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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

JAMES P. CHASSE, JR., et al., **CV-07-0189 HU**

PLAINTIFFS,

v.

CHRISTOPHER HUMPHREYS, et al.,

DEFENDANTS.

CITY DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY EXISTING PROTECTIVE ORDERS

I. Introduction

Plaintiffs filed a Motion to Modify Existing Protective Orders on May 25, 2008. Plaintiffs seek to modify the existing protective orders to remove several broad categories of discovery documents from protection. For the reasons discussed below, plaintiffs have failed to show good cause for the modification; therefore, the Court should deny this Motion.

II. The Existing Protective Orders

On October 23, 2007, pursuant to a finding of good cause, Judge Hubel granted a

protective order for eight categories of documents produced by City defendants[1]: (1) Internal Affairs Division (IAD) Documents; (2) Independent Police Review (IPR) Division Documents[2]; (3) Discipline Information and Documents from Humphreys' and Nice's Personnel File; (4) Training Documents; (5) Cell Phone Records; Emergency Room & Other medical Records and Injury Log; (7) PPB's After Action Report and Review Level Recommendations; (8) Records re: In-Custody or Other Officer Involved Deaths. (Doc. 134.) The Order stated that the "protective order shall remain in effect until…modified…by order of this Court upon good cause being shown" (doc. 134, p. 14:1-4) and noted that "*[t]o the extent any information protected by this Order is offered and received as an exhibit at trial*, the presumption is that the information will be public…unless one of the parties seeks and obtains a specific order from the Court limiting the disclosure of such documents." (Doc. 134, p. 14:22-25 (emphasis added.))

Judge Hubel amended the protective Order on November 2, 2007,[3] to include HIPAA-compliant language regarding the return or destruction of protected medical or mental health information and records. (Doc. 147.) The Amended Order reiterated that the Court would modify the Amended Protective Order only for good cause shown and that any information offered and received as an exhibit at trial would be presumed to be public at the time of trial. (Doc. 147, p. 6:3-7.)

Five days later, Judge Hubel ordered that City defendants produce, under Protective Order, documents that the City had made copies of and produced to plaintiffs' counsel in *Price v. Sery, et. al.*, No. CV-04-1178-MO. (Doc. 156.) Judge Hubel ordered production of *Price* documents from the following categories: (1) Files of the Internal Affairs Division; (2) Files of

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[1] The same Order granted County defendants' and AMR Northwest's motions for protective orders. (Doc. 134.)

[2] In the October 23 Order, Judge Hubel stated that he was unable to discern whether there was good cause to subject the IPR documents to a protective order. (Doc. 134). In a minute order dated November 21, 2007, Judge Hubel stated that documents generated by IPR in the course of any investigation of any PPB officer are included under the terms of the protective order. (Doc. 185.)

[3] Judge Hubel's October 31, 2007 minute order considered a protective order for personnel files from defendant AMR Northwest. (Doc. 140.)

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the Independent Police Review Division; (3) Discipline information and the Officers' personnel files' (4) Police Reports of prior shootings; (5) Training documents; and (6) The after action report of this incident. (Doc. 156, p. 2:1-6.) The Protective Order regarding the *Price* documents stated that any documents offered and received as an exhibit at trial is presumed public at the time of trial, unless a party obtains an order limiting disclosure of the document from the trial judge in *Chasse* and the trial judge in *Price*. (Doc. 156, p. 4:2-8.) Judge Hubel granted plaintiffs' attorney permission to discuss "the contents and anything else regarding the documents produced by City defendants directly with plaintiffs' counsel in *Price*; however, Judge Hubel noted that it was not clear whether Judge King, the Judge who signed and entered the protective order in *Price* or Judge Mosman, who is assigned to the *Price* case now, will allow these conversations to take place under the terms of the *Price* protective order. Judge Hubel directed counsel to address that question to Judge Mosman. (Doc. 156, p. 5:4-9.) Judge Hubel again noted the good cause standard for modifying the Protective Order regarding the *Price* documents. (Doc. 156, p. 5:10-13.)

Judge Hubel issued a Minute Order on November 21, 2007 ordering that the following documents, which were provided to the City by the third (2006) PARC review, were to be produced to plaintiff subject to the protective order: (1) printouts of information obtained through the Law Enforcement Data System (LEDS); (2) Medical records of any person; (3) IPR and IAD complaint histories for any PPB officer; and (4) Juvenile records. (Doc. 185.)

By Order filed November 27, 2007, Judge King adopted Judge Hubel's ruling on the motions for protective order in whole. (Doc. 194.) Judge King emphasized to the parties that Judge Hubel had noted that discovery under the federal rules was quite broad; thus much discoverable material may turn out not to be relevant. Releasing such irrelevant information, which is inadmissible at trial, could prejudice defendants by resulting in hostility toward them. (Doc. 194.) Judge King further noted that City defendants produced the majority of documents without seeking a protective order. (Doc. 194.) By Order filed December 13, 2007, Judge King

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adopted the rulings of Judge Hubel in the November 7, 2007 Protective Order re: Price documents and the October 31, 2007 minute order in their entirety. (Doc. 208.)

