OFFICER JOHN DOE, *et al.*,	*	IN THE
Plaintiffs,	*	CIRCUIT COURT FOR
v.	*	MONTGOMERY COUNTY,
MONTGOMERY COUNTY, MARYLAND,	*	MARYLAND
	*	Case No.: C-15-CV-22-002523
Defendant.	*	

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PLAINTIFFS' OPPOSITION TO MEDIA INTERVENORS' MOTION TO INTERVENE TO MODIFY PROTECTIVE ORDER AND OBTAIN PUBLIC ACCESS TO COURT RECORDS AND PROCEEDINGS

Plaintiffs Officer John Doe and the Fraternal Order of Police, Montgomery County, Lodge 35, Inc., ("FOP") by and through their undersigned counsel and the law firm CONTI FENN LLC, pursuant to Maryland Rules 2-214, 2-311 and 2-403, oppose the Washington Post and the Reporters Committee for Freedom of the Press' (together, the "Media Intervenors") Motion to Intervene to Modify Protective Order and Obtain Public Access to Court Records and Proceedings (hereinafter "Motion to Unseal") and hereby state as follows:

I. The Motion to Unseal would Nullify the Ability to Challenge MPIA Disclosures

The Washington Post is media company that profits from publishing stories and news articles, including coverage regarding the Maryland Police Accountability Act ("MPAA"). *See* Motion to Unseal at 2. By seeking to intervene in this case, the Washington Post clearly seeks the records and information at issue so that it can publish more stories related to police discipline. Unsealing the filings in this case will allow the Washington Post access to the substance of the disputed records, which it has demonstrated it desires so that it can publish additional articles.

Second, it is notable that, as of the time of filing of this Opposition, the Media Intervenors have not sought leave to file an *amicus* brief with this Court. The Media Intervenors cannot set forth any reason for needing the legal briefs filed in this action other than to report publicly on the substance of this case, namely the documents under dispute. The Media Intervenors' intent to unseal, while cloaked in First Amendment references, is nothing more than an attempt to moot the very purpose of Plaintiffs' challenge to the disclosures.

This is a reverse-MPIA case—the ultimate question for this Court is whether the Defendant must produce Officer Doe's personnel and investigative files under the Maryland Public Information Act ("MPIA"). This Court's Protective Order ensures the Court can answer that question by sealing the legal briefs that describe the records until the Court has reached a decision. A premature production of the parties' arguments, which include descriptions and a summary of the disputed records, would render this matter moot. *See ACLU of Md. v. Leopold*, 223 Md. App. 97, 127-28 (2015) (declaratory judgment action under the MPIA becomes moot when the underlying materials are produced); *see also Polakoff v. Hampton*, 148 Md. App. 13, 27 (2002) (a declaratory judgment action is moot when it "does not serve a useful purpose.").

Relying on inapplicable First Amendment caselaw, the Media Intervenors seek to usurp the Court's role in the instant litigation. In their Motion to Unseal, the Media Intervenors invite the Court to "modify" its August 16, 2022 Protective Order by "unsealing all previously filed, sealed judicial records . . . ." Motion to Unseal at 1. The Motion misapprehends this case because this case cannot proceed *without* a sealing Order. Plaintiffs' Consent Motion for Protective Order and Briefing Schedule identified for the Court that this case would be impossible for the Plaintiffs to effectively litigate *without* a protective order because the public disclosure of the records, the content of those records, the legal briefs describing those records, and the identity of Officer Doe

is the very purpose of this case. *See* Consent Motion at 2. Much like reverse-FOIA actions, reverse-MPIA cases like this one, authorized by § 4-362 of the MPIA, are part of the government's initial determination of whether the records are to be produced. *ERG Transit Sys. (USA), Inc. v. WMATA*, 593 F.Supp.2d 249, 252 (D.D.C. 2009). Public disclosure under the MPIA does not occur until *after* this procedure is complete (if it must occur at all). *See generally* MD. CODE ANN., GEN. PROV. § 4-203.

