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.	)	

ORDER DENYING DEFENDANT'S MOTION TO REDACT PORTIONS OF ECF NO. 364 AND UNSEALING DOCUMENTS 364 & 374

This cause is before the Court on the defendant City of Memphis's motion to redact the names of persons in three documents and to seal the contents of Section G Authorization Form. (ECF No. 369.) ACLU has responded to the City's motion asserting that the City has not met its "heavy burden" to show: "'(1) a compelling interest in sealing the records; (2) that the interest in sealing outweighs the public interest in accessing records; and (3) that the request if narrowly tailored.'" (ECF No. 374 at PageID 12489.) (quoting Kondash v. Kia Motors Am., Inc., 767 F. App'x 635, 637 (6th Cir. 2019) (citing Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016)).) ACLU further argues that "[t]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." (Id.) (quoting In re Nat'l Prescription Opiate Litig., 927 F.3d 919, 938–39 (6th Cir. 2019) (citing Shane Grp., 825 F.3d at 305).)

There is no doubt that the public has a strong interest in the content of the judicial records that are the subject of the City's motion. This case involves safeguards regarding the gathering of

"political intelligence" agreed to by the City in what is referred to as the Kendrick decree. (See Order Granting in Part and Denying in Part the ACLU-TN's Motion for Summary Judgment, ECF No. 120 at PageID 4887.) ("[T]he City failed to review and issue written authorization for at least some lawful investigations of criminal conduct that 'may result in the collection of information about' or 'interfere in any way with' the 'exercise of First Amendment rights.'") Those safeguards include a review and written authorization process designed to protect the First Amendment rights of free expression by members of the public. (See ECF No. 378; Amended Judgment and Decree "Modified Kendrick Decree", ECF No. 379 at PageID 12567–79.)

The documents from which the City seeks to redact information involve the review and written authorization process in the context of the law enforcement shooting death of Brandon Webber, an African American male, and the protests and civil disturbance that followed on June 12, 2019. (See generally ECF No. 364.)

The City asserts that it has proposed a narrowly tailored redaction from 55 pages of material (see Appendix A attached) of only small portions of four pages, including the redaction of only seven names plus one paragraph from a form entitled "Authorization for Investigation that May Incidentally Result in Political Intelligence." (ECF No. 370 at PageID 12433.) The City asserts that "its proposed seal is narrowly tailored to protect those persons identified as part of a criminal investigation, but who were never charged, from embarrassment or harassment; and to protect records relating to a pending criminal matter, while still allowing the public access to the substance of the communications between the City and the Monitor." (ECF No. 369 at PageID 12414.) The Court will address the City's arguments.

A party seeking to redact or seal information in a court proceeding bears the burden of demonstrating the facts necessary to support nondisclosure. Kondash, 767 F. App'x at 637. In

Shane Grp., Judge Kethledge set out the critical considerations in deciding whether materials entered in the judicial record may be excluded from public access. 825 F.3d at 305–06. Specifically, Judge Kethledge in Shane Grp. stated on behalf of the Court:

> By way of background, there is a stark difference between so-called "protective orders" entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one-hand and orders to seal court records, on the other. Discovery concerns the parties' exchange of information that might or might not be relevant to their case. "Secrecy is fine at the discovery stage, before material enters the judicial record." *Baxter Int'l, Inc. v. Abbott Labs*., 297 F.3d 544, 545 (7th Cir. 2002). . . .
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> "At the adjudication stage, however, very different considerations apply." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982). The line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record. *Baxter*, 297 F.3d at 545. Unlike information merely exchanged between the parties, "[t]he public has a strong interest in obtaining the information contained in the court record." *Brown v. Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983). That interest rests on several grounds. 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, *id.* at 1179 – 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." *Id.* 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 1181; *see also, e.g., Baxter*, 297 F.3d at 546.
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> The courts have long recognized, therefore, a "strong presumption in favor of openness" as to court records. *Brown v. Williamson*, 710 F.2d at 1179. The burden of overcoming that presumption is borne by the party that seeks to seal them. *In re Cedant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001). The burden is a heavy one: "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). Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access. *See Brown & Williamson*, 710 F.2d at 1179. For example, in class actions – where by definition "some members of the public are also parties to the [case]" – the standard of denying public access to the record "should be applied…with particular strictness". *Cendant*, 260 F.3d at 194. And even 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. *See e.g., Press Enter. Co. v. Superior Court of California, Riverside Cnty*., 464 U.S. 501, 609-11, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The proponent of sealing therefore must analyze in detail, document