III. Discussion

Plaintiffs now seek to modify the existing protective orders. (Doc. 322.) The party seeking to modify a protective order bears the burden of showing good cause for the modification. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir.1992) (stating that to modify a protective order a party must establish good cause by demonstrating how the protective order will prejudice the party's case); *see also, SEC v. The Street.Com*, 273 F.3d 222, 229 (2nd Cir. 2001).[4] The protective order must actually prejudice presentation of the moving party's case, not merely increase the difficulty of managing the litigation. *Brown Bag*, 960 F.2d at 1471. Plaintiffs have not shown good cause to modify the existing protective order, therefore, their Motion should be denied.

Plaintiffs seek to remove the following broad categories of documents from protection:

> Five of the eight categories of documents listed in the November 2, 2007 Amended Protective Order, which includes (1) PPB Internal Affairs Division documents; (2) Documents from Humphreys's and Nice's personnel files which are related to performance; (3) PPB training documents; (4) PPB after action reports and review level documents; and (5) City of Portland records involving in-custody or other officer involved deaths. (Doc. 147, p. 2-3, ¶ 1-3, 6-7.)
>
> All the documents which the City produced pursuant to a protective order in *Price* described in the November 7, 2007 Protective Order re: Price Documents. (Doc. 156.)
>
> All documents described in Judge Hubel's November 19, 2007 Order that were part of or related to AMR Northwest's investigation into Chasse's death. (Doc. 178.)
>
> Two of the five categories[5] of documents listed in the

[4] The Ninth Circuit has recognized that the party seeking protection bears burden of proof where "protective order was stipulated and *no party previously had made showing of 'good cause'*." *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992). Here, City defendants made a good cause showing for protection of all the documents at issue here, except for the PPDS documents contained in the PARC documents.

[5] Four numbered categories are listed on the minute order and the PARC documents described in the unnumbered fifth paragraph comprise the fifth document category.

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> November 21, 2007 Minute Order, which includes IPR and IAD complaint histories for any PPB Officer as well as documents generated by IAD and/or IPR in the course of any investigation of any PPB Officer (Doc. 185, ¶ 3) and Portland Police Data System (PPDS) documents contained within PARC documents. (Doc. 185, p. 2.)

In support of their Motion to modify the existing protective orders, plaintiffs state that City defendants have filed a motion for summary judgment on plaintiffs' injunctive relief claims, plaintiffs' response is due May 9, 2008, and that, as part of their opposition, plaintiffs need to place into the record documents and deposition testimony currently covered by the protective order. (Doc. 323.) Plaintiffs also contend that the existing protective orders must be modified because they fail "to comply with the legal standards governing the public judicial record at the dispositive motion state of litigation."

A. <u>Burden of Good Cause</u>

Plaintiffs cannot establish that their ability to litigate will be prejudiced by the existing protective orders remaining in effect. *A. Hirsch, Inc. v. United States,* 657 F.Supp. 1297, 1303 (C.I.T. 1987). First, the AMR Northwest documents have absolutely no bearing on plaintiffs' ability to respond to City defendants' summary judgment motion. Next, City defendants' summary judgment motion argues that plaintiffs have not alleged an actual case or controversy regarding injunctive relief because their Complaint contains a *potential* claim for injunctive relief; plaintiffs lack standing to seek injunctive relief; and principles of federalism warrant against enjoining the City. (Doc. 261.) It is hard to see how any of the documents in the broad categories which plaintiffs seek to remove from protection -- IAD, individual officer personnel files, after action reports and review level documents, records involving other in-custody or other officer involved deaths, the protected documents from the *Price* case (which is a shooting case), or PPDS documents, will aid plaintiffs in responding to City defendants summary judgment motion. Plaintiffs have not shown that their ability to litigate the City's summary judgment motion is prejudiced. *A. Hirsh Inc.*, 657 F.Supp. at 1305.

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Moreover, keeping the existing protective order will not prejudice plaintiffs' ability to litigate because plaintiff may still put any of the sealed documents before the Court. Judge Hubel's October 23, 2007 Protective Order noted that the Order did not affect the admissibility of any document or information covered by the Order and stated that to the extent that any information is offered and received as an exhibit at trial, it would be presumed public, unless one of the parties obtained a specific order from the court limiting disclosure of such document. (Doc. 134, p. 14: 13-25.) Accordingly, the issue here is when documents attached to a dispositive motion will become public.

City defendants argue that, until plaintiff attaches the sealed documents to a dispositive motion, they have "not traveled outside of the pretrial litigation and become a judicial document in this litigation." *Smith Kline Beecham Corp. v. Synthon Pharmaceuticals, Ltd.*, 210 F.R.D. 163, 168 (M.D. N.C. 2002). Thus, balancing the public's interest in disclosure of judicial documents against City defendants' interest in keeping irrelevant documents sealed to avoid potential public prejudice is best served as follows. Plaintiffs will file any dispositive-motion-related attachments, which include documents currently subject to the Protective Order, under seal. The Judge will conduct an in camera inspection to determine the threshold question of whether the filed documents are relevant to the dispositive motion and admissible at trial. *See e.g. Orr v. Bank of America*, 285 F.3d 764 (9th Cir. 2002) (stating a trial court can only consider admissible evidence in ruling on a motion for summary judgment). If the Court determines that the related documents filed under seal are relevant and admissible, then the documents will be presumed to be part of the judicial record. Then, if City defendants seek to keep any of the sealed documents out of the public judicial record, City defendants must advance compelling reasons to support the secrecy of said documents. *Foltz*, 447 F.3d at 1180. If City defendants cannot do so, then such documents would become public.