The caselaw cited by the Media Intervenors does not control the instant proceeding because disclosure of these records is the *legal* question faced by this Court. Tellingly, while disclosure of legal filings may be proper in run-of-the-mill civil and criminal matters, Media Intervenors cite no authorities which speak to protective orders in public information act or reverse-PIA cases. Public disclosure at this stage would frustrate MPIA procedure and this litigation because neither this Court nor any appellate court can "unring the bell once the information has been released." *Maness v. Meyers*, 419 U.S. 449, 460 (1975) (internal quotations omitted). The Media Intervenor's request ignores this Court's role and intervention should be denied because it will cause a delay to these proceedings and prejudice the Plaintiffs. *See* MARYLAND RULES COMMENTARY at 282 (5th ed. 2019) (noting that intervention should be denied when it would "delay or prejudice the pending adjudication, thereby frustrating its very purpose.").

II. The Media Intervenors Lack Standing to Intervene

The Washington Post seeks to intervene in this case because it wants to obtain the information and ultimate records at issue in this case so it can continue its news coverage of police discipline. To the extent that a news organization can merely establish standing every time it wants to write a story about a case or topic, the media could intervene as parties to every case in existence.

Maryland courts have carved out a narrow exception for when the news media can properly intervene in civil cases. *Hearst Corp. v. State*, 60 Md. App. 651, 657. This right of intervention, however, is available only when the news organization has actually suffered a violation of its First Amendment right of access. *See News American Div., Hearst Corp. v. State*, 294 Md. 30, 40 (to have standing, news organizations must have been denied right of access by the court). Accordingly, where there has been no violation of the First Amendment, news organizations do not have standing to intervene.

The Supreme Court has held that a "temporary" denial of the right of access is insufficient to find a violation of the First Amendment right of access. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979). In *Gannett*, the Supreme Court upheld the trial court's decision to close a pre-trial suppression hearing to the public, and then later release the transcript of the hearing, in large part because the "denial of access in this case was not absolute, but temporary." *Id.* at 393. Accordingly, there was no violation of the press' First Amendment right of access. *Id.* The same is true in this case—this Court's Protective Order is a temporary restriction on the right of access necessary to ensure that these proceedings are not prejudiced by the premature disclosure of the substance of the disputed records, which the Washington Post has made clear it intends to accomplish. The temporary sealing order in this case will not prevent any appropriate disclosure of the subject information, it merely delays the disclosure until the Court can enter a ruling. As a result, the Media Intervenors will suffer no violation of any First Amendment right of access and lack standing to intervene in this matter.

III. The Protective Order Is Not A Permanent Injunction, nor is it a Ruling on the Merits of this Action

The Media Intervenors cast this Court's Protective Order, which was entered pursuant to Maryland Rule 2-403,[1] as a broad, sweeping Order which "substantially restricts access to civil judicial records" and "withholds essentially all information from the press and public." *See* Motion to Unseal at 6, 8. The Media Intervenor's reliance on Rule 16-912 (now Rule 16-934) is misplaced. This Court's Protective Order was based not on the need to seal the record from public inspection but to temporarily seal the materials to ensure the parties can litigate this matter properly, as provided by Rule 2-403.

By entering a Protective Order, this Court did precisely what courts regularly do when personnel records, investigative records, or other confidential information may be utilized during the litigation. *See, e.g.*, *Tanis v. Crocker*, 110 Md. App. 559, 575 (1996) (a protective order is "a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes."). In fact, orders like this Court's Protective Order are *favored* in order to ensure the litigation proceeds without frustrating FOIA or other public information acts.

In *Armstrong v. Executive Office of the President*, the Court noted that a protective order (entered pursuant to the Classified Information Procedures Act) did not "act as a limitation on the Government's ability to determine the final disposition of these classified materials." 830 F.Supp. 19, 22-23 (D.D.C. 1993). Instead, the protective order merely protected the materials from disclosure during the litigation. The Court observed that the order "in no way limits the access of

[1] The Media Intervenor's reliance on Rule 16-912 (now Rule 16-934) is misplaced. This Court's Protective Order was based not on the need to seal the record from public inspection but to ensure the parties can litigate this matter properly, as provided by Rule 2-403.

any party to this material under FOIA." *Id.* As the *Armstrong* Court reasoned, limiting "access to certain records is not synonymous with a prohibition on their future releases." *Id.* at 23.

