

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. _____

**PETITION FOR ACCESS TO PUBLIC RECORDS AND
TO OBTAIN JUDICIAL REVIEW OF DENIAL OF ACCESS**

**TO THE HONORABLE CHANCELLORS OF THE
CHANCERY COURT FOR THE THIRTIETH JUDICIAL DISTRICT:**

Pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-501, *et seq.* (the “TPRA”), Petitioner Jose Marcus Perrusquia (“Mr. Perrusquia”) hereby petitions this Court for access to specific public records maintained by the City of Memphis (the “City”), for judicial review of the City’s denial of access to the specified public records, and for attorneys’ fees and costs. A memorandum of law in support of this Petition is being filed contemporaneously. In support of this Petition, Mr. Perrusquia states as follows:

INTRODUCTION

1. The use of force by law enforcement is an issue of substantial public interest and concern. While use of force is sometimes justified, there are also incidents where law enforcement uses excessive or unnecessary force.

2. The excessive use of force by law enforcement potentially can lead to criminal charges against the officer, but in most situations it is only treated as a violation of department policies or regulations. When it is the latter, the Memphis Police Department’s (“MPD”)

Internal Affairs Department (“Internal Affairs”), which is part of MPD’s Inspectional Services Bureau (“ISB”), conducts an administrative investigation.

3. A key piece of evidence in these administrative investigations often is body worn camera (“BWC”) footage of the incident.

4. In its Policy and Procedures Manual (the “MPD Manual”), MPD touts its use of BWCs for adding “further clarity and transparency to the examination of police related events” and having “the potential to improve community relations by providing an objective record that can be used to confirm valid allegations, while providing an unbiased record that may assist in disproving false allegations.” A true and correct copy of Chapter XIII, Section 15 of the MPD Manual¹ is attached as Ex. A. Moreover, according to MPD, BWCs improve “accountability by providing objective data for review.” *Id.*

5. But such clarity and transparency may only be achieved if BWC footage is available to the public.

6. Here, Mr. Perrusquia requested the BWC footage from an administrative investigation into excessive use of force by MPD Officer Colin Berryhill (“Officer Berryhill”).

7. Mr. Perrusquia’s request was improperly denied based on a written assertion by the City that the administrative investigation in Officer Berryhill’s conduct was still open.

8. The City’s oral denial of Mr. Perrusquia’s public records request based on an assertion that Tennessee Rule of Criminal Procedure 16 (“Rule 16”) applied was also improper.

9. As a result of the City’s improper denial of his public records request, Mr. Perrusquia was left with no choice but to file this petition, which seeks an order from the Court

¹ The MPD Manual in its entirety can be found on the Memphis Police Department’s website at: <https://memphispolice.org/MPD-Policy-and-Procedures-Manual-Revised-1-2020.pdf>, last accessed on February 12, 2020, or at this Permalink: <https://perma.cc/77JH-75V9>.

requiring the City to provide him with access to the requested public records as well as his attorneys' fees and costs in litigating this petition.

PARTIES

10. Petitioner Mr. Perrusquia is a resident of Shelby County, Tennessee. For more than twenty-nine years, Mr. Perrusquia was a journalist with *The Commercial Appeal*. His work now regularly appears in the *Daily Memphian*. His recent reporting has examined the use of force by MPD officers, including Officer Berryhill.

11. Respondent is the City of Memphis. Service of process upon the respondent will be made upon the City by delivering a copy of the summons, this Petition, and the accompanying Memorandum of Law to the City's chief executive officer or city attorney, pursuant to Rule 4.04(8) of the Tennessee Rules of Civil Procedure.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this petition and venue is proper in this Court under Tennessee Code § 10-7-505(b).

FACTUAL ALLEGATIONS

The City's Investigation of MPD Officer Berryhill

13. Internal Affairs conducted an administrative investigation, I2019-024, into whether Officer Berryhill's use of his Conducted Electrical Weapon ("CEW" or "Taser") on three different occasions between May 2018 and April 2019 violated MPD Policies, including MPD's policy against the excessive or unnecessary use of force (the "Berryhill Investigation"). A true and correct copy of the Case Summary for I2019-024 (the "Case Summary") is attached as Exhibit B.

14. MPD's DR 301 Excessive Force/Unnecessary Force Policy (the "Excessive Force Policy"), states that, "Officers shall never use force or violence that is unprovoked, needless, or not required during performance of their duties when making an arrest or in dealing with a prisoner or any person." Ex. B.

