IN THE CIRCUIT COURT FOR

MONTGOMERY COUNTY, MARYLAND

OFFICER JOHN DOE, et al., **Plaintiffs,** **v.** **MONTGOMERY COUNTY, MARYLAND,** **Defendant.**	Case No. C-15-CV-22-002523

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

Proposed intervenor Maryland Coalition for Justice and Police Accountability (the "Coalition") respectfully submits this Memorandum of Law in support of its motion to intervene as a defendant and to vacate the case sealing order in the above-captioned case for the threshold purpose of vindicating its and the public's constitutional and common law rights of access to court records and proceedings in this matter as well as to address the merits of the Plaintiffs' claims in this action.

BACKGROUND

This action is an effort by Plaintiff Fraternal Order of Police, Montgomery County, Lodge 35, Inc. ("FOP") to judicially eviscerate – in secret, no less – a democratically-enacted statewide legislative mandate expressly aimed at increasing transparency in the investigation and handling of police misconduct. The legislation, Anton's Law, established a new state policy that, but for narrow exceptions, it is in the public interest to permit access to records of investigations of police misconduct.

The Coalition is a large, diverse, statewide coalition of more than one hundred organizations united to demand impactful police reform.[1] As an organization made up of people harmed by police misconduct, local community organizations dedicated to restoring trust in police, and advocacy groups that came together to address Maryland's policing crisis, the Coalition's interests in the handling of this case cannot be overstated. Not only has the Coalition requested the same records that are at issue in this action, *see* Ex. A, but, as the driver of Anton's Law and as a representative of its Montgomery County members, the Coalition has a substantial interest in whether the County and its police department are complying with the spirit and the letter of the Maryland Public Information Act ("MPIA"), Md. Code, Gen. Prov. § 4-101 *et seq*. And the Coalition should also be permitted to intervene to challenge FOP's attempt to litigate these crucial matters of first impression under a shroud of secrecy.

Anton's Law

On April 10, 2021, overriding a gubernatorial veto, the Maryland General Assembly passed Anton's Law, also known as the *Maryland Police Accountability Act of 2021*, S.B. 178, 2021 Leg., 442nd Sess. (2021) (available at https://mgaleg.maryland.gov/2021RS/Chapters_noln/CH_62_sb0178e.pdf). Anton's Law was named in honor of Anton Black, an unarmed Black teenager who was killed in a police encounter on Maryland's Eastern Shore in 2018.[2] The law was the culmination of a five-year lobbying and public education effort, led by the Coalition and its constituent members, to convince the General Assembly to overturn the Court of Appeals'

[1]The Coalition includes individuals and family members who have been impacted by police violence, civil rights activists, religious leaders, legal experts, and advocates for a whole host of groups led by Black and Brown people, who together agree on specific reforms with the goal of improving police practices in Maryland. *See* Coalition, *Who We Are* (https://www mcjpa.org/who-we-are) (last accessed Oct. 4, 2022). The Coalition includes individuals and organizations whose primary focus is Montgomery County.

[2]*See Accountability for Police Killing Anton Black*, ACLU of Maryland (https://www.aclu-md.org/en/campaigns/accountability-police-killing-anton-black) (last accessed Oct. 10, 2022).

decision in *Dashiell v. Md. Dep't. of State Police*, 443 Md. 435 (2015), which held that all records of police department investigations into alleged officer misconduct were "personnel records" under the MPIA. Because the MPIA prohibits records custodians from releasing "personnel records" to the public, Md. Code, Gen. Prov. § 4-311, *Dashiell* had the effect of precluding the public from learning anything about whether and how Maryland police agencies were holding their officers to account, and it prohibited victims of police misconduct from learning anything about the investigation of their complaints and whether any discipline had been imposed on the officers.[3]

This was the precise experience of the Coalition's members. Convinced that this secrecy prevented all meaningful reform, police reform advocates, including many of the groups that eventually formed the Coalition, immediately began working to persuade legislators to amend the MPIA. After years of legislative inaction driven by the Fraternal Order of Police, FOP locals throughout the state (including Plaintiff in the present action), and the Maryland Chiefs of Police and Sheriffs Associations, the tides turned in 2021 when, faced with widespread public attention and outrage following the murder of George Floyd as well as public polling showing overwhelming public support for transparency in internal affairs investigations,[4] the General Assembly passed a series of significant police reform bills, including Anton's Law.

Anton's Law explicitly declares that "a record relating to an administrative or criminal investigation of misconduct by a police officer, including an internal affairs investigatory record, a hearing record, and records relating to a disciplinary decision," (the precise records at issue in

[3]Anton's Law also overturned *Montgomery Cnty. v. Shropshire*, 420 Md. 362 (2011), which held that records of unsustained internal affairs investigations were personnel records.

[4] *See* Joel Shannon, *USA TODAY poll: Americans want major police reform, more focus on serious crime*, USA Today (https://www.usatoday.com/story/news/nation/2020/06/29/us-police-reform-poll-finds-support-more-training-transparency/3259628001/) (last accessed Oct. 10, 2022).

this case) are, with one potentially relevant exception,[5] no longer "personnel records". Gen. Prov. § 4-311(c)(1). The legislation directs that these records be treated as "records of investigations", Gen. Prov. § 4-351(a)(4), subject to *discretionary* withholding ("*may* deny inspection") by a records custodian but *only* when inspection of the record would be "contrary to the public interest." Gen. Prov. § 4-343.

Having failed to achieve its objectives in the General Assembly, the FOP now seeks to accomplish the same thing through this litigation and continue a legacy of secrecy and unaccountability for police misconduct.

