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.	)	

THE CITY'S MOTION TO REDACT PORTIONS OF ECF NO. 364 AND MEMORANDUM OF LAW IN SUPPORT

Defendant, City of Memphis ("the City"), respectfully moves this Court to redact the names of persons identified as criminal suspects from ECF No. 364 before unsealing it to the public, and to seal the contents of the Section G Authorization Form because it is a record of an ongoing criminal investigation.

In support, the City states as follows:

I. BACKGROUND

On February 28, 2020, the Independent Monitor submitted a letter to the Court explaining that he believed that the City had not complied with Sanction 5 of the Court's October 26, 2018 Order and Opinion (ECF No. 151). (*See* ECF No. 364, PageID 12307.) The Monitor recommended that the Court docket the entire set of communications he submitted publicly and not under seal. (*Id.*)

On March 3, 2020, the City filed a Motion to Seal Documents or Allow Redactions Before Docketing Publicly the Monitor's February 28, 2020 Letter. (ECF No. 296.) The City

argued that "certain attachments contained confidential information pertaining to ongoing criminal investigations." (*Id.* at PageID 9108.)

The February 28, 2020 Letter included four exhibits, two of which are at issue here. Exhibit 1 is a November 20, 2019 Letter from the City to the Monitor responding to the Monitor's August 26, 2019 request for information related to a number of topics, one of which was whether the City obtained Director Authorization pursuant to § G of the Consent Decree to view the publicly available social media accounts of certain individuals present at a June 2019 riot. The document identified several persons by name. (*Id.* at PageID 12312.)

In the November 20, 2019 Letter, the City explained that it obtained authorization for the social media investigation from the Monitor as the events of that night unfolded, and that the Director of Police authorized the investigation pursuant to § G of the Consent Decree after the event. The City attached a copy of the signed Interim Authorization Form for that investigation to its November 20, 2019 Letter. (*Id.* at PageID 12316.) The Authorization Form identified seven persons as "Subjects of Investigation." Some, but not all, of the persons listed as "Subjects of Investigation" related to the June 2019 riot were charged with a crime. Several of those persons who listed but were not criminally charged were also identified in the Monitor's Letter of August 26, 2019. (*Id.* at PageID 12349.)

Exhibit 3 to the Monitor's February 28, 2020 Letter (*Id.* at PageId 12340-12359) is the City's February 14, 2020 Response to the Monitor's February 7, 2020 Letter, which included the Monitor's Letter of August 26, 2019 containing the names of the persons not criminally charged but identified on the Interim Authorization Form as "Subjects of Investigation." (*Id.* at 12349-50.)

On August 29, 2020, the Court denied the City's Motion to Seal Documents, but allowed

the City to refile its Motion within fourteen days of the entry of the Order "to provide the Court with a document-by-document analysis setting out in detail the factual basis supporting the sealing of each document as well as an alternative redacted version of each document Defendant wishes to have filed under seal." (ECF No. 363, PageID 12305-06.)

The City hereby moves the Court to redact to redact every instance of the names of the individuals who were identified as Subjects of Investigation in the correspondence between the City and the Monitor but who were not criminally charged. A proposed redacted document is filed separately under seal as Exhibit A.[1]

The City also moves the Court to seal the substance of the Interim Authorization Form in its entirety because it is a document related to an ongoing criminal investigation that is otherwise not subject to public view until the criminal matter has concluded under the Tennessee Open Records Act. While four of the persons identified as Subjects of Investigation in the Section G Authorization Form were never charged with a crime, three persons were charged with crimes arising out of the investigation, and those charges are still pending.

The City respectfully submits 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 related to a pending criminal matter, while still allowing the public access to the substance of the communications between the City and the Monitor.

II. LAW AND ARGUMENT

[1] Because the Court docketed ECF No. 364 under seal, the City, out of an abundance of caution, will file the proposed redacted version under seal as the next sequential docket number.

A. **Redaction of the names of the persons identified as "Subjects of Investigation" but who were not charged with a crime is a narrowly tailored remedy that will protect the privacy of those persons while still allowing the public access to court records.**

The courts have long recognized a strong 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 (6th Cir. 2016). "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). The greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access. *Shane Grp., Inc.,* 825 F.3d at 305. 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).

"[A] district court that chooses to seal court records must set forth specific findings and conclusions which justify nondisclosure to the public." *Id.* at 306 (citation and quotation omitted); *see Signature Mgmt. Team, LLC*, 876 F.3d at 836. "[A] court's obligation to explain the basis for sealing court records is independent of whether anyone objects to it." *Shane Grp., Inc.*, 825 F.3d at 306. A district court's failure to set forth the specific reasons "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" constitute "grounds to vacate an order to seal." *Id.*

Courts have carved out several distinct but limited common law exceptions to the strong presumption in favor of openness. "The exceptions to the practice of maintaining openness in the courtroom fall into two broad categories: those based on the need to keep order and dignity in the courtroom and those which center on the content of the information to be disclosed to the public." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983).

