

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF KANSAS**

EDWARDS, HORACE B., et al.)	
Plaintiff,)	
)	
v.)	Case No. 14-cv-02631-JAR-TJJ
)	
SNOWDEN, EDWARD JOSEPH, et al.)	
)	
Defendants.)	

**MOTION TO REQUIRE THE FILING OF DEFENDANTS'
DVD EXHIBIT AND EXHIBIT 1
TO DEFENDANTS' MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS UNDER SEAL**

Plaintiff respectfully asks the Court to order the filing under seal of Defendants' DVD Exhibit as well as Exhibit 1 to Defendants' Memorandum in Support of Motion to Dismiss Plaintiff's First Amended Complaint, because, upon information and belief, both allegedly contain classified information to which unauthorized individuals are prohibited from viewing pursuant to, *inter alia*, Executive Order No. 13526. Better safe than sorry. *See, Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009); Jennifer K. Elsea, *The Protection of Classified Information: The Legal Framework*, RS21900, Congressional Research Service (January 10, 2013) <<http://www.fas.org/sgp/crs/secretcy/RS21900.pdf>>.

Respectfully submitted,

LAMFERS & ASSOCIATES, LC

By: /s/Jean Lamfers
Jean Lamfers KS#12707
7003 Martindale Rd.
Shawnee, KS
Tel. (913) 962-8200
Email: jl@lamferslaw.com

ATTORNEY FOR PLAINTIFF
HORACE EDWARDS

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

HORACE B. EDWARDS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 14-cv-02631-JAR-TJJ
)	
EDWARD JOSEPH SNOWDEN, et al.,)	
)	
Defendants.)	

**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO
PLAINTIFF’S MOTION TO REQUIRE FILING UNDER SEAL**

As with his First Amended Complaint, Mr. Edwards appears to believe that the federal courts are subject to his personal proclivities rather than the narrow constraints of law and due process. He thus moves to seal the contents of the publicly available documentary *CITIZENFOUR* (and a transcript of the same) submitted by Defendants in conjunction with their motion to dismiss. His legal basis: “Better safe than sorry.” Pl’s Motion, ECF No. 15, at 1. While a fine idiom, that is hardly cause for limiting public access to judicial records.

I. Factual Background

On December 18, 2014, Mr. Edwards filed his Complaint, in which he alleged that he is “a former Secretary of the Kansas Department of Transportation, [and] a retired naval officer, LT (j.g.), who held a ‘Q’ security clearance.” ECF No. 1, ¶ 2. While Mr. Edwards, who is 89 years old, does not allege when he was a naval officer, he recently told the *Topeka Capital-Journal* he “served in the Navy during World War II.”¹ He also told the newspaper

¹ Justin Wingerter, *Topeka man, 89, files suit against Edward Snowden, documentary producers*, The Topeka Capital-Journal, Dec. 31, 2014, available at

that his “Q” security clearance was not granted by the Department of Defense, but “by the Atomic Energy Commission while working as an engineer in the 1950s and 1960s.” *Id.* Finally, he told his hometown newspaper he was Secretary of the Kansas Department of Transportation some 25 years ago. *Id.*

Mr. Edwards alleged that “[a]s a member of the moving-going public [he] purchased a ticket to Citizenfour and watched the documentary.” ECF No. 3 ¶ 2. Mr. Edwards also alleged that as of December 18, 2014, “box office receipts for Citizenfour [were] \$2,110,484.00.” *Id.* ¶ 10 n.4. Assuming an average price per ticket of \$10.00,² that means that over 200,000 people saw the documentary prior to Mr. Edwards ever filing his suit. Moreover, as of the date Mr. Edwards filed his motion, *CITIZENFOUR* was *still playing* in theaters across the country, including in Chicago, Denver, Columbus, and Santa Fe.³ Finally, the documentary is set to air on HBO on February 23, 2015.⁴

II. Applicable Law

As the Tenth Circuit has made clear, the public’s right of access to judicial records is “presumptively paramount.” *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011). This right derives from the public’s interest in “understanding disputes that are presented to a public forum for resolution.” *Crystal Grower’s Corp. v. Dobbins*, 616 F.2d 458, 461

<http://cjonline.com/news/2014-12-31/topeka-man-89-files-suit-against-edward-snowden-documentary-producers#gsc.tab=0>.

² According to the National Association of Theatre Owners, the average ticket price last year was \$8.17. Brent Lang, *Average Movie Ticket Prices Increase to \$8.17 for 2014*, *Variety*, Jan. 20, 2015, available at <http://variety.com/2015/film/news/movie-ticket-prices-increased-in-2014-1201409670/>.

³ See Exhibit 1 attached hereto, which is a print out of movie times from *Moviefone*, downloaded on February 12, 2015.

⁴ HBO Documentaries: *Citizenfour*, <http://www.hbo.com/documentaries/citizenfour#>.

