

**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,)

v.)

No. 2:17-cv-02120-JMP-dkv

THE CITY OF MEMPHIS,)

Defendant.)

PROTECTIVE ORDER

Certain documents, testimony, and other information to be disclosed or produced in this litigation contain confidential information protected from disclosure by applicable law. As used in this order, the term “the City” refers to Defendant City of Memphis. To preserve the confidentiality of such confidential documents and information pursuant to Federal Rule of Civil Procedure 26(c), it is ordered as follows:

1. Any document, portions of a document, interrogatory answer, response to requests for admission, deposition testimony, affidavit, expert report, legal brief or memoranda, technical or commercial information, or any other information produced or disclosed during the

course of pre-trial, trial and post-trial proceedings in this action, may be designated for protection under this Protective Order by any party or third party witness if, in good faith, the designating person reasonably believes that such material is or contains confidential information, provided nothing herein shall constitute a waiver of the attorney-client privilege, attorney work product doctrine, and/or other applicable doctrines and privileges including, but not limited to deliberative process privilege and the law enforcement investigative privilege.

2. Material designated for protection under this Protective Order (“Protected Material”) shall be categorized into one of the following classifications:

(a) “CONFIDENTIAL”: “CONFIDENTIAL” information shall mean all information documents or things that have not been made public by the disclosing party, that are not subject to disclosure to the public upon request under any applicable state or federal law and that the disclosing party reasonably believes contains or comprises private, personal, proprietary, or otherwise sensitive information the disclosure of which may have the effect of causing harm to one or more parties or other entities or persons.

(b) “ATTORNEYS’ EYES ONLY”: “ATTORNEYS’ EYES ONLY” shall mean confidential information, documents or things that the meets the requirements set forth in ¶2(a) and which the disclosing party believes is so highly sensitive that its disclosure to an opposing party implicates considerations affecting the safety and security of an entity or individual. “ATTORNEYS’ EYES ONLY” designations shall be made only after consultation and agreement of the parties, or if no agreement, upon consultation and permission of the Court. The parties shall not withhold agreement to a designation in bad faith.

The words above in quotation marks shall be placed clearly on each such page or each portion of the Protected Material. In lieu of marking the original of a document, if the

original is not produced, the designating person or entity may mark the copies that are exchanged or produced. To the extent possible, the designation should not be placed so as to obscure any substantive content of a document.

A party that has designated material “CONFIDENTIAL” may also choose to remove that designation at any time by notifying opposing counsel in writing and specifying specifically which materials will no longer be considered confidential. A party that has designated material “ATTORNEYS’ EYES ONLY” may choose to designate the information “CONFIDENTIAL” or remove any designation at any time by notifying opposing counsel in writing and specifying specifically which materials will no longer be considered confidential.

Any document or information not designated as set forth above shall not be treated as confidential material for the purposes of this Order.

3. Protected Material produced or exchanged in the course of this litigation shall be used only for the purpose of the parties’ prosecution or defense or settlement of this action, including appeals related to this action. Protected material shall not be used or shown, disseminated, copied, or in any way communicated, orally, in writing, or otherwise, to anyone for any purpose whatsoever, other than as required by a party for the preparation of this case. Access to Protected Material shall be limited to those persons designated as “qualified persons” in paragraphs 4 and 5 below, and all such qualified persons given access to Protected Material shall keep all Protected Material and the material contained therein confidential from all other persons.

4. Protected Material designated “CONFIDENTIAL” under paragraph 2(a) may be disclosed only to the following persons (“Qualified Persons”):

(a) The parties, including employees and officers of the corporate parties who are assisting counsel in the prosecution or defense of this case;

(b) Counsel for the parties, including in-house counsel of the corporate parties, and regular employees of such counsel whose functions are necessary to the prosecution or defense of this action;

(c) Consultants or experts retained by the parties, or the parties' counsel, and the employees of such consultants, or, experts, only to the extent reasonably necessary for the prosecution or defense of this action, provided that such consultant or expert has been informed of this Protective Order and has signed the Agreement to Be Bound attached hereto as Exhibit A.

