

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.

CITY OF GREENSBORO, Greensboro
Police Officers JUSTIN PAYNE, ROBERT
DUNCAN, MICHAEL MONTALVO,
ALFRED LEWIS, CHRISTOPHER
BRADSHAW, LEE ANDREWS, DOUGLAS
STRADER, and JORDAN BAILEY, and
Guilford EMS Paramedics ASHLEY ABBOTT
and DYLAN ALLING,

Defendants.

1:19CV386

ORDER PERMANENTLY SEALING FILINGS

This matter is before the Court on four motions to permanently seal various pleadings and exhibits filed under temporary seal, (ECF Nos. 172, 192, 198, 207), as supplemented by Defendants' Joint Unopposed Motion Regarding Pending Motions to Seal, (ECF No. 225), filed pursuant to the parties' settlement to provide additional arguments about the basis for sealing in light of the resolution of the parties' dispute.

BACKGROUND

Each motion to seal involves information that was designated as confidential by one or more Defendants during discovery, as allowed by the Protective Order. (ECF No. 79.)

Pursuant to the Protective Order and Local Rule 5.4(a)(2) and (c)(8), the filing party filed the materials under temporary seal, along with a motion to seal and redacted versions of the materials when appropriate. The filing party also submitted the Local Rule 5.4 Checklist. When the filing party was the designating party for the materials at issue, its motion addressed the basis for sealing under the applicable standard. When the filing party was not the designating party, the designating party responded to the motion to seal to set out the basis for sealing under the applicable standard.

The first motion to seal was filed by the City and Officer Defendants. (ECF No. 172.) They also filed a supporting brief. (ECF No. 173.) The movants requested permanent sealing of Exhibits OO and PP to their summary judgment motions. (ECF Nos. 171-41, 171-42.) These documents were produced by the City and designated as confidential. Exhibit OO is a copy of the administrative investigation report prepared by the Greensboro Police Department's ("GPD") Professional Standards Division, regarding the 8 September 2018 encounter with Mr. Smith. Exhibit PP is a copy of the criminal investigation report prepared by GPD's Criminal Investigations Division, regarding Mr. Smith's death. The movants publicly filed a limited portion of Exhibit PP and filed Exhibit OO entirely under temporary seal. Plaintiff responded in opposition, arguing that the exhibits should be unsealed. (ECF No. 181.) The movants filed a reply in support of sealing. (ECF No. 182.)

The second motion to seal was filed by Plaintiff. (ECF No. 192.) It addressed numerous exhibits to Plaintiff's summary judgment motion, including deposition transcripts, an expert report, body-worn camera recordings and related documents, and other discovery material produced by Defendants. All materials at issue were designated by one or more

Defendants as confidential. Although Plaintiff was the filing party, she argued that the documents should be unsealed. (*See id.*) Plaintiff publicly filed redacted versions of many of these exhibits, including deposition transcripts and the expert report. Plaintiff filed the temporarily sealed versions of these exhibits twice. The first set of sealed exhibits did not include highlighting of the “confidential” portions as required by Local Rule 5.4(c)(8); the second set included that highlighting. (ECF Nos. 191-4 through -7, -9 through -19, -21, -26, and -28 through -30; ECF Nos. 199-4 through -7, -9 through -19, -21, -26, and -28 through -30.) The City and Officers responded with respect to the materials for which they were the designating party, requesting permanent sealing. (ECF No. 208.) The Paramedics likewise responded with respect to other materials, also requesting permanent sealing. (ECF No. 210.) In their responses, Defendants also requested that the Court strike numerous temporarily sealed exhibits that Plaintiff filed in support of her summary judgment responses. (ECF Nos. 208, 210.) Plaintiff filed a reply. (ECF No. 215.)

The third motion to seal was filed by Plaintiff. (ECF No. 198.) It addressed several short passages in a brief that Plaintiff filed in support of her motion to strike. Plaintiff filed the temporarily sealed version of the brief twice; once without the highlighting required by Local Rule 5.4(c)(8), and once with highlighting. (ECF Nos. 197 at 5; 200 at 5.) Plaintiff publicly filed a redacted version of the brief. (ECF No. 196 at 5.) Each passage included information about a Professional Standards investigation involving a GPD Officer regarding an unrelated incident. This information was drawn from Professional Standards reports produced by the City and designated by it as confidential. Plaintiff, as the filing party, argued

for the passages to be unsealed. The City and Officers responded and argued for the passages to be permanently sealed. (ECF No. 211.) Plaintiff did not file a reply brief.

