

The public right of access attaches only to “judicial documents.” Because nonprosecution agreements are not judicial documents, there is no public right of access to them either under the First Amendment or the common law. To be considered a judicial document, “the item filed must be relevant to the performance of the judicial function and useful in the judicial process.” *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). *See, e.g., In re Cedant Co.*, 260 F.3d 183, 192 (3d Cir. 2001)(“The status of a document as a ‘judicial record’ . . . depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings”); *United States v. El-Sayegh*, 131 F.3d 158, 162 (D.C. Cir. 1997)(“with nothing to record, there are no judicial records”); *see also In re Boston Herald, Inc.*, 321 F.3d 174, 180 (1st Cir. 2003)(“Both the constitutional and the common law rights of access have applied only to judicial documents”); *Chicago tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001)(“when applying the common law right of access federal courts traditionally distinguish between those items which may properly be considered public or judicial records and those that may not”).

In general, “there is no First Amendment right of access to government processes,” including those of the Executive branch. *United States v. Gonzales*, 50 F.3d 1246, 1260 (10th Cir. 1998). As the District of Columbia Circuit stated in evaluating whether a plea agreement which was submitted to the district court as an attachment to the government’s motion for leave to file the plea agreement under seal was a judicial document where the plea agreement was not ultimately filed with the court because the plea deal broke down:

The details of the plea agreement may, of course, be relevant to evaluating the performance of the Department of Justice or other law enforcement agencies in their dealings with El-Sayegh. But that is not the judicial function, and proper public oversight of the executive neither requires nor justifies claims of access to the records of the judiciary.

El-Sayegh, 131 F.3d at 163. The case is even clearer as to nonprosecution agreements:

The government has absolute discretion to decide not to prosecute. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 . . . (1987) (“[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review.”). Even a formal, written agreement to that effect, which is often referred to as a “non-prosecution agreement,” is not the business of the courts.

United States v. HSBC Bank USA, N.A., 2013 WL 3306161 at *5 (E.D.N.Y. July 1, 2013). See Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components, U.S. Att’ys re: Selection and Use of Monitors in Deferred Prosecution Agreements and Non–Prosecution Agreements with Corporations (Mar. 7, 2008) at note 2, available at <http://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors> (last visited February 26, 2016) (“In the nonprosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court.”).