THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings:
Family Court Privacy Rules

Gary Solomon
August, 2023

FAMILY COURT PRIVACY RULES

By: Gary Solomon

Updated: 8/23

Table Of Contents

G. Removal Cases

I. First Amendment Right Of Access To Court Proceedings

In criminal cases, the general public and press have a qualified First Amendment right of access to trial. Given the presumption in favor of access, which is based on a long history of open trials and the First Amendment's role in ensuring an unfettered debate and flow of information, closure must be supported by a showing of a compelling governmental interest and must be narrowly tailored to serve that interest. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (Massachusetts statute under which press and public were excluded in all cases during testimony of minor sex offense victim violated First Amendment; protection of victims is a compelling interest, but does not justify closure in all cases); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

This presumption has been extended to phases of a criminal proceeding other than trial. *Press-Enterprise Co. v. Superior Court (Enterprise II),* 478 U.S. 1 (1986) (right of access to preliminary hearings as conducted in California); *Press-Enterprise Co. v. Superior Court (Enterprise I)*, 464 U.S. 501 (1984) (jury voir dire); *Associated Press v. Bell*, 70 N.Y.2d 32 (1987) (public and press may have First Amendment right of access to suppression hearings, and defendant bears the burden of showing that the right to a fair trial would be jeopardized by publicity; court notes that "suppression hearings pose a peculiar risk in that adverse pretrial publicity could inflame public opinion and taint potential jurors by exposing them to inadmissible but highly prejudicial evidence," but "it is apparent that a hypothetical risk of prejudice or taint cannot justify categorical denial of public access ..."); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430 (1979) (defendant failed to show sufficient basis for excluding public and press from pretrial mental competency hearing in rape case; court notes that motion to exclude must be made in open court and reasons for closure must be given in open court, but defense may ask that certain portions of argument be held *in camera* if the very information which is deemed prejudicial will be disclosed during argument); *Hartford Courant Company LLC v. Carroll*, 986 F.3d 211 (2d Cir. 2021) (Connecticut law mandating automatic sealing of judicial records and closure to public in cases transferred from juvenile docket to regular criminal docket violated plaintiff's First Amendment right of access to judicial proceedings

and records; more narrowly tailored approach - with presumption of openness but availability of confidentiality upon showing of necessity - would better balance public's right of access against dangers of stigmatizing juveniles); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988) (right of access to plea hearings). *But see Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), *aff'g* 43 N.Y.2d 370 (1977) (court upholds exclusion of press from suppression hearing and temporary denial of access to transcript).

Despite the absence of a long tradition of public access, two Family Court judges have found a presumption of openness in juvenile delinquency proceedings. *Matter of M.S.*, 173 Misc.2d 656 (Fam. Ct., West. Co., 1997); *Matter of Chase*, 112 Misc.2d 436 (Fam. Ct., N.Y. Co., 1982). However, there is good reason to believe that there is no such presumption. *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995) (across-the-board closure would violate First Amendment, but court opines in dicta that an assumption that delinquency proceedings are open is a dubious one); *United States v. A.D.*, 28 F.3d 1353 (3rd Cir. 1994) (same holding as in *Three Juveniles*, and court notes that *Globe* is not controlling as to closure in federal delinquency proceedings and that no "centuries-old tradition of openness exists for juvenile proceedings"); *State ex rel. Plain Dealer Publishing Co. v. Geauga County Court of Common Pleas*, 734 N.E.2d 1214 (Ohio 2000) (while finding that closure was an abuse of discretion, court concludes that news media did not have qualified constitutional right of access, including at proceedings on motion to transfer case to adult court; juvenile court may restrict public access if, after hearing argument, court finds that there is a reasonable and substantial basis for believing that child could be harmed or fairness of adjudication could be endangered, that the potential for harm outweighs the benefits of public access, and that there are no reasonable alternatives to closure); *see also Herald Co. v. Mariani*, 67 N.Y.2d 668 (1986) (after removal of juvenile offender case, Family Court standard governed release of transcript); *State v. James*, 902 S.W.2d 911 (Tenn. 1995) (court sets out rules, including: party seeking to close hearing has burden of proof; court shall not close proceedings to any extent unless it determines that failure to do so would result in particularized prejudice to party seeking closure that would override public's compelling interest in open proceedings; order of closure must be no broader than necessary to protect determined interests of party seeking closure; court must consider reasonable alternatives to closure).

II. New York Law On Access To Court Proceedings

A. Family Court Rules - "The Family Court is open to the public. Members of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of the Family Court otherwise open to individuals having business before the court."22 NYCRR §205.4(a). The court may exclude the general public or any person from a courtroom on a case-by-case basis, and the court may consider, among other factors, whether (1) the person is causing or is likely to cause a disruption in the proceedings; (2) the presence of the person is objected to by one of the parties, including the child's attorney, for a compelling reason; (3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm requires that some or all observers be excluded from the courtroom; (4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case. 22 NYCRR §205.4(b). In addition, "[w]hen necessary to preserve the decorum of the proceedings," the court shall instruct admitted persons regarding the permissible use of the courtroom and other court facilities, assignment of seats to media personnel on an equitable basis, and any other matters that may affect the conduct of the proceedings and the well-being and safety of litigants. §205.4(c).

B. Family Court Act - Although the public and many Family Court practitioners and professionals had always had a general sense that Family Court proceedings were confidential, that was not really the case even prior to the 1997 amendment of the Family Court Rules. The former §205.4 granted the court discretion without any presumption in either direction. In addition, FCA §341.1 merely provides that the court *may* exclude the general public and admit only such persons and representatives of authorized agencies as have a direct interest in the case.

C. Case Law - It is probably true that, after amendment of the Family Court Rules and the attendant publicity, courts will be somewhat more willing to admit the public. What is certainly true is that general and unspecified concerns about the risks of publicity will not be persuasive; the case law makes it clear that the party seeking to exclude the public

should be prepared to present supporting evidence, such as affidavits from mental health professionals concerning potential harm to the children, or allegations regarding the likelihood that new and sensitive details will be disclosed in court. *Compare Matter of Ruben R.*, 219 A.D.2d 117 (1st Dept. 1996), *lv denied* 88 N.Y.2d 806 (child's attorney presented affidavits regarding a negative impact on the children; court excludes press "[i]n light of the extraordinarily sensitive and personal nature of the information ... coupled with the strong evidence presented that publication of this information would be harmful to the children and the impossibility of protecting the children's right to privacy due to the previous disclosure of the children's identities ...") and *Matter of Katherine B.*, 189 A.D.2d 443 (2d Dept. 1993) (affidavit provided by psychologist) *with Matter of M.F.,* 12 Misc.3d 1164(A) (Fam. Ct., Bronx Co., 2006) (affidavits of treating psychiatrist and therapist alleged that publicity was likely to exacerbate respondent's suicidal condition due to facility's inability to control families of other residents, but court notes, *inter alia*, that respondent's condition deteriorated even after initial press coverage ceased, and that less restrictive alternatives were available, including directing press not to print names). *See also In re T.R.*, 556 N.E.2d 439 (Ohio 1990), *cert denied* 498 U.S. 958 (social worker asserted that continued publicity would increase risk of harm).

