

**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.)	

CITY’S PRE-HEARING BRIEF

The Defendant, the City of Memphis (“the City”), respectfully submits this pre-hearing brief in advance of the March 17, 2020 hearing ordered by the Court. (ECF No. 290.)

I. Procedural History

In August 2018, the Court found the City in contempt of the Consent Decree entered into in *Kendrick, et al. v. Chandler, et al.*, No. 2:76-cv-00449 (W.D. Tenn. 1978). Specifically, the Court found that the City engaged in “political intelligence” when it created and populated a City Hall Escort List based on political affiliations, by disseminating information about lawful gatherings through its Joint Intelligence Briefings, and by deploying plainclothes police officers to photograph and identify participants at political protests. (ECF No. 120, PageID 4881-82.)

After a trial on the remaining issues, the Court found the City further in contempt of the Consent Decree when it found that the Memphis Police Department (“MPD”), through the Office of Homeland Security and Real Time Crime Center searched a social media collator for particular activist groups; circulated social media posts about boycotts; gathered information on journalists based on their associations with certain activist groups; and indexed information relating to lawful protests. (ECF No. 151, PageID 6261.)

The Court ordered five sanctions against the City:

1. The City must revise Departmental Regulation 138.
2. The City must design training for members of OHS, RTCC, and MPD's Command Staff.
3. The City must establish a process for the approval of investigations into unlawful conduct that may incidentally result in political intelligence.
4. The City must establish written guidelines for the use of manual social media searches and of social media collators in compliance with the Decree.
5. The City must 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.

(ECF No. 151, PageID 6274-75.)

The Court ordered the City to submit proposed policies, training, and guidelines, and the first collection of search terms by January 14, 2019, pursuant to the Court's sanctions. (ECF No. 151, PageID 6274-75.) The Court further ordered the appointment of "an independent monitor to supervise the implementation of the sanctions described above." (ECF No. 151, PageID 6275.)

The City submitted its first set of proposed policies and materials pursuant to the Court's sanctions on January 14, 2019. (docketed at ECF No. 185.) At the same time, the City filed its first set of search terms under seal pursuant to Sanction No. 5. (ECF No. 183.) Along with the list of search terms, the City submitted an accompanying brief to the Court explaining its methodology for collecting search terms which is excerpted for ease of reference below:

The City has experienced technical challenges arising from the nature of social media use, in general, and the inability of any entity to capture social media use systematically, regardless of whether the social media use occurs on a network owned by that entity. For example, an MPD officer using social media to collect information while on duty and, in particular, at a crime scene may access the Internet via the City's network, or the officer may use his or her individual cellular data, hosted by third-party vendors. Even where social media use occurs on the City's network, some social media sources require an individual account to access

content, but others do not, so only those requiring an individual account would presumably have search history that is traceable to that user. Consequently, compliance with this request must rely in large part on self-reporting by any MPD officers of any search terms entered while collecting information on social media while on duty. The City devised the following methodology in a good faith attempt to collect responsive information to Request No. 5:

- 1) The City determined, with confirmation from Deputy Chief Don Crowe, whose responsibilities include overseeing information technology, that no social media collators have been utilized within the MPD since November 1, 2018.
- 2) Every MPD officer in Office of Homeland Security, Real Time Crime Center, General Investigative Unit, Homicide, Sex Crimes Unit and members of Command Staff received an order to report all search terms entered by them into social media sites to collect information for the purpose of conducting police business from November 1, 2018 through December 31, 2018. The written instruction was accompanied by reference guides on how to collect individual search history on the commonly used social media sources, Facebook, Instagram, and Twitter. This request was disseminated via email. Responses were collected electronically. For those MPD officers with search terms to report, they were asked to manually input those specific search terms into their responses. Those receiving the requests were required to make an affirmative or negative response.

(ECF No. 183, pp. 2-3.)¹

The City did not include the MPD patrol officers in groups it reported. It also did not include the officers from the Organized Crime Unit (“OCU”), Multi-Agency Gang Unit (“MGU”), and the Internet Crimes Against Children (“ICAC”) division.