(d) Persons who are shown on the face of the document to have been an author, source, addressee, or recipient of the Protected Material, or who are already possess a copy of the Protected Material;

(e) The Court and court personnel, court reporters, employees of outside copy services used to make copies of Protected Material, and mediators, arbitrators, or other personnel engaged as part of alternative dispute resolution, to the extent reasonably necessary for the conduct of this action; and

(f) Any other person as to whom the parties agree in writing, provided that such person has been informed of this Protective Order and has signed the Agreement to Be Bound attached hereto as Exhibit A.

Nothing in this Protective Order shall prohibit a disclosing party from making available to whomever it chooses documents that it has designated "CONFIDENTIAL."

5. Protected Material designated "ATTORNEYS' EYES ONLY" under Paragraph 2(b) may be disclosed only to the following Qualified Persons:

(a) The designating party, including current and former employees and officers of the designating party who are assisting counsel in the prosecution or defense of the case;

(b) Counsel of record in this action, other members of counsel's law firm, and any other counsel associated to assist in the preparation or trial of this action;

(c) Regular employees of counsel of record or of associated counsel, whose functions are necessary to the prosecution or defense of this action;

(d) Outside experts and consultants retained by any party in good faith for the preparation or trial of this action only to the extent reasonably necessary for the prosecution or defense of this action, provided that such consultant or expert has been informed of this Protective Order and has signed the Agreement to Be Bound attached hereto as Exhibit A.

(e) Persons who are shown on the face of the document to have been an author, source, addressee, or recipient of the Protected Material, or who already possess a copy of the Protected Material;

(f) The Court and court personnel, court reporters, employees of outside copy services used to make copies of Protected Material, and mediators, arbitrators, or other personnel engaged as a part of alternative dispute resolution, to the extent reasonably necessary for the conduct of this action; and

(g) any other person as to whom the parties unanimously agree in writing prior to production, provided that such person has been informed of this Protective Order and has signed the Agreement to Be Bound attached hereto as Exhibit A.

Nothing in this Protective Order shall prohibit a disclosing party from making available to whomever it chooses documents that it has designated "Attorneys' Eyes Only."

6. All Qualified Persons to whom Protected Material is to be disclosed in accordance with the terms of this Protective Order, except counsel of record and those Qualified Persons enumerated in paragraphs 4(e) and 5(g), shall be advised by counsel of the terms of this Protective Order, informed that they are subject to the terms and conditions of this Protective Order, and, where indicated in Paragraphs 4 and 5, execute the Agreement to Be Bound attached hereto as Exhibit A prior to any disclosure. Counsel shall be responsible for maintaining a list of all persons to whom any Protected Material has been disclosed and, for good cause shown, such list (or portions of it) shall be available for inspection by the other parties. The provisions of this Protective Order and the obligations not to disclose or use Protected Material, except as may be specifically ordered by the Court, shall remain in full force and effect as to all such person(s), and as to all such material.

7. Except to the extent permitted by this Order, every Qualified Person provided copies of or access to Protected Materials shall keep all such materials, and any permitted copies, notes, abstracts, or summaries of such material, within their exclusive possession and control, shall exercise all necessary and prudent precautions to maintain the confidentiality of all such materials, and shall not disseminate such materials or their contents to anyone.

8. Any Qualified Person having access to Protected Materials shall, to the extent copies, duplicates, extracts, summaries, notes, or descriptions of the materials or any portion thereof are created, treat any and all such copies, duplicates, extracts, summaries, notes, or descriptions of the materials or any portion thereof as confidential, and all provisions of this Order shall apply equally to such materials so created, in the same manner and to the same extent as are materials designated as confidential.

