

**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.)	
)	

**ACLU-TN’S RESPONSE TO DEFENDANT’S MOTION TO SEAL DOCUMENTS OR
ALLOW REDACTIONS BEFORE DOCKETING PUBLICLY**

Intervening Plaintiff ACLU of Tennessee, Inc. (ACLU-TN) hereby responds to Defendant’s Motion to Seal Documents or Allow Redactions Before Docketing Reply (“Motion to Seal”) filed by Defendant City of Memphis (the “City”) on March 3, 2020. For the reasons stated below, ACLU-TN asks the Court to deny the City’s Motion to Seal.

On February 28, 2020, the Monitor sent a letter to the Court outlining his determination that the City was not in compliance with Sanction 5 of the Court’s Orders, dated October 26 and 28, 2018. The Monitor recommended a hearing before the Court and that the communications between the City and the Monitor attached to the Monitor’s letter be unsealed, in their entirety, so that the public could consider the City’s explanation for its failure to comply and its proposed alternatives.

On March 3, 2020, the City filed a Motion requesting that the communications attached to the Monitor's letter¹ be kept under seal until the hearing before this Court on March 17, 2020 or, alternatively, be redacted to exclude information related to ongoing criminal investigations. The City did not specify which exhibits, or which portions of exhibits, it would elect to redact; nor did the City file a memorandum in support of its Motion identifying the exhibits or information the City proposes should be redacted and why redactions are essential.

There is a "long-established legal tradition [of a] presumptive right of the public to inspect and copy judicial documents and files." *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983). "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984).

The party seeking to seal the records bears a "heavy burden" to overcome the presumption in favor of openness. *Kondash v. Kia Motors America, Inc.*, 767 F. App'x 635, 637 (6th Cir. 2019).

To meet this burden, the party must show three things: (1) a compelling interest in sealing the records; (2) that the interest in sealing outweighs the public's interest in accessing the records; and (3) that the request is narrowly tailored. Where a party can show a compelling reason for sealing, the party must then show why those reasons outweigh the public interest in access to those records and that the seal is narrowly tailored to serve that reason. To do so, the party must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations."

Id. (citations omitted). "Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016). "[T]he proponents of

¹ Defendant did not oppose making the Monitor's Feb. 28, 2020 letter itself available to the public.

closure bear the burden of showing that disclosure will work a clearly defined and serious injury. And in delineating the injury to be prevented, specificity is essential.” *Id.* at 307–08 (internal quotations and citation omitted). When the burden is met, the court must still “consider alternatives to closure and to total suppression of the transcript.” *Press-Enterprise Co.*, 464 U.S. at 513.

Regarding the City’s request that the entirety of the documents be sealed, the City has failed to overcome the general “presumption of openness,” *Press-Enterprise Co.*, 464 U.S. at 510, or carry the “heavy burden” born by the party seeking to seal documents, *Kondash*, 767 F. App’x at 637. Many (if not all) of the exhibits attached to the communications in the Monitor’s letter are subject to open records requests or are otherwise already part of the public record related to this case. For those reasons alone, the City’s request that the documents be sealed should be denied.

Additionally, there is great public interest in the hearing set March 17, 2020, particularly in light of the concerns raised by the Monitor that the City is in violation of this Court’s sanctions. In *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Circuit 2016), the court explained the public interest in access to court records goes beyond the outcome or result of a case.

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,—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.” 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 305 (emphasis added) (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983)).

The public holds a similar interest in the conduct giving rise to the Monitor's concerns and whether those actions have violated this Court's prior order holding the City in contempt of the Consent Decree. Because the evidence in this case is of such immense public interest, the City cannot meet the high burden needed to justify sealing the documents in their entirety.

The City has also requested that, as an alternative to sealing the documents, it be allowed to redact information from them prior to disclosure to the public. Without specificity from the City regarding its proposed redactions, this request should be denied. ACLU-TN cannot address whether redaction of any particular information is warranted until the City has identified those portions to be redacted and articulated a compelling justification for sealing that information from public view.

ACLU-TN, therefore, opposes the City's Motion and respectfully request the Court deny the relief requested. To the extent the Court entertains the City's request to redact information from the documents, ACLU-TN requests that the Court order the City to provide the specific information to be redacted and its compelling justification for redaction and that ACLU-TN be afforded an opportunity to respond.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020 a true and correct copy of the foregoing document has been served via the Court Electronic Case Filing system to:

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