The County's Side Deal with the FOP

In January and February of 2022, FOP and Defendant Montgomery County, Maryland (the "County") executed a Memorandum of Agreement (the "Side Deal"), attached as Exhibit B, in which the County agreed to multiple union requests explicitly related to Anton's Law, each of which violates the MPIA. The Side Deal provides that "within two (2) business days of an MPIA request for a bargaining unit member's internal affairs file,[6] the Employer shall notify the

[5]Anton's Law has one potentially relevant exception, providing that records of "technical infractions" remain "personnel records" prohibited from disclosure. Gen. Prov. § 4-311(c)(2). However, the definition of "technical infraction," Gen. Prov. § 4-101(*l*), makes clear that this exception is also discretionary, with the same "public interest" standard that applies to records of investigations generally. Technical infractions are defined as

> a minor rule violation by an individual solely related to the enforcement of administrative rules that:
>
> (1) does not involve an interaction between a member of the public and the individual;
>
> (2) does not relate to the individual's investigative, enforcement, training, supervision, or reporting responsibilities; and
>
> (3) is not otherwise a matter of public concern.

Id. In other words, an infraction that meets the criteria of Gen. Prov. § 4-101(*l*)(1) and (2) can still be released if the custodian determines that it is a matter of public concern.

[6] Although the Side Deal is invalid because it flies in the face of Anton's Law, the Parties went even further than the improper Side Deal even purports to allow. The Side Deal applies to requests "for a bargaining unit member's internal affairs file." However, the County used the Side Deal to thwart the MPIA request at issue here, even though that request, as ultimately narrowed by the requestor, did not request Doe's entire "internal affairs file" but only the investigative findings for five separate complaint investigations. While those records may have been placed in an internal affairs file, they are not the whole file itself, which is what the Side Deal purports to address.

bargaining unit member and the Union of such request." But this provision directly conflicts with the explicit notice provision contained in Anton's Law itself, which says that "[a] custodian shall notify the [subject of a record of an internal investigation] . . . *when the record is inspected*[.]" Gen. Prov. § 4-351(e) (emphasis added). And a record is "inspected" when it is provided to the requestor, not when the request is made. The Side Deal also provides that once the responsive records have been compiled for release:

> at least ten (10) business days before the release, the Employer will provide the bargaining unit member and/or the Union with a copy of the final production. . . . Upon inspecting the material to be released, the bargaining unit member or the Union may notify the Employer of an objection and the intent to file a "reverse MPIA". The bargaining unit member and/or the Union shall file a "reverse MPIA" no later than ten (10) business days from receiving a copy of the final production. The Employer will then hold the file production until the action is ruled on.

These agreements conflict with multiple MPIA provisions. They violate the explicit notice provisions in Anton's Law applicable to release of internal affairs investigatory records. They violate the immediate production requirements of the MPIA. *Id.* ¶ 4-203(b)(1) ("[a] custodian who approves [a public records request] shall produce the public record immediately[.]"). And the agreement is improper because it erroneously assumes that the officer or union can utilize a "reverse PIA" action to assert any objection to release that they can dream up. But as the Attorney General's MPIA Manual points out, Maryland courts have limited such a cause of action to claims concerning mandatory withholding under the MPIA. Ofc. of the Attorney General, *Maryland Public Information Act Manual*, 17th ed., Ch. 3.H., p. 3-57 (2022) (available at https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf). The effect of this overreach can be seen in this case, where none of the claims asserted relate to information or records subject to mandatory withholding.

This Action

In or around June 2022, a member of the public submitted a MPIA request for records related to Plaintiff Officer John Doe. Compl. ¶ 11. Pursuant to the MPIA, as amended by Anton's Law, the County identified the investigation records that it intended to produce. However, based on the Side Deal, rather than provide those records to the requestor as the MPIA and Anton's Law require, Defendant instead notified the Plaintiffs and gave Plaintiffs a copy of the discoverable records. Defendant then continued to delay and withhold its production to the requestor to give the Plaintiffs an opportunity to file a lawsuit to further delay and attempt to thwart the legislatively-mandated records production. On July 5, 2022, consistent with the Side Deal, Plaintiffs filed this action seeking to prevent the release of the records. *Id*. ¶ 13.

On the afternoon of Thursday, August 11, 2022, Plaintiffs filed a consent motion for protective order and briefing schedule ("the Consent Motion"). Plaintiffs requested in the consent motion that the parties be permitted to brief the dispositive issues in this action entirely under seal and asked that any future hearing to determine disputed issues proceed in a manner "that protects the identity of the officer and the contents of the disputed materials[.]" Consent Mot. at 5. The following Tuesday morning, August 16, 2022, the Court granted the Plaintiffs' proposed order that they had submitted with the Consent Motion with only a minor modification.

Pursuant to the order, Plaintiffs filed a memorandum and exhibits on September 14, 2022 under seal, preventing all members of the public from accessing the briefing submitted to the Court.

ARGUMENT

I. The Coalition is entitled to intervene as a matter of right.

Maryland law establishes four requirements that a party moving for intervention as a matter of right must satisfy:

1. The application for intervention must be timely.

2. The applicant must have an interest in the subject matter of the action.

3. Disposition of the action in the applicant's absence would at least potentially impair the applicant's ability to protect its interest.

4. The applicant's interests must be inadequately represented by the existing parties.

See, e.g., Rule 2-214(a); *Env't Integrity Project v. Mirant Ash Mgmt., LLC*, 179 Md. App 179 (2010) (citing *Hartford Ins. Co. v. Birdsong*, 69 Md. App. 615 (1987)).

