

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ELAINE BLANCHARD, KEEDRAN)	
FRANKLIN, PAUL GARNER and BRADLEY)	
WATKINS, (Dismissed per Court Order))	
Plaintiffs,)	
)	
and)	
)	
ACLU OF TENNESSEE, Inc.)	
Intervening Plaintiff,)	
)	No. 2:17-cv-02120-jpm-DKV
v.)	
)	
THE CITY OF MEMPHIS,)	
Defendant.)	
)	

RESPONSE TO DEFENDANT’S MOTION TO ALLOW FILING UNDER SEAL

Comes now Plaintiff and files this response in opposition to Defendant’s Motion to Allow Filing Under Seal (Doc. No. 77) and Supplemental Memorandum in Support of Its Motion to Allow Filing Under Seal (Doc. No. 83).¹ Defendant have admitted that Exhibits 6, 7, 8, 9, 10, and 16 should not be sealed. Plaintiff agrees. With regard to the remaining exhibits, Defendant has failed to meet its burden.

The Exhibits to Defendant’s Statement of Undisputed Facts do not meet the exacting standards set forth in Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016) to justify sealing the documents from public view. There is a strong presumption

¹ Plaintiff notes that Defendant’s Supplemental Memorandum was filed several days following the filing of their Motion to Seal. Accordingly, Plaintiff objects to the filing as improper and respectfully submit that it should not be considered by the Court. Plaintiff will however, respond to both the Motion and the Supplement herein.

in favor of leaving court records open. Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016). “Only the most compelling reasons can justify non-disclosure of judicial records.” In re Knoxville News–Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983). The greater the public interest is in the subject matter of the litigation, the greater the burden necessary to overcome the presumption of openness. Shane Grp. Inc., 825 F.3d at 305. Asserting that the information may harm a party’s reputation or might prove embarrassing is not enough to meet this burden. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983). Even when a party can meet this exacting burden, the seal must be narrowly tailored to serve the reasons given. Shane Grp., Inc., 825 F. 3d at 308. The fact that information or records were designated as Confidential and prevented from disclosure under a protective order is not alone reason to order the evidence to be sealed. Id. at 306.

A. THE PUBLIC HAS A STRONG INTEREST IN ACCESS TO THIS CASE

In addition to the interest in access to court records in general, the public has a strong interest in access to this case in particular. The crux of this case is the conduct of the Defendant regarding its own residents. The Complaint alleges that the Defendant has engaged in gathering political intelligence on members of the Memphis community in violation of a Consent Decree.

In Shane Group, Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299 (6th Circuit 2016), the court explained the public interest in access to court records goes beyond the outcome or result of a case.

Sometimes, the public’s interest is focused primarily upon the litigation’s result— whether a right does or does not exist, or a statute is or is not constitutional. In other cases — including “antitrust” cases, — the public’s interest is focused not only on the result, but also on the conduct giving rise to the case. In those cases, “**secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.**” And in any of these cases, the public is entitled to assess for itself the merits of judicial decisions. Thus, “[t]he public has an interest in

ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions.”

Id. at 305 (quoting Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983) (citations omitted)).

Much like in Shane Group, the public has a similar interest in the case at hand, which involves the conduct of public officials who govern them. Secrecy in this case would serve only to insulate Defendant from the public becoming aware of the very conduct to which they have been subjected. Because the evidence in this case is of such high public importance, the resulting burden to justify sealing the evidence should be high.

B. IN LIGHT OF THE STRONG PUBLIC INTEREST IN DISCLOSURE, DEFENDANT HAS NOT MET THE HEAVY BURDEN TO JUSTIFY SEALING THE DOCUMENTS FROM PUBLIC VIEW.

The designated materials do not meet the high standard established in the Sixth Circuit to justify continuing treatment as confidential. Most of the exhibits are communications between employees of the police department, copies of presentations, deposition transcript and copies of social media posts.

