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.	)	

SEALED MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR IMMEDIATE MODIFICATION OF THE KENDRICK CONSENT DECREE

I. BACKGROUND AND PROCEDURAL HISTORY

In 1976 a group of plaintiffs brought a civil action for declaratory and injunctive relief against the City of Memphis ("the City") in *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978). The *Kendrick* plaintiffs alleged, *inter alia*, that the Memphis Police Department ("MPD") investigated and maintained files on persons engaged in non-criminal, constitutionally protected First Amendment activities. (*Kendrick* Comp. ¶ 7, ECF No. 33-1). The *Kendrick* plaintiffs claimed this conduct on the part of MPD had a chilling effect upon their First Amendment rights. *Id.* at ¶ 16.

On September 14, 1978, the Court entered a Consent Order and Decree (the "Consent Decree") in *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978). (*See* Consent Decree, ECF No. 151, PageIDs 6280-86). The Consent Decree prohibited the City of Memphis "from engaging in law enforcement activities which interfere with any person's rights protected by the First Amendment to the United States Constitution including, but not limited to, the rights to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose." (ECF No. 151, PageID 6281).

The provisions of the Consent Decree were directly at issue in the underlying litigation in this case.

In an Order entered August 10, 2018 (ECF No. 120) the Court granted summary judgment in part to the Intervening Plaintiff, the American Civil Liberties Union of Tennessee, Inc. ("ACLU-TN"), finding that the City had violated the Consent Decree in several respects. (ECF No. 120 at PageIDs 4880-4882, 4886). The Court also, however, observed that in the event that the Consent Decree "is outdated due to a change in legal or other circumstances, the City is free to file a motion to modify the Consent Decree." *Id.* at 4877. The Court noted that the City intimated its intention, if necessary, to file a Motion under Fed. R. Civ. P. 60(b) to do just that. *Id.* at 4877.

On August 16, 2018, the City filed a Motion for Relief from Judgment or Order and accompanying Memorandum of Law in Support of Motion to Modify and/or Vacate Judgment. ("Motion to Modify") (ECF No. 124).

After a trial on the merits, the Court found the City in contempt of additional portions of the Consent Decree. S*ee* October 26, 2018 Opinion and Order (ECF No. 151) ("October 26, 2018 Order"). The Court imposed five sanctions against the City "[t]o ensure compliance with the Consent Decree generally, and especially with the requirement that the City familiarize its officers with the contents of the Decree." (ECF No. 152). In addition to those sanctions, the Court ruled that it would appoint an independent monitor "to supervise the implementation of the sanctions described above." *Id.* at PageID 6290.

On November 14, 2018, the Court entered an Order Setting Consent Decree Modification Schedule and Setting Public Comment Period. (ECF 159). After consultation with the Intervening Plaintiff, and after reviewing the October 26, 2018 Order, the City concluded that its

broad Motion to Modify was premature in that it would present hypotheticals rather than existing facts. Moreover, the City determined any modification of the Consent Decree would be best addressed after a period of attempted compliance with the Consent Decree, and after a period of operation under the supervision and oversight associated with the then soon-to-be Court-appointed monitor. Once the City operated in that manner for a period of time, the City intended to revisit its Motion to Modify, if necessary. The Parties further agreed that they could make progress on proposed joint modifications to the Consent Decree if they had additional time to collaborate with each other and the Monitor. *See* Joint Motion to Stay the City's Motion to Modify and/or Vacate Judgement (ECF No. 175, PageID 6523).

On December 31, 2018, the Court granted the Joint Motion to Stay the City's Motion to Modify and/or Vacate Judgment, staying proceedings on the City's Motion to Modify until January 2, 2020. (ECF No. 178, PageID 6545). The Court noted, however, that it may "order that discovery and modification proceedings resume if 'either party in good faith believes that the collaborative attempt to suggest Consent Decree modifications has reached an impasse.'" (ECF No. 174 at PageID 6527.)

Since that time, the City has worked diligently to comply with the Court's sanctions in the Order, as well as to work with the Court-appointed Monitor and the ACLU-TN to revise its policies and procedures. A series of recent interpretations of the Consent Decree by the Independent Monitor, however, has left the City no choice but to seek immediate modification or clarification of Section I of the Consent Decree in the interest of maintaining public safety.

Accordingly, the City now moves, pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, to modify the Decree by vacating or significantly modifying Section I of the Decree, as interpreted by the Monitor, because it unduly burdens legitimate investigative activities and

creates restrictions that are unnecessary for the protection of First Amendment rights.[1]

Section I of the Consent Decree states:

> Restrictions on Joint Operations
>
> The defendants and the City of Memphis shall not encourage, cooperate with, delegate, employ or contract with, or act at the behest of, any local, state, federal or private agency, or any person, to plan or conduct any investigation, activity or conduct prohibited by this Decree.

Consent Decree, Section I (ECF No. 151, PageID 6284).

The City has interpreted this Section to prohibit it from using other agencies or persons as "surrogates" to do indirectly what it could not do directly. As explained below, the Monitor's reading of Section I, however, prevents inter-agency law enforcement information-sharing and cooperation.

Section I should be modified because it does not directly protect any federal right. Moreover, the law and circumstances surrounding surveillance and the First Amendment have changed significantly since the time of the original *Kendrick* lawsuit. Additionally, the City has complied with the Consent Decree to the best of its ability since the Court found it in contempt, and it will continue to cooperate with the Independent Monitor concerning its ongoing compliance with other portions of the Consent Decree.

Most importantly, Section I should be modified or vacated because, as interpreted, it creates an undue burden on law enforcement. By prohibiting joint operations with other law enforcement agencies, Section I inhibits investigations of terrorism, hate crimes, bombings, gang crimes, sex crimes against children, and mass shootings that by their very nature, require open sharing of information across local, state, and federal law enforcement agencies.

[1] The instant Motion relates only to modification of Section I of the Consent Decree, but the City does not waive its right to modify other provisions of the Consent Decree at a later date.

Additionally and separately, the City requests an *in camera* meeting with the Court and the Parties to discuss an extremely sensitive law enforcement matter at the Court's earliest convenience.

II. LAW AND ARGUMENT

A. Applicable Legal Standard

"Consent decrees are not 'entitlements.'" *John B. v. Emkes*, 710 F.3d 394, 398 (6th Cir. 2013). Instead, a decree may remain in force only so long as it continues to remedy a violation of federal law." *Id.*

A consent decree is subject to a Rule 60(b) motion because it is "a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). Accordingly, a district court may grant relief under Rule 60(b)(5) if "among other things, 'applying [the judgment or order] prospectively is no longer equitable.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009).

Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Id.* (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes. *Id.* (citations and quotations omitted).

Modification of a consent decree is appropriate: (1) "when changed factual conditions make compliance with the decree substantially more onerous," (2) "when a decree proves to be unworkable because of unforeseen obstacles," or (3) "when enforcement of the decree without modification would be detrimental to the public interest." *United States v. State of Mich.*, 62 F.3d

1418 (6th Cir. 1995). Rule 60(b)(5) "does not allow modification simply 'when it is no longer convenient to live with the terms of a consent decree,' but solely when there is 'a significant change either in factual conditions or in law.'" *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 613-14 (6th Cir. 2011) (quoting *Rufo*, 502 U.S. at 383–84). The party seeking to show such a change exists "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* at 614. If that party carries its burden, then the district court "should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.*

Rule 60(b)(5) serves a particularly important function in "institutional reform litigation." *Horne*, 557 U.S. at 447. "[I]njunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Id.*

Horne recognized that institutional reform decrees require courts to take a "flexible approach" to Rule 60(b)(5) motions addressing such decrees. *Id.* at 450.

> A flexible approach allows courts to ensure that responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant. In applying this flexible approach, courts must remain attentive to the fact that federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate federal law or does not flow from such a violation. If a federal consent decree is not limited to reasonable and necessary implementations of federal law, it may improperly deprive future officials of their designated legislative and executive powers.
>
> *Id.* (internal citations omitted)

The Court also noted that "institutional reform injunctions often raise sensitive federalism concerns." *Id*. The *Horne* Court stated that its flexible approach "allows a court to recognize that the longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic process." *Id*. at 453.

The Sixth Circuit established the following two-prong test in applying this flexible approach:

> First, whether the State has achieved compliance with the federal-law provisions whose violation the decree sought to remedy and second, whether the State would continue that compliance in the absence of continued judicial supervision.

Emkes, 710 F.3d at 412 (citations omitted).

Accordingly, the City seeks modification of the Decree under Federal Rule of Civil Procedure 60(b)(5). The rule provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . .

Fed. R. Civ. P. 60(b) (5).

B. Argument

Here, prospective application of Section I of the Decree is inequitable because a significant change in factual conditions and in law renders continued enforcement detrimental to the public interest. The Consent Decree does not secure a federal right and the law surrounding government surveillance and First Amendment rights has been clarified since the entry of the Decree. Most importantly, however, is that the Decree, as interpreted by the Monitor, impinges upon legitimate law enforcement interests in such a way that the continued enforcement of the Consent Decree is now detrimental to public safety, and therefore inequitable.

1. A change in the law warrants modification of a consent decree.

"There is … no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *Rufo*, 502 U.S. at 380

(quoting *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961)). Such "changed circumstances" warranting revision include changes in the statutory or decisional law supporting entry of the original decree. *See Railway Employees v. Wright*, 364 U.S. 642, 650 (1961) (holding that modification of consent decree was appropriate where statutory amendment made clear that prohibitions in decree were no longer illegal). In particular, "modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388. Stated another way, a court should grant relief under Rule 60(b)(5) where the federal claim underlying the decree, though valid when entered, is no longer supported by federal law. *See Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 1831 (1994).

Here, such a change in law exists that warrants modification of the *Kendrick* Consent Decree. In 1983, the Sixth Circuit, interpreting *Laird v. Tatum*, 408 U.S. 1 (1972), for the first time, held that if an undercover investigation or surveillance is conducted in good faith and is not designed to regulate or constrain a person or group's First Amendment activities, then that investigation or surveillance does not violate First Amendment rights, even though the investigation or surveillance may be targeted at a particular socio-political group or at the group's First Amendment activities. *See Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 (6th Cir. 1983).

In *Gordon*, the plaintiffs were high school teachers and students in Michigan. During the 1977-78 school year, school officials helped place an undercover policewoman in two classes at the school for the purpose of investigating drug trafficking at the school. *Id.* at 778. The undercover officer was placed in classes with teachers who had "liberal reputations." *Id.* at 779.

During her undercover investigation, the officer uncovered no evidence of drug sales occurring at the high school. A few months after the termination of the surveillance, several students learned of the undercover policewoman's true identity and learned of the drug surveillance operation. Disclosure of the investigation allegedly dramatically altered the content and open discussion methodology that had characterized the psychology and sociology classes targeted by the undercover officer. Class discussions allegedly became stilled, and certain topics were avoided, and students refused to freely express their opinions. *Id.*

The teachers and students filed a § 1983 suit against the school system alleging that the teachers' political beliefs motivated school officials to target the surveillance towards the teachers' particular classrooms. *Id.* at 780. They further alleged that the surveillance chilled their speech. *Id.* The district court dismissed the complaint because the complaint alleged nothing more than a subjective chilling of the plaintiffs' First Amendment rights and the Sixth Circuit agreed. *Id.*

First, the Sixth Circuit noted that *Laird v. Tatum* controlled the case stating:

> In *Laird* the complaint alleged that the United States Armed Forces intelligence agencies had engaged in the surveillance of lawful and peaceful civilian activity, collected information on political protests which served no legitimate military purpose, and disseminated this information to various military headquarters in the United States. These activities allegedly curtailed plaintiff's First Amendment rights and deprived them of their constitutionally guaranteed right of privacy. The Supreme Court rejected the claims that the intelligence activities had a "chilling effect" upon the exercise of First Amendment rights because plaintiffs were unable to point to any resulting direct injury or immediate threat of harm. The mere existence of a military data-gathering system does not constitute a justiciable controversy. "Allegations of subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; the federal courts established pursuant to Article III of the constitution do not render advisory opinions."

Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 780 (6th Cir. 1983) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)) (emphasis added).

Accordingly, in *Gordon*, the Sixth Circuit found that the plaintiffs failed to allege that the covert operation resulted in any tangible consequence, but rather only a subjective chilling on plaintiff's speech. *Gordon*, 706 F.2d at 780-81. Furthermore, it did not matter that the investigation focused on particular socio-political groups. The court stated that "even accepting plaintiffs' assertion that the investigation focused on classes where students and teachers held 'liberal' socio-political views, there was no indication that the investigation had any tangible and concrete inhibitory effect on the expression of particular socio-political views in these classrooms." *Id.* at 781. The court found that the undercover investigation was made in good faith, and was prompted by the school officials' legitimate concern about possible illegal drug activity at the school. *Id.* As a result, the plaintiff's subjective fear that the content of class discussions might be reported to school administrators or others was insufficient to establish a First Amendment claim. *Id.*

Importantly, the *Gordon* Court clarified that surveillance targeting First Amendment activity as part of a good faith investigation is permissible so long as Fourth Amendment protections are observed.