The courts have recognized that the child's attorney, in particular, is placed in an awkward position when the court admits the media. In *In re T.R.*, 556 N.E.2d 439, the court noted that "the presence of the media would place [the child's counsel] in 'an untenable position' when deciding what evidence to present," and would force counsel to "weigh the psychological harm to [the child] posed by the disclosure of evidence against the value of evidence needed to support her case."

D. Photos

22 NYCRR § 29.1 states:

> (a) Taking photographs, films or videotapes, or audiotaping, broadcasting or telecasting, in a courthouse including any courtroom, office or hallway thereof, at any time or on any occasion, whether or not the court is in session, is forbidden, unless permission of the Chief Administrator of the Courts or a designee of the Chief Administrator is first obtained; provided, however, that the permission of the Chief Judge of the Court of Appeals or the presiding justice of an Appellate Division shall be obtained with respect to the court over which each presides. Such permission may be granted if:
> (1) there will be no detraction from the dignity or decorum of the courtroom

or courthouse;
(2) there will be no compromise of the safety of persons having business in the courtroom or courthouse;
(3) there will be no disruption of court activities;
(4) there will be no undue burden upon the resources of the courts; and
(5) granting of permission will be consistent with the constitutional and statutory rights of all affected persons and institutions.
Permission may be conditioned upon compliance with any special requirements that may be necessary to ensure that the above conditions are met.
(b) This section shall not apply to applications made to the appropriate court for photographing, taping or videotaping by or on behalf of the parties to the litigation and not for public dissemination.

III. Prior Restraints And Sanctions For Disclosure

A. First Amendment Limitations - In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), the media attended a juvenile delinquency detention hearing with the knowledge of counsel and the court and without objection. The media learned the 11-year-old juvenile's name, and also photographed him as he left the courthouse. The court later enjoined the media from disclosing the juvenile's name or his photo. The Supreme Court held that the court's order constituted a prior restraint which violated the First Amendment. Similarly, in *Smith v. Daily Mail Publishing*, 443 U.S. 97 (1979), the Supreme Court held that the media could not be punished for disclosing a name which was lawfully obtained from a source such as the police, the prosecutor, or a witness. In a footnote in *Smith*, the Supreme Court expressed the hope that, if the courts make their purposes and methods clear, the media will police themselves when deciding whether to release information. *See also Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (First Amendment violated where damages were imposed on newspaper which published name of rape victim, which had been obtained from publically released police report; although it was unlawful for officials to disclose report, it was not unlawful for newspaper to receive it); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (First Amendment violated where civil damages award was entered against television station for broadcasting name of rape-murder victim, which was obtained from courthouse records).

The First Amendment might not act as a bar to prior restraint or to post-disclosure punishment where there has been some impropriety in the acquisition of information. In

Florida Star, the Supreme Court did not reach the question of whether unlawful acquisition of information and subsequent disclosure may be punished consistent with the First Amendment. 491 U.S. at 535, n. 8. *See also Bowley v. City of Uniontown Police Department*, 404 F.3d 783 (3rd Cir. 2005) (First Amendment barred imposition of liability on newspaper that published juvenile arrest information that was released unlawfully by police); *Hays v. Marano*, 114 A.D.2d 387 (2d Dept. 1985) (reporter could not be precluded from publishing information gleaned from public court file in which Grand Jury testimony had inadvertently been placed); *Natoli v. Sullivan*, 159 Misc.2d 681 (Sup. Ct., Oswego Co., 1993) (media could be held liable for publishing information from illegal wiretap which was given to media by private individuals who made the recording).

B. Conditional Admission - Under the Supreme Court cases, and 22 NYCRR §205.4(b)(4), the court is required to consider less restrictive measures than complete closure.

1. Selective Exclusion - A possible solution when the court wishes to admit media representatives, but is concerned about disclosure of the information acquired, is to close the courtroom during those portions of the proceeding during which sensitive information will be aired. *But see Matter of Ruben R.*, 219 A.D.2d 117 (partial closure procedure rejected because it would cause too much disruption and there was no way to know in advance when it would be necessary; court also notes that presence of press can cause party to alter presentation). Of course, additional problems will develop when the media asks to be present during argument regarding which portions of the proceeding should be confidential. Arguably, so that the parties may freely argue the closure issue without being concerned about publicity, the court may limit press access to oral argument and to the papers submitted. In *Ruben R.*, the child's attorney refrained from discussing the details during oral argument in Family Court, and instead submitted materials under seal.

2. Order/Promise Not To Disclose - The Supreme Court First Amendment decisions have the effect of limiting the court's power to admit the public and thereafter prohibit or punish the disclosure of information acquired while a person was lawfully inside the courtroom.

However, it is far from clear that these rules apply when a court order admitting the

media contains a condition of entry requiring the media not to disclose certain information acquired in court. In *Matter of S. Children*, 140 Misc.2d 980 (Fam. Ct., Orange Co., 1988), the court, while noting that opening the Family Court will help the public understand the seriousness of the system's problems, decided to admit the press. At the same time, the court directed the press not to publish certain information until the parent could attempt to obtain a stay of the court's order admitting the press, but the press published information anyway. Although the press cited the Supreme Court's First Amendment prior restraint cases, the court held that it could set, and punish the violation of, conditions, and noted that the Supreme Court decisions did not involve conditions imposed by a court sitting in a closed proceeding. The court stated: "It is clear that this court which is obligated to restrict public access, including the press, can set conditions and restrictions when permitting access to its proceeding [citation omitted]." 140 Misc.2d at 986. *See also Matter of Jane*, 163 Misc.2d 373 (Fam. Ct., Ulster Co., 1993) (court admits reporter and directs that he be given transcripts, but precludes disclosure of name, residence and other identifying information other than age, sex and interrelationships of parties and witnesses, and disclosure of names of people who reported possible abuse or neglect to the hotline or in confidence, and also precludes coverage *outside* the Family Court building of persons whose identities are confidential; court specifically notes that it has a duty under the Civil Rights Law to restrict the use of the name of an alleged child sex abuse victim, and orders that the child's name not be published even if the reporter has independent knowledge of the child's identity).

C. <u>"Gag" Orders Directed At Parties</u> - The court does have some authority to issue a "gag" order directing the parties and counsel not to communicate information to the media. *Compare In re T.R.,* 556 N.E.2d 439 (trial court did not abuse discretion in imposing gag order in consolidated custody and abuse/neglect litigation, but the order, which enjoined the adult parties and their counsel from communicating any information about the child or the custody litigation, was overbroad since, taken literally, it prohibited parties and their counsel from discussing the case with one another) and *In re J.S.*, 640 N.E.2d 1379 (Ill. App. Ct., 2d Dist., 1994) (gag order prohibiting parties and attorneys from discussing facts of underlying custody and dependency actions with members of news media was not unconstitutionally overbroad) *with Anonymous v. Anonymous*, 203

A.D.2d 283 (2d Dept. 1994) (insufficient evidence to justify gag order which prohibited father or any person acting in his behalf from discussing his petition to impose certain conditions on mother's custody of child).

IV. Access To Records

A. First Amendment Right Of Access - There is a qualified First Amendment right of access to the records of a criminal proceeding. However, although documents submitted in connection with hearings which were or would be open to the public can be obtained, other documents, such as discovery documents, are not related to matters subject to the First Amendment right of access and are covered only by the common-law right of access to court records. *People v. Burton*, 189 A.D.2d 532 (3rd Dept. 1993) (newspaper was entitled to access to court file in rape/murder case; court notes that Civil Rights Law §50-b does not preclude disclosure of identity of deceased sex crime victim, and a broader construction of §50-b mandating denial of public access to court documents in all sex offense cases would raise serious First Amendment questions). *See also Hartford Courant Company LLC v. Carroll*, 986 F.3d 211 (2d Cir. 2021) (Connecticut law mandating automatic sealing of judicial records and closure to public in cases transferred from juvenile docket to regular criminal docket violated plaintiff's First Amendment right of access to judicial proceedings and records; more narrowly tailored approach - with presumption of openness but availability of confidentiality upon showing of necessity - would better balance public's right of access against dangers of stigmatizing juveniles); *People v. Garlick*, 144 A.D.3d 605 (1st Dept. 2016), *lv denied* 29 N.Y.3d 948 (no bar to public disclosure of surveillance videotape of incident); *The Hartford Courant v. Pellegrino*, 371 F.3d 49 (2d Cir. 2004) (public and press had qualified right of access to docket sheets); *In re Newsday, Inc.*, 4 A.D.3d 162 (1st Dept. 2004), *appeal dism'd* 3 N.Y.3d 651 (access denied as to materials submitted in support of search warrant, since application process has historically not been open to public); *United States v. Haller*, 837 F.2d 84 (access to plea agreements); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987) (qualified right of access to documents filed in connection with pretrial motion to suppress); *Dorsett v. Nassau County*, 800 F.Supp.2d 453 (EDNY 2011) (court leaves in place protective order prohibiting plaintiff from publishing outside of the litigation a police

Internal Affairs Unit Report obtained during discovery; plaintiff is not precluded from discussing case in public, or discussing contents of IAU Report if she obtains information from source other than discovery); *People v. Williams*, 29 Misc.3d 1222(A), 2010 WL 4608687 (Sup. Ct., Nassau Co., 2010) (press entitled to videotapes allegedly depicting defendant engaged in conversations with undercover officer, and other related materials, where videotapes were admitted into evidence without objection and played for jury, and defendant asserted in conclusory fashion that release of evidence and media coverage may prejudice right to fair trial); *People v. DeBeers*, 3 Misc.3d 315 (County Ct., Ontario Co., 2004) (court refuses to seal People's CPL §710.30 Notice containing reference to confession); *People v. Hodges*, 172 Misc.2d 112 (Sup. Ct., Kings Co., 1997) (press given access to defendant's written confession, but could not photocopy it).

B. Common Law Right Of Access - There is also a common law presumption in favor of access to court records. *Nixon v. Warner Communications*, 435 U.S. 589 (1978); *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 153, n. 4 (1987) (newspaper not entitled to jurors' names and addresses; right applies to documents which have been entered into evidence or filed in court). In *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995), the court concluded that the presumption of access is strongest when the material plays a role in the judge's determination, somewhat weaker when the filing is unusual or under seal, and non-existent when documents, such as discovery documents passed between the parties, play no role in the court's adjudicative function. *See also Kaczynski v. San Francisco Examiner,* 154 F.3d 930 (9th Cir. 1998) (court upholds order releasing to media and public portions of defendant's psychiatric competency report); *In re Newsday, Inc.*, *supra,* 4 A.D.3d 162 (no access to search warrant materials given need to protect identity of confidential informant and avoid compromising ongoing investigation); *People v. Burton*, 189 A.D.2d 532 (newspaper entitled to access to court file in rape/murder case).

C. General Family Court Act Rule - "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records." FCA §166; *see also People v. M.M.*, 64 Misc.3d 259 (County Ct., Nassau Co., 2019) (it was unclear whether People could properly obtain juvenile delinquency information from County Attorney rather than make application under §166); *Matter of Demesyeux*, 39 Misc.3d

1209(A) (Surrogate's Ct., Nassau Co., 2013) (application under §166, which does not render family court records confidential and merely provides that they are not open to indiscriminate public inspection, must be made in family court); *People v. Malaty*, 4 Misc.3d 525 (Sup. Ct., Kings Co., 2004) (People granted access to records of defendant's custody proceeding where they asserted that statements made by defendant during proceeding would rebut his defense in forgery prosecution); *People v. Steven Santos*, 1 Misc.3d 909 (Sup. Ct., N.Y. Co., 2002) (People not entitled to disclosure to assist them in deciding whether to seek death penalty).

D. Access By Parties - Subject to limitations and procedures set by statute and case law, the following individuals/entities shall be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, subject to the provisions of CPLR 8002, transcribed minutes of any hearing held in the proceeding: (1) the petitioner, presentment agency and adult respondent and their attorneys; (2) when a child is a party to, or the child's custody may be affected by, the proceedings, the parents or persons legally responsible and their attorneys; the guardian, guardian ad litem and the attorney for the child; an authorized representative of the child protective agency involved in the proceeding or the probation service; an agency to which custody has been granted by court order and its attorney; and (3) when a temporary or final order of protection has been issued in a support, paternity, custody/visitation or family offense proceeding, a prosecutor where a related criminal action may be commenced; and, when a criminal action has been commenced, the prosecutor or defense attorney in accordance with Criminal Procedure Law procedures. 22 NYCRR §205.5(a), (b), (d).

E. Limitations On Re-Disclosure - Family Court Rule 205.5 does not indicate whether a person/entity may re-disclose documents acquired lawfully pursuant to the Rule. In *Matter of Jane*, 163 Misc.2d 373, the court held that, in the absence of a statute or rule preventing it, the respondent mother in a neglect proceeding was entitled to turn over transcripts and pleadings to a reporter, and the court refused to restrain publication of information contained in the documents. On the other hand, even if §205.5 does not itself preclude re-disclosure, it appears that, while First Amendment scrutiny is required, the court does have some power to prohibit the dissemination of information in certain circumstances. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the court upheld a

protective order which prohibited the defendant in a defamation case from disclosing certain information obtained during the discovery process, concluding that a litigant's freedom to disseminate information obtained during discovery is not absolute under the First Amendment, and that an order prohibiting dissemination before trial is not the type of prior restraint that requires exacting First Amendment scrutiny.

In addition, there are several statutory provisions which characterize certain types of records as confidential, and therefore, could be read to preclude re-disclosure without the permission of the court. One example is Family Court Act provisions providing for the parties' access to mental health evaluations and probation reports and records. *See* FCA §351.1(5)(a) ("[a]ll diagnostic assessments and probation investigation reports shall be submitted to the court and made available by the court for inspection and copying by the presentment agency and the respondent ..."); FCA §351.1(6) ("[a]ll reports or memoranda prepared or obtained by the probation service for the purpose of a dispositional hearing shall be deemed confidential information furnished to the court and shall be subject to disclosure solely in accordance with this section or as otherwise provided for by law").

F. Article Three Provisions

1. Sealing - Upon termination of a delinquency proceeding in the respondent's favor, the clerk of court is required to immediately notify the child's attorney, the director of the presentment agency, and the heads of the probation department and police department or other law enforcement agency, that the proceeding has terminated in favor of the respondent.

