IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

HISPANIC NATIONAL LAW ENFORCEMENT ASSOCIATION NCR, et al., Plaintiffs, v. PRINCE GEORGE'S COUNTY, et al., Defendants.	Civil Action No. 8:18-cv-03821 Hon. Theodore D. Chuang

DEFENDANTS' CONSOLIDATED OBJECTION TO MOTIONS TO INTERVENE AND FOR ACCESS TO RECORDS [ECF NOS. 282, 283 AND 305]

Defendants submit this objection (the "Consolidated Objection") to the Motion of the Prince George's County Office of the Public Defender (the "Public Defender") to Intervene and Unseal [ECF No. 282]; the Motion of the National Association for the Advancement of Colored People, Prince George's County Branch ("NAACP"), the Greater D.C. Chapter of the National Action Network ("NAN"), Community Justice, and Independent World Television, Inc., also known as "The Real News Network" ("TRNN") to Intervene and Unseal Court Records [ECF No. 283]; and the Motion of the Office of the State's Attorney for Prince George's County (the "State's Attorney") to Modify the Confidentiality Order Entered on July 1, 2019 [ECF No. 305] (collectively, the "Motions to Intervene and for Access to Records"). For the reasons set forth herein, the Motions to Intervene and for Access to Records should be denied.

INTRODUCTION

The Public Defender, the State's Attorney, the NAACP, NAN, Community Justice, and TRNN (collectively, the "Movants") all seek to expand the scope of persons who can view

CONFIDENTIAL personnel records of the Prince George's County Police Department (the "Department"), and information derived therefrom, including the expert report of Michael E. Graham (the "Graham Report"). The relief they seek is procedurally improper, duplicative of efforts already being taken by the Plaintiffs to unseal the Graham Report and the exhibits thereto, and it directly contradicts the plain language of Section 4-311 of the Maryland Public Information Act (the "MPIA"), Md. Code Ann., Gen. Provis. § 4-311, by which the Maryland legislature has expressed a compelling interest in keeping this information private.

The relief sought by the Proposed Intervenors is procedurally improper. The Public Defender, NAACP, NAN, Community Justice, and TRNN, who seek to intervene as parties in this action, (the "Proposed Intervenors") are three civil rights organizations, one news company, and one independent state-level agency—whose statutorily mandated purpose is "to provide representation for indigent individuals." *See* Md. Code Ann., Crim. Proc. § 16-207(a). None of them are related to the parties in this case and none of them have articulated "a claim or defense that shares with [this employment dispute] a common question of law or fact," as required for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. Allowing the Proposed Intervenors to join this action now as intervenor-parties would only serve to "unduly delay or prejudice the adjudication of the original parties' rights," *see* Fed. R. Civ. P. 24(b)(3), and inject into this case the influence of five outside organizations who seek to transform this employment dispute into a referendum on civil rights and policing issues in this country. Moreover, allowing the Public Defender—who does not seek to intervene on behalf of an indigent individual—to intervene would violate the Public Defender's statutory mandate.

The relief sought by the State's Attorney is procedurally improper. The State's Attorney, which is not a party to this case and has not moved to intervene, seeks to modify the Stipulated

Order Regarding Confidentiality of Discovery Material agreed to by the parties and approved by the Court over a year ago (the "Confidentiality Order") [ECF No. 72] to allow the State's Attorney essentially unfettered access to all materials designated as CONFIDENTIAL in this action, including the Graham Report. The State's Attorney has cited no authority entitling it (as a non-party with no apparent connection to this case) to modify the Confidentiality Order, and Defendants are aware of no such authority. Additionally, while the State's Attorney argues that it must have access to the *full* unredacted Graham Report and *all* officer files referenced therein (whether or not they relate to active prosecutions) in order to fulfill its constitutional duty to provide material exculpatory and impeachment evidence to criminal defendants under *Brady* and *Giglio*, it fails to identify: a single active criminal prosecution brought by its office that supposedly triggers the obligation here; what information in the Graham Report supposedly constitutes *Brady* or *Giglio* material in the [yet unidentified] case(s); or why it cannot obtain information from the Department through normal procedures for requesting such information. Indeed, the Department has already provided to the State's Attorney the IAPro cards for all officers named in the Graham Report (active and retired), which contain more than enough information for the State's Attorney to determine if any of those officers' files actually contain *Brady* or *Giglio* material with respect to an active prosecution and, if so, to then request those materials from the Department. "Good cause" does not exist to modify the Confidentiality Order.

The relief sought is duplicative of relief already being sought by the Plaintiffs. The Plaintiffs—thirteen current or former police officers of the Department, the Hispanic National Law Enforcement Association ("HNLEA"), and the United Black Police Officers Association ("UBPOA") (collectively, the "Plaintiffs")—have already moved this Court to unseal the precise materials to which Movants seek access. The parties have already fully briefed the issues, and the

issues are ripe for a ruling by this Court. Plaintiffs, in their latest brief, have even cited and adopted the Proposed Intervenors' arguments as their own, making clear that the Proposed Intervenors' position is being vigorously argued and that their presence as parties in the case is not necessary.

The Maryland legislature has expressed a compelling interest in keeping the information contained in the Graham Report private. The IAD records and other employment records (such as EEO and EEOC complaints) cited and discussed in the revised Graham Report are protected from public disclosure under Section 4-311 of the MPIA and this Court's precedent. The Maryland legislature has expressed a compelling interest in keeping these records—which not only relate to officers accused of misconduct, but also pertain to witnesses and accusers—private. None of the Movants have cited any authority holding that their purported interests in the CONFIDENTIAL information produced by Defendants in this action—and incorporated in the Graham Report—supersede the plain terms of the MPIA and this Court's precedent. While the State's Attorney has requested access to the *full* Graham Report and *all* officer files cited therein, its obligations under *Brady* and *Giglio* simply do not extend that far, and do not trump the terms of the MPIA. For all these reasons, the Motions to Intervene and for Access to Records should be denied.

