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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STEPHEN ELLIOTT and FW PUBLISHING, LLC, Petitioners, v. WILLIAM LEE, in his official capacity Governor of Tennessee, and JUAN WILLIAMS, in his official capacity as Commissioner of the Tennessee Department of Human Resources, Respondents.	No. 22-0011-I

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

Petitioners Stephen Elliott and FW Publishing LLC submit this Memorandum of Law in Support of their 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 Respondents, William Lee, in his official capacity as Governor of Tennessee, and Juan Williams, in his official capacity as Commissioner for the Tennessee Department of Human Resources ("TDHR"), to immediately produce the requested public records to Petitioners, and grant Petitioners costs, including reasonable attorneys' fees.

INTRODUCTION

The Tennessee Supreme Court has said that "the public has a vital interest in receiving information from public officials about the effective, or ineffective, functioning and performance of government" because "'[t]he effective functioning of a free government like ours depends largely on the force of an informed public opinion.'" *Jones v. State*, 426 S.W.3d 50, 54 (Tenn. 2013) (quoting *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (Black, J., concurring). Consistent with this logic, the General Assembly enacted the Tennessee Public Records Act ("TPRA") to provide the public with a broad, statutory right of access to public records, and instructed courts to "broadly construe[] [the TPRA] so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d).

While there are more than 538 statutory exceptions to the TPRA that limit the public's right of access to public records that the General Assembly deemed necessary for the effective operation of government, the deliberative process privilege is not one of them. Despite this—and a lack of binding case law recognizing the deliberative process privilege, generally, or as an exception to the TPRA—Respondents have asserted the deliberative process privilege as the justification for withholding public records, in whole or in part, that it received from the global consulting firm McKinsey & Company ("McKinsey").

The McKinsey contract cost the State millions of taxpayer dollars, informed the State's response to the COVID-19 pandemic, and has been the basis for restructuring State government, including services provided to the public. The

public should have access to these public records so that they may fully and effectively evaluate how the State's leaders responded to the ongoing pandemic and how it restructured State government, including the provision of public services.

FACTUAL BACKGROUND

The McKinsey Contract

Effective April 13, 2020, the State and McKinsey entered into a sole source contract (the "McKinsey Contract") with three Statements of Work ("SOW"), all of which related in some way to the COVID-19 pandemic and carried the broad title: "COVID-19 Response Execution Support." (Petition ¶¶ 6-7, 9.) Generally, the McKinsey Contract provided that the consulting firm would produce an "efficiency assessment and review to identify potential performance improvements and assist the State's response to the COVID-19 pandemic including but not limited to cost efficiency, citizen and State employee experience, overall government effectiveness, State government department review, and fiscal benchmarking and forecasting." *Id.* ¶ 8.) The combined cost for the work done pursuant to the McKinsey Contract was $3,816,000. (*Id.* ¶¶ 14, 18, 21.)

Pursuant to SOW #1, entitled "Re-Opening Tennessee," McKinsey was tasked with providing the State "data and best practices to inform the choices that the State will need to make as it re-opens Tennessee's economy, while still working to minimize further spread of COVID-19." (*Id.* ¶ 11.) "Key Deliverables" for SOW #1 included a "Baseline of COVID-19 and economy in Tennessee," and "Ongoing data and reports on the re-opening situation across Tennessee." (*Id.* ¶ 12.) According to

invoices submitted to the State by McKinsey, SOW #1 supported the Economic Recovery Group, which is a part of the Office of the Governor. (*Id.* ¶¶ 9, 13.)

SOW #2, entitled "Tennessee State Government Operations," tasked McKinsey with producing an efficiency report for restructuring State government. (*See id.* ¶¶15-18.)

SOW #3 related to supporting the Unified Command Group, which like the Economic Recovery Group, is part of the Office of the Governor. (*Id.* ¶¶ 9, 19.) The Key Deliverables for SOW #3 included:

- Fact-based options to facilitate [Unified Command Group] decision making in selected topics.
- Targeted analyses in selected deep dive topics.
- Access to the outputs from McKinsey modeling, tools, and assets.