It is worthwhile to note that in both the cases cited by plaintiffs in support of modifying the protective orders—*Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003)

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and *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006), the Ninth Circuit noted that when a document is attached to a dispositive motion, a party must make the higher showing of compelling reasons to rebut the presumption of the public's right to access. *Kamakana*, 447 F.3d at 1178; *Foltz*, 447 F.3d at 1179; *see also Del Campo v. American Corrective Counseling Serv. Inc.*, 2007 WL 902568 (N.D. Cal. March 22, 2007) (stating that because the documents at issue were not attached to a dispositive motion, the compelling reasons standard did not apply.) Therefore, plaintiffs' contention that litigation moving into the dispositive motion stage automatically triggers a party's duty to show a compelling reason for keeping all documents under a protective order, misstates this Circuit's caselaw.

Plaintiffs' cannot show that their ability to litigate is prejudiced by keeping the existing protective orders in effect until a specific document is attached to a dispositive motion or response to a dispositive motion. *A. Hirsh Inc.*, 657 F.Supp. at 1305. The Court should deny plaintiffs' motion to modify the existing protective order.

B. <u>Risk of Disclosure</u>

An unacceptable risk of disclosure that cannot be adequately mitigated by a protective order is a factor in limiting access to confidential information. *Intel Corp. v. VIA Technologies, Inc.*, 198 F.R.D. 525, 529 (N.D. Cal. 2000). Judge Hubel and Judge King both noted that the federal rules provided for very broad discovery and much of the discoverable material in this case may turn out not to be relevant. (Doc. 194.) Releasing irrelevant information, which is inadmissible at trial, could prejudice defendants by resulting in hostility towards them. (Doc. 194.) City defendants' concern about potential hostility due to dissemination of irrelevant discovery material is exacerbated by the media scrutiny of Mr. Chasse's death, including the documentary film, <u>Alien Boy</u>, being made about Mr. Chasse. *See e.g.*, (<u>http://blogtown</u>. portlandmercury.com /2008/02/james_chassethe_documentary_fi.php); (<u>http://www.alienboy.org</u>/); (http://alienboydoc.wordpress.com/2008/04/01/officer-humphreys-cocky-beginnings/ **attached as Ex. 1**). One of the <u>Alien Boy</u> filmmakers, lawyer Benjamin

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Haile, is listed on the film's website as being "excited about [the] project, especially that [it is] being made while the lawsuit is being pursued by the Chasse family; Mr. Haile states that it is "tragic when lawyers get involved and cause everyone to clam up." (http://alienboydoc.wordpress.com/2008/04/23/meet-the-filmmakers-benjamin-haile/ **attached as Ex. 2**).

City defendants object to the modification of the protective order which could result in a potential jury pool having access to materials which are not relevant at trial.

C. Existing Mechanism to Attach Sealed Documents to Dispositive Motions and Dispositive Motion Responses

Finally, as previously noted, the existing protective orders set forth a mechanism for putting documents which are subject to the protective order into the public record. The Order does not affect the admissibility of any document covered by the protective order, and to the extent that any information is offered and received as an exhibit at trial, it will be presumed public, unless one of the parties obtained a specific order from the court limiting disclosure of such document. (Doc. 134, p. 14: 13-25.) Under the terms of the existing protective orders, plaintiff may attach documents which are subject to the protective order to dispositive motions and file the attachments under seal. The Amended Protective Order provides:

> [I]n the event that any of the parties believe that any of these documents or the information contained there, or any sealed portion of a deposition, needs to be included with, or the contents thereof in any way disclosed in, any pleading, motion or other paper filed herein, such confidential documents or information, or sealed portion of a deposition, shall be exchanged by the parties prior to filing with the Court. If one of the parties believes that such confidential documents or information, or sealed portion of a deposition needs to be filed under seal, the matter will be brought to the attention of the Court so it can be resolved before any such documents or information or sealed portion of a deposition is filed. This Amended Protective Order shall not affect the admissibility of any document or information covered herein.

(Doc. 145, ¶ 11.) Unless City defendants obtain a specific order from the Court limiting disclosures, any sealed documents filed as attachments to dispositive motions or dispositive

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motion responses will become part of the public record. Because there is already a mechanism in place to allow for protected documents to become part of the public record, the Court should decline to modify the protective order.

IV. Conclusion

For the aforementioned reasons, the Court should deny plaintiffs' motion to modify the existing Protective Orders.

Dated this 6th day of May, 2008.

Respectfully submitted,

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