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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 ESQUEDA, an individual; ASHLEY MCFALL, an individual; CITY OF MEDFORD, a government agency; JACKSON COUNTY, a government agency; NATHAN SICKLER, in his individual and	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 UNSEAL JUDICIAL RECORDS

official capacity; and BRIAN KOLKEMO, an individual,

Defendants.

L-R 7.1 CERTIFICATION

Counsel for the American Civil Liberties Union of Oregon ("ACLU-OR") and the Oregon Justice Resource Center ("OJRC") (collectively, "Civil Rights Intervenors") certifies they contacted counsel for all parties to confer on the instant motion to unseal records. Plaintiff and County Defendants do not object to Civil Rights Intervenors' motion. City Defendants oppose the motion.

CERTIFICATION

This brief complies with L-R 7-2 (b)(1) because it contains 4,074 words.

I. PRELIMINARY STATEMENT

Information about police officer misconduct is a matter of high public importance. In particular, records from internal affairs investigations provide insight into an individual officer's suitability to serve in law enforcement and shed light on institutional responses to patterns of police harm. Intervenors have filed this motion to ensure public access to critical information about law enforcement misconduct and internal accountability mechanisms, particularly because this information may influence the outcome of the above-captioned case.

In this case, the City of Medford ("the City"), Jackson County ("the County"), and their taxpayer-funded law enforcement officers wrongfully arrested a vulnerable activist, used excessive force against him, and ignored his medical needs while he remained in their custody. ECF No. 209. 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 No. 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.

This case raises issues of utmost public concern—namely, how City and County agencies respond to police and correctional officer misconduct. As such, the public has a fundamental right to access all of the records that have been sealed in this case. The sealed 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 investigate, reprimand, or remove dangerous employees, and whether they are training officers on core issues that affect Americans with Disabilities Act ("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 the 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. In particular, the public has a strong right of access to sealed records submitted in connection with the Defendants' summary judgment motions, which could determine how the case will ultimately resolve.

Through this motion, Civil Rights Intervenors seek to vindicate their own and the public's constitutional and common law rights of access to judicial records in the above-captioned matter.

II. FACTUAL BACKGROUND

Plaintiff John Lee Malaer is an elderly disability and homeless rights advocate in Southern Oregon. ECF No. 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 Nos. 209; 226-227. At the jail, Jackson County Sheriff's deputies repeatedly hit Mr. Malaer in the face, dragged Mr. Malaer from his wheelchair onto the floor, and kneeled on him. ECF No. 209. 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. *Id*. During this time, Mr. Malaer was forced to drink from a toilet and suffered seizures without his medications. *Id*. 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. *Id*. 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 No. 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, which kept the documents under seal. ECF No. 206.

The portions of the record that are accessible to the public 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. ECF Nos. 179-80. The briefing also suggests that the City, County, and other government officers were colluding 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 force[1] and wrongful arrests[2] 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

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[1] *See, e.g.*, 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/.

abuse and medical mistreatment, at least three people have died while in the custody of the Jackson County Jail,[4] and the City of Medford continues to retaliate against civilians exercising their First Amendment rights.[5]

III. ARGUMENT

A. The First Amendment Requires the Unsealing of the Summary Judgment Record.

There is a presumptive First Amendment right of access to judicial records where: (1) a record has "historically been open to the press and general public" and (2) when "public access plays a significant positive role in the functioning of" a government process. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). Judicial records "are public documents almost by definition, and the public is entitled to access by default." *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("the federal courts of appeals have widely agreed that the First Amendment right of access extends to civil proceedings and associated records and documents"). In fact, a First Amendment right to judicial records may exist even if the specific

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[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.

documents in question have not historically been open to the public where "public scrutiny" would "benefit" the proceedings. *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516-17 (9th Cir. 1988); *United States v. Higuera-Guerrero (In re Copley Press, Inc.)*, 518 F.3d 1022, 1026 (9th Cir. 2008) ("logic alone, even without experience, may be enough to establish the [First Amendment] right" to public access). The presumption of access can only be rebutted "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II* at 9 (internal citation and quotation marks omitted).