(*Id.* ¶ 20.)

In both the contract and the SOWs, McKinsey explicitly disclaimed any agreement to provide policy advice and instead made clear that the relationship between the State and McKinsey was not the same as a close advisor who serves on the Governor's staff or in his cabinet. (*Id.* ¶¶ 23-25.) For example, all three SOWs provide that "McKinsey … will ***not*** provide advice, opinions or recommendations on policy." [[cites (emphasis added)]]. (*Id.* ¶23.) Similarly, Paragraph A.7 of the McKinsey Contract, states that "[t]he information included in [McKinsey's] Deliverables is intended to inform the State's management and business judgment only and ***will not contain, nor are the Deliverables provided for the purpose of constituting or informing, policy judgments or advice***." (*Id.* ¶24 (emphasis

added).) The McKinsey Contract further underscores that McKinsey served as an "Independent Contractor" and not an employee, agent, or partner of the States. (*Id.* ¶ 25.)

Petitioners' Public Records Requests and Respondents' Denials

Petitioner Stephen Elliott, a reporter for Petitioner FW Publishing LLC, made three public records requests related to the McKinsey Contract. (*Id.* ¶¶1, 27, 37, 40.) On May 15, 2020, Mr. Elliott made a request to the COVID-19 Unified Command & Economic Recovery Group ("UCG/ERG") seeking "any deliverables associated with contract #66331 with vendor McKinsey and Company beginning 4/13/2020." (*Id.* ¶ 27.) Counsel for the UCG/ERG denied this request entirely, asserting deliberative process privilege. (*Id.* ¶ 28.) After counsel for Petitioners sent a letter to the UCG/ERG, it produced three batches of records with some redactions and continued to withhold six unspecified documents, asserting deliberative process privilege. (*Id.* ¶¶29-35.)

On January 8, 2021, Mr. Elliott made his second request to the UCG/ERG seeking "any deliverables associated with contract #66331 with vendor McKinsey and Company beginning 6/13/2020 (date of last produced document)." (*Id.* ¶ 37.) On January 30, 2021, UCG/ERG produced the requested records with redactions, again asserting deliberative process privilege. (Id. ¶ 38.)

Mr. Elliott made his third public records request at issue in this case to the Tennessee Department of Human Resources ("TDHR") on June 15, 2021, and again on August 17, 2021 seeking the "McKinsey & Company efficiency report re:

buyouts" (the "McKinsey Efficiency Records"). (*Id.* ¶40.) TDHR denied Mr. Elliott's request for the McKinsey Efficiency Records on September 24, 2021, claiming that "[t]he documents requested are subject to the deliberative process privilege and contain information that is subject to the exception for information regarding operational vulnerabilities pursuant to Tenn. Code Ann. § 10-7-504(i)(1)(B)." (*Id.* ¶ 41.)

ARGUMENT

I. The TPRA must be interpreted broadly in favor of public access.

"The Public Records Act reflects the legislature's effort to … advance[] 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 Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74-75 (Tenn. 2002)). The purpose of the TPRA is "to apprise the public about the goings-on of its governmental bodies." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 687 (Tenn. 1994); *see also Cherokee Child. & Fam. Servs.*, 87 S.W.3d at 74 (citation omitted) (the TPRA "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 public

access to public records." Tenn. Code Ann. § 10-7-505(d). Accordingly, Tennessee's courts have held that the Public Records Act is a "clear mandate in favor of disclosure." *Tennessean v. Elect. 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 legislative mandate of the Public Records Act [is] very broad and … require[s] 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 Ann. § 10-7-505(c)).

To fully effectuate the broad legislative mandate in favor of disclosure, exemptions to the TPRA must be narrowly construed. *See, e.g., Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (holding that Florida public records act "is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose") (citation omitted).[1]

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[1] The Tennessee Supreme Court has said that Florida's public records law is similar to the TPRA. *Cherokee Child. & Fam. Servs.*, 87 S.W.3d at 74; *see also Elect. Power Bd.*, 979 S.W.2d at 302 (citing Florida case law). Florida has no deliberative process privilege exception to its public records law.