> We find no support for plaintiff's suggestion that an undercover investigation is necessarily constitutionally infirm because the focus of that investigation was directed to classes where particular socio-political views were espoused. Courts have recognized that physical surveillance consistent with Fourth Amendment protections in connection with a good faith law enforcement investigation does not violate First Amendment rights, even though it may be directed at communicative or associative activities. Here there is no suggestion that the investigation of drug activities was conducted in bad faith and was surreptitiously designed to regulate or proscribe the content of discussion in the classroom. Furthermore, plaintiffs do not contend that the investigation invaded any legitimate expectation of privacy so as to invoke Fourth Amendment protections. Finally, it should also be noted that this case is distinguishable from those cases where an investigation significantly invades rights of associational privacy and is not germane to the detection of specific criminal conduct.

Id. at 781 n.3 (internal citations omitted) (emphasis added).

When *Kendrick* was being litigated in the mid-1970s, the law surrounding surveillance of First Amendment activity was in flux. *Laird* was decided in 1972, but it took several years for the lower courts to develop its holding as applied to various surveillance situations. In 1983, the Sixth Circuit finally interpreted *Laird* in *Gordon*, and foreclosed the possibility that a plaintiff could allege a First Amendment violation based upon law enforcement's good faith investigation or surveillance that did not have an objective chilling effect on speech.

Since *Gordon*, Courts in this Circuit and beyond continue to interpret *Laird* in the same manner as *Gordon, i.e.* that for surveillance to give rise to a constitutional violation, something more than a subjective chilling of speech is required. *See, e.g. Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 661 (6th Cir. 2007) (finding that plaintiffs lacked standing to bring a First Amendment claim because they failed to establish that they were regulated, constrained, or compelled directly by the government's actions, instead of by their own subjective chill); *Ghandi v. Police Dep't of City of Detroit*, 747 F.2d 338, 347 (6th Cir. 1984) (explaining that the government's use of informants does not by itself give rise to a constitutional violation); *Handschu v. Special Servs. Div.*, 475 F. Supp. 2d 331, 353–54 (S.D.N.Y. 2007), *order vacated on reconsideration on other grounds*, No. 71 CIV. 2203(CSH), 2007 WL 1711775 (S.D.N.Y. June 13, 2007) (holding that plaintiffs failed to bring a justiciable claim that NPYD chilled their First Amendment rights by photographing and videotaping a political march); *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326, 332-33 (2d Cir. 1973) (holding that FBI's investigation of a planned anti-war protest, including examination of bank and transportation records was a lawful exercise of the agency's duty to maintain public safety); *Donohoe v. Duling*, 465 F.2d 196, 199-202 (4th Cir. 1972) (explaining that photographic surveillance by police at political and religious events does not present justiciable claim of injury).

Gordon undermines many of the *Kendrick* Consent Decree's provisions. For example, the Consent Decree prohibits "Political Intelligence", defined as "the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person's beliefs, opinions, associations or other exercise of First Amendment rights." (ECF No. 151, PageID 6281.) More importantly for this Motion, Section I of the Consent Decree bars the City of Memphis from "cooperat[ing] with" any agency or person to "plan or conduct any investigation, activity or conduct prohibited by [the] Decree. *Id.* at PageID 6284.

While at the time this Court entered the Consent Decree the plaintiffs may have had a valid federal claim that investigations of them based upon their political statement violated their constitutional rights, any such claim could not be maintained in the present day following *Laird* and *Gordon*. Indeed, the *Kendrick* plaintiffs arguably would not even have standing to bring such a claim in the present day.

At the very least, the Sixth Circuit's decision in *Gordon* clarified a fundamental misunderstanding among the parties to the Decree, and upon which the Decree was based: that the City, by investigating First Amendment activity, had violated the U.S. Constitution. In short, it is now plainly legal to engage in much of the surveillance activity the Decree was designed to prevent, making continued enforcement of most aspects of the Decree inequitable under Fed. R. Civ. P. 60(b)(5).

Moreover, and more importantly for this Motion, Section I's restriction on cooperation is not required by the First Amendment or the U.S. Constitution. There is no constitutional right to be free from cooperation with local, state, and federal law enforcement agencies. Moreover, the Constitution does not require evidence of criminal conduct before law enforcement agencies may undertake investigations of individuals because of statements made by them. Because

Section I of the Decree is no longer supported by legitimate interests, and is severely hampering law enforcement activities which are otherwise legal, this Court may grant a modification of the Decree's provisions.

Because the Consent Decree's onerous restraints on police intelligence work have no basis in existing federal law and do not secure any federal right, the Decree should be modified to the extent herein requested.

2. Section I of the Consent Decree is unworkable and a detriment to public safety.

As will be illustrated *infra*, Section I of the Consent Decree should be modified because it is unworkable for a modern police force. In particular, that portion of the Consent Decree hampers the City's exercise of its legitimate law enforcement functions and requires the City to expend scarce resources to assure compliance with restrictions that go well beyond that which is required by federal law.

The burden that a consent decree imposes on state and local governments is properly considered under Rule 60(b)(5). The U.S. Supreme Court in *Rufo* expressly acknowledged that the effect of a decree on the consenting party plays an important role in a district court's assessment of the need for modification. While mere inconvenience would not warrant modification of a consent decree, the Court noted, revision can be necessary if changed circumstances "make compliance with the decree substantially more onerous." 502 U.S. at 400.

Moreover, courts have suggested that a consent decree's impact on local law enforcement activities is a factor to consider in assessing the continued viability of a consent decree. In *Alliance to End Repression v. City of Chicago*, the Seventh Circuit reversed a district court's act of enjoining the City of Chicago from implementing new guidelines for FBI investigations that were inconsistent with a 1981 consent decree regarding surveillance of First Amendment

activities. *All. to End Repression v. City of Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984). The Seventh Circuit explained how Chicago's consent decree impeded law enforcement and possibly affected public safety:

> We doubt that any neutral observer would think it appropriate that the FBI should be governed by other than a uniform national set of investigatory standards—that it should operate under one set of constraints everywhere but Chicago, and under another and tighter set in Chicago, so that this city can become a sanctuary for nascent terrorist organizations. To some extent the FBI is unavoidably under a tighter rein in Chicago than elsewhere, because of the consent decree, which applies only to Chicago. But there is no reason to magnify the disparity by looking for conflict between two sets of general language—the general principles of the decree and the general principles of the Smith Guidelines.
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> *Id.* at 1018–19.

