NO. 00-5608

IN THE SUPREME COURT OF THE UNITED STATES

Geoffrey Davidian,

Petitioner

v.

T. Michael O'Mara, individually and in his official capacity as Cookeville City Attorney;
Jim Shipley, individually and in his official capacity as Cookeville City Manager;
City of Cookeville,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Geoffrey Davidian, pro se
4101 N. Prospect Ave.
Milwaukee, WI 53211
(414) 964-8871

QUESTION PRESENTED

In a First Amendment retaliation case, where a news reporter has repeatedly published criticism of a municipality's public officials, do the public officials sufficiently chill the news reporter's First Amendment rights by denying access to public records as part of an overall scheme of retaliation calculated to frustrate, delay, and diminish the news reporter's newspaper and web publication so as to give rise to a claim under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

Petitioner

Geoffrey Davidian, an individual currently a citizen of the State of Wisconsin. The Petitioner has no corporate affiliations. He was the sole owner of *The Putnam Pit*, Inc., a corporation that has been administratively dissolved.

Respondents

T. Michael O'Mara, individually and in his official capacity as Cookeville City Attorney and Jim Shipley, individually and in his official capacity as Cookeville City Manager for the City of Cookeville. The City of Cookeville is a municipality in the State of Tennessee; its only known affiliation is its 100 percent ownership of Cookeville Regional Medical Center, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Caselaw

OPINIONS BELOW

The unpublished opinion of the United States District Court for the Middle District of Tennessee is included in the Appendix at 18a. The Magistrate's Report is included herewith as Appendix C Appendix 21a. The unpublished opinion of the Sixth Circuit Court of Appeals is reported at Davidian v. O'Mara, 210 F.3d 371, (6th Cir. 2000), and is printed in the attached Appendix at 1a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit affirmed the Opinion of District Court on April 7, 2000. On April 21, 2000 Petitioner filed a Petition for Rehearing which The United States Court of Appeals for the Sixth Circuit denied on May 9, 2000 (Appendix D at 90a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*****

42 U.S.C. § 1983:

Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

Geoffrey Davidian is a journalist who was engaged in the constitutionally protected activity of gathering and reporting news and political commentary that portrayed the Cookeville, Tennessee, public officials in an accurate but unflattering light. The Defendants in this case are the City of Cookeville, its city manager, Jim Shipley, and the city attorney, T. Michael O'Mara.

In May 1996, Davidian published the first issue of The Putnam Pit, a lively, controversial journal of local news and investigative reporting. Davidian had encountered no troubles accessing public records prior to this first publication. In its first edition, The Putnam Pit reported the controversial background of Cookeville General Hospital administrator, Mike Mayes, and a story about the exorbitant legal fees Defendant O'Mara charged the city in prosecuting Davidian's traffic offense.

Following this publication, the city officials started a retaliatory campaign against Davidian. On June 3, 1996, superficially reading the Tennessee Open Records Act, O'Mara informed Davidian that the City would deny him access to public records unless he could prove

Tennessee citizenship. Throughout the summer of 1996, O'Mara and Shipley denied Davidian access to public records regarding the city attorney and the municipally-owned hospital administrator's personnel file. During this time, the Defendants successfully thwarted Davidian from doing follow-up stories on those issues.

Davidian hired his son, Eli Davidian, a Tennessee citizen, to obtain the records for the purpose of publishing articles in The Putnam Pit. Despite his Tennessee citizenship, which the Tennessee Open Records Act requires, the Defendants denied Eli Davidian public records because of his affiliation with The Putnam Pit. Davidian and his son pursued their rights to access public records successfully in the Chancery Court of Putnam County, Tennessee. Davidian's claim was left unresolved, but the Chancery Court found that the City of Cookeville had willfully and wrongfully denied Eli Davidian access to the public records.

Still the delay caused by litigation resulted in the stories losing their newsworthy qualities, especially timeliness in the public arena. Davidian pointed out to city manager, Shipley, that the City's own charter

provided that any representative of the press could obtain these records at all reasonable times and under reasonable circumstances. Shipley responded that since The Putnam Pit was not a newspaper of general circulation and Davidian lacked legitimacy as a member of the press, the availability of the records under the City's policy was not applicable to Davidian.

Davidian continued to publish criticism, but with difficulty in obtaining records. Davidian became despondent and humiliated. O'Mara, the city attorney, interfered with Davidian's employment arrangement with another local paper causing Davidian economic loss. This local paper also terminated a contract to distribute The Putnam Pit as the result of a phone call from O'Mara.

On March 6, 1997, Davidian filed this case in the United States District Court for the Middle District of Tennessee seeking damages pursuant to 42 U.S.C. § 1983 for violation of his civil rights. Federal jurisdiction was established under 28 U.S.C. §§ 1331 and 1343(3). On September 15, 1997, Defendants filed a Motion for Summary Judgment . On December 2, 1998, Magistrate Judge William J. Haynes, Jr. recommended that the motion be granted. The District Court Judge Thomas

Higgins entered an order of dismissal on February 11, 1999. On March 15, 1999, Davidian filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. On April 7, 2000, the Sixth Circuit affirmed the District Court's judgment. Davidian filed a timely motion for a panel rehearing, but that petition was denied on May 9, 2000.

ARGUMENT FOR GRANTING A WRIT OF CERTIORARI

The Defendants carried out a campaign of retaliation against Geoffrey Davidian because he criticized the political officials of the City of Cookeville. The Defendants intended to discourage, delay, deny, and at the very least frustrate Davidian until he ceased or altered his publications.

The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Retaliation is thus akin to an "unconstitutional condition" demanded for the receipt of a government-provided benefit. Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Access to public records is a government provided benefit under state law and local ordinance. While denial of access to public records may not necessarily infringe upon First Amendment newsgathering in every instance, where the government withholds otherwise accessible benefits (such as public information) with the intent to control political speech through retaliatory methods, then the First Amendment is fully implicated.

Applying the standard of the Sixth Circuit Court of Appeals for First Amendment retaliation cases, Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998), the appellate court below found that Davidian had "easily shown that he was engaged in constitutionally protected political speech when he published The Putnam Pit." (Davidian v. O'Mara, 210 F.3d 371, (C.A.6 (Tenn.) 2000), 7, app. 11a. The Sixth Circuit also found sufficient evidence, based on the denial of access to the city's public records less than two weeks after The Putnam Pit was first published, to show the denial of records was motivated by the exercise of his political speech. (Id.). The Sixth Circuit failed, however, to allow Davidian's First Amendment retaliation claim to go forward because the court found that he did not suffer an injury that would chill a person of ordinary firmness from continuing to publish news that criticizes local public officials. (Id. at p. 9, app. 13a).

The unsettled area of First Amendment jurisprudence regarding what type and what intensity of injury is sufficient to chill an individual's Freedom of Speech and Press rights is present in this case and invites resolution by the United States Supreme Court. The press needs to operate without fear of confronting bureaucratic gamesmanship to regulate what is reported about

government. Mr. Davidian's injuries in the form of delayed reporting of stories and failure to gather the full story on matters of public record and public concern were sufficient to interfere with the letter and spirit of the First Amendment.

ARGUMENT 1

The Lower Courts Are Inconsistent on the Question of What Retaliatory Acts Are Sufficient to Chill First Amendment Rights; Such Inconsistencies Call for this Court to Exercise its Supervisory Powers to Prevent Injustice through the Arbitrary Application of the Law on an Important First Amendment Question.

The Court has zealously protected information about the function of government and public officials, for it "lies near the core of the First Amendment." Landmark Communications, Inc. V. Virginia, 435 U.S. 829, 838, 98 S.Ct. 1535, 1545, 56 L.Ed.2d 1 (1978).

See also First National Bank v. Bellotti, 435 U.S. 765, 776-78, 98 S.Ct. 1407, 55 L.Ed.2d 1 (1978) and New York Times Co. v. Sullivan, 376 U.S. 254, 269-70, 84 S.Ct. 71, 11 L.Ed.2d 686 (1964).

Still the lower courts regularly hear First Amendment retaliation cases without benefit of guidance from an articulated standard regarding what acts are sufficiently injurious to be actionable. Indeed, as set forth

below, the lower courts have found retaliatory acts to be sufficient to state a First Amendment claim for far less egregious acts than the City of Cookeville's campaign of obstruction aimed at Mr. Davidian's journalistic endeavors.

North Mississippi Communications, Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986) sets forth a factual scenario similar to the present case in that local public officials allegedly aimed to put a newspaper out of business because of the newspaper's critical editorials. The Fifth Circuit found that allegations of withholding advertising or threatening commercial advertisers with a loss of county business was sufficient to establish a First Amendment retaliation claim. The court further noted that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests , especially, his interest in freedom of speech." Id. at 1337. (Citing to Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

The present case is in direct conflict with this aspect of Perry in that government benefits, in particular access to public records, were denied on the basis of Mr. Davidian's exercise of his First Amendment right.

The Sixth Circuit itself has conflicting analysis regarding sufficiency of injury to sustain a First Amendment retaliation case. While recognizing similarities between the present case and McBride v. Michiana, 100 F.3d 457 (6th Cir. 1996), the Sixth Circuit determines that the cases are distinguishable on the fact that the City of Cookeville did not engage in physically threatening behavior as in McBride. (Opinion, Appendix A, pp. 11a-13a). McBride otherwise sets forth a factual scenario of a retaliatory campaign almost identical in purpose as in Davidian's case. The decision to hear one case but not the other creates the impression of arbitrary application of the law and arbitrary analysis of the facts. A brief look at other Circuits indicates that the sufficiency of injury in First Amendment cases is an ill-defined concept. In Bart v. Telford, 677 F.2d 622 (7th Cir. 1982), the Seventh Circuit held that a city employee who had opposed the mayor's previous electoral bid and was harassed by fellow employees for bringing a birthday cake to work could maintain a First Amendment case pursuant to 42 U.S.C. § 1983. The Seventh Circuit noted that "the effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable. Comparing the obstruction in Davidian not being able to publish a

serious story of public concern with the harassment of an employee for bringing a birthday cake, one is left with little guidance as to how courts determine when an injury resulting from retaliation rises to the level of being actionable.