BACKGROUND

On June 18, 2020—almost four months after Defendants filed their initial Motion to Limit the Number of Discriminatory Acts that May be Considered at Trial [ECF 134][1]—Plaintiffs filed their Response and 1,488 pages of appended material under seal [ECF 161 – ECF 176]. Plaintiffs' Response and appended materials, including an initial version of the Graham Report, contain sensitive disciplinary and employment information of police officers and civilian employees of the

[1] The Court has now denied that motion via Order dated September 30, 2020 [ECF 299].

Department, the vast majority of whom are not Plaintiffs or Defendants, many of whom were cleared of wrongdoing, and many of whom are purported victims of wrongdoing.

Defendants properly designated such disciplinary and employment information "CONFIDENTIAL," as required by Section 4-311 of the Maryland Public Information Act, and in accordance with the Confidentiality Order [ECF 72 at ¶ 1(a)]. In conjunction with their June 18, 2020 Response, Plaintiffs also filed an Interim Sealing Motion [ECF 179] seeking to make this "CONFIDENTIAL" information public. Rather than identifying a list of materials and information that Plaintiffs actually believe should not be designated as confidential, Plaintiffs argued that *all of the information* should be made public and no redactions should be applied to the Graham report or its exhibits. On June 24, 2020, the State's Attorney sent a letter to Prince George's County Executive Angela D. Alsobrooks requesting an "unredacted version" of the Graham Report, claiming that the State's Attorney was purportedly "reviewing and investigating cases involving officers" who *may* have been named in the Graham Report. [Ex. 1 to ECF 305-1]. The County Executive responded with a letter dated July 7, 2020, explaining that the unredacted Graham Report could not be provided to the State's Attorney because the document contained information designated as CONFIDENTIAL under the Confidentiality Order and that the Department would continue to provide information in response to proper requests for *Brady* and *Giglio* material as to specific cases brought by the State's Attorney. [Ex. 2 to ECF 305-1].

Following a meet and confer (after which Defendants agreed to de-designate some information voluntarily, but Plaintiffs held fast to their position that *all information* should be public), Defendants responded to Plaintiffs' initial Interim Sealing Motion with an Objection to Unsealing and Request to Seal Additional Material that had been improperly left unredacted in the Graham Report [ECF 196]. Shortly thereafter, Plaintiffs filed a Reply to Defendants' Objection

to Unsealing and refiled the Graham Report [ECF 197 and 198]. Plaintiffs filed another Interim Sealing Motion [ECF 199], again seeking to make public all the information contained within their Response and its attached exhibits [ECF 161 to 176; ECF 180 and 181]. The parties fully briefed that motion as well.

On July 21, 2020, after the parties had already fully briefed the sealing issues, the Proposed Intervenors NAACP, NAN, Community Justice, and TRNN filed a procedurally defective motion to intervene in this action [ECF No. 202]. They directly violated this Court's Case Management Order by filing their motion without first seeking a pre-motion conference with this Court [ECF 4]. Although these Proposed Intervenors later filed a Notice of Intent to File Motion on July 23, 2020, the motion was already entered on the docket. Defendants objected [ECF 228]. The next day, the Public Defender also filed a letter expressing its intent to file a separate motion to intervene [ECF 213].

At an August 19, 2020 case management conference, Plaintiffs revealed that they were preparing to serve and file a revised version of the Graham Report. The Court ordered the parties to meet and confer in an attempt to resolve any differences regarding the confidentiality of information in the revised report. *See* Order, ECF No. 249. The Court further ordered the Plaintiffs to file the revised report after the meet and confer. *Id.* The Court granted Defendants leave to file a supplemental objection to unsealing. *Id*. The Court also dismissed the pending motion to intervene as moot and ordered all Proposed Intervenors to file (in the case of the Public Defender) or re-file (in the case of the NAACP, *et al*.) by September 18, 2020 their motions to intervene, along with any arguments as to unsealing the revised Graham Report. *Id*.

Plaintiffs served the revised Graham Report[2] and the parties met and conferred on September 3, 2020. Defendants agreed that additional sections of the Graham Report could be made public and the parties agreed on redactions to be applied to the remaining sections of the report. On September 10, 2020, Plaintiffs filed the revised Graham Report as a supplemental exhibit in further support of their opposition to Defendants' Motion in Limine (and failed to properly redact certain items designated as Confidential) [ECF 271; 271-1]. Defendants then filed their supplemental objection in support of maintaining redactions applied to the as-filed Graham Report (and objecting to Plaintiffs' failure to redact certain information) [ECF No. 276]. On September 16, 2020, Plaintiffs filed a response brief to that objection [ECF 280, 281]. In that brief, Plaintiffs specifically cited and incorporated the arguments raised by the Proposed Intervenors in their previous brief. Defendants filed a reply brief in response to the opposition on September 30, 2020 [ECF 298].

The issues were fully briefed (for a second time) as of September 30, 2020 and were ripe for this Court's decision. Yet, the following day, the State's Attorney filed a letter requesting leave to file its own motion related to these same issues [ECF No. 300]. The Court granted that request [ECF No. 301] on the same date that Defendants' opposition to the Proposed Intervenors' motions was originally due. On October 7, 2020, Prince George's County Attorney Rhonda L. Weaver provided to the State's Attorney the IAPro cards for all officers named in the Graham Report (active and retired), materials which the State's Attorney agreed to maintain as CONFIDENTIAL. Nevertheless, on that same day, the State's Attorney proceeded to file its motion [ECF 305],

[2] Michael E. Graham has since authored yet another expert report in this action. That report has not been filed. For the same reasons set forth herein and in Defendants' prior briefing, information in that revised report has been designated as CONFIDENTIAL, should remain confidential, and should be treated as confidential, pursuant to the terms of the Confidentiality Order.

arguing that it is entitled to *all* materials designated as CONFIDENTIAL in the case. While the State's Attorney does not seek to intervene as a party in this action or to make public the Graham Report (like the other Movants), it does seek to expand the scope of persons entitled to view the unredacted Graham Report by amending the Confidentiality Order. Accordingly, the Court has now ordered that Defendants respond to all the pending motions together.

