1991 WL 331673
United States District Court, D. Oregon.

UNITED STATES of America, Plaintiff,
Sonya Fryer, et al., Plaintiff–Intervenors,
v.
STATE OR OREGON, et al., Defendants
Oregonian Publishing Company, an Oregon corporation, Third–Party Intervenor

Civ. No. 86–961–MA. | Sept. 19, 1991.

Attorneys and Law Firms

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Opinion

OPINION

MARSH, District Judge.

***1** On June 12, 1991, the United States filed a motion for contempt against Fairview Training Center alleging that defendants violated the April 14, 1989 Consent Decree and the September 20, 1990 order of this court. Immediately after plaintiff filed this motion, defendants filed a motion to seal all U.S. expert reports which contained references to Fairview residents. On June 5, 1991 I granted defendants' motion to seal the U.S. expert reports and ordered plaintiff to refile its exhibits under seal. On July 7, 1991, defendants filed their response accompanied by a motion to place portions of their expert reports under seal. On July 8, 1991, I granted defendants' motion to file their expert reports under seal.

On June 17, 1991, and on July 19, 1991, plaintiff filed motions requesting reconsideration of my June 5th and July 8th orders sealing expert declarations. Plaintiff argued that all documents should be made public following a limited redaction of names. Plaintiff further contended that residents' privacy interests could be adequately protected by a limited redaction referring to residents by initials or numbers. On July 26, 1991, The Oregonian Publishing Company filed a motion to intervene for the limited purpose of challenging all orders sealing documents since the filing of this case or in the alternative, to modify them to forbid the public disclosure of names and other personal identifying information. The United States and Plaintiff–Intervenors raised no objection to The Oregonian's motion to intervene and "fully supported" its motion to vacate all of the prior sealing orders in this case with the caveat that names and identifying information should be redacted to protect residents and their families.

During the contempt hearing held on Friday, September 13, 1991, I granted The Oregonian's motion to intervene and granted their motion to vacate all prior sealing orders on the condition that documents under seal be redacted to delete all identifying information about clients, such as full name and cottage assignment. The following constitutes my findings and conclusions on the issues related to my order conditionally vacating all prior sealing orders.

DISCUSSION

A newspaper's interest in disclosure of court documents has its roots in the common law right to "inspect and copy public records and documents." *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 598 (1978). The public and press have a First Amendment right of access to pretrial documents in general. *Associated Press v. United States Dist. Court,* 705 F.2d 1143, 1145 (9th Cir.1983). The Ninth Circuit has held that this presumption of access extends to civil cases. *EEOC v. Erection Co., Inc.,* 900 F.2d 168, 169 (9th Cir.1990). In *EEOC,* the court rejected a proposed distinction between civil and criminal proceedings in a case involving the sealing of an EEOC consent decree and remanded the action back to the district court to make specific factual findings to justify the closure order. *Id.*

***2** In *Globe Newspaper Co. v. Superior Court, Etc.,* 457 U.S. 596 (1982), the Court held that a mandatory closure statute governing testimony of a child sexual molestation victim violated the First Amendment based upon the presumption of public access to criminal trials. The Court explained that the First Amendment guarantee of public

access is rooted in a recognition of the public's role as a check on the judicial process, public education and to stimulate an informed discussion of governmental affairs. *Id.,* at 604. Although the Court noted that the state's interest in protecting child witnesses was "compelling," the Court held that such an interest did not justify mandatory closure in light of the trial judge's ability to determine whether closure is necessary on a case-by-case basis.

