

ALLEGHENY COUNTY HEALTH DEPARTMENT

RAMESH JAIN AND VIKAS : IN THE MATTER OF: 1310
JAIN, : BEULAH ROAD, BUILDINGS
: # 401 AND # 501, CHURCHILL,
APPELLANT, : PA 15235
: :
v. : :
ALLEGHENY COUNTY : :
HEALTH DEPARTMENT, : :
: :
APPELLEE. : :

PETITION TO INTERVENE AND OPEN PROCEEDINGS

The Pittsburgh Post-Gazette (“The Post-Gazette”), by and through its attorneys, Frederick N. Frank, Esquire, and Frank, Gale, Bails, Murcko & Pocrass, P.C., presents the within Petition to Intervene and Open Proceedings and in support thereof avers as follows:

I. Statement of Material Facts

1. The Post-Gazette is a newspaper of general circulation throughout the Commonwealth and in particular, southwestern Pennsylvania, with its principal offices located at 358 North Shore Drive, Pittsburgh, Allegheny County, Pennsylvania 15212.

2. On August 7, 2017 a hearing was held before the Allegheny County Health Department (the “Department”) regarding the issuance of fines against

Ramesh Jain and Vikas Jain (collectively, the “Jains”), owners of Churchill Community Development LP, and Paradigm Consultants LLC, for violations of the County’s asbestos removal regulations, which were issued via an Enforcement Order dated June 2, 2017.

3. As required by Section 1105(D)(5) of Article XI of the Department Rules and Regulations (“Department Regulations”), “all hearings are to be open to the public.” However, on August 4, 2017, a reporter for The Post-Gazette contacted the Department and was told that the hearing of August 7, 2017 would be closed to the public.

4. Purportedly, because the hearing would address financial information of the Jains for the purposes of determining a bond, the hearing was closed to the public at the Jains’ request.

5. Another hearing on the bond issue is set to occur on August 29, 2017 and The Post-Gazette was informed that this hearing would be closed to the public.

6. The Post-Gazette hereby requests that it be permitted to intervene in the matter in order to assert the public’s right to access and that the hearing of August 29, 2017 should be open to the public and representatives of the press.

II. The Health Department’s Hearing is a Judicial Proceeding

7. The hearing of August 29, 2017 is a judicial proceeding subject to the public’s right of access.

8. In *Harrington v. Tate*, 254 A.2d 622, 625 (Pa. 1969), the Pennsylvania Supreme Court stated that enforcing and interpreting administrative or governmental rules and regulations, which includes hearing evidence, considering issues, and issuing decisions, are judicial in nature and an entity engaging in such activities is akin to a judicial body.

9. Article XI of the Department Regulations authorized the Department to conduct full evidentiary hearings to address issues of material fact raised by an aggrieved party. *See* Department Regulations, Article XI, Section 1105.

10. Specifically, Article XI, Section 1105(D) of the Department Regulations provides the hearing procedures:

1. Any person may be represented at a hearing by counsel. A partnership may be represented by any of its members, a corporation or association by any of its officers, and an authority or agency by an officer, or employee duly authorized in writing to represent the authority or agency.

2. Examination and cross-examination of witnesses shall be permitted by all parties.

3. No document or written material of any kind shall be introduced in evidence until a copy of the document or writing is furnished to every party.

4. The Director may, on his or her own motion, or at the request of any party, subpoena witnesses and any material relevant to the proceedings.

5. All hearings shall be open to the public unless deemed confidential by the Director acting upon his or her own motion or upon

consideration of any party's motion, for good cause shown or when confidentiality is required by law.

6. The Director may provide that all testimony be stenographically recorded, and may keep a full and complete record of the proceedings. In the event the Director does not provide for recording of the testimony, such testimony shall be stenographically recorded at the request of any party agreeing to pay the costs thereof.

7. The person filing the appeal shall bear the burden of proof and the burden of going forward with respect to all issues.

8. In hearings held pursuant to subsection 1105.A. of this Article, the Director shall hear and admit only such testimony and evidence as is relevant to the matters and issues set forth in the Notice of Appeal.

9. The Director may dismiss any Appeal, or part thereof, upon failure of the appellant to appear at any scheduled hearing or to go forward with respect to any issue.

11. Additionally, Article XI, Section 1110 of the Department Rules provides that “[a]ny party who is aggrieved by any decision of the Director rendered pursuant to Section 1106 of this Article, may appeal therefrom to the Court of Common Pleas of Allegheny County [“Court of Common Pleas”] as provided by law.”

12. The Department is vested with broad judicial authority, including the power to conduct hearings in accordance with evidentiary rules and its decisions are subject to appeal to the Court of Common Pleas.