STANDARD OF REVIEW

I. Legal standard governing a motion to intervene

Rule 24 provides two bases for intervention: (1) mandatory intervention and (2) permissive intervention. The Proposed Intervenors do not argue they have a mandatory right to intervention. Instead, they acknowledge they are pursuing permissive intervention. Under Rule 24(b), courts "may" allow anyone to intervene who "(A) is given a conditional right to intervene by a federal statute," or "(B) has a claim or defense that shares with the main action a common question of law or fact." The Proposed Intervenors do not argue that they have a statutory right to intervene—they are moving for permissive non-statutory intervention. As this Court has confirmed, "[a] decision to grant or deny permissive intervention [ ] lies within the sound discretion of the trial court." *Am. Coll. of Obstetricians & Gynecologists v. United States Food & Drug Admin.*, No. CV TDC-20-1320, 2020 WL 3184024, at *6 (D. Md. June 15, 2020) (citing *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003)). "In exercising its discretion under Rule 24(b), the Court 'must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Id.* (quoting Fed. R. Civ. P. 24(b)(3)). "'It is incontrovertible that motions to intervene can have profound implications for district courts' trial management functions,' as additional parties can complicate all aspects of litigation, including discovery, motion practice, settlement, and trial." *Id.* (quoting *Stuart v. Huff*, 706 F.3d 345, 350 (4th Cir. 2013)).

II. Legal standard governing a motion to modify the Confidentiality Order

A party to a protective order may only modify that order for "good cause." *United States v. (Under Seal)*, 794 F.2d 920, 928 n. 6 (4th Cir.1986). "Courts may employ several factors to help guide them in exercising their discretion as to whether to grant modification requests," including "the reason and purpose for the modification, whether a party has alternative means available to acquire the information, the type of protective order at issue, and the type of materials or documents sought." *Minogue v. Modell*, No. CIV. CCB-03-3391, 2012 WL 4105312, at *4 (D. Md. Sept. 17, 2012) (*citing SmithKline Beecham Corp. v. Synthon Pharmaceuticals, Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C.2002)). "The party seeking to modify a protective order bears the burden of showing good cause for the modification." *Id.*

Here, the State's Attorney is not a party to this case and is not seeking to intervene as a party. The State's Attorney has cited no authority entitling it (as a non-party with no apparent connection to this case) to modify the Confidentiality Order, and Defendants are aware of no such authority. As discussed herein, even if the State's Attorney is entitled to seek modification of the Confidentiality Order for "good cause" shown, good cause does not exist here.

ARGUMENT

I. The Office of the Prince George's County Public Defender does not have authority to intervene in this action.

As an initial matter, the Public Defender lacks the statutory authority to intervene in this action. It is an independent state agency created under Maryland law and governed by the Maryland Public Defender Act. The powers and duties of the Public Defender are specifically set forth at Md. Code Ann., Crim. Proc. § 16-207. The Maryland Court Appeals has confirmed in *Forster v. State, Office of Pub. Def.*, 426 Md. 565, 571, 45 A.3d 180, 183–84 (2012) that "[t]he primary duty of the State Public Defender is to 'provide representation for indigent individuals.'"

(*citing* Section 16-207(a)). While the Public Defender claims that "the head of [its] Prince George's County office was recently appointed to a local task force whose express goal is 'to study and make recommendations on police reform' " [ECF 282-1 at 7] and that it seeks to intervene in order to identify possible "*Brady* material" (based on pure speculation and without identifying any specific criminal case or facts in the Graham Report that may constitute "material" exculpatory information under *Brady*) [ECF 282-1 at 8], these are simply reasons the Public Defender may have for *wanting* to intervene—the Public Defender has cited no statute, rule, or case law *authorizing* it to do so. Indeed, intervening in this action falls far outside its statutory mandate. These vaguely described interests that it purports to have in the Graham Report—essentially that it desires to conduct a full scale fishing expedition in case there *might exist* evidence of actionable misconduct or *Brady* material—do not trump its authorizing legislation, which makes clear that its purpose is to represent indigent individuals, not to advocate for public access to court records.

The fact that this is a federal court proceeding further calls into question what authority the Public Defender could have to intervene. The Public Defender Act defines the powers of the Public Defender with respect to federal court litigation. Specifically, Md. Code Ann., Crim. Proc. § 16-206(a) provides that "[t]his title does not prohibit the Office from representing an indigent individual in federal court at federal expense *if the matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the State*." (emphasis added). The statutory language is clear on its face—the Public Defender is not authorized to act in federal court, except for representation of indigent individuals in criminal proceedings (not civil law employment disputes) "related to an action pending or recently pending" in state court. Here, the Public Defender does not seek to intervene as legal representative of an indigent individual (indeed, no such party has been named anywhere), nor has any related state action been identified.

The Public Defender's general interests in the public's right of access to Court documents and in uncovering purported evidence of police misconduct do not authorize it to participate in this action. For these reasons alone, the Public Defender's Motion to Intervene should be denied.

II. It is not necessary for any of the Proposed Intervenors to join this action as parties because Plaintiffs have already moved this Court for the same relief they seek

The Proposed Intervenors seek to intervene in this action for the purpose of making public certain individual police officers' personnel records, and information derived therefrom, including in the Graham Report and exhibits thereto. *See, e.g.,* ECF No. 282-1 (The Public Defender "seeks to intervene in this case in order to challenge the redactions to the expert report"); ECF No. 283-1 at 10 (movants NAACP, *et al.* confirming that their "sole and ultimate objective is the public disclosure of the judicial records filed with this court."). However, as detailed above, Plaintiffs have already moved to de-designate as confidential the same exact materials that the Proposed Intervenors also seek to make public. In fact, Plaintiffs' recently filed response to Defendants' objection [ECF 280] specifically references and incorporates arguments raised by the Proposed Intervenors. *See, e.g.*, Pls' Response at 3 (arguing that "Plaintiffs *and the potential intervenors* stressed the following points which remain unrefuted" (and proceeding to discuss points raised in the Proposed Intervenors' prior motion to intervene)) (emphasis added); at 4 ("Plaintiffs' July brief (ECF 197) *and the briefs of the potential intervenors* (ECF 202-1) provided substantial evidence and argument . . . .") (emphasis added).