A. The Coalition's motion to intervene is timely.

In considering timeliness under Rule 2-214(a), Maryland courts consider all relevant circumstances, including the purpose of the intervention, the probability of prejudice to parties already in the case, the extent to which the proceedings have progressed, and the reason for any delay in seeking intervention. *See, e.g.*, *Md. Radiological Soc'y, Inc. v. Health Servs. Cost Rev. Comm'n*, 285 Md. 383 (1979). These factors point decisively in favor of intervention as of right.

The purpose of the Coalition's intervention is to contest the Protective Order and Briefing Order entered in this action on August 16, 2022 (the "Case Sealing Order") as well as the viability of Plaintiffs' claims in this suit, the merits of their arguments, and the legality of the Side Deal. The Court has not yet held a hearing as necessary to address the Case Sealing Order and has not in any way addressed the merits issues. Accordingly, the Coalition's purpose in intervening poses no problems of timeliness. *See Dep't of State Plan. v. Mayor and Council of Hagerstown*, 288

Md. 9, 17 (1980) (finding intervention timely when "no determinations had been made with respect to the merits of either appeal").

Similarly, the Coalition's intervention will not prejudice the parties already in this case. As noted above, this litigation is still in its initial stages, and all current parties will have ample opportunity to respond to any arguments that the Coalition may raise. Finally, the Coalition has not engaged in undue delay in requesting to intervene. Plaintiffs' Complaint was filed on July 5, 2022 and Defendant has not yet answered. The parties' Consent Motion set forth an agreed briefing schedule for the injunctive relief sought by Plaintiffs and briefing is not yet complete. The Coalition did not learn of the Consent Motion until after the Court had already granted the motion and sealed the action. The Coalition's request to intervene therefore cannot be considered untimely. *See Birdsong*, 69 Md. App. 615 (finding a motion to intervene timely when filed 17 days after motion for summary judgment and more than 8 months after filing of complaint).

B. The Coalition has a particularized interest in the subject matter.

The Coalition has submitted an MPIA request for the same records that are at issue in this action, *see* Ex. A, which the Plaintiffs dispute are subject to disclosure under Anton's Law. As a result, the Coalition has a particularized interest in the merits of this action because, among other reasons, the result of this suit will determine if the Coalition obtains the response owed to its MPIA request. *Duckworth v. Deane*, 393 Md. 524 (2006). In jurisdictions with similar public information laws, intervenors have shown sufficient interest to warrant intervention where, as here, they have filed information requests mirroring those at issue in the subject case. *See LaRouche v. FBI*, 677 F.2d 256 (2d Cir. 1982) (allowing intervention based on FOIA request to appeal an injunction enjoining the release of FBI files); *Am. Farm Bureau Fed'n v. U.S. Env't Prot. Agency*, No. 13–CV–01751 (ADM/TNL), 2013 WL 12142527 (D. Minn. Nov. 27, 2013) (permitting intervention where plaintiff seeks an injunction to prevent farm information from being released

under FOIA request because "significantly, the proposed intervenors have filed a request for the information at issue"); *State of Haw. Org. of Police Officers v. City of Honolulu*, 494 P.3d 1225 (Haw. 2021) (allowing a civil advocacy organization that had requested the documents at issue to intervene in the police union's action to seal documents under a reverse public information act action).

Beyond the Coalition's pending MPIA request, this case presents questions of first impression as to whether the FOP may, in a second bite at the apple,[7] undermine Anton's Law, the outcome of which might decide the future efficacy of Anton's Law and the transparency of police misconduct in Montgomery County. As the leader of the multi-year effort to pass Anton's law and as an organization dedicated to seeking police accountability through legislative change, the Coalition has a particularized interest in weighing in on these issues and is uniquely poised to do so.[8] Likewise, because the entire purpose of Anton's Law was to provide transparency in connection with police discipline, the Coalition, as its leading proponent, has a similar, unique interest in ensuring that the judicial resolution of the claims at issue in this litigation do not take place in secret.

C. The disposition of this action may affect the Coalition's ability to protect its interests.

Rule 2-214(a) requires only that disposition of the main action may *potentially* impair the intervenor's ability to protect its interests. *See, e.g.*, *Chapman v. Kamara*, 356 Md. 426, 443

[7] The FOP employs arguments in the Complaint that were expressly rejected by the Legislature when enacting Anton's Law. For example, opponents of Anton's Law argued (like Plaintiffs do so here) that release of records for unsustained complaints would violate an officer's privacy, but the legislature expressly rejected that argument and applied the law to *all* misconduct records.

[8] The Coalition's Montgomery County members also have a substantial interest in ensuring that the FOP and County are not improperly denying or delaying MPIA requests through an illegal side deal.

(1999). In this case, the threat to the Coalition's ability to protect its interests if denied intervention is clear and substantial.

As a threshold matter, the Coalition seeks to intervene to challenge the Case Sealing Order in order to protect its interest in access to courts and judicial records. Civil actions are "presumptively open" to the public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980); *see also Company Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014) ("It is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings."). That right has its origins in both the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny. *Baltimore Sun v. Colbert*, 323 Md. 290, 297-98 (1991) (discussing constitutional foundations to presumptive right of access); *Balt. Sun Co. v. Mayor of Balt.*, 359 Md. 653, 661-62 (2000) (discussing bedrock common law principles underlying rights of access). "The common law principle of openness is not limited to the trial itself but applies generally to court proceedings and documents." *Balt. Sun Co.*, 359 Md. at 661. This principle of openness has been recognized for centuries as "necessary so that truth maybe discovered in civil as well as criminal matters." *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (cleaned up).