13. As established by *Tate supra*, given authorizations and powers vested with the Department per the Department Regulations and the right of appeal to the Court of Common Pleas, the Department is acting as a quasi-judicial body and hearings

before the Department are judicial proceedings to which the public's right of access applies.

III. Right to Intervene

14. Of significance to this matter is the critical role the press¹ plays in our democracy. In *Mills v. Alabama*, the United States Supreme Court noted: “The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus, the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.” 384 U.S. 214, 219 (1966).

15. The Courts have continuously recognized this important role the press plays in protecting the public interest in public access and “the legitimacy and importance of the interest of the news media in judicial proceedings.” *Capital Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984); *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) (reaffirming that “the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals); and *PG Pub. Co. v. Governor's Office of Admin.*, 120 A.3d 456, 462 (Pa. Cmwlth. 2015), *aff'd*, 135 A.3d 578 (Pa. 2016) (recognizing the “media's unique role

¹ The Courts will use the terms “press” and “media” interchangeably.

and interest in observing government activity in our democracy” and holding that the media had a sufficient direct interest for standing to challenge alleged obstacles to accessing public records).

16. The filing of a motion to intervene by the press in judicial proceedings involving matters of great public concern has long been recognized by the Pennsylvania Supreme Court as an appropriate means of asserting the public’s right of access to the proceedings. *See Toole*, 483 A.2d at 1344 (intervention by news media is in accordance with this Court’s well-established and strongly held views, and is not only adequate, but highly preferable as a means of obtaining review of alleged abridgments of the public’s rights to information and access) (Chief Justice Nix, writing for a unanimous Court); *Commonwealth v. Hayes*, 414 A.2d 318, 336 (Pa. 1980), *cert. denied*, 449 U.S. 992, (1980); and *Hutchison v. Luddy*, 581 A.2d 578, 581 (Pa. Super. 1990), *rev’d on other grounds*, 594 A.2d 307 (1991) (per curiam).

17. Intervention of this type may properly be termed *de bene esse*, i.e., an action that is provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted. *See Commonwealth v. Fenstermaker*, 530 A.2d 414, 416 n.1 (Pa. 1987).

IV. The Right of Access to Judicial Proceedings

18. A strong presumption exists that all court proceedings are open to the public, which is derived from a right to access conferred by the common law; the First Amendment of the United States Constitution; and Article I, Section 11 of the Pennsylvania Constitution. *See R.W. v. Hampe*, 626 A.2d 1218, 1220 n.3 (Pa. Super. 1993).

19. In order to infringe upon the public's right of access, the Pennsylvania Superior Court has provided that:

There are two methods for analyzing requests for closure of judicial proceedings, each of which begins with a presumption of openness—a constitutional analysis and a common law analysis. Under the constitutional approach, which is based on the First Amendment of the United States Constitution and Article I, Section 11 of the Pennsylvania Constitution, the party seeking closure may rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest. Under the common law approach, the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness.

Zdrok v. Zdrok, 829 A.2d 697, 699 (2003) (internal citations omitted).

20. In accordance with the preceding authority, once a party asserts the right of openness guaranteed by the common law, Pennsylvania Constitution and the First Amendment, the burden shifts to any party opposing openness to demonstrate that a

party's "interest in secrecy outweighs the presumption of openness," and that closure serves "an important governmental interest and there is no less restrictive way to serve that interest." *Id.*

21. Furthermore, the party seeking closure cannot rely on general assertions and must demonstrate that closure is "necessary in order to prevent a clearly defined and serious injury." *PA ChildCare LLC v. Flood*, 887 A.2d 309, 312 (Pa. Super. 2005).

A. The Common Law Right to Access

22. In order to justify closure or sealing the judicial record a party must first overcome the common law presumption of openness. *Hampe*, 626 A.2d at 1220. "The existence of a common law right of access to judicial proceedings and inspection of judicial records is beyond dispute." *Id.* In order to rebut this well-established presumption of openness and to obtain a closure of judicial proceedings "the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness." *Zdrok*, 829 A.2d at 699 *citing In re M.B.*, 819 A.2d 59, 62 (2003) (internal citations omitted).

23. In *Hampe, supra*, the Superior Court quotes from the United States Court of Appeals for the Third Circuit's decision in *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) concerning the benefits that openness has on judicial proceedings. *Id.* at 1220-21.

24. "In order to rebut this well established presumption of openness and to

obtain a closure of judicial proceedings a party must demonstrate good cause.” *Id.* at 1221. “Good cause exists where closure ‘is necessary in order to prevent a clearly defined and serious injury to the party seeking it.” *Id.*

25. In the case at hand, it is believed that the press is being barred from the August 29, 2017 hearing solely on the Jains’ bald assertion that the hearing would address confidential financial information.