The fourth motion to seal was filed by the City. (ECF No. 207.) It relates to four paragraphs of the City's summary judgment reply brief that discuss the contents of BWC recordings of other incidents when a hobble restraint was used. (ECF No. 205 at 8-9.) The City also filed a redacted version of this brief. (ECF No. 204.) The City's motion incorporated the arguments made by the City about sealing body-worn camera ("BWC") recordings and discussions of the contents of those recordings, in its response to a different motion to seal. (ECF No. 208 at 15-20.) Plaintiff filed an objection to sealing, (ECF No. 213), incorporating arguments previously made, (ECF No. 179 at 3-8). The City filed a reply. (ECF No. 218.)

The joint unopposed motion regarding pending motions to seal was filed by Defendants as part of the settlement of this case. (ECF No. 225.) Defendants also filed a supporting brief. (ECF No. 226.) In these filings, Defendants argue that the good cause standard from Rule 26(c) should apply to the pending motions to seal, based on changes in procedural posture and the parties' positions as a result of the settlement. In particular, as part of the settlement, Plaintiff has changed her position on sealing. Now, Plaintiff "does not oppose permanent sealing of the temporarily-sealed filings," and she "withdraws [her] requests to unseal temporarily-sealed filings." (ECF No. 224-1, ¶ 8.b.) As such, the arguments advanced by Defendants to permanently seal the temporarily sealed filings are uncontested. Additionally, the parties have agreed that the underlying motions to which the motions to seal relate – such as the summary judgment motions and Plaintiff's motion to strike – can be denied as moot. (*Id.*, ¶ 8.c.) To date, the Court has not taken up and ruled on the merits of the

underlying motions associated with the temporarily sealed filings. As a result of the settlement, it does not have to, and by separate order it is denying those motions as moot and granting the parties' joint motion to approve the settlement. Finally, as part of the settlement, Defendants have agreed to withdraw their requests to strike Plaintiff's temporarily sealed summary judgment exhibits, (ECF Nos. 208, 210), so long as those exhibits are permanently sealed.

ANALYSIS

The Fourth Circuit requires the Court to follow several steps when determining whether to permanently seal a filing. First, the Court “must determine the source of the right of access with respect to each document.” *Va. Dept. of State Police v. Washington Post*, 386 F.3d 567, 576 (4th Cir. 2004) (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir. 1988)). The Court also

must give the public notice of the request to seal and a reasonable opportunity to challenge the request; it must consider less drastic alternatives to sealing; and if it decides to seal it must state the reasons (and specific supporting findings) for its decision and the reasons for rejecting alternatives to sealing.

Id.

Typically, the right of access to judicial records is evaluated under the common law or First Amendment standards. However, “[a] document does not become a judicial record merely because it is filed with a court.” (ECF No. 201 at 19 (citing *In re Pol’y Mgmt. Sys. Corp.*, 67 F.3d 296, 1995 WL 541623 (4th Cir. 1995) (unpublished).) “Rather, a document filed with the court becomes a judicial record when it ‘play[s] a role in the adjudicative process[] or adjudicate[s] substantive rights.’” (*Id.* (quoting *Gary v. James S. Farrin, P.C.*, 2020 WL 5211851,

*5 (M.D.N.C. Sept. 1, 2020)).) *See also In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290-91 (4th Cir. 2013).

As the Fourth Circuit explained, it is a court's actual use of a document that converts a mere filing into a judicial record with a public right of access. Specifically, "a document becomes a judicial document when a court uses it in determining litigants' substantive rights." *In re Pol'y Mgmt. Sys.*, 1995 WL 541623, at *4. For a public right of access to attach, "a document must play a relevant and useful role in the adjudication process." *Id.* The exhibits to a summary judgment motion that a court rules upon are judicial records subject to the First Amendment right of access. *See, e.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (considering status of sealed exhibits after substantive ruling on summary judgment motion). But when the exhibits to a dispositive motion are not considered by the court, the right of access does not attach, as illustrated by *In re Policy Management Systems*. In that case, the Fourth Circuit held that that neither the First Amendment nor common law rights of access attached to exhibits that were not considered by the district court when ruling on a dispositive motion and therefore "d[id] not play any role in the adjudicative process". *In re Pol'y Mgmt.*, 1995 WL 541623, at *4; *see also Watts v. Am. Express Co.*, 2009 WL 2913076, at *3-4 (D. Colo. Sept. 8, 2009) (holding that the public's interest in exhibits to a motion for class certification was "minimal" because that motion had been denied as moot, and therefore permanently sealing the exhibits).

The sealing of documents that are not "judicial records" is governed by the "good cause" standard under Rule 26(c). (*See* ECF No. 201 at 19 (citing *Hatch v. Demayo*, 2020 WL 6161533, at *6 (M.D.N.C. Oct. 21, 2020)).) Under Rule 26(c), "the Court may seal documents

for good cause to ‘protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.’” (*Id.* (quoting Fed. R. Civ. P. 26(c)(1)).)