Decisions cited in this Memorandum of Law that are unpublished or from outside Tennessee are attached as Exhibit A.

II. There is no deliberative process privilege exemption to the TPRA.

"Deliberative process privilege" is the primary justification Respondents relied upon to deny Petitioners' public records requests. (Petition ¶¶28, 32-33, 35, 38, 41.) But no binding authority recognizes a common law deliberative process privilege in Tennessee, let alone as an exception to the TPRA. Indeed, when faced with a similar question regarding a different, previously unadopted common law privilege, the Tennessee Supreme Court rejected the argument that it was an exception to the TPRA. *Schneider*, 226 S.W.3d at 344. This Court should not adopt a deliberative process privilege. But even if it does, the Court should reject the privilege as an exception to the TPRA.

The first mention of a deliberative process privilege in Tennessee's appellate case law was in *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). In *Swift*, a public defender sought "the contents of an assistant district attorney general's files in a case involving a prisoner on death row," while the state proceeding was being challenged in federal court. *Id.* at 568. "[T]he trial court dismissed the petition based on Tenn. R. Crim. P. 16, the work product doctrine, the law enforcement investigative privilege, and the deliberative process privilege." *Id.* The Court of Appeals, however, affirmed only on the basis of Tenn. R. Crim. P. 16. *Id.*

The *Swift* court discussed the other three arguments made by the assistant district attorney general, but "decline[d] to accredit any of these theories because they lack logic and legal support." *Id.* at 576. In *dicta*, the court assumed the deliberative process privilege existed and might apply under different

circumstances without citation to any Tennessee authority. *Id.* at 578; *see also Hill v. Waste Mgmt., Inc.*, No. 1:10-ccv-0033, 2011 WL 3475545, at *4-5 (M.D. Tenn. Aug. 9, 2011) (concluding that the *Swift* court "assumed that [a] state court decision could serve as a 'state law' to except documents from the [TPRA]," and that the discussion of the deliberative process privilege in *Swift* was *dicta*). But the Court of Appeals warned that "the deliberative process privilege must be applied cautiously because it could become the exception that swallows up the rule favoring governmental openness and accountability." *Swift*, 159 S.W.3d at 578; *see also Hill*, 2011 WL 3475545, at *4 ("*Swift* suggests a very narrow application of [the deliberative process] privilege given Tennessee's … Public Records laws").

Chancellor Perkins reached the opposite conclusion in 2010, in *Coleman v. Kisber*, No. 10-137-IV, at 11-12 (Tenn. Ch. Ct. Mar. 2, 2010), *aff'd on other grounds* 338 S.W.3d 895, 909 (Tenn. Ct. App. 2010) (noting "our opinion should not be interpreted as an affirmance of the trial court's finding on [the deliberative process privilege] issue."). In that case, Chancellor Perkins explained that the deliberative process privilege "is grounded in the federal common law," and that despite the privilege being "alluded to" in *Swift*, "this privilege has not been clearly adopted by a Tennessee appellate court." *Id.; see also id.* at 12 ("This Court has been unable to locate any Tennessee appellate court decision that applies the deliberative process privilege to prevent production of public records."). Accordingly, the court "decline[d] to adopt this privilege as an exception to the Public Records Act…" *Id.*

Notably, Chancellor Perkins explained, referring to *Schneider*, *supra*, that "[a] recent Tennessee Supreme Court decision suggests that our highest court might be reluctant to enforce a common law exception to the Public Records Act based largely on federal legal authority." *Id.* at 12 n.4 (citing *Schneider*, 226 S.W. 3d at 342-44). Indeed, the Supreme Court's ruling in *Schneider* undercuts the logic of *Swift* and should guide the Court here.

In *Schneider*, *The Jackson Sun* asked the City of Jackson for two categories of public records, one of which is pertinent here: "field interview cards generated by police officers of the City." 226 S.W.3d at 334-35. The City of Jackson argued that the field interview cards were exempt from disclosure under the TPRA pursuant to an asserted "law enforcement privilege," which the Court of Appeals in *Schneider* adopted for the first time in Tennessee. *Id.* at 340. The Tennessee Supreme Court unanimously disagreed and refused to adopt such a privilege as an exception to the TPRA. *Id.* at 344.