This Court's Protective Order functions in the same manner as the order in *Armstrong*. By temporarily sealing the filings in this case, this Court ensured it could properly adjudicate the matter without frustrating the MPIA or this litigation. The court in *McDonnell Douglas Corp. v. NASA* succinctly summarized this rationale:

> While this court's sealing order temporarily precluded release, that order was not intended to operate as the functional equivalent of an injunction prohibiting release. It was only approved by the court for the purposes of expediting this litigation and protecting information . . . until this lawsuit was resolved."

No. 91-3134, slip op. at 1-2 (D.D.C. July 12, 1993). In overseeing litigation regarding public information act or freedom of information cases, courts do not enter sealing orders whose "scope would prevent disclosure of that information pursuant to the relevant freedom of information law." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 792 (3d. Cir. 1994). This Court's Protective Order properly restricts access while ensuring that the information will be disclosed in accordance with the MPIA, if it is to be disclosed at all.

Further, there is no "right of access" at this stage of the MPIA because the question of "access" is the entire underlying premise of this proceeding. The First Amendment's guarantee of a "right of access" is limited based on the "type of proceeding or materials to which access is sought." *ACLU v. Holder*, 652 F.Supp.2d 654, 660 (E.D.Va. 2009). In *Holder*, the ACLU challenged the provisions of the False Claims Act ("FCA") which require *qui tam* complaints to be filed under seal, arguing these "sealing provisions" violate the public's First Amendment right of access to information. *Id.* at 655. The ACLU argued, much like the Media Intervenors do here, that unsealing these documents was necessary to vindicate the public's right of access to judicial records. *Id.* at 660. The Court disagreed, finding that "neither experience nor logic" justified

unsealing the documents because "the internal workings" of processing a *qui tam* complaint is "necessarily shielded from the public eye." *Id.* at 662. The Court reasoned that the unique nature of a *qui tam* proceeding, statutorily and otherwise, carries "no historical tradition of access to sealed records" in order to "preserve the integrity" of *qui tam* proceedings. *Id.* at 663-64.

The same reasoning applies to the instant case. The FCA's process of limiting who has access to a *qui tam* complaint prior to public disclosure is deserving of analogous treatment in an MPIA case. The MPIA allows for a process of reviewing Officer Doe's personnel and investigative files by the government and a reviewing court (at least initially) that is shielded from the public. The proper functioning of the MPIA is ensured through reverse-MPIA actions like this one which question whether the subject files should be produced under the MPIA. Accordingly, there can be no "right of access" at this stage of the MPIA process because the MPIA does not mandate production until it is determined that the requested files ought to be produced. *See* MD. CODE ANN., GEN. PROV. § 4-362 (vesting the Circuit Courts with authority to hear and adjudicate controversies concerning the production, or non-production, of records under an MPIA request); s*ee also Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) ("[t]his Court has never intimated a First Amendment guarantee of access to *all* sources of information within governmental control") (emphasis added).

IV. The Improper Conduct of the Washington Post Warrants a Denial of the Motion to Unseal

In the short period of time since the filing of its Motion to Unseal on September 27, 2022, the Washington Post has, on its own, provided the Court with more than enough cause to deny its Motion to intervene in this case. As illustrated by citations to its own ongoing "extensive" publications about the case, the Washington Post's attempted involvement in this matter is merely

an effort to further its own commercial enterprise without any of the traditional limitations imposed on counsel to these proceedings. The Washington Post has also engaged in a deliberate practice of directly communicating with the represented parties.

Maryland Attorneys' Rule of Professional Conduct 19-304.2, modeled after the American Bar Association's Model Rules of Professional Conduct Rule 4.2, protects the attorney-client relationship by ensuring that an attorney does not frustrate the attorney-client relationship enjoyed by a represented party. This duty, combined with the general duty of candor and fairness owed to the opposing party embodied in Rule 19-303.4, means that attorneys cannot permit their client to avoid restrictions imposed on attorneys by directly communicating with the opposing party in an effort to obtain privileged or undisclosed information about the legal position of a represented party. Once an attorney or their client has been asked to cease and desist from communicating directly with a represented party, the Maryland Rules of Professional Conduct require compliance.