The Ninth Circuit has held that this case-by-case analysis requires a 3–pronged inquiry: (1) whether closure serves a compelling interest; (2) whether there is a substantial probability that, in the absence of closure this interest would be harmed, and (3) no alternatives exist that would adequately protect that interest. *Oregonian Publishing v. U.S. Dist. Court for the District of Oregon,* 920 F.2d 1462, 1465 (9th Cir.1990), *cert. denied* 111 S.Ct. 2809 (1991) (extending presumed right of public access to plea agreements unless defendants can demonstrate closure is essential to preserve 'higher values'); *Cf. United States v. Schlette,* 842 F.2d 1574, 1579, *amended* 854 F.2d 359 (9th Cir.1988) (in analyzing disclosure of pre-sentence reports to third party investigating a civil damage claim, court noted a 'presumption' in favor of confidentiality). In examining whether a compelling interest exists justifying closure, the party asserting confidentiality "cannot rest on some general rationale." *Schlette,* 842 F.2d at 1583. In addition, the asserted interest in closure must be "balanced against" the presumed right of public access. *See e.g. Seattle Times v. U.S. Dist. Court for the Western Dist. of Washington,* 845 F.2d 1513 (1988) (court must balance presumption of public access against defendant's 6th Amendment right to a fair trial).

In this case, Oregonian Publishing relies upon the presumption of openness accorded public proceedings and argues that access should be permitted since the subject matter of this action involves a public agency. The Oregonian contends that the expert reports are of particular public importance since the court referred to them in my April 14, 1989, opinion approving the terms of the consent decree. Finally, The Oregonian argues that it should have access to the documents and the full names of the residents because residents and their families do not have a recognized statutory or constitutional right to privacy.

Defendants argue that closure is necessary to protect the confidentiality interests of its residents. The State points out that many of its residents are attempting to transition into the community and that this process may be exacerbated by public disclosure of aggressive and destructive incidents that take place within the institution's walls. In addition, the state contends that the use of initials is insufficient to protect residents' privacy because they are too identifiable by incident or cottage assignment.

***3** Indeed, many of the U.S. experts' reports contain graphic descriptions of incidents involving residents which could embarrass family members if the name of the resident were made public. Plaintiff-intervenors and the Fairview Parents Association have consistently opposed disclosure of the residents names for this very reason.

However, the State fails to provide the kind of specific *probable* harm that could arise from disclosure of the incidents described in the expert reports. Although disclosure of such incidents may make transitioning more difficult for residents, it is equally plausible that the publicity could heighten public sensitivity to problems residents face. Finally, although Fairview staff could identify all but five of the residents based upon their initials and the context of the experts' reports, there is nothing to indicate that anyone outside of Fairview could identify specific residents by their initials. Thus, the concern raised by defendants regarding a potentially "cool" public reception to specific residents transitioning out of Fairview would be served by a limited redaction of the names and reference solely to initials or patient numbers.

Finally, I disagree with The Oregonian's contention that an order of limited redaction of identifying information must be founded upon a specific constitutional or statutory provision. In *Globe Newspaper* and *Oregonian Publishing,* the courts noted that closure must be justified upon a finding of "compelling interests" or to preserve "higher values." They make no reference to a *requirement* that a court find a specific legal citation for protecting privacy interests of a person involved in a court action.[1]

CONCLUSION

Based upon the foregoing, I find that closure of the records in their entirety would not serve a "compelling interest" that outweighs the public's interest in activity which takes place at one of the state's institutions. However, I also find that residents and their families have valid privacy interests which would be harmed if the expert reports were disclosed with the names and identifying information about the residents. Based upon my review of all of the circumstances in this case and in balancing the presumption of public access against the residents' privacy concerns, I find that a limited redaction of names and identifying information is an alternative to closure which adequately protects the interests of the residents and their families. Accordingly, plaintiff and Oregonian Publishing's motions for reconsideration of my orders sealing documents are granted conditioned upon the redaction of client names and identifying information.

Parallel Citations

19 Media L. Rep. 1506

Footnotes

1 In addition, courts have traditionally treated limited redactions as an alternative to closure, rather than a modified form of closure. *See e.g. United States v. Broussard,* CR 91–39, Amended Opinion at pages 7–8 (filed May 31, 1991) and cases cited therein.