Because the Plaintiffs are already zealously advocating to obtain precisely the same relief requested by the Proposed Intervenors (indeed, the issue is fully briefed and ripe for resolution), it is not appropriate to allow the Proposed Intervenors to intervene. Permissive intervention is inappropriate in cases, like this one, where an existing party *is already seeking the same relief as the Proposed Intervenor*. *Stuart*, 706 F.3d at 355. The plaintiffs in *Stuart*, an action brought by

providers of abortion services against North Carolina state officials, alleged that North Carolina's abortion law violated the First and Fourteenth Amendment rights of physicians and patients. *Id.* at 348. A group of pro-life medical professionals, women who previously had abortions, and pregnancy counseling centers moved to intervene in that case for purposes of defending the statute. *Id.* The district court denied their motion to intervene, and the Fourth Circuit affirmed that ruling, because *the movants had the same objective* as the defendants in the case, who were already working zealously to defend the statute. *Id.* at 355. The Fourth Circuit concluded as follows:

> In this case, the district court noted that "[a]dding three groups of intervenors would necessarily complicate the discovery process and consume additional resources of the court and the parties." J.A. 608. The court further reasoned that permitting intervention would likely "result in undue delay in adjudication of the merits, without a corresponding benefit to existing litigants, the courts, or the process" because "the existing [d]efendants are zealously pursuing the same ultimate objectives" as the appellants. *Id.* The court denied permissive intervention for that reason, and we find no error in its ruling.

Id.

Here, Plaintiffs are already "zealously pursuing the same ultimate objectives," to de-designate as "CONFIDENTIAL" and unseal the exact materials that the Proposed Intervenors seek to make public. The Proposed Intervenors do not suggest that the briefing already submitted by Plaintiffs is in any way inadequate or incomplete. Nor could they. Plaintiffs' briefing specifically addresses both the First Amendment and common law arguments for public access to the confidential materials—the same arguments that the Proposed Intervenors have raised. Moreover, Plaintiffs cite directly to the Proposed Intervenors' prior filing in their recent response brief [ECF 280]. As in *Stuart*, granting the Motion to Intervene here would only serve to delay and complicate these proceedings, and increase the burdens on the Court and the parties, without adding any benefit to the parties or to the process of resolving the pending sealing motions. Other courts agree. *See, e.g.*, *Hopwood v. State of Tex.*, 21 F.3d 603, 606 (5th Cir. 1994) (affirming district

court's denial of civil rights organizations' motion to intervene in action challenging affirmative action policies where "proposed intervenors' interests were adequately being represented by the defendants in the case"); *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) (affirming denial of motion to intervene by association of Texas counties, where their interests were adequately represented by the defendant); *Lee v. State of Or.*, 891 F. Supp. 1421, 1427 (D. Or. 1995) (denying motion to intervene where the movants' interests were "adequately covered by other named defendants," rendering intervention "unnecessary.")[3]

The Proposed Intervenors contend that third parties are routinely permitted to intervene to challenge the sealing of court documents. *See* ECF 282-1 at 6; ECF 283-1 at 8. However, none of the cases they cite involved an existing party who had already properly moved for (and fully briefed) *the exact same relief sought by the Proposed Intervenor*.[4]

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[3] Even if it could be deemed an error to deny the Motions to Intervene—which it cannot—"at least two circuits have indicated that a failure to permit intervention can be considered harmless if the position of the petitioner has been fully considered by the court." *In re Associated Press*, 162 F.3d 503, 508–09 (7th Cir. 1998) (citing *In re Grand Jury Proceedings in the Matter of Freeman*, 708 F.2d 1571, 1575 (11th Cir.1983) (holding that district court's denial of motion to intervene was harmless error because the merits of the proposed intervenor's claim were eventually considered on appeal); *United States v. Preate*, 91 F.3d 10, 12 n. 1 (3d Cir. 1996) (noting that, despite district court's denial of motion to intervene, the press was "effectively" permitted to intervene to present its claims)).

[4] The Class Plaintiffs in *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 84185 (N.D. Ill. 1996), cited by the Proposed Intervenors, had moved for the same relief—declassifying documents—that the intervenors in that case sought. In that case, however, the court found that Class Plaintiffs' motion was fatally flawed and improperly filed. *See id.* at *2 ("At the outset we must state that we are troubled by the form of the Class' motion, as the Class presents us with an over-inclusive list of documents that it claims need declassifying . . . . Class Plaintiffs' request that we 'declassify' documents never classified as confidential is irresponsible and accentuates the 'shotgun' nature of their motion. While we share in the Class' concerns regarding unfettered use of confidentiality designations, we agree with the defendants that the Class Plaintiffs' failure to follow the agreed-upon declassification procedures provided in Revised Pretrial Order No. 4 renders their motion improper."). Accordingly, unlike the Plaintiffs here, the Class Plaintiffs in ***In re Brand Name Prescription Drugs Antitrust Litig.*** were ***not*** already zealously representing the interests of the movant-intervenors.

The cases cited by the Proposed Intervenors are distinguishable on other grounds as well. The case of *In re Bridgestone/Firestone, Inc., ATX A1X II and Wilderness Tires Prods. Liab. Litig.*, 198 F.R.D. 654, 656-57 (S.D. Ind. 2001) perfectly illustrates why intervention is *not* appropriate here. The court in that case granted the movants' motion to intervene to argue for unsealing certain court documents because none of the existing parties made that argument. *Id*. The Court observed that it was "faced with an essentially nonadversarial decision-making process" and that the intervenors "have the opportunity to fill this gap in advocacy." *Id*. at 657. Here, in contrast, there is no "gap in advocacy." Plaintiffs have zealously sought to de-designate and unseal the same materials to which Proposed Intervenors seek access here. The parties have fully briefed the issues twice now—and the Plaintiffs have explicitly incorporated Proposed Intervenors' arguments. The matter is fully briefed and ripe for a ruling.

