

**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-02120-jpm-DKV
)
 THE CITY OF MEMPHIS,)
)
 Defendant.)

**DEFENDANT’S RESPONSE IN COMPLIANCE WITH ORDERS ON SEARCH TERM
SUBMISSIONS - SEARCH TERMS FILED SEPARATELY
AS HIGHLY SENSITIVE DOCUMENTS**

I. Background

Pursuant to the Court’s October 27, 2018 Opinion and Order the Court imposed certain sanctions on the Defendant, the City of Memphis (“the City”) and ordered compliance by a date certain. (ECF No. 151.)

Under the Order, the Court required, in part, that:

5) The City shall maintain a list of all search terms entered into social media collators or otherwise used by MPD officers collecting information on social media while on duty. This list shall be filed under seal every three months until the Court orders otherwise. The first filing shall be submitted no later than January 14, 2019 and shall reflect all such social media searches conducted from November 1, 2018 through December 31, 2018.

(ECF No. 151, PageID 6275.)

In January 2019, the City began collecting search terms from every Memphis Police Department (“MPD”) officers in the following units: Office of Homeland Security, Real Time Crime Center, General Investigative Unit, Homicide, Sex Crimes Unit, and members of the Command Staff. The City submitted the search terms reported from those units to the Court under seal every quarter beginning in January 2019 and ending July 2020.

In an August 19, 2020 Order, the Court ordered the City to disclose all work-related social media search terms used by all MPD officers, including the officers from the Multi-Agency Gang Unit (“MGU”), the Organized Crime Unit (“OCU”), and the Internet Crimes Against Children (“ICAC”) divisions, under seal, as part of its quarterly filings. (*Id.* at PageID 12306.) The Court also ordered the City to supplement its previous filings with the work-related search terms since January 2019 from the officers it had not previously reported. (*Id.*)

On November 3, 2020, the City submitted the work-related search terms used by every MPD officer during the period from January 1, 2019 through September 30, 2020 under seal. (ECF No. 383.)

II. The recent security breach of the Court’s CM/ECF system.

On January 6, 2021, the City learned that the Judicial Conference of the United States issued a Memorandum notifying the federal court system of a significant cybersecurity breach of the Court’s Case Management/Electronic Case Filing (CM/ECF) system. The Judicial Conference Memorandum asked all federal courts to issue a standing or general order or to adopt some other equivalent procedure requiring that highly sensitive documents (“HSDs”) will be accepted for filing only in paper form or via a secure electronic device.

Additionally, the Judicial Conference Memorandum explained that any document pertaining to a HSD, i.e. filing, order, etc., should not be uploaded to the CM/ECF or PACER systems or to any system connected to a network or the internet. The Judicial Conference Memorandum further directed that litigants may request certain sealed documents be removed from CM/ECF expeditiously.

In view of the information in the Judicial Conference Memorandum, the City moved the Court for a continuance and/or stay of the filing of its January 14, 2021 submission of search

terms under seal until it received guidance from the Court on the procedure for filing its search terms under seal. (ECF No. 391.)

On January 14, 2021, the Court granted the City's Motion and extended the City's time to file this quarter's search terms within 14 days of the entry of a standing Order on the procedure for filing HSDs. (ECF No. 392.)

On January 22, 2021, the Court entered Administrative Order No. 2021-03, which instructed litigants seeking designation of a particular document as an HSD to file a motion seeking such designation and to submit a proposed order. The Administrative Order further directed that the motion "shall explain why the document warrants designation as an HSD." The motion is to be filed electronically through the Court's CM/ECF system and be entered on the public docket. After the motion is filed, and as soon as practicable, the filing party is instructed to deliver to the Clerk's Office the document as to which the HSD designation is sought in the form of two paper copies. The filing party shall also serve the proposed HSD on the other parties

In response to Administrative Order No. 2021-03, on January 28, 2021, the City promptly filed an unopposed Motion to Have Its Quarterly Search Term Submissions Treated as HSDs and Removed from the CM/ECF System. (ECF No. 393.) In the Motion, the City explained why its search term submissions should be considered HSDs. The search terms used by MPD, and in particular, certain investigative units within the MPD, include names and aliases of targets of ongoing criminal investigations and their associates. The disclosure of this highly confidential information could destroy long-running, ongoing investigations into violent crime and drug enterprises and compromise the safety of undercover officers and informants, whose identities may be implicitly revealed by the search terms. The Court has not yet ruled on the City's Motion.

On February 3, 2021, the Court vacated Administrative Order No. 2021-03 and replaced it with Administrative Order No. 2021-05. Relevant to the City's search term submissions, Administrative Order No. 2021-05 states that a document may be deemed an HSD if it involves "sensitive on-going law enforcement investigations."

In view of the pending unopposed Motion to Have Its Search Terms Treated as HSDs (ECF No. 393) and the new language in Administrative Order No. 2021-05 pertaining to "sensitive on-going law enforcement investigations," and out of an abundance of caution, the City is submitting this quarter's submission of search terms as if the Court will treat them as HSDs.¹

Accordingly, the City will deliver two paper copies of the search terms to the Clerk's Office today in a sealed envelope marked "HIGHLY SENSITIVE DOCUMENT." A copy of the HSD's caption page will be affixed to the outside of the envelope. The folder will contain two files. The search terms collected from the majority of MPD officers were compiled into a file included in the filing as Exhibit A.

Due to the heightened sensitivity of investigations conducted by certain investigative units within MPD, those units' search terms were collected in a non-electronic manner, and are compiled and submitted separately as Exhibit B. The officers in those units printed their search terms and hand-delivered them to their supervisors. The City redacted any information on the printouts that could identify the officers, including names and avatars.

The City has consulted with the ACLU-TN and the Independent Monitor, who both agreed to accept service copies of this quarter's submission of search terms via encrypted hard

¹ Of course, if the Court denies the City's Motion to Treat Its Search Term Submissions as HSDs, the City will comply with the desired procedure for filing the search terms that the Court sets forth.

drive. Those hard drives will be sent today via overnight delivery service. The password to each hard drive will be sent separately.

III. Update on *Touhy* Requests for search terms of MPD Officers on Secondments with Federal Agencies

In the October 19, 2020 quarterly submission of search terms (ECF No. 383), the City filed copies of *Touhy* requests it made of the U.S. Marshals Service (“USMS”), Federal Bureau of Investigation (“FBI”), and Drug Enforcement Agency (“DEA”). The City noted that it would “apprise the Court of the federal agencies’ responses to its *Touhy* requests.” (ECF No. 383, pp. 3-4.)²

The U.S. Department of Justice (“DOJ”) has responded on behalf of the federal agencies. The letters in response are attached hereto as Exhibit C. The DOJ has notified the City that it will not authorize production of the social media search terms used by MPD officers during their work on the various federal task forces.

Respectfully Submitted,

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

s/ Bruce McMullen

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² The City does not have access to the as-filed copy of this document it filed under seal, and thus, cannot provide the PageID numbers.

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2021, the foregoing document and Attachment C will be served by the Court's ECF system to:

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Attorneys for Intervening Plaintiff

I hereby certify that on February 5, 2021, the foregoing documents referenced as Attachments A and B that were filed under seal as HSDs will be served on encrypted hard drive via overnight delivery service to:

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/s Bruce McMullen
