

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPEREME JUDICIAL COURT
SINGLE JUSTICE SESSION

ROCHESTER POLICE DEPARTMENT

vs.

KEITH HOVAN

**OPPOSITION TO M.G.L. 211 §3
PETITION**

Now comes the Defendant, Keith Hovan, in the above-titled matter to request this Honorable Court to deny the request for a stay a Clerk Magistrate's Hearing pursuant to M.G.L. 218 §35A. and to deny a request to allow public access to the hearing. The Petitioner now seeks the extraordinary relief from a single justice after a clerk-magistrate's decision to deny public access to a Clerk Magistrate's Hearing pursuant to M.G.L. 218 §35A. *Eagle Tribune v. Clerk Magistrate* Lawrence Division of District Court, 448 Mass. 647 (2007).

Show Cause Hearing Pursuant to M.G.L. 218 §35A

Pursuant to M.G.L. c. 211, § 3, the Massachusetts Supreme Judicial Court has “general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided.” The court views its powers as “extraordinary,” *Schipani v. Commonwealth*, 382 Mass. 685, 685 (1980), and it exercises them “sparingly,” *Soja v. T.P. Sampson Co.*, 373 Mass. 630, 631 (1977); *Rosenberg v. Commonwealth*, 372 Mass. 59, 61 (1977). To make a successful request that the court invoke its extraordinary powers, a litigant must demonstrate a substantial claim of a violation to a substantive right and irremediable error, such that he or she cannot be placed in the status quo

through the normal appellate course. *Schipani v. Commonwealth*, 382 Mass. at 685; *Morrisette v. Commonwealth*, 380 Mass. 197, 198 (1980). The Petitioner has failed to demonstrate a substantial claim in violation of a substantive right and irremediable error.

The Petitioner is a third-party online news outlet who seeks access to a Clerk Magistrate's Hearing pursuant to M.G.L. 218 §35A. The Petitioner has failed to accompany this petition with the written decision of the Clerk Magistrate.¹ Further, the Petitioner seeks this request without citing any violation of any constitutional law (First Amendment Violation), and without any verification of the allegations (Standing Rule §2.06 SJC Single Practice); and failed to establish a special public significance and a legitimate public interest which outweighs the right to privacy. *Eagle Tribune v Clerk Magistrate Lawrence Division of District Court*, 448 Mass. 647 (2007). Rather, they have attached news articles written by themselves and a precipitately released investigatory report²; and other news organizations who have essentially republished or referred to their articles.³ Finally, they rely upon a Change.org petition written and published by a former disgruntled employee of Mr. Hovan.⁴

¹ The Petitioner does quote at least some portion of the decision “The issue involved in the show cause hearing has no connection to his position as CEO of Southcoast Health nor to the reason he was charged with assault and battery. The issue is a separate personal matter,” Wareham Clerk Magistrate Daryl G. Manchester wrote in an email on Jan. 4. “Therefore, I find that Mr. Hovan is entitled to the privacy of the show [cause] hearing process and that the interest of the public does not outweigh that right to privacy.”

² It is unknown how such investigatory reports were provided to the Petitioner before provided to the court or Counsel. Pending or denied applications for criminal complaints are presumptively sealed unless the clerk magistrate or a judge concludes that the legitimate interest of the public outweighs the privacy interest of the accused. District Court Standards of Judicial Practice, The Complaint Procedure §§ 3.15 and 3:16 (1975), cited in Administrative Office of the District Court, A Guide to Public Access to District Court Records 16 (1998)

³ At least one of the articles written was written and published online after the clerk made his decision.

⁴ This “on-line petition” was not part of the record for the clerk magistrate to review. However, it should be noted that Change.org is a for-profit website that allows people to petition others to “change” things. Such petitions have included a “Petition to Change Donald Trump’s Name”; to change “the name of fire ants to spicy boys; and “to abolish usage of the word ma’am”. Further, the creator of the on-line petition is a disgruntled doctor who lost a lucrative contract with Southcoast Hospitals. Further, acknowledges he “dislikes” Mr. Hovan.

Ignoring the significant procedural deficiencies of this petition, the substance of the Petitioner's requests, also fails on its face. Reviewing the Petition in the light most favorable to them, there is nothing in their own articles that would indicate that this matter is of a "special public significance." See. *Eagle Tribune* @656.

First, Mr. Hovan is not a public official and the allegations do not involve any criminal behavior in his capacity as the CEO/President of Southcoast Hospitals. Show cause hearings are "presumptively" closed. Complaint Standards 3:16 provides:

"If the application [for issuance of process] is one of special public significance, and if in the opinion of the magistrate the legitimate interest of the public outweighs the right of privacy in the accused, the hearing may be open to the public, and should be conducted in the formal atmosphere of a courtroom." *Eagle Tribune v Clerk Magistrate Lawrence Division of District Court*, 448 Mass. 647 (2007).