It is well-settled that "documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches . . . under the First Amendment." *Kamakana*, 447 F.3d at 1179. *See also Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019) (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006)). Furthermore, "the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public's understanding of the judicial process." *Kamakana*, 447 F.3d at 1179. This presumption of public access to summary judgment records applies in full force to cases involving law enforcement records. *Muhaymin v. City of Phoenix*, 2021 U.S. Dist. LEXIS 211707 at *20-21 (D. Ariz. Nov. 2, 2021) (tentatively granting motion to unseal summary judgment briefing and exhibits as well as expert testimony in police brutality case); *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) (affirming district court's decision to unseal investigative records at issue in civil rights challenge alleging police misconduct in malicious prosecution case); *Chicago Tribune Co. v. Bridgestore/Firestore, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001); *In re Search Warrant for Secretarial Area-Gunn*, 855 F.2d 569, 573 (8th Cir. 1988).

Here, Civil Rights Intervenors and the public have a presumptive right to access all records submitted in support of the summary judgment briefing. As documents related to motions for summary judgment, they are precisely the type of records that have "historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. Further, since these documents might influence the disposition of the case, they would assist the public in understanding the Court's reasoning and the case outcome. Moreover, the documents Civil Rights Intervenors seek to unseal include law enforcement records, which courts routinely recognize should be open to the public, *see, e.g.*, *Muhaymin*, 2021 U.S. Dist. LEXIS 211707 at *20-21; *Virginia Dep't of State Police*, 386 F.3d at 575, and which would enable the public to play a "significant positive role in the functioning of" the County jail, the City's police department, and their investigations of officer misconduct, *Press-Enterprise II*, 478 U.S. at 8.

B. The Common Law Also Requires Unsealing the Summary Judgment Record.

The presumption of access to judicial proceedings flows from an "unbroken, uncontradicted history" rooted in the common law notion that "justice must satisfy the appearance of justice." *Richmond Newspapers Inc. v. Virginia*, 448 U.S. at 555, 573–74 (plurality opinion) (*quoting Levine v. United States*, 362 U.S. 610, 616 (1960)); *see also Ibrahim v. U.S. Dep't of Homeland Sec*., 912 F.3d 1147, 1184 n.38 (9th Cir. 2019) (en banc) cert. denied, 140 S. Ct. 424, 425 (2019) (mem.). This strong presumption of access to judicial records applies to civil cases, *see San Jose Mercury News, Inc. v. United States Dist. Court—N. Dist.*, 187 F.3d 1096, 1102 (9th Cir. 1999) (superseded by statute on other grounds), and "applies fully to dispositive pleadings, including motions for summary judgment and related attachments," *Kamakana*, 447 F.3d at 1179. Unlike material adduced in discovery but never presented to the court, "judicial records are public documents almost by definition, and the public is entitled to

access by default." *Id*. at 1180. Under this common law right of access, intervenors and the public at large should have access to the summary judgment filings and proceedings sealed by this Court.

C. The Government Cannot Articulate a Compelling Interest That Outweighs the Public's Presumptive Right of Access, Nor Can it Show That the Extensive Sealing in This Case is Tailored to That Interest.

Under both the First Amendment and common law, the onus is on the government party asserting confidentiality to articulate an interest in secrecy compelling enough to overcome the presumption of public access to judicial records. *See Press-Enterprise II*, 478 U.S. at 15. Once a First Amendment right is established, the government must show that sealing "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). Similarly, the common law right to access can only be defeated if the party opposing unsealing "articulate[s] compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana*, 447 F.3d at 1178-9 (cleaned up).

Here, City Defendants previewed the government's "compelling reasons" to overcome the public's presumptive First Amendment and common law rights to access the sealed records in their opposition to the motion to intervene: (1) certain alleged misconduct detailed in the sealed documents did not occur; and (2) police officers will not accurately report their conduct if the public might be able to access reports at a later date. ECF No. 239. With respect to the first argument, it is unclear why this is cause to keep the records closed. To the extent the City is concerned that releasing the records will result in the dissemination of misinformation, the City could simply share information that contradicts the written narrative. If the City is arguing the

records should not be accessible because they are not relevant to pending claims, courts have not distinguished between relevant and irrelevant records in determining whether to unseal records. All records are presumptively open. The inaccuracy or irrelevance of the record in question is not cause to keep it sealed.