The First Circuit found that denial of a residential use permit could state a claim sufficient to constitute a retaliation claim. Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32 (1st Cir. 1992). The Fifth Circuit found sufficient injury to state a claim where police officials revoked permission to use the police radio frequency by the owner of a wrecker service who had criticized the bidding procedure for abandoned vehicle towing contracts with the city. Blackburn v. Marshall City of, 42 F.3d 925 (5th Cir. 1995) (Relying in part on North Mississippi Communications, Inc.).

The present case conflicts with these cases from the various Circuit Courts of Appeal in that injuries caused in those cases were found to be sufficient to sustain a claim for First Amendment retaliation. Despite the denial of records on arbitrary grounds to Mr. Davidian as well as later to his agent resulting in the delay and expense of litigation (in cases other than the present one), the Sixth Circuit analyzed the facts and law without clear

guidance on the issue. This Court must end the arbitrary results so that all parties will better understand the delineation between trivial injuries and those injuries that are actionable.

ARGUMENT 2.

This Court Should Reiterate an Important Principle of First Amendment Jurisprudence That Public Officials Can Abuse an Individual's Freedom of Press Rights Through Retaliation Even Though the Individual Continues to Publish.

> Censorship . . . as often as not is exercised not merely by forbidding the printing of information in the possession of a correspondent, but in depriving him of access to places where he might obtain such information.

Rehnquist, "The First Amendment: Freedom, Philosophy, and the Law," 12 Gonz. L. Rev. 1, 17 (1976).

Denying or delaying access to government records is a remarkably effective tool by public officials to

control public discourse.

"No less important to the news dissemination process is the gathering of information . . . . [F]or without freedom to acquire information the right to publish would be impermissably compromised." Branzburg v. Hayes, 408 U.S. 665, 728 92 S.Ct. 2646, 2673, L.Ed.2d 1 (1972). "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Bellotti, 435 U.S. at 783, 98 S.Ct. at 1419.

To chill a person from exercising their First Amendment rights does not mean that the person must cease all unfavorable speech. To require complete cessation of publishing before a First Amendment violation is recognized is to signal to public officials that they may penalize reporters and editors so long as they avoid an unconditional surrender war policy against the press.

As North Mississippi Communications, Inc. indicates, a newspaper can continue to publish yet still suffer injury from retaliatory acts by public officials. Denying and discouraging advertisers like the public

officials in North Mississippi Communications, Inc. is a variation on the basic theme of local public officials trying to make life difficult for the small town press that dares to criticize. Denying or causing difficulty through litigation over public records is another page out of the public officials' playbook.

This Court is presented with the opportunity to resolve the Sixth Circuit's deviation from the First Amendment analysis applied by the Fifth Circuit and the other courts set forth above. The Sixth Circuit in the case *sub judice* based its decision in part on the issue that Davidian's injuries were insufficient because Davidian continued to publish The Putnam Pit. (Opinion, Davidian v. O'Mara, p. 8-9, Appendix, 13a). Davidian suffered injury and should not be left without legal recourse simply because he had the fortitude to continue to publish. Denial of the records for even a short period of time was retaliatory censorship, an injury that should always be actionable if we want the press to act as the conduit to the public being informed about the working of the government, not only at the national level but in the small towns as well.

The retaliatory campaign and Davidian's injuries were not trivial; hopefully this Court will never view

censorship as a minor inconvenience that must be endured for the sake of the bureaucracy. Indeed, it is the petty nature of the public officials attempting to control public debate that may have caused the Sixth Circuit to erroneously conclude that the resulting injuries were also trivial. Petty acts can cause serious infringement of rights.

CONCLUSION

Petitioner seeks a Writ of Certiorari from this Court so that he might urge this Court to adopt a rule that would say that where adverse acts, consisting of deprivation of otherwise available government benefits such as access to public records, are made by public officials with retaliatory intent, the sufficiency of injury ("chilling effect") shall constitute a question of fact.

Reporters, under this standard, need not fear that news stories that criticize public officials will result in the effective censorship of their reporting by cutting off the primary source of information about government, i.e., public records. Public officials can be made to understand that in the Information Age, public officials' power to control access to public records is not a new weapon for circumventing the First Amendment by

subtle, sophisticated forms of retaliation.

This case presents the United States Supreme Court with an issue that extends beyond the present day journalistic battle in the small town of Cookeville, Tennessee. The resolution of this important constitutional issue regarding sufficiency of injury would instruct the lower courts that retaliation, particularly through the denial of access to public information, will not be tolerated as a form of back-door censorship.

The Petition for a Writ of Certiorari should be granted. Otherwise, the law will be applied in an arbitrary, unjust, and inconsistent fashion.

GEOFFREY DAVIDIAN, pro se
4101 N. Prospect Ave.
Milwaukee, WI. 53211
(414) 964-8871

APPENDIX A

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

[April 7, 2000]

No. 99-5423.

D.C. No. 2-97-0020

Geoffrey DAVIDIAN,	**)**
Plaintiff-Appellant,	**)**
	)
v.	**)**
	)
T. Michael O'MARA, individually	**)**
and in his official capacity as	**)**
Cookeville City Attorney;	**)**

Jim Shipley, individually and in his official capacity as Cookeville City Manager; City of Cookeville, Defendants-Appellees.)

On Appeal from the United States District Court for the Middle District of Tennessee.

Before NORRIS, MOORE, and COLE, Circuit Judges.

OPINION

MOORE, Circuit Judge.

This appeal was brought by a freelance reporter who claims that city officials from Cookeville, Tennessee retaliated against him after he had published several articles that portrayed certain city officials in an unfavorable light. Plaintiff Geoffrey Davidian, who publishes a self-described "watchdog" newspaper called *The Putnam Pit,* brought this 42 U.S.C. § 1983 suit against the City of Cookeville and two city officials in their official and individual capacities after these defendants allegedly kept him from gaining access to

public municipal records.

The district court granted summary judgment in favor of the defendants, adopting a magistrate judge's report and recommendation that explained that the defendants had not engaged in retaliation and concluded that the city officials were entitled to qualified immunity. Because Davidian has failed to provide sufficient evidence to show that the defendants engaged in an adverse action that would chill a person of ordinary firmness from criticizing local officials, we AFFIRM the district court's grant of summary judgment on Davidian's claim that his First Amendment rights were adversely affected by retaliatory conduct.

I. BACKGROUND

In May of 1996, Geoffrey Davidian, a freelance journalist who had spent over a year investigating an alleged murder in Cookeville, Tennessee, began publishing *The Putnam Pit,* a newspaper that reports on a variety of public issues involving local government in Cookeville and Putnam County, Tennessee. In his paper, Davidian relied on public records from the City of Cookeville to show that public officials had engaged in

unethical and illegal behavior. One of the articles in the paper criticized Cookeville's City Attorney, T. Michael O'Mara, for allegedly charging the city $8,730 to prosecute a speeding violation involving Davidian.

Shortly after the paper had been circulated, O'Mara sent a letter to Davidian that informed him that he would no longer be given access to the city's public records unless he could show that he was a citizen of the State of Tennessee, The letter explained that:

> The City of Cookeville has allowed you access to its records for some time in an attempt to cooperate with you. This effort and cooperation seems fruitless as you grow more demanding and belligerent in your requests.
>
> The Tennessee Open Records Act requires that the records of the City of Cookeville be open to 'citizens' of the State of Tennessee. When you provide evidence that you are a citizen of the State of Tennessee, the City will respond to your records request.

* * *

* * *

> The City of Cookeville has and will continue to conduct its affairs with normal business courtesies. Verbal harassment, intimidation and threats will not cause the City to change its method of doing business.

Joint Appendix ("J.A.") at 197 (O'Mara's June 3, 1996 Letter).

O'Mara claims that he sent this letter to Davidian because Davidian had tried to "bully" people at city hall to get records, insisting that they take time away from their regular jobs and immediately wait on him. J.A. at 184-85 (O'Mara Dep.). Jim Shipley, Cookeville's City Manager, also testified that several city employees had complained that Davidian's requests were bothersome and were forcing them to do excessive levels of work. J.A. at 162-63 (Shipley Dep.)

Because Davidian was not a citizen of Tennessee, city officials--relying on their interpretation of the Tennessee Open Records Act[1]--began denying him

[1] The Tennessee Open Records Act states in relevant part:

access to the city's public records. In particular, Davidian was denied access to O'Mara's records regarding his legal bills to the city and he was denied the personnel records that belonged to Mike Mayes, the Administrator of Cookeville General Hospital. Davidian responded by hiring his son. Elijah Davidian, who is a citizen of Tennessee, to request the records. The city, however, allegedly denied Elijah Davidian access to the records because of his association with *The Putnam Pit.*

Davidian then sent the city a fax in which he argued that he was entitled to the records pursuant to § 14.04 of the Cookeville City Charter. Section 14.04 reads in relevant part:

> Be it further enacted, That all records and accounts of every office, department, or agency

---

> All state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.
>
> TENN. CODE ANN. § 10-7-503.

> of the city shall be open to inspection by any citizen of Cookeville, any representative of a citizens' organization of Cookeville *or any representative of the press* at all reasonable times and under reasonable regulations established by the city manager or city council, except health and personnel records of a confidential nature, and records and documents the disclosure of which would tend to defeat the lawful purpose which they are intended to accomplish.

J.A. at 338-39 (Cookeville City Charter) (emphasis added).

Shipley responded to the fax with a letter that stated that he did not believe that Davidian was a "representative of the press" because *The Putnam Pit* was not a newspaper of general circulation. J.A. at 139 (Shipley's November 8, 1996 Letter). Davidian also tried to get access to the public documents by telling city officials that he had entered into an oral agreement to write articles for another newspaper, *The Putnam Star*. Davidian claims that this led city officials to contact The Putnam Star and persuade the newspaper to breach its

agreement with Davidian.