Here, there is no reason for the public to have access to a hearing which does not involve a public official in his/her public capacity. There is no evidence present to suggest there is a "special public significance" in this matter. There is no allegation that Mr. Hovan used his public position in a criminal way. Further, there is no evidence presented which supports the proposition that there is a legitimate public interest in this case. The only evidence presented is several stories written by two local on-line reporters, a perfunctory article in the Boston Globe and an article which is based on one of the local online reporter's articles in the Boston Business Journal.

Further, the use of the Change.org petition as evidence of public interest is disingenuous. The creator of the on-line petition is referred to in the Petitioner's article as someone who has been a longtime "critic" of Mr. Hovan, and others could perceive the on-line petitioner as

someone with “an ax to grind”. Allowing the public, including this person, is precisely the reason why §35A hearings are privately conducted. Show cause hearings should not be used to settle scores, gain leverage, or aid in revenge on a person disliked by an individual. As such, the Clerk Magistrate did not abuse his decision in denying the Petitioner’s request for public access to the traditionally closed hearing.

The clerk magistrate shall consider “if the application [for issuance of process] is one of special public significance, and if in the opinion of the magistrate the legitimate interest of the public outweighs the right of privacy in the accused, the hearing may be open to the public, and should be conducted in the formal atmosphere of a courtroom.” *Eagle Tribune v Clerk Magistrate Lawrence Division of District Court*, 448 Mass. 647 (2007). Here, the Petitioner has failed to provide the Court or the parties with the decision for review. Therefore, it is difficult to determine if the Clerk Magistrate abused his discretion.

Although the petitioner has not mentioned its rights pursuant to the First Amendment of the United States Constitution, we will address it briefly as the court did in *Eagle Tribune*. *Ibid* @ 651.

The First Amendment confers a *qualified right* of public access to certain judicial proceedings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). The right to access to certain judicial proceeding, requires a two-part test”: (1) the type of proceeding must have a historic tradition of openness, and (2) public access must “play [] a significant positive role in the functioning of the particular process in question.” *Eagle Tribune* quoting: *Press-Enterprise II*, *supra* at 8, 106 S.Ct. 2735. See *WBZ-TV4 v. Executive Office of Labor*, 414 Mass. 767, 770, 610 N.E.2d 923 (1993). The application of these principles to this case results in the finding of the clerk magistrate acted properly.

Hearings pursuant to §35A have traditionally been closed because the criminal process has not begun. In a constitutional sense a criminal proceeding begins under the Sixth Amendment's right to counsel at arraignment. In addition, trials are considered public because historically there is a need to require witnesses to testify before public scrutiny. Here, because the hearing is informal, accepts hearsay evidence and there is no right to cross-examine, there is no significant positive public role in the functioning of the hearing. Compare *Press-Enterprise II*, *supra* at 9, 106 S.Ct. 2735 (rights of the jury trial compared to those of the grand jury proceeding.) If this two-pronged test of historic tradition and public function are met in this case the right of public access to all clerk's hearing pursuant to §35A. As a result, all such hearings would always be open to the public, and a finding would result in §35A hearings only being closed to the public on specific findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.*, quoting *Press-Enterprise I*, *supra* at 510, 104 S.Ct. 819. Such a ruling would be contrary to the very intent of the statute.

Finally, the Petitioner seems to rely on the fact the case has gotten publicity and therefore requires the hearing to be open to the public. However, most of the "publicity" is the result of the articles written, edited, and chosen by the Petitioners to place on their on-line platform. However, "[t]he sole fact that the person complained against is a public official or otherwise well-known is not in and of itself ... reason for the hearing to be public." Commentary to Standard 3:16 of the Complaint Standards. The Petitioners should not be able to gain access to a traditionally privately held hearing because they decide what to publish and what not to publish. Further, they should also not benefit using a prematurely released investigatory police report.

Stay of Proceedings

A stay of a proceeding requires the person seeking such request to establish a need. *Soe v. Sex Offender Registry Board* 466 Mass. 381 (2013); *Clinton v. Jones*, 520 U.S. 681, 708, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997). The decision whether to grant the continuance or stay “ultimately requires and must rest upon ‘a particularized inquiry into the circumstances of, and the competing interests in, the case. Ibid *Soe* @ 392 quoting *Banks v. Yokemick*, 144 F.Supp.2d 272, 275 (S.D.N.Y.2001).

First, the Petitioner has failed to establish a need. There is no overwhelming public interest in this story which would require further appellate review. Second, as stated above the circumstances of this case do not rise to the level which require public access to a traditionally private hearing. Mr. Hovan remains on a leave of absence from his position as CEO/President of Southcoast Hospitals because of the claims in the application for complaint. Any further delay of this process will greatly prejudice Mr. Hovan. Finally, there is no evidence that the Clerk Magistrate abused his discretion in denying the on-line reporter access to the hearing.

Conclusion

For the above stated reasons, Mr. Hovan requests that this Honorable Court deny the Petitioner’s request for extraordinary relief of allowing the public access to this M.G.L. §35A hearing and the stay of the proceedings..

Respectfully submitted,



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