26. The common law right of access provides that the Jains cannot obtain closure of the proceedings without specific proof of the “clearly defined and serious injury” they would suffer from release of such information. The Jains must articulate specifically how they will incur harm as a result of the alleged involvement of confidential financial information at the August 29, 2017 hearing.

27. Furthermore, the violations issued against the Jains by the Department, which have already been made public, implicates significant issues related to public safety and concern. The Jains also received a significant grant of taxpayer funds to, *inter alia*, remove asbestos from the former George Westinghouse Research and Technology Park as part of a major redevelopment project in the area.

28. The preceding issues demands transparency and heightens the public’s right to access proceedings related thereto by the Department. Given the findings against them by the Department, the Jains’ request for closure is an attempt to shield their actions from the public.

29. As such, the Jains' bald assertion of confidential financial information cannot outweigh the common law presumption of openness.

B. The First Amendment Right to Access

30. Even if the common law presumption is overcome, and a clearly defined and serious injury exists, the movant still must overcome the higher First Amendment burden. *Commonwealth v. Long*, 922 A.2d 892, 897 (Pa. 2007) (“the First Amendment provides a greater right of public access than the common law”); *In re Cendant Corp.*, 260 F.3d 183, 198, n.13 (3d Cir. 2001) (wherein the United States Court of Appeals for the Third Circuit [the “Third Circuit”] noted the “higher showing” which a party seeking closure must establish to rebut the presumption of openness under the First Amendment). Under the First Amendment analysis, the party seeking closure can only overcome the presumption of openness by showing that “denial of public access serves an important governmental interest and there is *no less restrictive way* to serve that government interest.” *Hampe*, 626 A.2d at 1220 n.3 (emphasis added); *See also Flood*, 887 A.2d at 312.

31. It is believed that the only basis for closure of the August 29, 2017 hearing is that it will involve confidential financial information of the Jains. **This basis for closure is a purely private interest and in no way serves an important governmental interest.** Additionally, the Jains must articulate how closure would be the least restrictive way to serve the alleged interest.

32. Given that no important government interest exists justifying closure, the First Amendment presumption of openness cannot be overcome and the August 29, 2017 hearing must be open to the public.

C. The Pennsylvania Constitution

33. The Pennsylvania Constitution further amplifies the First Amendment right of access to judicial proceedings, stating: “All courts shall be open.” Pa. Const. Art. I, §11.

34. This unqualified and unalienable mandate will be violated if the Department, acting in its quasi-judicial capacity, closes the hearing of August 29, 2017.

V. Experience and Logic Test Requires Openness

35. Even if it is the position of the Department that the hearing of August 29, 2017 is not a civil judicial proceeding, the First Amendment right of access still applies, because the hearing meets the experience and logic test for access of the press. *See Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986). In *Capital Cities*, the Third Circuit noted that the experience prong is satisfied when “the place and process has historically been open to the press and general public” and the logic prong is satisfied when “public access plays a significant role in the functioning of the process in question.” *Id.*

36. Both the experience and logic prongs are squarely satisfied by the Department Regulations as Section 1105(D)(5) provides that hearing before the

Department “are to be open to the public.” The Department Regulations further guarantees public access by providing that the “Director may cause notice of any hearing to be published in the Pittsburgh Legal Journal and one newspaper of general circulation.” Department Regulations, Section 1105(C).

37. Further as to the experience prong, Article XI of the Department Regulations went into effect in 1958, which is over fifty nine years ago. The Department has been functioning under the mandate of public hearings and public notice throughout that time.

38. In a similar case, the Third Circuit found that the experience and logic test was satisfied and extended a First Amendment right of access to a municipal planning meeting when the 1986 enactment of the Sunshine Act required that meeting to be public. The Department Regulations provisions for public access are the functional equivalents of the Sunshine Act. *See Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999).

VI. The Constitutional Right to Gather News

39. The backdrop to all of the rights asserted, including any experience and logic application, must be the basic First Amendment right of the press to gather and report news. The actions of the Department in barring The Post-Gazette from the hearing of August 29, 2017 would directly violate these rights.