Davidian eventually filed suit in Chancery Court for Putnam County in an attempt to get access to the records.

The Chancery Court ruled that the city did not need to turn its records over to Davidian under the Tennessee Open Records Act, but it concluded that the city was required to turn public records over to his son. Davidian acknowledges that, after the Chancery Court's decision and since filing a federal civil rights lawsuit, he has been given access to all of the records that he had requested. J.A. at 111-112 (Davidian Dep.).

Davidian subsequently filed this 42 U.S.C. § 1983 suit seeking damages against the City of Cookeville, Jim Shipley, and T. Michael O'Mara for the alleged violation of his First Amendment rights.[2]

---

[2] Davidian brought a separate suit against the City of Cookeville and Jim Shipley, Cookeville's City Manager, arising out of the denial of access to electronic computer files concerning parking tickets, denial of access to "cookie" files in the city's computers, and a denial of a link from the city's web page. *See The Putnam Pit, Inc. v. City of Cookeville,* 23 F.Supp.2d 822 (M.D.Tenn.1998).

The district court granted summary judgment in favor

In his amended complaint, Davidian argued that his constitutional rights were violated when these defendants denied him access to the city's public records and when they kept him from distributing his newspaper at city hall.[3] Davidian also raised state law claims of slander, malicious interference with a contractual relationship, and outrageous conduct. The district court referred the case to a magistrate judge, who recommended that the district court grant the defendants' motion for summary judgment on grounds that Davidian had failed to provide sufficient evidence to sustain his First Amendment claim

---

of the defendants, and Davidian appealed the case to this court. The case was argued before this court on October 29, 1999.

[3.] Davidian has failed to argue on appeal that the defendants violated his constitutional rights when they allegedly restricted his ability to distribute his newspaper at city hall. Because Davidian's appellate brief does not address this issue, we limit our review to the district court's decision to grant summary judgment on Davidian's claim that the defendants violated his constitutional rights by retaliating against him for criticizing local public officials. See, e.g., McMurphy v. City of Flushing, 802 F.2d 191, 198-99 (6th Cir.1986).

and on grounds that the city officials were entitled to qualified immunity. The district court adopted the magistrate judge's report and recommendation, granting summary judgment in favor of the defendants and declining to exercise supplemental jurisdiction argued that his constitutional rights were violated when these defendants denied him access to the city's public records and when they kept him from distributing his newspaper at city hall.[4] Davidian also raised state law claims of slander, malicious interference with a contractual relationship, and outrageous conduct. The district court referred the case to a magistrate judge, who recommended that the district court grant the defendants' motion for summary judgment on grounds that Davidian had failed to provide sufficient evidence to sustain his

---

[4.] Davidian has failed to argue on appeal that the defendants violated his constitutional rights when they allegedly restricted his ability to distribute his newspaper at city hall. Because Davidian's appellate brief does not address this issue, we limit our review to the district court's decision to grant summary judgment on Davidian's claim that the defendants violated his constitutional rights by retaliating against him for criticizing local public officials. *See, e.g., McMurphy v. City of Flushing,* 802 F.2d 191, 198-99 (6th Cir.1986).

First Amendment claim and on grounds that the city officials were entitled to qualified immunity. The district court adopted the magistrate judge's report and recommendation, granting summary judgment in favor of the defendants and declining to exercise supplemental jurisdiction over the state law claims.

II. ANALYSIS

Davidian challenges the district court's decision to grant summary judgment in favor of the defendants, arguing that he has provided sufficient evidence to sustain his First Amendment claim. This court reviews a grant of summary judgment de novo, viewing the facts in the record and any inferences to be drawn from them in the light most favorable to the non-moving party. *Johnson v. United States Postal Serv.,* 64 F.3d 233, 236 (6th Cir.1995). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

Davidian claims that city officials kept him from examining public municipal records in retaliation for statements that he made about certain public officials in

The Putnam Pit. The defendants respond that Davidian has not provided sufficient evidence to show that they violated his First Amendment rights, and they argue that, even if they have engaged in unconstitutional conduct, they are entitled to qualified immunity. There is a considerable amount of overlap between the defendants' claim that they have not engaged in unconstitutional conduct and their claim that they are entitled to qualified immunity. Indeed, we have typically started our qualified immunity inquiry by asking whether a plaintiff has sufficiently asserted a constitutional violation at all. *See Mattox v. City of Forest Park,* 183 F.3d 515, 520 (6th Cir.1999);*see also Siegert v. Gilley,* 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."). Thus, we must determine, as a threshold matter, whether Davidian has provided sufficient evidence to show that city officials engaged in retaliatory conduct that adversely affected his First Amendment rights when they refused to provide him with public municipal records.

A plaintiff cannot establish a claim that his First

Amendment rights have been adversely affected by retaliatory conduct unless that plaintiff shows: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendants' adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of plaintiff's constitutional rights. *Bloch v. Ribar,* 156 F.3d 673, 678 (6th Cir.1998); *Mattox,* 183 F.3d at 520.

In the present case, Davidian has easily shown that he was engaged in constitutionally protected political speech when he published *The Putnam Pit*--a newspaper that contained articles that were critical of several local public officials. *Bloch,* 156 F.3d at 678; *see also Glasson v. City of Louisville,* 518 F.2d 899, 904 (6th Cir.1975) ("The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.") (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 273 (1964)). Furthermore, there is sufficient evidence, based on the fact that Davidian was denied access to the city's public records less than two weeks after *The Putnam Pit* was first published, to show

that the decision to deny access was motivated at least in part by the statements that Davidian made in his newspaper. Accordingly, Davidian can sustain his First Amendment retaliation claim as long as he has provided sufficient evidence to show that the defendants' adverse action caused him to suffer an injury that would chill a person of ordinary firmness from continuing to publish articles that were critical of local public officials.

Davidian attempts to show that he has satisfied this element of his retaliation claim by comparing the adverse action taken in this case to the adverse action taken in *McBride v. Village of Michiana,* 100 F.3d 457 (6th Cir.1996), a case in which we held that city officials were not entitled to qualified immunity after they allegedly retaliated against a reporter for exercising her First Amendment rights. In *McBride,* a reporter who had written several unfavorable articles about local public officials alleged that, after she had written these articles, city officials began making threats to her safety, harassed her on the street, engaged in a campaign to force her employers to use other reporters, denied her access to public records, and verbally harassed her at town meetings. We concluded that this type of harassment was sufficient to state a cause of action for retaliation,

and we went on to conclude that the city officials were not entitled to qualified immunity because "[t]he law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional." *Id.* at 461 (quoting *Zilich v. Longo,* 34 F.3d 359, 365 (6th Cir.1994), *cert. denied,* 514 U.S. 1036 (1995).

The are some similarities between the adverse actions taken in *McBride* and the adverse actions taken in the present case. For instance, Davidian claims that city officials denied him access to public records, and he has alleged that they interfered with the potential employment relationship he had with *The Putnam Star.* Nevertheless, we conclude that, unlike the adverse actions taken in *McBride,* the adverse conduct in this case is not severe enough to chill a person of ordinary firmness from continuing to publish unfavorable articles about city officials. Indeed, Davidian has provided no evidence that city officials engaged in the type of harassing and physically threatening behavior that went on in *McBride.* Moreover, the record, even when construed in the light most favorable to Davidian, shows that city officials were generally cooperative in providing Davidian with public information. J.A. at 138-56

(Letters between Shipley and Davidian). Although some city officials may have made it more difficult for Davidian to obtain the information as quickly as he wanted it, this is not the type of conduct that rises to the level of a First Amendment retaliation claim. As this court explained in *Mattox,* "[A] constitutional tort--like any tort--requires injury, and allowing constitutional redress for every minor harassment may serve to trivialize the First Amendment." *Mattox,* 183 F.3d at 521.

The fact that Davidian was temporarily denied access to public information certainly may have had an adverse impact on the sources that Davidian cited in his newspaper, e.g., without access to the city's sources, he no longer would have been able to rely on public records to show that city officials had engaged in unethical and illegal behavior. However, the city's decision to prevent Davidian from getting access to public records did nothing to chill Davidian from continuing to write articles that were critical of local public officials. City officials may have tried to limit Davidian's sources, but they did not engage in the type of threatening or intimidating behavior that is specifically designed to chill a person of ordinary firmness from continuing to exercise

First Amendment rights.

Because Davidian has failed to provide sufficient evidence to show that the defendants engaged in an adverse action that would chill a person of ordinary firmness from continuing to criticize local officials, the claim against the city officials was properly dismissed on qualified immunity grounds, and the claim against the city was properly dismissed on grounds that Davidian has failed to assert a constitutional violation at all.

III. CONCLUSION

For the reasons stated above, we AFFIRM the district court's grant of summary judgment in favor of the defendants with regard to Davidian's claim that his First Amendment rights were adversely affected by retaliatory conduct. Furthermore, because there are no overwhelming judicial economy reasons for exercising supplement jurisdiction in this case, we AFFIRM the district court's decision to decline to exercise supplemental jurisdiction over Davidian's state law claims.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

(Filed February 12, 1999)

No. 2-97-0020

Judge Higgins

GEOFFREY DAVIDIAN	**)**
	)
v.	**)**
	)
T. MICHAEL O'MARA, et al.	**)**

ORDER

The Court has before it the Magistrate Judge's Report and Recommendation (entered December 3, 1996; Docket Entry No. 43), the plaintiff's objections (filed December 18, 1998; Docket Entry No. 44) and first

amended objections[1] (filed February 4, 1999; Docket Entry No. 50); defendants' response (filed January 4, 1999; Docket Entry No. 47)[2];2 and the plaintiff's reply (filed January 15, 1999; Docket Entry No. 48) to the defendants' response.

After independently reviewing the Magistrate Judge's findings, the plaintiff's objections, amended objections and defendants response, and the entire record, the Court finds that the findings. and conclusions are correct and are adopted and approved. The plaintiff's objections and amended objections are overruled.

Accordingly, the defendants' motion (filed September 15, 1997; Docket Entry No. 20) for summary judgment is granted. This action is dismissed with prejudice as to the plaintiff's federal law claims under the First Amendment. As the court elects not to exercise supplemental jurisdiction, the plaintiffs state law claims

---

[1]. See also notice of filing (filed December 29, 1998; Docket Entry No 45) of exhibits to plaintiff's objections.

[2]. See also defendants' notice of filing (filed February 11,1999; Docket Entry No. 51) of Chancery Court memorandum opinion.

are dismissed without prejudice.

The entry of this order shall constitute the judgment in this action.

It is so ORDERED.

/s/_____
Thomas A Higgins
United States District Judge
2/11/99

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COOKEVILLE DIVISION
No. 2:97-0020
(Filed December 3, 1998)

GEOFFREY DAVIDIAN,	**)**
Plaintiff,	**)**
v.	**)**
T. MICHAEL O'MARA, individually	**)**
and in his official capacity as	**)**
Cookeville City Attorney,	**)**
JIM SHIPLEY, individually and	**)**
in his official capacity as	**)**
Cookeville City Manager,	**)**
the CITY OF COOKEVILLE,	**)**
Defendants.	**)**

REPORT AND RECOMMENDATION

I. INTRODUCTION

This civil action was referred to the Magistrate

Judge by the Honorable Thomas A. Higgins, District Judge, by Order entered March 3, 1998. (Docket Entry

No. 40). Pursuant to 28 U.S.C. § 636(b)(1)(B). the Magistrate Judge was directed to submit proposed findings of fact and recommendation for disposition of the defendants' motion for summary judgment (Docket Entry No. 20).

Plaintiff, Geoffrey Davidian, filed this action under 42 U.S.C. § 1983 and its jurisdictional counterparts, 28 U.S.C. §§ 1331 and 1343(3) alleging that defendants T. Michael O'Mara, City Attorney for Cookeville, Tennessee and Jim Shipley, the Cookeville City Manager violated plaintiff's First Amendment rights under the United States Constitution.

In essence, plaintiff asserts that his rights to freedom of speech and the press were suppressed when the defendants denied him access to public records and to allow the distribution of his newspaper within City Hall. The individual defendants are sued in their official and individual capacities. Plaintiff further presents several state claims of slander, malicious interference with a contractual relationship and

outrageous conduct.

Pending before the Court is the defendants' motion for summary judgment (Docket Entry Nos. 20) contending that the plaintiff did not suffer any violation of his First Amendment rights because any 'impediments to plaintiff's access and dissemination of information were the result of content neutral, reasonable time, place, and manner restrictions. (Docket Entry No. 21). The defendants further contend that even if the restrictions violated plaintiff's First Amendment rights, the defendants are entitled to qualified immunity. Id.

In his response (Docket Entry No.26), plaintiff contends that defendants violated his First Amendment rights by denying him the right to access public information and their failure to disseminate his newspaper in city buildings Both violations were caused by plaintiff's criticisms of city officials in his paper, The Putnam Pit. Plaintiff contends his First Amendment rights are clearly established.

For the reasons set forth below, the Magistrate Judge concludes that the defendants' motion for

summary judgment should be granted. First, this Court has earlier found in a related action that the plaintiff's First Amendment right does not include the unrestricted access to gather public information. Second, the Magistrate Judge concludes that any of the defendants' alleged restrictions on the plaintiff's distribution of his newspaper were reasonable and were not discriminatory toward the plaintiff's newspaper. Further, the site of the plaintiff's distribution, inside city hall, is not a forum that requires distribution of plaintiff's publications.

II. FINDINGS OF FACT[1]

[1.] Upon a motion for summary judgment the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. Duchon v. Cajon Co., 791 F.21 43, 46 (6th Cir. 1986) app. 840 F.2d 16 (6th Cir. 1988) (unpublished opinion). As will be discussed *infra*, under recent Supreme Court holdings, upon filing of a motion for summary judgment, the opposing party must come forth with sufficient evidence to withstand a motion for directed verdict. Anderson v. Liberty Lobby, 477 U.S. 242, 247-52, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986), particularly where there has been

1. The Restriction on the Access to Public Records

Plaintiff, Geoffrey Davidian, a citizen of Maine, arrived in Cookeville in February, 1995, to investigate an alleged murder (Docket Entry No. 21, Attachment thereto, Davidian deposition at pp. 6-7, 72-73 and Docket Entry No. 27, Plaintiff's Responses to Defendants' Statement of Undisputed Facts at ¶ 1). Davidian states that he came to Cookeville as a member of the press (Docket Entry No.27 at 1 ¶ 1). Davidian received a speeding ticket on or about March 8, 1995, and thereafter began making over twenty record requests for public traffic records (Docket Entry No.22, Attachment thereto, Davidian deposition at pp.44, 68). By his own estimate, Davidian asked Shipley, the City Manager or his assistant, Gail Fowler, for records over twenty occasions, and would do so when he was in town and sometimes made his requests

---

an opportunity for discovery. Celotex Corp. v. Cattrett, 477 U.S. 317, l06 S.Ct. 2548, 91 L.Ed.2d 265, 276 (1986). While there are some factual disputes, under the applicable law, those disputes are not material and this section constitutes findings of fact under Fed.R.Civ.P. 56(d).

twice a day (Docket entry No. 22, Attachment thereto, Davidian deposition at pp. 67-68) Davidian's requests for this information, in his view, was related to the speeding ticket and the alleged murder.

Gail Fowler, Shipley's administrative assistant, states that Davidian insisted that city employees provide him with records immediately and his requests were for records in formats which the city did not ordinarily provide (Docket Entry No. 25, Fowler Affidavit at ¶¶ 2-3).

According to Fowler, Davidian frequently demanded records be faxed to him or transmitted by e-mail rather than him picking them up during normal business hours (Docket Entry No.25 at 2-3, ¶ 2). In her affidavit, Fowler estimates that Davidian's record requests cost the City in excess of $2,600.00 in researching, locating, compiling, and copying requests. Id. at ¶¶ 2-4).

Shipley states that Davidian was belligerent, demanding, and offensive to City employees in making his requests (Docket Entry No.22, Attachment thereto, Shipley deposition excerpt at pp.8-9). Several

employees reported to Shipley that Davidian's requests were creating excessive levels of work for them. Id. at pp. 10-11. Some of Davidian's requests were duplicative. Id. The City attorney O'Mara also learned that Davidian was "bullying people in getting records, insisted that employees respond immediately to his requests, and was harassing certain employees, including one woman at the Utility Department (Docket Entry No. 22, Attachment thereto, O'Mara deposition excerpt at pp.14-16).

Davidian denies any harassment in making his requests and states that he paid the full amount charged for the records at the rate set by the City (Docket Entry No. 27, Plaintiff's Responses to Defendant's Statement of Undisputed Facts at ¶ 6 and Docket Entry No.29, Davidian affidavit at ¶ 15). Richard Holt, Chief of Police with the City of Cookeville, states in his affidavit that Davidian "conducted himself in a professional manner" during his visits to Holt's office and department in connection with Davidian's record requests. (Docket Entry No. 28, Holt affidavit. Also, Davidian's former attorney, Sam Harris, states in his affidavit that he was present on at least one occasion when Davidian was making a record request and that

Davidian was polite with Gail Fowler while making this request and that the person retrieving the records was inconvenienced for no more than ten to fifteen minutes. (Docket Entry No. 28, Harris affidavit at p. 3). Yet, Davidian concedes as to his requests, that, "My attorney later told me it may have been abuse of the system by legal ethics standards. It did not seem to me I was abusing the system. My code is that of a journalist." (Docket Entry No. 27, Plaintiff's Responses to Defendants' Statement of Undisputed Facts at ¶ 2.) In his deposition, Davidian also admitted that he became personally involved in the investigation of the alleged murder (Docket Entry No. 28, attachment thereto, Davidian deposition at pp. 38-44).

> The problem was that I had become so personally involved in the process, that it no longer was a newspaper story. It had to be a book or a screen play or some other form. It would not be a daily newspaper story unless somebody else did it.
>
> So I was unable to sell it because of the personal relationship I had with the story itself. I had become part of the story as

opposed to an observer.

Id. at 44 (emphasis added).

The defendants respond that Davidian did pay the cost of the actual copying, but cite the costs associated with employee time in securing the information (Docket Entry No. 22, Attachment thereto, Shipley deposition excerpt pp. 14-15). Shipley estimated that copies were about $.25 each, but the City had to pay closer to $1.00 to $2.00 in employee time to do the research, to locate, to compile, and to make copies. Id. at p. 32. Also, the City cites its legal fees and expenses in the amount of $11,520.45 for research of state law issues raised by Davidian's record requests and the subsequent state court litigation over a speeding ticket (Docket Entry No. 25, Fowler deposition at ¶ 3).

Davidian was denied access to some records. Among the records denied Davidian were O'Mara's back-up information concerning his legal bills to the City and personnel records of the Administrator of the Cookeville General Hospital, Mike Mayes. (Docket Entry No. 22, Attachment thereto, Davidian deposition

excerpt at pp. 55-56). The defendants did not have many of this information other than O'Mara's bills, which Davidian eventually received, Id. The records of the Cookeville General Hospital, which has its own separate board of directors and the defendants did not have management or access over those records (Docket Entry No. 26, Fowler Affidavit at ¶ 6) The hospital is not under the control of the City of Cookeville. Id. The City Manager's office is not involved in the management of the hospital records nor their release. Id. Davidian was referred to the hospital management for hospital records. Id. at ¶ 6.

In any event, as a result of Davidian's requests, Shipley asked defendant O'Mara, City attorney, what measures the City could take on Davidian's requests and their demands on City employees (Docket Entry No. 22, Attachment thereto, Shipley Deposition excerpt at p. 12 and Exhibit 4). O'Mara researched the Tennessee Open Records Act that was the legal basis for Davidian's requests. O'Mara was unaware of the nature of the records Davidian requested (Docket Entry no. 22, Attachment thereto, O'Mara deposition excerpt at pp. 12-15, 54). At the time of O'Mara's research, Davidian had not yet published The Putnam Pit. Id. at

pp. 7, 67.

O'Mara concluded that the Tennessee Open Records Act, Tenn. Code. Ann. § 1O-7-5O3 only allowed Tennessee citizens access to records and advised Shipley that Davidian's request could be denied access because he was not a Tennessee citizen. Id. p. 59. Shipley then decided to rely on the Open Records Act in denying Davidian access to the records. (Docket Entry No. 22, Attachment thereto, O'Mara deposition excerpt at p. 59). A letter from O'Mara dated June 3, 1996 informed Davidian that although the City had previously allowed Davidian access to records, until Davidian provided evidence that he was a citizen of Tennessee, the City would deny his request because of his "increasingly demanding requests and belligerent attitude" (Docket Entry No. 21 at 7-8, Attachment thereto, O'Mara letter). Davidian contested O'Mara's legal interpretation and that difference led to the state court litigation cited in the Court's earlier ruling in Davidian I.

After Davidian filed the state court action, in an August 16, 1995, letter, O'Mara advised Davidian to conform his requests to the Tennessee Rules of Civil

Procedure when making requests for information. (Docket Entry No. 22 at 10, Attachment thereto, Letter from O'Mara to Davidian dated August 16, 1995). In his letter, O'Mara also wrote Davidian, he states

> Although, the records of the City of Cookeville are open to the public, nothing in the law requires the City of Cookeville to conduct the types of intensive searches that you have requested in your correspondence to Mr. Shipley or Chief Holt. The City of Cookeville will make its records open to you and if you want to delve into the records and find information that you have requested you may do so. The City is not going to accommodate you and spend clerical time looking for the types of information you have requested . . . .
>
> *****
>
> ****
>
> . . . If you continue to press for this type of information I will request from the Court an order limiting your discovery in this case to matters relevant to these proceedings.

Id.

The State Chancellor ruled in the favor of the City officials that the Tennessee Public Records Act was limited to Tennessee citizens which Davidian was not. Davidian returned to the City Manager's office to request access to O'Mara's latest bills for legal services under the City Charter. (Docket Entry No. 22, Attachment thereto, at Exhibit 3A). Davidian, however, was denied access to the records because he was determined not to be a member of "the press" under the City Charter. Id. The Charter provides:

> Be it further enacted, that all records and accounts of every office, department, or agency of the city shall be open to inspection by any citizen of Cookeville, any representative of a citizen's organization of Cookeville or any representative of the press at all reasonable times and under reasonable regulations established by the city manager or city council, except health and personnel records of a confidential nature, and records and documents the disclosure of which would tend to defeat the lawful purpose which they

are intended to accomplish.

(Docket Entry No.26, attachment thereto, Exhibit 9, Cookeville, Tennessee City Charter § 14.04).

It was upon the advice of O'Mara that Shipley decided that Davidian was not a member of the press. (Docket Entry No. 22, Attachment thereto, Exhibit 3A Plaintiff's document requests). Shipley wrote Davidian a letter dated November 8, 1996, defining the phrase "the press" under the Tennessee Code Annotated. Id.

> A 'newspaper of general circulation' includes a publication bearing a title or name, regularly issued at least as frequently as once a week for a definite price, having a third-class mailing privilege, being not less than four (4) pages, published continuously during the immediately preceding one-year period, which is published for the dissemination of news of general interest to the community which it serves, and is circulated generally in the municipality in which it is published and in which notice is to be given

citing Tenn. Code Ann § 2-1-117.

> Shipley further explained that,
>
> > "While your 'Putnam Pit' meets some of the aforementioned criteria, I do not believe it fully qualifies as a newspaper of general circulation. Additionally, the Chancery Court for Putnam County found 'The Putnam Pit' is not a legal entity . . . "

Id.

Later, however, Shipley allowed Davidian access to the requested records.

> Access to public records will be granted as set forth in T.C.A. Section 10-7-501 et seq. While the courts have found that you are not a citizen of Tennessee, I see no point in continuing to cause legal expense to you and the City of Cookeville in order that you view public records. However. I want to reiterate that we have limited staff and your requests will be honored as time permits, but in an

> expedient manner. I do not consider 'The Putnam Pit' a 'newspaper of general circulation' as outlined in T.C.A. Section 2-1-117 and am not granting access under those provisions.

Id.

Fowler provides the context

> For a brief time, Davidian left a few copies of The Putnam Pit at the City Hall reception desk and with the drive-through window clerk who collected utility bills. Mr. Davidian requested the clerk to distribute The Putnam Pit. When this activity was brought to the attention of the City Manager, he requested that this activity cease.

(Docket Entry No. 25, Fowler Affidavit at ¶ 18).

Davidian also notified Defendants on September 5, 1996, "that he would be writing for The Putnam Star and therefore was entitled to access to records." (Docket Entry No. 26 at 4). The editor of the latter

paper, however, told O'Mara that Davidian did not have a business relationship with the paper (Docket Entry No. 27 at 9-10 ¶¶ 23-24; Davidian deposition pp. 99-103; Shipley deposition pp 23-25, 28; O'Mara deposition pp.71-72).

In his response, Davidian denies the contention by the defendants that he did not have a business relationship with The Putnam Star (Docket Entry No.27, Plaintiff's Response to Defendants' Statement of Undisputed Facts at ¶¶ 23-24). Davidian alleges that he entered into an oral agreement with Becky Hammond, the publisher of The Putnam Star to write stories for The Putnam Star and in exchange, Hammond would distribute in return 1,000 copies per month of The Putnam Pit to local business persons (Docket Entry No. 26. Attachment thereto, Davidian deposition excerpt pp. 25-30). Yet, Davidian concedes that this alleged oral agreement was not executed.

Q. Did she ever make a statement to you, "I'm not going to distribute your paper"?

A. No.

***

Q. Did you ask her why she did not

distribute?

A. Yeah, because our deal was off. She didn't want me to write for her paper anymore and I couldn't get the information.

***

Q. So you never wrote an article for her paper?

A. No, I never wrote an article . . . .

***

Q. And you didn't fulfill your end of the bargain and you say she didn't fulfill her end of the bargain?

A. She renounced it.

Q. But you never wrote an article for her?

A. She never gave me an assignment after that. After O'Mara talked to her she never told me what she wanted me to write.

***

Q. Did you ever work for her where you received money? And I'm not talking about the service.

A. No, never did.

Q. Okay so did you ever tell anybody at the City of Cookeville that you were working for <u>The Putnam Star</u>?

A. I've probably said, "I'm writing for The Putnam Star," the words, "I'm writing for The Putnam Star now."

Q. Did--who did you tell that to?

A. Gail Fowler.

Q. Did you ever ask Ms. Hammond at The Putnam Star, "Were you asked if I was writing for you and what did you say?"

A. Yes, I did.

Q. What did she say?

A. She said that she said, "He's not on my payroll."

Q. Which was true?

A. Yes.

(Docket Entry No. 22, Attachment thereto, Davidian deposition at pp 103-104)

2. The Restriction on the Distribution of The Putnam Pit

As to his restriction on distributing The Putnam Pit at City Hall, Davidian cites these restrictions are after he wrote several articles about Shipley and O'Mara (Docket Entry No. 26 at 6). Davidian decided to publish a publication entitled The Putnam Pit that was first published on May 24, 1996 (Docket Entry No. 26 at 3, Attachment thereto).

According to the defendants, the City of Cookeville does not allow any publications to be distributed inside City Hall (Docket Entry No. 25, Fowler Affidavit at ¶¶ 9 and 10). The reason for this prohibition is to avoid potential litter, clutter, and pedestrian hazards. Id. In her affidavit, Fowler explained that

> The informal policy of the City of Cookeville is that only materials relating to City business or activities sponsored by the City (event calendars and the like), community greeting folders for newcomers and similar public-oriented information is

> allowed to be distributed from the City Hall reception desk. The drive-through window clerk does not pass out literature at all.
>
> The City does not allow newspaper racks or personal opinion publications such as The Putnam Pit to be placed for distribution from City Hall. The only newspapers at City Hall are those that are received through the City's subscriptions to same. Newspapers or the like are not disseminated out of the Cookeville City Hall.

Id.

In his deposition, Davidian admitted that he has not been restricted from handing out his paper to city employees. (Docket Entry No. 26, Attachment thereto, Davidian deposition excerpt pp.112-l13).

> Q. After the first distribution that occurred, there has been no distribution in the City Hall, the hospital or electric company?
>
> **A.** There has been - well, I've handed

them out to employees.

Q. Okay. So that's a distribution?

A. Yes, it is.

Q. Are you still permitted to distribute and hand them out to employees?

A. I have not been stopped from handing them out to employees.

Q. Ever?

A. Never.

Q. So what have you been not allowed to do?

***

A. The phone book and other public- other printed matter are left on the counter in the City Hall.

***

Q. What other distribution besides the phone book?

***

A. The woman that I allegedly harassed worked at the window in the electric company where people make their payments. I had given her a stack of them to give out to people when they drive up to pay their electric bill and she had given them out.

Now when a beauty shop opens or there's other businesses there, they have frequently gone and given this woman stuff and she would hand them out the window for other firms that had something they wanted to distribute. But when they found out that The Putnam Pit was being distributed that way, they stopped The Pit.

Now I don't know why they singled out The Putnam Pit, but I would imagine it was because of the content, because they let all the others sit out there, they let the phone book out, but The Putnam Pit can't be out there and it can't be distributed through their window.

***

Q. Do you know whether or not she was told not to distribute them?

A. Yes. She is now, just since The Putnam Pit was distributed.

Q. So when the distribution of The Putnam Pit stopped through that window with that lady, all other distributions stopped, too?

A. I don't know that.

***

Q. So you don't know whether or not after that one time distribution with The Putnam distribution, Pit distribution, you don't know whether they still distributed things for other people?

A. I don't know that. But I do know that the phone book was out there and there are things for the travel and tourism people and the Chamber of Commerce, which are all, you know, advertising and money going into it.

Q. The phone book is not in that window though?

A. I don't know that. I don't know if it is or not.

Id. pp 112-117.

Davidian, however, cites to the defendants' distribution of the "Cookeville Update" for his contention of disparate treatment based upon his publication's context. The "Cookeville Update" "is a City-sponsored circular to keep citizens updated about

the City's services, sponsored events and the like. It is not a private paper but rather is published on a semi-annual basis by the City." (Docket entry No. 34, Defendant's Reply at p. 7). In a word, The Putnam Pit is different. See e.g., Docket Entry No. 26, Attachment thereto, Attachment A to Exhibit 2.

To place these matters in context, the Magistrate Judge quotes the earlier findings by the District Court in Davidian I:

> The plaintiffs, The Putnam Pit, Inc., and Geoffrey Davidian,[2] filed this action in the Chancery Court of Putnam County, Tennessee, on October 3, 1997, pursuant to 42 U.S.C. § 1983, against the City of Cookeville and Jim Shipley, the city manager of the City of Cookeville, in his official capacity. On October 27, 1997, the defendants filed a notice of removal in federal court. Notice of removal (filed October 27, 1997; Docket Entry No. 1) In their second amended complaint, the plaintiffs

---

[2] The docket sheet mistakenly reflects that the plaintiff's name is Geoffrey Davidian.

allege that the defendants violated their rights to free speech, due process, and equal protection under the law as guaranteed by the First and Fourteenth Amendments of the United States Constitution. See second amended complaint (filed September 6, 1998; Docket Entry No. 41). Further, the plaintiffs allege a state law claim under the Tennessee Public Records Act.

The Putnam Pit, Inc., consists of a newspaper and web page, which focuses its commentary on the local government of the City of Cookeville. Mr. Davidian is the editor and publisher of the newspaper and web page. In July of 1997, Mr. Davidian sought a copy of the electronic computer files concerning information regarding parking tickets issued by the City. The City would not provide Mr. Davidian with a copy of the electronic file containing such information or allow him to inspect it but provided Mr. Davidian with hard copies of parking ticket information.[3]

---

[3] The plaintiffs complained that some of the information provided by the City, "would be to

On August 12, 1997, Mr, Davidian asked Mr. Shipley for all "cookie" files in the City's computers that would allegedly show whether City computers had been used to browse internet sites inconsistent with government functions. Mr. Shipley consulted Mr. Steve Corder, the City computer operations manager, who determined the cost to the City to perform such a task. Based on this assessment, Mr. Shipley asked Mr. Davidian to pay a deposit for these costs. However, approximately two weeks later, Mr. Shipley informed Mr. Davidian by letter that, based on Microsoft's definition of a "cookie" file, a "cookie "is "neither the property of the City nor a public record, and accordingly they would not allow the inspection request." Defendants' memorandum (Docket Entry No. 31) at 4.

On October 1, 1997, the plaintiffs again sought access to cookie files and parking tickets

---

Plaintiffs and some of which would not." Second amended complaint (Docket Entry No. 41) ¶ 6.

by letter sent to Mr. Shipley. On October 2,1997, Mr. Shipley informed the plaintiffs by e-mail that Mr. Davidian could not inspect the cookie files on the City's computers, and that he would have to reschedule a time to see the police data on the parking tickets, as no one was available to assist him. Mr. Davidian alleges that on October 3,1997, he requested to see the paper documents of parking tickets and was told to contact the City manager's office. Mr, Davidian alleges that he was told by the City manager's office that he would not be allowed to see any parking tickets that day. On October 31, 1997, the plaintiffs requested by fax and e-mail to inspect the City's internet flies including browser and cache files. On that same date, Mr Shipley responded by e-mail that such files are not public records and are destroyed daily.[4]

---

[4] In their memorandum, however, the plaintiffs state that on November 3, 1997, Mr. Davidian was allowed to view internet files, but the inspection revealed that no information was available. Mr. Davidian alleges that he asked for another inspection later that day, but was refused by the defendants.

In the fall of 1997, the plaintiffs also asked to have a link[5] from the City's web site. Mr. Corder referred the request to Mr. Shipley. Mr Shipley contends that he was not aware that private businesses had a link from the City's web site, and after learning this information, he first decided to remove all for-profit entities linked from the City's web site. On October 31, 1997, via e-mail, Mr. Shipley informed the plaintiff that the City was declining the plaintiffs' request because links were to be limited to non-profit entities.

After further consideration, however, Mr. Shipley decided that the policy concerning links from the City's web site would be to 'limit 'links' to entities that promote the economic welfare, tourism and industry in Cookeville." Defendants' memorandum (Docket Entry No. 31) at 5. As the defendants contend that Putnam Pit, Inc., does not meet that criteria, they have

---

[5]A link allows an internet user to move from one web site to another.

denied the plaintiffs a link from the City's web page to the plaintiffs' web page.

The Putnam Pit and Geoffrey Davidian v. City, No. 2:97-0108 (M.D. Tenn. Memorandum filed September 21, 1998 at pp 1-4) (Davidian I).

III. CONCLUSIONS OF LAW

"The very reason of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, 1963 Amendment Federal Civil Judicial Procedure and Rules (West Ed. 1996). Moreover, "district courts are widely acknowledged to possess the power to enter summary judgment sua sponte, so long as the opposing party was on notice that she had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Accord, Routman v. Automatic Data Processing, Inc.,

873 F.2d 970, 971 (6th Cir. 1989).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the United States Supreme Court explained the nature of a motion for summary judgment:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with he affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or

unnecessary will not be counted.

477 U.S. at 247-48 (emphasis in the original and added in part).

Earlier the Supreme Court defined a material fact for Rule 56 purposes as "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Electrical Industrial Co. v. Zenith Radio Com., 475 U.S. 574, 587,106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citations omitted).

A motion for summary judgment is to be considered after adequate time for discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where there has been a reasonable opportunity for discovery, the party opposing the motion must make an affirmative showing of the need for additional discovery after the filing of a motion for summary judgment. Emmons v. McLaughlin, 874 F.2d 351, 355-57 (6th Cir. 1989). But see Routman v Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

There is a certain framework in considering a summary judgment motion as to the required showing of the respective parties, as described by the Court in Celotex:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.

Celotex, 477 U.S. at 323 (emphasis deleted).

As the Court of Appeals explained, "[t]he moving party bears the burden of satisfying Rule 56(c) standards." Martin v. Kelley, 803 F.2d 236, 239, n. 4 (6th Cir. 1986). The moving party's burden is to show

"clearly and convincingly" the absence of any genuine issues of material fact. Sims v. Memphis Processors, Inc., 926 F.2d 524, 526 (6th Cir. 1991)(quoting Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). "So long as the movant has met its initial burden of 'demonstrating the absence of a genuine issue of material fact,' the nonmoving party then 'must set forth specific facts showing that there is a genuine issue for trial.'" Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) (quoting Celotex and Rule 56(e)).

Once the moving party meets its initial burden, the Court of Appeals warned that "[t]he respondent must adduce more than a scintilla of evidence to overcome the motion [and] . . . must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989)(quoting Liberty Lobby.) Moreover, the Court of Appeals explained that:

> The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the

> record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.'

Street, 886 F.2d at 1480 (cites omitted). See also Hutt v Gibson Fiber Glass Products, No. 89-5731(6th Cir. filed September 19,1990) ("A court deciding a motion for summary judgment must determine 'whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." quoting Liberty Lobby.)

If both parties make their respective showings, the Court then determines if the material factual dispute is genuine, applying the governing law.

> More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine' that is,. if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Progressing to the specific issue in this case, we an convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'

Liberty Lobby, 477 U.S. at 248, 252, 106 S. Ct. 2505, 91 L.Ed.2d at 211-212, 214 (citation omitted and emphasis added).

It is likewise true that:

> [I]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. It has been stated that: 'The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute. . . .'

Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962)(citation omitted). As the Court of Appeals stated, "[a]ll facts and inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion," Duchon v.

Calon Company, 791 F.2d. 43, 46 (6th Cir. 1986) app. 840 F.2d 16 (6th Cir. 1988)(unpublished opinion) (citation omitted).

The Court of Appeals further explained the District Court's role in evaluating the proof on a summary judgment motion:

> A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Rule 56 contemplates a limited marshaling of evidence by the nonmoving party sufficient to establishing a genuine issue of material fact for trial. This marshaling of evidence, however, does not require the nonmoving party to "designate" facts by citing specific page numbers. Designate means simply "to point out the location of." Webster's Third New InterNational Dictionary (1986).
>
> Of course, the designated portions of the

> record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies; but that need for specificity must be balanced against a party's need to be fairly apprised of how much specificity the district court requires. This notice can be adequately accomplished through a local court rule or a pretrial order.

InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111(6th Cir. 1989)cert. Denied 110 S Ct. 1839, 108 L.Ed.2d 967 (1990). Here, the parties have given some references to the proof upon which they rely. Local Rule 8(b)(7)(A) and (C) require a showing of undisputed and disputed facts.

In Street, the Court of Appeals discussed the trilogy of leading Supreme Court decisions, and other authorities on summary judgment and synthesized ten rules in the "new era," on summary judgment motions:

1. Complex cases are not necessarily inappropriate for summary judgment.

2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

3. The movant must meet the initial burden of showing 'the absence of a genuine issue of material fact' as to an essential element of the non-movant's case.

4. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the party must prevail as a matter of law.'

6. As on federal directed verdict motions, the

'scintilla rule' applies, i.e., the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

10. The trial court has more discretion than in the 'old era' in evaluating the respondent's

> evidence. The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.'

Street, 886 F.2d at 1479-80.

The Magistrate Judge has distilled from these collective holdings four issues that are to be addressed upon a motion for summary judgment: (1) has the moving party "clearly and convincingly" established the absence of material facts?; (2) if so, does the plaintiff present sufficient facts to establish all the elements of the asserted claim or defense?; (3) if factual support is presented by the nonmoving party, are those facts sufficiently plausible to support a jury verdict or judgment under the applicable law?; and (4) are there any genuine factual issues with respect to those material facts under the governing law?

Access to Public Records

Davidian's initial contention is the defendants are denying him access to public records and that as a member of the press, the defendants are "arbitrarily" deciding who is a member of the press. As this Court found on its earlier ruling in Davidian I, even members of the press do not possess the First Amendment right to gather data without restriction.

> The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of

the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.

Pell v. Procunier, 417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed. 2d 495, 508 (1974)(footnotes omitted) (citations omitted). See also, Branzburg v. Hayes, 408 U.S. 665, 684, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626, 641(1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.")see Zemel v. Rusk, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179, 190 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information."). Moreover, in Houchins v. KOED, Inc., 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), the Supreme Court held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." Id. at 15, 98 S.Ct. at 2597, 57

L.Ed.2d at 565.[6]

The Putnam Pit and Geoffrey Davidian v. City, No. 2:97-0108 (M.D. Ten. Memorandum filed September 21,1998 at pp.7-8).

In Davidian I, this Court found on Davidian's access to public records that

> "[p]laintiffs (including Davidian) have ready access to the parking ticket data in paper, hard copy form, the form in which it is and has been available to the public generally." Defendants' memorandum (Docket Entry No. 31) at 9. The plaintiffs argue, however, that they were denied access to parking ticket records in their paper form on October 3,

---

[6] The Supreme Court has noted an exception to this general rule in cases involving the First Amendment right to attend criminal proceedings. See Press-Enterprise Co v. Superior Court, 478 U.S. 1, 8,106 S.Ct. 2735, 2740, 92 L.Ed.2d 1, 9-10 (1986); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580, 100 S.Ct. 2814, 2829, 65 L.Ed.2d 973, 991-92 (1980).

> 1997, and thus, they still have a First Amendment claim on that basis. The Court disagrees.
>
> According to the plaintiffs' complaint, Mr. Davidian was simply told he "would not be allowed to see any parking ticket records that day. Second amended complaint (Docket Entry No. 41) ¶ 14 (emphasis added). It is clear that the plaintiffs have been given hard copies of parking ticket records on other occasions. Thus, the plaintiffs base their First Amendment claim on one incident in which they were told that they could not see records on that day. Such an isolated incident does not rise to the level of a First Amendment claim. Accordingly, the defendants' motion for summary judgment on the plaintiffs' First Amendment claim concerning access to computer files shall be granted.

Id. at pp. 8-10.

> Further, its earlier opinion this Court cited to Gail Fowler's affidavit regarding costs where

> she did a breakdown of Mr. Davidian's record requests and employee time spent processing same which I could document. From May of 1995 through August of 1997, by a conservative estimate, Mr. Davidian's record requests consumed seventy-five to eighty hours of employee time at a conservatively estimated cost of about $2,500.00 to the City of Cookeville. . . . No other individual or entity has made record and information requests remotely comparable to the volume of records and the information requested by Mr. Davidian.

Id. at p.23.

The Magistrate Judge follows this Court's ruling in Davidian I to conclude that Davidian did not have a First Amendment right of access to the City of Cookeville's public records in the format that he requested and that the City had a legitimate public interest in limiting costs associated with the researching and copying of records. Moreover, the Magistrate Judge follows the state trial court's ruling that Davidian did not have an independent right under Tennessee's Public Records Act to demand access to

these records because he was not a Tennessee citizen, as required by that Act.

As to Davidian's assertion of a right of access under the City's charter as a member of the press, there is no material dispute that Davidian was not employed by any newspaper (Docket Entry No.27 at 9-10 ¶¶ 23-24; Davidian deposition pp.99-103; Shipley deposition pp.23-25, 28; O'Mara deposition pp.71-72). The Chancellor found that The Putnam Pit was not a legal entity, (Docket Entry No. 22, Attachment thereto, Chancery Court pleadings). Further, Shipley could have reasonably relied on the Chancellor's findings and Tennessee Code Ann. § 2-1-117 to define "press"in making his determination that Davidian did not qualify as a member of the press under the Charter.

In any event, the Supreme Court defined qualified immunity to bar damage actions under Section 1983 to mean that an official was immune unless the right at issue was clearly established at the time of the alleged violation. Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396, 410-11(1982); Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). If the right is not clearly established, then

the damages claim must be dismissed.

In Anderson v Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Court stated that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action." Id. at 639 (citation omitted). The Court went on to say that 'those officials-like other officials who act in ways they reasonably believe to be lawful-should not be held personally liable." Id. at 641. The Court later said in Hunter v. Bryant, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991), "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' This accommodation for reasonable error exists because 'officials should not err always on the side of caution because they fear being sued.'

Also, this Court stated in Caldwell v. Moore, 968 F.2d 595, 599 (6th Cir. 1992), "'[D]iscretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of

which a reasonable person would have known."' Using the "objective legal reasonableness" standard, this Court stated, "The official will be immune 'if officers of reasonable competence could disagree' on whether the conduct violated the plaintiffs rights." Id.

Here, the Magistrate Judge concludes that there was no clearly established right that Davidian was entitled to access to public records as a matter of Tennessee or federal law.

In support of his First Amendment claim, Davidian cites City of Los Angeles v. Preferred Communications, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986). In Preferred Communications, the plaintiff sought to lease space on the City's utility poles to provide cable television service in the south central Los Angeles area. 476 U.S. at 490. In order to obtain a lease the plaintiff needed to obtain a franchise from the City, but the City refused to grant Preferred one because Preferred had not participated in an auction that was to award a single franchise in the area. Id. Preferred alleged that cable operators were First Amendment speakers, that there was sufficient excess physical capacity and economic demand in the south

central area of Los Angeles to accommodate more than one cable company, and that the City's auction process allowed it to discriminate among franchise applicants based on which one seemed the "best." Id. The City did not deny that there was excess physical capacity to accommodate other cable systems, but cited the City availability of space on public utility structures, limitations on the economic demand for the cable medium, and the practical and esthetic disruptive effect that installing and maintaining a cable system would have on the public right-of-way as reasons for restricting access to a single cable company. Id. at 492.

Although the Supreme Court agreed that the plaintiffs complaint should not have been dismissed, the Court stated "We do think that the activities in which respondent [Preferred] allegedly seeks to engage plainly implicate First Amendment interests." Id. at 494. Moreover, the Court added that "'Even protected speech is not equally permissible in all places and at all times.' Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." Id. at 495 (citations omitted).

Relying on Preferred Communications, Davidian argues that: "Thus a cable company did not have to be a 'Newspaper of general circulation' to deserve First Amendment privileges under the Constitution what mattered is that it involved communication." (Docket Entry No. 26 at 16).

Assuming there is a First Amendment right to access to the City's records, there is no factual dispute that Davidian has received the information from the City that he originally sought. As a practical matter, there is no need for injunctive relief and the only relief would be damages for which the defendants properly invoke the qualified immunity doctrine.

To overcome the defendants' qualified immunity contention, Davidian cites McBride v. Village of Michiana, 100 F.3d 457 (6th Cir. 1996). In McBride, a reporter for various newspapers filed an § 1983 action asserting a claim that defendants, city officials, infringed upon her clearly established constitutional right to be free from retaliation for exercising her First Amendment freedoms. Id. at 458. The reporter had written stories concerning the mishandling of public funds, violations of the Michigan Open Meetings Act,

and efforts by village officials to encourage non-residents to vote in village elections. Id.

The reporter in McBride alleged that village officials contacted her employers and urged them not to allow McBride to report on the village's political news, threatened to boycott a certain news publication if the paper did not remove the reporter from her political beat, and contacted a potential employer and suggested that the reporter not be hired. Id. at 459. A city official requested that the reporter not be assigned to cover council proceedings stating that he could not ensure her safety if she appeared before the body. Id. When the reporter did appear, a village official ordered her to leave a press table in the council chambers and a council member informed the general public that the meeting would not begin as long as the reporter remained. Id.

A village officer threatened to remove the reporter physically, if she did not comply. Id. The reporter alleged that officials violated the Michigan Freedom of Information Act by improperly refusing to produce documents for McBride or for charging her inflated prices for document requests. Id. Also, she alleged that

one official intentionally destroyed government documents in order to deny her access. Id.

In response to the defendants' qualified immunity, the Sixth Circuit stated:

> It is, however, only improper acts of retaliation that are forbidden by our First Amendment jurisprudence discussed in this opinion. The proper exercise by the defendants of their own free speech rights cannot serve as the basis for imposition of liability upon those individuals. . . the district court should differentiate between *those alleged improprieties by defendants that constitute protected expressions of the defendants' own ideas and positions and those allegations that involve intimidation, harassment. and retribution directed toward McBride solely to punish her for choosing to exercise one of the basic freedoms upon which our society is founded*.

Id. at 462 (emphasis added).

In the Magistrate Judge's view McBride is factually

inapposite. First, McBride was an established member of the press and was employed by a newspaper. Davidian admitted in his deposition that he was not an employee of The Putnam Star (Docket Entry No. 26, Attachment thereto, Davidian deposition excerpt at pp 99-103) and the Chancellor ruled that The Putnam Pit was not a legal entity. (Docket Entry No. 22, Attachment thereto, Chancery Court pleadings). In McBride the reporter was refused documents, was threatened with physical force, and was singled out as a member of the press due to the content of her writing. As stated in McBride the district court must "differentiate between those alleged improprieties by the defendants that constitute protected expressions of the defendants' own ideas and positions and those allegations that involve *intimidation, harassment, and retribution* directed toward McBride *solely to punish her for choosing to exercise one of the basic freedoms* upon which our society is founded." Id. at 462 (emphasis added). In contrast, Davidian was only limited in his access to public records because as a matter of Tennessee law, Davidian was not entitled to demand those records. Davidian's reliance upon McBride is misplaced.

For the same reason, the Magistrate Judge concludes that Davidian's reliance upon Zilich v. Longo, 34 F.3d 359 (6th Cir. 1994) is misplaced because that case involved "[r]etaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment." Id. at 364 (citations omitted). In Zillich, the Sixth Circuit found that of retaliation "a political opponent with physical threats, harassment and vandalism." Id. Here, there were no such retaliatory acts, rather assertions of proper procedure under Tennessee and City of Cookeville laws.

Thus, assuming Davidian's demands for access to the City's records implicate a First Amendment right, there was no clearly established precedent at the time of his requests defining such a right and the defendants' are entitled to qualified immunity from any damages claims.

First Amendment Privilege as to Distribution

Davidian's next claim is that although he was initially permitted to distribute The Putnam Pit at the

Cookeville City Hall, the Cookeville General Hospital, and the City of Cookeville Electric Company, "after several articles had been published relating to defendants O'Mara and Shipley defendant City of Cookeville began refusing to permit the distribution of The Putnam Pit through these locations, notwithstanding the continued distribution of other publications based on the content of the newspaper." (Docket Entry No. 26, Plaintiffs Brief at 6).

The defendants respond that any restrictions on the distribution of Davidian's paper within the City Hall were valid content-neutral time, place, and manner restrictions (Docket Entry No. 21 at 20). The defendants' cited reasons for the restrictions were to minimize clutter, litter, and to avoid possible slip and fall hazards within the building. Id. Defendants also contend that no other comparable publications are distributed in City Hall, that literature is not distributed by the City's clerk at the drive-through window, and that only "pamphlets or leaflets with respect to City-sponsored activities providing valuable information to citizens about events, availability of services and the like are allowed to be distributed at the receptionist's desk or inside the municipal office building." Id. Also,

defendants state that there are other alternative means in which Davidian can disseminate his publication such as news racks and on Davidian's web site on the internet. Id.

As this Court explained in Davidian I, In Arkansas Educ. Television Commm'n v. Forbes, U.S., 118 S.Ct.1633, 1641, 140 L.Ed.2d 875, 886-87 (1998) (citations omitted), the Supreme Court stated,

> "[T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." Traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government flat," the property has been "devoted to assembly and debate." The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."
>
> Designated public fora, in contrast, are created

> by purposeful governmental action. "The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." Hence "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.
>
> Other government properties an either nonpublic fora or not fora at all. The government can restrict access to a nonpublic forum "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."

Id.

In Cornelius v. NAACP Legal Defense and

Educational Fund Inc., 473 U.S. 788, 803, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567, 580 (1985), the Supreme Court held that "[n]ot every instrumentality used for communication, however, is a traditional public forum or a public forum by designation." Likewise, in Lehman v City of Shaker Heights, 418 U.S. 298, 304, 94 S.Ct. 2714, 2718, 41 L.Ed.2d 770, 778 (1974), the Supreme Court held that "[w]ere we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require."

The traditional public forum includes public streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus, Org., 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423, 1436 (1939) (Roberts, J. concurring). "The Court has rejected the view that traditional public forum status extends beyond its historic confines." Forbes, 118 S.Ct. at 1641, 140 L.Ed.2d at 887.

The Magistrate Judge concludes that under Lehman the inside area of City Hall is not a traditional public forum like "public streets and parks." In any event, no other publications comparable to Davidian's paper are allowed inside the building except those which are received by subscribers, and Davidian admits in his deposition that he has not been prohibited from handing out his paper to city employees. (Docket Entry No. 26, attachment thereto, Davidian deposition excerpt pp. 112-113). Accordingly, the Magistrate Judge concludes that the inside of City Hall is not a traditional public forum for distributing publications and any denial of distribution by Davidian on his request for distribution by a City employee does not implicate any First Amendment right.

As to Davidian's contention about the "Cookeville Update" and its distribution within City Hall, a designated public forum is created when the government purposefully "open[s] additional properties for expressive use by the general public or by a particular class of speakers." Forbes, 118 S.Ct. 15 1641. In Forbes, Court then explains that "the government must intend to make the property 'generally available' to a class of speakers. . . . A designated public forum is not created when the

government allows selective access for individual speakers rather than general access for a class of speakers." Id. at 1642, 140 L.Ed.2d at 887 (citation omitted). The Court further emphasized that the government does not create a designated public forum

> when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission" to use it.
>
> ***
>
> The Cornelius distinction between general and selecting access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Id. at 1642, 140 L.Ed.2d at 888 (citation omitted).

The Magistrate Judge concludes that under the undisputed facts, the City has not created a public forum inside City Hall. The record reflects that no other comparable news publications or any other publications are permitted inside the building. The City of Cookeville has not "purposefully opened additional properties for expressive use by the general public or by a particular crass of speaker." The only newspapers which are received by employees are through subscriptions. The "Cookeville Update" is a publication sponsored by the city which informs citizens about city events and services and such. Further, Davidian admitted that he was not restricted from handing out his paper to city employees. (Docket Entry No. 26, Attachment thereto, Davidian deposition excerpt pp. 112-117).

Also, Davidian does not contend that the utility clerk at the drive-through window distributed material comparable to The Putnam Pit. Davidian merely contends that when other businesses such as beauty shops opened, businesses would give material to the utility clerk to distribute. (Docket Entry No. 26,

Attachment thereto, Davidian deposition excerpt pp. 112-113). Davidian, however, does not submit proof that the utility clerk distributed material for other publications comparable to Davidian's. Also, Davidian was unsure if the utility clerk distributed any other materials after that one time distribution of his paper through that window. Id.

In her deposition, Fowler described the informal policy of the City to only distribute from the City Hall reception desk, "materials relating to City business or activities sponsored by the City (event calendars and the like), community greeting folders for newcomers and similar public-oriented information" but that "[t]he drive-through window clerk does not pass out literature at all." (Docket Entry No. 25 at ¶ 9). In any event, the Supreme Court has held that the government "is not required to indefinitely retain the open character of the facility." Perry Educ. Assn. V. Perry Local Educators' Assn., 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed 2d 794, 805 (1983).

Thus, the Magistrate Judge concludes that Davidian has failed to show that he has been treated differently from other comparable publications in the

ability to distribute because of the content of his paper. Thus, the Court finds that restriction on the distribution of The Putnam Pit is in accordance with a valid content-neutral, time, place and manner restriction.

As to the final type of forum the Supreme Court stated that in a non-public forum

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose special benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

***

> The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.

Cornelius 473 U.S. at 806-808, 105 S.Ct. at 3451-52, 87 L.Ed.2d at 562-584 (citations omitted).

By definition, a non-public forum allows the City to exclude Davidian on the basis of subject matter and speaker identity In Perry, the Supreme Court pointed out that:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities

> compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Perry, 460 U.S. at 49, 103 S.Ct. at 957, 74 L.Ed.2d at 807.

The Supreme Court has held that

> [a]lthough the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a view-point-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

Cornelius, 473 U.S. at 811, 105 S.Ct. at 3453, 87 L.Ed.2d at 585; see also Perry, 460 U.S. at 53,103 S.Ct. at 959, 74 L.Ed.2d at 809 ("[W]hen government property is not dedicated to open communication the

government may-without further justification-restrict use to those who participate in the forum's official business.").

Here, within City Hall, only matters related to community tourism and local industry were permitted The Putnam Pit does not comport with the goal of promoting tourism. In light of the City's goal, the restriction on the distribution of The Putnam Pit or any other comparable paper is reasonable.

The Magistrate Judge also concludes that the City was justified excluding The Putnam Pit because there are alternate channels for Davidian to spread his message.

There are news racks that Davidian can use along with other publications Davidian also has his own web site to disseminate his message without restriction. In Cornelius, the Supreme Court noted that

> The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. Rarely will a nonpublic

> forum provide the only means of contact with a particular audience Here, as in Perry Education Assn., the speakers have access to alternative channels, including direct mail and in-person solicitation outside the workplace, to solicit contributions from federal employees.

Cornelius 473 U.S. at 809, 105 S.Ct. at 3452, 87 L.Ed.2d at 584 (citations omitted).

In sum, the Magistrate Judge concludes that Davidian's First Amendment claims on his access to public records and restrictions on his distribution of his publication within the City Hall lack merit.

Because the Magistrate Judge concludes that Davidian's federal claims against the defendants should be dismissed, the Magistrate Judge also concludes that if the Court adopts that conclusion, the Court loses its supplemental jurisdiction over Davidian's state claims. See 28 U.S.C. § 1367(c)(3); see also Cameron v. Seitz, 38 F.3d 264, 276 (6th Cir. 1994) ("With the dismissal of the [federal] claim, original jurisdiction over the state...claim is lacking, and the district court has discretion as to whether to

continue to exercise supplemental jurisdiction over it."). Thus, the Court should dismiss Davidian's state claims without prejudice.

IV. RECOMMENDATIONS

For the reasons stated above, the Magistrate Judge recommends that the defendants' motion for summary judgment (Docket Entry No. 20) be granted and this action be dismissed without prejudice to Davidian's state law claims. Under Rule 72(b) of the Federal Rules of Civil Procedure, any parry has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any parry opposing said objections shall have ten (10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh'g denied. 474 U.S. 1111(1986).

ENTERED this the 2nd day of December, 1998.

/s/_____
William J. Haynes, Jr.
United States Magistrate Judge

APPENDIX D

Case No. 99-5423

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER
Filed May 9, 2000, LEONARD GREEN, Clerk

GEOFFREY DAVIDIAN
Plaintiff - Appellant

v.

T. MICHAEL O'MARA, individually and in his official capacity as Cookeville City Attorney; JIM SHIPLEY, individually and in his official capacity as Cookeville City Manager; CITY OF COOKEVILLE
Defendants - Appellees

BEFORE: NORRIS, MOORE and COLE, Circuit Judges

Upon consideration of the petition for rehearing

filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/_____

LEONARD GREEN, Clerk

Appendix 94a