Here, the good cause standard applies to each of the temporarily sealed documents at issue, because the Court has not taken up and ruled upon the motions to which they relate. Instead, the Court is denying those motions as moot, as the parties agreed in their settlement. In other words, the Court is not using the temporarily sealed exhibits, or the temporarily sealed portions of pleadings, to determine the litigants’ substantive rights, and the temporarily sealed filings have not played a relevant and useful role in the adjudicative process.

Having determined the appropriate standard for sealing, the Court considers the other procedural steps established by the Fourth Circuit. First, the Court finds that the public has had notice of the requests to seal and a reasonable opportunity to challenge the requests. The motions to seal were publicly filed on September 7, 2021, (ECF No. 172), October 7, 2021, (ECF No. 192), October 15, 2021, (ECF No. 198), and October 21, 2021, (ECF No. 207). These motions and the parties’ briefing complied with the requirements of the Court’s Local Rules, including by identifying the temporarily sealed materials at issue and through the submission of arguments for sealing by the designating parties.

The Court finds that there are no less drastic alternatives to sealing. As noted above, many of the temporarily sealed documents were also filed in a public form, with redactions of the material at issue. Additional redactions would constitute an undue burden, such as requiring extensive further review of lengthy deposition transcripts or the editing of lengthy BWC recordings and would likely lead to the disclosure of personnel information and criminal investigative information that is non-public under North Carolina law.

There is good cause to permanently seal each of the temporarily sealed filings, which the Court will discuss by category:

BWC Recordings and “Summaries.” (ECF Nos. 191-28 through -30, 199-28 through -30; ECF No. 194, (notice of manual filing).) Plaintiff manually filed these exhibits, which are BWC recordings of incidents that did not involve Mr. Smith, produced in discovery and designated as “Highly Confidential” by the City, as well as excerpts of those recordings and “summaries” of the recordings made by Plaintiff’s counsel. When Plaintiff previously filed the same materials, Magistrate Judge Webster held that the recordings were correctly designated as “Highly Confidential”, and that good cause warranted permanent sealing. (ECF No. 201 at 14-23.) Plaintiff did not appeal that ruling. The Court is not aware of a basis to reach a different result now and adopts Magistrate Judge Webster’s analysis in full. Good cause for permanent sealing is also provided by North Carolina’s public policy that law enforcement recordings are not public records, as set forth in N.C. Gen. Stat. § 132-1.4A. The North Carolina General Assembly recently amended the statute to require judicial review before disclosure of BWC recordings in more circumstances, when previously an agency was allowed to disclose the recordings in a non-public setting without a court order. *See* N.C. Session Law 2021-138, § 21.(a).

Professional Standards Report. (ECF No. 171-41.) Reports prepared by a law enforcement agency’s professional standards unit are considered personnel information of the subject officers. Such reports are therefore within the scope of N.C. Gen. Stat. § 160A-168, which makes those records confidential. *See Wind v. City of Gastonia*, 738 S.E.2d 780, 785-86 (N.C. App.) (holding that administrative investigation report was within scope of Section

160A-168), *aff'd*, 751 S.E.2d 611 (N.C. 2013) (per curiam). The state statute provides good cause for permanent sealing of this report, which the City produced and designated as “Highly Confidential.” *C.f. Alexander v. City of Greensboro*, 2013 WL 6687248, at *4 (M.D.N.C. Dec. 18, 2013) (holding that GPD Professional Standards Division reports should be sealed under the First Amendment standard).

Criminal Investigations Division Report. (ECF No. 171-42.) This report contains information about a criminal investigation that is within the scope of N.C. Gen. Stat. § 132-1.4, which makes such records confidential. The state statute provides good cause for permanent sealing of this report, which the City produced and designated as “Highly Confidential.” *C.f. Alexander*, 2013 WL 6687248, at *4 (holding that GPD criminal investigation report should be sealed under the First Amendment standard).

Dr. Smith Emails. (ECF Nos. 191-26 and 199-26.) In discovery, former defendant Guilford County produced an email exchange between Dr. Melanie Belfi, the Medical Director for Guilford County EMS, and Dr. Henry Smith, a local physician, related to the Paramedics’ performance during the encounter with Mr. Smith. The County designated the documents as confidential. State statutes provides good cause to seal this email exchange. *See* N.C. Gen. Stat. §§ 90-21.22A (confidentiality of peer review process), 153A-98 (confidentiality of county personnel information).