More importantly, the clerk shall also provide notification that any records of the proceeding must be sealed, unless the court has directed otherwise in the interest of justice upon the presentment agency's motion to prevent sealing. Upon receipt of such notification, all official records and papers, including judgments and orders of the court, but not including public court decisions or opinions or records and briefs on appeal, relating to the arrest, the prosecution and the probation service proceedings, including all duplicates or copies thereof, on file with the court, police agency, probation service and presentment agency shall be sealed and not made available to any person or public or private agency. Such records shall remain sealed during the pendency of any motion for sealing FCA §375.1(1). *See Matter of Dashawn Q.*, 112 A.D.3d 1250 (3d Dept. 2013)

(court declines to seal psychiatric and sex offender records which were relevant to neglect case pending against respondent's mother that involved respondent and eight siblings, and "numerous acts of sexual abuse [alleged to have occurred] between siblings in the [mother's] household and the [mother's corresponding] failure … to protect the children from [such] abuse"); *Matter of Barnett v. David M. W.*, 22 A.D.3d 575 (2d Dept. 2005) (sealing order in youthful offender case covered official documents, including results of breathalyzer and blood alcohol tests administered by law enforcement personnel as integral part of proceeding, *and* information contained therein, but accused can be forced to answer questions about facts underlying the incident); *People v. P.D.*, 78 Misc.3d 352 (Sup. Ct., Kings Co., 2023) (Domestic Incident Reports are not official records within scope of sealing statute); *People v. Anonymous*, 76 Misc.3d 1022 (Crim. Ct., Bronx Co., 2022) (NYPD Domestic Incident Report is official record on file with prosecutor's office and must be sealed); *People v. Bundy*, 60 Misc.3d 518 (Justice Ct. of Town of Penfield, Monroe Co., 2018) (People could use documents from sealed case involving same charges that was dismissed for facial insufficiency where People filed within 30-day window within which the People could appeal and case was not yet sealed); *Matter of Carolina K.*, 55 Misc.3d 352 (Fam. Ct., Kings Co., 2016) (recording of 911 call covered by sealing statute); *People v. Cordeiro*, 24 Misc.3d 526, 876 N.Y.S.2d 636 (Town of Webster Justice Ct., Monroe Co., 2009) (People could not use deposition filed with previous accusatory instrument that was dismissed for facial insufficiency); *People v. Nicholas*, 19 Misc.3d 1144(A), 2008 WL 2369755 (Watertown City Ct., 2008) (court grants People's motion to bar sealing in child endangerment prosecution in which defendant left 18-month-old child alone in vehicle strapped into car seat in public parking lot for over 25 minutes with motor running while she had tanning session; in analysis, court borrows factors found in CPL §170.40, the dismissal in the interest of justice statute); *People v. Tyre*, 19 Misc.3d 1144(A), 2008 WL 2369753 (Watertown City Ct., 2008) (court bars sealing in 3 child endangerment cases in which defendant left children alone in vehicle); *People v. Nicholas*, 19 Misc.3d 322 (Watertown City Ct., 2008) (because People may exercise right to oppose sealing unless they have waived that right as part of a plea bargain, defendant, before entering plea, is entitled to notice of possibility that sealing will not be ordered; "public stigma" that remains if sealing is not ordered would be "direct

consequence" of plea); *People v. I.S.*, 4 Misc.3d 984 (Tuckahoe Village Ct., West. Co., 2004) (record is not deemed sealed on day of acquittal, since People must have opportunity to make motion); *see also Matter of New York Times Company v. District Attorney of Kings County*, 179 A.D.3d 115 (2d Dept. 2019) (Kings County District Attorney's Conviction Review Unit's final reports constitute "official records" subject to sealing); CPL §160.60 (arrest and prosecution of matter terminated in favor of defendant "shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution"); *Lino v. The City of New York*, 101 A.D.3d 552 (1st Dept. 2012) (in class action challenging inclusion of sealed records in "stop and frisk" database, court holds that CPL §§ 160.50 and 160.55 create private rights of action which allow plaintiffs to seek enforcement of statute).

It is not clear that the respondent may bargain away the opportunity to obtain sealing of a case that is dismissed in exchange for an admission in another case. *See*, *e.g.*, *Matter of Alexis W.*, D-9981/14, NYLJ 1202717065446, at *1 (Fam., BX, Decided January 13, 2015) (where respondent made admission on one docket to cover two, with understanding that second docket would be dismissed but "remain unsealed," and plea case was later adjourned in contemplation of dismissal, court grants motion to seal at end of ACD period, concluding that unsealing agreement meant that docket would remain unsealed during pendency of disposition in plea case and respondent did not permanently give up right to move for sealing; "The only reason to keep a dismissed case on the record of this young woman would be to persistently stigmatize her beyond her diligent and laudable efforts to elevate her behavior and ameliorate her situation").

The sealing requirement does not apply to "public court decisions or opinions or records and briefs on appeal ...." Also, it has been held that the accused has no standing to object to the use of sealed records from a proceeding involving a third party. *People v. Encarnacion*, 29 Misc.3d 490 (Sup. Ct., Bronx Co., 2010) (defendant lacked standing to object to use of sealed records of prosecution of third party).

A delinquency proceeding shall be considered terminated in favor of the respondent when: the petition is withdrawn; the petition is dismissed as defective or in furtherance of justice; the petition is dismissed after an adjournment in contemplation of dismissal; the petition is dismissed after a probable cause hearing; the petition is

dismissed after trial; the petition is dismissed after a fact-finding because of insufficient proof that the respondent requires supervision, treatment or confinement; the probation department adjusts the case or terminates the case without adjustment prior to the filing of a petition; the presentment declines to file a petition; or the petition is dismissed on speedy trial, double jeopardy or statute of limitations grounds. FCA §375.1(2). *See also Matter of Demesyeux*, 39 Misc.3d 1209(A) (Surrogate's Ct., Nassau Co., 2013) (insanity acquittees not entitled to sealing); *People v. O'Brien*, 193 Misc.2d 500 (Sup. Ct., Richmond Co., 2002) (defendant not entitled to sealing of charges that were dismissed prior to entry of guilty plea); *People v. Schleyer*, 192 Misc.2d 113 (Rochester City Ct., 2002) (same as *Tucker*). Probation when it adjusts a case, and the presentment agency when it declines to prosecute, must notify the other record-keeping agencies, which are then required to seal the records. FCA §375.1(4), (5).

In some instances, the proceeding has not yet been "terminated" in favor of the respondent if the presentment agency has taken an appeal. FCA §375.1(2)(b), (c), (d). *See, e.g., People v. Sanchez*, 8 Misc.3d 900 (Crim. Ct., N.Y. Co., 2005).

These sealing requirements have been strictly enforced. In *Matter of Alonzo M.*, 72 N.Y.2d 662 (1988), Probation violated the statute when it included, in a dispositional report, information concerning sealed cases. The court noted that Probation's maintenance of separate records was an "audacious" violation of the respondent's rights, but allowed that "background facts" from sealed matters may be revealed if derived from independent sources. *See also In re Cochran v. Olatoye*, 183 A.D.3d 426 (1st Dept. 2020) (administrative tribunal permitted to consider evidence of facts leading to charges that are independent of sealed records); *Matter of Mi-Kell "V"*, 226 A.D.2d 810 (3rd Dept. 1996) (respondent failed to support contention that proceedings referred to in probation report were, in fact, terminated in respondent's favor; court also holds that prior PINS petitions could be cited since FCA Article Seven contains no sealing requirement); R.C. v. City of New York, 2021 NY Slip Op 32049(U) (Sup. Ct., N.Y. Co., 2021) (court grants preliminary injunction enjoining NYPD from allowing personnel to access and use sealed arrest information without court order).

