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CLERK OF COURT

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

JOSE MARCUS PERRUSQUIA, Petitioner, v. THE CITY OF MEMPHIS, Respondent.	No. CH-21-0196

MEMORANDUM OF LAW IN SUPPORT OF PERRUSQUIA'S PETITION FOR ACCESS TO PUBLIC RECORDS AND TO OBTAIN JUDICIAL REVIEW OF DENIAL OF ACCESS

Petitioner Jose Marcus Perrusquia ("Mr. Perrusquia") submits this Memorandum of Law in Support of his Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access (the "Petition"). For the reasons set forth in the Petition and in this Memorandum of Law, this Court should grant the Petition, order the City of Memphis (the "City") to immediately produce the requested public records to Mr. Perrusquia, and grant Mr. Perrusquia his costs, including his attorneys' fees.

INTRODUCTION

On July 16, 2020, Mr. Perrusquia requested body-worn camera ("BWC") footage of three incidents in which Officer Colin Berryhill ("Officer Berryhill") used his Conducted Electrical Weapon ("CEW" or "Taser") from May 2018 into April 2019. Ex. E at 4.[1] The BWC footage was evidence in an administrative investigation, I2019-024 (the "Berryhill Investigation"), conducted by the Memphis Policy Department's ("MPD") Internal Affairs Department ("Internal

[1] All exhibits referred to in this memorandum are attached to the Petition, and are cited as "Ex. __". Pincites are to the pagination of the underlying document and does not take into account the exhibit cover page.

Affairs") of the Inspectional Services Bureau ("ISB") into these three incidents, in which Internal Affairs found that Officer Berryhill's use of his Taser in each instance violated MPD Policy and Procedures. Ex. B at 23. On two occasions, including in the Case Summary of the Berryhill Investigation, the City stated that it had not referred the matter to the Shelby County District Attorney General (the "Shelby DA") for criminal prosecution. Ex. B at 6; Ex. C at 1. In November 2020, the Shelby DA's Public Information Officer ("PIO") Larry Buser also confirmed that there was no pending prosecution of Officer Berryhill. Ex. D at 1. As of July 27, 2020, Officer Berryhill was still employed by MPD. Ex. C at 1-2.

Despite these facts, the City denied Mr. Perrusquia's public records request in writing for the BWC footage of these three incidents by claiming that "no responsive records exist at this time due to an Administrative investigation." Ex. E at 4. When pressed on the issue, the City said "[t]he request was not denied. There is nothing responsive available at this time until MPD concludes the administrative investigation." *Id.* at 2. But according to the Case Summary, the administrative investigation had, in fact, been concluded. Ex. B at 23.

When the undersigned sent a letter to the City seeking the release of the requested BWC footage, Ex. F, the City's Chief Legal Counsel, Jennifer Sink, requested a phone call, Ex. G at 1. In that conversation, Ms. Sink said the City's position was that Tennessee Rule of Criminal Procedure 16 ("Rule 16") was the basis for withholding the requested public records because the matter could possibly lead to a criminal action.

The facts of this case, however, belie the City's position. The Shelby DA has confirmed that there is no pending prosecution of Officer Berryhill and the City has said twice that the matter was not referred to the Shelby DA for investigation or prosecution. Ex. B at 6; Ex. C at 1; Ex. D at 1. Moreover, the Case Summary plainly indicates that the administrative investigation

has been completed; any assertion that the City is still conducting its administrative investigation, more than nineteen months after the most recent incident, is implausible, to say the least. Indeed, the City's own manual explains that administrative investigations are usually completed within thirty days. Ex. H at 34. Finally, the City's position ignores the very well-defined distinction between MPD's administrative investigations and its criminal investigations of MPD officers.

The law is equally against the City. There is no exemption for administrative investigations by the City—whether they are completed or not—in the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-501, *et seq.*, (the "TPRA"), or any other state law. Similarly, the very limited exemptions to the TPRA that specifically apply to BWC footage do not apply here. And the objective facts of this case do not support an assertion that there is a contemplated or pending prosecution of Officer Berryhill such that Rule 16 might bar release of the requested public records.