In declining to adopt a law enforcement privilege, the Court began by noting that it had never been asked to adopt a common law privilege as an exception to the TPRA and that the Court of Appeals "had not previously applied a common law privilege as an exception to the [TPRA]." *Id.* at 342. The Supreme Court noted that "[i]n adopting the law enforcement privilege, the Court of Appeals relied exclusively upon federal court decisions and decisions of other state courts," which differed significantly from the TPRA. *Id.* at 342-43. The Court juxtaposed the federal Freedom of Information Act ("FOIA"), with its "nine broad and general exceptions to

disclosure that necessarily require substantial judicial interpretation," with the TPRA, which "provides specific statutory exceptions to disclosure, with more than a dozen such exceptions for the records of law enforcement agencies."[2] *Id.*

The *Schneider* Court also looked to its prior TPRA decisions in which it had rejected pleas to adopt public policy exceptions to the TPRA. *Id.* at 343-44 (citing *Cawood*, 134 S.W.3d at 166-67; *Memphis Publ'g*, 871 S.W.2d at 685; *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986)). The *Schneider* Court applied the same reasoning as in its prior decisions to conclude "that the law enforcement privilege has not previously been adopted as a common law privilege in Tennessee and should not be adopted herein," and that "[w]hether the law enforcement privilege should be adopted as an exception to the [TPRA] is question for the General Assembly," because "the General Assembly, not this Court, establishes the public policy of Tennessee."[3] *Id.* (citations omitted); *see also Johnson v. Advanced*

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[2] As of January 30, 2018, the Tennessee Office of Open Records Counsel had identified 538 statutory exceptions to the TPRA. https://comptroller.tn.gov/office-functions/open-records-counsel/open-meetings/exceptions-to-the-tennessee-public-records-act.html. More statutory exceptions to the TPRA have been added by the General Assembly since then.

[3] The Court of Appeals' subsequent unpublished decision in *Davidson v. Bredesen*, No. M2012-02374-COA-R3-CV, 2013 WL 5872286 (Tenn. Ct. App. Oct. 29, 2013), is unavailing. Critically, *Davidson* is not a TPRA case, but instead concerns whether a deliberative process privilege may be invoked in civil discovery. *Id.* at *1. The court did not consider the TPRA and its mandate of transparency, nor did it discuss or even cite to *Schneider*. Whatever persuasiveness *Davidson* might have in the civil discovery context, it is inapplicable here, where the question is whether Tennessee law recognizes a deliberative process privilege exception to the TPRA.

Bionics, LLC, No. 2:08-cv-2376, 2009 WL 10700764, at *3-4 (W.D. Tenn. July 28, 2009) (relying on *Schneider* in refusing to adopt and apply a common law privilege).

A deliberative process privilege has not been established in Tennessee law by statute, rule, or binding case law and should not be adopted here. But even if a deliberative process privilege is adopted, it should not be applied as an exception to the TPRA. The General Assembly sets the public policy of Tennessee, and the Tennessee Supreme Court has held that it is the General Assembly, not the courts, that should decide whether a privilege, like a deliberative process privilege, should be adopted as an exception to disclosure under the TPRA. This Court should apply the same logic as in *Schneider*, defer to the General Assembly, and find that a deliberative process privilege, to the extent one even exists in Tennessee, is not an exception to the TPRA.

III. Should the Court recognize a common law deliberative process exception to the TPRA, Petitioners request that the Court review the withheld records *in-camera*, require Respondents to produce a detailed privilege log, and set a second hearing with a dedicated briefing schedule on whether the privilege applies to the specific public records at issue.

In the alternative, should the Court find that there is a common law deliberative process privilege in Tennessee and that it is an exception to the TPRA, a second hearing on the contours of the privilege along with *in-camera* review of the requested public records and production of a detailed privilege log akin to a *Vaughn* Index by Respondents to the Court and the Petitioners would assist the Court in deciding how such a privilege might apply to the requested public records.