On the second point, Defendants argued that unsealing would discourage "candor," "cooperation," and "self-critical analysis" in law enforcement misconduct in the future. ECF No. 239. In a nutshell, they are arguing law enforcement officers will not tell the truth about their conduct and that the internal affairs department will not zealously investigate police misconduct if they know the public can access officer statements in the future. Courts across the country have consistently rejected these arguments, finding instead that the possibility of public access will improve officer honesty and bolster the integrity of internal affairs systems. *See McGee v. City of Chicag*o, 2005 U.S. Dist. LEXIS 30925, at *13 (N.D. Ill. June 23, 2005) ("the effectiveness of the [police department's] internal investigations is strengthened by public review of [Compliant Register] files produced in civil rights litigations"); *Mercy v. Suffolk County*, 93 F.R.D. 520, 522 (E.D.N.Y. 1982); *Wood v. Breier*, 54 F.R.D. 7, 12-13 (E.D. Wis. 1972). As the Eastern District of New York explained, "[I]f the fear of disclosure in civil rights lawsuits does have some real effect on officers' candor, the stronger working hypothesis is that fear of disclosure is more likely to increase candor than to chill it." *King v. Conde*, 121 F.R.D. 180, 193 (E.D.N.Y. 1988). The Northern District of California similarly reasoned that there is a "real possibility that officers working in closed systems will feel less pressure to be honest than officers who know that they may be forced to defend what they say and report." *Kelly v. San Jose*, 114 F.R.D. 653, 665 (N.D. Cal. 1987).

Other courts have given far more credit to the professionalism of law enforcement officers than the City has given its own officers here, finding that police officers will tell the truth and conduct thorough investigations into misconduct regardless of whether their reports are publicly accessible or remain closed. *Wiggins v. Burg*e, 173 F.R.D. 226, 229 (N.D. Ill. 1997) ("[T]his [c]ourt agrees with its distinguished colleague in New York, … that the threat of future disclosure of this type of information in civil rights litigation is probably not of great import to the officers at the time they file their reports") (internal citation omitted). In contrast, Civil Rights Intervenors have not been able to locate a case where the court blessed a speculative argument that the possibility of public disclosure would undermine officer truthfulness or compromise internal affairs investigations.

In addition to lacking case law to support its claims, the City has not offered any empirical, or even anecdotal, evidence for its arguments. Indeed, it is counter-intuitive that Defendant Kirkpatrick, as the Lieutenant of the City of Medford Community Engagement Division, would seek to suppress his reporting of Medford policing on community engagement issues. The City has failed to carry its burden of showing a compelling reason to keep the records sealed.

Even if the Court determines, based on "specific, on the record findings," that there is a substantial probability of prejudice to a compelling government interest that sealing the judicial records would prevent, *Press-Enterprise II*, 478 U.S. at 13-14 (1986), the Court should consider alternatives to sealing. *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995). In the event no alternatives to sealing are available to protect the compelling interest identified, the Court's sealing order must be narrowly tailored. *Id*. This tailoring ordinarily involves disclosing some of the documents or giving access to a redacted version. *Baltimore Sun Co. v. Goetz*, 886 F.2d 60,

66 (4th Cir. 1989). Thus, even if there is some confidential material in the record, "redaction is an adequate alternative to closure, … and it is preferred given [the] strong tradition of open court proceedings." *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1095 (9th Cir. 2014); *see also Foltz*, 331 F.3d at 1137. For instance, in the context of the personnel records at issue here, the court could redact any personally identifying information in the document while permitting the public access to view the substantive information in the documents.