On October 4, 2022, counsel for Plaintiffs advised counsel for the proposed Media Intervenors, Ms. Zycherman, that her client, the Washington Post, continued to make direct contact with the Plaintiff. *See* **Exhibit 1** (Email to Ms. Lisa Zycherman). The Washington Post reporter was seeking comments about the Plaintiffs' position on the motions currently pending before this Court that had not yet been briefed by the Plaintiffs. Counsel for the Plaintiffs requested that counsel for the Media Intervenors instruct her client to cease from directly communicating with already represented parties. Ms. Zycherman did not respond; instead, a response was provided by Ms. Katie Townsend.

Despite not being authorized to practice law in Maryland,[2] Ms. Townsend stated that the Washington Post's employees "are not attorneys subject to Rule 4.2 . . . [and] are free to contact parties directly for comment on potentially newsworthy case developments." *Id.* (Email from Ms. Katie Townsend). Ms. Townsend and Ms. Zycherman, however, *are* attorneys subject to Rule 19-304.2 and their refusal to counsel their client against directly communicating with a represented party is improper and should not be condoned by this Court.

The Washington Post can either remain an independent news gathering agency and seek "comment on potentially newsworthy case developments" or it may seek to intervene as a party litigant in the case and advocate for a cause. To the extent that it chooses, and the Court permits it to intervene as a litigant, the Washington Post should be bound by this Court's rules and orders, just like the rest of the parties. Since the Washington Post, through its counsel, made clear that it intends to continue to engage in improper direct communication with a represented party, its request to intervene should be denied.

V. Media Intervenors Articulate no Basis to Intervene

Neither of the Media Intervenors articulate a sufficient reason to intervene in this case. As a threshold matter, each Intervenor states a different reason for intervening—one (the Washington Post) seeks to publish stories while the other (the Reporters Committee for Freedom of the Press) seeks to potentially offer an *amicus* brief to the Court. The Washington Post has already, by its own words, "published extensive coverage" about the production of police investigative and

[2] Ms. Townsend is admitted only in California, New York, and Washington, D.C.; her motion for admission *pro hac vice*, filed in this Court on September 29, 2022, has not yet been ruled by this Court. Despite this, Ms. Townsend has insisted on acting in a lead counsel capacity and corresponding on behalf of the Media Intervenors. *See generally* Maryland Rules 10-217, 19-305.5.

personnel files under the MPIA. *See* Motion to Unseal at 2-3. They have joined with the Reporters Committee, which maintains that it needs access to the sealed record, including all legal arguments by the parties, so that it may "file an *amicus* brief in this matter." *Id.* at 5.

The Maryland Rules do not permit the filing of *amicus* briefs at the trial level. *See* Md. Rule 8-511 (permitting the filing of *amicus* briefs in the Court of Appeals and Court of Special Appeals); *Poku v. Friedman*, 403 Md. 47, 54 n.8 (2008) ("[*a*]*micus* briefs are allowed for the purpose of supporting or opposing the issues presented by the parties *in the appellate process*.") (emphasis added). To the extent the *federal* rules permit *amicus* briefs, federal district courts only accept *amicus* briefs if the prospective *amici* offers the Court "helpful analysis of the law" which could not otherwise be provided by the parties. *American Humanist Ass'n. v. MNCPPC*, 303 F.R.D. 266, 269 (D.Md. 2014). The *amici* should "state the reason why an *amicus* brief is desirable and why the matters asserted [therein] are relevant to the disposition of the case." *Id.* (citing Fed. R. Civ. P. 29) (internal quotations omitted). There is no pending motion for leave to present an *amicus* brief and, even if this Court permitted one, any *amicus* would need to agree to abide by the sealing and Protective Order and not disclose any sealed records. By virtue of the joint representation of the Media Intervenors and their counsel, the Reporters Committee's request to intervene should be denied because the sealed materials will be compromised.