9. Protected Material disclosed at any deposition (including testimony, information, or exhibits) occurring in this litigation shall be designated under Paragraph 2 by indicating on the record at the deposition that the testimony is Protected Material and noting the appropriate category of classification. Upon request by the designating party, the court reporter shall designate those portions of the deposition transcripts that are considered to be Protected Material with the appropriate legend indicated under Paragraph 2. All persons who are not Qualified Persons for purposes of the particular designation (see Paragraphs 4 and 5) under this Protective Order shall be excluded from depositions where documents and information designated pursuant to this Protective Order are the subject of examination. Any party or third party witness may also designate testimony, information, or exhibits disclosed at such deposition as Protected Material by notifying the other party in writing within thirty (30) days after receipt of a transcript of that deposition. During that 30-day period, the parties shall treat the transcript as if it had been designated "ATTORNEYS' EYES ONLY" unless the parties otherwise agree or the Court otherwise orders. Each party shall attach a copy of such written notice or notices to the face of the transcript and each copy thereof in its possession, custody, or control.

10. If, due to inadvertence or mistake, a designation of Protected Material under Paragraph 2 is not made at the time of disclosure, a party or third party witness may designate documents or information under Paragraph 2 by serving notice of such designation upon the parties in writing. Following such designation, the terms of this Protective Order shall apply and disclosure of the Protected Material following such designation shall be made only in accordance with this Protective Order. The disclosure of the Protected Material prior to such designation shall not be deemed a waiver of the designating party's right to preserve the alleged proprietary, confidentiality, or trade secret status of the Protected Material. The disclosure of the Protected

Material prior to such designation also shall not be considered a violation or breach of the Protective Order, but nothing herein shall immunize a disclosure otherwise prohibited by law.

11. The parties agree that the inadvertent production of any documents that would be protected from disclosure pursuant to the attorney-client privilege, the work product doctrine, or any other relevant privilege or doctrine shall not constitute a waiver of the applicable privilege or doctrine. If any such document is inadvertently produced, the recipient of the document agrees that, upon request from the producing party, it will promptly return the document, destroy all copies (including copies on any electronic database), and make no use or further disclosure of the information contained in the document.

12. This Protective Order shall be without prejudice to the right of any party to present a motion to the Court under the Federal Rules of Civil Procedure (or other applicable law) for a separate protective order as to any particular document or information, including restrictions differing from those as specified herein and including challenges to designations made pursuant to this Protective Order.

13. Subject to the Federal Rules of Evidence, stamped confidential material may attached to pretrial motions and be offered in evidence at trial or any pre-trial court hearing, provided that the proponent of the evidence gives seven (7) days advance notice to counsel for any party or other person that designated the information as confidential. Any party may move the Court for an order that the documents, information or evidence be filed under seal, received *in camera* and/or received under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information at the trial.

14. Each party shall use reasonable efforts to maintain, to the extent possible, the confidentiality of Protected Material when such material is used at a hearing or other pretrial proceeding and shall cooperate both with the designating party and the Court in preserving any confidentiality of the Protected Material. In the event that any Protected Material is used in any court proceeding and not disclosed to the public, it shall not lose any confidential status through such use. The use and treatment of confidential material at trial will be addressed with the Court at the pre-trial conference.

15. A receiving party shall be under no obligation to object to the designation of any document at the time the designation is made, or at any other time, and a party shall not, by failing to object, be held to have acquiesced or agreed to the designation or be barred from objecting to the designation at any time.

16. Nothing herein shall prejudice the parties' right to object to the admission into evidence of any documents or things containing Protected Material.

17. Except as otherwise stipulated by the parties or ordered by the Court, nothing herein shall impose any restrictions on the use or disclosure by the parties of their own Protected Material.

18. This Protective Order shall not be used to require any party to produce any particular document or information. For example, a party may have other objections to the production of such documents or a portion of them (*e.g.*, a portion of a document may also be privileged as an attorney-client communication). Instead, this Protective Order shall simply facilitate the exchange of documents and information between the parties. All parties retain whatever burden they have under the Federal Rules of Civil Procedure for production of any specific document or information.

19. This Protective Order is entered for the purpose of facilitating the exchange of documents and information between the parties to this action without involving the Court unnecessarily in the process. Nothing in this Protective Order or the production of any information or document under the terms of this Protective Order shall be deemed to have the effect of an admission or waiver, including that anything is or is not a trade secret.