Recognizing and duly protecting these weighty interests, courts routinely permit members of the public and the press to intervene in cases to challenge the sealing of judicial records. *See, e.g., Balt. Sun Co.*, 359 Md. at 661-62 (reversing trial court's denial of newspaper's motion to intervene because trial court violated its rights under the First Amendment by closing the courtroom and imposing the sealing order); *see also Pub. Citizen*, 749 F.3d at 263 ("the right of access is widely shared among the press and the general public alike, such that anyone who seeks and is denied access to judicial records sustains an injury"); *In re Knight Pub. Co.*, 743 F.2d 231,

235 (4th Cir. 1984) ("The public was entitled to . . . an opportunity to object to the request [for sealing] before the court made its decision."). These cases recognize that intervention is "the most appropriate procedural mechanism" for members of the public to vindicate their right to access court records. *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998).[9]

Further, having submitted an MPIA request for the records at issue, *see* Ex. A, the Coalition will be unable to protect its rights under the MPIA to that information if it is unable to intervene in this action. In addition, the Coalition disputes the validity of the Side Deal, and the results of this suit will determine if the Coalition obtains the response owed it for its MPIA request. The Coalition's interest in the subject matter of this action is therefore significant, direct, and plainly supports intervention.[10]

Finally, the Coalition has a direct stake in this matter as a public interest organization dedicated to transparency in police misconduct. The denial of the ability to participate in this action and obtain the records the Coalition has requested hampers its advocacy at both an individual and a systemic level. *See Pub. Citizen*, 749 F.3d at 264 ("Consumer Groups are public interest organizations that advocate directly on the issues to which the underlying litigation and the sealed materials relate. By seeking, and having been denied access to, documents they allege a right to inspect, Consumer Groups have a direct stake in having a concrete injury redressed."). That interest provides a sufficient basis for intervention here.

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[9] The Maryland Court of Appeals has repeatedly acknowledged that "intervention decisions under Rule 24 of the Federal Rules of Civil Procedure serve as a guide to interpreting the Maryland Intervention rule." *Coal. for Open Doors v. Annapolis Lodge No. 622*, 333 Md. 359, 370 n.11 (1994) (collecting cases).

[10] *Cf. Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962) (allowing companies to intervene to support the legality of a government regulation if the companies would suffer substantial injury if the regulation was struck down). Because the Maryland rule on intervention was modeled after its federal counterpart, Maryland courts consider federal decisions on these issues to be of considerable precedential value. *See, e.g., Md. Radiological Soc'y, Inc.*, 285 Md. at n.5.

D. The Coalition's interests are inadequately represented.

The burden of showing that existing representation may be inadequate is minimal. *See, e.g., Citizens Coordinating Comm. on Friendship Heights, Inc. v. TKU Assocs.*, 276 Md. 705, 714 (1976). An applicant for intervention need not definitively demonstrate that its interests will be inadequately represented if leave to intervene is denied; it suffices that the representation may be inadequate. *See Stewart v. Tuli*, 82 Md. App. 726, 733 (1990). Indeed, the Court of Appeals has stated that if an intervenor's interest is similar but not identical to that of an existing party, "[the applicant] ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee." *Md. Radiological Soc'y, Inc.*, 285 Md. at 390.

The current parties do not have the same stake as the Coalition in enforcing the application of Anton's Law as written. *Cf. Holmes v. Gov't of V.I.*, 61 F.R.D. 3 (D.V.I. 1973) (finding representation inadequate where a private party seeking intervention had an "immediate" interest to protect, notwithstanding that a government party was aligned with the potential intervenor in defending the challenged statute). Given that the County already entered an invalid Side Deal with the FOP regarding objections to responses to MPIA requests, it is apparent that the County would make different decisions at the trial level or determine to forgo an appeal of an issue that the Coalition would pursue. *See Bd. of Trs. of the Employee's Retirement System of the City of Balt. v. Mayor of Balt. City*, 317 Md. 72, 91 (1989) (representation may be inadequate if a party might not seek appellate review to the detriment of the proposed intervenor); *Coal. for Open Doors*, 333 Md. at 370 (same).[11] Moreover, the County, which entered into a side deal to allow individual officers and the FOP to inject themselves into the MPIA process and prevent the orderly production

[11] For the same reason, even if the original requestor were permitted to intervene, because the original requestor might make different arguments or might not proceed with an appeal if necessary, she would not be deemed to adequately represent the Coalition's interests.

of responsive materials, likely does not intend to object to the Plaintiffs' ability to even bring this action, which the Coalition disputes.

The Coalition's interests in unsealing the records and addressing the procedural and substantive issues in the Complaint are distinct from those of the parties. Unlike the Plaintiffs and the County, the Coalition seeks to vacate the Case Sealing Order and unseal the filings in this action, except only for any possible, limited redactions solely to the extent necessary to comply with express legislative acts or Maryland judicial authority. *See Balt. Sun Co.*, 359 Md. at 662 ("the trial judge … could properly have closed the courtroom and issued the Case Sealing Order only if authorized by statutes, rules promulgated by this Court, or decisions of this Court modifying the common law principle under specified circumstances"). As evidenced by the Consent Motion, no party in this case has the same interest in unsealing that information. Thus, the Coalition cannot rely on the parties to vindicate its distinct interests here. Nor can the Coalition rely on those other parties to raise its strongest arguments in favor of unsealing.

Moreover given the Side Deal that the Defendant already entered with the plaintiff FOP and the Consent Motion to seal the parties' litigation of these issues, there is a lack of adversity between the parties regarding the issues presented. If these issues were to be resolved without the Coalition's presence in this litigation, the Coalition faces the risk that the effort to judicially rewrite Anton's Law would proceed unchecked, without any meaningful advocacy regarding the legislative purpose and intent which precludes Plaintiffs' position in this action.