Ultimately, the Seventh Circuit modified the *Alliance* consent decree, based largely on the decree's impact on the ability of the Chicago Police Department to effectively protect the public. Judge Posner explained:

> All this the First Amendment permits (unless the motives of the police are improper or the methods forbidden by the Fourth Amendment or other provisions of federal or state law, *see Alliance to End Repression v. City of Chicago*, *supra*, 742 F.2d at 1014–15, and cases cited there), but the decree forbids. The decree impedes efforts by the police to cope with the problems of today because earlier generations of police coped improperly with the problems of yesterday. Because of what the Red Squad did many years ago, today's Chicago police are fated unless the decree is modified to labor indefinitely under severe handicaps that other American police are free from. First Amendment rights are secure. But under the decree as written and interpreted, the public safety is insecure and the prerogatives of local government scorned**.** To continue federal judicial micromanagement of local investigations of domestic and international terrorist activities in Chicago is to undermine the federal system and to trifle with the public safety. Every consideration favors modification; the City has made a compelling case for the modification that it seeks.

All. to End Repression v. City of Chicago, 237 F.3d 799, 802 (7th Cir. 2001) (emphasis added).

Here, like was the case in Chicago in the 1990s and early 2000s, the Consent Decree impedes the Memphis Police Department's ability to "cope with the problems of today" because earlier generations of police were found by this Court to have acted improperly with the

problems of the 1970s. Because of what a few bad actors did in 1976, today's police officers in Memphis are "fated unless the decree is modified to labor indefinitely under severe handicaps that other American police are free from." *See* 237 F.3d at 802.

Because the law regarding surveillance of First Amendment activity has been clarified since the entry of the Decree, and because the Decree is unworkable and a detriment to public safety, as explained *infra*, Section I of the Decree should be vacated or significantly modified in the interest of public safety.

C. ISSUES REQUIRING THE COURT'S IMMEDIATE REVIEW

Recently, the Monitor, acting as the special master for the Court, made several specific findings related to the intersection of the Consent Decree with MPD's current and proposed policies, practice, and procedures, which the City believes necessitate immediate modification of the Consent Decree in order to maintain the safety of the public. *See* July 2019 Quarterly Report of the Independent Monitor (ECF No. 218) ("July Quarterly Report"); August 12, 2019 Letter from Monitor to City ("August 12 Letter"), attached as **Exhibit A**; August 21, 2019 Letter from Monitor to City ("August 21 Letter"), attached as **Exhibit B**; August 26, 2019 Letter from Monitor to Mark Glover ("August 26 Letter"), attached as **Exhibit C;** August 29, 2019 Letter from Monitor to Mark Glover ("August 29 Letter"), attached as **Exhibit D.**

The specific issues that trigger the City's need for immediate modification or vacation of Section I of the Consent Decree to ensure that MPD is able to protect the public are (1) the City's need to receive and share intelligence with federal agencies; (2) the need to continue participation in the Joint Terrorism Task Force and to receive information from the Tennessee Fusion Center; (3) the need to continue participation in the Multi-Agency Gang Unit; (4) the need to continue participation in CrimeStoppers; and (5) the need to share information with the Shelby County Sherriff's Department which operates security within Shelby County Schools.

1. The need to receive and share intelligence with federal agencies for the purpose of public safety

On July 16, 2019, the City Attorney, Bruce McMullen, requested from the Monitor approval to coordinate with the FBI and the Secret Service in preparation for the 2019 PSP Symposium on Violent Crime, which was attended by executives from the DOJ, FBI, DEA, ATF, and United States Marshall Service. *See* August 21 Letter, at Exhibit B.

On August 21, 2019, the Monitor responded to Mr. McMullen's request explaining that request to coordinate with the FBI and Secret Service raised two issues that implicate the Consent Decree:

> First, to the extent that "coordinat[ing]" with the FBI or the Secret Service includes sharing personal information, the City may not coordinate with those agencies, or any others, in planning for the symposium. Section H of the *Kendrick* Consent Decree prohibits the City from "maintain[ing] personal information about any person unless it is collected in the course of a lawful investigation of criminal conduct." § H(1). It also prohibits the City from sharing "personal information . . . collected in the course of a lawful investigation of criminal conduct" unless the recipient is "another governmental law enforcement agency then engaged in a lawful investigation of criminal conduct." § H(2). I read this language to impose two applicable restrictions: (1) entirely against the sharing of personal information collected in any way other than via lawful criminal investigation (as such information may not be maintained in the first instance); and (2) against the sharing of personal information collected via lawful criminal investigation unless such sharing is with another governmental law enforcement agency and that agency already is engaged in a lawful criminal investigation.
>
> The second restriction is straightforward, but the first warrants elaboration. As an initial matter, § C(1) of the consent decree broadly prohibits the City from "engag[ing] in political intelligence." Section B(4) defines "political intelligence" to include both "the gathering [and] . . . dissemination of information . . . relating to any person's . . . exercise of First Amendment rights." Together, the two provisions prevent the City from sharing information relating to any person's exercise of First Amendment rights.
>
> …
>
> The ultimate consequence of these four sections, B(4), C(1), H(1), and H(2), is that the City may collect personal information—related or unrelated to the exercise of First Amendment rights—only in the course of a lawful criminal

> investigation, and may share that information only with a governmental law enforcement agency that already is involved in a criminal investigation.
>
> ***Second***, the City may not "benefit from the Intel" acquired by the FBI, the Secret Service, or any other law enforcement agencies unless the City first verifies that the information was not acquired in any way that the consent decree prohibits the City from using. Section I of the *Kendrick* Consent Decree forbids the City to "encourage, cooperate with, delegate, employ or contract with, or act at the behest of, any local, state, federal or private agency, or any person, to plan or conduct any . . . activity . . . prohibited by th[e] decree." I read this restriction to place the onus on the City to verify that any information it receives from governmental law enforcement agencies, non-law enforcement agencies, public and private entities, and individuals satisfies the same standards as information lawfully collected by the City itself.

Id. at pp. 1-3 (emphasis in the original).