Relevant here is the second group of limitations on the content of the information to be disclosed to the public. "Under the common law, content-based exceptions to the right of access have been developed to protect competing interests. In addition to the defendant's right to a fair trial, these interests include certain privacy rights of participants or third parties, trade secrets and national security." *Id.* (citing *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 598, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings,* 91 Harv.L.Rev. 1899 (1978) (emphasis added)).

The Sixth Circuit has determined that persons have a privacy right in their names that are contained in law enforcement investigatory files. It analyzed the propriety of disclosing such information from investigatory records of law enforcement agencies in the context of Freedom of Information Act (FOIA) requests. *See, e.g. Kiraly v. F.B.I.*, 728 F.2d 273 (6th Cir. 1984); *Rimmer v. Holder*, 700 F.3d 246, 257 (6th Cir. 2012). The Sixth Circuit concluded that disclosure of the name of a person suspected but not charged in a criminal investigation "could subject a person to embarrassment, harassment and even physical danger," thus justifying its withholding from public disclosure. *Kiraly*, 728 F.2d at 277.

In *Kiraly*, the plaintiff was convicted of arson. In an effort to develop a habeas corpus petition, *Kiraly*, pursuant to FOIA, sought all information concerning himself and certain other individuals, which may have related in some way to his criminal conviction." *Id.* at 275.

Subsequently, the FBI released a number of documents relating to Kiraly, which edited certain information and totally withheld other material, invoking FOIA exceptions under 5 U.S.C. § 552(b). *Id.*

Kiraly filed suit to require disclosure of the materials the FBI withheld. *Id.* at 275-76. The district court granted the defendants' summary judgment motion. *Id.* at 276. Kiraly appealed, and the Sixth Circuit upheld the district court's ruling.

> In the present case the information withheld is from the investigatory records of law enforcement agencies. Many of the deletions concern "people who were investigated for suspected criminal activity or who were otherwise mentioned therein, but who were not indicted or tried." Disclosure of such information could subject a person to embarrassment, harassment and even physical danger. In *Librach* the court held that disclosure of such information was "a clearly unwarranted invasion of personal privacy."

Id. (quoting *Librach v. Federal Bureau of Investigation,* 587 F.2d 372, 373 (8th Cir.1978), *cert. denied,* 440 U.S. 910, 99 S.Ct. 1222, 59 L.Ed.2d 459 (1979) (emphasis added).

The *Kiraly* court applied a balancing test to determine if refusing to disclose the names of the criminal suspects was appropriate. "The first inquiry is whether public access to the information sought constitutes an invasion of privacy. If there is such an invasion, the question becomes whether the invasion is justified by any countervailing public benefit from its disclosure." *Kiraly*, 728 F.2d at 277 (citing *Madeira Nursing Center, Inc. v. N.L.R.B. Region No. 9,* 615 F.2d 728 (6th Cir.1980)). The court determined that even though one of the suspects was deceased, he still had a surviving privacy interest which justified withholding the information related to him. *Id.* The court further found the public interest in the disclosure to be "minimal." *Id.* at 279.

While *Kiraly* dealt with the release of information subject to a FOIA request, it is

analogous to the situation at hand and supports redacting the names of persons suspected but not indicted as part of the court record. In the instant case, the persons identified as criminal suspects, but who were never charged with a crime in ECF No. 364 have a compelling privacy interest that justifies withholding the information related to them from the public record. *See Kiraly,*728 F.2d at 276 (quoting *Librach,* 587 F.2d at 373).[2]

The public disclosure of the identities of those persons who were not charged would only serve to needlessly subject those persons to embarrassment and reputational harm. *See id.* at 277; *see also, e.g., Librach,* 587 F.2d at 373 (holding that the release of third-party personal information contained in law enforcement records was "a clearly unwarranted invasion of personal privacy"); *Rimmer*, 700 F.3d at 257 (stating that the same privacy interest exists "not only for those who are suspects in an investigation, but also for third parties mentioned in the documents, such as witnesses, informants, and investigators"); *Fitzgibbon v. CIA,* 911 F.2d 755, 767 (D.C.Cir.1990) (asserting that "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation" (internal quotation marks omitted)).

Moreover, the public's interest in the disclosure of the names of those persons identified in ECF No. 364 is low. None of the persons identified are elected officials or public figures such that greater public scrutiny would be warranted.

Importantly, the City does not seek to withhold any of its substantive correspondence with the Monitor regarding the investigation of the June 2019 riot or any other issue raised in his

[2] Additionally, the public release of information related to persons suspected of criminal activity but not indicted could subject the City to civil liability. The City has already defended at least two other lawsuits by persons identified in public records requests who were only tangentially identified as potential suspects by the Memphis Police Department.