Furthermore, the challenged MPIA response is but one of a large number of similar MPIA requests seeking information now available as a result of Anton's Law. The Coalition has a unique interest in ensuring that this case is resolved in a manner consistent with its broader interests.

Given these disparate interests, the Coalition should be allowed to respond directly to Plaintiffs' Complaint, including its request for injunctive relief.

II. Alternatively, the Coalition should be permitted to intervene in the Court's discretion.

Even if this Court were to find that the Coalition is not entitled to intervene as a matter of right, the Court should still exercise its discretion to permit intervention. Rule 2-214(b) indicates that permissive intervention is proper when a common question of law or fact exists between the original suit and the applicant's claims. The Coalition has requested the same records at issue here, and the anticipated objection by Plaintiffs will clearly involve the same legal issues as this action. And as discussed above, the Coalition's entry into the litigation at this early stage would not unduly delay or prejudice the adjudication of the rights of the original parties.

III. Additionally, the Coalition is entitled to intervention under CJ § 3-405.

As a separate and independent basis for intervention, the Coalition is entitled to intervention under CJ § 3-405 because Plaintiffs filed an action for declaratory relief, *see* Compl. ¶ 1, and the Coalition has an interest that would be affected by the declaration. *See* Md. Code, Cts. & Jud. Proc. § 3-405(a)(1). As the Maryland Court of Appeals explained in *Doe v. Alternative Medicare Md., LLC*, 455 Md. 377, 429 (2017), "to warrant intervention under CJ § 3-405(a)(1), a person need only show that they have or claim an interest that would be affected by the declaration." The Coalition has amply demonstrated such an interest here, including as a result of its pending MPIA request. Importantly, intervention under CJ § 3-405(a)(1) is mandatory, not discretionary. "If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, *shall* be made a party." Md. Code, Cts. & Jud. Proc. § 3-405 (emphasis added).

IV. The Case Sealing Order should be vacated because the public has a constitutional and common law right of access to judicial records.

As noted above, the United States Supreme Court and Maryland courts recognize both a constitutional and common law right of access to the courts, including judicial records. *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978); *Balt. Sun Co.*, 359 Md. at 661; *State v. Cottman Transmission Sys., Inc.*, 75 Md. App. 647, 654-55 (1988).

"The common law principle of openness is not limited to the trial itself but applies generally to court proceedings and documents." *Balt. Sun Co.*, 359 Md. at 661; *see also Admin. Off. of Cts. v. Abell Found.*, 480 Md. 63, 68 (2022) ("There is a longstanding tradition of access to court proceedings and records under the common law in Maryland, and in the United States generally."). One of the "major purpose[s]" of the First Amendment is "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). That includes public discourse about judicial proceedings. Indeed, the Supreme Court has recognized that such discourse "guards against the miscarriage of justice" by subjecting our "judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

Documents that play a critical role in the adjudicative process are generally subject to public access pursuant to common law and First Amendment protections and may be sealed only if the sealing is narrowly tailored to serve a compelling government interest. *Press-Enter. Co. v. Super. Ct. of Cal. for the Cnty. of Riverside*, 478 U.S. 1, 13-14 (1986); *see also Press-Enter.Co. v. Super. Ct. of Cal., (Press-Enterprise I)*, 464 U.S. 501, 510-11 (1984); *Globe Newspaper Co. v. Super. Ct. for the Cnty. of Norfolk*, 457 U.S. 596, 607 (1982) (access restrictions must be "necessitated by a compelling governmental interest, and … narrowly tailored to serve that interest"); *see also* Md. Rule 16-912(d) (mandating that any protective order "shall be as narrow as practicable in scope and duration to effectuate the interest sought to be protected by the order").

Because the parties have not shown that the protective order is narrowly tailored to serve a compelling interest, the Court must vacate the Case Sealing Order. To the extent that the parties still seek to seal any part of the record, they must satisfy their burden to demonstrate a compelling interest in sealing specific information and that the proposed sealing is the least restrictive means to protect that interest. The need for transparency is particularly acute in this case, which will be the first decision on the scope and meaning of the transparency obligations imposed by Anton's Law. It would be a tragic irony, and legally improper, if the legal arguments and judicial decision-making in that case took place in secret.

A. The Case Sealing Order was entered without necessary notice and opportunity to be heard.

As the Maryland Court of Appeals observed in *Colbert*, "Adequate public disclosure of a motion for closure is particularly important." *Colbert*, 323 Md. at 300. Accordingly, "for the public to be able to assert this right in a meaningful fashion, the motion must be docketed in advance of the time of the hearing to provide notice to afford an opportunity to oppose the closure motion, as well as to present alternatives to closure. The court should provide individuals opposing closure an opportunity to object and to state the reasons for that opposition before ruling on the closure motion." *Id.* The *Colbert* court explained that a hearing on the sealing motion should be held in the ordinary course, during which the movant "must inform the court of the precise nature of the sensitive information." *Id*. at 330. Moreover, the movant must make a proffer with sufficient evidence to allow the Court to make an informed decision. Objectors should be made aware of the issue under consideration and be given an adequate opportunity to present argument in opposition to the sealing motion. *Id.* at 304 & 306.

Here, the Consent Motion was filed on the afternoon of Thursday, August 11, and the Order was signed by the Court the following Tuesday morning, August 16. No meaningful notice of the

Consent Motion or opportunity to be heard was afforded the public, contrary to the dictates of *Colbert*. No hearing was held. No evidentiary proffer was made. The order shows no consideration, as required, of alternatives to a broad seal, including redacting only portions of pleadings or transcripts or precise limitations on the Case Sealing Order.