(10th Cir. 1980). Thus, a party seeking to seal judicial records “bears the burden of showing some significant interest that outweighs the presumption.” *Helm*, 656 F.3d at 1292. That significant interest must be based on “articulable facts” and not merely “unsupported hypothesis and conjecture.” *Meyer v. Unum Life Ins. Co. of America*, No. 12-1134-KHV-KGG, 2014 WL 791207, at *2 (D. Kan. Feb. 27, 2014).

As a result, courts in this District have repeatedly denied motions to seal where the movant relied on nothing more than speculation. *See, e.g., Am. Fam. Mut. Ins. Co. v. Techtronic Indus.*, No. 12-2609-KHV, 2014 WL 1116901, at *1 (D. Kan. Mar. 20, 2014) (“defendants have not come close to meeting the heavy burden to articulate a real and substantial interest which justifies depriving the public access to records which inform the Court’s decision-making process”); *Alwel v. Dex One Serv., Inc.*, No. 13-2312-SAC, 2013 WL 6858504, at *5 (D. Kan. Dec. 30, 2013) (“The parties have failed to articulate substantial interests recognized by legal authority and to support those interests with facts showing them to be real and not mere conjecture”); *Dryden v. City of Hays*, No. 11-1354-KHV-KGS, 2012 WL 966170, at * 1 (D. Kan. Mar. 21, 2012) (“Defendants have failed to articulate any facts upon which the Court may base a finding of a public or private harm that would overcome the public’s right of access”).

III. Application of the Law to the Facts

Mr. Edwards asserts that the DVD and transcript of *CITIZENFOUR* “allegedly contain classified information to which unauthorized individuals are prohibited from viewing.” Pl’s Mot. at 1. That is unsupported hypothesis and conjecture by a man who has apparently never held a security clearance issued by the Department of Defense, and has not been in

the U.S. military for more than 50 years. This explains why Mr. Edwards' claims are founded only "upon information and belief." *Id.*

Moreover, Mr. Edwards fails to explain how publicly filing the documentary (and transcript) damages national security when it has already been screened across the country to hundreds of thousands of people (and remains available in theaters nationwide). In this regard, Judge Crow's decision in *Flohers v. Eli Lilly Co.*, No. 12-2439-SAC, 2013 WL 4773515 (D. Kan. Sept. 4, 2013), is directly on point. There, as here, plaintiff moved to seal materials which had been publicly available for several months. In rejecting the request, Judge Crow relied on a Southern District of New York case which held that "however confidential [a document] may have been beforehand, subsequent to publication it was confidential no longer. . . . We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again." *Id.* (quoting *Calabrian v. Bangkok Bank, Ltd.*, 55 F.R.D. 82, 144 (S.D.N.Y. 1972)).

The same is equally true here, as Judge Crow explained: "Once the cat is out of the bag, the ball game is over." 2013 WL 4773515, at *2 (quoting *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 n.1 (2d Cir. 2004)).

IV. Conclusion

For Mr. Edwards' motion to succeed, it would have been necessary for him to identify the specific classified information revealed in *CITIZENFOUR*, and then show that it is not publicly available elsewhere. "Better safe than sorry" does not suffice to overcome the presumption in favor of public access. Pl's Mot. at 1.

Respectfully submitted,

LATHROP & GAGE, LLP

By: /s/Bernard J. Rhodes

Bernard J. Rhodes KS #15716

2345 Grand Blvd., Suite 2400

Kansas City, MO 64108

Tel: (816) 292-2000

Fax: (816) 292-2001

Email: brhodes@lathropgage.com

Attorneys for Defendants Praxis Films, Inc.,
Laura Poitras, Participant Media LLC, Diane
Weyermann, Jeffrey Skoll, and The
Weinstein Company LLC

Of Counsel:

Marvin S. Putnam (Cal. Bar No. 212839)

(admitted *pro hac vice*)

Daniel D. Ambar (Cal. Bar No. 278853)

(admitted *pro hac vice*)

O'Melveny & Myers LLP

1999 Avenue of the Stars, 7th Floor

Los Angeles, CA 90067

Tel: (310) 246-8480

Fax: (310) 246-6779

Email: mputnam@omm.com

dambar@omm.com

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served via the Court's ECF System this 13th day of February, 2015 on the following:

Jean Lamfers
Lamfers & Associates, L.C.
7003 Martindale
Shawnee, KS 66218

/s/Bernard J. Rhodes
Attorney for Defendants Praxis Films, Inc.,
Laura Poitras, Participant Media, LLC,
Diane Weyermann, Jeffrey Skoll, and The
Weinstein Company LLC

Exhibit 1



Citizenfour (2014)

where to watch:

movie times & tickets



fan rating: ★★★★★ | write a review

movie times & tickets

[print movie times](#)



enter city, state or zip

within

date

go

Unlimited



15 Theaters Found

show

All Theaters



284.5 miles away

Peoria Cinemas 12

[View All Movies At This Theater](#)

Address: 32251 N. Dries Ln, Peoria, IL 61604 | 309-682-6356

Citizenfour

11:15am | 8:45pm

text showtimes

get directions

412.6 miles away

moviefone apps



[more moviefone app info](#)

similar movies





Gene Siskel Film Center

[View All Movies At This Theater](#)

