

**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.	)	
	)	

---

**PLAINTIFF’S RESPONSE IN OPPOSITION TO  
DEFENDANT’S MOTION FOR *IN CAMERA* REVIEW**

Plaintiff submits this response in opposition of Defendant’s Motion for *In Camera* Review of two affidavits claimed under law enforcement privilege (the “Affidavits”). Plaintiff asks that the Court deny Defendant’s Motion because Defendant has failed to make a sufficient showing that the law enforcement privilege applies; further, such privilege does not justify *in camera* review of the Affidavits. If Defendant intends to rely on the Affidavits in support of its Motions to seal documents filed in this case, Plaintiff should be allowed to review the facts asserted in the Affidavits and be permitted to respond.

**INTRODUCTION**

Defendant has asked the Court to review *in camera* two affidavits that it claims are privileged under the law enforcement investigative privilege. The stated purpose of these

affidavits is “to establish the existence of the privilege as it relates” to documents attached to Plaintiff’s Motion for Summary Judgment.<sup>1</sup> Defendant does not seek to use the privilege to claw back documents, but instead seeks to use an invocation of the privilege to seal the already-filed summary judgment exhibits in the Court’s record. Defendant asserts that not even Plaintiff can view the testimony that supports its claims that the exhibits should be sealed. This is improper. The sole purpose of Defendant’s manufacture of the Affidavits, which it claims contains privileged material, is to bolster its argument for sealing documents in this case without allowing Plaintiff an opportunity to review the Affidavits and respond accordingly. Respectfully, Defendant’s motion should be denied.

### **ARGUMENT AND CITATION TO AUTHORITY**

The Court is permitted to review materials *in camera*; however, such review is a departure from ordinary procedure and is disfavored where it may be unduly prejudicial to a party. *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 700 (D. Nev. 1994) (“*In camera* review should not replace the effective adversarial testing of the claimed privileges and protections.”)<sup>2</sup> Further,

---

<sup>1</sup> Specifically, Defendant asserted privilege on the following documents submitted with Plaintiff’s Motion for Summary Judgment on Contempt, (ECF No. 79): portions of Plaintiff’s Memorandum in Support of its Motion for Summary Judgment, (ECF No. 79-1, at 12); excerpts of Timothy Reynold’s Deposition referencing the social media platforms utilized by the Memphis Police Department, (Reynolds Dep. 91-98, 104, 110); and Exhibits X, Y, Z, AA, BB, CC, LL, MM, and PP, which all include either interdepartmental emails, screenshots of social media activity, or both. Importantly, the documents contained in Exhibit Z were not even produced by Defendant in discovery, but rather were discovered by Plaintiff in independently investigating publicly available information related to a social media account.

<sup>2</sup> See also *Bergman v. United States*, 565 F. Supp. 1353, 1373 (W.D. Mich. 1983) (“It is the Court’s task to . . . ensure that fairness is not violated.”), *aff’d*, 844 F.2d 353 (6th Cir. 1988); *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 480 (1990) (“In the circumstances of the present case, we are not disposed to accept such an affidavit as dispositive, without providing petitioner the opportunity of rebuttal.”).

none of the circumstances in which courts permit *ex parte* submissions for *in camera* review apply here.<sup>3</sup>

Before a Court grants *in camera* review, a movant must first make a requisite showing that the asserted privilege does exist and can be applied to the submitted documents. *Automated Sols. Corp. v. Paragon Data Sys.*, 756 F.3d 504, 517 (6th Cir. 2014) (citing *United States v. Zolin*, 491 U.S. 554, 572 (1989)); *see also In re Haynes*, 577 B.R. at 738-40 (holding that *in camera* review should only take place “after the party asserting privilege has submitted an adequate record to support the claim”) (internal citations omitted)). The Defendant carries the burden with respect to showing law enforcement privilege.

The law enforcement privilege claimed by Defendant does not apply to shield the Affidavits from *Plaintiff’s* view. Law enforcement privilege *only* applies where it will interfere with *ongoing* criminal investigations and unnecessarily expose law enforcement techniques to the public. *United States v. Taylor*, No. 3:14-00015, 2015 WL 9274934, at \*2 (M.D. Tenn. Dec. 18, 2015). Law enforcement privilege does not apply to materials involving *past* or even *future* criminal investigations.<sup>4</sup> *See Taylor*, 2015 WL 9274934, at \*2; *Lykken*, 2008 WL 2077937, at \*7.

Further, the law enforcement privilege’s application is limited in civil proceedings, such as this one, because the privilege is intended to “prevent a party who is *himself* the subject of a criminal investigation from obtaining premature discovery of law enforcement actions that may

---

<sup>3</sup> For example, see grand jury testimony, FOIA requests, and criminal case proceedings. *E.g., In re Grand Jury Proceedings (Gordon)*, 722 F.2d 303, 310 (6th Cir. 1983) (An “*in camera* submission on the facts of this case was a reasonable accommodation of the need to maintain secrecy of the grand jury investigation.”); *United States v. Hanna*, 661 F.3d 271, 294 (6th Cir. 2011).