The Public Defender's citation to *Doe v. Public Citizen*, 749 F.3d 246, 275 (4th Cir. 2014) is unavailing. The Fourth Circuit in *Public Citizen* did not rule on the merits of a motion to intervene. Rather, the question before the Fourth Circuit was whether the filing of a notice of appeal deprived the district court of authority to entertain a motion to intervene (the court held that it did). *Id*. *In re Knight Pub. Co*., 743 F.2d 231, 236 (4th Cir. 1984) is similarly inapplicable. As in *Doe*, the Fourth Circuit did not rule on a motion to intervene, but rather on a petition for a writ of mandamus filed by a newspaper to force a district judge to open court proceedings to the public. *Id*. The Court ultimately declined to issue the writ. *Id*.[5]

[5] The case of *Doe v. Marsalis*, 202 F.R.D. 233, 235-36 (N.D. Ill. 2001), also cited by the Proposed Intervenors, involved a motion to intervene by a newspaper company *after that case had settled*. As with several of the other cases cited by the Proposed Intervenors, the parties to the litigation were not seeking the same relief as the proposed intervenors. In fact, the parties were no longer seeking relief at all. In addition, allowing a third-party to intervene in a case after the matter has already concluded does not carry the same risk of delay, confusion, and prejudice to the parties as allowing intervention during discovery in an active matter, as the proposed intervenors seek here.

The Proposed Intervenors' interests with respect to the Graham Report are not sufficiently unique from those of the Plaintiffs to justify granting the motions to intervene—indeed, they are perfectly aligned. The Proposed Intervenors all contend that they seek different relief than the Plaintiffs because Plaintiffs have proposed releasing the Graham Report with officer names redacted, whereas the Proposed Intervenors argue that the *entire report* (unredacted) should be made publicly available. *See* ECF 282-1 at 8; ECF 283-1 at 10. However, that does not accurately reflect the Plaintiffs' position. Plaintiffs *have not* agreed that the names of the officers should remain redacted. Instead, Plaintiffs, like the Proposed Intervenors, seek to unseal the entire report. The redaction of officer names is a fallback position Plaintiffs have taken in case the Court holds the information is protected from disclosure. In any event, the same legal arguments apply and the Court will determine (based on the extensive briefing now filed) whether, as Plaintiffs have argued, redaction of officers' names alone affords sufficient protection for information protected by Section 4-311 of the MPIA. Granting the Proposed Intervenors the status of intervenor-parties in the case will not aid the Court in resolving the dispute.

The Public Defender further argues that its *interests* here are unique because of, e.g., its engagement with the community on "matters of police reform," including a task force to which the head of its Prince George's County office was recently appointed, and interest in uncovering possible *Brady* material that was not previously disclosed (again, which is based on pure speculation with no identified nexus between any specific prosecution and information in the Graham Report that is expected to constitute material exculpatory information in case). ECF 282-1 at 6-8. While it may have different and unique reasons for seeking access to the Graham Report (as compared to the Plaintiffs or the other Proposed Intervenors), the Public Defender's *arguments* for unsealing the Graham Report and the relief sought are the same. Accordingly, its positions are

already being fully advanced by Plaintiffs in these proceedings and intervention is not warranted. Indeed, the Plaintiffs specifically noted the Public Defender's interest in unsealing the Graham Report in its recently filed response brief [ECF 280].

III. Intervention would only serve to delay and over-complicate these proceedings and prejudice Defendants and non-parties.

When ruling on a motion for permissive intervention, courts "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see also Stuart*, 706 F.3d at 350 ("Additional parties can complicate routine scheduling orders, prolong and increase the burdens of discovery and motion practice, thwart settlement, and delay trial."). Earlier this year, this Court observed in *Am. Coll. of Obstetricians & Gynecologists*, 2020 WL 3184024 at *6, that "[w]hen considering whether to permit intervention, this Court may consider factors such as concerns about judicial economy." In that case, the Court denied a motion to intervene where allowing the movants to intervene as parties would unfairly complicate the proceedings, consume court resources, and cause unrelated issues to be injected into the underlying dispute. *Id*. at *6-7.

Allowing the Proposed Intervenors to intervene in this case—even for the limited purpose of securing public access to the Graham Report and related exhibits—would unnecessarily consume the Court's time and resources and further delay these proceedings. Moreover, as in *Am. Coll. of Obstetricians & Gynecologists*, allowing the Proposed Intervenors to intervene would prejudice the Defendants. Anytime issues of confidentiality arose in the future, the meet and confer process would be unnecessarily complicated and Defendants would undoubtedly be required, as in this instance, to respond to more briefing than it would otherwise (even though, as demonstrated here, Plaintiffs are already vigorously pursuing the same relief).

Additionally, the Proposed Intervenors have made clear their intention to use the protected information – activities of *non-parties* – for publicity, seeking to inject the national conversation on police accountability into this employment litigation. *See*, e.g., ECF 283-1 at 1 ("While recent events have refocused the national spotlight on police misconduct and systemic discrimination nationwide, such misconduct and discrimination are the lived experiences of many minority police officers and residents in Prince George's County."); at 2 (arguing that Defendants have "deprive[d] the public of essential information regarding PGPD's discriminatory conduct at a time when the disparate impacts of police conduct on minority officers and communities nationwide are under necessary and appropriate public scrutiny"); at 14 ("At this moment, there is perhaps no greater public concern than the operation of our police departments, and even prior to the recent protests advocating for racial justice and police reform . . . ."). Allowing that to occur would compromise Defendants' ability to have a fair trial on the specific employment-related claims at issue, without this case being made into a referendum on policing in general.

Finally, it cannot be forgotten that the information the Proposed Intervenors seeks to splash across the headlines relates not only to the accused—many of whom were cleared of any wrongdoing—but also to witnesses and purported victims. The innocent, the witnesses, and the purported victims would be subjected to unnecessary public scrutiny, doxing, ridicule, and, perhaps harm if information contained in the Graham Report and exhibits thereto was made public. The fact that the contentions in the Graham Report have not yet been tested through cross-examination and contain opinion-based descriptions of officer-involved incidents with which Defendants do not agree further demonstrates the potential prejudice and risk to non-parties if the unredacted report were made publicly available. The potential prejudice to these non-parties is compelling and should not be ignored.

