GENERAL RULE 15 As Of 07052013

Draft Amendment

DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

(a) Purpose and Scope of the Rule. This rule sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

(b) Definitions.

(1) "Court file" means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

(2) "Court record" is defined in GR 31(c)(4).

(3) "Destroy"~~. To destroy~~ means to obliterate a court record or file in such a way as to make it permanently irretrievable. A motion or order to expunge shall be treated as a motion or order to destroy.

(4) ~~Dismissal.~~ "Dismissal" means dismissal of an adult criminal charge or juvenile offense by a court for any reason, other than a dismissal pursuant to RCW 9.95.240, ~~or~~ RCW 10.05.120, RCW 3.50.320, or RCW 3.66.067.

(5) ~~(4)~~ ~~Seal. To s~~"Seal" means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, or erase, or redact shall be treated as a motion or order to seal.

(6) ~~(5)~~ ~~Redact. To r~~"Redact" means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.

(7) ~~(6)~~ "Restricted Personal Identifiers" are defined in GR 22(b)(6).

~~(8) (7) Strike. A motion or order to strike is not a motion or order to seal or destroy.~~

Comment [SUH1]: Definition not used in rule.

~~(9)~~ (8)~~Vacate. To v~~"Vacate" means to nullify or cancel.

(c) Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal

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case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

(2) ~~After~~ At the hearing, the court ~~may order the court files an~~ a~~nd records in the proceeding, or any part thereof, to be~~ sealed or redacted if the court makes and enters written ~~findings that the specific sealing or redaction is justified~~ b~~y identified compelling privacy or safety~~ concerns~~ that outweigh the public interest in access to the court record.Agreement of the parties alone does not constitute a~~ s~~ufficient basis for the sealing or redaction of court~~ r~~ecords. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:~~ shall consider the applicable factors and enter specific findings on the record to justify any sealing or redaction.

(A) For any court record that has become part of the court's decision-making process, the court must consider the following factors:

(i) Has the proponent of sealing or redaction established a compelling interest that gives rise to sealing or redaction, and if it is based upon an interest or right other than an accused's right to a fair trial, a serious and imminent threat to that interest or right; and

(ii) Has anyone present at the hearing objected to the relief requested; and

(iii) What is the least restrictive means available for curtailing open public access to the record; and

(iv) Whether the competing privacy interest of the proponent seeking sealing or redaction outweighs the public's interest in the open administration of justice; and

(v) Will the sealing or redaction be no broader in its application or duration than necessary to serve its purpose.

COMMENT

The applicable factors the court shall consider in a Motion to Seal or Redact incorporate current Washington caselaw including:

Federated Publications v. Kurtz, 94 Wn.2d 254 (1980)
Seattle Times v. Ishikawa, 97 Wn.2d 30 (1982)
Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205 (1993)

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State v. Boneclub, 128 Wn.2d 254 (1995)
Rufer v. Abbot Laboratories, 154 Wn.2d 530 (2005)
Dreiling v. Jain, 151 Wn.2d 900 (2004)
State v. Waldon, 148 Wn. App. 952 (2009)
State v. Coleman, 151 Wn. App. 614, at FN 13 (2009)
Tacoma News v. Cayce, 172 Wn.2d 58 (2011)

(B) For any court record that was not a part of the court's decision-making process, the court must consider the following:

(i) Has the proponent of the sealing or redaction established good cause; and

(ii) Has any nonparty with an interest in nondisclosure been provided notice and an opportunity to be heard.

COMMENT

In Bennett et al v. Smith Bunday Berman Britton, PS, 176 Wn.2d. 303 (2013), the State Supreme Court held that documents obtained through discovery that are filed with a court in support of a motion that is never decided are not part of the administration of justice and therefore may be sealed under a good cause standard.

(3) Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records.

(4) Sufficient privacy or safety concerns that may be weighed on a case by case basis against the public interest in the open administration of justice include findings that:

(A) The sealing or redaction is permitted by statute; or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A criminal conviction or an adjudication or deferred disposition for a juvenile offense has been vacated; or

(D) A criminal charge or juvenile offense has been dismissed, and:

(i) The charge has not been dismissed due to an acquittal by reason of insanity or incompetency to stand trial; or

(ii) A guilty finding does not exist on another count arising from the same incident or within the same cause of action; or

(iii) Restitution has not been ordered paid on the charge in another cause number as part of a plea agreement.