The Reporters Committee's suggestion of offering an *amicus* brief to this Court is also unnecessary based on the recent intervention of the individual who submitted the underlying MPIA request, Alexa Renehan. Ms. Renehan will argue her position to this Court, just like Plaintiffs and Defendant have done and will do. Ms. Renehan is represented by no fewer than 7 attorneys and/or law students, including members of the Vanderbilt Law School First Amendment Clinic. The Media Intervenors offer only a conclusory statement that their interests would not be "adequately

represented" by the parties, but fail to provide any facts in support thereof and only vaguely suggest important First Amendment issues. Motion to Unseal at 5. Certainly any First Amendment issues will be adequately addressed by the First Amendment law clinic participants. The Reporters Committee suggests it will file an *amicus* brief as to why "the County must disclose Doe's investigative records under Maryland law," but such arguments will be redundant and duplicative of the Defendant's position and Ms. Renehan's position. As such, the proposed intervention based on the potential filing of a motion to submit an *amicus* brief is not only unauthorized, but would not be helpful for this Court.

VI. There is No Urgency in the Production of Officer Doe's Decades-Old Records

Undercutting the Media Intervenors' alleged claim of a need for urgent access to all court filings is the fact that the filings relate to records centering on Officer Doe's 20+ year tenure as a sworn officer with the Montgomery County Police Department. These records, dating back decades, suggest little, if any, *present* public interest in their disclosure and certainly not a need for their urgent and immediate disclosure. On the other hand, not only does Officer Doe risk personal, professional, and economic harm by the premature release of these records, so too do the third parties contained in the records. As such, there is a stronger public interest in maintaining the confidentiality of this information. *See Montgomery County v. Shropshire*, 420 Md. 362, 380-81 (2011) ("there is a significant public interest in maintaining confidentiality, both in fairness to the investigated officers *and cooperating witnesses* . . . .") (emphasis added).

Courts have routinely recognized the unique privacy interests held by police officers. *See District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 268 (D.C. 2013) (finding that police officers "have a cognizable privacy interest in the nondisclosure of their names and other

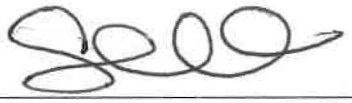
identifying information."); *see also Fraternal Order of Police/Metro. Police Labor Comm. v. District of Columbia*, 124 A.3d 67, 77 (D.C. 2015) ("there is no dispute that police officers . . . have far more than a *de minimus* privacy interest in not being publicly identified."). Accordingly, any public interest in the disclosure of Officer Doe's decades-old personnel and investigative records is heavily outweighed by Officer Doe's well-established privacy interests.

If this Court finds merit to the Media Intervenor's request to intervene, this Court should enter further Orders to ensure that the Media Intervenors, *and any subsequent intervenors*, are subject to the same restrictions regarding third-party dissemination as are the Plaintiffs and Defendant. *See* Protective Order at 2 ("and it is further **ORDERED** that the identity of the officer and the contents of the disputed records shall not be disclosed, published or produced to any third party or through any publicly-available filing until a final resolution of this case and any subsequent appeal . . . ."). This Court make clear that *all* filings that address the merits and substance of the records, including any exhibits, are filed under seal to ensure that the identity of Officer Doe and the contents of the disputed personnel records remain confidential and sealed. To permit otherwise would preclude the parties, and their attorneys, from properly advocating before this Court. To that end, if provided access to any sealed materials, any intervenors must be precluded from sharing or disseminating the filings in this case with the public and any non-parties or unauthorized persons.[3]

[3] Notably, both Media Intervenors are represented by the *same* counsel. Granting access to the sealed filings in this case to *one* of the Media Intervenors, then, risks the improper and unlawful dissemination of the sealed filings to the *other* Media Intervenor.

Wherefore, based upon the foregoing arguments, Plaintiffs respectfully request this Court deny the Media Intervenors' Motion to Intervene to Modify Protective Order and Obtain Public Access to Court Records and Proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2022, a copy of the foregoing Opposition was served via MDEC on all parties and properly-registered intervenors and a courtesy copy by electronic mail to:

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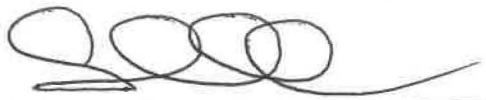

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