IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MARY SMITH, as Administrator of the ESTATE OF MARCUS DEON SMITH, deceased,	)	
Plaintiff,	)	
v.	)	1:19CV386
CITY OF GREENSBORO, et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court upon Defendants' "Joint Motion for Order to Show Cause or for Other Relief with Respect to Potential Violations of Protective Order and Local Rules" (Docket Entry 101) ("Show-Cause Motion") and their Joint Motion to Seal (Docket Entry 104) ("Seal Motion"). Plaintiff has filed responses in opposition to both motions (Docket Entries 112, 121, 140). Defendants have filed supplements to both motions (Docket Entries 108, and 114), as well as replies to Plaintiff's opposition (Docket Entries 115 and 130). For the following reasons, Defendants' joint motions are denied.

When considering whether to allow parties to keep information produced in discovery confidential, a court must remember that "the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings." *Doe v. Public Citizen, et al.*, 749 F.3d 246, 265 (4th Cir. 2014). Public right of access to judicial proceedings is essential to a fair and just judicial process: "[f]irst the right protects the public's ability to oversee and monitor the workings of the Judicial Branch . . . . Second, public access to the

courts promotes the institutional integrity of the Judicial Branch." *Id.* at 263 (citations omitted). "The interest of the public and press in access to civil proceedings is at its apex when the government is a party to the litigation. Indeed, the public has a strong interest in monitoring not only functions of the courts but also the positions that its elected officials and government agencies take in litigation." *Id.* at 271. A court must take care not to impede public access without good reason.[1]

Nonetheless, the public's right of access to discovery materials is circumscribed because "pretrial depositions and interrogatories are not public components of a civil trial." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Because discovery is often wide-ranging, "[t]here is an opportunity . . . for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy." *Id.* at 35. To protect information that should be kept confidential because of statutory requirements or because it is highly sensitive, litigants often seek the entry of a protective order.

On July 16, 2020, with good cause shown and pursuant to Federal Rule of Civil Procedure 26(c), the Court entered a Protective Order (Docket Entry 79) ("PO"), which was drafted and agreed upon by the parties. The Court entered this order to allow the parties to conduct discovery and protect information that is generally considered confidential or that is protected under state law. The PO states that certain discovery items:

[1] "The common-law presumptive right of access extends to all judicial documents and records, and the presumption can be rebutted only by showing that 'countervailing interests heavily outweigh the public interests in access." *Public Citizen*, 749 F.3d at 265-66 (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).

> may contain personnel information, criminal investigation information, body-worn camera footage, or other information that Defendants may claim are both confidential and statutorily protected . . .; confidential medical information . . .; and/or other information that one or more parties may claim to be sensitive and confidential information related to individuals not parties to this action.

(*Id.* at 2, ¶ B.) The PO authorizes the parties to produce information that may otherwise be protected and allows each party to designate any information as "Confidential Information" or "Highly Confidential." (*Id.* at 2-3.) Each designation governs the use of confidential information and determines the people associated with each party to whom such information may be disclosed. (*Id.* at 6-7.)

Defendants claim that Plaintiff has directly violated the PO by releasing "Confidential Information" beyond the receiving parties allowed by the PO. Defendants assert that Plaintiff's attorneys have intended from the outset of the case to try it not in court but in "the public domain." (Docket Entry 102 at 2.) Defendants point to press conferences held and press releases issued by Plaintiff's attorneys (*id.* at 5), statements made by activists at city council meetings and in other venues (*id.* at 6-7), and articles written by journalists (*id.* at 7-8). To achieve these ends, Defendants argue, Plaintiff's attorneys have been releasing discovery material in violation of the PO and the North Carolina Rules of Professional Conduct, as adopted by this Court. (*Id.* at 16.)