To justify sealing of the Exhibits, Defendant has made only vague and non-specific assertions, unsubstantiated by any evidence. Defendant has identified two categories of documents which it argues should be sealed. The first are documents for which Defendant admits there is no reason to seal the documents. Defendant asks the court to seal them anyway, pending its determination on Defendant’s Motion for Summary Judgment on the issue of Plaintiff’s standing. These are identified as Exhibits 1 through 5. They are an affidavit from Defendant’s expert and experts from four depositions taken in the case.

Defendant cites no case for the proposition that the existing of a dispute over standing, an argument that Defendant has already made and on which the court has previously ruled, justifies

sealing evidence filed in the court record from public view. Simply because Defendant may ultimately prevail on any particular argument does not change the fact that court records are presumptively public. Nor does this argument present such a compelling reason as to satisfy Defendant's burden to justify sealing documents. The case has proceeded through discovery and dispositive motions have been filed. The public has an interest in reviewing those motions and the evidence attached if they so choose.

In Defendant's separate Motion to Hold Plaintiff's Motion to File Under Seal in Abeyance (Doc. No. 82). Defendant reveals its reason for wanting the evidence produced in this case kept from public view:

It would be unfair to the City and Memphis Police Department ("MPD") to needlessly expose sensitive internal document relating to how MPD is attempting to protect the public from potential safety concerns to public view . . .

Id. at p.1602. Whether information may harm a Defendant's reputation or prove embarrassing is not enough to meet the burden to justify sealing evidence. Brown & Williamson Tobacco Corp., 710 F.2d at 1179.

Additionally, Defendant has not identified what about the information is so sensitive that it warrants sealing. Defendant instead relies on a blanket pronouncement that there would be harm to it and the MPD. If the harm is simply that members of the public would dislike the policies and practices of the city, this would not present a compelling justification for sealing records. Even if the public might be angry or demand change from Defendant, the burden would not be met. Because the nature of the sensitivity and harm have not been disclosed, the Court cannot assess the harm claimed by Defendant that would result from disclosure. Conclusory statements claiming that disclosure would be harmful are not enough to meet the burden to justify sealing documents.

For the remaining exhibits, Defendant has identified multiple, and sometimes overlapping, reasons for sealing documents. Defendant asserts that exhibits contain “information pertaining to confidential law enforcement techniques,” “operational details about a law enforcement investigation,” operation details about security at City Hall, information pertaining to person suspected of criminal activity and information obtained from a confidential source.

Again, Defendant provides no details explaining what information the exhibit contain that relate to these concerns. Defendant fail to identify which “law enforcement techniques” or operational details are at issue, which might allow Plaintiff and the Court to better assess their claim. The same is true regarding claims of “ongoing investigations” — no evidence has been produced of such.

Again, Defendant may not rely on conclusory statements to meet the high bar articulated in Shane Group. Other than the claims that these exhibits may somehow related to operations or investigations, Defendant fails to articulate why public disclose would in any way harm Defendant. Defendant’s motion merely invokes a rationale for sealing without doing the yeomen’s work of proving that the rationale is true.

Even if Defendant had proffered a suitable justification to warrant sealing these exhibits, Defendant fail to identify what particular information is so sensitive that it warrants sealing. Orders to seal must be drawn narrowly. Shane Grp., Inc., 825 F. 3d at 308. If information can be redacted, as is the standard for social security numbers and birth dates², then the remaining information should be made available to the public.

² In several instances, dates of birth and Social Security numbers have not been redacted from Defendant’s Exhibits prior to filing. (*See, e.g.*, Exs. 13, 19.) Plaintiff would request that those documents be appropriately redacted prior to unsealing.

For the foregoing reasons, Plaintiff request that Defendant's Motion to Allow Filing Under Seal be denied.

Respectfully submitted,

/s/ Thomas H. Castelli
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CERTIFICATE OF SERVICE

I certify that on July 2, 2018 the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served via the Court's ECF system to:

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