In public records cases, courts regularly conduct *in camera* review. *E.g., Schneider*, 226 S.W.3d at 336 (noting that "the Chancellor directed the City immediately to provide him the requested documents for *in camera* inspection); *Brennan v. Giles Cnty. Bd. of Educ.*, No. M2004-00998-COA-R3-CV, at *1 (Tenn. Ct. App. Aug. 18, 2005) (holding that *in camera* review was proper in deciding public records case). *In camera* review permits courts to examine the public records at issue and more fully evaluate the exceptions claimed by a respondent.

Respondents should also be required to produce a detailed privilege log akin to a *Vaughn* Index, which is common in federal FOIA cases, wherein they will describe each document (or portion of each document) that has been withheld and provide a detailed justification of the government's grounds for non-disclosure, including specification of how disclosure would damage the interest protected by a deliberative process privilege. As one federal court has explained in relation to federal FOIA:

> Parties who seek documents through FOIA are at a disadvantage when a government agency refuses to turn over records claiming statutory exemption because the seeking party can only speculate as to the exact nature of the withheld documents. To alleviate this disadvantage, the government agency must create a *Vaughn* Index to "assist the trial court in its de novo review of agency refusals to disclose materials or portions of materials." The *Vaughn* Court stated that the index would assist the trial court to "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information."

Long v. U.S. Dep't of Just., 10 F. Supp. 2d 205, 209 (N.D.N.Y. 1998) (citations omitted). Respondents should be required "to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of 'conclusory and generalized allegations of exemptions… but will require a relatively detailed analysis in manageable segments.'" *Cuneo v. Schlesinger*, 484 F.2d 1086, 1092 (D.C. Cir. 1973) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973)). "The need for specificity is closely related to assuring a proper justification by the governmental agency." *Vaughn*, 484 F.2d at 827. In other words, providing a detailed privilege log is necessary here for Respondents to meet their burden of showing that a deliberative process privilege applies. *See* Tenn. Code § 10-7- 505(c) ("The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence.")

If the Court concludes that a common law deliberative process privilege exists and is an exception to the TPRA, Petitioners respectfully request that the Court set a second hearing so that argument and additional briefing on the contours of such a privilege and whether it applies to the requested public records may be provided to the Court following *in-camera* review of the requested public records and provision by the Respondents of a detailed privilege log sufficiently in advance of the hearing to both the Court and the Petitioners.

IV. Tenn. Code Ann. § 10-7-504(i)(1)(B) does not apply to the McKinsey Efficiency Records.

For the McKinsey Efficiency Records, Commissioner Williams also asserted that they were exempt from disclosure under the TPRA pursuant to Tenn. Code Ann. § 10-7-504(i)(1)(B). (Petition ¶ 41.) Tenn. Code Ann. § 10-7-504(i)(1)(B) provides that "[i]nformation that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity" is confidential under the TPRA. The language of Tenn. Code Ann. § 10-7-504(i), the preamble to the bill when it was passed, and an opinion from the Tennessee Office of Open Records all demonstrate that this is a narrow exception focused on computer information system security, which should have minimal, if any, applicability to the McKinsey Efficiency Records.

Tenn. Code Ann. § 10-7-504(i) limits the provision's reach to "electronic information." *E.g.*, Tenn. Code Ann. § 10-7-504(i)(1) ("'government property' includes *electronic information* processing systems, telecommunications systems, or other communications systems of a governmental entity") (emphasis added); *id.* § 10-7-504(i)(1)(A) (exempting "[p]lans, security codes, passwords, combinations, or computer programs used to protect *electronic information*…") (emphasis added); *id.* § 10-7-504(i)(1)(C) (exempting "[i]nformation that could be used to disrupt, interfere with, or gain unauthorized access to *electronic information* …") (emphasis added).