More specifically, Defendants claim that the Plaintiff has released an expert report created by her own expert Dr. Kris Sperry to Lewis Pitts and Hester Petty, local activists who both showed copies of the report during a City Council meeting. (*Id.* at 10-11.) Additionally, they assert that Defendants have released deposition transcripts—including those of

Defendant Douglas Strader, Mayor Nancy Vaughan, Sergeant Matthew Stein, City Manager David Parrish, and former Police Chief Wayne Scott—to these activists and to local news reporters. (*Id.* at 14-15, 17; Docket Entry 108 at 2; Docket Entry 114 at 1.) Finally, Defendants argue that Plaintiff's attorneys have discussed the conclusions of Plaintiff's expert Scott Defoe with the press and public. (Docket Entry 108 at 3.) Plaintiff responds that her counsel has not violated the PO because it only prohibits disclosure of information marked "Confidential" or "Highly Confidential." (Docket Entry 121 at 13.)

The parties interpret the terms of the PO, to which they both consented,[2] in widely different ways. Defendants claim that the PO prohibits use or dissemination of "all documents and information produced in this litigation" for any purposes beyond the litigation itself. (Docket Entry 102 at 17.) They argue that Plaintiff's attorneys are using discovery information in their communications with the public and the press for purposes other than the litigation of the case. (*Id.*) Defendants cannot present direct evidence of the specific disclosures made or of "the full extent of the disclosure," but they point to circumstances that tend to suggest that Plaintiff's attorneys have violated the terms of paragraph ten of the PO. (*Id.* at 20.) Plaintiff argues that the PO only protects confidential information. (Docket Entry 121 at 13.)

Defendants read paragraph ten of the PO too broadly. The PO only limits the use of discovery information that is "not otherwise available to the parties":

[2] "When a party willingly accedes to the entry of a stipulated protective order, the Court will be hesitant to relieve that party of its obligations, particularly when the other party produced discovery in reliance on their agreement." *Parkway Gallery Furn., Inc., v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 267 (M.D.N.C. Aug. 17, 1988).

> All information or documents disclosed in discovery in this Litigation and *not otherwise available to the parties*, shall be used by the receiving party solely for the purposes of preparation for trial, pretrial proceedings and trial of this action and not in connection with any other litigation or judicial or regulatory proceeding or for any business, commercial, competitive, political, personal or other purpose until such time as the documents are filed publicly with the Court. Information or documents determined by the Court to be properly filed under seal will be subject to the Court's order to seal at that time.

(Docket Entry 79 at 8, ¶ 10 (emphasis added).) Defendants seek a blanket prohibition on the use of discovery materials, but the PO they agreed to is not actually that broad. If the information produced in discovery is available from another source, then paragraph ten will not prohibit its use. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984), The Supreme Court of the United States considered a protective order similar to the one in this case, which "prevent[ed] a party from disseminating only that information obtained through the use of the discovery process." The Court concluded that "the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." *Id.* at 34.

Plaintiff, in her responses to both motions, has demonstrated that the information her attorneys have shared with the public and press were available from sources other than the discovery designated as confidential by Defendants. Plaintiff has disseminated exhibits used in depositions or intended for use in depositions, but those exhibits, such as the autopsy report and public statements made by Mayor Vaughan, were available from public sources. Similarly, Plaintiff has released and discussed the reports of her own experts, but the PO allows a party to disseminate information produced by her own witnesses. (*See* Docket Entry 79 at 8-9, ¶ 13 and 14, ¶ 22.) Defendants have not shown that these reports contained

"Confidential Information" that was prohibited from release.

Paragraph thirteen of the PO requires depositions to remain "Confidential" for thirty days after the parties receive them *only* if, during the deposition, the defending party indicated that confidential information was imminent and so indicated. (*Id.* at 8-9, ¶ 13.) As far as the Court understands, this provision does not automatically subject all deposition transcripts to thirty-day confidentiality, but only those transcripts marked as confidential. Defendants allege that Plaintiff's attorneys disseminated exhibits from the Parrish deposition within the thirty-day window. (Docket Entry 114 at 2; Docket Entry 130 at 3.) Those exhibits were all from publicly available sources. Defendants allege similar violations of the thirty-day rule regarding the Vaughan, Scott, and Biffle deposition transcripts. (Docket Entry 130 at 4-5.) From the Court's review of the record, it appears that the transcripts shared were redacted transcripts with confidential information removed, as well as exhibits that were otherwise publicly available. So, assuming *arguendo* that Plaintiff's attorneys have violated the strict language of paragraph thirteen, they have not violated the spirit of the PO, which was intended to protect confidential information and prevent its dissemination.[3] *See Parkway*, 121 F.R.D. at 269 (finding sanctions unnecessary because the violation of the ambiguous protective order was minor, the party did not violate the stated purposes of the order, and there was not good cause for sanctions). Defendants have not shown that Plaintiff has disseminated any information marked as confidential and thus exposed protected material to public view.