40. In *Mills v. Alabama*, 384 U.S. 214, 218 (1966), the United States Supreme Court noted: “The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”

VII. The Sunshine Act

41. As discussed *supra*, The Post-Gazette maintains that the August 29, 2017 hearing is a quasi-judicial hearing. In the alternative, if it is an executive body governed by the Sunshine Act, then the actions in barring the public violated both the procedures and requirements of the Sunshine Act, Act of October 15, 1998, P. L. 729, No. 93, 65 Pa. C. S. § 701 *et seq.*

42. In *Trib Total Media, Inc. v. Highlands Sch. Dist.*, the Commonwealth Court explained:

The current version of the Sunshine Act was enacted in 1998. Section 702 of the Sunshine Act, 65 Pa.C.S. § 702, declares that it is the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in the statute. To that end, section 704 of the Sunshine Act, 65 Pa.C.S. § 704, provides that all official agency action and all deliberations by an agency shall take place at a meeting open to the public unless the agency is in closed executive session or another exception to the Act applies.

3 A.3d 695, 699 (Pa. Commw. Ct. 2010).

43. The closing of the August 29, 2017 hearing would be the functional equivalent of an executive session under the Sunshine Act. There are extremely limited bases under which an executive session can be held. *See* 65 Pa.C.S.A. §708(a). The discussion in a public hearing of alleged “proprietary” information does not even begin to attach to any of those limited bases. Further, before holding an executive session, the presiding officer must announce the reason for holding the executive session, referencing one of the limited bases for doing so. *See* 65 Pa.C.S.A § 708(b).

VIII. Conclusion and Statement of Relief Sought

44. As demonstrated above, the basis for closure in the instant action does not overcome the common law presumption of openness, let alone the higher burden under the First Amendment.

45. Accordingly, The Post-Gazette requests that it be permitted to intervene to assert the public’s right of access and that the presumption of openness cannot be overcome such that the hearing of August 29, 2017 should be open to the public.

[continued on the following page]

WHEREFORE, the Post-Gazette asks that this Court grant its Petition to Intervene and Open Proceedings.

Respectfully, submitted:

FRANK, GALE, BAILS, MURCKO,
& POCRASS, P.C.

Date: Aug 25, 2017

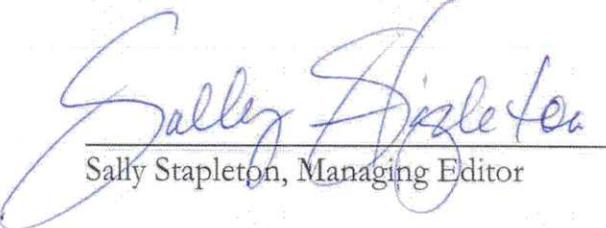
By: 
Frederick N. Frank, Esquire
Attorney for The Pittsburgh Post-Gazette

VERIFICATION

I, SALLY STAPLETON, Managing Editor of The Pittsburgh Post-Gazette, am authorized to make this verification on behalf of The Pittsburgh Post-Gazette, and do make the following statement subject to penalties of 18 Pa.C.S. 4904, relating to unsworn falsifications to authority, and do state that as Managing Editor, the facts set forth in the foregoing Petition to Intervene and Open Proceedings are true and correct to the best of my knowledge, information and belief.

Date: _____

8/25/2017



Sally Stapleton, Managing Editor

ALLEGHENY COUNTY HEALTH DEPARTMENT

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HEALTH DEPARTMENT,	:	
	:	
APPELLEE.	:	

CERTIFICATE OF SERVICE

I, Frederick N. Frank, Esquire, hereby certify that a true and correct copy of the foregoing Petition to Intervene and Open Proceedings was served upon the following in the manner indicated below, on the 25th day of August, 2017:

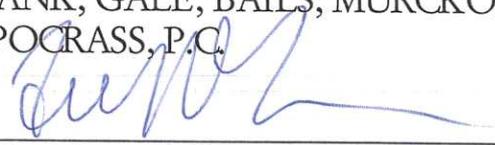
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Respectfully, submitted:

FRANK, GALE, BAILS, MURCKO,
& POGRASS, P.C.

Date: 8/25/17

By: 
Frederick N. Frank, Esquire
Attorney for The Pittsburgh Post-Gazette

ALLEGHENY COUNTY HEALTH DEPARTMENT

RAMESH JAIN AND VIKAS JAIN, APPELLANT, v. ALLEGHENY COUNTY HEALTH DEPARTMENT, APPELLEE. IN THE MATTER OF: 1310 BEULAH ROAD, BUILDINGS # 401 AND # 501, CHURCHILL, PA 15235

ORDER

NOW, this ____ day of _____, 2017, upon consideration of Motion to Open Judicial Proceedings and Petition to Intervene filed by The Pittsburgh Post-Gazette, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The Pittsburgh Post-Gazette is permitted to intervene in this matter for the purposes of asserting the public’s right of access to the hearing of August 29, 2017.
2. The hearing of August 29, 2017 shall be open to the public.

BY THE DEPARTMENT:
