



## Introduction

1. This civil case involves claims stemming from the December 26, 2020 shooting of T.J., a 16-year-old African American child who died at the hands of law enforcement in Des Moines.

2. T.J.'s homicide, which occurred amidst heightened public scrutiny of police violence in America, often against Black people, and the resulting litigation before this Court involve matters of utmost public concern and interest.

3. Defendants, in an affront to the public that they serve and defend and without regard to the taxpayers who fund their work and that of the government lawyers defending them, tell this Court in the Motion for a Protective Order that "Public scrutiny is synonymous with prejudgment and jury contamination, which is the opposite goal of fair and equitable proceedings." Mot. for Protective and Sealing Order 4, ECF No. 18.

4. Yet, clear mandates of law and the need in a democracy for the open and accountable administration of justice say otherwise.

5. The public interest outweighs Defendants' desire and intent to shroud this United States District Court action in secrecy as if it were a private forum where substantive filings and information presented in evidence would forever remain shielded from public access, review, and scrutiny.

6. The Council seeks to prevent that secrecy from occurring.

7. Moreover, controlling law supports Movant's position, warrants granting it intervenor status, calls for entry of an order declaring that no protective and sealing order in this matter shall shield federal judicial records (as defined in *Steele v. City of Burlington*, 334 F.

Supp. 3d 972, 981–82 (S.D. Iowa 2018)) or evidence received by the Court from public access, copying, and review.

**Motion to Intervene and Resistance to Motion for Protective and Sealing Order**

8. Movant The Iowa Freedom of Information Council is a nonpartisan, nonprofit corporation formed under the laws of the State of Iowa. The Council serves as an umbrella organization that seeks to foster and protect access to information from and about government, including the courts. It was founded by and remains largely comprised of journalists, lawyers, educators, and other Iowans devoted to open government and government accountability.

9. The Council possesses a direct interest in the workings of this Court and in unfettered access to judicial records filed in this litigation, especially any filings reviewed or considered by a presiding Article III judge called on to make merits-based, substantive, evidentiary, or dispositive rulings.

10. The Council successfully intervened in the *Steele* case and its interests and position in this police death case parallel those that supported its participation in that lawsuit. Further, the ruling of this Court in the *Steele* case vindicating the paramount concerns favoring continued public access to judicial records will provide a hollow victory if the Council is subjected to sealing orders as sought by Defendants.

11. Movant directly and in association with its members and supporters possesses substantial interests in monitoring and understanding the workings of this Court, securing access to information presented to all courts through judicial records, and keeping court files and proceedings open and accessible.

12. Movant, along with its members and supporters, retains interests in this case specifically, police conduct and accountability in general, and the ability of the news media and

public to gather facts regarding the functions and operation of—and the use of public funds by—government, from local police departments to federal courts.

13. Further, this motion serves not only the interests of Movant, but also those of the news-consuming public, which, in our democracy, depends on government transparency and robust reporting to keep it informed about matters of public concern. Council members can provide the public with regular news reports or comment regarding the courts and this case only if protective and sealing orders such as those sought by Defendants do not extend beyond discovery exchanges such that judicial records become secret.

14. Movant—and, by extension, the public—will incur prejudice that is direct, substantial, and irreparable if their rights of access to the judiciary and judicial records become impinged through imposition of sealing orders such as that sought by Defendants, which would shield dispositive motions, supporting filings, and evidence from public access.

15. Entry of protective or sealing orders as Defendants request making judicial records secret would implicate serious constitutional issues under the First and Fourteenth Amendments—especially now that a dispositive motion to dismiss is on file. *See Press–Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986); *Press–Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508–10 (1984); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *United States v. Thunder*, 438 F.3d 866 (8th Cir. 2006).

16. Entry of a sealing order, whether labeled as a protective order or otherwise, would permit secret filings in derogation of Movant’s common law rights of access to judicial records. *See Steele v. City of Burlington*, 334 F. Supp. 3d 972 (S.D. Iowa 2018); *see also Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978); *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996);

*In re Search Warrant for Secretarial Area–Gunn*, 855 F.2d 569 (8th Cir. 1988); *United States v. Webbe*, 791 F.2d 103 (8th Cir. 1986).

17. These common law access rights to judicial records pre-date the Constitution and rest upon the public’s right to monitor the workings of the judicial system. *See United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

18. Under the caselaw cited above, courts test secrecy requests such as that contained in Defendants’ motion for protective and sealing orders under a strict scrutiny standard they have not satisfied and cannot meet here.