The Monitor then found that the City may not receive intelligence collected from the FBI — or from any law enforcement agency — unless the City "first verified that the information was not acquired in any way that the consent decree prohibits." *Id.* at p. 3.[2] The Monitor also concluded that if "the City receives criminal intelligence from a governmental law enforcement agency for the purpose of conducting or supervising the MPD's own investigation of criminal conduct, then the City's receipt of that information also may be subject to the authorization and reporting requirements of § G of the consent decree." *Id.*

During the hearing on August 27, 2019, the Court addressed the specific issue of the City's coordination with the FBI and Secret Service in preparation for the PSP Symposium on Violent Crime *in camera*. Subsequently, the Monitor memorialized his understanding of that *in camera* conference in a letter to the City explaining that the Court authorized:

> … a limited, non-precedential departure from § I [of the Consent Decree] for purposes of providing security and public safety for the symposium. That departure allows the City to receive intelligence from the FBI, the Secret Service, and other law enforcement agencies without first verifying that such intelligence was acquired consistently with the consent decree's requirements. As your email

[2] The Monitor initially verbally expressed the view to the City on a conference call on June 14, 2019, that such receipt of information *did not* violate the Consent Decree. *See* Exhibit B, August 21 Letter, at p. 3.

> correctly recites, this departure does not allow the City or the MPD to (1) request that other law enforcement agencies "plan or conduct any investigation, activity or conduct prohibited by th[e] decree," § I; or (2) act on any information the City receives that, on its face, reflects that it was acquired in some way that the consent decree prohibits.
>
> I do not understand Judge McCalla to have authorized a departure from § H. In other words, in my view, the City and the MPD remain fully bound by § H as they prepare for and work with other law enforcement agencies before and during the symposium. They thus may share personal information with other law enforcement agencies, as opposed to receiving it from them, only as prescribed by § H.
>
> (Exhibit D, August 29 Letter, pp. 1-2,).

While the City is grateful for the Court's allowance of this limited, non-precedential departure from § I of the Consent Decree so that it was allowed to work with the Secret Service and FBI to provide security for the Deputy Attorney General and other high ranking governmental officials, the Monitor's interpretation of the Decree leaves the City with a serious and unworkable dilemma. How can the City receive and share information with federal agencies, and any other law enforcement agency, federal or otherwise, without violating the Consent Decree going forward?

The Monitor's interpretation of § I of the Consent Decree requires MPD to vet every piece of intelligence it receives from any source, including but not limited to the FBI, the DOJ, the Department of Homeland Security, and state law enforcement agencies. (Exhibit B, August 21, 2019 Letter, pp. 2-3). If MPD cannot determine if the intelligence gathered by the other law enforcement agency was gathered in a way that did not violate the Consent Decree, the very receipt of that information is a violation of the Decree. *See id.* at p. 3 ("If intelligence collected by governmental law enforcement agencies is not verified before the City receives it, then the City's receipt of that intelligence would violate the consent decree."). This interpretation places MPD in the precarious position of operating in a law enforcement "blind spot."

First, MPD cannot require that a federal agency, such as the FBI or DOJ, certify that the information it shares with MPD was obtained in a way that is not violative of the Consent Decree. As a threshold issue, requiring that a federal agency verify every piece of intelligence before it is disseminated to the MPD could have the effect of delaying the transmission of an urgent piece of intelligence that could stop, for example, a mass shooting.

Notwithstanding the impracticability of timely verifying that intelligence was obtained in way that did not violate the consent decree, federal agencies are not bound by the Consent Decree, only the U.S. Constitution. Unlike MPD, they are not restricted in the methods and sources they use to gather intelligence. It is impractical to suggest that an agency not bound by the Consent Decree should voluntarily abide by that decree's restrictions and prohibitions. MPD has no power or authority to require any federal or other entity to comply.

These restrictions on the open and contemporaneous sharing of information and intelligence with federal agencies will severely hamper the ability of federal law enforcement and MPD to prevent potential crimes in the Memphis area. For example, if the FBI used an undercover Facebook account to surveil a person who made inflammatory statements that might be reasonably be construed as veiled threats against a particular religious group, MPD would not be able to receive that intelligence from FBI unless MPD first certified that the information was not gathered in violation of the Consent Decree.[3] Under the Decree, MPD arguably would not even be able to hear that the FBI has determined that there is a possible threat or how urgent the situation is because MPD would first have to determine how the FBI obtained the information and then attempt to go through the certification process. If MPD learned that an undercover account was used to surveil someone expressing his First Amendment rights, under the Monitor's

[3] In this hypothetical, the posts, while inflammatory, did not rise to the level of an identifiable criminal threat.

interpretation, it would not be able to receive the intelligence at all and, therefore, act on the potential threat.

Moreover, if the intelligence received from the other law enforcement agency pertains to a criminal investigation that might interfere with the exercise of First Amendment rights or incidentally result in the collection of First Amendment-protected information, such an investigation must be approved by MPD's police director pursuant to § G of the Consent Decree. (Exhibit B, August 21 Letter, p. 3). Using the example from above, not only would MPD have to verify that the intelligence about the person making inflammatory comments about the religious group was obtained in a manner that does not violate the Consent Decree — which it could not reasonably do — it would also require that the MPD's Police Director authorize the FBI's investigation pursuant to § G of the Consent Decree. Obviously, it is impossible to require that MPD's Police Director approve investigations initiated and conducted by the FBI. MPD is not aware of any other law enforcement agency in the country that is limited in such a way. In short, the City cannot effectively provide public safety under such conditions.

Furthermore, MPD receives hundreds of thousands of dollars in federal grant money in exchange for its open and full cooperation with the federal government. This federal money is critical to the ability of MPD to reduce crime and protect the citizens of Memphis. For example, the City of Memphis received two law enforcement federal grants for 2018. The City was awarded $714,055 from the Bureau of Justice Assistance via the Local Law Enforcement Crime Gun Intelligence Center Integration Initiative Grant, which is described as follows:

> The Local Law Enforcement Crime Gun Intelligence Center Integration (CGIC) Initiative, administered by BJA in partnership with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), is a competitive grant program that provides funding to state and local government entities that are experiencing precipitous increases in gun crime to implement comprehensive and holistic models to reduce violent crime and the illegal use of firearms within their

> jurisdictions by enabling them to integrate with their local ATF CGIC. The purpose of this initiative is to encourage local jurisdictions to work with their ATF partners to utilize intelligence, technology, and community engagement to swiftly identify firearms used unlawfully and their sources, and effectively prosecute perpetrators engaged in violent crime. The CGIC Initiative is part of the Project Safe Neighborhoods (PSN) Suite of programs, which is focused on reducing violent crime. The PSN Suite comprises PSN, Strategies for Policing Innovation, Innovative Prosecution Solutions, CGIC Initiative, National Public Safety Partnerships, Technology Innovation for Public Safety, Encouraging Innovation: Field Initiated, Innovations in Community-Based Crime Reduction, and Community Based Violence Prevention Demonstration, and these initiatives will coordinate proactively with the PSN team in the respective district of the United States Attorneys Office (USAO) to enhance collaboration and strengthen the commitment to reducing violent crime. Applicants must demonstrate this coordination with their USAO district PSN team in their submission.
>
> The City of Memphis will use the BJA funds to enhance the analytical capabilities of the police department by hiring a contract analyst and eventually, a permanent senior crime analyst, as well as, purchasing technology to increase the capability to conduct investigations to identify, arrest, and prosecute violent gun crime offenders.