Address: 164 State St., Chicago, IL 60601 | 312-846-2800

Citizenfour

8:15pm

text showtimes

get directions

555.4 miles away

Sie FilmCenter

[View All Movies At This Theater](#)

Address: 2510 E. Colfax, Denver, CO 80206 | 720-381-0813

Citizenfour

4:00pm

text showtimes

get directions

619.2 miles away

The Gateway Film Center

[View All Movies At This Theater](#)

Address: 1550 N. High St., Columbus, OH 43201 | 614-247-4433

Citizenfour

11:40am

text showtimes

get directions

666.4 miles away

CCA Cinematheque

[View All Movies At This Theater](#)

Address: 1050 Old Pecos Trail, Santa Fe, NM 87505 | 505-982-1338

Citizenfour

4:15pm

text showtimes

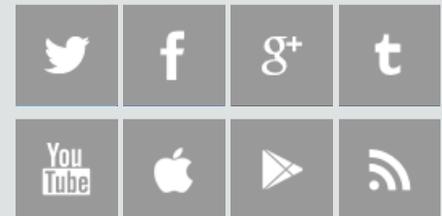
get directions



Keep on Keepin' On (2014)

Whitey: United States of America v. James J. Bulger (2014)

stay connected with moviefone



Powered by TMS

© 2015 AOL Inc. All Rights Reserved. Part of AOL-HuffPost Entertainment.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served via the Court's ECF System this 12th day of February, 2015 on the following:

Bernard Rhodes
Lathrop & Gage LLP
2345 Grand Blvd., Suite 2400
Kansas City, MO 64108

Marvin S. Putnam
Daniel D. Ambar
O'Melveny & Myers LLP
1999 Avenue of the Stars, 7th Fl.
Los Angeles, CA 90067

/s/Jean Lamfers
Attorney for Horace Edwards

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

HORACE B. EDWARDS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 14-2631-JAR-TJJ
EDWARD JOSEPH SNOWDEN, et al.,)	
)	
Defendants.)	
<hr style="border: 0.5px solid black;"/>		

ORDER

Before the Court is Plaintiff Horace B. Edwards’ Motion to Require the Filing of Defendants’ DVD Exhibit and Exhibit 1 to Defendants’ Memorandum in Support of Motion to Dismiss under Seal (Doc. 15). The motion asks the Court to seal the DVD exhibit of the film *Citizenfour*, the subject of this lawsuit, which was filed conventionally by Defendants on February 10, 2015, in support of their motion to dismiss. Defendants have responded and oppose the motion to retroactively seal this exhibit. For the reasons stated below, Plaintiff’s motion is denied.

Federal courts “recognize a general right to inspect and copy public records and documents, including judicial records and documents.”¹ The Court, however, does have “discretionary power to control and seal, if necessary, records and files in its possession.”² “In exercising this discretion, [the court] weigh[s] the interests of the public, which are presumptively paramount, against those advanced by the parties.”³ “The Court should seal documents based only on articulable facts known to the Court, and not based on unsupported

¹*Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

²*Crystal Grower’s Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980).

³*Id.*

hypothesis or conjecture.”⁴

Plaintiff’s motion makes no showing that his interest in sealing this exhibit outweighs the public’s interest in access. Importantly, the exhibit Plaintiff seeks to seal is a film that has been released to the general public in movie theaters—Plaintiff’s viewing of this movie forms the basis of his claims in this case.⁵ Given the inherently public nature of this film, the Court can discern absolutely no interest that could justify sealing this exhibit. Moreover, even if this DVD contained some sort of confidential information for which Plaintiff had an interest in preventing public disclosure, it has already been publicly filed. The Court’s procedures contemplate that a request to file a document or other exhibit under seal should be made before the exhibit is filed.⁶ “Matters already made public will not be sealed after the fact absent extraordinary circumstances.”⁷ The Court finds no extraordinary circumstances present here. Accordingly, the Court denies Plaintiff’s motion for leave to seal Exhibit 1 to Defendants’ motion to dismiss.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff Horace B. Edwards’ Motion to Require the Filing of Defendants’ DVD Exhibit and Exhibit 1 to Defendants’ Memorandum in Support of Motion to Dismiss under Seal (Doc. 15) is **denied**.

IT IS SO ORDERED.

⁴*McCaffrey v. Mortg. Sources, Corp.*, No. 08-2660-KHV, 2010 WL 4024065, at *1 (D. Kan. Oct. 13, 2010).

⁵See Doc. 3, Am. Compl. at 2 ¶ 2 (“Plaintiff, Horace B. Edwards, . . . [a]s a member of the moviegoing public who purchased a ticket to Citizenfour and watched the documentary, [] was outraged by the admissions of Defendant Edward J. Snowden detailing his government status as a former CIA/NSA/DIA officer with special high level security clearances, . . .”).

⁶See D. Kan. Rule 5.4.6.

⁷*Flohers v. Eli Lilly & Co.*, No. 12-2439-SAC, 2013 WL 4773515, at *2 (D. Kan. Sept. 3, 2013) (quotation omitted).

Dated: February 13, 2015

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE