

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

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

**MEMORANDUM AND FINAL ORDER ON PETITION FOR ACCESS
TO PUBLIC RECORDS AND JUDICIAL REVIEW OF DENIAL OF ACCESS**

This matter is before the Court on a *Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access* (the “Petition”), filed pursuant to the Tennessee Public Records Act (“TPRA”), Tenn. Code Ann. § 10-7-503, *et seq.* The Court entered an Order requiring Respondents to appear and show cause why the Petition should not be granted under Tenn. Code Ann. § 10-7-505. *See* Jan. 12, 2022 Order. The Court also ordered Respondents to submit the records requested prior to the hearing for the Court’s *in camera* review under Tenn. Code Ann. § 10-7-505(b). *Id.* Participating in the hearing were Attorney Paul R. McAdoo, representing Petitioners Stephen Elliott and FW Publishing, LLC, and Deputy Attorney General Janet Kleinfelter, representing Respondents Governor William Lee and Commissioner of Human Resources Juan Williams.

I. BACKGROUND

Petitioners Stephen Elliott and FW Publishing, LLC filed their Petition supported by a memorandum of law and two declarations. Mr. Elliott is a journalist and resident of Davidson

County, Tennessee. He is employed by FW Publishing, LLC, a Tennessee limited liability company. It is the parent company of four Nashville and Williamson County area publications—*Nashville Scene*, *Nfocus Magazine*, *Nashville Post*, and *HomePage Media Group*. Respondents are William Lee, in his official capacity as Governor of Tennessee, and Juan Williams, in his official capacity as Commissioner of the Tennessee Department of Human Resources.

Petitioners made several public records requests regarding a contract between the State of Tennessee and McKinsey & Company, a consulting firm, for services relating to the State's response to the COVID-19 pandemic. Petitioners allege Respondents improperly withheld access to the requested records asserting two grounds: (i) the common law “deliberative process” privilege; and (ii) a statutory exception under the TPRA, Tenn. Code Ann. § 10-7-504(i)(1)(B), which protects “information that would identify those areas of structural or operational vulnerability [of the state].”

II. LEGAL PRINCIPLES

A. Tennessee Public Records Act

Under the TPRA, the public is granted access to inspect government records. Tenn. Code Ann. § 10-7-503; *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 864 (Tenn. 2016) (citations omitted). The TPRA embodies the principle that public records are to be open and accessible, and defines “public records” broadly to include “all documents, papers, letters, maps, books, photographs . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” Tenn. Code Ann. § 10-7-503(a)(1)(A); *Tennessean*, 485 S.W.3d at 864. While the definition of “public records” is broad, the TPRA also recognizes a number of exceptions to public disclosure, including a general exception recognized under “state law,” which encompasses the state constitution, state statutes, common law, court rules, and administrative rules and regulations. Tenn. Code Ann.

§§ 10-7-504, -503(a)(2)(A); *Swift v. Campbell*, 159 S.W.3d 565, 571-72 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. 2005) (citations omitted).

The TPRA establishes the procedure for requesting public records and responding to such requests. Tenn. Code Ann. § 10-7-503(a). Any Tennessee citizen who has requested access to public records but has been denied, may petition a court for access to the requested records and judicial review of the denial. *Id.*, § 10-7-505(a). The government official responding to the request bears the burden of proving by a preponderance of the evidence that the denial of access was justified. *Id.*, § 10-7-505(c); *Moncier v. Harris*, No. E2016-00209-COA-R3-CV, 2018 WL 1640072, at *11 (Tenn. Ct. App. Apr. 5, 2018). Courts are to construe the TPRA broadly “to give the fullest possible public access to public records.” *Id.*, § 10-7-505(d). Absent an established exception, public records must be disclosed “even in the face of serious countervailing considerations.” *Schneider v. City of Jackson*, 226 S.W.3d 332, 340 (Tenn. 2007) (quoting *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994)).

B. The Deliberative Process Privilege

The “deliberative process” privilege protects from public access “communications between high government officials and those who advise or assist them in the performance of their official duties.” *Swift*, 159 S.W.3d at 578 (citing *United States v. Nixon*, 418 U.S. 683, 705 (1974)). “High government officials” are those who are responsible for “developing and implementing law and public policy” and who often must consider “differing and various interests and viewpoints” in arriving at their decisions. *Davidson v. Bredesen*, M2012-02374-COA-R3-CV, 2012 WL 5872286, at *4 (Tenn. Ct. App. Oct. 29, 2013), *perm. app. denied* (Tenn. 2014). Shielding such “conversations and deliberations” from public view fosters “frank and open discussion and, therefore, more efficient government operations.” *Id.* (citing *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984)). But the privilege is to be “applied cautiously,” lest it “become

the exception that swallows up the rule favoring governmental openness and accountability,” leaving our state’s public records and open meetings laws “little more than empty shells.” *Id.* In order to be covered by this privilege, a document must be “predecisional” (that is, “received by the decisionmaker on the subject of the decision prior to the time the decision is made”) and “deliberative” (that is, “the result of a consultative process”). *E.E.O.C. v. Burlington Northern*, 615 F. Supp. 2d 717, 720 (W. D. Tenn. 2009). Factual information is not protected by the privileged. *Id.*

In Tennessee, the deliberative process privilege is a common law privilege that has been applied in the context of preventing public disclosure of protected documents in discovery. *See Davidson*, 2013 WL 5872286 at *4. The issue of whether the deliberative process privilege applies as an exception to the TPRA has yet to be decided. *See Coleman v. Kisber*, 338 S.W.3d 895, 909 (Tenn. Ct. App. 2010) (issue of whether deliberate process privilege is an exception to the TPRA pretermitted by holding that a different exception applied); *see also Schneider*, 226 S.W.3d at 342-43 (even if common law privilege is “state law,” whether privilege excepts disclosure under TPRA is separate issue, recognizing significant differences between the state TPRA and the federal Freedom of Information Act).

III. FINDINGS OF FACT

As required by the TPRA, Tenn. Code Ann. § 10-7-505(d), the Court has reviewed *in camera* the requested documents and makes the following findings of fact based on the Petition, response, and declarations. Specifically, Petitioners rely on the Declaration of Stephen Elliott (“Elliott Decl.”), with attachments, Declaration of Paul R. McAdoo (“McAdoo Decl.”), counsel for Petitioners, with attachments, and Second Declaration of Paul R. McAdoo (“2nd McAdoo Decl.”), with attachment. Respondents rely on the Declaration of Todd B. Skelton (“Skelton Decl.”), Legal Counsel to the Governor’s COVID-19 Unified Command Group and the Economic

Recovery Group (“UCG”), with exhibit, and Declaration of Brandon O. Gibson (“Gibson Decl.”), Chief Operating Officer for the State of Tennessee.

A. The McKinsey Contract

The State of Tennessee entered into a contract with McKinsey and Company (“McKinsey”), as of April 13, 2020, for a period of twelve months. The estimated purchases under the contract were \$3,000,000.

The contract is a sole source contract and identified as contract number 66331 (the “McKinsey Contract”). Elliott Decl., Attach. 1; McAdoo Decl. ¶4.

Relevant provisions of the McKinsey Contract include the following:

Paragraph A.1.a regarding the scope of the Contract provides:

[McKinsey] shall provide government efficiency assessment and review to identify potential performance improvements and assist the State’s response to the COVID-19 epidemic including but not limited to cost efficiency, citizen and State employee experience, overall government effectiveness, State government department review, and fiscal benchmarking and forecasting.

Paragraph A.1.c. further provides:

[McKinsey] cannot and will not give medical, regulatory, public health or legal advice. The State must consider this context and secure appropriate legal, medical and other relevant advice prior to making decisions in connection with the Services.

Paragraph A.7. provides, in pertinent part:

Warranty. . . . The information included in the 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. . . .

Paragraph D.15. provides, in pertinent part:

Independent Contractor. The Parties shall not act as employees, partners, joint venturers, or associates of one another. The Parties are independent contracting entities. Nothing in this Contract shall be construed to create an employer/employee relationship or to allow either Party to exercise control or direction over the manner or method by which the other transacts its

business affairs or provides its usual services. The employees or agents of one Party are not employees or agents of the other Party.

Paragraph D.18. provides, in pertinent part:

Limitation of [McKinsey's] Liability. The Services are not (and will not be interpreted as) medical, investment, legal, tax, accounting or other regulated advice, and do not constitute policy advice. [McKinsey's] Services do not supplant the State's management, policy-making, or decision-making functions and do not guarantee results. The State remains solely responsible for its decisions (including policy decisions), actions, use of the Deliverables and any other materials received pursuant to this agreement, and compliance with applicable laws, rules and regulations. . . .

The McKinsey Contract contains three Statements of Work ("SOW"), more specifically describing the consulting services to be provided. *See* McKinsey Contract, Attachments B, C, D.

The first SOW is for "COVID-19 Response Execution Support: Statement of Work #1: Re-Opening Tennessee" ("SOW #1). The key deliverables listed at paragraph 1.2 are: (i) baseline of COVID-19 and economy in Tennessee; (ii) initial strategy options for State decision-making; and (iii) ongoing data and reports on re-opening. SOW #1 further provides the following working guideline at paragraph 3.2:

The State will develop and will own its work and recommendations both internally and externally. McKinsey is not registered as a lobbyist and will not provide advice, opinions, or recommendations on policy or political matters nor will it be involved in, or support, any advocacy, policy, or lobbying efforts. McKinsey's services cannot be for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing any legislative or administrative action.

The second SOW is for "COVID-19 Response Execution Support: Statement of Work #2: Tennessee State Government Operations" ("SOW #2). The key deliverables listed at paragraph 1.2 are: (i) analysis of governance structure for returning to traditional government operations; (ii) analysis of existing State employee remote work across the State government and providing options for consideration; (iii) analysis of existing data and practices on physical service delivery locations and providing options; (iv) draft case examples on State office operations; (v) case

studies for physical delivery locations; (v) identification and proposed options for efficiencies and innovations. SOW #2 provides the same working guideline at paragraph 3.2 as SOW #1, set forth above.

The third SOW is for “COVID-19 Response Execution Support: Statement of Work #3: Support to Unified Command Group [UCG]”¹ (“SOW #3). The key deliverables listed at paragraph 1.2 are: (i) fact-based options to facilitate UCG decision making in selected topics; (ii) targeted analyses in selected deep dive topics; and (iii) access to the outputs from McKinsey modeling, tools and assets. SOW #3 provides the same working guideline at paragraph 3.2 as SOW #1, set forth above.

The McKinsey Contract was completed by June 2020.

McKinsey invoiced the State a total of \$3,816,000 for services provided under the McKinsey Contract.

B. Public Records Requests and Responses

1. First Request

On May 15, 2020, Petitioner Stephen Elliott sent an email to Todd Skelton, asking “Does the Unified Command have any deliverables associated with contract #66331 with vendor McKinsey and Company beginning 4/13/2020?” (“UCG Records”).

On May 19, 2020, Todd Skelton responded by email that UCG was in the process of “retrieving, reviewing, and/or redacting the requested records.”

On May 29, 2020, Todd Skelton further responded by email, stating “Your request is denied on the grounds that the requested records are protected from disclosure on the basis of deliberative process privilege.”

¹ In his declaration, Mr. Skelton described the “Unified Command Group” as a joint effort to streamline coordination among existing state agencies with respect to COVID-19.

On July 23, 2020, Stephen Elliott sent an email to Todd Skelton asking if the UCG had “its own public records request form? I want to get this denial as official as possible before proceeding with other options to get the documents in question.”

On August 5, 2020, Todd Skelton responded by email that “Unified Command has not used a records request response form” and that the TPRA “requires that a records request denial be provided ‘in writing or by completing a records request response form’” and Unified Command had complied with its obligations under the TPRA.

On August 14, 2020, counsel for Stephen Elliott and FW Publishing LLC, Paul McAdoo, wrote Todd Skelton regarding Stephen Elliott’s public records requests relating to the McKinsey contract deliverables, addressing UCG’s denial on the basis of the deliberative process privilege, and again requesting disclosure of the requested records.

On September 2, 2020, Todd Skelton wrote Paul McAdoo, stating UCG would re-examine relevant documents and determine if any responsive records were not covered by the deliberative process privilege and otherwise subject to disclosure. Mr. Skelton indicated that any such documents would be provided on “an installment basis beginning no later than September 21, 2020.”

On September 21, 2020, Todd Skelton sent an email to Paul McAdoo with the first installment of responsive public records, consisting of seven attachments (83 pages with no redactions).

On October 6, 2020, Todd Skelton sent an email to Paul McAdoo with the second installment of responsive public records, consisting of one zip file (219 pages, 26 of which contained redactions).

On October 15, 2020, Todd Skelton sent an email to Paul McAdoo with the third and final installment of responsive public records, consisting of a zip file with portions of the records

redacted based on deliberative process privilege or HIPPA/privacy reasons. Mr. Skelton further noted six records were being withheld on the basis of deliberative process privilege.

On October 27, 2020, Todd Skelton sent an email to Paul McAdoo with a revised zip folder attached, withdrawing the redactions based on HIPPA or privacy reasons and limiting UCG's redactions to the deliberative process privilege.

2. Second Request

On January 8, 2021, Stephen Elliott sent to Todd Skelton a follow-up second request for records “any deliverables associated with contract #66331 with vendor McKinsey and Company beginning 6/13/2020 (date of last produced document)” and “requesting any materials related to the ‘management workshop’ listed on page 6 of the contract.”

On January 30, 2021, Todd Skelton sent an email to Paul McAdoo with a .pdf copy of responsive records to Mr. Elliott's January 8, 2021 request, (100 pages, of which five pages contained redactions based on the deliberative process privilege).

3. Third and Fourth Requests

On June 15 and August 7, 2021, Stephen Elliott made two public records requests to the Tennessee Department of Human Resources for the McKinsey and Company efficiency report re: buyouts that the state previously refused to release to The Tennessean” (“McKinsey Efficiency Records”).

On September 24, 2021, the associate general counsel with the Department of Human Services, Andrew Puryear, denied the two public records requests, stating “the documents requested are subject to the deliberative process privilege and contain confidential information that is subject to the exception for information regarding operational vulnerabilities pursuant to Tenn. Code Ann. § 10-7-504(i)(1)(B).

The Petition was filed in this matter on January 4, 2022.

On January 21, 2022, a copy of the McKenzie Efficiency Records was sent to Petitioner's counsel.

C. Documents Submitted for In Camera Review

In response to the Court's Show Cause Order, Respondents submitted the following documents for *in camera* review:

1. Withheld Documents.

As identified and described by Respondents, the following six documents were withheld from disclosure on the basis of the deliberative process privilege in response to Petitioner's public records requests:

- A 2-page document identifying key strategic issues to be addressed.
- An 11-page document titled "Scenario Planning May 29, 2020" (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which contains strategies and "wargaming" for a variety of possible hypotheticals or scenarios.
- An 11-page document titled "Scenario Planning June 5, 2020" (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which contains strategies and "wargaming" for a variety of possible hypotheticals or scenarios.
- A 15-page document titled "Economic Scenario Planning June 5, 2020) (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which contains strategies and "wargaming for a variety of possibly hypotheticals or scenarios specifically dealing with the Tennessee economy.
- A 47-page document titled "DRAFT THEC Tabletop Exercise Scenarios" (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which discusses the issues and strategies for addressing issues that might arise with respect to the educational institutions under the Tennessee Higher Education Commission (THEC); and
- A 1-page document titled "Potential bold moves to combat COVID-19" and labeled "Confidential – Working Draft."

See Response, Ex. 1, Declaration of Todd B. Skelton

2. *Redacted Documents*

As identified and described by Respondents, the following documents were disclosed to Petitioners, with portions of the records redacted as noted [with Court notations in brackets]:

- 10-page document title “Check-In: Impact of COVID-19 on Tennessee” dated April 2, 2020 – 2 pages [6, 7] - Evaluation Criteria for prioritization of alternate care sites (document is labeled “Confidential, Proprietary, Pre-Decisional”)
- 16-page document titled “Economic relief for individual residents of States” dated April 11, 2020 (labeled “Confidential, Proprietary, Pre-Decision”)
 - Page [6] titled “For programs requiring significant state-led implementation, States can consider several immediate measures”
 - Page [7] titled “D.2. Actions States could consider to raise awareness for the Recover Rebate”
 - Page [8] titled “States and businesses can work together to provide immediate relief to residents” and identifying “What States can do”
 - Page [9] titled “Longer-term interventions can help States’ economies come back even stronger” and identifying “What States can do” and “How businesses can help”
- 9-page document titled “UCG and ERG Check-in” dated April 16, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [3] titled “Swim lane example: Tennessee could define responsibilities across all domains of COVID-19 response” [all content redacted]
 - Page [4] titled “Illustrative decision rights: Responding to new, localized outbreaks” [content and title redacted]
 - Page [5] titled “Illustrative battle rhythm: What routines and cadences might work best for Tennessee’s COVID response” – specifically outlines internal decision-making processes & responsibilities [content and title redacted]
 - Page [6] titled “Additional topics for consideration” [content and title redacted]
- 17-page document titled “Facts on Tennessee’s COVID-19 Outbreak” dated April 24, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [11] titled “Potential Metrics to Monitor” and identifying “Foundational” and “Potential” metrics
 - Page [12] discussing “which thresholds” state should consider that would trigger state action

- 17-page document titled “Facts on Tennessee’s COVID-19 Outbreak” dated April 24, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [11] titled “Potential Metrics to Monitor” and identifying “Foundational” and “Potential” metrics
 - Page [12] discussing “which thresholds” state should consider that would trigger state action
- 10-page document titled “Decision meeting to align on UCG data” dated April 26, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [4] titled “Potential Metrics to Monitor” and identifying “Foundational” and “Potential” metrics
 - Page [5] titled “Potential metrics and thresholds to inform state action” – specifically range of external thresholds
- 6-page document titled “Considerations for Testing via Housing Authorities” dated April 29, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [2] titled “Considerations for maximizing participation in housing authority testing initiatives”
- 12-page document titled “UCG Check in” dated May 13, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [12] titled “Next steps on after action review work”
- 9-page document titled “COVID-19 response support: Progress to date and next steps” dated May 17, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [2] titled “Priorities moving forward—COVID-19 response support”
 - Page [6] titled “Summary of progress to date across 3 SOWs”
- 1-page document titled “Review of higher education proposal—questions for consideration” and specifically discussing “specific questions about best practices” (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
- 1-page document titled “For discussion: potential checklist for pressure-testing safeguarding proposals”

- 9-page document titled UCG follow up on approach to testing for COVID-19 dated May 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page titled “Executive Summary”
 - Page titled “Detailed testing assumptions and calculations – highly preliminary and subject to update/additional refinement
- 11-page document titled “UCG follow up on approach to testing for COVID-19” dated May 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [2] titled “Executive Summary”
 - Page [9] titled “Detailed testing assumptions and calculations – highly preliminary and subject to update/additional refinement
- 15-page document titled “UCG follow up on approach to testing for COVID-19” June 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
 - Page [3] discussing COVID-19 total TN healthcare system testing costs
 - 3 Pages {5, 6, 7} discussing costs of comprehensive testing of relevant populations, cost and population assumptions and testing capacity
- Multi-page documents titled “Governor’s Dashboard TN” for following dates: May 7, 8, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 29, 31, and June 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, and 12

See id.

The McKinsey Efficiency Records, which initially were withheld from disclosure but subsequently were provided on January 21, 2021, are described as follows with redactions as noted:

- 20-page document titled “ERG Check-In” June 15, 2020
 - Page discussing objectives for today
- 11-page document titled “ERG Check-In” June 16, 2020
 - Page discussing objectives for today
- 10-page document titled “ERG Check-In” June 18, 2020
 - Page discussing objectives for today
- 7-page document titled “ERG Check-In” June 22, 2020

- Page discussing objectives for today

IV. CONCLUSIONS OF LAW

Respondents preliminarily argue that with the onset of the unprecedented COVID-19 pandemic, state officials had to exercise flexibility and ingenuity in responding to this public health crisis. The Governor established the Unified Command Group to streamline the implementation of the State's emergency management response and the UCG determined that it needed expert assistance, which led the State into entering into the McKinsey Contract in April 2020. The McKinsey Contract outlined three Statements of Work. Petitioners made public records requests for the deliverables to be provided to the State under the McKinsey Contract. The UCG initially denied the public records requests for the contract deliverables in their entirety, asserting the deliberative process privilege. The UCG later reconsidered its position, withheld six documents in their entirety, and disclosed a number of other responsive documents in installments with portions of those records redacted. In response to the separate public records requests for the McKinsey Efficiency Records, the Department of Human Resources initially denied Petitioners' requests in their entirety. After the lawsuit was filed, the McKinsey Efficiency Records were provided by Respondents to Petitioners' counsel.²

Respondents contend the *Petition* for access to the withheld and redacted portions of the requested records should be denied because (i) Petitioners lack standing for failure of either *Petition* to allege it is a Tennessee "citizen," and (ii) the deliberative process privilege is recognized

² Respondents contend Petitioners' public records request for the McKinsey Efficiency Records is moot because the records were provided on January 21, 2022, after the lawsuit was filed and prior to the show cause hearing. Petitioners disagree. They maintain that providing requested documents *after* a TPRA enforcement lawsuit is filed does not relieve the governmental entity from liability for having previously denied access *before* suit was filed, citing *Kersey v. Jones*, M2006-01321-COA-R3-CV, 2007 WL 2198329, *6 (Tenn. Ct. App. Jul. 23, 2007) (where requested public record provided *after* lawsuit was filed, TPRA claim not moot; otherwise the TPRA would become pointless).

under Tennessee's common law and, therefore, provides an exception to the TPRA protecting the withheld and redacted records from public disclosure.

A. Petitioners' Standing

Under the TPRA, "any citizen of Tennessee" may request inspection of public records. Tenn. Code Ann. § 10-7-503(a)(2), (f). If the request is denied, "any citizen of Tennessee" may file a petition for access in chancery court. *Id.*, § 10-7-505(a). Respondents argue that neither Petitioner alleged Tennessee "citizenship" status and, therefore, the petition should be denied for their lack of standing.

Stephen Elliott alleged in the *Petition* that he is a resident of Davidson County, Tennessee, and maintains that allegation is sufficient for purposes of the TPRA. Pet., ¶ 1. Respondents reply that a person's domicile and not residency determines citizenship status. FW Publishing LLC alleged in the *Petition* that it is a "Tennessee Limited Liability Company, with its principal place of business in Nashville, Tennessee." Pet., ¶ 2. Respondents reply that citizenship of a limited liability company is not determined by the state of its organization or location of its principal place of business, but is determined by the citizenship of each and every member of the limited liability company (relying on federal principles of citizenship of limited liability companies for purposes of diversity jurisdiction). Respondents contend that because FW Publishing failed to allege the citizenship of each of its member(s), it has not sufficiently pled Tennessee citizenship.

Petitioners contend that Respondents arguments are based on federal law principles, and not Tennessee law. There are no cases determining the test for citizenship under the TPRA, but there is a Tennessee case interpreting the phrase "any citizen of this state" under the analogous Tennessee Open Meetings Act. See *Metropolitan Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville and Davidson Cnty.*, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992). Like the TPRA, a lawsuit to enforce the provisions of the Open Meetings Act may be brought by "any citizen of this

state.” In *Metropolitan Air Research*, the Court of Appeals construed the term “citizen” broadly in order to give the Act the “fullest possible effect consistent with the General Assembly’s intent.” *Id.* In that case, the petitioner seeking to enforce the Open Meetings Act was a Tennessee corporation with its principal place of business in Nashville. The Court of Appeals held that it was a resident of Tennessee and Nashville, and had standing as a citizen of this state to file suit to enforce compliance with the Act.

The Court concludes Petitioners have standing to bring their petition for access to the public records requested under the TPRA. Section 10-7-505 of the TPRA expressly provides that a court, in ruling on a petition to enforce access to public records, shall broadly construe the section “so as to give the fullest possible public access to public records.” Tenn. Code Ann. § 10-7-5-5(d). This section, like the Open Meetings Act, embodies the broad, remedial nature of the TPRA intended by the General Assembly. Following the reasoning of *Metropolitan Air Research*, the Court interprets “citizen” broadly to give the fullest possible effect to the TPRA’s public access to public records consistent with the General Assembly’s intent, and concludes Petitioners’ Tennessee residency is sufficient to establish standing for purposes of enforcing the provisions of the TPRA.

B. Deliberative Process Privilege

The Court has conducted an *in camera* review of the withheld and redacted documents described above. Unlike the documents in *Davidson*, which consisted of notes prepared by legal counsel regarding their communications with and deliberations of high government officials, the documents reviewed in this case are documents prepared by a non-governmental, third-party contractor to facilitate and guide the decision-making process, but do not reflect the actual communications with or deliberations of those governmental officials. The members of the UCG, who were appointed by the Governor, are assumed to be high level government officials to which the deliberative process privilege could apply. The Court, however, does not find that the withheld

and redacted documents, which are documents prepared by McKinsey and provided to the government officials, reflect the discussions or deliberations of those high level officials.

Review of Withheld Documents. The withheld documents consist of factual information compiled by McKinsey and provided to the UCG regarding the pandemic (such as progression of new cases, hospitalizations, deaths, etc.), a process for identifying strategic issues and a workshop process for scenario planning, including potential scenarios, questions for consideration in planning strategic objectives, resources to be assessed, potential consequences, and potential action plans based on practices utilized by other states. These documents contain one-way communications from McKinsey to the UCG to guide the planning process and do not reflect actual communications with high governmental officials or the content of deliberations had, advice given, or decisions made. The documents generally reflect McKinsey's proposal as to the suggested process or methodology for the UCG to utilize in addressing and planning for the state's response to the pandemic.

Redacted Documents. The redacted documents consist largely of reports addressed to:

- (i) Health information, including trends, healthcare service capacities and alternative sites, and potential action steps;
- (ii) Economic impact and federal COVID-19 relief available to the states, approaches and measures for states to utilize;
- (iii) UCG Check-In, with suggested decision-making approaches, method of defining responsibilities, illustrative response planning and objectives, and tracking of other states response strategies;
- (iv) Factual information, including White House guidelines, comparison of COVID and influenza illnesses, active cases in Tennessee, positive testing rates, hospitalization,

- factual tracking information from other states, suggested action planning and management for Tennessee;
- (v) Action planning documents for “Opening Up America Again,” guidelines, including agenda, goal setting, factual information regarding trends monitoring, cases, hospitalizations, suggested metrics to monitor and used to inform state action, proposed data worksheets, and factual tracing information from other states;
 - (vi) Considerations for public housing authority testing initiatives, with proposed methods of communication, sample communications from other states, and identification of vulnerable groups;
 - (vii) UCG check-in, with suggested approaches for after action reviews and case studies from other countries and states;
 - (viii) McKinsey SOW progress to date reports and options for support priorities moving forward;
 - (ix) Proposal for higher education and questions for consideration about best practices;
 - (x) Discussion documents with potential checklist for “pressure-testing” safeguarding proposals;
 - (xi) UCG follow up on approach to testing with consideration of testing deployed in other states and countries and considerations for testing in Tennessee going forward;
 - (xii) UCG follow up on approach to testing with additional considerations for testing strategy;
 - (xiii) UCG follow up on approach to testing with additional considerations for testing strategy and potential costs.

The remainder of the redacted documents reviewed are a series of documents titled “Governor’s Dashboards,” dated from May 7, 2020 through June 12, 2020. These documents are daily reports containing detailed factual information compiled on a statewide and county basis with the number of cases, hospitalizations, deaths, and percentage of positive tests, capacity of health facilities, vulnerable population reporting, unemployment rates and claims filed, etc. The redacted information on these documents consist largely of the “Additional comments” sections, which provide additional factual information and pose specific questions for UCG’s further consideration. There is no indication whether those comments were discussed, the deliberations had, or any decisions made. Again, these documents only reflect one-way communications from McKinsey to the UCG, and nothing more.

Consistent with the reasoning in *Davidson*, the Court concludes that Tennessee common law recognizes the existence of the deliberative process privilege, although the deliberative process privilege has yet to be applied in the context of the TPRA to protect documents coming within the deliberative process privilege from public records disclosure. Even assuming the deliberative process privilege were deemed to be an exception to the TPRA, the Court concludes the deliberative process privilege does not extend to and protect the withheld and redacted documents in this case. As described above, the withheld and redacted documents are records reflecting one-way communications from McKinsey to the UCG government officials. In large part, the redacted records contain compilations of factual information regarding pandemic statistics and trends, response and approaches of other states and countries, and proposed options and alternatives for the UCG to consider. The withheld records largely reflect McKinsey’s suggested planning approach and methodology to guide the UCG’s decision-making process. The records do not reflect the content of discussions between McKinsey and the UCG, deliberations had, or specific advice given. Thus, unlike the records in *Davidson* which consisted of notes by legal counsel

reflecting communications between “high government officials” and their advisors, the Court finds the records in this case contain factual information offered to inform the UCG’s decision-making process, available options, and suggested approaches.

The Court’s conclusion is bolstered by the express terms of the McKinsey Contract. In the scope of contract provision and again in the limitation of contractor’s liability provision, the Contract states that McKinsey “cannot and will not give medical, regulatory, public health or legal advice” and the State should secure appropriate legal, medical and other relevant advice prior to making decisions in connection with the Services. *See* McKinsey Contract at ¶ A.1.c. and D.18. Further, as noted above, the deliberative process privilege is to be “applied cautiously,” lest it “become the exception that swallows up the rule favoring governmental openness and accountability.” Thus, based on the Court’s *in camera* review of the withheld and redacted records and guided by the terms of the McKinsey Contract and the TPRA’s stated purposes and intentions for the enforcement provision of the TPRA, the Court concludes that the withheld and redacted records prepared by McKinsey and provided to the UCG do not come within the ambit of records protected by the deliberative process privilege and are not excepted from disclosure under the TPRA and should be made available to Petitioners.

C. Attorneys’ Fees under the TPRA

The enforcement provision of the TPRA provides that a trial court may, within its discretion, assess all reasonable costs involved in obtaining the requested public records, including attorneys’ fees, against the governmental entity if the entity *knew* the record was public but *willfully refused* to disclose it. Tenn. Code Ann. § 10-7-505(g) (emphasis added). The Court does not conclude that Respondents willfully refused to disclose the withheld and redacted records. While Respondents initially refused to disclose the requested records based on the deliberative process privilege, it re-examined its position and provided a large number of records, portions of

which contained redactions, and withheld only six documents in their entirety. Both Todd Skelton, Legal Counsel to UCG, and Brandon Gibson, Chief Operating Officer for the State, believed the redacted and withheld documents came within the deliberative process privilege exception for the reasons set forth in their respective declarations. The Court finds Respondents made a reasonable effort to designate only those portions of the records that they believed were protected under the deliberative process privilege exception. The Court reaches a different conclusion as to the applicability of the exception, but finds Respondents did not “willfully refuse” to disclose those records for purposes of attorneys’ fees under the TPRA. Accordingly, the Court, within its discretion, declines to assess costs and attorneys’ fees against Respondents.

V. CONCLUSION

Based on the foregoing, the Court concludes the Petitioners have standing, the withheld and redacted records are public records under the Tennessee Public Records Act, the withheld and redacted records are not excepted from disclosure by the deliberative process privilege, and the Petition should be GRANTED.

It is, accordingly, ORDERED, ADJUDGED and DECREED that the *Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access* under the Tennessee Public Records Act is hereby GRANTED. Respondents are ORDERED to produce to Petitioners the withheld documents and unredacted versions of the redacted documents.

It is further ORDERED, ADJUDGED and DECREED that Petitioners’ request for reasonable costs including attorneys’ fees under the Tennessee Public Records Act is hereby respectfully DENIED.

The Clerk and Master is hereby directed to enter this Memorandum and Final Order as a final judgment under Rule 58 of the Tennessee Rules of Civil Procedure.

s/ Patricia Head Moskal

PATRICIA HEAD MOSKAL
CHANCELLOR, PART I

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing is being forwarded via U.S. Mail, first-class, postage pre-paid, with a courtesy copy by email, to the parties or their counsel named below.

Paul R. McAdoo, Attorney at Law
The Reporters Committee for Freedom
of the Press
6688 Nolensville Road, Suite 108-20
Brentwood, TN 37027
pmcadoo@rcfp.org

Janet M. Kleinfelter, Deputy Attorney General
Pablo A. Varela, Ass't Attorney General
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
janet.kleinfelter@ag.tn.gov
pablo.varela@ag.tn.gov

s/ Julia Spencer
Deputy Clerk & Master

1/3/23
Date