In *People v. Ellis*, 184 A.D.2d 307 (1st Dept. 1992), *lv denied* 80 N.Y.2d 929, the court held that a prosecution witness properly denied the existence of prior arrests and

that the prosecution was not obliged to disclose the sealed information.

Evidence flowing indirectly from a violation of sealing rules is not suppressible unless a constitutionally-protected right is implicated. *People v. Patterson*, 78 N.Y.2d 711 (1991); *People v. Stewart*, 161 A.D.3d 1108 (2d Dept. 2018) (no error in admission of audio recording of telephone conversation defendant had with victim, and transcript of conversation); *People v. Capers*, 129 A.D.3d 1313 (3d Dept. 2015) (no suppression where photograph of juvenile that should have been destroyed pursuant to FCA §354.1 was used in photo array); *People v. Vega*, 116 A.D.3d 454 (1st Dept. 2014), *lv denied* 24 N.Y.3d 965 (even if sealed, defendant's prior inconsistent statements would not necessarily have been inadmissible); *Matter of Quadon H.*, 55 A.D.3d 834 (2d Dept. 2008); *People v. Torres*, 291 A.D.2d 273 (1st Dept. 2002), *lv denied* 98 N.Y.2d 681 (2002); *see also People v. Saqline K.*, 164 A.D.3d 1368 (2d Dept. 2018) (court lacked power to suppress confidential presentence report in immigration proceedings). Arguably, however, sealed information itself may not be used at trial. *Matter of Dashawn Q.*, 112 A.D.3d 1250 (3d Dept. 2013) (in neglect proceeding, court discounts testimony of psychologist who reviewed sealed materials since "there is no meaningful way to gauge the impact of those materials upon the opinion he ultimately rendered"); *Matter of T.P.*, 51 Misc.3d 738 (Fam. Ct., Kings Co., 2016) (court strikes testimony of officer who, before testifying, reviewed records of dismissed criminal proceeding that were covered by sealing statute).

Sealed records shall be made available to the respondent or his designated agent [*see Matter of Elijah P.*, 128 A.D.3d 830 (2d Dept. 2015) (court erred in preventing respondent from introducing criminal complaint from sealed case allegedly containing prior inconsistent statements made by child to detective; Second Department cites CPL § 160.50(1)(d), under which records shall be made available to, among others, person accused or such person's designated agent)], and probation's records and papers shall be available to probation for the purpose of complying with statutory provisions governing adjustment. FCA §375.1(3). *See also* FCA §308.1(6) (probation may provide relevant record of adjustments to presentment agency).

After a respondent's eighteenth birthday, he/she may file a *post-adjudication* motion to seal. The court may grant the motion in the interest of justice. FCA §375.2. *See*

In re Giovanni G., 152 A.D.3d 419 (1st Dept. 2017) (no error in denial of motion to vacate adjudication and seal records where respondent's interests were adequately protected by "automatic confidentiality" of family court records and fact that adjudications do not entail civil disabilities; respondent failed to substantiated claim that adjudication might subject him to sex offender registration if he relocates to another state; and sealing records could impede use by law enforcement agencies for legitimate purposes if respondent engaged in further criminal activity); *In re Rosa R.*, 68 A.D.3d 407 (1st Dept. 2009) (sealing of record of assault adjudication and conditional discharge denied given serious nature of assault; respondent's interests are adequately protected by general confidentiality of Family Court records and fact that juvenile delinquency adjudications do not entail civil disabilities, and sealing records could impede their use by law enforcement agencies for legitimate purposes if respondent engages in further criminal activity); *In re Carlton B.*, 268 A.D.2d 368 (1st Dept. 2000) (motion denied given serious nature of assault, and relevance of case to upcoming Parole Board determination); *Matter of M.D.*, 66 Misc.3d 287 (Fam. Ct., Nassau Co., 2019) (in case involving findings of sexual abuse arising from two separate incidents, court orders sealing where acts were committed nearly five years earlier before respondent had turned fourteen and it was reasonable to assume respondent had matured; respondent had not had further involvement in juvenile or criminal justice system and successfully completed probation; respondent was dealing with physical and mental health difficulties, but had undertaken steps to improve health and after a hospitalization there was a "turn around" after respondent agreed to accept medication management; presentment agency's opposition was largely premised on seriousness of acts but §375.2 permits sealing except when there is designated felony finding; and Presentment Agency's unsubstantiated assertion that respondent's conduct "left the complainant traumatized even years after the incidents" is insufficient to warrant denial of application); *Matter of M.S.*, 37 Misc.3d 1223(A) (Fam. Ct., West. Co., 2012) (court grants sixteen-year-old respondent's motion for order sealing records and destroying fingerprints in arson case in which respondent entered admission to misdemeanor criminal mischief and was placed on probation for one year, where respondent had successfully completed probation and done well in school, and seemed to be on road to becoming productive member of society); *Matter of Kiara C.*, 31 Misc.3d

1245(A), 2011 WL 2477541 (Fam. Ct., Queens Co., 2011) (court grants motion to seal records of manslaughter case involving death of infant to whom respondent gave birth in bathtub where unfortunate events were result of sex offense perpetrated against respondent when she was impregnated by 18-year-old boyfriend, separation and divorce of parents led to emotional distress and feelings of isolation and psychological damage before respondent became pregnant, and respondent complied with probation conditions, was 19 years old, intended to pursue career as professional in field of automotive technology, and had no further involvement with criminal justice system; "The adjudication of juvenile delinquency in this case was never intended to constitute a Scarlet Letter which must be forever displayed to the public at large, and the notion of imposing punishment is contrary to the purposes underlying the juvenile delinquency statute"); *Matter of Donald R.*, 26 Misc.3d 1239(A), 2010 WL 1006696 (Fam. Ct., Queens Co., 2010) (21-year-old respondent's motion for sealing of record of burglary charges granted where respondent had successfully completed the period of probation, there was no evidence that he had subsequent contact with juvenile or adult criminal justice systems, he had completed High School and enrolled in college and would receive his Bachelor of Arts degree, he had enlisted in Army National Guard and achieved rank of Specialist and was a member of the United States Air Force, and wished to pursue career in law enforcement and should be permitted to pursue that objective without possible stigmatizing effects caused by juvenile delinquency adjudication); *Matter of A.B.*, 13 Misc.3d 1242(A) (Fam. Ct., Nassau Co., 2006) (sealing ordered after respondent earned early discharge from probation); *Matter of K.B.*, 10 Misc.3d 1063(A) (Fam. Ct., Nassau Co., 2005) (motion not barred as premature where respondent was still on probation, but motion denied since court would need access to file if violation of probation were filed); *Matter of Hiram G.,* 123 Misc.2d 911 (Fam. Ct., Bronx Co., 1984) (in deciding to seal records, court identified and considered the following factors: the nature of the charge; the history of the respondent and the composition, structure and characteristics of his family; the respondent's revealed characteristics and behavioral patterns and inclinations; the likelihood that the respondent will continue his behavior; the community's interest in the respondent and his development and the probability of future need for access to information; the value, importance and meaningfulness of the information and history to