Pursuant to this Court's Order following the August 19, 2020 case management conference, the Proposed Intervenors have now had the opportunity to file what is essentially an amicus brief on the issue of sealing. No further involvement on their part is appropriate or needed to advance their cause. The issue of unsealing the Graham Report has now been fully briefed and is ripe for a ruling. There is no need for them to be parties to the case.

IV. First Amendment and common law rights of access to court records are outweighed here by the State of Maryland's and individual police officers', witnesses', and accusers' compelling interests in keeping this information confidential.

Defendants do not dispute that members of the public have fundamental First Amendment and common law rights of access to judicial records. However, in this case, those rights are clearly and heavily outweighed by a compelling interest in individual privacy. The Proposed Intervenors seem to misunderstand the gravity of this interest, stating for example that "[a]t most, the PGPD and individual officers may be embarrassed by the public disclosure of misdeeds" and that "public embarrassment is not a legitimate basis for hiding evidence of police misconduct from the public." ECF 283-1 at 15; *see also* ECF 282-1 at 21. But embarrassment is not at all the concern here. The individuals whose confidential information is at issue—including individuals cleared of wrongdoing, witnesses, and the accusers—have a substantial right not to have their information dragged through the media, a right the Maryland legislature deemed so compelling that it is codified in the Maryland Code.

Under the Maryland Public Information Act, Md. Code Ann., General Provisions § 4-311, "personnel records" are exempt from disclosure. The Maryland Court of Appeals has defined "personnel records" as anything "relating to hiring, discipline, promotion, dismissal, or any matter involving an employee's status." *Montgomery Cty. Maryland v. Shropshire*, 420 Md. 362, 378, 23 A.3d 205, 215 (2011). This Court has adopted that same definition in *Fether v. Frederick Cty.*,

Md., Case No. CIV. CCB-12-1674, 2014 WL 1123386, at *5-8 (D. Md. Mar. 19, 2014). Here, the IAD records and other employment records (such as EEO and EEOC complaints) cited and discussed in the revised Graham Report clearly relate to discipline, promotion, and employee status. Accordingly, they fall squarely within the protections of Section 4-311, and the statements in the revised Graham Report that are pulled directly from such records should remain redacted. Again, these records do not just relate to the accused, but also pertain to witnesses and accusers.

The existence of a state statute specifically protecting police personnel records from public disclosure is certainly a "compelling" reason not to make those records, or information derived therefrom, publicly available. The Maryland legislature found—and codified—that there is a compelling interest in ensuring the privacy of individual employment information. *See Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 190 Md. App. 359, 368, 988 A.2d 1075, 1080 (2010), aff'd, 430 Md. 179, 59 A.3d 1037 (2013) ("The personnel record exemption is 'intended to address the reasonable expectation of privacy that a person in interest has' in his or her personnel records.") (quoting *Univ. Sys. of Md. v. Balt. Sun Co.*, 381 Md. 79, 99–100, 847 A.2d 427 (2004)); *Baltimore City Police Dep't v. State*, 158 Md. App. 274, 282, 857 A.2d 148, 153 (2004) ("The purpose of treating personnel records as confidential is 'to preserve the privacy of personal information about a public employee that is accumulated during his or her employment.' ") (quoting 78 Op. Att'y Gen. 291, 293 (1993)). Not a single case cited by the Proposed Intervenors has held that information specifically protected from public disclosure under Section 4-311 of the MPIA (or a similar statute) should be made publicly available on the docket.

The fact that Plaintiffs' claims in this action do not arise under the MPIA (*see* ECF 283-1 at 17, objecting that the MPIA "is not at issue in this case") is inapposite. The terms of Section 4-311 do not limit its application to cases where the MPIA is "at issue." Regardless of the subject

matter of the case at bar, Section 4-311 serves as strong evidence of the State of Maryland's compelling interest in keeping personnel records private. The plain language of this statute is clear—personnel records are not for public consumption, even under the terms of the MPIA, which is otherwise liberally construed in favor of public disclosure. Moreover, this Court has specifically commented in *Johnson v. Baltimore City Police Dep't*, No. CIV.A. ELH-12-2519, 2013 WL 497868, at *3 (D. Md. Feb. 7, 2013) "that the State of Maryland's governmental interest in the confidentiality of 'personnel records,' embodied in [Section 4-311] is sufficiently compelling to justify a narrowly tailored sealing request, so as to overcome the First Amendment public right of access."[6]

None of the cases cited by the Proposed Intervenors (for the proposition that state records laws *must give way* to public access rights) dealt with Section 4-311 of the MPIA—whose clear terms this Court has previously acknowledged in *Johnson* (although assuming without deciding) do represent a compelling interest that requires withholding information from public view. The cases cited by Proposed Intervenors are all distinguishable. The Southern District of Iowa in *United States v. Story Cty.*, 28 F. Supp. 3d 861, 877 (S.D. Iowa 2014) specifically concluded its opinion by stating that the "[p]ublic access to [the records at issue] is a question for another day and another forum." The matter before the Court was whether certain email records were properly

[6] The Court in *Johnson* ultimately held that redacting officers' names from personnel records was sufficient, explaining that "once a record has been appropriately redacted to remove information that could connect a record to a particular 'individual' employee, the redacted record is no longer a 'personnel record of an individual.'" *Johnson*, 2013 WL 497868 at *3. However, in this case, given the lengthy and detailed discussions of officer files and employment/disciplinary events which are frequently intertwined in the Graham Report with other information that is publicly available, redaction of names alone would not be sufficient to render the information "no longer" a personnel record. *See, e.g., Glass v. Anne Arundel Cty.*, 453 Md. 201, 244, 160 A.3d 658, 683 (2017) (police department was entitled to withhold personnel records from disclosure where, even with redactions, records were still "related to a specific identified individual.")

considered property of the United States or property of a local governmental entity (Story County). *Id*. The Court made clear "[t]his is not a case in which the United States is seeking to restrict any right of Story County to disclose its own records but is instead a case in which the United States is seeking to enforce its own property rights to the subject emails." *Id*. Here, there is no claim that the United States, this Court, or any other federal-level entity has a property interest in the personnel files at issue. Accordingly, the *Story County* case is inapplicable.

