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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

JOHN LEE MALAER,

Plaintiff,

v.

GEOFFREY KIRKPATRICK, an individual;
MICHAEL WULFF, an individual; OMAR

Case No. 1:20-cv-00049-CL

MOTION OF NON-PARTY CIVIL RIGHTS
ORGANIZATIONS AMERICAN CIVIL LIBERTIES
UNION OF OREGON AND OREGON JUSTICE
RESOURCE CENTER TO INTERVENE FOR THE
LIMITED PURPOSE OF MOVING TO UNSEAL
JUDICIAL RECORDS

ESQUEDA, an individual; ASHLEY MCFALL, an individual; CITY OF MEDFORD, a government agency; JACKSON COUNTY, a government agency; NATHAN SICKLER, in his individual and official capacity; and BRIAN KOLKEMO, an individual,

Defendants.

LR 7-1 CERTIFICATION

Counsel for Civil Rights Intervenors certifies they contacted counsel for all parties to confer on the instant motion to intervene and unseal records. Plaintiff does not object to Civil Rights Intervenors motion. City Defendants oppose this motion. County Defendants oppose this motion.

CERTIFICATION

This brief complies with LR 7-2(b)(1) because it contains 3,812 words.

MOTION

Pursuant to Fed. R. Civ. P. 24(a) and (b) and Local Rule 7, non-party civil rights organizations the American Civil Liberties Union of Oregon (“ACLU-OR”) and the Oregon Justice Resource Center (“OJRC”) (collectively, the “Civil Rights Intervenors”) hereby move for leave to intervene in the above-captioned proceeding for the limited purpose of vindicating the right of the public to access judicial records in this matter. In particular, the Civil Rights Intervenors seek to unseal judicial records filed entirely under seal by the parties pursuant to a protective order, including sealed records filed in support

of the parties' motions for summary judgment and motions and briefing regarding the disclosure of law enforcement investigation records. ECFs 167-68, 179-85, 196-206.

PRELIMINARY STATEMENT

This case concerns whether the City of Medford (“the City”), Jackson County (“the County”), and their taxpayer-funded law enforcement officers wrongfully arrested, used excessive force, and ignored the medical needs of a vulnerable activist in their custody. ECF 209. A central issue in this case is how government defendants respond to police and correctional officer misconduct. Because this “action concerns allegation of law enforcement misconduct and medical damages,” this Court entered a protective order that permitted restricted filing of “personnel records of law enforcement officers and personal medical records.” ECF 157. But the government Defendants have abused the limited scope of this protective order to keep secret a broad range of documents related to Defendants’ alleged misconduct and how that misconduct was handled, including portions of summary judgment briefs and briefs regarding the law enforcement investigations at issue and their supporting exhibits. The records submitted in connection with City Defendants’ summary judgment motions, and the County Defendants’ likely forthcoming summary judgment motion, could determine how the case will resolve. Moreover, the records have the potential to inform and shape public discourse surrounding police misconduct given the issues before the Court. The public at large has a strong interest in knowing whether the City and County adequately investigates, reprimands or removes dangerous employees or is training officers on core issues that

affect ADA access and medical care for vulnerable adults in custody. Access to information about how incidents of misconduct are investigated and handled provides the public with information they need to understand law enforcement department processes and functioning, advocate for better accountability systems, press for the removal of problematic officers, and make decisions about municipal leadership. When officers are permitted to continue their harmful behavior without intervention or correction, every individual who interacts with law enforcement faces risk of abuse. Through this motion, the American Civil Liberties Union of Oregon (“ACLU-OR”) and the Oregon Justice Resource Center (“OJRC”) seek to vindicate their own and the public’s constitutional and common law rights of access to judicial records in the above-captioned matter.

PROPOSED CIVIL RIGHTS INTERVENORS

The ACLU-OR is a non-profit, nonpartisan organization dedicated to the principles embodied in the Bill of Rights. It advocates for transparency in government functions, law enforcement accountability, and the protections against excessive force, deliberate indifference, and unlawful searches and seizures enshrined in the Constitution. In particular, the ACLU-OR advocates to end abuse by police and in jails through policy reforms and litigation. Access to information concerning past incidents of misconduct and how that misconduct was addressed by internal affairs is essential to the ACLU-OR’s efforts to identify root causes of abuse and formulate solutions to end it. Moreover, ACLU-OR believes that transparency can lead to more accountability for officers and better policing and jail practices.

The OJRC is a non-profit organization founded in 2011 to promote criminal legal system reform through advocacy, direct legal services, and public education. OJRC works to dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation for traditionally underserved communities. Public accountability is an essential tenet of OJRC's work and the organization is focused on redressing police and correctional officer violence across the state.

BACKGROUND

Plaintiff John Lee Malaer is an elderly disability and homeless rights advocate in Southern Oregon. ECF 209. Mr. Malaer is paraplegic and uses a wheelchair. In July 2019, Mr. Malaer was arrested by the City Defendants for throwing a pebble at a restaurant window when his wheelchair became stuck in a pothole and he needed mobility assistance. The arresting officers verbally denigrated Mr. Malaer for his disability throughout the arrest, grossly mishandled Mr. Malaer in removing him from his wheelchair, and unsafely distorted his body during the jail transport. ECF 209; 226-227. At the jail, Jackson County jail deputies repeatedly hit Mr. Malaer in the face, dragged Mr. Malaer from his wheelchair onto the floor, and kneeled on him. Then they left him naked on the floor for hours, depriving him of a wheelchair, his medications, a catheter, or access to food or water. During this time, Mr. Malaer was forced to drink from a toilet and suffered seizures without his medications. After he was released from jail, Mr. Malaer needed to be hospitalized and was nearly septic as a result of the abuse and the

denial of his medications for a neurogenic bladder condition. ECF 209. It is unclear whether these incidents resulted in any discipline for any of the involved deputies.

Mr. Malaer brought this action against the Jackson County Jail, the City of Medford, the Jackson County Sheriff, and a number of their employees alleging violations of his constitutional and ADA rights. ECF 209. Over the course of the litigation, Defendants have unsurprisingly been adamant about denying Mr. Malaer—and, by implication, the public—access to law enforcement investigation records from the incident and keeping briefing and exhibits regarding the case under seal. This Court ultimately ordered the City of Medford to produce investigation reports subject to a protective order and the documents remain under seal. ECF 157. The portions of the record that are not sealed hint that the sealed evidence contains details that would be in the public interest and relevant to the work of both Civil Rights Intervenors. For instance, the records suggest an officer involved in Mr. Malaer’s abuse was tasked with investigating himself and the other involved officers. That investigation resulted in the exoneration of all of the involved officers. ECFs 179-80. The briefing also suggests that the City, County, and other government officers were colluding to attempt to cover up the abuse Mr. Malaer suffered. *Id.*

The misconduct in this case is not an isolated incident. There are documented allegations against officers in the Medford Police Department (“MPD”) for excessive

force¹ and wrongful arrests² as well as claims that the City has failed to take appropriate steps to prevent misconduct. Similarly, the Jackson County Jail has been accused of unnecessary force that is condoned by County leadership.³ Since Mr. Malaer filed his lawsuit against the City and County alleging abuse and medical mistreatment, at least three people have died while in custody of the Jackson County Jail,⁴ and the City of Medford continues to retaliate against civilians exercising their First Amendment rights.⁵

¹ See Eg. Brett Taylor, *Suspect's attorney claims 'excessive force' used in MPD arrest from January*, KDRV (Dec. 13, 2021), https://www.kdrv.com/community/suspects-attorney-claims-excessive-force-used-in-mpd-arrest-from-january/article_4b7a5236-0804-5515-8ea9-9d843feda13c.html.

² See, e.g., *Oregon Journalist Arrested While Reporting on Homeless Sweep Sues Medford and Its Police Department*, The Oregonian (Feb. 22, 2023), <https://www.oregonlive.com/crime/2022/09/oregon-journalist-arrested-while-reporting-on-homeless-sweep-sues-medford-and-its-police-department.html>; Troy Brenelson, *Medford, local law enforcement face lawsuits after sweeping homeless camp*, Oregon Public Radio (Sept. 28, 2020), <https://www.opb.org/article/2020/09/29/medford-local-law-enforcement-face-lawsuits-after-sweeping-homeless-camp/>.

³ John Notarianni, *'I'm a brown man in this situation': Shakespeare Festival actor files excessive force lawsuit after arrest*, Oregon Public Broadcasting (Aug. 24, 2020), <https://www.opb.org/article/2020/08/24/shakespeare-festival-actor-excessive-force-lawsuit-jackson-county/>.

⁴ Jerry Howard, *Central Point woman died as Jackson County jail inmate*, KDRV (Nov. 14, 2022), available at https://www.kdrv.com/news/central-point-woman-died-as-jackson-county-jail-inmate/article_1cd7794a-6495-11ed-985a-8fb6c475995d.html; *Jackson County Jail inmate dies while in custody*, KOBI (June 28, 2023), available at <https://kobi5.com/news/jackson-county-jail-inmate-dies-while-in-custody-210868/>; *Jackson County inmate dies following possible head injury, says police*, KOBI (Feb. 16, 2020), available at <https://www.kobi5.com/news/jackson-county-inmate-dies-following-possible-head-injury-says-police-121999/>.

⁵ Roman Battaglia, *Disabled man suing Medford police alleges retaliation at bus station*, JPR (Jan. 11, 2023), available at <https://www.ijpr.org/environment-energy-and-transportation/2023-01-11/disabled-man-suing-medford-police-alleges-retaliation-at-bus-station>; *Medford City Council Meeting Minutes*, City of Medford (April 20, 2023) (Chief of Police advocating for removal of a civilian member of the Police Advisory Committee for simply inquiring about MPD's handcuffing policy), available at <https://www.medfordoregon.gov/files/assets/public/city-recorders-office/2023-agendas-amp-minutes/04-20-2023/04-20-2023-minutes.pdf>.

ARGUMENT

1. Civil Rights Intervenors Have Presumptive Right to Intervene to Unseal Records.

The public has a presumptive right of access to court records filed under seal pursuant to the First Amendment and the common law. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978); *Press-Enterprise Co. v. Superior Ct. (Press-Enterprise I)*, 464 U.S. 501, 508 (1984); *Courthouse News Serv. v. Planet (Planet II)*, 947 F.3d 581, 591 (9th Cir. 2020). Public access to judicial proceedings “enhances both the basic fairness of the [proceeding] and the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise I*, 464 U.S. at 508. The Ninth Circuit has held that public access forms “an essential part of the First Amendment’s purpose to ‘ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.’” *Courthouse News Serv. v. Planet (Planet I)*, 750 F.3d 776, 785 (9th Cir. 2014).

In particular, there is an established public right of access to judicial documents and proceedings where (1) the types of judicial processes or records sought have “historically been open to the press and general public” and (2) “public access plays a significant positive role in the functioning of the particular [governmental] process in question.” *Press-Enterprise Co. v. Superior Ct. (Press-Enterprise II)*, 478 U.S. 1, 8 (1986). Both factors are met here.

On the first factor, the Civil Rights Intervenors are seeking to unseal law enforcement misconduct documents filed in support of summary judgment and other briefing—which have traditionally been open to the press and public. *See, e.g., Macias v. Cleaver*, 2016 U.S. Dist. LEXIS 85529 (E.D. Cal. Jun. 30, 2016) (“This ‘federal common law right of access’ to court documents generally extends to ‘all information filed with the court,’”)(citing *Phillips ex Rel Estates of Byrd v. Gen Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002)); *Perkins v. City of Oakland*, 2018 U.S. Dist. LEXIS 234852 (N.D. Cal. May 1, 2018); *Welsh v. City & County of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995); *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985). Indeed, courts have found the public is entitled to court records involving law enforcement conduct ranging from documents filed in pre-trial criminal proceedings to search warrant applications. *CBS, Inc. v. United States District Court*, 765 F.2d 823 (9th Cir. 1985); *U.S. v. Business of Custer Battlefield Museum*, 658 F.3d 1188 (9th Cir. 2011).

On the second factor, public access to misconduct records is instrumental in the proper functioning of policing and jail operations in Jackson County. Public access to evidence in police accountability litigation plays a significant role in ensuring fairness, decreasing the perception of bias, and boosting public confidence in the justice system. *See Nixon*, 435 U.S. at 598 (explaining that the law’s recognition of the importance of judicial transparency serves “the citizen’s desire to keep a watchful eye on the workings of public agencies... [and] the operation of government.”). Here, transparency is an essential prerequisite to ensuring law enforcement officer accountability and it is critical to ongoing discussions about how best to address claims of misconduct and the

community's lack of trust in MPD and Jackson County Sheriff's Department. *See eg. Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017) (“[a]ccess to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, the highest rung of the hierarchy of First Amendment values.”).

Third parties are frequently deemed the proper advocates for vindicating the public's right of access to sealed court records. *Beckman Indus., Inc. v Int'l Ins Co.*, 966 F.2d 470, 473 (9th Cir. 1992). Non-profit organizations in particular have standing to challenge the unsealing of records both on their own behalf and on behalf of the general public. *See, e.g., Uniloc USA, Inc. v. Apple, Inc.*, 508 F. Supp. 3d 550, 554 (N.D. Cal. 2020) (granting the privacy non-profit Electronic Freedom Foundation's motion to intervene for the purpose of unsealing records); *Muhaymin v. Phoenix*, 17-cv-04565, ECF #375 (D. Ariz. Nov. 2, 2021) (granting civil rights non-profit Muslim Advocate's motion to intervene for the limited purpose of unsealing judicial records); *Hispanic Nat'l Law Enf't Ass'n NCR v. Prince George's Cty.*, 2021 U.S. Dist. LEXIS 9591 at *4 (D. Md. Jan. 19, 2021) (granting motion to intervene to unseal records brought by civil rights organizations NAACP and National Action Network); *Johnson v. CCA*, 2014 U.S. Dist. LEXIS 11171 (W.D. Ky. 2016) (granting motion to intervene of non-profit Prison Legal News). Here, Civil Rights Intervenors and the public at large have a strong interest in knowing what happened to Mr. Malaer when he was arrested by MPD and detained in the Jackson County Jail, as well as how city and county leadership responded to the officers'

actions and how the events and officers in question were investigated following Mr. Malaer's multiple complaints of misconduct and abuse.

Moreover, the documents sought will help Civil Rights Intervenors in their efforts to advocate for police accountability and reform. This matter is of significant current public concern and debate, as the State of Oregon is in the process of soliciting public comment and input regarding the formation of statewide standards for law enforcement misconduct in Oregon,⁶ and the Oregon Legislature has been actively addressing law enforcement misconduct policy in recent years.⁷ ACLU-OR was specifically invited to provide feedback on the proposed standards, and access to information such as the documents Civil Rights Intervenors seeks to unveil is relevant to the ACLU's response to the State.

2. Civil Rights Intervenors' Motion is Timely and Intervention is Permissible Under Rule 24.

Moving for permissive intervention is the appropriate procedural mechanism for third parties to assert their own and the public's right to access sealed records and courts generally "construe[] [the Rule] broadly in favor of proposed intervenors." *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir.1992). Pursuant to F.R.C.P 24(b), a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and

⁶ Commission on Statewide Law Enforcement Standards of Conduct and Discipline website, available at <https://justice.oregon.gov/lesc/>.

⁷ Oregon Legislature Advances Police Accountability Measures, OPB, available at <https://www.opb.org/news/article/oregon-senate-sends-police-discipline-bill-to-house/>.

(3) the applicant’s claim or defense, and the main action, have a question of law or a question of fact in common. *Northwest Forest Res. Council v. Glickman*, 82 F.3d at 825, 839 (9th Cir. 1996); *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 403 (9th Cir. 2002). However, where a third party seeking to intervene does not intend to become a party to the action and is only seeking limited intervention for the purpose of unsealing judicial records—as the Civil Rights Intervenors seek to do here—courts generally limit their analysis to whether the proposed intervenor’s motion is timely. *Beckman Indus. v. Int’l Ins. Co.*, 966 F.2d 740, 473-74 (9th Cir. 1992) (holding inapplicable to limited intervention Rule 24(b)’s prongs regarding independent jurisdictional basis or common question of fact or law); *San Jose Mercury News v. U.S. Dist. Court–N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999); *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, 340 F. Supp. 2d 1118, 1121 (D. Or. 2003) (noting that a party’s filing of an exhibit under seal pursuant to a protective order is of little weight in the court’s unsealing analysis because blanket protective orders are “inherently subject to challenge and modification”).

