

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

ACLU OF TENNESSEE,	)	
	)	
Intervening Plaintiff,	)	
v.	)	No. 2:17-cv-02120-JPM-dkv
	)	
THE CITY OF MEMPHIS,	)	
	)	
Defendant.	)	

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO FILE UNDER SEAL**

The Plaintiff, ACLU-TN, filed its Motion for Summary Judgment on Civil Contempt (ECF No. 79) along with fifty-three exhibits under seal. In its contemporaneously-filed Motion to File Under the Seal (ECF No. 78), the ACLU-TN asked Court to unseal all but two of the exhibits. (ECF No. 78-1, PageIDs 682-84).

The City acknowledges that courts have long recognized a presumption in favor of openness as to court records. The burden of overcoming that presumption is borne by the party that seeks to seal them. *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305. The greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access. *Id.* Where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason. *Id.* The proponent of sealing therefore must analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.” *Id.* at 305-06 (citations omitted).

Pursuant to the requirements of *Shane Group, Inc.*, the City will analyze each document for the propriety of secrecy along with the reasons and legal citations supporting the continued

sealing of the document. For each Exhibit listed, the City either (1) has no objection to the document being unsealed; (2) is arguing why the exhibit should remain sealed, regardless of the Court's ruling on the Motion for Summary Judgment on Standing; or (3) is conceding that there is no substantive reason to keep the document sealed, but for the same reasons listed in the City's Motion to Hold Plaintiff's Motion to File Under Seal in Abeyance (ECF No. 82), requests that the Court delay unsealing these documents until it has ruled on the City's Motion for Summary Judgment on Standing.

EXHIBIT LIST

<b>Ex. No.</b>	<b>DESCRIPTION</b>	<b>SEALED OR UNSEALED</b>	<b>ARGUMENT</b>
	Deposition Excerpts of Eddie Bass	Sealed pending ruling on Motion for Summary Judgment on Standing	
	Deposition Excerpts of Director Albert Bonner	Sealed pending ruling on Motion for Summary Judgment on Standing	
	Deposition Excerpts of Major Stephen Chandler	Sealed pending ruling on Motion for Summary Judgment on Standing	
	Deposition Excerpts of Aubrey Howard	Sealed pending ruling on Motion for Summary Judgment on Standing	
	Deposition Excerpts of Joseph Patty	Sealed pending ruling on Motion for Summary Judgment on Standing	
	Deposition Excerpts of Director Michael Rallings	Sealed pending ruling on Motion for Summary Judgment on Standing	
	Deposition Excerpts of Bradley Wilburn	Sealed pending ruling on Motion for Summary Judgment on Standing	
	Deposition Excerpts of Timothy Reynolds	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. Sgt. Reynolds's

			deposition contains testimony related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
A	AOA for Mayor's Home and City Hall Escort List	Unsealed	
B	Email from Director Rallings to Eddie Bass	Sealed pending ruling on Motion for Summary Judgment on Standing	
C	Email regarding AOA and City Hall Escort List that includes driver's license records of persons included on the Escort List.	Sealed	For the same reasons articulated by the ACLU-TN in the Motion to File Under Seal, the City agrees that Exhibit C should remain sealed. <i>See</i> ECF No. 78-1, PageIDs 682-83.
D	Escort List vetting memo	Sealed pending ruling on Motion for Summary Judgment on Standing	
E	Email requesting assistance with publication of Joint Intelligence Brief (JIB)	Sealed pending ruling on Motion for Summary Judgment on Standing	
F	Email regarding JIB	Sealed pending ruling on Motion for Summary Judgment on Standing	
G	Email containing a JIB	Sealed pending ruling on Motion for Summary Judgment on Standing	
H	Email containing a JIB	Sealed pending ruling on Motion for Summary Judgment on Standing	
I	Email regarding inclusion on distribution list of JIB	Sealed pending ruling on Motion for Summary Judgment on Standing	
J	Email forwarding a JIB containing juvenile records.	Sealed	For the same reasons articulated by the ACLU-TN in the Motion to File Under Seal, the City agrees that Exhibit C should remain sealed. <i>See</i> ECF No. 78-1, PageIDs 683.