B. Judicial records are subject to the rights of access under common law, the First Amendment, and the Maryland Declaration.

Judicial records are presumptively available to the public. *Abell Found.*, 480 Md. at 34. "The common law rule that court proceedings, records, and documents are open to the public is fully applicable in Maryland except to the extent that the principle has been modified by legislative enactments or decisions by this Court." *Balt. Sun Co.*, 359 Md. at 662. Further, Maryland Rule 16-904 expressly recognizes that "judicial records are presumed to be open to the public for inspection."

Likewise, the First Amendment's access protections generally cover documents that are important to informing the public how a given case may be resolved. As the Fourth Circuit has explained, "the First Amendment right of access extends to materials submitted in conjunction with judicial proceedings that themselves would trigger the right to access." *Pub. Citizen*, 749 F.3d at 267. Accordingly, the briefs that the parties anticipate will set forth "all of their arguments as to why the Court should enter an order enjoining the production of the records subject to the pending MPIA request" fall within the ambit of the access protections under common law and the First Amendment.

C. The parties cannot satisfy their burden of showing that sealing the record is narrowly tailored to serve a compelling interest.

Because pretrial proceedings are subject to the common law and First Amendment rights of access by the public, access may be denied only on the basis of a compelling governmental interest and only if the denial is narrowly tailored to serve that interest. *Colbert*, 323 Md. at 302;

Buzbee v. J. Newspapers, Inc., 297 Md. 68, 82 (1983) ("There appears to be near unanimity of opinion that, before the public's right of access to pretrial proceedings may be restricted, there must be, in addition to finding a probability of damage to a fair-trial right, consideration of methods alternative to closure … and a determination made that alternative measures will probably be ineffective to prevent the threatened prejudice.").

The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must demonstrate that "higher values" will be infringed by open access, that closure will prevent specified prejudice, and that reasonable alternatives cannot protect the asserted values. *Colbert,* 323 Md at 302; *see also Buzbee*, 297 Md. at 82 ("In cases where closure of pretrial suppression hearings is sought the trial court must make findings as to the nature and extent of any threatened prejudice and, at least as a matter of Maryland procedure, findings concerning the probable efficacy of alternative measures, short of closure, for avoiding probable prejudice. If the conclusion is that some form of restriction on public access is required, the trial court must adopt the least restrictive means necessary to protect the interest which, on the facts of the case, has outweighed public access.").

In *Colbert,* the court identified various alternatives less restrictive than sealing all access; the existence of which demonstrated that the sealing remedy was improper. *Colbert*, 323 Md. at 302. The *Colbert* court also anticipated that, at most, only "portions of the record" might be sealed where the movant met its burden – not that the entire proceeding would be subject to the sealing order. *Colbert*, 323 Md. at 305. Because the trial court in *Colbert* failed to make the required findings before closing the courtroom, the Court of Appeals held that the trial court failed to follow the necessary procedures to protect the interest of the public in open access to judicial records and vacated the trial court's sealing order. The same outcome is required here.

As the Court of Special Appeals has acknowledged, "[b]oth the lower federal courts and this Court have applied the First Amendment analysis to civil as well as criminal proceedings." *Doe v. Shady Grove Hosp*, 89 Md. App. 351, 359 (Ct. Spec. App. 1991).

D. The parties have not satisfied their burden.

The Consent Motion does not make a serious attempt to satisfy their burden here and fails in any event because there is no consideration at all of whether less restrictive means than sealing the entire action might address any purported compelling interest. As noted, the parties have gone far beyond the limited specific information that *might* be permitted to be redacted and have not cited any authority to support the sweeping relief of sealing the entire record. Instead, the Consent Motion bases the entire sealing argument on two grounds: (1) a Maryland statute that shields police personnel records from public disclosure; and (2) a generalized allegation of "unwarranted invasion of privacy." Consent Mot. at 2. Neither the statute nor generalized assertion of privacy is sufficient to justify sealing the record.[12]

As a threshold matter, the Consent Motion ignores the fact that the recordholder has already determined that the records responsive to the MPIA are not, in fact, "personnel records," but instead are "investigative records" that have no mandatory confidentiality protection under the MPIA. Neither the Plaintiffs nor the County provide any evidence or reasoning to contradict that earlier determination by the recordholder, nor could they, given the text of Anton's Law. Indeed,

[12] Although the parties also assert the need to protect the identity of the plaintiff officer, given that the officer has been repeatedly identified in public news reports about this proceeding, that issue is moot and the Coalition does not address that issue here. *See, e.g.,* Steve Thompson, *When she sought answers about an office, this Maryland Police union sued,* Washington Post, (Sept. 5, 2022), https://www.washingtonpost.com/dc-md-va/2022/09/05/when-she-sought-answers-about-an-officer-this-md-police-union-sued/; Camilo Morgan, *In the police transparency trial, groups are calling for …more transparency*, US Today News, (Oct. 10, 2022) https://ustoday.news/in-the-police-transparency-trial-groups-are-calling-for-more-transparency/; Quotessh, *The Washington Publish and different teams struggle police union's try to dam launch of misconduct information*, News Quotes Shine, (Oct. 5, 2022), https://news.quotesshine.com/us-local-news/the-washington-post-and-other-groups-fight-police-unions-attempt-to-block-release-of-misconduct-records/. For avoidance of any doubt, however, the Coalition disputes the proposition that the identity of a police officer whose investigative records are the subject of an MPIA request could validly be deemed "confidential."

the vague allusion to personnel records and privacy interests highlight a fundamental shortcoming in their sealing argument: a lack of specificity in the supposed sealing justifications.

