). The public has a “general right to inspect and copy public records and documents, including judicial records and documents . . . [based on] the citizen's desire to keep a watchful eye on the workings of public agencies.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98, 98 S. Ct. 1306, 55 L. Ed.2d 570 (1978).

At least 11 decisions from the U.S. Court of Appeals for the Fourth Circuit have recognized a strong presumptive right of access to judicial records and proceedings.¹ The Fourth Circuit is in line with numerous other federal circuits that have recognized a common law and constitutional right of access to judicial records and proceedings.²

¹ *U.S. v. Moussaoui*, 65 Fed. Appx. 881, 2003 WL 21076836, 31 Media L. Rep. 1705 (4th Cir. 2003); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000); *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000); *Stone v. Univ. of Maryland Medical Sys. Corp.*, 948 F.2d 128 (4th Cir. 1991); *In re Search Warrant*, 923 F.2d 324, 326 (4th Cir.), cert. denied, *Hughes v. Washington Post Co.*, 500 U.S. 944, 111 S. Ct. 2243, 114 L. Ed. 2d 484 (1991); *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *In re Washington Post*, 807 F.2d 383 (4th Cir. 1986); *In re Knight Pub. Co.*, 743 F.2d 231 (4th Cir. 1984); *Under Seal v. Under Seal*, 27 F.3d 564, 22 Media L. Rep. (BNA) 1922, 1923 (unreported 4th Cir. 1994); *In re Landmark Communications*, 12 Media L. Rep. (BNA) 1340 (unpublished 4th Cir. 1985).

² *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) (“[T]he right of the press to obtain timely access to judicial decisions and the documents which comprise the bases of those decisions is essential.”); *EEOC v. Westinghouse Elec. Corp.*, 917 F.2d 124 (3rd Cir. 1990); *Davis v. Reynolds*, 890 F.2d 1105 (10th Cir. 1989); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100, 104 S. Ct. 1595, 80 L. Ed.2d 127 (1984); *Joy v. North*, 692 F.2d 880 (2nd Cir. 1982), cert. denied sub nom. *Baldwin v. Joy*, 460 U.S. 1051, 103 S. Ct. 1498, 75 L. Ed.2d 930 and cert. denied sub nom. *Citytrust v. Joy*, 460 U.S. 1051, 103 S. Ct. 1498, 75 L. Ed.2d 930 (1983) (bank’s litigation committee report “is no longer a private document. It is part of a court record.”); *U.S. v. Criden*, 648 F.2d 814 (3rd Cir. 1981); *Bigelow v. District of Columbia*, 122 F.R.D. 111, 112, 15 Media L. Rep. (BNA) 2143 (D.D.C. 1988) (“It is

The Constitution of North Carolina also creates a presumptive right of public access to court proceedings; it declares, flatly and unequivocally, that "[a]ll courts shall be open . . ." N.C. CONST. Art. I, §18. Moreover, under North Carolina's Public Records Law, judicial records are public records subject to inspection and copying absent a statutory exemption excluding them from disclosure. The public has a right of access in all cases except those in which a party has demonstrated an overriding interest that cannot be accommodated by any means less drastic than closure. In *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 466, 515 S.E.2d 675, 687 (1999), *cert. denied*, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed.2d 337 (2000), the North Carolina Supreme Court held that documents "entered the public domain and became 'public records' once ... filed with the clerk of court." Certainly the rule can be no different when the documents are presented directly to a judge.

D. Merely conclusory allegations are insufficient to overcome the presumption of openness and satisfy the strict scrutiny standard.

A party who moves a court to close proceedings or seal records and to exclude the public bears "the heavy burden of exhibiting the existence of special circumstances adequate to overcome the presumption of public accessibility." *FTC v. Standard Financial*, 830 F.2d 404, 413 (1st Cir. 1987). Unsubstantiated claims or speculations are insufficient grounds for entry of a protective order. "A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *Brown & Williamson*, 710 F.2d 1165, 1176 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S. Ct. 1595, 80 L. Ed.2d 127 (1984). ("Under the First Amendment and the common law, we conclude that the District Court erred by failing to state findings or conclusions which justify nondisclosure to the public. The order of the District Court sealing the documents in the case is, generally recognized that the public has a common law right to inspect and copy judicial records.").