FACTUAL BACKGROUND

The Administrative Investigation of Officer Berryhill

After an incident with a motorist on April 10, 2019 in which Officer Berryhill used his Taser, Internal Affairs reviewed "Officer Berryhill's Response to Resistance Reports from January 2017 through April 2019 for excessive force/unnecessary force violations." Exh. B at 1. This inquiry led ISB to also investigate two other incidents in which Officer Berryhill used his Taser, one on April 4, 2019 and another on May 23, 2018. *Id.* "The purpose of this investigation was to determine whether or not Officer Colin Berryhill violated any Policies or Procedures regarding the Memphis Police Department's Excessive Force/Unnecessary Force Policy." *Id.* at 6, 12. Specifically, Office Berryhill was investigated for possible violations of two MPD

Departmental Rules ("DR") related to his use of his Taser: (1) DR 301 Excessive Force/Unnecessary Force (the "Excessive Force Policy") and (2) DR 101 Compliance with Regulations to wit: Weapons. *Id.* at 1, 7-8, 12, 14, 17, 19, 23.

DR 301 provides in part:

> **Excessive Force/Unnecessary** is defined as the amount of force which is beyond the need and circumstances of the particular event, or which is not justified in the light of all circumstances, as is the case of deadly force to protect property as contrasted with protecting life.

Id. at 7, 13, 17. DR 101 provides "Disciplinary action may be taken for, but not limited to, violations of the stated policy, rules, regulations, orders, or directives of the Department." *Id.* at 8, 14, 19. For the DR 101 violation in Officer Berryhill's case, ISB investigated whether Officer Berryhill had violated MPD's policy related to the use of Tasers. Id. at 8-9, 14, 19–21.

Based on the interviews conducted and a review of the pertinent BWC footage, Internal Affairs found that Officer Berryhill's use of the Taser in all three incidents violated MPD's Excessive Force and Taser Policies. *Id.* at 6, 8, 12, 14, 17, 19, 23. For example, in the April 10, 2019 incident, the BWC footage showed that Officer Berryhill tased an individual "with his hands behind his back while in handcuffs on the ground." *Id*. at 7. Based on a review of Officer Berryhill's BWC footage for the April 4, 2019 incident, Internal Affairs explained that Officer Berryhill's use of the Taser was "unnecessary and needless." *Id.* at 12. Similarly, in regard to the May 23, 2018 incident, Internal Affairs concluded after reviewing Officer Berryhill's BWC footage that he had tased an individual "in the back twice" and that "[t]he amount of force used in this particular event was unnecessary." *Id.* at 17.

The Case Summary, which was printed on July 4, 2020, *id.* at 1, indicates that "[t]hese case files were not submitted to the Attorney General's Office for review" *id.* at 6. Lieutenant

Rudolph confirmed this in her July 27, 2020 email to Mr. Perrusquia when she stated that the administrative investigation of Officer Berryhill discussed here, I2019-024, was "not referred to any prosecution agency or outside investigative agency." Ex. C at 1. Similarly, on November 12, 2020, Larry Buser, the PIO for the Shelby DA, confirmed that there were "[n]o cases" pending against Officer Berryhill. Ex. D at 1. According to Lieutenant Rudolph, as of July 27, 2020, Officer Berryhill was still employed by MPD. Ex. C at 1-2.

Mr. Perrusquia's Public Records Requests

On July 16, 2020, Mr. Perrusquia requested via the TPRA that the City provide him with "copies of the video in ISB case I2019-024 involving officer Colin Berryhill." Ex. E at 4. The City responded that "no responsive records exist at this time due to an Administrative investigation." *Id.* Mr. Perrusquia followed-up with the City regarding this response and asked for "the legal basis for denying this request." *Id.* at 3. The City responded that "[t]he request was not denied. There is nothing responsive available at this time until MPD concludes the administrative investigation." *Id.* at 2. Mr. Perrusquia persisted, asking "on what legal authority [is the City] withholding records until the conclusion of the administrative investigation? Please cite the applicable legal provision you are relying on." *Id.* The City responded on July 28, 2020: "I will send this inquiry to the City Attorney's Office and update you accordingly." *Id.* at 1. Mr. Perrusquia followed-up with the City on September 14, 2020 and received a response the next day that his inquiry was "still under review with the City Attorney's Office." *Id.*

On September 29, 2020, the undersigned sent a letter via email to Chief Legal Counsel for the City, Jennifer Sink, asking for the requested public records to be produced to Mr. Perrusquia. Ex. F at 1-2. During a subsequent telephone discussion with the undersigned, Ms. Sink stated that the City's position was that the requested public records were exempt pursuant to

Rule 16 because the administrative investigation of Officer Berryhill could possibly lead to a criminal action. This action followed.

