Memorandum

TO: **Supreme Court Advisory Committee**

FROM: **Subcommittee on Rule 16-165a, Chair Richard R. Orsinger, Vice-Chair Honorable Ana Estevez**

RE: **Proposed Changes to Tex. R. Civ. P 76a**

DATE: **August 12, 2022**

I. Matter Referred to Subcommittee:

On October 25, 2021, Chief Justice Nathan Hecht sent a letter to SCAC Chairman Chip Babcock referring the following matter to this Subcommittee:

> **Texas Rule of Civil Procedure 76a.** Since its adoption in 1990, the Court has received a number of complaints about Texas Rule of Civil Procedure 76a. Courts and practitioners alike complain that the Rule 76a procedures are time consuming and expensive, discourage or prevent compliance, and are significantly different from federal court practice. The Committee should draft any rule amendments that it deems advisable and, in making its recommendations, should take into account the June 2021 report of the Legislative Mandates Subcommittee.

II. Background

This topic was referred to the Subcommittee on Rules 16-165a on November 2, 2021. Since that time, the Subcommittee and interested persons who volunteered to work on the project, has met several times via zoom to discuss what changes, if any, should be made to Rule 76a. The Subcommittee has also engaged in email discussions. It should be noted that there are different perspectives on sealing court records among the Subcommittee members and others who volunteered to help. The proposed changes to Rule 76a that the Subcommittee presents do not reflect the consensus of the Subcommittee because of many diverse views, including some opposition to sealing court records under any circumstances. Several drafts of the proposed changes to Rule 76a were circulated, ultimately resulting in a proposed draft, which is a composite of different perspectives.

III. Issues for Discussion/Proposed Changes

The Subcommittee and volunteers identified the following areas of Rule 76a that should be discussed and possibly changed. * Some Subcommittee members do not support some of these suggested changes.

A. Whether there should be some types of information that should not have a presumption of openness to the general public and should have a less burdensome process available to be sealed. These specific areas include:

1. trade secrets;
2. information that is confidential under a constitution, statute, or rule;
3. information subject to a confidentiality agreement or protective order;
4. information subject to a pre-suit non-disclosure agreement with a non-party; and
5. an order changing the name of a person to protect that person from a well-founded fear of violence.

These categories are called "Paragraph 3 information in this memo." The Subcommittee process led to a suggestion that advance notice should be given before Paragraph 3 Information is filed unsealed.

B. If an easier process is adopted for information that is not presumed to be open to the general public, what should be changed? The Subcommittee suggests two processes depending on the type of information that is being sealed. This permits a party or non-party

1. The current Rule 76a standard to seal would apply to all information that is not included within Paragraph 3 of the proposed new Rule 76a draft.

    a. notice requirements – less burdensome notice suggested
    b. hearing requirements – remain the same
    c. changes in process to unseal documents
    d. actual notice requirements for non-parties interested in the unsealing

2. Information that is not presumed to be open to the general public (Paragraph 3 Information)

    a. less burdensome notice requirement
    b. no hearing requirement, unless requested; burden changes
    c. changes in process to unseal documents
    d. actual notice requirements for non-parties interested in the unsealing
    e. requires a notice of intent to file confidential information before filing the information unsealed

IV. Discussion

A. **Information that should be presumed to meet the standard of sealing** and should be treated differently than other information. The Subcommittee process identified five areas of information that should not have a presumption of openness to the general public and, therefore, the burden on whether the information should be sealed should be shifted in favor of sealing (for Paragraph 3 information).

1. **Trade secrets** – presumption of openness in 76a does not apply to trade secrets – *see HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021).

2. **Information that is confidential under a constitution, statute, or rule -** Every individual has a privacy interest in avoiding the disclosure of certain personal matters under both the United States and Texas Constitutions. *See Nguyen v. Dallas Morning News, L.P.,* No. 02-06-00298 –CV, 2008 WL 2511183 at *14 (Tex. App.—Fort Worth June 19, 2008, no pet.) (mem op.).

3. **Information subject to a confidentiality agreement or protective order –** The Subcommittee recognizes the potential for overuse or misuse if litigants enter into confidentiality agreements for areas of information that do not truly contain confidential, privileged, or protected information. In order to deter abuse, the Subcommittee has included a sanctions paragraph in Rule 76a.

4. **Information subject to a pre-suit non-disclosure agreement with a non-party-** The Subcommittee recognizes that in commerce parties enter into non-disclosure agreements as part of a contracting process, unrelated to a pending lawsuit. When a party possessing another party's confidential information becomes involved in litigation, notice should be given to the contracting non-party before the non-party's information is filed unsealed.