15. MPD officers may also be disciplined for violating other departmental policies. Ex. B. MPD's Taser Policy specifies that Tasers should not be used "on a handcuffed or secured individual absent an overly combative behavior that may cause harm to the officer or others and that cannot be reasonably dealt with in any other less obtrusive manner," "[i]n Drive Stun mode for pain compliance to prod or escort persons," and "[s]olely as a compliance technique to overcome passive resistance or on any individual who does not demonstrate an overt intention to use violence or force against the officer or another person." *Id.*

16. ISB's investigation of each of the three incidents in I2019-024 included interviews with witnesses and Officer Berryhill as well as review of the related BWC footage, referenced by their Computer Aided Dispatch ("CAD") Number in the Case Summary. *Id.*

17. The Taser incident that sparked the administrative investigation of Officer Berryhill was when Officer Berryhill used his Taser on Owen Buzzard on April 10, 2019. *Id.*

18. The Case Summary indicates that Internal Affairs also investigated Officer Berryhill's use of his Taser on Joshua Cortez on April 4, 2019 and Terrence Barber, Jr. on May 23, 2018. *Id.*

19. Internal Affairs found that Officer Berryhill violated MPD's Excessive Force Policy and Taser Policy in all three incidents. *Id.*

20. In each of the incidents, the BWC footage was a critical piece of evidence that supported the policy violations found by Internal Affairs.

21. In Mr. Buzzard's case, Internal Affairs found that based on a review of Officer Berryhill's BWC, "Mr. Buzzard was tased with his hands behind his back while in handcuffs on the ground" and that "[t]hese actions place Officer Berryhill in violation of" MPD's Excessive Force Policy and Taser Policy. *Id.*

22. According to the Case Summary, Officer Berryhill tased Mr. Cortez on the leg while "a minimum of four officers on the scene ... had full control of Mr. Cortez's arms and hands," which also violated MPD's Excessive Force Policy and Taser Policy. *Id.*

23. Internal Affairs also concluded that on May 23, 2018, Officer Berryhill violated MPD's Excessive Force Policy and Taser Policy during his interaction with Mr. Barber. According to the Case Summary, Berryhill had detained Mr. Barber and "as Terrence Barber, Jr. got off the ground and attempted to walk away, he was tased twice in the back by Officer Berryhill." *Id.*

24. Internal Affairs indicated in the Case Summary that, "[t]hese case files were not submitted to the Attorney General's Office for review." *Id.*

25. The attached Case Summary shows that it was printed on July 4, 2020. *Id.*

26. On July 16, 2020, Mr. Perrusquia emailed MPD Public Information Officers ("PIO") Lt. Karen Rudolph and Louis Brownlee, as well as the MPD Public Information Office, and asked, in part: "Did you refer case[] I2019-024 . . . to any prosecutorial agency or outside investigative agency for review? If not, why not? If so, I'd like to see a copy of the referrals and answers." A true and correct copy of the July 16, 2020, email chain between Mr. Perrusquia and Lt. Rudolph is attached as Exhibit C.

27. On July 27, 2020, Lt. Rudolph responded that I2019-024 "w[as] not referred to any prosecution agency or outside investigative agency." Lt. Rudolph further responded:

Currently, being in line with other local law enforcement agencies, there is no formal process in place for submitting use of force complaints to the District Attorney General's Office. If a citizen presents a use of force complaint to the Inspectional Services Bureau (ISB), an administrative investigation is opened. Additionally, the citizen is advised that they may also elect to submit a criminal complaint to the appropriate bureau. Regardless, if the citizen chooses to move forward with filing a criminal complaint or not, ISB will proceed with the administrative investigation. During any administrative investigation, if an ISB investigator determines that there may have been criminal misconduct on the behalf of an officer, the ISB investigator should notify the ISB commanding officer immediately. The ISB commanding officer is then required to notify the Command Staff for further direction.

Id.

28. In that same July 27, 2020 email, Lt. Rudolph also confirmed that Officer Berryhill was still employed by MPD. *Id.*

29. On November 11, 2020, Mr. Perrusquia emailed Shelby County District Attorney PIO Larry Buser about I2019-024, stating: "I'm looking to update this matter and wanted to double check to see if your office has any pending prosecution of Officer Berryhill." A true and correct copy of Mr. Perrusquia's email to Mr. Buser and Mr. Buser's response is attached, collectively, as Exhibit D.

