

Subcommittee's Proposed Revision of Rule 76a. **Sealing Court Records**

8-16-22

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed, except as provided below. Information in other court records, except for information under Paragraph 3, is presumed to be open to the general public and may be sealed only if there is a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records are:

(a) all documents of any nature filed, or sought to be sealed before filing, in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents to which access is otherwise restricted by law;

(3) court orders required to be sealed by statute

(4) documents filed in an action originally arising under the Family Code;

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. Information Presumed to meet the Standard of Sealing.

(a) It is presumed that the following information within a court record meets the standard for sealing as prescribed in Paragraph 1:

(1) trade secrets or other proprietary information of a party or non-party;

- (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.

(b) After fourteen days from the date of the notice required under Paragraph 5, the information shall be ordered sealed unless a hearing has been requested or the judge determines that the information is not any of those listed in Paragraph 3(a). If a hearing is requested, the information shall be ordered sealed unless a person objecting to sealing or moving to unseal the information shows that sealing would have a probable adverse effect on the general public health or safety. If the judge determines that Paragraph 3(a) does not apply, the movant may file a new motion that does not rely on the presumption in Paragraph 3.

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information described in Paragraph 3 without requesting that it be sealed must give notice to all parties, to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest in the confidentiality of the information is otherwise known. The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal. If a timely motion to seal is filed, Paragraph 5 applies.

5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (<https://topics.txcourts.gov/>) for at least 14 days before any judge may enter a final order sealing the records.

6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (<https://topics.txcourts.gov/>) for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest is otherwise known. If a hearing is requested within 14 days of the public notice, a judge may not sign an order unsealing the records until the hearing has been held.

7. Hearing. If a hearing is requested, a hearing, open to the public, shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party to the case, any non-party who filed a motion to seal or unseal, and any person who

requested the hearing may participate in the hearing in a manner determined by the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. Temporary Sealing Order. A temporary sealing order may issue only if there is a showing of a compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant to immediately give the public notice required by Paragraph 5. A temporary sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration.

9. Order. An order sealing or unsealing a court record must be filed and open to the public. It must state the applicable standard and burden and give specific reasons for finding and concluding whether that standard has or has not been met by the party with the burden. An order that seals a court record must also reference the specific portions of court records which are to be sealed by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state the time period for which the sealed portions of the court records are to be sealed, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

10. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. If a court has previously ruled on a request to seal or unseal filed documents, the movant who seeks to seal or unseal the filed documents at a later time must show a material and substantial change in circumstances affecting the prior ruling since the time of the prior ruling. Such circumstances need not be related to the case in which the order was issued. If there is a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents under the appropriate standard applying to the documents at issue.

11. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and participated in the hearing preceding issuance of such order it. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

12. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

13. **Sanctions.** Non-compliance with this rule is subject to sanctions pursuant to rule 13 and Chapters 9 or 10 of the Texas Civil Practice and Remedies Code. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed and filing information presumed to meet the standard for sealing, described in Paragraph 3, without an order permitting it.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

Comment: Paragraph 3(a) resolves the conflict between the rule's prohibition on sealing court orders and legal requirements that an order be sealed or that some information within an order be concealed. For example, Chapter 82 of the CPRC gives the plaintiff the option of concealing her identity by using a pseudonym. Though not otherwise required by law, Paragraph 3(a)(5) permitting certain name change orders to be sealed, like Chapter 82, is intended to protect a person from violence.