ARGUMENT

I. The TPRA Must Be Interpreted Broadly in Favor of Public Access.

"The Public Records Act reflects the legislature's effort to create legislation that advances the best interests of the public." *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004). "Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007) (citing *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74-75 (Tenn. 2002)). And, the purpose of the TPRA is "to apprise the public about the goings-on of its governmental bodies." *Memphis Publishing Co. v. City of Memphis*, 871 S.W.2d 681, 687 (Tenn. 1994); *see also Cherokee Children & Family Servs.*, 87 S.W.3d at 74 (citation omitted) (the Public Records Act "serves a crucial role in promoting accountability in government through public oversight of governmental activities").

To further this important policy goal, the General Assembly has specified that the TPRA "shall be broadly construed so as to give the fullest possible access to public records." Tenn. Code Ann. § 10-7-505(d). Thus, Tennessee's courts have held that the Public Records Act is a "clear mandate in favor of disclosure." *The Tennessean v. Electric Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *see also Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) (citing *City of Memphis*, 871 S.W.2d at 684) (explaining that the Tennessee Supreme Court "has interpreted the legislative mandate of the Public Records Act to be very broad and to require disclosure of government records even when there are significant

countervailing considerations"). Consistent with this broad construction, public records are presumptively open and "the burden is placed on the governmental agency to justify nondisclosure of the records." *City of Memphis*, 871 S.W.2d at 684 (citing Tenn. Code § 10-7-505(c)).

In order to fully effectuate the broad legislative mandate in favor of disclosure, exemptions to the TPRA should be narrowly construed. This is a logical corollary of the TPRA's language and its related jurisprudence. *See Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007)[2] (holding that Florida public records act "is to be construed liberal in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose" (citation omitted)); *Arkansas Dep't of Health v. Westark Christian Action Council*, 910 S.W.2d 199, 201 (1995) (holding that "[i]n conjunction with" Arkansas's requirement that its public record law be "liberally construed … to accomplish its broad and laudable purpose," the Arkansas Supreme Court "narrowly construe[s] exceptions to the FOIA to counterbalance the self-protective instincts of the government bureaucracy") (citations omitted); *Swickard v. Wayne Cty. Med. Exam'r*, 438 Mich. 536, 544, 475 N.W.2d 304, 307–08 (1991) ("[W]e keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." (citation omitted)).

II. The Petition Should Be Granted Because the City's Written Basis for Withholding the Requested Records Did not State an Exemption to the TPRA.

Under the TPRA, a governmental entity that denies a public records request must "[d]eny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial." Tenn. Code Ann.

[2] The Tennessee Supreme Court has described Florida's public records law as being "similar to Tennessee's." *Cherokee Children & Family Servs.*, 87 S.W.3d at 74; *see also Electric Power Bd.*, 979 S.W.2d at 302 (citing Florida case law).

§ 10-7-503(a)(2)(B)(ii). In this case, the only written justifications provided by the City for denying Mr. Perrusquia's public records request were that "no responsive records exist at this time due to an Administrative investigation" and that "[t]he request was not denied. There is nothing responsive available at this time until MPD concludes the administrative investigation." Ex. E at 2, 4. But the requested BWC footage did (and does) exist and there is no exemption for records related to ongoing administrative investigations.

As the Tennessee Supreme Court has succinctly explained, "[m]unicipal police department investigative files" are "not listed" in the TPRA's statutory exemptions. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991). Similarly, in *Memphis Publishing Co v. Holt*, 710 S.W.2d 513, 516 (Tenn. 1986), the Tennessee Supreme Court noted that "investigative records of municipal law enforcement agencies are not specifically excluded from" the TPRA. In other words, there is no exemption for administrative investigations by municipal police departments, whether they are ongoing or not. As such, the written basis, as required by Tennessee law, proffered by the City for withholding the requested public records does not bar their release and the Court should grant Mr. Perrusquia's Petition.