Here, the interference with the public's presumptive access is not narrowly tailored, as every document, exhibit, and hearing related to the Parties' Motions for Summary Judgment—with the exception of the court's order--has been sealed in its entirety. Arguably, even if Defendants were able to assert a compelling interest sufficient to overcome the public's presumptive right of access to the sealed judicial records in this case, individually-justified redactions—not continued, wholesale sealing—are likely all that would be warranted. *See United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (emphasizing "the requirement that district courts avoid sealing judicial documents in their entirety unless necessary"). Because the sealing of a document must also be narrowly tailored to serve a compelling interest, *see Oregonian Pub. Co. v. U.S. Dist. Ct. for Dist. of Or*., 920 F.2d 1462, 1465 (9th Cir. 1990), and because the Ninth Circuit favors redaction over complete closure, *see Index Newspapers LLC*, 766 F.3d at 1095, all records related to the Motions for Summary Judgment in this case should be unsealed. If necessary, the documents can be redacted to remove any information that is appropriately subject to sealing (such as personally identifying information pursuant to the Court's protective order) to allow public access to the substance of the arguments and exhibits in this dispute. For these reasons, the Court should lift the blanket seal on these proceedings and require the government to provide sufficiently specific justifications for any requested sealings or redactions. *See, e.g., In re*

Fort Totten Metrorail Cases, 960 F. Supp. 2d. 2, 11-12 (D.D.C. 2013) (ordering the parties to redact minors' personal identifying information from settlement documents, so that the documents – to which the public had a right of access – could be filed on the public docket).

D. The Government Cannot Articulate Good Cause to Block Access to Even Those Records That Are Not Used in Support of Summary Judgment Motions.

The public's interest in the sealed records does not rise and fall with whether they are used in support of summary judgment motions and any related filings. First, as the Court itself has determined, the Kirkpatrick Report may be admissible evidence at trial. *See* ECF No. 206 at 6 – 7. There are apparently notable inconsistencies between Defendant Kirkpatrick's statements in the final disposition report and his statements in the Kirkpatrick Report, which was created prior to the final disposition report. *Id*. at 6. As the Court recognized, Plaintiff will need to introduce the Kirkpatrick Report itself if he wants to impeach Defendant Kirkpatrick with those inconsistent statements. *Id*. This will be true whether Defendant Kirkpatrick is called as a Defendant or as a fact witness. The anticipated use of the sealed records as exhibits in the dispositive stages of the litigation demonstrate the ongoing nature of the public's weighty interest in disclosure. The fact the documents may implicate the veracity or transparency of Defendant Kirkpatrick's statements in the course and scope of his employment with the Medford Police Department further underscores the public's interest in transparency, as Defendant Kirkpatrick was until recently the Lieutenant of Community Engagement and often the face of the City in representing facts, incidents, and policy to the public. He has since become the Administrative Lieutenant,[6] a position that plays a key role in internal affairs investigations, outside investigations into officer misconduct, and legal compliance.

[6] Chevone Card, *Downtown Safety Update*, Downtown Medford Association (June 28, 2023), available at https://downtownmedford.org/downtown-safety-update/.

Moreover, although records supporting and opposing summary judgment motions are one category of documents historically open to the public, "*all* information filed with the court" has generally been publicly accessible. *Phillips v. GMC*, 307 F.3d 1206, 1212 (9th Cir. 2002) (emphasis added). As Civil Rights Intervenors argued in their motion to intervene, courts have found sealed documents related to police conduct filed in a range of court proceedings—not just summary judgment—should be accessible to the public. ECF No. 237 at 9.

Although the Ninth Circuit has applied a higher standard to attempts to block public access to dispositive motion records, the government still must show good cause to defeat a motion to unseal court records related to other, non-dispositive matters. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003) ("A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if" the document is disclosed). Vague generalizations and conclusory assertions do not suffice, even under this less exacting "good cause" standard. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the [good cause] test."). To satisfy the good cause standard, a party seeking secrecy must make "a particular and specific demonstration" that harm will result from disclosure. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981); *see Foltz*, 331 F.3d at 1130.

Even if the good cause standard applies to certain records, Defendants cannot meet the burden to block public access. The arguments previewed by the City in its motion to oppose intervention are insufficient to clear even this lower standard. As Civil Rights Intervenors explained in their reply, and above, neither of these arguments amount to the requisite good cause to overcome the public's right to access these critical records. *See* ECF No. 240.

IV. CONCLUSION

For the foregoing reasons, Civil Rights Intervenors respectfully request that this motion be granted.

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