20. If a party contends that any document or material has been erroneously or improperly designated as Confidential or Attorneys' Eyes Only, that party shall notify the designating party in writing of its objection and the basis for the objection. The designating party shall then have 20 days from receipt of the written objection to respond to the objecting party and to arrange for a meet and confer. After any meet and confer, a party may file a motion to resolve any dispute. The party asserting the Confidential or Attorneys' Eyes Only designation will bear the burden of proving such protection is warranted. Pending any court ruling, the provisions of this Protective Order shall apply and disclosure and use of the challenged documents or information shall not be made except as provided under this Protective Order. The Court may raise the issue of designation of the protected status without request from a party.

21. Absent written agreement by the parties, this Protective Order shall not be modified without a showing of good cause and the satisfaction of any other applicable burdens under the law. The Court may modify the terms and conditions of this Protective Order for good cause, or in the interests of justice, or on its own order at any time in these proceedings.

22. After the conclusion of this litigation, including all appeals from any decision of the district court,, all documents and other tangible items containing Protected Material, including all copies, notes, electronic data, and other materials containing or referring to information derived therefrom, shall, within 60 days after termination, be delivered to the

designating party or destroyed at the option of the designating party, except a party and its counsel of record need not destroy or return Protected Material filed with the Court or destroy or return Protected Materials (designated by another) incorporated in attorney work product or attorney-client communications retained solely by counsel of record. To the extent documents are destroyed, an affidavit attesting to the destruction of such documents shall be delivered to the designating party within the 60-day period, or as otherwise agreed in writing.

23. This Protective Order shall survive the final termination of this action, and the Court shall retain jurisdiction to resolve any dispute concerning any designation or use of information disclosed subject to this Protective Order.

IT IS SO ORDERED, this 2nd day of October, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

s/ Thomas H. Castelli
Thomas H. Castelli (#024849)
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212
(615) 320-7142
tcastelli@aclu-tn.org
Counsel for Plaintiff

s/ Thomas Parker
Buckner Wellford (#TN 9687)
Thomas Parker (#TN 13908)
Jennie Vee Silk (#TN 35319)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
Telephone: 901.577.2152
Fax: 901.577.0786
Email: bwellford@bakerdonelson.com
tparker@bakerdonelson.com
jsilk@bakerdonelson.com
Counsel for Defendant, The City of Memphis

EXHIBIT "A" TO PROTECTIVE ORDER

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ELAINE BLANCHARD, KEEDRAN)
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BRADLEY WATKINS, (Dismissed per)
Court Order))

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ACLU OF TENNESSEE, Inc.)
)

Intervening Plaintiff,)
v.)

THE CITY OF MEMPHIS,

Defendant.

AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

I, _____, declare and agree as follows:

1. I have received and read an entire copy of the Protective Order regarding treatment of Confidential Information entered by the Court in the above-captioned matter.

2. I have had the opportunity to discuss with the undersigned counsel of record the nature and ramifications of the Protective Order and understand each of its terms.

3. I understand that, on behalf of Plaintiff or Defendant, I will be given access to review documents that contain confidential and proprietary information, documents that may contain confidential personal information protected from disclosure, and documents that contain

confidential information of the City, all of which information would not otherwise be accessible to me but for the fact that I am an agent for Plaintiff or Defendant in this action.

4. I agree unequivocally to be bound by the terms of the Protective Order and understand fully that my breach of it, or any of its terms, may result in sanctions by the Court, contempt proceedings, and other proceedings to enforce the terms of the Protective Order. I understand that the Protective Order has been issued by a court of competent jurisdiction and is enforceable by the power of contempt.

5. To this end, I agree to submit to the jurisdiction of the United States District Court for the Western District of Tennessee for the purpose of any proceedings that may be instituted to enforce the terms of the Protective Order. In any such proceedings, I agree not to make any challenge based upon personal jurisdiction, subject matter jurisdiction, or venue.

I declare under penalty of perjury that the foregoing is true and correct and represents my understanding of my agreement to be bound to the terms of the Protective Order.

Executed this ____ day of July, 2017, at _____.

Signed _____

INSOFAR AS APPLICABLE:

Counsel of Record