III. Body Camera Footage Is a Public Record Under the TPRA Except in Specified Circumstances That Do Not Apply Here.

The TPRA "defines 'public record' as 'all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.'" *Tennessean v. Electric Power Bd.*, 979 S.W.2d 297, 300 (Tenn. 1998) (quoting Tenn. Code Ann. § 10-7-301(6)). Especially given the required broad interpretation of the TPRA, BWC footage falls within this definition. And the General Assembly removed any doubt on this

issue when it enacted Tenn. Code Ann. § 10-7-504(u), which specifies certain types of BWC footage that is exempt from production. None of the BWC-specific exemptions apply here. *Id.* § 10-7-504(u)(1)(A)-(C)(exemptions for body worn cameras are specific videos of minors, the inside of certain facilities, and the interior of people's homes when it is not part of a crime scene). This too supports granting Mr. Perrusquia's Petition and requiring the City to release the requested BWC footage.

IV. The Petition Should Be Granted Because Rule 16 Does Not Bar Release of the Requested BWC Footage.

While the City should be barred from raising Rule 16 as the basis for its withholding the requested public records because it has never asserted it in writing as required by the Tenn. Code Ann. § 10-7-503(a)(2)(B)(ii), Rule 16, in any event, does not apply in this case. Rule 16 "applies only to discovery in criminal cases." *Holt,* 710 S.W.2d at 517 (citing Tenn. R. Crim. P. 1). There is no criminal case here, but instead only an administrative investigation into violations of MPD policies. Moreover, the standard for when Rule 16 does apply as an exemption to the TPRA is limited to situations in which there is either a pending criminal action or a contemplated criminal action, neither of which is the case here. *Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987); *Memphis Publ'g Co v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986). The City has on multiple occasions stated that it has not referred the three Taser incidents involving Officer Berryhill to the Shelby County DA, and the Shelby County DA has stated that there was no pending prosecution of Officer Berryhill. Ex. B at 6; Ex. C at 1; Ex. D at 1. And the manner in which the City handled this case—as an administrative investigation—bolsters this conclusion. Because there is no pending or contemplated criminal action against Officer Berryhill, Rule 16 does not bar the release of the requested public records and this Court should order the immediate release of the requested BWC footage.

A. Administrative Investigations Are Not Criminal Investigations.

The Tennessee Rules of Criminal Procedure "govern the procedure in all criminal proceedings conducted in all Tennessee courts of record." Tenn. R. Crim. P. 1(a). Rule 16, which governs "Disclosure and Inspection," limits the disclosure of some information by the state during criminal proceedings. That Rule states in relevant part:

> Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

Tenn. R. Crim. P. 16(a)(2). In the public records context, Rule 16 does not apply to every type of investigation, even ones conducted by law enforcement. Instead, it is limited to pending or contemplated criminal actions. *Appman*, 746 S.W.2d at 166; *Holt*, 710 S.W.2d at 517 (citing Tenn. R. Crim. P. 1 and stating, "by definition this limitation on access applies only to discovery in criminal cases."). The City, through MPD's Policies and Procedures (the "MPD Manual"), ISB's 2015 Standard Operating Procedures Manual (the "ISB Manual"),[3] and the Memorandum of Understanding between the City and the Memphis Police Association (the "MOU"), makes a clear distinction between criminal investigations, that might sometimes be covered by Rule 16, and administrative investigations, which are not. The City's position ignores this critical distinction.

The MPD Manual, ISB Manual, and the MOU all explain in detail the unambiguous demarcation between administrative investigations and criminal investigations of MPD officers

[3] Mr. Perrusquia relies upon the 2015 ISB Manual because the City has still not provided him with the current version, despite Mr. Perrusquia submitting a public records request for it on December 11, 2020.

by ISB. Administrative investigations are handled by ISB's Internal Affairs and focus on investigating MPD policy violations. Ex. J at 3; Ex. H at 15; Ex. I at 17. The ISB Manual explains that for administrative investigations "[a] case number will be assigned to IAB complaints on serious MPD or City of Memphis Policy violations or on cases that will require an in-depth investigation that cannot be handled at the work station." Ex. H at 15. Unit supervisors decide if a case is assigned an IAB number, which begins with an I and uses the year and a three-digit number as the case number, *id.*, just like the case number for the Berryhill Investigation at issue here: I2109-024, Ex. B at 1. The MOU draws similar distinctions. "Investigations by the Department of allegations of a violation of the rules and regulations of the Department will be known as an Administrative Investigation." Exh. I at 17.