Deposition Transcripts. (ECF Nos. 191-4 through -7 and -9 through -19, and 199-4 through -7 and -9 through -19.) Plaintiff filed numerous complete deposition transcripts, including passages that were designated as confidential by the City and Officers. Plaintiff publicly filed redacted versions of the 15 transcripts that contained designated material. (ECF

No. 190-4 through -7 and -9 through -19.) The confidential passages within these transcripts generally fall into six categories: (1) personal financial and business information of the Officers; (2) medical information regarding the Officers; (3) names and information about the Officers' minor children and other family members; (4) testimony regarding the Professional Standards investigation into Mr. Smith's death; (5) testimony about unrelated Professional Standards investigations involving the Officers or other GPD employees; and (6) testimony about unrelated criminal incidents involving nonparties and associated incident reports.

The first three categories involve personal and family details that are not relevant to this proceeding and that are widely regarded as nonpublic. For example, Rule 5.2(a) requires that a minor's name and other personal information be maintained in a nonpublic manner. Details about Officers' assets, and their family members, which were obtained during deposition testimony, are the kinds of information that could lead to "annoyance, embarrassment, [or] oppression" if publicly disclosed. Fed. R. Civ. P. 26(c)(1). The remaining categories include personnel and criminal investigation information that, as discussed above, is confidential under state statute, which provides good cause for permanent sealing. *See* N.C. Gen. Stat. §§ 132-1.4, 160A-168.

DeFoe Report. (ECF Nos. 191-21, 199-21.) Plaintiff filed the full report prepared by her police practices expert, Scott DeFoe. The report contains verbatim excerpts from GPD's Professional Standards Report and from interviews conducted by GPD's Professional Standards Division and by the North Carolina State Bureau of Investigation, which also conducted a criminal investigation into Mr. Smith's death. The City designated the underlying discovery materials as confidential. Plaintiff also filed a redacted version of the report. (ECF

No. 190-21.) The same state statutes discussed above provide good cause for sealing these instances of personnel and criminal investigation information. *See* N.C. Gen. Stat. §§ 132-1.4, 160A-168.

Plaintiff's Response to Paramedics' Summary Judgment Motion. (ECF No. 188 at 10.) Plaintiff's response to the Paramedics' summary judgment motion contains one paragraph discussing the contents of the email exchange between Dr. Belfi and Dr. Smith, which is discussed above. Plaintiff also filed a redacted version of the response. (ECF No. 186 at 10.) The state statutes discussed above provide good cause for permanent sealing of this passage. *See* N.C. Gen. Stat. §§ 90-21.22A, 153A-98.

Plaintiff's Brief in Support of Motion to Strike. (ECF No. 197 at 5; ECF No. 200 at 5.) Plaintiff's brief in support of her motion to strike includes several short passages describing the subjects of prior, unrelated Professional Standards investigations involving two of the Officers. Plaintiff filed two copies of the brief under seal; one contains highlighting of the temporarily sealed passages and other does not. Plaintiff also filed a redacted version of the brief. (ECF No. 196 at 5.) The state statute regarding confidentiality of personnel information provides good cause for permanent sealing. *See* N.C. Gen. Stat. § 160A-168.

City's Summary Judgment Reply Brief. (ECF No. 205 at 8-9.) The City's reply brief in support of its summary judgment motion contains four paragraphs discussing the contents of BWC recordings involving subjects other than Mr. Smith. The City also filed a redacted brief. (ECF No. 204 at 8-9.) As noted above, there is good cause to permanently seal the BWC recordings and summary material. The same analysis applies to the passages in the City's reply brief.

Finally, the Court recognizes that Defendants have presented extensive arguments that the temporarily sealed documents should be permanently sealed under the common law and First Amendment standards. Because of the settlement and the mootness of the underlying motions, neither of these standards apply. The Court is therefore not reaching the question of whether permanent sealing is warranted under either or both of those standards at this time.

CONCLUSION

For the foregoing reasons, the pending motions related to sealing, (ECF Nos. 172, 192, 198, 207, and 225), are all **GRANTED**, and all temporarily sealed filings on the docket **SHALL BE PERMANENTLY SEALED**:

- ECF No. 171-41 and -42.
- ECF No. 188.
- ECF No. 191-4 through -7, -9 through -19, -21, -26, and -28 through -30.
- ECF No. 197.
- ECF No. 199-4 through -7, -9 through -19, -21, -26, and -28 through -30.
- ECF No. 200.
- ECF No. 205.

IT IS HEREBY ORDERED that in light of the foregoing ruling, Defendants' requests to strike Plaintiff's temporarily sealed exhibits, (ECF Nos. 208, 210), are **DENIED AS MOOT**.

This, the 24th day of October 2022.

/s/ Loretta C. Biggs
United States District Judge