5. **An order changing the name of a person to protect that person from a well-founded fear of violence.**

B. **Two different procedures to seal information**

1. **The existing Rule 76a with a few modifications (except for information included in the new proposed Paragraph 3) would still be used for sealing in some circumstances.**
- Information is presumed to be open to the general public. For information to be sealed the movant must show a specific, serious and substantial interest which clearly outweighs the presumption of openness, any probable adverse effect that sealing will have upon the general public health or safety, and that no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

   a. Less Burdensome Notice

      i. Public notice – Rule 76a currently requires posting the notice at the place where notices for meetings of county governmental bodies are required to be posted.
      The proposed change would require posting of the notice at the website maintained by the State of Texas for posting public notices (https//topics.txcourts.gov/).

      ii. Filing of notice – Rule 76a currently requires filing a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.
      The proposed change would eliminate this requirement.

   b. Requires a hearing not less than 14 days after the motion is filed and notice is posted. The movant must show that no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted. Some participants say that having a hearing within 14 days is not always possible, due to the press of other court business. Should we have a longer period for a hearing? What period of time to rule?

   c. The proposed change to Rule 76a would require public notice on the website before sealing or unsealing records.

   d. Changes in actual notice requirements in a Motion to Unseal – When a party intends to file Paragraph 3 information unsealed, that party must give notice to other parties, to the public, and to any non-party whose Paragraph 3 information would be filed unsealed. This preliminary notice requirement would allow the

court (and not a party acting unilaterally) to determine whether information should be filed unsealed. It would also give non-parties the opportunity to protect their own Paragraph 3 information. For example: Company X previously provides confidential information under an NDA to Company A. At a later time, Company A negotiates to acquire Company B. The deal falls apart and Company B sues Company A, claiming that Company A breached an agreement to purchase Company B. Company B then seeks discovery from Company A regarding any other potential acquisitions, including confidential information provided to Company A by Company X. The proposed rule change would require advance notice to Company X before Company X's confidential information is filed unsealed.

2. **Information Presumed to Meet the Standard of Sealing** (New Paragraph 3) To have information sealed, the movant need only initially show that the information is included within the categories of Paragraph 3. See Section IV.A above.

a. Less Burdensome Notice

i. Public notice – Rule 76a currently requires posting the notice at the place where notices for meetings of county governmental bodies are required to be posted.
The proposed change would require posting of the notice at the website maintained by the State of Texas for posting public notices (https//topics.txcourts.gov/).

ii. Filing of notice – Rule 76a currently requires filing a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas. The proposed change would eliminate this requirement.

b. Allows sealing without a hearing if no hearing has been requested within 14 days from the day of notice. If a hearing is requested, a person objecting to sealing or moving to unseal the information must show that sealing, or failure to unseal, would have a probable adverse effect upon the general public health or safety. The judge should also determine whether the information does not meet the requirements of Paragraph 3, in which event the presumption of openness would apply.

c. The proposed change to Rule 76a would require public notice on the website before unsealing records.

d. Changes in actual notice requirements in a Motion to Unseal – When a person files a motion to unseal, each party must forward the Motion to Unseal to any third-party who produced the document and to any other person or entity known by that party to have an interest in opposing the Motion to Unseal. Notice must also be given to all persons whose confidential information was obtained through pretrial discovery in the case. This added notice would protect those who are not involved in the litigation and would have no way of knowing that anyone was seeking to unseal their confidential information.

e. Notice of Intent to File Confidential Information: This provision requires parties and non-parties to file a notice of intent to file confidential information if they are not going to request that the information that is described in Paragraph 3 be filed under seal. It also requires that they give actual notice to those who have an interest in the information that they intend to file. This allows for those other persons to intervene before their confidential information is released to the general public.

C. Subsequent Motions to Seal or Unseal

The proposed rule continues the procedure of the ability to file a later motion to seal or unseal records, but the concept of res judicata is changed. Under the current Rule 76a.7, Continuing Jurisdiction, a ruling on a motion to seal or unseal has res judicata effect only on a party or intervenor with actual notice of the hearing. An exception applies upon a showing of changed circumstances materially affecting the order. [One suggestion is to add: "or if the public interest requires reconsideration."] Under the proposed Rule change, the res judicata effect applies to everyone, even non-parties with no notice of the prior hearing on sealing. The rationale is that courts should not have to relitigate matters already considered by them, regardless of who brings the later motion. In other words, res judicata applies to the circumstances previously adjudicated, not just participants in that hearing or non-parties who had notice but did not appear.

D. Sanctions

The proposed Rule does not create a new rule for imposing sanctions. It refers to the existing sanctions Rule 13 and Chapters 9 and 10 of the Texas Civil Practice and Remedies Code. The reminders are deemed advantageous because it reminds lawyers of their duty to be accurate and reminds Judges of their power to sanction lawyers who misuse the safe harbor of Section 3 information.