See FY 18 CGIC Program (emphasis added), attached as **Exhibit E.**

The City of Memphis also received $417,224 from the Bureau of Justice Assistance in the form of its Technology Innovation for Public Safety ("TIPS") Addressing Precipitous Increases in Crime:

> The FY 2018 Technology Innovation for Public Safety (TIPS) Addressing Precipitous Increases in Crime is part of the Project Safe Neighborhoods (PSN) Suite of programs, which is focused on reducing violent crime. The TIPS Program is designed to enable strategic information sharing across crime-fighting agencies with identified partnerships to address specific local or regional crime problems. Often these efforts will require a multidisciplinary response involving law enforcement, analysts and/or investigators, information technology staff, public safety and/or first responders, adjudications and/or courts, corrections, human services organizations, and other stakeholders.
>
> The City of Memphis will use the BJA funds to increase the License Plate Reader (LPR) technology by securing six mobile brief case LPR systems to investigate violent gang crimes in their jurisdiction. During investigations, officers will greatly benefit from LPR technology to quickly be able to both read and store license plates for their cases.

See FY 18 TIPS Memphis (emphasis added), attached as **Exhibit F.**

The federal government has formally recognized the importance of sharing of criminal intelligence through its implementation of 28 CFR Part 23, attached as **Exhibit G.** The regulation recognized that:

> certain criminal activities including but not limited to loan sharking, drug trafficking, trafficking in stolen property, gambling, extortion, smuggling, bribery, and corruption of public officials often involve some degree of regular coordination and permanent organization involving a large number of participants over a broad geographical area. The exposure of such ongoing networks of criminal activity can be aided by the pooling of information about such activities. However, because the collection and exchange of intelligence data necessary to support control of serious criminal activity may represent potential threats to the privacy of individuals to whom such data relates, policy guidelines for Federally funded projects are required.
>
> 28 C.F.R. § 23.2 (emphasis added).

Because the City is bound by the restrictions in the Consent Decree, and after receiving the Monitor's interpretation of the Consent Decree, the City is in the untenable position of being instructed that it is prohibited from freely and immediately sharing intelligence with federal law enforcement agencies as set forth in 28 CFR Part 23. This restriction puts the City's current and future federal law enforcement grants at risk.

In sum, it is impossible for the City to vet all intelligence a federal agency seeks to share before the City receives it. Moreover, because MPD cannot require that a federal agency obtain the MPD's Director of Police authorization of a criminal investigation that might incidentally result in the collection of First Amendment information, the Decree as interpreted by the Monitor, is unworkable. These circumstances, which could not have been foreseen in 1978, make compliance with Section I of the Consent Decree impossible while maintaining law enforcement standards now expected across the country and necessary to protect the public. It is, therefore, respectfully submitted that Section I be significantly modified or entirely vacated in the paramount interest of public safety.

2. The need to continue participation in the Joint Terrorism Task Force and to receive information from the Tennessee Fusion Center.

Similarly, Section I of the Consent Decree severely restricts or prohibits MPD's participation in the FBI's Joint Terrorism Task Force. The FBI's Joint Terrorism Task Forces ("JTTFs") are the nation's front line on terrorism: small groups of highly-trained, locally-based, passionately-committed investigators, analysts, linguists, SWAT experts, and other specialists from dozens of U.S. law enforcement and intelligence agencies. A JTTF fights domestic and foreign terrorism by chasing down leads, gathering evidence, making arrests, providing security for special events, conducting training, and collecting and sharing intelligence.[4]

JTTFs have been instrumental in breaking up cells like the "Portland Seven," the "Lackawanna Six," and the Northern Virginia jihad. They have foiled attacks on the Fort Dix Army base in New Jersey, on the JFK International Airport in New York, and on various military and civilian targets in Los Angeles. They have traced sources of terrorist funding, responded to anthrax threats, halted the use of fake IDs, and quickly arrested suspicious characters with deadly weapons and explosives.[5]

The regional JTTFs coordinate their efforts largely through the interagency National Joint Terrorism Task Force, working out of FBI headquarters, which ensures that information and intelligence flows freely among the local JTTFs.[6]

The Memphis-based JTTF includes members from the FBI, MPD, Shelby County Sherriff's Department, the Department of Homeland Security, Immigration and Customs Enforcement, and the Transportation Security Administration. The JTTF enables a shared intelligence base across many agencies, and creates familiarity among investigators and

[4] https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces
[5] https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces
[6] https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces

managers before a crisis. *See* Affidavit of Director Rallings ("Rallings Affidavit") at ¶ 11, attached as **Exhibit H.**

In view of Section I's restrictions on joint operations, as currently interpreted by the Monitor, the City will no longer be able to participate in the JTTF, putting not only local public safety at risk, but also jeopardizing the safety of the greater region and, potentially, the nation. If MPD is cut off from the JTTF, the ability of MPD to learn of potential threats and connections among local, regional, and national criminal activity will be severely limited.