In contrast, criminal investigations of MPD officers are handled by ISB's Security Squad and involve the investigation of violations of criminal laws, not department policies. Ex. J at 2-3; Ex. H at 15; Ex. I at 17. The ISB Manual explains that "[t]he deciding factor in a Security Squad investigation is whether elements exist that aspects of the investigation will be criminal in nature." Ex. H at 40. Under the MOU, "an employee is considered to be the target of a criminal investigation when he/she has been advised of his/her right pursuant to the Miranda decision or applicable law." Ex. I at 18.

In addition to the differences in the nature and subject of the two types of investigations handled by ISB, the procedures for administrative and criminal investigations by ISB are different. The MOU explains that "Administrative Investigations by the Internal Affairs Bureau are to be conducted in a manner conducive to public confidence, good order, and discipline, which observe and protect the individual rights of each employee of the Department." *Id.* at 17. The MOU then outlines nine paragraphs of "rules of procedures" for use in Administrative

Investigations, including that "[t]he refusal by an employee to answer all pertinent questions that are narrowly and specifically relevant to the investigation, whether as a participant or as a witness, may result in disciplinary action." *Id*. at 17-18.

The procedures for a Criminal Investigation discussed in the MOU are a single paragraph that, unsurprisingly, points to statutory and constitutional protections for criminal suspects. *Id.* at 18. When the employee is interviewed the officer "will be afforded the same protection guaranteed by the constitution and laws of the United States, State of Tennessee, and City of Memphis as would any private citizen." *Id.* And, unlike in an administrative investigation, "[i]f an employee chooses to invoke his/her protection under the Miranda decision at that time, that employee will not be subject to charges of insubordination or failure to cooperate for that reason alone." *Id.* The 2015 ISB Manual also has specific rules for Security Squad criminal investigations that do not apply to Internal Affairs administrative investigations. *Id.* at 31 (noting that photographic evidence is handled differently between the two types of investigations); *id.* at 40-42 (entire chapter specifically for "Security Squad Complaints").

In fact, according to MPD's PIO, Lieutenant Rudolph, even where a citizen files both an administrative complaint and criminal complaint, "ISB will proceed with the administrative investigation." Ex. C at 1. In other words, where a citizen files both types of complaints, separate criminal and administrative investigations are undertaken by ISB.

Here, the case was assigned to Internal Affairs and was not referred to the Shelby DA for prosecution. Ex. B at 1, 6; Ex. C at 1. There is no indication, including from the Case Summary, the statements from MPD's PIO, and the statement of the Shelby DA PIO, that this case was investigated as a criminal matter. Ex. B; Ex. C; Ex. D. There is no mention in the Case Summary that Officer Berryhill was read his Miranda rights. The MPD Manual, ISB Manual,

and MOU plainly demonstrate that administrative investigations are distinct from criminal investigations. While open criminal investigations might be exempt from disclosure under Rule 16 when criminal action is contemplated or pending, administrative investigations are not. Therefore, the Court should order that the requested public records be provided to Mr. Perrusquia.

B. Rule 16 Does Not Apply Here Because There Is No Contemplated or Pending Criminal Action Against Officer Berryhill.

The Tennessee Supreme Court on at least two occasions has explained that Rule 16 only applies to contemplated or pending criminal actions.[4] *Appman*, 746 S.W.2d at 166; *Holt*, 710 S.W.2d at 517. As discussed in detail above, MPD administrative investigations are not criminal investigations. The City has claimed that Rule 16 applies here because the administrative investigation of Officer Berryhill could possibly lead to a criminal action. That is not the applicable standard and falls short of being a contemplated criminal action, as required under *Holt* and *Appman*.

In *Holt*, the *Commercial Appeal* sought access to public records that were part of a police investigation that "had been completed and the file closed, and that no proceedings relative to the 'incident' were pending in any criminal court, and none were contemplated." 710 S.W.2d at 515. In rejecting an argument that Rule 16 exempted the requested public records from having to be produced under the TPRA, the Court first noted that Rule 16 "applies only to discovery in criminal cases." *Id.* at 517 (citing Tenn. R. Crim. P. 1). The Court held that "[t]he investigative file sought to be examined in this case is a closed file, and is not relevant to any pending or contemplated criminal action. Rule 16, therefore, does not come into play in this case." *Id.* The

[4] It is also worth noting that in both *Holt* and *Appman*, the "contemplated" language is dicta. In *Holt*, the case was closed, 710 S.W.2d at 517, and in *Appman* there was a pending prosecution, 746 S.W.2d at 166-67.