"In order to determine whether sanctions should be imposed, the Court must first

[3] Because the facts as to which depositions were marked as "confidential" and the receipt dates of those transcripts are hazy, the Court does not find that there has been a violation of the PO.

examine the nature of the protective order, the degree of violation, if any, and whether public policy generally supports or disfavors enforcement of the protective order." *Id.* at 267. The purpose of the PO is "to expedite discovery and to protect statutorily protected and confidential information of parties and non-parties." (Docket Entry 79 at 1.) The PO does not expressly prohibit a party from speaking to the press or disseminating public information not designated as confidential. In a case involving a government and its agents, the public's access to judicial materials is essential to fulfill the public's role as a guardian of both its judicial system and its elected officials. This Court did not enter the PO to stifle that role, and it will not punish Plaintiff for responding to the narrative originally put forth by Defendants from the date of Mr. Smith's death.[4] The parties would do well to focus on completing the litigation before them, rather than making distracting and unwarranted accusations against each other.

The Court finds no violation of the PO that warrants sanctions or further investigation. Furthermore, the Court has not seen sufficient evidence to order a hearing to determine whether Plaintiff's attorneys have violated North Carolina's Rules of Professional Conduct, as adopted by this Court in Local Rule 83.10e(b). The death of Mr. Smith has been a matter of public interest since well before Plaintiff filed suit in this Court. Both parties have made many statements and released information regarding this case to the public and press. Neither has brought any such statement to the Court that would "have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." N.C. Rules of

[4] *See* Docket Entry 112, Exhibits 1 and 2, for a publicly sourced accounting of Defendants' public statements about this matter, narrative of Mr. Smith's death, and public commentary regarding the litigation and potential settlement of the case.

Prof'l Conduct 3.6(a) (as adopted by M.D.N.C. LR 83.10e(b)).

Turning to the Seal Motion (Docket Entry 104), a district court in the Fourth Circuit must undergo a strict procedure to seal a document in the court record. In *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984), the court explained that a district court "has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests," but the court must presume that public access is the norm. Before sealing a record, a district court must "(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives." *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (citing *Knight*, 743 F.2d at 235-36.) In addition to the procedure required by the Fourth Circuit, the Court must also consider whether the parties have followed Local Rule 5.4 in their request for sealing.[5]

The Court sees no cause to seal all or any portion of Exhibit S to Docket Entry 102 because it contains no information properly considered to be confidential. Defendants claim that Plaintiff's attorneys included multiple references to confidential information and even confidential information itself in their April 23, 2021 letter to Defendants' counsel. (Docket Entry 104 at 1.) Based on the Court's review and the information provided by Plaintiff, however, all information included in that letter has come from public sources. (*See* Docket Entry 112, Exs. 1 and 2.) Defendants have essentially conceded that the email was marked

[5] Local Rule 5.4 warns that "sealing is disfavored," but allows parties to file a motion to seal specific documents. The rule guides the Court in following the procedure the Fourth Circuit set out in *Knight*. Defendants have complied with the local rule.

mistakenly and is not "Confidential Information." (*See* Docket Entries 124-1, 133 at 9-10, 140 at 1-2.) Because Plaintiff's letter designated as Exhibit S to Docket Entry 102 contains no confidential information and no information derived from confidential sources, there is no specific reason to seal the exhibit. Defendants' motion to seal is therefore denied.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendants' "Joint Motion for Order to Show Cause or for Other Relief with Respect to Potential Violations of Protective Order and Local Rules" (Docket Entry 101) is **DENIED.**

IT IS FURTHER ORDERED that Defendants' Joint Motion to Seal (Docket Entry 104) is **DENIED.**

Joe L. Webster
United States Magistrate Judge

August 2, 2021
Durham, North Carolina