Beads v. Maryland State Police, 2015 WL 1757368 at *3 (D. Md. Apr. 16, 2015), also cited by the Proposed Intervenors, is likewise distinguishable. *Beads* addressed whether MPIA Section 4-311 protected employment files from *discovery – not public disclosure.* The Court held that the MPIA did not create a "privilege" per se under federal law. The Court did not rule on whether the materials could be made publicly available on the Court's docket. As noted above, here the Defendants not only responded to Plaintiffs' document requests but provided many volumes of internal files without redaction. The issue is whether the Plaintiffs can now make these files, and the private information contained in them, publicly available. This Court in *Fether,* 2014 WL 1123386, at *5-8 has specifically ruled that, although they are discoverable, police internal affairs records are confidential in their entirety. *Id*. at *7. Here, as in *Fether*, the Department records warrant protection and a party should not be permitted to circumvent that protection simply by filing the information.

Matter of N.Y. Times Co., 828 F.2d 110, 115 (2d Cir. 1987); *Stone v. University of Maryland*, 855 F.2d 178, 181 (4th Cir. 1988), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604, 610–11 (1982),[7] cited by the Public Defender, are likewise inapplicable. None of

[7] The Supreme Court's decision in *Globe Newspaper* is completely unrelated to the issue here. There, the Court held that a state statute barring public attendance from certain proceedings was unconstitutional. Here, no party has challenged the constitutionality of Section 4-311 of the MPIA.

those cases involved Section 4-311 of the MPIA. They are also distinguishable for other reasons. The Second Circuit in *N.Y. Times*, while declining to order that materials remain sealed solely on the basis of a federal wiretap statute providing for that information to remain private, did hold (as Defendants argue here) that the statute was strong evidence that the government had a *compelling interest in the privacy of that material*. The court remanded the case for further analysis by the district court.

The Fourth Circuit in *Stone did not* hold that the public's right of access must trump a state statute. On the contrary, the court specifically held that a Maryland statute providing that "proceedings, records, and files of a medical review committee are not discoverable or admissible in civil actions arising out of matters reviewed by the committee" *should have been seriously considered* by the district court in determining whether court filings containing those materials should be sealed. The Fourth Circuit remanded the case for further analysis by the district court. *Stone*, 855 F.2d at 181. For all the reasons set forth herein, and in Defendants' prior briefing [ECF 196, 209, 228, 276, 298], the redacted information in the Graham Report and exhibits thereto should not be made publicly available, pursuant to the clear terms of the MPIA and federal caselaw.

V. There is no basis to modify the Confidentiality Order in this action to permit the Office of the State's Attorney for Prince George's County "to obtain, review, and use" materials designated by a party as CONFIDENTIAL under that Order.

The State's Attorney has separately moved, not to intervene in this action, but to amend the Confidentiality Order to allow the Office of the State's Attorney for Prince George's County "to obtain, review, and use" materials designated by a party as CONFIDENTIAL under that Order. *See* ECF No. 305-1. While the State's Attorney vaguely contends that it "is unable to comply with

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The dispute is whether the strong interest in privacy it evidences is sufficient to justify redacting private information from the Graham Report. Defendants maintain that it certainly is.

its discovery requirements and obligations, without the modification of the Confidentiality Order permitting disclosure of unredacted copies of the Graham Reports" (including its obligations "to provide criminal defendants with exculpatory and/or impeachment information concerning police officers who are involved in their respective cases"), *id*. at 2, it identifies no "respective cases" that have triggered this obligation (relying instead on its general desire to explore the Graham Report in case some information may at some time be exculpatory to some hypothetical prosecution) and cites absolutely no authority establishing that it has any right (as a non-party) to access materials properly designated as Confidential by parties in federal court litigation.

The State's Attorney is not a party to this action and has cited no authority establishing that it has standing to now challenge the Confidentiality Order agreed to by the parties and approved by the Court in this action, and Defendants are aware of none. Even if it is entitled to seek modification of the Confidentiality Order for "good cause," the State's Attorney has failed to demonstrate "good cause" to modify the Confidentiality Order here.

Defendants do not dispute that the State's Attorney is obligated under the United States Supreme Court's decisions in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Giglio v. United States*, 405 U.S. 150, 154 (1972) to disclose to criminal defendants material exculpatory and impeachment evidence as part of the constitutional guarantee to a fair trial. However, that duty does not require that the State's Attorney be granted access to all confidential material in a federal court employment dispute that happens to involve records related to Prince George's County police officers—or to the full unredacted text of an expert report filed in that action, which is a fundamentally adversarial document containing the opinion-based descriptions of Plaintiffs' untested expert (with which Defendants do not agree) regarding material obtained from the Department's personnel files. *Brady* and Giglio do not grant to prosecutors an absolute right to

review all internal police employment records on the chance that some material may be contained therein that constitutes exculpatory or impeachment material in one or more cases brought by that prosecutor's office.

The State's Attorney has managed to satisfy its constitutional obligation to identify and produce exculpatory material since long before the commencement of this case, through the regular channels existing between that office and the Department. In the standard course, when a specific case is brought against a criminal defendant, the Department provides to the State's Attorney, upon request, those Department materials that could be *Brady* or *Giglio* material as to that active prosecution, and materials that must be disclosed under *Brady* and *Giglio* are provided to the criminal defendant.