Appman Court similarly explained that Rule 16 "does not apply to investigative files in the possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action." *Id.* at 166. In that case, the requested public records were relevant to a pending criminal action and thus were not required to be disclosed under the TPRA. *Id.* at 166-67

There is no pending criminal action against Officer Berryhill related to the three incidents that are the basis of the City's administrative investigation. Ex. D at 1 (Shelby DA PIO stating in November 2020 that there was no pending prosecution of Officer Berryhill). Because the scope of Rule 16 is limited "only to discovery in criminal cases" by Rule 1, *Memphis Pub. Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986) the lack of a referral of the investigation to the DA (and the fact that apparently no criminal complaint was lodged against Officer Berryhill for the conduct documented in I2019-024) can and should be the end of this Court's inquiry insofar as it examines the City's oral denial at all.,

Nor is any criminal action against Officer Berryhill contemplated. Though Tennessee's courts have not defined "contemplated" as it arises in the dicta of *Holt* and *Appman*, there is no meaningful sense of the word that matches the facts of this case. Merriam-Webster's appropriate definition of "contemplate" is "to view as likely or probable or as an end or intention." https://www.merriam-webster.com/dictionary/contemplate, last accessed on February 12, 2021. Similarly, the relevant Dictionary.com definition of "contemplate" is "to have as a purpose; intend."[5] https://www.dictionary.com/browse/contemplate, last accessed on February 12, 2021.

[5] The example usage of contemplate in the specified dictionary.com definition reinforces its applicability: "[t]he District Attorney's office does not contemplate any charges." *Id.*

That the Shelby DA "could" bring a criminal action against Officer Berryhill is not the same as whether the Shelby DA is "contemplating" bringing a criminal action against him. The power to bring a criminal action or the possibility that a criminal action might be brought is not the same as whether criminal action is currently contemplated. Indeed, far from the broad construction of the TPRA required by law, such a construction would severely undercut the availability of public records about any activity even arguably criminal in nature.

Any interpretation of "contemplated" should include an objective component to prevent potential abuse of Rule 16. Here, there are multiple objective indications that there is no contemplated criminal action against Officer Berryhill. First, the Case Summary plainly states that as of July 4, 2020, the matter had not been "submitted to the Attorney General's Office for review." Ex. B at 6. On July 27, 2020, Lieutenant Rudolph likewise stated that the administrative investigation of Officer Berryhill was "not referred to any prosecution agency or outside investigative agency." Ex. C at 1. The Shelby DA indicated that there was no pending prosecution involving Officer Berryhill on November 12, 2020. Ex. D at 1. And, as of July 27, 2020, Officer Berryhill was still employed by MPD. Ex. C at 1-2. ISB's designation of this as an Internal Affairs case and the fact that there is no indication that Officer Berryhill was read his Miranda rights prior to being interviewed by Internal Affairs are also objective indicators that signal there is no contemplated criminal action against Officer Berryhill.

The timeline of events in this case buttresses the lack of contemplation to prosecute Officer Berryhill. It has been more than twenty-two months since the most recent of the three Taser incidents that was the subject of the administrative investigation and more than thirty-two months since the oldest of the three Taser incidents. Ex. B at 1. Administrative investigations are usually handled within thirty days of a complaint. Ex. H at 34. These facts further support

the conclusion that there is no pending or contemplated criminal action against Officer Berryhill related to the three Taser incidents.

Rule 16 is not unlimited in reach and must be "construed so as to give the fullest possible access to public records." Tenn. Code Ann. § 10-7-505(d); *see also Tennessean v. Electric Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998) (holding that the TPRA is a "clear mandate in favor of disclosure"). The Tennessee Supreme Court has limited its reach in relation to the TPRA to matters in which there is either pending or contemplated criminal action. *Appman*, 746 S.W.2d at 166; *Holt*, 710 S.W.2d at 517. To construe "contemplated" to encompass the mere possibility that a criminal action might be commenced would be inconsistent with both the Tennessee Supreme Court's jurisprudence and the well-established rules of construction in TPRA cases. Because the facts and precedent demonstrate that there is no contemplated or pending criminal action against Officer Berryhill, the Court should order the City to immediately release the requested public records.