<sup>4</sup> Defendant contends that they “cannot disclose that information – *even to opposing counsel* – without jeopardizing past and future criminal investigations.” (ECF No. 86, at 3) (emphasis added).

be taken against him.” *Lykken v. Brady*, No. CIV. 07-4020-KES, 2008 WL 2077937, at \*7 (D.S.D. May 14, 2008) (emphasis added); *United States ex rel. Becker v. Tools & Metals, Inc.*, Civil Action No. 3:05-CV-627-L, 2011 WL 856928, at \*3 (N.D. Tex. Mar. 11, 2011) (denying the “government’s attempt to eliminate a distinction between civil cases and criminal cases with respect to the application of the investigatory law enforcement privilege”).

The Defendant’s invocation of law enforcement privilege to prevent *Plaintiff* from viewing the Affidavits — presented as testimony and evidence in this lawsuit — is entirely improper. Unless the documents demonstrate that *ACLU-TN* is under a *current* criminal investigation, there is *no basis* to keep the Affidavits hidden from its attorneys in this civil action.<sup>5</sup> See *Lykken*, 2008 WL 2077937, at \*7; *Taylor*, 2015 WL 9274934, at \*2. Even where Defendant claims that disclosure could hinder other ongoing investigations, law enforcement privilege does not apply to materials produced in a civil case, such as this one. See *Homeland Sec.*, 459 F.3d at 570-71.

Defendant also claims that the Affidavits require protection because disclosure “would compromise the confidentiality of a source,” (ECF No. 86, at 3), but privilege does not protect the confidentiality of informants where that source’s identity is potentially “essential to a fair determination of a cause.” *United States v. Murray*, 35 F. App’x 125, 127 (6th Cir. 2002) (citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)). Such a claim is even more outrageous given that the use of confidential sources is part of the very subject matter of the underlying dispute.

Even if the application of law enforcement privilege was appropriate here—which it is not— it is still improper for the Defendant to assert this privilege to the Exhibits in this fashion.

---

<sup>5</sup> See Def.’s Privilege Log No. 246-48. (referencing criminal investigations of two individuals, neither of whom are *ACLU-TN* or their attorneys).

These documents have already been affirmatively disclosed by the Parties.<sup>6</sup> Further, the documents contained in one Exhibit (Ex. Z) were not even produced by Defendant, but rather were prepared by Plaintiff from publicly available sources.

### CONCLUSION

Defendant's Motion for *In Camera* Review does not concern whether the Summary Judgment Exhibits should be sealed from the public. Rather, it concerns whether Defendant should be permitted to file secret testimony to justify why the Court should seal previous-filed documents without affording Plaintiff an opportunity to know the content of that testimony or to meaningfully respond to it. Without knowing the content of the testimony or the documents attached to them, Plaintiff cannot challenge the relevance of the evidence submitted, cannot provide context where necessary, and cannot defend its interests. Such a presentation of evidence would be unduly prejudicial.

WHEREFORE, Plaintiff respectfully requests that Defendant's Motion for *In Camera* Review of the Affidavits be DENIED.

Dated: July 13, 2018

---

<sup>6</sup> Defendant is permitted to assert privilege on documents *inadvertently* produced, (*see* ECF No. 52 ¶ 11), but not on those *affirmatively* produced by a Party in discovery. *Cf. In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (“Here the disclosure of the document was more than inadvertent, its disclosure was actually the result of affirmative acts by the attorney and client now asserting the privilege. We therefore have no difficulty in holding that the privilege, if indeed it ever existed, has been waived.”).

Respectfully submitted,

/s/ Thomas H. Castelli  
Mandy Strickland Floyd (BPR# 31123)  
Thomas H. Castelli (BPR# 24849)  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF TENNESSEE  
P.O. Box 120160  
Nashville, Tennessee 37212  
Phone: (615) 320-7142  
Fax: (615) 691-7219  
[mfloyd@aclu-tn.org](mailto:mfloyd@aclu-tn.org)  
[tcastelli@aclu-tn.org](mailto:tcastelli@aclu-tn.org)  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that on July 13, 2018, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served via the Court's Electronic Filing System to:

Buckner Wellford, Esq.  
Thomas Parker, Esq.  
R. Mark Glover  
BAKER, DONELSON, BEARMAN,  
CALDWELL, & BERKOWITZ, P.C.  
165 Madison Avenue, Suite 2000  
Memphis, Tennessee 38103

*Attorneys for Defendant*

/s/ Thomas H. Castelli  
Thomas H. Castelli