In the same vein, Section I limits MPD's receipt of information from the Tennessee Fusion Center ("TFC"). The Tennessee Fusion Center (TFC) is a team effort of local, state and federal law enforcement, in cooperation with the citizens of the State of Tennessee, for the timely receipt, analysis and dissemination of terrorism information and criminal activity relating to Tennessee.[7]

Housed within TBI Headquarters in Nashville, the TFC was created in response to the intelligence failures of September 11, 2001. Fusion Centers have been developed across the country to provide an avenue of communication to enhance information sharing between federal, state, and local law enforcement agencies. The collaborative effort of the partnered agencies provide and share resources, expertise, and information with the goal of maximizing the ability to detect, prevent, apprehend and respond to criminal and terrorist activity. The TFC uses intelligence information with an 'all crimes' approach. It provides a central location for the collection and analysis of law enforcement related information and produces a continuous flow of that information to the law enforcement community. The TFC forecasts and identifies emerging crime trends and gives assistance to law enforcement in criminal investigations.[8]

[7] https://www.tn.gov/tbi/law-enforcement-resources/tennessee-fusion-center.html
[8] https://www.tn.gov/tbi/law-enforcement-resources/tennessee-fusion-center.html

The TFC consists of TBI employees as well as liaisons from the Tennessee Department of Safety & Homeland Security, Department of Correction, Board of Parole, the National Guard, ROCIC, ATF, and the FBI. TBI's Criminal Intelligence Unit ("CIU") houses the Fusion Center. CIU concentrates its effort on combating organized crime, gang activity, drug trafficking, Medicaid fraud, and fugitives. The CIU manages programs such as AMBER Alert, the statewide Sex Offender Registry, and the TBI Top Ten Most Wanted program. It is also the state's clearinghouse for missing and exploited children.[9]

As explained in detail above, it is not possible for MPD to vet every piece of intelligence it receives from the TFC to ensure it was obtained in a manner not violative of the Consent Decree. Even if it were possible, MPD would be expending precious resources and losing valuable time that would otherwise be focused on law enforcement, leading to more criminal activity and impairing MPD's ability to prevent and solve crimes. Moreover, it is also not practicable or feasible to require that the TFC obtain the Memphis Police Director's approval before initiating an investigation that might incidentally interfere with a person's First Amendment rights. Section I, as interpreted, thus prohibits MPD from receiving any information from the TFC going forward. This is an outcome, one can safely assume, that was neither intended nor desired by the drafters of the Consent Decree.

3. The need to continue participation in the Multi-Agency Gang Unit.

For many of the reasons set forth in Section II.C, *supra*, the City's participation in the Multi-Agency Gang Unit ("MGU") implicates and potentially violates Section I of the Consent Decree, as interpreted by the Monitor.

The MGU was formed in 2011, and is a group of elite highly-trained members of the Shelby County Sheriff's Office Narcotics Division, Memphis Police Department Organized

[9] https://www.tn.gov/tbi/law-enforcement-resources/tennessee-fusion-center.html

Crime Unit, ATF, FBI, and the U.S. Marshals. The MGU's mission is to conduct long term investigations on criminal gangs, to dismantle gang organizations, and to disrupt the illegal activities perpetrated by gang members. (Rallings Affidavit, ¶ 14.)

Since its inception, the MGU has been very successful. To take a recent example, in June 2019, a federal jury found five members of the Conservative Vice Lords Concrete Cartel criminal gang guilty of conspiracy to participate in racketeering activities, multiple armed pharmacy robberies, and drug trafficking conspiracy. One of the defendants was a Tennessee statewide gang leader and another was a citywide gang leader. The remaining defendants were branch leaders in the organization, claiming areas in East Memphis, Orange Mound, and Whitehaven. This federal prosecution and guilty verdict was the result of an extensive investigation which began in 2015 by FBI's Safe Streets Task Force and the MGU. (Rallings Affidavit, ¶¶ 15-16.)

Another example of MGU's success is the implementation of several "gang injunctions." In September 2013, as the direct result of MGU investigations into reports of criminal gang activity in the Riverside area of South Memphis, the Shelby County District Attorney's Office filed the first nuisance petition against the "Riverside Rollin' 90's Neighborhood Crips" ("R90"). In response to the petition, General Sessions Court Judge Larry Potter issued an injunction against R90 members, creating a 4.6-square-mile "safety zone." This process was followed three more times to obtain five more injunctions: (1) October 2014 against the "Dixie Homes Murda Gang/47 NHC" ("DHMG") in the North Main precinct; (2) December 2014 for two injunctions against the "FAM Mob" in two areas of the Old Allen precinct; and (3) January 2016 for injunctions against the "Grape Street Crips" (GSC) and "Vice Lords" (VL) in two overlapping areas of the Tillman Precinct. In each instance, the gang was declared a "public nuisance," and

members were required to abide by eleven requirements with respect to their behaviors in the safety zones. (Rallings Affidavit, ¶¶ 17-19.)

A preliminary assessment conducted by the University of Memphis's Public Safety Institute reveals that these gang injunctions are having a positive effect on the reduction of crime in the safe zones. Violent offenses in the zones have dropped nearly 8 percent from 2014 through 2018, and the number of violent offenses decreased in four of the six zones. *See* Public Safety Institute Interim Assessment of Gang Injunctions and Safety Zones in Memphis, attached as **Exhibit I.**

Participation in the MGU necessarily implicates § I of the Consent Decree, as currently interpreted, because the MGU requires open, free-flowing information among all the participating agencies. Because the Consent Decree, as interpreted by the Monitor, prohibits MPD's receipt of intelligence from another law enforcement agency unless vetted prior to its receipt to ensure it was obtained in a manner not violative of the Consent Decree, MPD effectively can no longer participate in the MGU. MPD is a critical member of the MGU, given its expertise and experience in gang-related law enforcement work. If MPD cannot participate in the MGU, public safety is gravely at risk. This risk can be mitigated through the modification or elimination of Section I of the Consent Decree.

4. The need to continue its participation in the CrimeStoppers program

The CrimeStoppers program is also implicated by Section I of the Consent Decree. CrimeStoppers is an independent, nonpartisan, nonprofit, citizen-run organization whose objective is to fight crime and bring criminals to justice.[10]

A telephone number maintained by CrimeStoppers receives anonymous tips regarding unsolved felony crimes and fugitives wanted. The anonymous tips are then forwarded to the

[10] http://crimestopmem.org/

appropriate law enforcement agency. The tipster is provided with a secret number that becomes the tipster's identity and means of staying anonymous. CrimeStoppers pays a reward to the tipster once a suspect is arrested and charged. Since 1981, CrimeStoppers "has helped solve thousands of crimes and stopped thousands of criminals."[11]

Because CrimeStoppers funnels intelligence related to criminal activity, *i.e.* anonymous tips, MPD's receipt of that intelligence is governed by Section I of the Consent Decree. The Monitor explained:

> Section I forbids the City to "encourage, cooperate with, delegate, employ or contract with, or act at the behest of, any local, state, federal or private agency, or any person, to plan or conduct any . . . activity . . . prohibited by th[e] decree." As stated in the August 21. 2019, Coordination Opinion, I read this restriction to place the onus on the City to verify that any information it receives from governmental law enforcement agencies, non-law enforcement agencies, public and private entities, and individuals satisfies the same standards as information lawfully collected by the City itself.
>
> Information collected by civilian residents of the City, shared with Crime Stoppers, and then shared with the MPD ordinarily would not implicate the First Amendment. The First Amendment restrains only the government, and not private individuals or organizations. Thus, the practices of private individuals and organizations do not offend the First Amendment even when those same practices, employed by the government, would violate it.
>
> Section I of the consent decree, however, forbids the City to coordinate both with governmental entities—"any local, state, [or] federal" entity—and with any "private agency, or any person, to plan or conduct any . . . activity . . . prohibited by th[e] decree." As a result, the practices of private individuals or organizations may offend the consent decree if the City "encourage[s], cooperate[s] with, delegate[s], employ[s] or contracts] with, or act[s] at the behest of' such private individuals or organizations "to plan or conduct any . . . activity . . . prohibited by th[e] decree." § I.
>
> The only way to ensure that the City does not offend the consent decree in working with private individuals or organizations is to require the same verification process for information received from private individuals and organizations as I understand the consent decree to impose for receiving information from the FBI, the Secret Service, or any other law enforcement agencies. (See generally August 21, 2019, Coordination Opinion.) The City's

[11] http://crimestopmem.org/

> ability to receive information from private citizens, either through Crime Stoppers or directly, is thus subject to verification that the information satisfies the same standards as information lawfully collected by the City itself.
>
> (Exhibit C, August 26, 2019 Letter, pp. 10-11).

It would be literally impossible for the City to determine whether the information it receives from anonymous tipsters via CrimeStoppers was obtained in such way that does not violate the Consent Decree. The very element of the program that makes it successful is the preservation of the anonymity of the tipster. If the MPD tried to vet the tips that were provided, it would necessarily have to ascertain the identity of the tipster. This would effectively end the program, resulting in fewer prosecutions of crimes.

CrimeStoppers has been wildly successful in the Memphis and Shelby County region. In 2019 alone, tips received from CrimeStoppers has resulted in 216 felony arrests. These arrests have allowed law enforcement to resolve 135 cases this year, including 17 homicides.[12] If the Consent Decree prohibits MPD from participating in CrimeStoppers, crimes like those that were solved here will remain unsolved, and Memphis will be less safe, as a result. For that additional reason, Section I of the Consent Decree should be largely modified or set aside.

5. The need to receive and share personal information regarding juveniles with the Shelby County Sherriff's Department, which operates security within several Shelby County Schools.

Another "joint operation" implicated by Section I of the Consent Decree involves MPD's interaction with Shelby County Schools. First, the Shelby County Sheriff's Department provides security via its deputies within several local schools. Shelby County Sherriff's deputies often receive intelligence from students of potential gatherings that are planned that could end in a fight, or worse, a shooting. Under Section I of the Consent Decree, MPD is not permitted to receive that intelligence unless it first validates that the intelligence was gathered in a way that

[12] http://crimestopmem.org/

does not offend the Consent Decree. This would likely be impossible because the student tipster who provided the information to the deputy would be unlikely to provide his source for that intelligence for fear of reprisal. (Rallings Affidavit, ¶¶ 24-25.)

Indeed, Shelby County Schools recognized that students are often unwilling to publicly come forward with tips regarding past or potential crimes and implemented the Safe School Tips program. This service allows any parent, student, or employee to report information about illegal, potentially illegal, or inappropriate activities via text message anonymously anytime someone has a safety concern for herself or other students.[13]

Because the tips received from Safe School Tips are submitted anonymously, MPD has no way of determining if the intelligence contained in the tips was collected in a permissible manner under the Consent Decree. This inability to receive and act on anonymous tips from students leaves the student population of Shelby County much less safe.

Moreover, the City, Shelby County, and CrimeStoppers collaborate on a program called "Trust Pays." Trust Pays offers a safe way for students to confidentially inform a school administrator of a serious incident and potentially receive a cash reward as a result The Trust Pays program operates in elementary, middle and secondary schools. Trust Pays provides a safer learning environment for staff and students by reducing the incidents of weapons, drugs and violence on Shelby County Schools campuses.[14] For the same reasons as outlined in Section B.4. *supra*, Trust Pays will be severely impacted if MPD is required to adhere to the interpretation of Section I of the Consent Decree as put forth by the Monitor.

Indeed, the Consent Decree, as interpreted by the Monitor, precludes MPD from receiving information, from students or otherwise, gathered as part of the Department of

[13] http://www.scsk12.org/safe/
[14] http://www.scsk12.org//safety/programs?PID=649; http://www.crimestopmem.org/trust_pays.html;

Homeland Security's "If You See Something, Say Something" campaign. The "If You See Something, Say Something" campaign works with partners to educate the public on suspicious activity reporting. The campaign calls on citizens and the public to learn the indicators of terrorism-related suspicious activity and to notify local law enforcement of anything suspicious.[15] For the reasons explained *supra*, MPD can no longer receive this type information from a citizen because it would not be able to guarantee that the information was not obtained in violation of the Consent Decree.

The drafters of the Consent Decree could not possibly have foreseen the varied and significant restrictions Section I would impose on MPD forty years in the future. It is respectfully submitted that Section I should be set aside or significantly modified in the interest of public safety.

III. CONCLUSION

The City understands that, absent a modification such as the one requested here, the Monitor was required to interpret the Consent Decree as it is currently worded. For that reason, as well as the reasons set forth above, and subject to further proposed modifications or revisions as considered reasonable or necessary by the City, the City respectfully moves to vacate, or substantially modify, Section I of the Consent Decree. The City further respectfully requests that the Court permit it to continue its participation with the agencies listed *supra* while the Court considers this Motion in the interest of public safety.

[15] https://www.dhs.gov/see-something-say-something

Respectfully Submitted,

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

s/ Jennie Vee Silk

Buckner Wellford (#9687)
R. Mark Glover (#6807)
Jennie Vee Silk (#35319)
Mary Wu Tullis (#31339)
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
Telephone (901) 526-2000
E-mail: bwellford@bakerdonelson.com
mglover@bakerdonelson.com
jsilk@bakerdonelson.com
mtullis@bakerdonelson.com
Attorneys for Defendant, The City of Memphis

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2019 the foregoing will be served by this Court's ECF system to:

Thomas H. Catelli, Esq.
Mandy Floyd, Esq.
Legal Director
ACLU Foundation of Tennessee
Post Office Box 120160
Nashville, Tennessee 37212

s/ Jennie Vee Silk