agencies likely to be involved with the respondent); *see also In re Darwin P.*, 146 A.D.3d 682 (1st Dept. 2017) (while finding no error in denial of ACD in sex crime prosecution, court notes that statutory remedies such as sealing would minimize likelihood that adjudication would subject respondent to sex offender registration in another jurisdiction); *People v. Pettinato*, 22 Misc.3d 140(A), 2009 WL 596556 (App. Term, 9th & 10th Jud. Dist., 2009) (courts have inherent power to seal their own records, but power, exercised rarely, has been wielded when there has been showing of need to protect individual who might unjustly be injured by indiscriminate availability of records); *People v. Siddons*, 34 Misc.3d 1240(A) (Dist. Ct., Nassau Co., 2012) (sealing ordered where 1995 guilty plea was conditioned upon defendant waiving sealing rights, and existence of record was adversely affecting defendant's ability to pursue career).

Where the order of fact-finding includes solely a violation as defined in PL §10.00(3) committed by a juvenile at least sixteen years of age, the records shall be sealed automatically at the expiration, as applicable, of a successful period of an adjustment, adjournment in contemplation of dismissal or conditional discharge. FCA §375.2(7).

2. Unsealing - There is no authority in FCA Article Three for the unsealing of records except for the statement in FCA §375.1(3) that sealed records shall be made available to the respondent or his designated agent and that probation's records and papers shall be available to probation for the purpose of complying with statutory provisions governing adjustment. There are more exceptions in CPL §160.50(1)(d), which presumably do not apply in juvenile delinquency proceedings.

A court may not grant an application to unseal a record unless there is specific statutory authorization or some other grant of power, or unsealing is required under right of confrontation rules. *People v. Anonymous*, 34 N.Y.3d 631 (2020) (Court of Appeals holds that sentencing court lacked authority to consider erroneously unsealed transcript of defendant's trial testimony; that when violation of sealing law impacts sentence, error warrants relief; that People could not rely on law enforcement agency exception to sealing law, or on sentencing court's constitutional and statutory mandates to impose sentence based on reliable and accurate information); *Matter of Joseph M.*, 82 N.Y.2d 128 (1993); *Matter of Dondi*, 63 N.Y.2d 331 (1984); *Matter of Hynes v. Karassik*, 47 N.Y.2d 659

(1979); *Matter of John S.*, 23 N.Y.3d 326 (2014), *reargument den'd* 24 N.Y.3d 933 (Mental Hygiene Law §10.08(c) supersedes sealing provisions in CPL §160.50); *People v. F.B.,* 155 A.D.3d 1 (1st Dept. 2017), *lv denied* 30 N.Y.3d 911 (People not "law enforcement agency" able to seek access when they act as agency authorized pursuant to RPAPL 715(1) to demand that an eviction proceeding be commenced against a defendant); *Matter of Albany County District Attorney's Office v. William T.*, 88 A.D.3d 1133 (3d Dept. 2011) (unsealing not allowed where purpose was to facilitate Pennsylvania prosecution); *Matter of Akieba Mc. v. Nassau County District Attorney*, 72 A.D.3d 689 (2d Dept. 2010) (no unsealing where District Attorney alleged that there were criminal matters pending against two other individuals arising out of same incident, and that unsealing was necessary so that District Attorney could obtain testimony or statements of respondent in event that she testified in trials of charges against other individuals and to prevent perjury; request did not fall under "law enforcement agency" exception in CPL §160.50[1][d][ii]); *People v. Anonymous*, 7 A.D.3d 309 (1st Dept. 2004) (unsealing denied where Office of Professional Medical Misconduct had other sources of information); *People v. G.V.*, (County Ct., Nassau Co., 2021) (court finds no authority for post-removal unsealing of records of juvenile's criminal proceeding, which People alleged they needed to satisfy disclosure obligations in prosecution of adult co-defendant; court cites *Herald Co., Inc. v. Mariani*, 67 N.Y.2d 668, where Court of Appeals held that application must be made to family court, to be determined in accordance with standards applicable to juvenile delinquency proceedings, and notes that CPL §725.10(2) provides that filing of order of removal terminates criminal court action and all further proceedings shall be in accordance with family court laws); *People v. Alexander*, 67 Misc.3d 620 (Sup. Ct., Queens Co., 2020) (where 911 call and related paperwork were inadvertently sealed after case against individual who had been arrested in error was dismissed, court grants People's application to unseal records); *In re Police Commissioner of the City of New York*, 44 Misc.3d 1205(A) (Sup. Ct., Bronx Co., 2014) (police request for unsealing for purposes of employee disciplinary proceeding brought against defendant denied where police department was acting as public employer rather than "law enforcement agency"; court declines to invoke inherent authority to unseal based on extraordinary circumstances since petitioner failed to demonstrate that information could not be

obtained from other source); *Matter of Demesyeux*, 39 Misc.3d 1209(A) (Surrogate's Ct., Nassau Co., 2013) (application for unsealing must be made in criminal court); *Ligon v. City of New York*, 2012 WL 2125989 (SDNY 2012) (in action challenging police implementation of a program pursuant to which officers patrol inside and around private residential apartment buildings and alleging that plaintiffs and their minor children had been unlawfully stopped, questioned, frisked, and/or arrested, court orders unsealing of any records of plaintiffs' prior arrests for charges of trespass or related crimes covering past ten years); *People v. Stephen C.*, 33 Misc.3d 1223(A) (County Ct., Suffolk Co., 2011) (People not acting as "law enforcement agency" for which order to unseal is available where People wanted to obtain certified copy of temporary order of protection to use in prosecuting subsequent criminal action); *In re Stanley*, 32 Misc.3d 897, 926 N.Y.S.2d 886 (Sup. Ct., Kings Co., 2011) (where defendant was charged in Georgia with murder of common law husband and was raising battered woman's defense, court agreed to unseal records of victim's domestic violence cases and provide records to defense counsel); *Matter of the Application of the Central Screening Committee*, 28 Misc.3d 726 (Sup. Ct., Bronx Co., 2010) (unsealing ordered in connection with disciplinary matter involving defense counsel; statute was enacted to protect rights of accused, not to protect lawyers from scrutiny in disciplinary matters); *People v. Marcus A.*, 28 Misc.3d 667 (Sup. Ct., N.Y. Co., 2010) (where prosecutor filed new charge of criminal contempt prior to seeking unsealing order to obtain original temporary order of protection, prosecutor was not acting as law enforcement agency investigating crime; amendment to statute is necessitated by *Katherine B. v. Cataldo,* 5 N.Y.3d 196); *People v. Diaz*, 15 Misc.3d 410 (Sup. Ct., N.Y. Co., 2007) (court vacates unsealing order issued upon request of District Attorney, noting that DA is not a "law enforcement agency," and that, in any event, DA failed to justify unsealing to enable eviction proceeding to go forward); *People v. Joseph W.F.*, 111 Misc.2d 752 (Sup. Ct., N.Y. Co., 1981) (court denies complainant's motion where she sought records to assist her in civil action against acquitted defendant); *but see People v. Davis*, 70 Misc.3d 467 (Crim. Ct., Bronx Co., 2020) (prior negative judicial determination about officers' credibility in sealed case is evidence favorable to defense that must be disclosed; since People are not required under CPL Article 245 to ask for unsealing order and in any event cannot obtain records,

court orders unsealing in interest of justice and will conduct in camera inspection); *People v. Scott*, 134 Misc.2d 224 (Sup. Ct., Kings Co., 1986) (while granting defendant's motion to unseal youthful offender file of complaining witness, court notes that youthful offender is not entitled to same protection as one whose case has been terminated in his favor).