30. On November 12, 2020, Mr. Buser responded, "No cases." *Id.*

The City's Denial of Mr. Perrusquia's Public Records Request

31. Mr. Perrusquia requested "copies of the video in ISB case I2019-024 involving officer Colin Berryhill" on July 16, 2020 (the "Berryhill Request"). A true and correct copy of Mr. Perrusquia's email chain with the City regarding the Berryhill Request is attached as Exhibit E.

32. The City responded to the Berryhill Request on July 27, 2020, stating "[p]er the custodian, no responsive records exist at this time due to an Administrative investigation." *Id.*

33. Mr. Perrusquia asked the City on July 28, 2020, to “[p]lease provide the legal basis for denying this request” by “citing the exemption [that] makes the records not subject to disclosure under the TPRA.” *Id.*

34. The City responded on July 28, 2020, that “[t]he request was not denied. There is nothing available at this time until MPD concludes the administrative investigation.” *Id.*

35. Mr. Perrusquia responded on July 28, 2020, “What I’m asking is on what legal authority are you withholding records until the conclusion of the administrative investigation? Please cite the applicable legal provision you are relying on.” *Id.*

36. The City responded on July 28, 2020, that the inquiry would be referred to the City Attorney’s Office, and that Mr. Perrusquia would be updated on the answer to his inquiry. *Id.*

37. Mr. Perrusquia followed up with the City on September 14, 2020, seeking an update about the Berryhill Request. The City responded that it was still reviewing the matter. *Id.*

38. The undersigned counsel for Mr. Perrusquia sent a letter via email to Chief Legal Counsel for the City, Jennifer Sink, on September 29, 2020, requesting that the City produce the requested BWC footage sought in the Berryhill Request. A true and correct copy of the September 29, 2020, letter from the undersigned to Ms. Sink is attached hereto as Exhibit F.

39. Ms. Sink responded to the undersigned by email on October 6, 2020, stating: “I have received your letter, and would like to schedule a phone call with you next week.” A true and correct copy of Ms. Sink’s October 6, 2020 email to the undersigned is attached as Exhibit G. Ms. Sink did not respond in writing to the substance of either Mr. Perrusquia’s inquiries nor those of the undersigned. By phone on October 14, 2020, Ms. Sink explained the City’s position

to the undersigned counsel for Mr. Perrusquia that the administrative investigation of Officer Berryhill could possibly lead to a criminal action and was thus exempt from disclosure pursuant to Rule 16.

**Administrative Investigations, Like the Berryhill Investigation,
Are Not Criminal Investigations**

40. ISB’s 2015 Standard Operating Procedures Manual (the “ISB Manual”), the Memorandum of Understanding between the City and the Memphis Police Association² (the “MOU”), and the MPD Manual all make clear that MPD administrative investigations, like the Berryhill Investigation, are not criminal investigations. True and correct copies of pertinent excerpts from the 2015 ISB Manual are attached as Exhibit H. True and correct copies of pertinent excerpts from the MOU are attached as Exhibit I.

41. The MOU states: “Investigations by the Department of allegations of a violation of the rules and regulations of the Department will be known as an Administrative Investigation.” On the other hand, “[i]nvestigations by the Department and/or other law enforcement agencies of conduct, which constitutes a violation of City, County, State, or Federal criminal laws, will be known as a Criminal Investigation.” Ex. I. The timeline for completing both types of investigations is usually thirty days. Ex. H.

42. According to the MPD Manual, Chapter I, Section 2, ISB’s Security Squad (the “Security Squad”) is responsible for the investigation of all criminal complaints of misconduct involving on-duty MPD officers. A true and correct copy of MPD Manual, Chapter I, Section 2 (the “MPD Manual Internal Integrity Section”) is attached as Exhibit J.

² The MOU in its entirety can be downloaded from the City’s website at: <https://www.memphistn.gov/download/66/mpa/3647/memphis-police-association-2017-2021-mou.pdf>, last accessed on February 12, 2021, or at this Permalink: <https://perma.cc/QLX2-GLRL>.

43. Internal Affairs is responsible for the investigation of all administrative complaints of MPD policy violations involving on-duty MPD officers. *Id.*

44. Administrative investigations of “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” are given case numbers that begin with an ‘I’ and use the year and a three-digit number as the case number, like the Berryhill Investigation, which was designated as I2019-024. Ex. H; Ex. B.