V. Mr. Perrusquia Should Be Awarded His Attorneys' Fees and Costs in this Case.

"If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity." Tenn. Code Ann. § 10-7-505(g). The Tennessee Supreme Court has explained that "the Public Records Act does not authorize a recovery of attorneys' fees if the withholding governmental entity acts with a good faith belief that the records are excepted from the disclosure." *Schneider v. City of Jackson,* 226 S.W.3d 332, 346 (Tenn. 2007) (citing *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 798 (Tenn. Ct. App. 1999)). "Moreover, in assessing willfulness, Tennessee courts must not impute to a

governmental entity the 'duty to foretell an uncertain juridical future.'" *Id.* (quoting *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d at 689).

In recent published decisions from the Court of Appeals, the court has "stressed that willfulness should be measured 'in terms of the relative worth of the legal justification cited by a municipality to refuse access to records." *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015) (quoting *Friedmann v. Marshall Cnty.*, 471 S.W.3d 427, 439 (Tenn. Ct. App. 2015). "In other words, the determination of willfulness 'should focus on whether there is an absence of good faith with respect to the legal position a municipality relies on in support of its refusal of records." *Id.* (quoting *Friedmann*, 471 S.W.3d at 438). "If a municipality denies access to records by involving a legal position that is not supported by existing law or by a good faith argument for the modification of existing law, the circumstances of the case will likely warrant a finding of willfulness." *Id.*

In *Schneider*, the petitioners sought field interview cards generated by the Jackson police department, among other records. "The City's police chief verbally confirmed the existence of these records, but the City declined to grant [petitioners] access to them." *Schneider*, 226 S.W.3d at 335. After petitioners brought suit, but shortly before the first hearing, the City filed a written response to the petition asserting that the interview cards—which it had not reviewed to determine whether they were part of any ongoing criminal investigation—were protected by a blanket law enforcement privilege and thus not subject to the disclosure requirements of the TPRA. *Schneider*, 226 S.W.3d at 336. The Tennessee Supreme Court upheld the trial court's decision that this response to petitioners' request constituted a willful refusal to disclose public records and warranted an award of attorneys' fees. *Id.* 347 ("[R]ecognizing that at least a portion of the field interview cards were subject to disclosure would *not* have required the City 'to

foretell an uncertain juridical future.'") Similarly, in *Clarke*, the petitioner sought records from MPD, but did not receive a timely response despite several efforts. *Clarke*, 473 S.W.3d at 286. After the petition for access was filed, the City responded to the petitioner by stating that it was in receipt of petitioner's request and that the public records request must be dealt with as part of the discovery process in a different civil case. *Id.* at 287. The Court of Appeals held that this response "failed to provide a specific legal reason as to why Mr. Clarke should be denied records, but instead relied upon a hypothesized general barrier to access. Similar to the Tennessee Supreme Court's holding in *Schneider*, we conclude that such reliance is willful in light of existing law." *Id.* at 292.

The City's initial response, similar to its response in *Clarke*, did "not articulate a valid reason as to why [the] records request cannot be entertained." *Id.* at 292; *see* Ex. E at 4. As noted above, there is no question that the records exist, and there is no question that there is no exemption to the TPRA for municipal law enforcement administrative investigations. *Griffin*, 821 S.W.2d at 923; *Holt*, 710 S.W.2d at 516. The City, then attempted to verbally justify its withholding of the requested public records by relying upon Rule 16. But, as discussed above, the City's application of Rule 16 is inconsistent with both the Tennessee Supreme Court's jurisprudence and the facts of this case. Moreover, the City ignored its own policies and agreements by not taking into account the clear demarcation between administrative investigations, like this one, and criminal investigations. Based on the facts of this case and the current state of the law, the City should be found to have willfully refused Mr. Perrusquia's public records request and the Court should exercise its discretion to award Mr. Perrusquia his attorneys' fees and costs in this matter.

Respectfully submitted,

/s/ Paul R. McAdoo
Paul R. McAdoo (BPR No. 034066)
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
6688 Nolensville Rd., Suite 108-20
Brentwood, TN 37027
Phone: 615.823.3633
Facsimile: 202.795.9310
pmcadoo@rcfp.org

Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served with the Petition and Summons upon the Respondent.

/s/ Paul R. McAdoo
Attorney