Of course, it is possible for the respondent to waive the protection of the sealing requirements by, for example, raising issues in litigation that are related to the contents of a sealed file. *See Matter of Scott D.*, 13 A.D.3d 622 (2d Dept. 2004) (filing of civil action against City and arresting officer did not result in waiver in disciplinary proceeding commenced by Department of Education since plaintiff did not seek to use privilege as sword to gain advantage); *Matter of Barnett v. David M. W.*, 22 A.D.3d 575 (2d Dept. 2005) (defendant waived Youthful Offender confidentiality by answering questions at deposition in civil proceeding); *Kalogris v. Roberts*, 185 A.D.2d 335, 586 N.Y.S.2d 806 (2d Dept. 1992) (filing of malicious prosecution action based on same proceeding resulted in waiver); *People v. Destine*, 187 Misc.2d 702 (Dist. Ct., Nassau Co., 2001) (sealed record does not become public merely because some contents are recited at trial, but should defendant use portion of testimony of witness who testified at trial of sealed matter, defendant must turn over to People entire transcript of witness' testimony, and, in discretion of trial court, may be required to turn over any items contained in sealed file which were put in issue by witness' testimony).

3. Expungement - The court has inherent power to order the expungement of court records, FCA §375.3, and, in cases in which the record destruction requirement in FCA §354.1 is not activated because fingerprints were not taken pursuant to FCA §306.1, the court arguably has some authority to order the expungement of police records. Generally, but not always, this power is designed to be exercised in cases where the charges prove to be unfounded. *See Matter of Todd H.,* 49 N.Y.2d 1022 (1980), *aff'g Matter of Anthony P. v. City of New York*, 65 A.D.2d 294 (2d Dept. 1978); *Matter of Dorothy D.*, 49 N.Y.2d 212 (1980); *People v. Stamos*, 31 Misc.3d 130(A), 2011 WL 1440315 (App. Term, 9th & 10th Jud. Dist., 2011) (motion to seal and expunge records, made 14 years after plea of guilty to sexual abuse in the third degree, was properly denied; courts' inherent power to seal their own records has been wielded only when there is need to protect individual who has been or might unjustly be injured by

indiscriminate availability of records); *Matter of Bryant W.*, 114 A.D.2d 962 (2d Dept. 1985); *United States v. Hasan*, 2002 WL 31946712 (E.D.N.Y., 2002); *but see Matter of Ejiro A.,* 268 A.D.2d 428 (2d Dept. 2000) (expungement appropriate where case was dismissed after fact-finding due to absence of evidence that respondent was in need of treatment, supervision or confinement; however, court cited FCA §375.1, and thus it may be that court meant to say sealing); *Matter of M.B.G.*, _Misc.3d_, 2023 WL 5008034 (Fam. Ct., N.Y. Co., 2023) (courts vacates dispositional order, dismisses petition pursuant to FCA §352.1(2) and seals records, and expunges court records, noting, inter alia, that expungement is not limited to cases of "complete innocence," and that expungement is appropriate considering respondent's rehabilitation, and would promote, rather than impede, his future academic and career achievement); *Matter of Emily P.*, 63 Misc.3d 755 (Fam. Ct., N.Y. Co., 2019) (court vacates dispositional order and dismisses petition, and orders sealing pursuant to FCA §375.1 and expungement pursuant to FCA §375.3, where respondent, a thirty-four-year-old accomplished forensic scientist about to commence a position with the United States Attorney's Office, was concerned about having to disclose information when questioned by current and prospective employers; court notes that there is nothing in statute or case law which precludes court from vacating dispositional order after its expiration, that relief will permit respondent to advance in career in public service unencumbered by delinquency adjudication, and that although Court of Appeals stated in *Matter of Dorothy D.* in dictum that expungement would not be appropriate in absence of respondent's "complete innocence," this dictum has not been consistently followed); *Matter of Dennis B.*, 104 Misc.2d 166 (Fam. Ct., Kings Co., 1980) (records expunged where designated felony petition was dismissed because of complainant's unwillingness to cooperate).

In *Matter of Francis O.*, 208 A.D.3d 51 (1st Dept. 2022), the First Department held that the family court had jurisdiction under Executive Law §995-c to order, and should have ordered, expungement of the respondent's DNA sample and related information where the sample was obtained without the respondent's knowledge or consent and in violation of his constitutional and due process rights; and that maintaining the respondent's DNA profile in the OCME's database in perpetuity was incompatible with the statutory goal in delinquency proceedings and would result in substantial injustice. Regarding the mechanics of expungement, *see All of Us or None–Riverside Chapter v. Hamrick*, 64 Cal.App.5th 751 (Cal. Ct. App., 4th Dist., 2021) (practice of using black

marker to cross out eligible references violated statutory requirement that record "be prepared again so that it appears that the arrest or conviction never occurred").

4. Use Of Records In Other Courts - "Except where specifically required by statute, no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under this article." FCA §380.1. In addition, "[n]either the fact that a person was before the family court under this article for a hearing nor any confession, admission or statement made by him to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or his interests in any other court." FCA §381.2(1). *See Green v. Montgomery*, 95 N.Y.2d 693 (2001) (statutory privilege applied despite supreme court's technical failure to send case to family court for final disposition; however, plaintiff waived the privilege by commencing a civil suit alleging that the police had used excessive force in apprehending him and placing at issue the very conduct for which he had been adjudicated a juvenile delinquent); *People v. Campbell*, 98 A.D.3d 5, 946 N.Y.S.2d 587 (2d Dept. 2012), *lv denied* 20 N.Y.3d 853 (use of juvenile delinquency adjudication for upward departure under Sex Offender Registration Act prohibited by FCA §381.2); *Holyoke Mutual Insurance Co. v. Jason B.*, 184 A.D.2d 550 (2d Dept. 1992) (while citing §§ 380.1 and 381.2, court refuses to admit delinquency records in insurance company's action seeking to deny coverage on grounds that juvenile's actions were intentional); *People v. T.P.*, 73 Misc.3d 1215(A) (County Ct., Nassau Co., 2021) (defendant's history and past contacts with New Jersey Family Court were inadmissible); *People v. J.A.D.*, 70 Misc.3d 1222(A) (County Ct., Nassau Co., 2021) (in determining whether to order removal, court prohibited from considering defendant's family court records and history); *People v. M.M.H.*, 67 Misc.3d 1216(A) (County Ct., Nassau Co., 2020) (same as *J.A.D.*); *People v. Evans*, 20 Misc.3d 1112(A), 867 N.Y.S.2d 19 (Sup. Ct., Kings Co., 2008) (prosecutor improperly questioned defendant in grand jury about juvenile delinquency adjudication in violation of §381.2(1); even if defendant opened door to questioning, prosecutor was required to limit impeachment to underlying facts of adjudication and could not ask about adjudication itself); *but see People v. Brailsford*, 106 A.D.2d 648 (2d Dept. 1985) (prosecutor could not inquire as to existence of family court record or fact that defendant had been declared a juvenile delinquent and had been the subject of a PINS proceeding, but was entitled to

cross-examine defendant regarding the underlying facts and circumstances which led to defendant's involvement with the Family Court).