45. Security Squad investigations of “incidents which may be reviewed by the Shelby County Attorney General’s Office that may or may not result in the case being presented to a Grand Jury” are given case numbers that begin with an ‘S.’ Ex. H. “The deciding factor in a Security Squad investigation is whether elements exist that aspects of the investigation will be criminal in nature.” *Id.*

46. The 2015 ISB Manual contains specific rules for Security Squad investigations that do not apply to Internal Affairs administrative investigations. Ex. H.

47. Similarly, the MOU has specific rules for both administrative investigations and criminal investigations. Ex. I.

48. 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.*

49. Under the MOU rules for administrative investigations, “the refusal by an employee to answer all pertinent questions that are narrowly and specifically related to the investigation, whether as participant or witness, may result in disciplinary action.” *Id.*

50. In contrast, the MOU rules for criminal investigations state that “an employee is considered to be the target of a criminal investigation when he/she has been advised of his/her rights pursuant to the Miranda decision or applicable law” and that “[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.*

51. There is no indication in the Case Summary that Officer Berryhill was advised of his *Miranda* rights prior to being interviewed by Internal Affairs for I2019-024.

CLAIM FOR RELIEF

52. Petitioner incorporates the allegations in paragraphs 1 through 51.

53. As set forth above, Mr. Perrusquia has attempted to obtain these public records without filing a petition with this Court. Such efforts have been unsuccessful. The City has denied access to the public records he requested. It is therefore necessary to bring this action for access and judicial review pursuant to Tennessee Code § 10-7-505.

54. The records sought by Mr. Perrusquia are “public records” within the meaning of Tennessee Code § 10-7-503(a)(1).

55. Tennessee Code § 10-7-503(a)(1) states in relevant part:

(A) “Public record or records” or “state record or records”:

(i) Means 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 entity . . .

56. Mr. Perrusquia’s request was denied by the City.

57. The written basis proffered by the city for withholding the public records requested by Mr. Perrusquia’s does not justify the denial.

58. The verbal basis proffered by the City for withholding the public records requested by Mr. Perrusquia does not justify the denial.

59. Mr. Perrusquia is therefore entitled to receive the public records he requested under the TPRA.

60. Tennessee Code § 10-7-505(g) provides that the Court may award “all reasonable costs involved in obtaining the records, including reasonable attorneys’ fees” if the government “knew the record was public and willfully refused to disclose it.”

61. The City knew that the records sought by Mr. Perrusquia were public and willfully refused to disclose them to him.

62. Therefore, Petitioner is entitled to full access to these public records and an award of all costs, including reasonable attorneys’ fees.

PRAYER FOR RELIEF

WHEREFORE, Petitioner Jose Marc Perrusquia prays that this Court:

- 1) Immediately issue an order, pursuant to Tennessee Code § 10-7-505(b), requiring representatives of the City to appear by video conference before this Court within ten days and show cause, if any they have, why this petition should not be granted;
- 2) Grant Petitioner a declaratory judgment that all records sought by the Berryhill Request are public records under Tennessee Law and that the City’s failure to grant access to Mr. Perrusquia to these public records constitutes a violation of the TPRA;
- 3) Grant Petitioner a declaratory judgment that the City knew the requested public records were public and willfully refused to grant Petitioner access to the public records he requested;

- 4) Order the City to immediately make available to Petitioner copies of the public records requested by Mr. Perrusquia;
- 5) Grant Petitioner his reasonable costs and attorneys' fees pursuant to Tenn. Code Ann. § 10-7-505(g);
- 6) Grant Petitioner discretionary costs under Tenn. R. Civ. P. 54;
- 7) Grant Petitioner such equitable relief as may be necessary to secure the purposes and intentions of the TPRA and specifically Tenn. Code Ann. § 10-7-505, including, if necessary, the exercise of the full injunctive remedies and relief available to the Court; and
- 8) Grant Petitioner all such further relief to which he may be entitled.

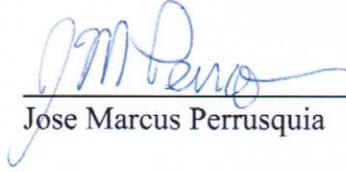
Respectfully submitted,

/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 Petitioner

VERIFICATION

I, Jose Marcus Perrusquia, do declare under penalty of perjury that I have reviewed this petition and the facts stated in it are true to the best of my knowledge, information and belief.



Jose Marcus Perrusquia

Feb. 16, 2021
Date