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(E) A defendant or juvenile respondent has been acquitted, other than an acquittal by reason of insanity or due to incompetency to stand trial; or

(F) A pardon has been granted to a defendant or juvenile respondent; ~~by the Governor. pursuant to law~~; or

(G)~~(D)~~The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(H) The sealing or redaction is of a court record of a preliminary appearance, pursuant to CrR 3.2.1, CrRLJ 3.2.1, or JUCR 7.3 or a probable cause hearing, where charges were not filed; or

(I)~~(E)~~The redaction includes only restricted personal identifiers contained in the court record; or

(J)~~(F)~~Another identified compelling circumstance exists that requires the sealing or redaction.

COMMENT

Additional privacy or safety concerns that may be weighed against the public interest are included based upon the deliberations at the Joint Legislative Court Records Privacy Workgroup in 2012. In Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205 (1993), the court held that the presumptive right of public access to the courts ***is not absolute and may be outweighed by some competing interest as determined by the trial court on a case by case by basis, according to the Ishikawa guidelines.***

(5) Every order sealing or redacting material in the court file, except for sealed juvenile offenses, shall specify a time period, after which, the order shall expire. The proponent of sealing or redaction has the burden of coming back before the court and justifying any continued sealing or redaction beyond the initial specified time period. Any request for public access to a sealed or redacted court record received by the custodian of the record after the expiration of the Order to Seal or Redact shall be granted as if the record were not sealed, without further notice. Thereafter, the record will remain unsealed. The Court, in its discretion, may order a court record sealed indefinitely if the court finds that the circumstances and reasons for the sealing will not change over time.

COMMENT

Requiring a time period, after which the order sealing or redacting expires, implements the factor that the order must be no broader in its duration than necessary to serve its purpose. The critical distinction between the adult criminal system and the juvenile offender system lies in the policy of the 1977 Juvenile Justice Act's policy of responding to the needs of juvenile offenders. ~~Our Supreme Court has found s~~Such a policy has been found to be ***rehabilitative*** *in nature, whereas the criminal system is punitive. State v. Rice, 98 Wn.2d 384 (1982); State v. Schaaf, 109 Wn.2d 1,4; Monroe v. Soliz, 132 Wn.2d 414, 420 (1997); State v. Bennett, 92 Wn. App. 637 (1998). Legacy JIS systems do not have the functionality to automatically unseal or unredact a court record upon the expiration of an Order to Seal or Redact.*

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(6) The name of a party to a case may not be redacted, or otherwise changed or hidden, from an index maintained by the Judicial Information System or by a court. The existence of a court file containing a redacted court record is available for viewing by the public on court indices, unless protected by statute.

COMMENT

~~In Hundtofte v. Encarnacion, 169 Wn. App. 498 (2012), review granted 176 Wn.2d 1019 (2013), the Court of Appeals reversed a trial court order redacting the name of a party from the court index. Redacting a name from the index would effectively mask the existence of a case from the public.~~ Existence of a case can no longer be determined for the purpose of public access and viewing, if the case cannot be found by an index search. Redacting the name of a party in the index would prevent the public from moving for access to a redacted record under section (f). The policy set forth in this section is consistent with existing policy when the entire file is ordered sealed, as reflected in section (c) (9).

(7)~~(4)~~No court record shall be sealed under this rule when redaction will adequately protect the interests of the proponent.

(8) Motions to Seal/Redact when Submitted Contemporaneously with Document Proposed to be Sealed or Redacted – Not to be Filed.

(A) The document sought to be sealed or redacted shall not be filed prior to a court decision on the motion. The moving party shall provide the following documents directly to the court that is hearing the motion to seal or redact:

(i) The original unredacted document(s) the party seeks to file under seal shall be delivered in a sealed envelope for in camera review.

(ii) A proposed redacted copy of the subject document(s), if applicable.

(iii) A proposed order granting the motion to seal or redact, with specific proposed written findings and conclusions that establish the basis for the sealing and redacting and are consistent with the five factors set forth in subsection (2)(a).

(B) If the court denies, in whole or in part, the motion to seal, the court will return the original unredacted document(s) and the proposed redacted document(s) to the submitting party and will file the order denying the motion. At this point, the proponent may choose to file or not to file the original unredacted document.

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(C) If the court grants the motion to seal, the court shall file the sealed document(s) contemporaneously with a separate order and findings and conclusions granting the motion. If the court grants the motion by allowing redaction, the judge shall write the words "SEALED PER COURT ORDER DATED [insert date]" in the caption of the unredacted document before filing.

COMMENT

The procedure established by State v. McEnroe, 174 Wn.2d 795 (2012) for withdrawal of documents filed contemporaneously with a Motion to Seal or Redact is incorporated in the rule.