February 28, 2020 Letter. The City's proposed redactions are narrowly tailored to serve the purpose of protecting those persons identified as subjects of a criminal investigation in the Monitor's February 28, 2020 Letter but who were not criminally charged from embarrassment, while preserving the public's access to the substance of the communications between the City and the Monitor.[3]

B. **Because the Section G Authorization Form is a record of an ongoing criminal investigation by law enforcement, sealing it from public view is appropriate.**

Under Tennessee law, the records of a criminal investigation by law enforcement are exempt from public viewing until the criminal matter has been closed or concluded. Tenn. Code Ann. § 10–7–503(a); Tenn. R. Crim. P. 16(a)(2). As explained in *Swift v. Campbell*, 159 S.W.3d 565, 575-576 (Tenn. Ct. App. 2004):

> The public records statutes have required the courts to consider whether this general rule applies when the government is a litigant. Because of the breadth of Tenn. Code Ann. § 10–7–503(a), the public's right of access to government records must be balanced with the burden that the disclosure of these records will place on the government. As far as Tenn. R. Crim. P. 16 is concerned, the courts have struck this balance over the past twenty years by holding that Tenn. R. Crim. P. 16(a)(2) does not except records from disclosure when (1) no criminal prosecution is contemplated or pending, (2) the direct appeal is finally concluded, and (3) no collateral challenge to the criminal conviction is pending.

Moreover, "[t]he federal courts have recognized a qualified common-law privilege . . . for law enforcement investigatory information." *United States v. Lilly*, 185 F.R.D. 113, 115 (D. Mass. 1999).[4] The purpose of the privilege "is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of courses, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation,

[3] The City's proposed redactions are shown in Exhibit A, filed separately under seal as explained at fn. 2 *infra*.
[4] While the law enforcement investigatory privilege is typically invoked during discovery, the same principles apply to disclosure through the public court record.

and otherwise prevent interference in an investigation." *Jones v. City of Indianapolis*, 216 F.R.D. 440, 444 (S.D. Ind. 2003) (quoting *In re Department of Investigation of City of New York*, 856 F.2d 481, 484 (2d Cir. 1988) (internal citation omitted)); *see also United States v. Winner*, 641 F.2d 825, 831 (10th Cir. 1981) ("The law enforcement investigative privilege is based primarily on the harm to law enforcement efforts which might arise from public disclosure of . . . investigatory files."). Put simply, the privilege protects from disclosure of documents which might impair the ability of law enforcement to function properly. *Rosser v. City of Philadelphia*, No. CIV.A. 05-514, 2005 WL 2205920, at *1 (E.D. Pa. Sept. 9, 2005).

Here, ECF No. 364 includes a Section G Authorization Form, which by its own words, states that it pertains to "investigations into unlawful conduct." Thus, it is a record of an investigation into unlawful conduct, and it should be sealed from public view under the Tennessee Open Records Act until the investigation concludes.

The question of the public's access to the Section G Authorizations is one that has been raised with the Monitor by the City but not yet resolved. The City's position is that these Authorizations should be treated like any law enforcement criminal investigation record and be exempt from public disclosure until the criminal investigation meets one of the criteria established in *Swift v. Campbell*.

In support of this, the City notes that it routinely communicates with the Monitor regarding criminal investigations that implicate Section G of the Consent Decree. It is important that the City have the ability to freely communicate with the Monitor and his Team. Indeed, transparency is critical to allowing the Monitor to perform the tasks asked of him and to ensure the City is complying with the Consent Decree. In his role as Special Master, the Monitor is tasked with approving or prohibiting specific actions by MPD for the purpose of ensuring full

compliance with the Consent Decree. However, the City often must discuss matters pertaining to criminal investigations and other sensitive issues. Understandably, the Monitor has requested that all inquiries and requests by the City be reduced to writing. The City submits that it must necessarily be free to include information that pertains to a criminal investigation or other sensitive matters in this correspondence without fear of civil liability or interference with a criminal matter.

The City respectfully submits that the public's interest in viewing Section G Authorization Forms and communications with the Monitor related thereto while the criminal matter is ongoing is not as strong as the public's interest in the Monitor having open, transparent communications with the City, such as to facilitate oversight by the Monitor and compliance by the City.

The City, therefore, respectfully requests that the Court seal the Interim Authorization Forms from the Court record until a time when the criminal prosecutions have concluded. If the Court denies that request, the City respectfully requests that it be allowed to redact the names of the persons who were not charged with crimes from the Interim Authorization for the reasons stated *infra*.

Respectfully Submitted,

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

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CERTIFICATE OF CONSULTATION

Pursuant to Local Rule 7.2(a)(B), on September 2, 2020, Jennie Silk emailed counsel for Intervening Plaintiff, Thomas Castelli, regarding the relief sought in this motion. Mr. Castelli did not respond to the communication before the City filed this Motion.

s/ Bruce McMullen

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September 2020, a copy of the attached pleading was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to all counsel of record.

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