However, when imposing sentence upon an adult, the court "may receive and consider the records and information on file with the family court, unless such records and information have been sealed pursuant to section 375.1. FCA §381.2(2); see also CPL §§ 530.40, 530.20, 510.30, 510.10 (in making decision regarding securing order, court must consider and take into account record of previous adjudication as juvenile delinquent, as retained pursuant to FCA §354.1, or of pending cases where fingerprints are retained pursuant to FCA §306.1).

5. Police Records - "All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection." FCA §381.3(1). Upon motion and for good cause shown, the court may open such records for the respondent or his parent, or a judge of a court in which the respondent has subsequently been convicted of a crime, unless the record has been sealed pursuant to FCA §375.1. FCA §381.3(2).

6. Fingerprints, Palmprints, And Photographs - The police may take fingerprints, palmprints and photographs under certain specified circumstances when a child has been charged with a felony. FCA §306.1(1), (2). The police are required to forward the records to the State Division of Criminal Justice Services; the police shall not retain any fingerprints, and must keep copies of palmprints and photographs confidential and in the exclusive possession of the police and separate and apart from files of adults. FCA §306.1(4). Upon receipt of the records, DCJS must, *inter alia*, retain them "distinctly identifiable from adult criminal records," and, after conducting a search, shall transmit information to the police regarding any adjudications or pending matters. FCA §306.2(1), (2). The police shall then transmit two copies of the DCJS report to the Family Court, and two copies to the presentment agency, which shall furnish a copy to the child's attorney. FCA §306.2(3). When DCJS has not received disposition information regarding a case within two years of an arrest, it shall, until information is received, withhold the record of that arrest when disseminating criminal history information. FCA §306.2(2).

However, whenever an arrest does not eventually result in a felony adjudication in Family Court (or, in the case of an eleven or twelve-year-old child, a class A or B felony

adjudication), all records and information generated pursuant to FCA §306.1 must be destroyed by DCJS and the police. FCA §354.1(2), (3), (4), (5). *See People v. Capers*, 129 A.D.3d 1313 (3d Dept. 2015) (suppression not required where photograph taken during juvenile delinquency proceeding that should have been destroyed pursuant to FCA §354.1 was used in photo array); *Matter of Quadon H.*, 55 A.D.3d 834, 866 N.Y.S.2d 693 (2d Dept. 2008) (in absence of additional circumstances justifying suppression, family court erred in ordering suppression where basis for arrest was match between fingerprints recovered at scene and respondent's fingerprints, which were taken in connection with previous arrest but should have been destroyed pursuant to FCA §354.1). The clerk of the family court - or, when the matter is terminated prior to filing, the police, probation or the presentment agency - is responsible for sending notification to DCJS and/or the police. If the child is subsequently convicted of a crime, any records not already destroyed shall become part of DCJS's permanent adult criminal record for that person. FCA §354.1(6). When the child reaches the age of twenty-one or has been discharged from placement for at least three years, whichever occurs later, and has had no criminal convictions, the records shall be destroyed. FCA §354.1(7).

In *Matter of Francis O.*, 208 A.D.3d 51 (1st Dept. 2022), the First Department held that the family court had jurisdiction under Executive Law §995-c to order, and should have ordered, expungement of the respondent's DNA sample and related information where the sample was obtained without the respondent's knowledge or consent and in violation of his constitutional and due process rights; and that maintaining the respondent's DNA profile in the OCME's database in perpetuity was incompatible with the statutory goal in delinquency proceedings and would result in substantial injustice. There was no abandonment, or waiver of constitutional protections, where it could be inferred that the 16-year-old respondent, who was offered a drink of water in a disposable cup for the sole purpose of collecting and preserving a DNA sample, was unaware that the cup could be used against him at a later date and be retained by OCME in perpetuity. Also, there was no DNA recovered in connection with the police investigation and thus the police would not have been able to obtain a court order to collect a DNA sample from the respondent.

7. <u>Protection From Adverse Consequences</u>

"No adjudication under [FCA Article Three] may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication." FCA §380.1(1). "No adjudication under this article shall operate as a forfeiture of any right or privilege or disqualify any person from holding any public office or receiving any license granted by public authority. Such adjudication shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling." FCA §380.1(2). "Except where specifically required by statute, no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under this article; provided, however, whenever a person adjudicated a juvenile delinquent has been placed with the office of children and family services pursuant to [FCA §353.3], and is thereafter enrolled as a student in a public or private elementary or secondary school, the court that has adjudicated such person shall provide notification of such adjudication to the designated educational official of the school in which such person is enrolled as a student. Such notification shall be used by the designated educational official only for purposes related to the execution of the student's educational plan, where applicable, successful school adjustment and reentry into the community. Such notification shall be kept separate and apart from such student's school records and shall be accessible only by the designated educational official. Such notification shall not be part of such student's permanent school record and shall not be appended to or included in any documentation regarding such student and shall be destroyed at such time as such student is no longer enrolled in the school district. At no time shall such notification be used for any purpose other than those specified in this subdivision. FCA §380.1(3). "Notwithstanding any other provision of law, where a finding of juvenile delinquency has been entered, upon request, the records pertaining to such case shall be made available to the commissioner of mental health or the commissioner of developmental disabilities, as appropriate; the case review panel; and the attorney general pursuant to section 10.05 of the mental hygiene law." FCA §380.1(4).

With certain exceptions, Executive Law §296(16) defines as an unlawful discriminatory practice any inquiry (not specifically required or permitted by statute) by a person, agency, bureau, corporation or association about an arrest or criminal accusation which was followed by termination of a criminal action or proceeding in favor of the

individual (*see* CPL §160.50), a youthful offender adjudication, or a conviction for a violation sealed pursuant to CPL §160.55, and any adverse action taken as a result of such an arrest or accusation, in connection with the licensing, employment or providing of credit or insurance to such individual. Under §296(16), an inquiry regarding whether the individual has ever been arrested is unlawful. *New York State Department of Mental Hygiene v. State Division of Human Rights*, 66 N.Y.2d 752, 754 (1985).

There is no mention of juvenile delinquency proceedings in §296(16). However, when read in the light of Executive Law §296(16), FCA §380.1(3) arguably precludes a prospective employer from asking an individual about prior juvenile arrests, proceedings or adjudications. *See New York State Department of Mental Hygiene v. State Division of Human Rights*, 66 N.Y.2d 752, 754.

G. Removal Cases

Under Criminal Procedure Law §725.15, "[e]xcept where specifically required or permitted by statute or upon specific authorization of the court that directed removal of an action to the family court," all records on file with the court, a police agency or the Division of Criminal Justice Services "are confidential and must not be made available to any person or public or private agency ...." The availability of records on file with the family court is governed by provisions applicable to family court records.