Although the Consent Motion alludes to a generalized interest in maintaining the "confidentiality" of police personnel records, it fails to explain how Plaintiffs would be harmed by the disclosure of the specific material they seek to seal in this case, much less the disclosure of the parties' briefing of the issues in this action. That failure is fatal to its sealing request. *Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004); s*ee also Kamakana v. City of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006) ("Simply mentioning a general category of privilege, without any further elaboration or any specific linkage with the documents, does not satisfy the burden.").

Requiring litigants to provide concrete and specific reasons for sealing records is especially important in cases where the government is a party. *See generally Pub. Citizen*, 749 F.3d at 271 ("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."); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party."). And when the government is the party consenting to the sealing request—as in this case—the need for a concrete and specific justification grows stronger still. A "blind acceptance by the courts of the government's insistence on the need for secrecy, . . . without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Wash. Post Co*., 807 F.2d 383, 392 (4th Cir. 1986). The generic justifications for the proposed Case Sealing Order exacerbate those risks.

More to the point, the parties' lack of specificity precludes them from satisfying their burden here. Once again, the parties must establish a compelling governmental interest to justify any redactions, much less sealing the entire record. To satisfy that "rigorous First Amendment standard," *In re Wash. Post Co*., 807 F.2d at 390, the parties must do more than merely assert a generalized interest in shielding police personnel records from public view. *See Press-Enterprise Co. v. Super. Ct. of Cal. for the Cnty. of Riverside*, 478 U.S. 1, 15 (1986) ("The First Amendment right of access cannot be overcome by [a] conclusory assertion[.]").

To the extent that the parties' sealing argument rests on a fear that disclosure could expose the officer to some sort of "privacy" or "fairness" harm because some records sought concerning allegations that were not sustained, Consent Mot. at 2, 4, that (speculative) concern cannot justify sealing here. *Cottman Transmission Sys., Inc.*, 75 Md. App. at 659 ("The right of the individual to a fair trial must be protected, but that protection does not include safeguarding reputations. An individual or corporate entity involved as a party to a civil case is entitled to a fair trial, not a private one."); *Cf. Pub. Citizen*, 749 F.3d at 269 ("We are unaware, however, of any case in which a court has found a company's bare allegation of reputational harm to be a compelling interest sufficient to defeat the public's First Amendment right of access."). The Supreme Court has expressly recognized that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Hous. v. Hill*, 482 U.S. 451, 461 (1987). What is more, restricting the public's access to information "for the very purpose of insulating public officials from unpleasant attacks would plainly undermine [a] core First Amendment principle." *Overbey v. Mayor of Balt.*, 930 F.3d 215, 226 (4th Cir. 2019). And the fact that the legislature specifically refused to limit the disclosure obligations imposed by Anton's Law to sustained

complaints only further reinforces this point. The parties therefore cannot assert a legitimate interest in shielding officers from public scrutiny.

As with the First Amendment right of access, the common-law right of access to judicial records may be abrogated "only if authorized by statutes, rules promulgated by this Court, or decisions of this Court modifying the common law principle under specified circumstances." *Balt. Sun Co.*, 359 Md. at 662. *See also State v. WBAL-TV,* 187 Md. App. 135, 156 (2009) ("[The Title 16 rules] clearly reflect the common law presumption of the openness of court records that, as a general rule, can only be overcome by a 'special and compelling reason.'").

The fact that allegations were not sustained by an investigation is not a recognized basis for the Case Sealing Order. Moreover, the parties have not concluded that their briefing of the issues presented would even entail attaching the records responsive to the MPIA request, regardless of the erroneous assertion that allegations not sustained by the investigation could somehow provide a recognized basis for the Case Sealing Order. At the same time, the parties ignore the value that the judicial records disclosure would have for the broader public.

For instance, the Consent Motion fails to acknowledge that disclosing the judicial record to the public would provide the sole source of the public's understanding of this case. In particular, disclosing the briefing would allow the public—for the first time—to meaningfully assess the validity of the County's position regarding its private side agreement through the Side Deal with the FOP. *See generally Pub. Citizen,* 749 F.3d at 271 ("[T]he public has a strong interest in monitoring . . . the positions that its elected officials and government agencies take in litigation."). But the public cannot assess the merits of that argument without access to the parties' briefs, which both the Plaintiffs and the County have sought to file under seal. Furthermore, without that information, the public will not be able to evaluate this Court's ultimate ruling on the motion.

Unsealing the record would also benefit the public by promoting greater transparency within the County's justice system. *See Abell Found.*, 480 Md. 63 (2022) (judicial openness achieves "the citizen's desire to keep a watchful eye on the workings of public agencies") (citing *Nixon,* 435 U.S. at 598). The Fourth Circuit likewise has recognized that "[s]ociety has an understandable interest . . . in law enforcement systems and how well they work." *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991). That court has further noted public interest "is at its apex when the government is a party to the litigation. Indeed, the public has a strong interest in monitoring… [the positions] government agencies take in litigation." *Pub. Citizen*, 749 F.3d at 271. And the Supreme Court has similarly recognized that "[p]ublic awareness and criticism [of the legal system] have even greater importance where . . . they concern allegations of police corruption." *Gentile v. State Bar of Nev.*, 501 U.S. 1030,1035 (1991). The sealing of the record in this action undermines those important interests by shielding the parties' position(s) on the Side Deal as well as on the relief sought in the Complaint to enjoin the production of records sought by the MPIA.

