

**DO YOU KNOW WHO HAS ACCESS TO YOUR CLIENT'S DIVORCE RECORDS?
PROTECTING YOUR CLIENT'S PERSONAL INFORMATION IN THE
INFORMATION AGE**

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Most of us use the Internet proactively to represent our clients. It is a useful and wide-reaching tool in conducting discovery, preparing for examination, and getting background information on a variety of subjects. But it is not often that we think that others might be doing the same thing—including those with less than honorable intentions. Access to divorce, custody and support records is growing as more and more counties are imaging public records and making them available online. The Internet provides people around the world broad access to online records for years to come, even after we are enjoying blissful retirement! Creditors, potential employers, identity thieves and even nosy neighbors are just a few of the many who may be able to access this information with just a few clicks of the mouse. Individuals who might not have spent the time or money to travel to the county where your case is located during court business hours in order to look through the file and personal or sensitive client information might, however, spend the relatively small amount of time and money it will take to access and search through these records online. The new and broader Right to Know Law, which takes effect on January 1, 2009, creates a presumption that records in the possession of the court are public, and the burden is on the agency to show that the records are exempt under the specified exceptions stated in the law. This article is an overview of the current accessibility of divorce, custody and support files, including walk-in access and online access, and offers some practical tips as to how to protect your client's personal financial and other sensitive information from unwanted access and disclosure in an environment where free and immediate access to information is favored.

Our research revealed some startling statistics in Pennsylvania: (1) of the 67 counties in Pennsylvania, all but three allow walk-in access to divorce and custody records; (2) ten counties allow walk-in access of all family records including support (DR); and (3) nine counties presently allow online access to divorce and custody records. The trend toward allowing unfettered access to family law records is growing as the stigma of divorce lessens and the public's demand for online access to information grows. For a nominal fee, any individual or firm can subscribe to a public records access system, and obtain copies of any papers that have been made part of the public record. Such papers in a divorce case typically include tax returns, bank statements, and appraisals. These documents contain sensitive financial information, including Social Security numbers, bank, retirement and credit card account information that, while certainly important in resolving the issues at hand, is arguably irrelevant to the public at large, especially when it can be used to the detriment of your client if it falls into the wrong hands. This concern about unwanted and unnecessary disclosure extends to sensitive personal information such as psychological or vocational evaluations, allegations of marital misconduct, bad parenting or abuse. We have all been involved in cases where such pleadings have been filed and ultimately forgotten or forgiven (except for broad mutual releases and waivers) in the final resolution.

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Following is a summary of the results of a survey of the Pennsylvania courts and their record access policies:

County	Walk in Access	On Line Access	Subscription
Adams	Yes	No	N/A
Allegheny	Yes	Yes	N/A
Armstrong	Yes	No	N/A
Beaver	Yes	No	N/A
Bedford	Yes	Yes	Yes
Berks	Yes	Yes, docket only	Yes
Blair	Yes, including DR	No	N/A
Bradford	Yes, including DR	No	N/A
Bucks	No	No	N/A
Butler	Yes	Yes	Yes
Cambria	Yes	No	N/A
Cameron	Yes	No	N/A
Carbon	Yes	No	N/A
Centre	Yes, including DR records	No	N/A
Chester	Yes	Yes, docket only	Yes
Clarion	Yes	Yes, docket only	Yes
Clearfield	No – all sealed	No	N/A
Clinton	Yes	Yes	Yes
Columbia	Yes	No	N/A
Crawford	Yes	No	N/A
Cumberland	Yes	Yes, docket only	Yes
Dauphin	Yes	No	N/A
Delaware	Yes	No	N/A
Elk	Yes	No	N/A
Erie	Yes	Yes	Yes
Fayette	Yes	No	N/A
Forest	Yes	No	N/A
Franklin	Yes	No	N/A
Fulton	Yes	No	N/A
Greene	Yes	No	N/A
Huntingdon	Yes	Yes, docket only	No
Indiana	Yes	Yes	Yes
Jefferson	Yes	Yes, docket only	Yes
Juniata	Yes	No	N/A
Lackawanna	Yes	No	N/A
Lancaster	Yes	Yes, docket only	No
Lawrence	Yes	Yes	Yes
Lebanon	Yes	No	N/A
Lehigh	Yes	No	N/A
Luzerne	Yes	No	N/a
Lycoming	Yes, including DR	No	N/A

