MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

<table>
<tr><td>JOHN CHASNOFF,

Plaintiff,

v.

COL. JOSEPH MOKWA, etc., et al.,

Defendants.

WENDELL ISHMON, et al.,

Plaintiffs,

v.

ST. LOUIS BOARD OF POLICE COMMISSIONERS, etc., et al.,

Defendants,

and

JOHN CHASNOFF,

Intervenor Defendant.</td><td>)
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)</td><td>No. 0722-CC07278
Div. 18

consolidated with

No. 1122-CC01598
Div. 18

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FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

This sorry episode in the annals of the St. Louis Metropolitan Police Department has dragged on for over seven years, and the Court regrets that its judgment today will not mark the final chapter. To paraphrase Perry Mason, it only takes one bad police officer to undermine the good work of hundreds of good police officers. The Court observes that the officers involved in these consolidated cases are not bad police officers, but several of them succumbed to the temptation (to which none of us in the public service is immune) to use an incident of their office for private purposes. That their

misfeasance must become public is an unfortunate but necessary consequence of the power they were and are entrusted with, a power that, on a daily basis, has more direct impact on individual citizens than does the power of the Court--and for that reason, they must be held to a higher standard than other citizens.

Pursuant to mandates of the Court of Appeals, *Chasnoff v. Mokwa,* 415 S.W.3d 152 (Mo.App.E.D. 2013) and *Ishmon v. St. Louis Bd. of Police Commissioners,* 415 S.W.3d 144 (Mo.App.E.D. 2013), the above-captioned actions were assigned to this Court, which entered its order consolidating the causes. The *Ishmon* cause was then tried to the Court on April 9, 2014. The *Ishmon* plaintiffs requested findings pursuant to Sup.Ct.R. 73.01. Having considered the appellate mandate, the pleadings, testimony, exhibits and arguments of counsel, and being fully advised in the premises, the Court now enters its findings of fact, conclusions of law, order and judgment. Objections not expressly ruled on are overruled, with the Court using evidence for permissible purposes only. Issues on which no express findings are made shall be deemed found in accordance with the result reached.

The alignment of the parties in the consolidated cases fosters confusion. For the sake of clarity, the Court will refer to the plaintiff police officers in No. 1122-CC01598 as the *Ishmon* plaintiffs; Mr. Chasnoff, the original plaintiff in No. 0722-CC07278 and intervenor defendant in No. 1122-CC01598, will be referred to as intervenor defendant; the Board of Police Commissioners of the City of St. Louis, defendant in both cases, will be referred to as the Board.

Because the Court interprets the mandate of the Court of Appeals to require that the release of any records be subject to an ongoing stay unless and until no appeal is taken or, if an appeal is taken, until the appeal is decided, the Court will file this Order and Judgment in two forms: a redacted Order and Judgment will be made public; an unredacted Order and Judgment will be filed as a "confidential" document, accessible only to counsel for the parties who will be forbidden to disclose it to anyone (except their clients) without leave.

The Court insisted that counsel for the *Ishmon* plaintiffs provide the Court with a roster of the anonymous or "John Doe" plaintiffs. Although the petition alleged the existence of 30 "John Does," plaintiff's counsel presented a roster which consisted of 19 persons, four of whom are individually named plaintiffs, to wit, Officers Ishmon, Kranz, Menendez and Somogye. Surprisingly, counsel disclaimed representation of any "John Does" other than those appearing on the roster.

The Court ordered that all plaintiffs appear personally for trial. The Court deemed such an order essential to assure that the anonymous plaintiffs were in fact seeking relief and that there could be no misunderstanding as to whom counsel was representing. Of the 19 identified *Ishmon* plaintiffs, six did not appear for trial. The Court will dismiss the claims of those parties. It is one thing for the courts to countenance anonymous litigation; it is another for persons prosecuting lawsuits anonymously to fail or refuse to present themselves for trial. The Court finds and concludes that *Ishmon*

plaintiffs Deeba, Disterhaupt, Edmond, Ehnes, Kuntz and Spiess have waived any claim to relief in the consolidated cases and have no justiciable interest in the closure of the records at issue. Since these parties lack standing to contest release of the records at issue, it follows that the stay on disclosure of records pertaining to them is inapplicable. The records pertaining to those erstwhile parties will be unsealed and made available to intervenor defendant and the public at large upon the filing of this Order and Judgment.

Findings of Fact

1. Wendell Ishmon, Thomas Kranz, Phillip Menendez, Joseph Somogye, [NAMES OMITTED], Michael Deeba, Daniel Disterhaupt, Philip Edmond, Michael Ehnes, Edward Kuntz, and Joseph Spiess are or were at all times material hereto commissioned police officers employed by the Board of Police Commissioners of the City of St. Louis.

2. During October 2006, the baseball World Series was played in St. Louis. The *Ishmon* plaintiffs were assigned to, or supervised, a special detail deployed to prevent ticket scalping, i.e., the sale of World Series tickets at prices above their stated price.

3. Several persons arrested for ticket scalping filed complaints that the arresting officers appropriated the arrestee's money and World Series tickets. See Chasnoff Ex. 2 & 3. These complaints induced the Police Department to conduct an "internal affairs" investigation. The investigation disclosed that a number of World Series tickets seized from arrestees were utilized by other persons and then placed in the evidence storage area of the vice/narcotics division.

4. In practice, the Internal Affairs Division (IAD) of the Police Department operates independently of a criminal investigation. If a complaint of police officer misconduct involves alleged criminal conduct of the officer, or if an IAD investigation uncovers evidence of such criminal conduct, the matter will be referred to the Deputy Chief of Police, Bureau of Professional Standards. See Ex. 61, Rule 7.009. A complaint of criminal conduct can result in a separate investigation by regular police officers in the usual way, and the targeted officer will be interviewed by investigating officers. The information obtained by this investigation is provided to the IAD when the criminal case is complete. However, the IAD will also conduct its own investigation and will not share any information obtained with the criminal investigators. In this case, as a matter of fact, the investigation of the complaints regarding the World Series ticket seizures is indistinguishable from a criminal investigation, although no criminal charges were preferred.

5. When investigating a misconduct complaint, IAD officers interview the targeted officer or officers. Prior to the interview, the IAD investigator provides the officer with an "advice of rights" as follows (e.g., Ex. 20):

> I wish to advise you that you are being questioned as part of an official investigation of the Police Department. You will be asked questions related and specifically directed to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and the Constitution of this State and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to testify or answer questions relating to the performance of your official duties or fitness for duty, you will be subject to department charges which could result in your dismissal from

> the Police Department. If you do answer, these statements may be used against you in relation to subsequent departmental charges, but not in any subsequent criminal proceedings. [I understand that all matters discussed are confidential and that I shall not discuss or communicate any part of these matters to any other person, other than my attorney, without prior written permission from the Command, Internal Affairs.]

(The bracketed language is not included in the current "advice of rights" form, see Ex. 60, but was included in the forms presented to the *Ishmon* plaintiffs.)

6. The IAD interviewed each of the *Ishmon* plaintiffs in the course of investigating the World Series ticket complaints. The IAD investigators presented each officer with the "advice of rights" quoted above, which is based on *Garrity v. New Jersey,* 385 U.S. 493 (1967), and the subsequent interviews are known in the Police Department as "*Garrity* statements." Each *Ishmon* plaintiff signed the advice of rights form. Some, but not all, of the *Ishmon* plaintiffs were represented by counsel during the interviews. None of the interviewees invoked his right to remain silent.

7. The records of the IAD investigation that are the subject of the *Ishmon* plaintiffs' claim for relief were filed with the Court under seal. They have been individually marked as exhibits 1 through 59. The individual documents consist of transcripts and recordings of the interviews with each plaintiff, Ex. 1-19, the "advice of rights" form executed by 16 plaintiffs, Ex. 20-35, consent to discipline forms signed by seven plaintiffs, Ex. 36-42, a "computerized card file" summary of the results of the investigation covering 16 plaintiffs, Ex. 50, and IAD administrative reports, Ex. 43-49, 51-59.

8. Although the recorded interviews in this case vary, the Court finds that at no time did the IAD investigators promise or represent that the so-called *Garrity* statements would not become public record or would not be disclosed for legitimate purposes. The *Ishmon* plaintiffs understood that the statements were being obtained for "internal use only," but in actuality, the consistent representation was only that the statement could not be used in any subsequent criminal prosecution. The oral statements of the IAD investigators regarding the potential use of the *Garrity* statements did not vary materially from the written "advice of rights" form, which makes no representation that the Police Department will treat the recorded statement as secret. See Ex. 1-19. Notwithstanding the evidence of the custom regarding use and disclosure of "*Garrity* statements" within the Police Department, the Court finds that, in fact, no promises of secrecy were given in this case.

9. As a result of the IAD investigation of the World Series ticket complaints, 16 *Ishmon* plaintiffs were disciplined, with the penalties ranging from written reprimand to varying suspensions and demotions in rank. See Ex. 50. It does not appear from the record that any officer contested the discipline imposed. The findings of the IAD investigation were that the officers in question failed to observe rules for proper handling of evidence, engaged in conduct unbecoming an officer, or violated department procedures. No officer under investigation was charged with giving false information to the IAD. The Court finds that the officers were forthright in their

statements to the IAD concerning the improper use of the seized World Series tickets.

10. The intervenor defendant secured a judgment in No. 0722-CC07278. The Board did not appeal; an appeal filed by the *Ishmon* plaintiffs as intervenors was dismissed. The judgment in No. 0722-CC07278 concluded that the materials in the record here as Ex. 1-59 were public records.

11. The Court finds that disclosure of Ex. 1-59 will cause embarrassment to the *Ishmon* plaintiffs, but the Court finds no likelihood that such disclosure will cause any future pecuniary loss. The Court finds that none of the *Ishmon* plaintiffs is now seeking other employment and so any effect of disclosure on future employment prospects is wholly speculative.

12. The Court finds that the IAD investigation and its results are matters of substantial public interest and importance, and that disclosure of the records at issue in this case is likely to enhance public confidence in the internal disciplinary procedures of the Police Department, whereas continued closure is likely to injure the Department's reputation in the community.

Conclusions of Law

1. The Court has jurisdiction of the parties and subject matter. §§ 527.010 *et seq.*, RSMo 2000 & Supp.; *Ishmon v. St. Louis Bd. of Police Commissioners,* 415 S.W.3d 144 (Mo.App.E.D. 2013): cause remanded "for adjudication on the merits of Plaintiff police officers' asserted constitutional and/or statutory rights to keep the subject records closed in part or in their entirety." 415 S.W.3d at 151.

(The Court considers that the mandate of the Court of Appeals requires this Court to address the *Ishmon* plaintiffs' claims on the merits and to reject intervenor defendant's arguments regarding estoppel.)

2. The judgment heretofore entered on June 7, 2010, in No. 0722-CC07278 is a final judgment and is not subject to collateral attack by the *Ishmon* plaintiffs. The 2010 judgment is the law of the case. See *Pathway Financial v. Schade,* 793 S.W.2d 464 (Mo.App.E.D. 1990). Thus, the recorded interviews, advice of rights forms, consent to discipline forms, and investigative reports denominated Ex. 1-59 are public records and are subject to disclosure unless the *Ishmon* plaintiffs demonstrate an independent right to compel closure.

3. The *Ishmon* plaintiffs disclaim any reliance on the Sunshine Law, §§610.010 *et seq.*, RSMo 2000 & Supp. The disclaimer is well advised, since the Sunshine Law itself does not create any right to compel a governmental entity to close any record: "Nothing in sections 610.010 to 610.028 shall be construed as to require a public governmental body to hold a closed meeting, record or vote to discuss or act upon any matter." §610.022.4; see *Chasnoff v. Board of Police Commissioners,* 334 S.W.3d 147 (Mo.App.E.D. 2011). The terms of the Sunshine Law are therefore irrelevant to the issues before this Court.

4. Under Missouri law, privileges usually must be created by the constitution or by statute. See W. Schroeder, 33 *Missouri Practice: Courtroom Handbook on Missouri Evidence* §501.1. *Garrity v. New Jersey,* 385 U.S. 493 (1967) holds that the Fourteenth Amendment precludes the use in a criminal prosecution of an incriminating statement obtained from a public employee under threat of discharge or

discipline. Contrary to the *Ishmon* plaintiff's position (and, apparently, the opinion of the St. Louis Police Department), *Garrity* does not erect an impenetrable barrier around a statement elicited from a public employee under compulsion. Rather, *Garrity* makes any such statement inadmissible as direct evidence in a criminal prosecution, period. The idea that a so-called *Garrity* statement cannot be disclosed to the public or to prosecutors is simply wrong.

5. "[T]he protection of a person's *general* right to privacy --his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States,* 389 U.S. 347, 350-51 (1967)(footnotes omitted). The Court is unable to discern, and even an eminent civil libertarian like intervenor defendant does not assert, that the Fourteenth Amendment shrouds employment records of public employees with a veil of secrecy. *State ex rel. Daly v. Info. Tech. Services Agency, City of St. Louis,* 417 S.W.3d 804, 812 (Mo.App.E.D. 2013), declaims about a constitutional "right of privacy" that prevents disclosure of "personal matters," but it does so without much analysis. *Daly* cites to *Whalen v. Roe,* 429 U.S. 589 (1977), which discussed various federal authorities often described as "privacy" cases, but the holding of *Whalen* actually rejects a claim of a right of privacy to prevent reporting of certain drug prescriptions.

6. The provenance of a right to privacy of employment records[1] is murky. Later cases often cite *State ex rel. Tally v. Grimm,* 722 S.W.2d 604 (Mo.banc 1987), for the proposition that such a right exists, but *Tally* says no such thing. Its holding rests on the standards of relevancy under the discovery rules and establishes only that discovery of a plaintiff's earnings history can be compelled in a case where the plaintiff claims lost earnings. By contrast, *Disabled Police Veterans Club v. Long,* 279 S.W.2d 220 (Mo.App.St.L. 1955), held that the names and addresses of disabled police pensioners were a matter of public record, and that any member of the public had a right to inspect such records. It is true that *State ex rel. Crowden v. Dandurand,* 970 S.W.2d 340 (Mo.banc 1998), proclaims that employees have a "fundamental right of privacy in employment records," 970 S.W.2d at 343, citing *Tally,* but, again, there was no analysis and the holding of the case was that the employment records at issue were discoverable. *State ex rel. Delmar Gardens North Operating, LLC v. Gaertner,* 239 S.W.3d 608 (Mo.banc 2007), yet another discovery case, is more cryptic, referring only to a "right of privacy in employment records," without explication of source or reasoning. In any event, none of the cases declaiming about a right of privacy in employment records involves records pertaining to a public employee's performance of duty. On the whole, the Court is unable to conclude that there is in reality an overarching *constitutional* right to privacy of employment records of public employees. Any right of privacy of

[1] The Court's references to "employment records" should not be construed as departing from the findings and conclusions in the prior judgment. The Court uses the phrase in a generic sense for convenience.

public employees would at most extend to purely personal facts (e.g., health history).

7. Assuming that there is a constitutional right to privacy of employment records of public employees, "[t]o the extent a Constitutional right of privacy has been recognized, that right has been extended to protect an *individual's* interest in preventing disclosure of *personal matters*." *North Kansas City Hosp. Bd. of Trustees v. St. Luke's Northland Hosp.,* 984 S.W.2d 113, 121 (Mo.App.W.D. 1998)(emphasis in original). The Court concludes that information regarding a police officer's performance of official duties, including discipline imposed for misconduct involving citizens, is not a *personal matter* subject to constitutional protection. On the contrary, an officer's performance of official duties is one of the most important subjects for public knowledge and scrutiny and to attempt to fashion such a right to conceal may well raise First Amendment issues. Cf. *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975). The idea that police disciplinary matters, involving mishandling of evidence seized from citizens, are subject to a constitutional right of privacy finds no support in any case that the parties cite or that the Court can unearth.

8. In the leading Missouri case on public disclosure of private facts, one of Missouri's most eminent jurists analyzed the common law tort of invasion of privacy and held that publication of private facts could be actionable, but only under certain circumstances. *Y.G. v. Jewish Hosp. of St. Louis,* 795 S.W.2d 488 (Mo.App.E.D. 1990)(Simeone, J.). Noting that matters of public

concern are legitimately publicized, Judge Simeone delineated the elements of an action for publication of private matter as follows: "(1) publication or 'publicity,' (2) absent any waiver or privilege, (3) of private matters *in which the public has no legitimate concern*, (4) so as to bring shame or humiliation to a person of ordinary sensibilities." 795 S.W.2d at 499 (emphasis added).

9. Even assuming that public employees such as the *Ishmon* plaintiffs have a common law right of privacy in their employment records, it is evident that, in this case, the public's legitimate concern in the records at issue precludes deployment of that right to conceal those records from the public.

10. The Court also observes that the remand contemplated determination of claims regarding constitutional or *statutory* rights of the *Ishmon* plaintiffs, and no common law right of privacy can trump the statutory policy declared by the Sunshine Law and expressly recognized by §109.180, RSMo: "except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for personal inspection by any citizen . . ." See also §1.010, RSMo. The Court construes the use of the phrase "except as otherwise provided by law" to refer to statutory law and not common law. Thus, only if a statute authorizes closure, can a governmental entity withhold official records from the citizen. Cf. *American Family Mut. Ins. Co. v. Mo. Dept. of Insurance,* 169 S.W.3d 905 (Mo.App.W.D. 2005)(applying Sunshine Law exception where disclosure prohibited by law; closure of

records required by Missouri Uniform Trade Secrets Act). That is not the case here.

11. The *Ishmon* plaintiffs rely heavily on the reasoning of *Laut v. City of Arnold,* 417 S.W.3d 315 (Mo.App.E.D. 2013), to support their claim that they are entitled to compel closure of the records here at issue. Because it is established that the records in this case are not subject to closure under the Sunshine Law, *Laut* is inapposite. To be sure, *Laut* extensively parses the question of closure of "personnel records" as permitted by the Sunshine Law and the line of demarcation between "investigative reports" and "personnel records" in the context of investigations of police misconduct; but *Laut* proclaims no independent right of privacy so as to *compel* closure of employment records. On the contrary, *Laut* recognizes that if a given report or record is both an investigative record and a personnel record, its contents must be deemed open and not subject to closure under the Sunshine Law. 417 S.W.3d at 323, 326. Although *Laut* opines that a mixed investigative and personnel record can be subject to partial closure under the Sunshine Law, this Court rejects any contention that *Laut* governs disposition of the *Ishmon* plaintiffs' claims herein.

12. Even if the custom and practice of the Board was to preserve "*Garrity* statements" as confidential, this custom and practice does not create any enforceable rights in the *Ishmon* plaintiffs. The law of Missouri is found in the statutes and decisions of the courts and not in police department administrative customs. Likewise, the Court categorically rejects the *Ishmon* plaintiffs' argument that individual public employees have a right to

enforce closure of the Board's records because the Board at one time treated them as closed. As noted above, the Sunshine Law imposes no mandate on governmental entities to close any record, and there is no other mandate for closure to be found in any other applicable statute.

13. In sum, public employees have no federal or state constitutional right of privacy to compel closure of governmental records pertaining to their performance of their official duties. The procedure prescribed by *Garrity v. New Jersey* for handling statements obtained by compulsion from public employees creates only a limited evidentiary privilege to prevent use of such statements in criminal prosecutions and recognizes no constitutional right to prevent disclosure of such statements to the public. There is no other statutory or common law right of privacy that would be infringed by release of the investigative records at issue in this case, as the investigation and discipline of the *Ishmon* plaintiffs for misconduct in putting seized evidence to personal use is a matter of public interest.

14. The Court concludes that intervenor defendant is entitled to recover from defendant Board his reasonable attorney's fees in connection with all proceedings in the consolidated cases. This is so because the conduct of defendant Board in attempting to evade the judgment in No. 0722-CC07278 by the device of a consent decree in No. 1122-CC01598 necessitated the intervention in the *Ishmon* case so as to enforce the judgment in No. 0722-CC07278.

ORDER AND JUDGMENT

In light of the foregoing, it is

ORDERED, ADJUDGED AND DECREED that the claims of plaintiffs Deeba, Disterhaupt, Edmond, Ehnes, Kuntz and Spiess be and the same are hereby dismissed with prejudice and the stay heretofore entered with regard to disclosure of employment records of said plaintiffs is dissolved and Exhibits 4, 5, 6, 7, 11, 19, 24, 25, 35, 36, 37, 44, and 55 are unsealed and are made part of the public record; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that intervenor defendant have judgment against the *Ishmon* plaintiffs (Wendell Ishmon, Thomas Kranz, Phillip Menendez, Joseph Somogye, [NAMES OMITTED]) on the claims alleged in the petition in No. 1122-CC01598, and it is declared that said *Ishmon* plaintiffs have no legally cognizable right to privacy which precludes release of the records of defendant Board of Police Commissioners pertaining to the investigation and discipline of said plaintiffs for misconduct in the handling of evidence seized incident to ticket scalping arrests, arising at the time of the baseball World Series in the City of St. Louis in 2006; and it is

FURTHER ORDERED that costs attributable to No. 1122-CC01598 are taxed against the plaintiffs therein; and that intervenor defendant shall have and recover his reasonable attorney's fees in these consolidated actions from defendant Board of Police Commissioners of the City of St. Louis; intervenor defendant shall file a statement of such fees within 20 days of the date hereof; defendant Board shall respond within 15 days thereafter; and it is

FURTHER ORDERED that, in accordance with the mandate of the Court of Appeals, enforcement of the judgment herein is stayed pending the filing and disposition of any notice of appeal, except with regard to

the records pertaining to the dismissed plaintiffs named above; and it is

FURTHER ORDERED that intervenor defendant and his counsel shall not publicly disclose the unredacted version of this Order and Judgment or the names of the "John Doe" plaintiffs [names withheld] pending filing and disposition of any appeal herein.

SO ORDERED:

____
Robert H. Dierker
Circuit Judge

Dated: _June 11, 2014
cc: Counsel/parties pro se