In the same brief, the City invited instruction from the Court or the appointed Monitor to assist in its compliance with Sanction No. 5. (ECF No. 183, p. 3.) On February 4, 2019, the ACLU-TN filed a Response with the Court outlining several objections it had to the City’s proposed policies and procedures related to the Court’s sanctions. (ECF No. 186.) Notably, the

¹ This document is under seal, even to the parties, such that PageID numbers are not visible.

ACLU-TN stated that it had no objection to the City's submission of search terms. (ECF No. 186, PageID 6708.)

Having received this notification that there was no objection to its search term reporting process, the City believed it was in compliance with the Court's Order and sanctions. Accordingly, the City continued to report search terms from the same groups identified in the initial submission and in the same manner.

Since the first filing in January 2019, the City has submitted four additional sets of search terms quarterly to the Court. (*See* ECF Nos. 199, 214, 256, and 275.) In each of those submissions, the City again outlined its process and explicitly identified which officers it queried for search terms. Those officers and groups of officers included "[e]very MPD officer in Office of Homeland Security, Real Time Crime Center, General Investigative Unit, Homicide, Sex Crimes Unit and members of Command Staff." (*See, e.g.*, ECF No. 214, PageID 7311.)

It was not until the City received the Monitor's February 7, 2020 letter that it was on notice that its quarterly reporting of search terms was objectionable to the Monitor. The City responded to the Monitor on February 14, 2020.

On February 28, 2020, the City received the Monitor's Letter to the Court explaining that he believed the City has been departing from Sanction No. 5 of the Court's Order. Attached to the Monitor's letter was a letter from the ACLU-TN which, for the first time, objects to the City's procedure for reporting search terms.

The City then requested a hearing from the Court to address the issue (ECF No. 289), and the Court granted the hearing. (ECF No. 290.)

II. The City's Reasoning for Its Search Term Reporting Procedure

When determining how it could best comply with Sanction No. 5, the City did so with reference to the Court's reasoning in its Opinion and Order (ECF No. 151) to develop the list of officers from which it would require the quarterly reporting of search terms. During the trial and in the subsequent Order (ECF No. 151), the ACLU-TN and the Court focused on the collection, retention, and dissemination of information obtained from social media, rather than the cursory viewing of information posted on social media. For example, the Court found that the City violated the Consent Decree's prohibition on political intelligence when "officers gathered and circulated social media posts about potential boycotts and boycotts [that] are squarely within the protection of the First Amendment;" and when "MPD indexed information relating to the leadership of lawful protests." (ECF No. 151, PageID 6261) (emphasis added.)

Accordingly, the City interpreted the Court's Sanction No. 5 as requiring it to provide search terms from MPD officers who are most likely to collect, maintain, and distribute information from social media. The groups of officers from which the City has been reporting search terms includes officers assigned to Homeland Security, RTCC, the investigative units of MPD, such as homicide and sex crimes, that might collect, index, and maintain information from social media as part of their investigations.

A. Patrol Officers are not collecting and indexing information from social media.

The City reasoned that a "rank and file" patrol officer does not "collect" information from social media in the same manner that an investigator collects and maintains information. A patrol officer may briefly view social media during the course of his or her patrol duties, but that officer does not collect, save, catalog, or maintain that information in any way. Because patrol officers

do not “collect” information from social media, the City believed that patrol officers were not included in the search term reporting requirement, which by its terms deals with persons “collecting information” on social media.

This interpretation was believed to be consistent with the context of the other sanctions in the Court’s Order. For example, the Court did not require that the City train every officer in the MPD on the prohibition against the collection of political intelligence, but rather only the officers in the Office of Homeland Security (“OHS”), Real Time Crime Center (“RTCC”), and the Command Staff. (*See* ECF No. 152, PageID 6288, ¶ 2.) In light of the totality of the Court’s Order and sanctions, the City surmised that the Court was not requiring the City to provide the search terms of every patrol officer in the MPD. The City believed that the group of people from whom it was reporting search terms complied with the Court’s sanctions by including officers that might “collect” and “index” information they obtain from social media.