19. Specifically, courts narrowly tailor every order sealing files or otherwise restricting access to information based on ample evidence showing that a compelling state interest in government secrecy overrides the press and public’s right of access. Entry of a finding that a litigant has met its burden to seal judicial records should occur only after a hearing where those with potentially affected rights receive due process and the Court should then articulate its findings of fact and conclusions of law in a written order.

20. Access to judicial records relating to qualified immunity filings, motions to dismiss, evidentiary matters, and summary judgment papers remains especially important.

21. In this instance, for example, Defendants’ motion to dismiss papers do not ask a magistrate to resolve a discovery dispute or change a scheduling order. They seek a ruling on the merits of claims and the existence of a qualified immunity and thereby request that an Article III judge enter judgment in reliance on judicial records Defendants filed but forever want to withhold from public assessment. Defs.’ Mot. to Dismiss, ECF No. 10.

22. Thus, in reviewing a summary judgment access case raising parallel access and accountability concerns, the Third Circuit noted: “[t]he public’s exercise of its common law

access right . . . promotes public confidence in the judicial system . . . . As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.” *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991) (alteration in original) (finding common law right of access to motion for summary judgment papers) (quoting *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (which recognized the common law right of access to civil trial transcript and trial exhibits)).

23. Pursuant in part to Fed. R. Civ. P. 24, intervention here is appropriate as a matter of right, or because permissive intervention grounds exist.

24. In related cases, the Council obtained intervention status or otherwise received permission to resist motions seeking to limit courtroom or judicial records access. *See, e.g., Steele v. City of Burlington*, 334 F. Supp. 3d 972 (S.D. Iowa 2018); *In re Iowa Freedom of Info. Council*, 724 F.2d 658 (8th Cir. 1983); *Iowa Freedom of Info. Council v. Wifvat*, 328 N.W.2d 920 (Iowa 1983).

25. As *Steele* exemplifies, intervention provides an appropriate procedural vehicle for journalists and their news organizations, as well as other members of the public, to vindicate their common law access rights to judicial records.

26. The Council requests that it receive intervenor status for the limited purpose of resisting entry of the protective and sealing order that Defendants seek *and* to secure and maintain public access to judicial records filed or considered in connection with substantive or merits-based motions or rulings in this case, including most notably any motions to dismiss or

summary judgment motions, and the pleadings, exhibits, filings, and evidence presented to this Court in connection with submission of a dispositive motion for hearing or decision such as police body camera video recordings.

### **Conclusion**

27. Pursuant to L.R. 7, Movant contemporaneously files its supporting brief and incorporates it here by reference.

28. That pleading also contains Movant's Fed. R. Civ. P. 24(c) statement.

29. On Friday, February 16, 2024, an attorney for Movant exchanged email communications with Gary Dickey, an attorney for Plaintiff, who indicated that Plaintiff does not resist Movant's motion to intervene or its opposition to the protective and sealing orders that Defendants request. Further, "Woods desires to use audio and video of the underlying event along with investigative reports as part of her amended Complaint and resistance to motion to dismiss." Pls.' Resp. to Defs.' Mot. for Protective Order, ECF No. 19, at 2.

30. On Friday, February 16, 2024, an attorney for Movant emailed the Defendants' attorneys seeking their position on Movant's intervention motion and protective and sealing order resistance. On Monday, February 19, 2024, Defendants' attorney Luke DeSmet replied: "The City will not object to your motion for intervention. The City will maintain its position that the body camera videos at issue are confidential under Iowa law and should be sealed. To that extent, the City will resist public access to case materials involving the videos."

### **Request for Relief**

WHEREFORE, Movant The Iowa Freedom of Information Council requests that the Court:

- Grant it mandatory or permissive intervention,
- Consider its arguments in favor of securing and maintaining access by Movant and the public to all judicial records, as delineated in *Steele*, filed in this case including police body camera video recordings, and

- Deny Defendants request for protective and sealing orders, including that proposed in ECF No. 18-3, to the extent they would deny, delay, or restrict public access to judicial records (rather than mere discovery exchanged between the parties) or otherwise would limit or adversely affect public attendance at court proceedings and instead order that all judicial records, including body camera video recordings, submitted as evidence or exhibits or reviewed by the Court in its consideration of a substantive, merits-based, dispositive, or evidentiary motion, remain available for public access and copying.

Dated: February 21, 2024.

Respectfully submitted,

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**ATTORNEYS FOR MOVANT**

**Certificate of Service**

The undersigned certifies that service of a true copy of this motion occurred on February 21, 2024, through the Court's electronic filing system to each attorney of record at his/her last known email address shown below.

/s/Rita Bettis Austen

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