

# Pennsylvania Appeals Court Unseals Records in Prosecution of Penn State Officials

By Dana Green and Michael Berry

A Pennsylvania appeals court delivered a significant victory to The Associated Press in its efforts to challenge the extensive sealing of court records related to the scandal surrounding Pennsylvania State University and Jerry Sandusky, a prominent football coach at the university. [\*Commonwealth v. Spanier\*](#), No. 637 MDA 2017, 2018 PA Super 147 (June 4, 2018).

In a unanimous decision, the court reaffirmed the importance of both the First Amendment and common law rights of public access to judicial documents in Pennsylvania, emphasized that courts must make specific, on-the-record findings prior to closure, and clarified that the attorney-client privilege is not a basis for continued sealing once the substance of the privileged information becomes public.

## Background

In 2011, allegations emerged that dozens of boys had, for years, been sexually abused by a well-known football coach at Penn State. The coach, Jerry Sandusky, ultimately was convicted of 45 counts of sexual abuse. The Sandusky scandal was the subject of intense public interest and media attention and raised important questions about the power and influence of college sports.

Prosecutors alleged that three senior University officials—University President Graham Spanier, Vice-President for Finance and Business Gary Schultz, and Athletic Director Tim Curley—were aware of credible allegations against Sandusky as far back as 1998, but either took no action or tried to conceal the allegations from authorities and the public. As a result, the men were charged with a number of crimes, including perjury, obstruction of justice, and endangering the welfare of children. See *Commonwealth v. Spanier*, 132 A.3d 481, 482 (Pa. Super. 2016); *Commonwealth v. Schultz*, 133 A.3d 294, 300 (Pa. Super. 2016); *Commonwealth v. Curley*, 131 A.3d 994, 994 (Pa. Super. 2016). In 2017, Curley and Schultz each pled guilty to reduced charges and testified against Spanier, who proceeded to trial and then was convicted of child endangerment.

Throughout the criminal proceedings against the three men, the trial court placed a vast number of records under seal, including motion papers, hearing transcripts, and court orders. Over 200 records were sealed across the three criminal cases. The secrecy surrounding the cases was compounded by the fact that each sealed record was identified on the public docket simply as a “Sealed Entry,” with no information provided to the public as to the nature of the record.

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Many of the sealed records appeared to concern former Penn State general counsel Cynthia Baldwin, who previously served as a Pennsylvania Supreme Court Justice. Baldwin provided legal counsel to Spanier, Schultz, and Curley in the early stages of the Sandusky scandal and accompanied them in their appearances before the grand jury. Later, when the state Attorney General's office suspected that the men had perjured themselves and sought to obstruct justice, it subpoenaed Baldwin, who then testified against the men before the grand jury. This testimony became a matter of significant controversy during the men's prosecution, as they claimed she represented them personally and her testimony violated the attorney-client privilege. That issue was the subject of substantial litigation in the trial court and then on appeal before the Superior Court, which held that Baldwin's testimony violated the attorney-client privilege. That holding resulted in the dismissal of some of the most serious charges against them.

### Trial Court Denies Access

During the trial court proceedings, several media entities, including the AP, intervened and challenged the extensive sealing in the case. In their motion, the media intervenors sought to unseal the records and their corresponding docket entries so that, at a minimum, the public could know the nature of each filed document. Multiple factors militated against sealing. For example, the substance of Baldwin's grand jury testimony already appeared to have been made public, had been the subject of extensive briefing, and was the basis for several court rulings. None of the parties opposed unsealing most of the records at issue, or the docket entries themselves. And, to the extent that the records quoted privileged and confidential materials, redaction offered a more narrow remedy than wholesale sealing.

The trial court granted the motion in part, but refused to unseal most of the documents – including many documents the defendants themselves did not ask to remain sealed. In ordering the documents to remain sealed, the court did not issue any individualized findings, instead broadly asserting that the public's right of access was overcome because “an attorney-client privilege existed between each Defendant and Ms. Baldwin” and “numerous filings . . . contain citation to privilege[d] evidence or reference to related filings.” The trial court also refused to unseal the docket entries themselves, apparently on the basis that it would be technologically difficult for the Clerk to do so using the court's electronic docketing system.

The AP then appealed from the trial court's decision.

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### **Superior Court Reverses; Attorney-Client Privilege Cannot Justify Sealing Once Privileged Materials Are Made Public**

On appeal, the Superior Court ordered the unsealing of almost all of the records at issue. The court ruled “there is no question” that the majority of the documents were subject to both First Amendment and common law rights of access. The appeals court sharply criticized the trial court for not making “individualized, specific, particularized findings on the record that closure is essential to preserve higher values and is narrowly tailored to that interest.” This was clear error.

The appeals court then turned to the issue of whether the attorney-client privilege could overcome the public right of access. The court recognized the importance of maintaining the privilege. But, in this case, “much of the substance” of the information under seal – including summaries and quotes of Baldwin’s grand jury testimony – had been disclosed in prior public filings. Thus, continued sealing could not be justified: “once evidence has been disseminated to the general public, it cannot be resealed; the cat is out of the bag, so to speak.” The fact that some privileged materials would be disclosed against the defendants’ requests did not alter the analysis. The appropriate remedy for Ms. Baldwin’s violation of the attorney-client privilege was to quash the charges, as already had been done. As the court explained, “no further justice . . . may be served by attempting to reseat documents whose substance has been public for years.” The court also ordered the corresponding docket entries to be unsealed.

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The appeals court kept a small category of documents under seal: letters that the defendants’ attorneys had sent to the trial court providing proffers of potential witness testimony for a hearing relating to Baldwin’s role in the case. According to the Superior Court, the trial court did not formally accept the letters into the record or docket them, and the trial court stated that it would make a decision without use of them. On that basis, the appeals court did not consider them to be “public judicial documents” and no right of access attached. As the appeals court explained: “[B]ecause the proffers were never docketed, formally filed with the court, or required by any rule of criminal procedure, they are not considered ‘public judicial documents’ subject to the right of First Amendment or common law access.”

*Michael Berry, Paul Safier, Dana Green, and Jeremy Kutner of Ballard Spahr LLP worked on behalf of The Associated Press. Defendant Gary C. Schultz was represented by Thomas J. Farrell of Farrell & Reisinger, LLC. Defendant Graham B. Spanier was represented by Timothy K. Lewis, Samuel W. Silver, Bruce P. Merenstein, and Emily J. Hanlon of Schnader Harrison Segal & Lewis LLP. Defendant Timothy M. Curley was represented by Caroline Roberto and Brian W. Perry. The Commonwealth of Pennsylvania was represented by Carson B. Morris of the Office of the Attorney General.*