(9)~~(4)~~Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. Except for sealed juvenile offenses, the existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, the charge has been dismissed, the defendant has been acquitted, the governor has granted a pardon, or the order is to seal a court record of a preliminary appearance or probable cause hearing; then section (d)shall apply. Except for sealed juvenile offenses, the order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

(10)~~(5)~~Sealing of Specified Court Records. When the clerk receives a court order to seal specified court records the clerk shall:

(A) On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records; and

(B) Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in a microfilm, microfiche or other storage medium form other than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

(C) File the order to seal and the written findings supporting the order to seal. Except for sealed juvenile offenses, both shall be accessible to the public; and

Comment [SUH2]: DDC requested further review and discussion regarding (9) and asked for comments from interested parties.

Comment [SUH3]: Possible comment added after subsection discussing financial restraints/computer system upgrades.

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(D) Before a court file is made available for examination, the clerk shall prevent access to the sealed court records.

(11)~~(6)~~Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

(d) Procedures for Vacated Criminal Convictions, Dismissals and Acquittals, Pardons and Preliminary Appearance Records.

(1) In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type ~~with the notification "DV" if the case involved domestic violence~~, the ~~adult's~~ defendant's ~~or juvenile's~~ name, and the notation "vacated."

(2) In cases where a defendant has been acquitted, a charge has been dismissed, ~~the governor has granted a pardona~~ pardon has been granted, or the subject of a motion to seal or redact is a court record of a preliminary appearance, pursuant to CrR 3.2.1 or CrRLJ 3.2.1, or a probable cause hearing, where charges were not filed, and an order to seal entered, the information in the public indices shall be limited to the case number, case type ~~with the notification "DV" if the case involved domestic violence~~, the ~~adult's~~ defendant's ~~or juvenile's~~ name, and the notation "non conviction."

(e) Procedures for Sealed Juvenile Offender Adjudications, Deferred Dispositions, and Diversion Referral Cases. In cases where an adjudication for a juvenile offense, a juvenile diversion referral, or a juvenile deferred disposition has been sealed pursuant to the provisions of RCW 13.50.050 (11) and (12), the existence of the sealed juvenile offender case shall not be accessible to the public.

COMMENT

RCW 13.40.130 sets forth procedures for the adjudication and disposition of juvenile offenses. Juvenile offenses which may be referred to diversion are described in RCW 13.40.070. RCW 13.50.050 (11) provides that when an information has been filed or a complaint has been filed with the prosecutor and referred for diversion, "the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and findings, if any, and subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and any other agency in the case." RCW 13.40.127 prescribes the eligibility requirements and procedure for entry of a deferred disposition in juvenile offender cases, and the process for subsequent dismissal, and vacation of juvenile conviction. This provision provides for sealing of vacated deferred dispositions pursuant to RCW 13.50.050 and subsection (10) (a) (ii) provides for administrative sealing of vacated deferred disposition in certain circumstances. RCW 13.50.050 (14) (a) provides that:

Comment [SUH4]: DDC requested further review of the Comment.

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"Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual."

This remedial statutory provision is a clear expression of legislative intent that the existence of juvenile offender records which have been vacated pursuant to the provisions of RCW 13.50.050 (11) and (12) and ordered sealed by the court not be made available to the public. Records sealed pursuant to RCW 13.40.127 have the same legal status as records sealed under RCW 13.50.050. RCW 13.40.127 (10) (c). The statutory language of 13.50.050 (14) (a), included above, is distinguishable from statutory provisions governing vacation of adult criminal convictions found in RCW 9.94A.640, RCW 9.95.240, and RCW 9.96.060.

~~(e)~~(f) Grounds and Procedure for Requesting the Unsealing of Sealed Court Records or the Unredaction of Redacted Court Records.

(1) Order Required. Sealed or redacted court records may be examined by the public only after the court records have been ordered unsealed or unredacted pursuant to this section ~~or~~, after entry of a court order allowing access to a sealed court record or redacted portion of a court record, or after an order to seal or redact the record has expired. Compelling circumstances for unsealing or unredaction exist when the proponent of the continued sealing or redaction fails to overcome the presumption of openness under the factors in section (c)(2). The court shall enter specific findings on the record supporting its decision.

(2) Criminal Cases. A sealed or redacted portion of a court record in a criminal case shall be ordered unsealed or unredacted only upon proof of compelling circumstances, unless otherwise provided by statute, and only upon motion and written notice to the persons entitled to notice under subsection (c)(1) of this rule except:

(A) If a new criminal charge is filed and the existence of the conviction contained in a sealed record is an element of the new offense, or would constitute a statutory sentencing enhancement, or provide the basis for an exceptional sentence, upon application of the prosecuting attorney the court shall nullify the sealing order in the prior sealed case(s).