> by document, the propriety of secrecy, providing reasons and legal citations." *Baxter*, 297 F.3d at 548.
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> In like fashion, a district court that chooses to seal court records must set forth specific findings and conclusions "which justify nondisclosure to the public." *Brown & Williamson*, 710 F.2d at 1176. That is true even if neither party objects to the motion to seal, as apparently neither did in *Brown & Williamson*. (There, our court "reach[ed] the question" of the district court's seal "on our own motion." *Id.*) As our decision there illustrates, a court's obligation to explain the basis for sealing court records is independent of whether anyone objects to it. And a court's failure to set forth those reasons – as to why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary – is itself grounds to vacate an order to seal. *Id.; see also United States v. Kravetz*, 706 F. 3d 47, 60 (1st Cir. 2013) ("Appellate courts have on several occasions emphasized that upon entering orders which inhibit the flow of information between courts and the public, district courts should articulate on the record their reasons for doing so"); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) (reversing because "[w]e find no evidence in the record that the district court balanced the competing interests prior to sealing the final order").

825 F.3d at 305–06.

The standard for sealing judicial records is set out further in Kondash, 767 F. App'x at 637, and is also discussed in Circuit Judge Griffin's dissent in that case, id. at 640–47.

While it appears in the instant case that the City has narrowly tailored the portions of ECF No. 364 (see Appendix A) to be redacted, the central issues in this case are (1) whether the City has met its heavy burden to show a compelling interest in sealing/redacting the selected portions of ECF No. 364 and (2) whether the interest in sealing/redacting outweighs the public interest in accessing the complete judicial record. The City has neither met its burden of proof nor shown that the interest in redacting outweighs the public interest in accessing the complete judicial record.

Both the City and the ACLU acknowledge the substantial burden placed on an entity in seeking to seal all or a portion of documents that constitute a part of the record in a judicial proceeding. (ECF No. 369 at PageID 12415; ECF No. 374 at PageID 12489.) The City, to meet that burden, submits case law and argument focusing on the content of the information to be

disclosed to the public. Specifically, the City relies on the "'interests include[ing] certain privacy rights of participants or third parties.'" (ECF No. 369 at PageID 12416.) (quoting Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978)).)

The City then relies on Kiraly v. F.B.I., 728 F.2d 273 (6th Cir. 1984) for the proposition that disclosure of the names of persons suspected but not charged in a criminal investigation justifies the withholding of those names to avoid "'embarrassment, harassment and even physical danger'" to those individuals. (ECF No. 369 at PageID 12416.) (quoting Kiraly, 728 F.2d at 277.) It should be noted that this argument lacks factual support such as affidavits from these individuals. It is, however, logical to conclude that most persons would prefer not to be identified as an uncharged suspect in a criminal investigation. Here, it should also be noted, that the City has provided no specific information, either sealed or public, regarding the asserted criminal investigation(s).

Kiraly, however, provides little helpful authority for the City. 728 F.2d 273 (6th Cir. 1984). In Kiraly, the Sixth Circuit held that records of an FBI investigation were exempt from public disclosure under the personal privacy exemption available under the Freedom of Information Act, 5 U.S.C. §552(b). Id. at 280. Thus, Kiraly did not involve documents that were part of a judicial proceeding and did involve the application of a Federal statute that is inapplicable in this case. Judge Merritt, concurring in the result in Kiraly, found that the information to be withheld was information received from a confidential source and therefore excluded from disclosure under 5 U.S.C. §552(b)(7)(D). Id. at 281. The instant case involves neither a confidential source nor an action under the FOIA.