In adopting Tenn. Code. Ann. § 10-7-504(i), the General Assembly identified "a danger of computer crime and other abuse of electronic data management

programs and resources used by public entities in the State of Tennessee." 2001 Tennessee Laws Pub. Ch. 259 (S.B. 1473, 102nd Gen. Assemb. (May 22, 2011). The General Assembly also described subsection (i) as a "narrow limitation" on the TPRA. *Id.*

And, accordingly, the Tennessee Office of Open Records Counsel has applied Tenn. Code. Ann. § 10-7-504(i)(1)(B) narrowly. In a 2009 opinion, the question before the Tennessee Office of Open Records Counsel pertained to application of the same provision at issue here to the confidentiality of courtroom surveillance video. Tenn. Office of Open Records Counsel Op. 09-01, at 1 (Jan. 13, 2009).[4] The opinion explains that "it is clear that the General Assembly's sole intent in enacting this provision was protecting 'the technical infrastructure security coding of the state's computer system … [and the] personal credit and debit and personal identification numbers' of anyone doing business with the state or political subdivision of the state." *Id.* at 2 (quoting *Public Records: Hearing on H.B. 867 Before the House of Representatives*, 102nd Sess. (May 14, 2001) (statement of Representative Matthew Kisber, Member, Tennessee General Assembly)). The opinion therefore concludes that Tenn. Code Ann. § 10-7-504(i) is "an exception to the TPRA relative to

[4] This opinion is attached as Exhibit B and is also available at https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/advisory-opinions/0901courtroomfootage.pdf

information regarding the infrastructure of a governmental entity's computer system…"[5] *Id.* at 3 (emphasis added).

Based on the terms of the McKinsey Contract, the McKinsey Efficiency Records do not pertain to the State's computer information system security. SOW #2, which is the sole SOW in the McKinsey Contract related to the McKinsey Efficiency Records, states that McKinsey was tasked with "designing and beginning to implement a coordinated and well-communicated plan to return to pre-COVID levels of service (and beyond) without introducing unnecessary risk and while capturing efficiencies." (Petition ¶ 16.) While SOW #2 refers to "[a]nalysis of existing State employee remote work across State government," nothing in the SOW suggests that McKinsey was retained to assess the State's computer information system security. (*Id.* ¶ 17.)

The McKinsey Efficiency Records relate to the operation of State government generally, and to the provision of services to the public by State government. It is unlikely that even a portion of the McKinsey Efficiency Records, let alone the entirety of them, relate to the structural or operational vulnerabilities of electronic information. And even if some small portion of McKinsey Efficiency Records are exempt pursuant to § 10-7-504(i)(1)(B), the proper response is redaction of the

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[5] This conclusion is further supported by the General Assembly's reference to Tenn. Code Ann. § 10-7-504(i) in Tenn. Code Ann. § 4-3-5509, in which discussion of information that is confidential pursuant to Tenn. Code Ann. § 10-7-504(i) may be discussed in a confidential meeting of the State's Information Systems Council. The Information Systems Council's duties relate to the State's "information systems." Tenn. Code Ann. § 4-3-5502(1).

limited portions covered by this provision after this Court conducts an *in-camera* review of the withheld records. Tenn. Code Ann. § 10-7-503(a)(5) ("Information made confidential by state law shall be redacted whenever possible, and the redacted record shall be made available for inspection and copying."); Tenn. Code. Ann. § 10-7-504(i)(2) ("Information made confidential by this subsection (i) shall be redacted wherever possible and nothing in this subsection (i) shall be used to limit or denying access to otherwise public information because a file, document, or data file contains confidential information.").

CONCLUSION

In sum, Respondents' primary basis for withholding the requested public records—a common law deliberative process privilege—even if recognized under Tennessee law (which it is not), is not an exception to disclosure under the TPRA. The other basis for withholding the McKinsey Efficiency Records is also inapplicable. For these reasons, the Court should find that the requested public records are not exempt from disclosure under the TPRA, order that they be released, and award costs and attorneys' fees to Petitioners. Alternatively, Petitioners request an order (1) setting a second hearing on the applicability of a deliberative process privilege to the requested public records, (2) requiring Respondents to provide the Court with the requested public records for *in-camera* review, and (3) requiring Respondents to provide the Court and the Petitioners with a detailed privilege log for the requested public records that were, in whole or in part, withheld.

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 Petitioners

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 Respondents.

s/ Paul R. McAdoo
Paul R. McAdoo