K	Email regarding Day of Rage Protests	Sealed pending ruling on Motion for Summary Judgment on Standing	
L	Email forwarding a JIB	Sealed pending ruling on Motion for Summary Judgment on Standing	
M	Email forwarding a JIB	Sealed pending ruling on Motion for Summary Judgment on Standing	
N	Email forwarding a JIB	Sealed pending ruling on Motion for Summary Judgment on Standing	
O	Criminal Justice Information System Media Policy	Unsealed	
P	Database of protest activity	Sealed pending ruling on Motion for Summary Judgment on Standing	
Q	PowerPoint Presentation regarding protest at Graceland in 2016	Sealed	This document contains arrest records of several persons that should be treated as confidential due to the personal identifying information contained therein.
R	PowerPoint Presentation regarding protest at Graceland in 2017	Sealed pending ruling on Motion for Summary Judgment on Standing	
S	Email regarding law enforcement software	Sealed pending ruling on Motion for Summary Judgment on Standing	
T	Email regarding law enforcement software	Sealed pending ruling on Motion for Summary Judgment on Standing	
U	Email with screenshots of social media regarding protests	Sealed pending ruling on Motion for Summary Judgment on Standing	
V	Email regarding potential public events	Sealed pending ruling on Motion for Summary Judgment on Standing	
W	Email regarding potential public events	Sealed pending ruling on Motion for Summary Judgment on Standing	
X	Email related to investigation of potential	Sealed	The City is invoking the law enforcement privilege to

	planned civil disturbance at City Hall		seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
Y	Email containing screenshots of a Facebook account	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
Z	Screenshots of a Facebook account	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
AA	Screenshots of a Facebook account	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.

BB	Email discussing Facebook posts	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
CC	Screenshots of a Facebook account	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
DD	After Action Review of Public Event	Sealed pending ruling on Motion for Summary Judgment on Standing	
EE	Email regarding potential protest	Sealed pending ruling on Motion for Summary Judgment on Standing	
FF	Email regarding potential protest	Sealed pending ruling on Motion for Summary Judgment on Standing	
GG	Email with photos of protest	Sealed pending ruling on Motion for Summary Judgment on Standing	
HH	Email regarding community event	Sealed pending ruling on Motion for Summary Judgment on Standing	
II	Email regarding potential protest on Beale Street	Sealed pending ruling on Motion for Summary Judgment on Standing	
JJ	Email regarding event planned at a church	Sealed pending ruling on Motion for Summary Judgment on Standing	

KK	Email regarding potential event related to anniversary of Darrius Stewart's death	Sealed pending ruling on Motion for Summary Judgment on Standing	
LL	Email regarding the use of an undercover phone	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
MM	Email regarding the use of an undercover phone	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to a confidential source, and revealing that source might interfere with past, present, or future law enforcement investigations.
NN	Email regarding inquiries about protest permits	Sealed pending ruling on Motion for Summary Judgment on Standing	
OO	Email regarding protest permit process	Sealed pending ruling on Motion for Summary Judgment on Standing	
PP	Email regarding use of law enforcement software with attachment	Sealed	The City is invoking the law enforcement privilege to seek an order from this Court preventing this document from being unsealed. This document contains information related to the use of confidential law enforcement tools and techniques.
QQ	Screenshot of MPD	Unsealed	

	Internal Website		
RR	Email forwarding the Consent Decree and Internal MPD Policy	Sealed pending ruling on Motion for Summary Judgment on Standing	
SS	Email regarding potential protest	Sealed pending ruling on Motion for Summary Judgment on Standing	

### Exhibits C, J, Q

Exhibits C, J, and Q, designated as "SEALED" in the above chart, should be sealed because they contain personal information about individuals not parties to this lawsuit, and disclosure of this information could cause unnecessary harm to those persons. The City agrees with ACLU-TN's arguments regarding Exhibits C & J, and incorporates those arguments herein. See ECF No. 78-1, PageIDs 682-83 .