E. Any hearing on sealing the record and on the injunctive relief sought in the Complaint must be held in open court.

In addition to protecting the right of access to judicial records, the First Amendment and the common law also protect the right to attend court hearings. Thus, to the extent that this Court intends to hold a hearing to revisit the issues raised in the Consent Motion—or any other hearing addressing the relief sought in the Complaint—it cannot restrict the public's access to that hearing absent a compelling justification. *See Press-Enterp. Co.,* 464 U.S. at 510 ("The presumption of openness may be overcome only by an overriding interest based on findings that [courtroom] closure is essential to preserve higher values and is narrowly tailored to serve that interest."). As explained above, the public has a significant interest in monitoring and understanding any

proceedings related to the effort to alter the County's obligations in response to an MPIA. That interest cannot be taken lightly.

CONCLUSION

For the foregoing reasons, the Coalition respectfully asks that the Court grant its motion to intervene in this action and vacate the Case Sealing Order. The Coalition further seeks an appropriate briefing schedule, once the record is unsealed, to allow it to participate in the briefing contemplated by the Case Sealing Order and to participate in further activity in this action.

Respectfully submitted,

Dated: October 11, 2022

/s/ Ashley-Anne L. Criss (Md Bar ID 1612130122)

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Counsel for Maryland Coalition for Justice and Police Accountability

EXHIBIT A

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Maryland

October 3, 2022

Mary Davison
Custodian of Records
Montgomery County Police, Records Section
100 Edison Park Drive, First Floor
Gaithersburg, Maryland 20878

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PRESIDENT

DANA VICKERS SHELLEY
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

VIA ELECTRONIC AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: Maryland Public Information Act Request

Dear Mary Davison or Custodian of Records:

This is a request under the Maryland Public Information Act (MPIA), Md. Code, Gen. Prov., §§ 4-101 *et seq.,* sent on behalf of our client, the Maryland Coalition for Justice and Police Accountability (MCJPA). The MCJPA wishes to inspect and copy all of the following records in your custody and control:

- The records compiled to be provided in response to the public information request made by Alexa Renehan, which are currently the subject of *John Doe v. Montgomery County,* C-15-CV-22-002523.

We anticipate that we will want copies of all of the records sought. Pursuant to Gen. Prov. § 4-206(e), we request that all fees related to this request be waived. The Maryland Coalition for Justice and Police Accountability (MCJPA) is an unfunded coalition of non-profit organizations, including 501(c)(3) organizations that receive their funding from charitable donations, and do not charge for their services. If the request for a waiver of fee is denied, please advise us in writing of the reason(s) for the denial and of the cost for obtaining a copy of the requested records.

It is essential that this request be fulfilled within 30 days, as required by Gen. Prov. § 4-203(a). Further, if you anticipate it will take more than 10 days to produce the records, we expect that you will indicate in writing, within 10 days of this request, (1) the amount of time that you estimate records production will take, (2) an estimate of the range of fees that may be charged to comply with the request, and (3) the reason for the delay. Md. Code Gen. Prov. § 4-203(b)(2).

If we do not receive notice within the required time period, we will treat your failure to respond as a denial and seek appropriate relief.

Thank you for your time and attention to this matter, and we look forward to receiving your response. Please feel free to contact us with any questions or concerns.

Sincerely,

David Rocah
Senior Staff Attorney

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
MARYLAND

EXHIBIT B

MEMORANDUM OF AGREEMENT
BETWEEN
MONTGOMERY COUNTY GOVERNMENT
AND
FRATERNAL ORDER OF POLICE
MONTGOMERY COUNTY LODGE 35, INC.

Pursuant to the changes to the Maryland Public Information Act (MPIA) by Maryland Senate Bill 0178, Maryland Police Accountability Act of 2021, Montgomery County Government (Employer) and Fraternal Order of Police, Montgomery County Lodge #35, Inc. (Union), agree to the following matters regarding the release of bargaining unit member internal affairs files:

1) Within two (2) business days of an MPIA request for a bargaining unit member's internal affairs file, the Employer shall notify the bargaining unit member and the Union of such request. All MPIA requests for a bargaining unit member's internal affairs file will be maintained in a log, which may be inspected at any time by the Union.

2) Once the request is approved and the Employer notifies the requesting party of its intent to release a bargaining unit member's internal affairs file, the Employer shall notify the bargaining unit member and the Union. Upon completion of the final production of records to be released per the MPIA request and at least ten (10) business days before the release, the Employer will provide the bargaining unit member and/or the Union with a copy of the final production. In the event the Employer intends to release any body-worn camera video or mobile car video in connection with the bargaining unit member's internal affairs file, the bargaining unit member shall have access to the video through the employer's video database (currently evidence.com or download for Panasonic camera video). Upon inspecting the material to be released, the bargaining unit member or the Union may notify the Employer of an objection and the intent to file a "reverse MPIA." The bargaining unit member and/or the Union shall file a "reverse MPIA" no later than ten (10) business days from receiving a copy of the final production. The Employer will then hold the file production until the action is ruled on. The parties will make all reasonable efforts to provide each other with an expeditious notice under this agreement given the relatively short time limits in the MPIA and its overall policy of providing the public with prompt access to public records without unnecessary delay.

3) The Employer shall ensure the redaction of all personal information described in Senate Bill 0178 to include but not limited to bargaining unit members' photographs, medical information, personal contact information, or information related to their family.

[Signature page to follow]

For the County:

2/1/2022

Marc Elrich
County Executive

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Richard Madaleno
Chief Administrative Officer

1/24/22

Jennifer Harling
Chief Labor Relations Officer

Approved as to form and legality
Office of County Attorney

1/24/22

Edward E. Haenftling, Jr.
Associate County Attorney

For FOP Lodge 35:

1/21/22

Lee Holland
President