McKean	Yes, including DR	No	N/A
Mercer	Yes	Yes, docket only	Yes
Mifflin	Yes	No	N/A
Monroe	Yes	Yes	Yes
Montgomery	Yes, not divorce actions	Yes, docket only	No
Montour	Yes	Yes, docket only	Yes
Northampton	Yes	No	N/A
Northumberland	Yes	No	N/A
Perry	Yes	No	N/A
Philadelphia	No	Yes, docket only	No
Pike	Yes, including DR	Yes	Yes
Potter	Yes	Yes	Yes
Schuylkill	Yes	Yes, docket only	No
Snyder-Union	Yes	No	N/A
Somerset	Yes (not after Decree issued)	Yes, docket only	No
Sullivan	Yes, including DR	No	N/A
Susquehanna	Yes, including DR	Yes, docket only	Yes
Tioga	Yes	No	N/A
Union	Yes	No	N/A
Venango	Yes	No	N/A
Warren	Yes	No	N/A
Washington	Yes	Yes, docket only	Yes
Wayne	Yes, including DR	No	N/A
Westmoreland	Yes	Yes	Yes
Wyoming	Yes, including DR	No	N/A
York	Yes	Yes, docket only	Yes

Of course, there is a well-recognized right of public access to judicial records based on the First Amendment to the United States Constitution, the common-law right to access doctrine, and the Pennsylvania Right to Know Act. *Karczakowski v. Hwan*, 68 Pa. D & C 4th 129, 132 (2004). The right of access to judicial records in civil cases promotes public confidence in the judicial system and accountability of that system. *Id.* If a document is filed with the court or is incorporated into a court's adjudicatory process, it is deemed to be a judicial record and is subject to disclosure under the common law right of access. *Id.* However, as emphasized by the Pennsylvania Superior Court in the seminal case of *Katz v. Katz*, 514 A.2d 1374 (Pa. Super. 1986), *appeal denied*, 515 Pa. 581, 527 A.2d 542 (1987), this right of access is not absolute. Instead, there is a presumption in favor of openness, and a party seeking closure of a civil trial has the burden of showing good cause for closing the proceedings. *Id.* The *Katz* Court reasoned that because divorce hearings are essentially private in nature and the details of such proceedings may not serve any useful public purpose, such hearings may be closed to protect the rights of the parties. The trial court has the discretion to close the hearings where such "disclosure will work a clearly defined and serious injury to the party seeking closure." *Katz, supra*, 514 A.2d at 1380, citing *Publicker Industries, Inc. v. Cohen*, 733 F. 2d 1059 (3d Cir. 1984). However, this burden is high and the mere assertion that details of a case may be humiliating to one of the parties is not

usually enough to warrant closure. See *Zdrok v. Zdrok*, 829 A.2d 697 (Pa. Super. 2003) and *Karczakowski v. Hwan, supra* (closure denied); but see *Bryan v. Bryan*, 16 Pa. D.&C. 4th 503 (1992) (closure allowed).