Indeed, the City believed that it was arguably being over-inclusive with the groups of officers from which it collected search terms, as some of the officers assigned to those units may not be “collecting” and “indexing” the information they viewed on social media. As the Court noted, “[t]he maintenance and storage of information was an active task in 1978, like gathering and indexing still are today.” (ECF No. 151, PageID 6258.) Here, not every officer is performing the active task of gathering and indexing information from social media.

It is the City’s understanding that an officer’s act of simply viewing open source social media, without further interaction, is not an affirmative investigative act that constitutes the collection and indexing of information such that it would be subject to the prohibitions of the Consent Decree. Viewing open source social media, without further affirmative actions, was

believed to be simply surveying the open landscape, the same as surveying a physical landscape, where no constitutional protections would be infringed.

For these reasons, the City did not believe that the Court intended for it to include every instance of every MPD officer's passive viewing of social media in its quarterly reporting.

B. The City did not report the terms of MGU, OCU, and ICAC because they are highly sensitive and implicate highly sensitive criminal investigations, and the identities of the officers and informants involved.

Regarding the more specific request to add officers of MGU to the quarterly submission group, the City has security concerns with this request. As noted in the City's November 20, 2019 Letter to the Monitor, the MGU is comprised of officers not only from MPD, but from various other agencies that are not subject to the Consent Decree or within the jurisdiction of the Court. Clearly, those officers would not be required to report their search terms in any scenario.

Moreover, the City has grave concerns about maintaining the safety of the officers conducting the search terms and the confidentiality of the search terms of MPD officers assigned to MGU if submitted in a court filing, or in any written submission to the Monitoring team or the ACLU. This is certainly not because of a lack of confidence in the trustworthiness of any party or employee. The Court has acknowledged during an *in camera* conference at the November 2019 hearing, however, that eventually much or all of the filed information might become available to the public.

The search terms used by MGU will include names and aliases of targets of ongoing long-running, investigations and their associates. Anything submitted to the Court, even under seal, runs the risk of inadvertent disclosure. The disclosure of some of this highly confidential information could destroy long-running, ongoing investigations into violent crime and drug enterprises. The City is also very concerned about the safety of officers and informants, whose

identities may be implicitly revealed by the search terms.

The City understands the Monitor's concerns about MGU and has twice invited the Monitor to MGU to view the search terms of the MPD officers assigned to MGU. The search terms are available for viewing at the Court's and the Monitor's convenience.

Additionally, the City proposed that it work with the Monitor to create and implement a process for a designee of the Director to authorize the social media searches of MPD officers assigned to MGU, without creating a paper trail. The City stands ready, of course, to comply with whatever course the Court desires.

Although not squarely presented in the Monitor's February 7, 2020 Letter, the City notes that it also has not reported the search terms from OCU and ICAC for similar reasons as the decision concerning the search terms of the MPD officers assigned to MGU. Likewise, these units are conducting searches that implicate ongoing criminal investigations (some of which are being conducted by undercover officers and/or relying upon confidential informants), matters under indictment and/or prosecution. The City stands ready to collect those terms if the Court so orders, but the City requests that a procedure be implemented so that the terms could be viewed without the transfer of documents from one party to another or filed through the Court's ECF system.

CONCLUSION

In retrospect, the City should have sought affirmative clarification from the Court as to which groups of officers the Court intended be included in the search term reporting requirement. The City in no way, however, was intending to depart from Sanction No. 5, and it welcomes further clarification and instruction from the Court as to how to fully comply with the Consent Decree and

the Court's sanctions. The City requests that a separate procedure be established to share or produce the search terms of the MGU, OCU, and ICAC units, if it is required to do so.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13st day of March 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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