The State's Attorney does not argue there is any specific criminal action now actively pending which requires disclosure of information contained in the Graham Report, or that (if such a case is pending) it has been unable to obtain *Brady* and *Giglio* material from the Department through the usual process. Without an active criminal case, pursuant to which *Brady* and *Giglio* obligations attach, the State's Attorney is simply not entitled to the Confidential material contained in the Graham Report. *See Brady*, 373 U.S. at 87; *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (Only evidence and that is "material" and "favorable" to a specific accused is required to be disclosed to the defense under *Brady*). Additionally, the Department has already provided to the State's Attorney the IAPro cards for all officers named in the Graham Report (active and retired). The IAPro cards contain more than enough information for the State's Attorney to determine whether any of those officers' files actually contain *Brady* or *Giglio* material relevant to an active prosecution and, if so, to then request those materials from the Department.

All the factors that courts consider in ruling on a motion to modify a protective order weigh against granting the State's Attorney's motion here. First, the State's Attorney has not identified a single specific active criminal case for which information in the Graham Report allegedly constitute *Brady* or *Giglio* material. This failure suggests that the State's Attorney's real motivation for seeking access to the Graham Report is to launch its own investigation into the facts contained therein, to scrutinize the conduct of the officers named in the Graham Report, and to re-litigate all of these issues in the public domain in the context of the ongoing national conversation about police practices. Indeed, the Prince George's County State's Attorney, Aisha N. Braveboy, stated in her June 24, 2020 letter to County Executive Alsobrooks that her office sought an unredacted copy of the Graham Report in order to conduct its own investigation into officers named in that report—with no reference to *Brady* or *Giglio* obligations being the motivation. [Ex. 1 to ECF 305-1]; *see also* Hannah Gaskill, *Prince George's Public Defenders Pressing for Access to Police Misconduct Records*, Maryland Matters (September 18, 2020), https://www.marylandmatters.org/2020/09/18/prince-georges-public-defenders-pressing-for-access-to-police-misconduct-records/ (reporting that State's Attorney Braveboy indicated a desire to obtain the unredacted contents of the Graham Report in order to "conduct her own investigation.").

Second, even if the Graham Report does contain information that is properly considered "material" exculpatory or impeachment material under *Brady* and *Giglio* as to one or more active prosecutions, the State's Attorney does have an "alternative means available to acquire the information." *Minogue*, 2012 WL 4105312, at *4. Specifically, the State's Attorney can request the relevant information from the Department as it does routinely and has done for years prior to this action. While the State's Attorney is obligated to exercise "due diligence" to uncover possible

exculpatory material, the State's Attorney does not allege that the Graham Report contains any *Brady* or *Giglio* material that is not in the possession of the Department itself and available through the usual channels.. As County Executive Alsobrooks stated in her July 7, 2020 letter to State's Attorney Braveboy with respect to this issue, "the Police Department remains responsible for providing *Brady* and *Giglio* for every case that they present to State's Attorney Office [sic] for prosecution. This can remain the practice by which this type of information is provided.") [ECF No. 305-1 at 15 (Exhibit 2)].

The "type of protective order at issue, and the type of materials or documents sought here," *Minogue*, 2012 WL 4105312, at *4, further weigh in favor of denying the State's Attorney's motion. The protective order in this case has been in place for over a year, and discovery has proceeded under its framework (including extensive document discovery). Indeed, despite being entitled under the MPIA and federal case law to produce all officer personnel files with officer names redacted, Defendants produced unredacted versions in specific reliance on the terms of the Confidentiality Order, which provides that Confidential information can only be viewed and used by the parties to this action in connection with this case.

For the reasons set forth above, the State of Maryland, individual police officers, and the complainants and witnesses involved in individual officer complaints have a strong interest in keeping the information contained in these records (and incorporated into the Graham Report) private. Especially given the alternative means for the State's Attorney to obtain the information it seeks (via the usual process on a case-by-case basis where there is an active prosecution), there is no justification for setting aside those compelling interests and granting the State's Attorney access to all Confidential information in this case. For all of these reasons, there is not good cause to modify the Confidentiality Order, and the State's Attorney's motion should be denied.

CONCLUSION

For these reasons, the Motions to Intervene and for Access to Records [ECF Nos. 282, 283, and 305] should all be denied in their entirety.[8]

Dated: October 21, 2020

Respectfully submitted,

/s/ Vincent E. Verrocchio

Craig Thompson, Bar No. 26201
Todd J. Horn, Bar No. 06849
Christine E. White, Bar No. 19185
Venable LLP
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
Tel.: (410) 244-7400
Fax: (410) 244-7742
klthompson@venable.com
tjhorn@venable.com
cewhite@venable.com

Kurt J. Fischer, Bar No. 03300
Matthew R. Alsip, Bar No. 28002
Christine C. Carey, Bar No. 29428
Venable LLP
210 W. Pennsylvania Avenue, Suite 500
Towson, Maryland 21204
Tel: (410) 494-6200
Fax: (410) 821-0147
kjfischer@venable.com
mralsip@venable.com
ccarey@venable.com

Robert G. Ames, Bar No. 03372
Courtney Sullivan (admitted *pro hac vice*)
Vincent E. Verrocchio, Bar No. 18407
Lauren Stocks-Smith, Bar No. 20784
Robin Lynn Stevenson Burroughs, Bar No. 20507
Venable LLP
600 Massachusetts Ave., N.W.
Washington, D.C. 20001
Tel.: (202) 344-4000

[8] The Public Defender has further requested that any hearing on Prince George's County's Motion in Limine be held in open court. *See* ECF 282-1 at 28. Because this Court has since ruled on the Motion in Limine, that request is now moot.

Fax: (202) 344-8300
rgames@venable.com
casullivan@venable.com
veverrocchio@venable.com
lrstocks-smith@venable.com
rsburroughs@venable.com

Doreen Martin (admitted *pro hac vice*)
Venable LLP
Rockefeller Center
1270 Avenue of the Americas 24th Fl.
New York, NY 10020
Tel.: (212) 983-1179
Fax: (212) 307-5598
dsmartin@venable.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2020, a copy of the foregoing Defendants' Consolidated Objection to Motions to Intervene and for Access to Records [ECF Nos. 282, 283, and 305] was served via the Court's CM/ECF system on all counsel of record.

/s/ William B. King
William B. King