In the twenty two years since *Katz* was decided, the burden has been placed squarely on the litigants to show that their personal interest in keeping their divorce, custody and support matters private outweighs the strong public policy in favor of keeping these proceedings open in order to promote confidence in the judicial system. Consequently, pleadings, exhibits and other papers filed in those cases are part of the judicial record, also open to the public. The public policy in favor of openness was recently reinforced with the Pennsylvania Legislature's passage of a broader Right-to-Know Law, signed by Governor Rendell on February 14, 2008. 2008 Pa. ALS, 2008 Pa. Laws 3, 2007 SB 1. This law was intended to improve the public's access to government records including judicial records and is mostly effective January 1, 2009. Under this law, a record in the possession of a Commonwealth agency or a local agency is presumed to be a public record, unless it is exempt as defined by the law or protected by a privilege. The law places the burden of proof on the agency seeking to deny public access of the document. Public records include information which is created, received or retained by an agency, except those records protected by privilege and those protected from disclosure by court order or by certain specified exemptions defined in the law. Information in the divorce, custody or support context exempt from disclosure include records which would: result in a substantial and demonstrable risk of physical harm to or the personal security of an individual; endanger the public safety; disclose an individual's medical, psychiatric or psychological history or disability status; reveal an individual's personal identification information, including a person's Social Security number, driver's license number; personal financial information, home, cellular or personal telephone numbers, email addresses, employee number or other confidential personal identification number, spouse's name, marital status and beneficiary or dependent information; a record that constitutes or reveals a trade secret or confidential proprietary information; personal email addresses; eligibility for social services; home address or date of birth of a child 17 years of age or younger; and DNA or RNA records. Act 3 of 2008, Section 708.

These exemptions are helpful in protecting personal information which serves no useful public purpose. However, it remains to be seen how the exemptions will be implemented by the courts to protect information that need not be disclosed to the public including the efforts of the court to make more records available to the public online. Moreover, the exemptions do not automatically protect papers which become part of the official record in a court proceeding. It is up to the agency to whom the request is made to determine which exemptions to disclosure may apply and, in the case of protected information which is an "integral part of the public record" and cannot be separated, the agency must redact the portion of the record to which the public does not have access. Act of 2008, Section 706. In other words, you may not have any control over what is ultimately disseminated in your case to the public at large. As a result, it is more important now than it was ever before to take precautions to avoid such unwanted disclosures in your custody, divorce and support cases to protect the interests of your clients.

Some precautionary measures that you can take include the following:

1. Do not file documents such as tax returns, bank records, retirement account statements etc. unless they are needed for the court's adjudication of the issues, and only do so after redacting such documents (with an appropriate notation on the document) to omit sensitive personal or identifying financial information such as Social Security numbers, bank account numbers, retirement account numbers, and credit card account numbers.
2. Do not file documents such as psychological reports or medical reports except after marking them clearly as exempt from disclosure under the Right-to-Know Law.
3. Do not file the property settlement agreement except as may be necessary to enforce or modify its provisions at the appropriate time, or if you decide to incorporate the agreement as part of the divorce decree, limit or omit reference to identifying personal financial information in the final agreement as filed.
4. Refer to account numbers in pre-trial, settlement statements, briefs and agreements with Xs in place of numbers, except for the last three or four digits, so that the parties and the master or judge may identify the account.
5. Do not include Social Security numbers in captions or other pleadings filed with the Court, including Qualified Domestic Relations Orders. For an order to "qualify," the plan must have the SSN for both the participant and alternate payee. However, you may be able to submit the SSN "outside the order" by prior arrangement with the plan administrator. For example, the bank or investment company may provide a separate form, not to be filed with the order, but not to be transmitted to the plan with the certified court order on which the SSNs are omitted.
6. Seek an agreement with opposing counsel that before filing sensitive personal and financial information, the parties will jointly file a request to place the record under seal. This is the least reliable method since the closing of the record is discretionary with the court, and public disclosure is favored. However, with an agreement in place, the request will have greater weight.

It is ironic that, in family law practice where full and complete financial disclosure is demanded, and essentially everything that happens in our clients' personal lives may be relevant to their property, support and custody claims, effective advocacy requires our filing papers which may later be harmful to them. It is important to remember that such information can be easily accessed by individuals and entities with no valid interest in the case, and discretion should be taken to ensure that a client's sensitive personal and financial information is adequately protected. By taking these precautionary steps, we will help our clients to avoid unnecessary embarrassment and exploitation at some point in the future.