(B) If a petition is filed alleging that a person is a sexually violent predator, upon application of the prosecuting attorney the court shall nullify the sealing order as to all prior criminal records of that individual.

(C) If the time period specified in the Order to Seal or Redact has expired, the sealed or redacted court records shall be unsealed or unredacted without further order of the court~~, unless the proponent of sealing or redacting has noted a motion for continued sealing for hearing,~~ in accordance with this rule.

Comment [SUH5]: DDC requested further review as it relates to the *Bennett* case.

Comment [SUH6]: DDC requested further time to review this subsection.

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~~Compelling circumstances for unsealing exist when the proponent of continued sealing fails to overcome the presumption of openness under the factors in section (c)(2).~~

(3) Civil Cases. A sealed or redacted portion of a court record in a civil case shall be ordered unsealed or unredacted only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing or redaction no longer exist, or pursuant to ~~RCW~~ chapter 4.24 RCW or CR 26(j). ~~Compelling circumstances for unsealing exist when the proponent of continued sealing fails to overcome the presumption of openness under the factors in section (c)(2).~~ If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful.

COMMENT

In State v. Richardson, Wn. 2d (2013)~~.~~ ~~T~~there was a motion in the trial court to unseal. The State Supreme Court remanded to the trial court for further proceedings a 1993 criminal conviction, which was vacated and later sealed in 2002 was remanded to the trial court for further proceedings. There was no record of the trial court considering the Ishikawa factors. A previous version of GR 15 was in effect in 2002. The Supreme Court found that "compelling circumstances" for unsealing exist under GR 15 (e) when the proponent of sealing fails to overcome the presumption of openness under the five factor Ishikawa analysis. In either case, the trial court must apply the factors.

(4) Juvenile Proceedings. Inspection of a sealed juvenile court record is permitted only by order of the court upon motion made by the person who is the subject of the record, except as otherwise provided in RCW 13.50.010(8) and 13.50.050(23). Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order, pursuant to RCW 13.50.050(16). Unredaction of the redacted portion of a juvenile court record shall be ordered only upon the same basis set forth in section (2), above.

~~(f)~~**(g) Maintenance of Sealed Court Records.** Sealed court records are subject to the provisions of RCW 36.23.065 and can be maintained in mediums other than paper.

~~(g)~~**(h) Use of Sealed Records on Appeal.** A court record, or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Court records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court.

~~(h)~~**(i) Destruction of Court Records.**

(1) The court shall not order the destruction of any court record unless expressly permitted by statute. The court shall enter written findings that cite the statutory authority for the destruction of the court record.

(2) In a civil case, the court or any party may request a hearing to destroy court records only if there is express statutory authority permitting the destruction of the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to destroy the court records only if there is express statutory authority permitting the destruction of the court records. Reasonable notice of the hearing to destroy must be given to all parties in the case. In a criminal case, reasonable notice of the hearing must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile.

(3) When the clerk receives a court order to destroy the entire court file the clerk shall:

(A) Remove all references to the court records from any applicable information systems maintained for or by the clerk except for accounting records, the order to destroy, and the written findings. The order to destroy and the supporting written findings shall be filed and available for viewing by the public.

(B) The accounting records shall be sealed.

(4) When the clerk receives a court order to destroy specified court records the clerk shall:

(A) On the automated docket, destroy any docket code information except any document or sub-document number previously assigned to the court record destroyed, and enter "Order Destroyed" for the docket entry; and

(B) Destroy the appropriate court records, substituting, when applicable, a printed or other reference to the order to destroy, including the date, location, and document number of the order to destroy; and

(C) File the order to destroy and the written findings supporting the order to destroy. Both the order and the findings shall be publicly accessible.

(5) Destr~~uction~~oying ~~of~~ Records.

(A) This subsection shall not prevent the routine destruction of court records pursuant to applicable preservation and retention schedules.

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(B) Trial Exhibits. Notwithstanding any other provision of this rule, trial exhibits may be destroyed or returned to the parties if all parties so stipulate in writing ~~and~~ or the court so orders.

(j) Effect on Other Statutes. Nothing in this rule is intended to restrict or to expand the authority of clerks under existing statutes, nor is anything in this rule intended to restrict or expand the authority of any public auditor in the exercise of duties conferred by statute.

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