

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

ACLU OF TENNESSEE, Inc.)	
)	
Intervening Plaintiff,)	
)	
v.)	No. 2:17-cv-2120-JPM-jay
)	
THE CITY OF MEMPHIS,)	
)	
Defendant.)	
)	

**ACLU OF TENNESSEE, INC.’S SEALED RESPONSE TO THE ORDER TO SHOW
CAUSE WHY THE TRANSCRIPT FROM AUGUST 27, 2019 IN-CAMERA
CONFERENCE SHOULD NOT BE PREPARED, DOCKETED, AND MADE
AVAILABLE TO THE PUBLIC**

Plaintiff files this response to the Court’s *Order to Show Cause Why the Transcript of August 27, 2019, In-Camera Conference Should Not Be Prepared, Docketed, and Made Available to the Public* (“Order to Show Cause”). For the reasons set for the below, the Court should unseal the transcript.

On August 27, 2019, the City of Memphis (the “City”) requested an in-camera conference to discuss a security matter related to the consent decree entered into as a result of *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978). The conference was held later that day and remains sealed at the City’s request. On October 2, 2019, the Court issued the Order to Show Cause on the issue of whether a transcript of the proceeding should be prepared and whether all or a portion of the transcript should be unsealed.

There is a “long-established legal tradition [of a] presumptive right of the public to inspect and copy judicial documents and files. *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474

(6th Cir. 1983). “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984).

The party seeking to seal the records bears a “heavy burden” to overcome the presumption in favor of openness. *Kondash v. Kia Motors America, Inc.*, 767 F. App'x 635, 637 (6th Cir. 2019).

To meet this burden, the party must show three things: (1) a compelling interest in sealing the records; (2) that the interest in sealing outweighs the public’s interest in accessing the records; and (3) that the request is narrowly tailored. Where a party can show a compelling reason for sealing, the party must then show why those reasons outweigh the public interest in access to those records and that the seal is narrowly tailored to serve that reason. To do so, the party must “analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.”

Id. (citations omitted). “Moreover, the greater the public interest in the litigation’s subject matter, the greater the showing necessary to overcome the presumption of access.” *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016). “[T]he proponents of closure bear the burden of showing that disclosure will work a clearly defined and serious injury. And in delineating the injury to be prevented, specificity is essential.” *Id.* at 307–08 (internal quotations and citation omitted). When the burden is met, the court must still “consider alternatives to closure and to total suppression of the transcript.” *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 513 (1984).

The sealing of judicial records must be narrowly tailored to a compelling interest. *Kondash v. Kia Motors America, Inc.*, 767 F. App'x 635, 637 (6th Cir. 2019). The August 27, 2019 proceeding discussed the application of the *Kendrick* consent decree to the City’s cooperation with federal agencies in planning the 2019 PSP Symposium on Violent Crime. The temporary sealing of the proceeding until the event had concluded was a sufficiently narrowly tailored remedy to any

security concerns, however the symposium was held on September 9–11, 2019. Any concerns about the secrecy of the City’s intent to provide security for the symposium no longer apply, so there is no compelling interest for continued sealing.

To justify a continued sealing of the record, the City bears the burden of showing, with specificity, “a clearly defined and serious injury” that will result from the unsealing of the record. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 307 (6th Cir. 2016). Since the proceeding referred to security measures for an event that has passed, there will be no specific injury from the public disclosure that the City assisted with security for a large, law-enforcement event. Indeed, the public may assume that the City was involved in security for the event. During the proceeding, the City offered no specific details about security measures for which there is a compelling public safety reason to conceal. To the extent that any of the discussion on the transcript would contain such sensitive information, then it would be appropriate for those portions of the transcript to be redacted, but the remaining transcript to be made available to the public. *See Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 513 (1984) (finding that a court must consider “alternatives to closure and to total suppression of the transcript”); *Kondash v. Kia Motors America, Inc.*, 767 F. App’x 635, 637 (6th Cir. 2019) (finding that requests to seal must be narrowly tailored to a compelling interest). Because there is no compelling interest for the continued sealing of the transcript, it should be unsealed. *See Press-Enterprise Co. v. Superior Court of California, Riverside City*, 464 U.S. 501, 510 (1984).

For the foregoing reasons, ACLU-TN asks that the Court unseal the August 27, 2019 transcript.

Respectfully Submitted,

/s/ Thomas H. Castelli
Thomas H. Castelli, BPR# 024849
ACLU Foundation of Tennessee
P.O. BOX 120160
Nashville, TN 37212
615.320.7142
tcastelli@aclu-tn.org

Mandy Strickland Floyd, BPR#31123
Bone McAllester Norton PLLC
511 Union Street, Suite 1600
Nashville, TN 37219
615.238.6302
mfloyd@bonelaw.com

ATTORNEYS FOR PLAINTIFF
ACLU of Tennessee, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, a true and correct copy of the foregoing document has been served via email to:

Attorneys for Defendant, City of Memphis

Buckner Wellford

R. Mark Glover

Jennie Vee Silk

Mary Wu Tullis

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.

165 Madison Avenue, Suite 2000

Memphis, Tennessee 38103

bwellford@bakerdonelson.com

mglover@bakerdonelson.com

jsilk@bakerdonelson.com

mtullis@bakerdonelson.com

/s/ Thomas H. Castelli

Thomas H. Castelli