The City next argues that the Section G Authorization form (see Appendix A, Item 2) "is a record of an ongoing criminal investigation" and should therefore be sealed. (ECF No. 369 at PageID 12419.) The City, in this context, relies on Swift v. Campbell, 159 S.W.3d 565, 575–76 (Tenn. Ct. App. 2004) and the Tennessee Rules of Criminal Procedure. (See ECF No. 369 at PageID 12419.) The Tennessee Court of Appeals in Swift dealt with the application of Tennessee Rule of Criminal Procedure 16 in the context of a records request when a federal habeas corpus proceeding was pending. 159 S.W.3d at 575. The "narrow question" which the Tennessee Court addressed was "whether the State's investigative and prosecutorial work product prepared in the defense of Mr. Workman's writ of error coram noblis proceeding in state court is a public record that must be disclosed to Mr. Workman's lawyers or any other interested citizen." Id. The Tennessee Court of Appeals answered the question "No" but specifically declined to recognize a law enforcement investigative privilege. Id. at 578. Swift is readily distinguished from the instant case since it did not address in any way documents filed in a judicial proceeding and related to an action seeking prosecutorial records through the Tennessee Public Records Act.

The City then relies on a district court case, United States v. Lilly, 185 F.R.D. 113 (D. Mass. 1999) for the general proposition that '"federal courts have recognized a qualified common-law privilege . . . for law enforcement investigative information."' (ECF No. 369 at PageID 12419.) (quoting Lilly, 185 F.R.D. at 115.) In Lilly, however, the court denied a government motion for leave to file an affidavit under seal, finding that in the First Circuit a conditional investigative privilege had only been applied in two circumstances – where the affidavit would disclose a confidential source or the location of electronic surveillance equipment. Lilly, 185 F.R.D. at 115. In Lilly the court ordered public filing of the affidavit in question. Id. at 116.

The City cites no authority that is persuasive on either the existence of an investigative privilege in Tennessee or the applicability of such a privilege in this case.

The ACLU counters the City's position, pointing out that "[a]t issue in the Monitor's letters is the conduct of *the City* and its use of social media—not any alleged criminal conduct of the named individuals." (ECF No. 374 at PageID 12493.) As the ACLU correctly observes, the City has not supported its assertions with documentary evidence or affidavits as to any ongoing criminal investigations of any of the named individuals arising out of the factual assertions in submitted documentation. (See ECF No. 364.) Moreover, the November 28, 2019 letter from the City does not indicate that any named individual is in fact the subject of a criminal investigation rather than only a person believed to have information of possible use in a criminal investigation. (ECF No. 374 at PageID 12493.)

While the Court has concern regarding the potential for embarrassment to the identified individuals based on disclosure of their names and recognizes that each of those persons may ultimately wish to assert a personal privacy claim, these issues are not before the Court.

Considering the entire record before the Court and authorities submitted by the City, the City has not met the heavy burden required to seal or redact the judicial record in the context of a matter of strong public interest.

ECF Document No. 364 is therefore **UNSEALED** and shall be available to the public without redaction. ACLU requests that ECF Document No. 374 likewise be unsealed, there being no further reason for said document to be sealed. (Id. at PageID 12504.) Therefore, ECF Document No. 374 is also **UNSEALED** and shall be available without redaction.

SO ORDERED this 29th day of September 2021.

/s/ Jon P. McCalla
JON P. MCCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX A
ITEMS THE CITY OF MEMPHIS PROPOSES TO REDACT

Item	ECF No.	Document Page No.	No. of Names of Words
1	Doc. 370, Page ID 12429 Doc. 364, Page ID 12312	P. 7 of 56 P. 6 of 55	4 Names
2	Doc. 370, Page ID 12433 Doc. 364, Page ID 12316	P. 11 of 56 P. 10 of 55	1 full paragraph (62 words) plus 7 names
3	Doc. 370, Page ID 12466 Doc. 364, Page ID 12349	P. 44 of 56 P. 43 of 55	4 Names
4	Doc. 370, Page ID 12467 Doc. 364, Page ID 12350	P. 45 of 56 P. 44 of 55	4 Names