Courts consider three factors in determining whether a motion is timely: “(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.” *San Jose Mercury News, Inc.*, 187 F.3d at 1100-01. Ninth Circuit courts have held that intervention to unseal is appropriate at the pre-judgment and pre-settlement stages of litigation. *Id.* at 1101-03 (holding that the public has a pre-judgment right of access to judicial records in civil cases); *Cahill v.*

Nike Inc., 2022 U.S. Dist. LEXIS 182366 at *42-43 (D. Ore. Sept. 30, 2022) (granting intervention where motion was filed nearly three years after protective order was entered and two days after the defendant filed its Reply to Motion to Seal) (findings and recommendations adopted by 2022 WL 16924190. Further, there is no bright-line rule on what constitutes an impermissible delay but courts have permitted intervention years after protective orders have been issued in a case. *San Jose Mercury News*, 187 F.3d at 1101 (finding an intervention 12 weeks after the submission of sealed records was timely and that “delays measured in years have been tolerated where an intervenor is pressing the public’s right of access to judicial records”); *Beckman Indus.*, 966 F.2d at 471 (affirming intervention two years after underlying case settled); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9th Cir. 1964) (permitting intervention to challenge a protective order three years after the underlying litigation had terminated).

Here, the Civil Rights Intervenors’ motion is timely because it is being filed within ten (10) months of when the operative protective order was entered and within five (5) months of when sealed records were submitted to the court. Moreover, the Civil Rights Intervenors are not aware of any plausible argument that their motion comes at an inappropriate stage of the litigation or that the timing of the filing will prejudice Defendants.

3. The Extensive Sealing in this Case Violates Proposed Intervenors’ and the Public’s Common Law and First Amendment Right of Access to Judicial Records and Defendants Lack a Compelling Reason to Keep the Records Sealed.

In motions to unseal, the onus is on government defendants to show good cause for keeping the records confidential. *Wood v. Ryan*, 759 F.2d 1076, 1081-82 (9th Cir. 2014); *Press-Enter Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986). To show good cause, a defendant must show that “specific prejudice or harm will result” from unsealing the records. *Phillips ex. rel. Est. of Byrd v. Gen. Motors Corp.*, 307 F.3d 1076, 1081-2 (9th Cir. 2014). Where records are used to support a dispositive motion, the proponent of secrecy has a heightened burden and must establish “compelling reasons” to keep the records sealed. *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1179-1180 (9th Cir. 2006) (“[W]e treat judicial records attached to dispositive motions differently from records attached to non-dispositive motions. Those who seek to maintain the secrecy of documents attached to dispositive motions must meet the high threshold of showing that ‘compelling reasons’ support secrecy.”) (citing *Foltz v. State Farm*, 331 F.3d 1122, 1136 (9th Cir. 2003)). A compelling reason is defined as an interest “essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter Co.*, 478 U.S. at 2. Generally, compelling reasons require a finding that “the disclosure of the material could result in improper use of material for scandalous or libelous purpose or infringement upon trade secrets.” *Foltz*, 331 F.3d at 1136. Ultimately the court’s decision to unseal turns on a balancing test where the opponent of unsealing must put forward an exceptionally weighty reason to prevail. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995); *Ctr. for Auto Safety v. Chrysler Group LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016) (describing the conscientious balance between the public’s weighty interest in

access and the government’s “compelling reasons” for confidentiality) (quoting *Foltz*, 331 F.3d at 1135)). No such interest is present in this case. Here, there is no question that the internal affairs reports are judicial records in which there is a public interest. Further, the bulk of the records Civil Rights Intervenors would be moving to unseal are exhibits to briefing on the parties’ motions for summary judgment. ECF No. 183. Additionally, Defendants do not have a compelling reason for the records to remain sealed as generic privacy interest in personnel matters would be insufficient to prove that disclosure would result in improper use of material for a scandalous purpose. Courts have routinely found that the public’s interest in allegations of police misconduct and how they are handled outweighs any concern that the information will be misused. *See, e.g., Macias v. Cleaver*, 2016 U.S. Dist. LEXIS 85529 (E.D. Cal. Jun. 30, 2016); *Perkins v. City of Oakland*, 2018 U.S. Dist. LEXIS 234852 (N.D. Cal. May 1, 2018); *Welsh v. City & County of San Francisco*, 887 F. Supp. 1293, 1302 (N.D.Cal. 1995); *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985).

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CONCLUSION

For the foregoing reasons, the proposed Civil Rights Intervenors respectfully request that the Court grant their motion to intervene to unseal the judicial records in this case.

DATED this 14th day of August 2023.

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