For similar reasons, the City asserts that Exhibit Q should also remain under seal. Exhibit Q contains copies of arrest tickets with personal information about individuals who are not parties to this lawsuit. Disclosure of this personal information to the public could cause unnecessary harm or embarrassment to those persons.

### Other Documents to Remain Sealed

The City asserts that the following documents should be protected from public disclosure based on law enforcement privilege: Deposition Excerpts of Timothy Reynolds; portions of Plaintiff's Memorandum in Support of its Motion for Summary Judgment, and Exhibits X, Y, Z, AA, BB, CC, LL, MM, and PP.

[T]he purpose of the law enforcement privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.



*United States v. Taylor*, No. 3:14-00015, 2015 WL 9274934, at \*2 (M.D. Tenn. Dec. 18, 2015) (citing *In re Dep't of Investigation of City of N.Y.*, 856 F.2d 481, 484 (2nd Cir. 1988) (internal quotations omitted)).

The Sixth Circuit has explicitly held that law enforcement tools and software are protected from disclosure by the law enforcement privilege. *United States v. Pirosko*, 787 F.3d 358, 362 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 518 (2015) ("[A]llowing Pirosko access [to ShareazaLE, a proprietary program used exclusively by law enforcement] without any evidence of error would needlessly expose the government's enforcement tools to examination and pointlessly drag out the course of litigation.") *Id.* at 367.

#### Documents Identifying Confidential Law Enforcement Sources

The City asserts the law enforcement privilege on a portion of Plaintiff's Memorandum in Support of its Motion for Summary Judgment (ECF No. 79-1, p, 12); Deposition Excerpts of Timothy Reynolds (pp. 91-98; 104, 110); and Exhibits X, Y, Z, AA, BB, CC, LL, and MM. These documents contain confidential information related to the undercover Facebook account identified in the depositions as being used by the Office of Homeland Security. Disclosure of the documents and documentation regarding that account will have the potential for implicating or identifying cooperative witnesses involved in active and/or completed criminal investigations involving the Organized Crime Unit ("OCU") of the Memphis Police Department. Those OCU investigations are not related to the allegations in this matter. *See* Affidavit of Sgt. Timothy Reynolds, separately submitted for *in camera* review as Exhibit 1; Affidavit of Colonel Paul Wright, separately submitted for *in camera* review as Exhibit 2.

As noted above, one of the purposes of the law enforcement privilege "is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of

individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Taylor*, 2015 WL 9274934, at \*2. Disclosure of these documents to the public would unquestionably compromise the confidentiality of a source, and the documents should remain sealed from public view.<sup>1</sup>

Document Identifying Confidential Law Enforcement Tools and Techniques

Regarding Exhibit PP, the City asserts that law enforcement privilege applies because its disclosure would reveal a confidential law enforcement technique, i.e. how a confidential law enforcement investigative tool -- a social media aggregator -- operates in a "real world" law enforcement model. In this instance, the law enforcement technique at issue is the application of the law enforcement software i2Analysis Notebook in conjunction with the law enforcement software Accurint LE. Since one of the purposes of the law enforcement privilege "is to prevent disclosure of law enforcement techniques and procedures," Exhibit PP should remain under seal. *See Taylor*, 2015 WL 9274934, at \*2.

CONCLUSION

For the reasons stated above, the City requests that the exhibits and documents marked as Sealed remain under seal. The City further requests that the remaining documents marked as "Sealed pending ruling on Motion for Summary Judgment on Standing" be sealed at least until the Court rules on the City's Motion for Summary Judgment on the Issue of Standing.

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<sup>1</sup> Accordingly, portions of Plaintiff's Memorandum in Support of its Motion for Summary Judgment (ECF No. 79-1) that identify the existence of a confidential social media account used by MPD for investigations should be redacted should the Court decide to unseal the Motion and Memorandum in Support.

Respectfully submitted,

/s/ Jennie Silk

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2018, the foregoing was served via the Court's ECF system to the following counsel of record:

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