

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.* (“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:

PARTIES

1. Petitioner is a journalist, a resident of Shelby County, Tennessee, and a Tennessee citizen. For more than twenty-nine years, Mr. Perrusquia was a reporter for *The Commercial Appeal*. His work now regularly appears in the *Daily*

Memphian. His recent reporting examines the use of force by law enforcement officers in Shelby County. (Perrusquia Decl. ¶ 4 (attached as Exhibit A).)

2. Respondent is the City of Memphis. Service of process upon Respondent will be made 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

3. This Court has subject matter jurisdiction over this petition and venue is proper in this Court under Tenn. Code Ann. § 10-7-505(b). This Court also has subject matter jurisdiction over this petition pursuant to Tenn. Code Ann. § 1-3-121.

FACTUAL ALLEGATIONS

4. Public oversight of government and its employees, including of law enforcement entities and officers, is necessary in a democracy; facilitating such oversight is the fundamental purpose of the TPRA. Here, Mr. Perrusquia seeks public records that would shine a light on how the City and the Memphis Police Department (“MPD”) seek to improve the performance of MPD officers who have been found to have violated MPD rules, including the rules against the use of excessive force, through non-disciplinary measures.

The City’s Denial of Mr. Perrusquia’s Public Records Requests

5. On December 26, 2020, Mr. Perrusquia made three separate public records requests to the City; each request sought “a copy of all written Performance Improvement Plans” for one of three current or former MPD officers: Colin Berryhill, Eric Kelly, and Justin Vazeii (the “Performance Improvement Plans”).

(Perrusquia Decl. ¶ 6; Attach. 1 at 1 (Officer Berryhill), 3 (Officer Kelly), 5 (Officer Vazeii).)¹

6. The City responded to each of the three public records requests on February 2, 2021, stating in each response that “the records requested are exempt from disclosure” under Tenn. Code Ann. § 10-7-504. (Perrusquia Decl. ¶7; Attach. 1 at 1 (Officer Berryhill), 3 (Officer Kelly), 5 (Officer Vazeii) (emphasis removed from all three).) No other basis for the denials was given by the City.

7. The three requested Performance Improvement Plans are not exempt from disclosure under Tenn. Code Ann. § 10-7-504, or any other state law.

The City’s Performance Enhancement Program and Performance Improvement Plans

8. Performance Improvement Plans are a key component of MPD’s Performance Enhancement Program (“PEP”). (McAdoo Decl. ¶ 4 (attached as Exhibit B), Attach. 1 at 3, 6-8.) In MPD’s Policy and Procedures Manual (the “MPD Manual”), the City describes the PEP as “a structured system designed to identify and manage behaviors that result in performance related problems. It is a non-disciplinary system that is designed to improve the performance of [MPD] members through coaching, training, and professional development as described in this policy. The intent of PEP is to provide non-disciplinary intervention, as needed, to assist members in order to provide the highest level of service and satisfaction to the public.” (McAdoo Decl. Attach. 1 at 2.)

¹ Pincites are to the pagination of the underlying document, if applicable, and do not take into account the exhibit cover page.

9. The PEP identifies and tracks eleven “performance indicators”:

- 1) Officer-involved firearms discharge
- 2) Non-lethal uses of force
- 3) Criminal arrests and investigations of subject officer
- 4) Officer-involved vehicular pursuits
- 5) Traffic crashes
- 6) Departmental disciplinary actions
- 7) Documented citizen-initiated complaints (i.e. Workstation, IAB, etc.)
- 8) Officer-involved civil suits
- 9) Sick leave
- 10) On-the-job injuries
- 11) Formal Management Referral

(*Id.* at 3.)

10. These eleven “performance indicators” are then divided into PEP “Indicator Entries” that are used to “identify and evaluate the behavior of members who have been involved in” a specific number of incidents within a specific time frame. (*Id.* at 3-4.) These Indicator Entries include, for example, using force three times within a three-month period, and having two traffic accidents within a twelve-month period. (*Id.* at 4.)

11. Once an indicator “threshold” has been met, the PEP also takes into account “Associated Factors,” which are “[e]vents that will be considered in order to provide a comprehensive review of a member.” (*Id.* at 2.)

12. Though the City describes the PEP as a “non-disciplinary system,” twelve Indicator Entries encompass violations of MPD rules, including, among other things, DR-301 Excessive Force/Unnecessary, DR-104 Personal Conduct, and DR-

107 Courtesy, the threshold for each of which is two within a six-month period. (*Id.* at 4.)

13. On a daily basis, the PEP Coordinator reviews the system “to determine if any member has met or surpassed a threshold” in order to determine “if a pattern of at-risk behavior exists”; if “a pattern appears probable, the coordinator will electronically transmit the information to the members workstation commander for further review and intervention.” (*Id.* at 6.) “Intervention” is defined in the PEP section of the MPD Manual as “[a] proactive management tool intended to improve the efficiency of members and the Department as a whole.” (*Id.* at 2.)

14. Workstation commanders then assign MPD employee reviews to the appropriate supervisor, who determines “if or what intervention is needed for any members under their supervision.” (*Id.* at 6.)

15. The supervisor then works with the MPD employee and the workstation commander to agree upon a Performance Improvement Plan. (*Id.*)

16. A “Performance Improvement Plan” is a “written performance improvement plan agreed upon by the member, reviewing supervisor, and workstation commander designed to reduce or eliminate identified behaviors that contribute to PEP Indicator Entries.” The plan “must describe the behaviors to be addressed, actions designed to change those behaviors, measures to enable both the member and the supervisor to gauge progress and a time-line for reaching the objective of changing, moderating, or eliminating the behavior(s).” (*Id.* at 3.)

17. “Any member, who refuses to participate in a performance improvement plan or declines to sign the plan, shall be immediately referred to a counseling panel.” (*Id.* at 6.)

18. The MPD Manual defines a “counseling panel” as “a panel consisting of a member’s supervisor, workstation commander, and deputy chief, who will review cases when a member refuses to sign a performance improvement plan or has a second referral.” (*Id.* at 3.)

19. “The supervisor shall continue to monitor the member’s performance after the intervention has taken place, and transmit a performance enhancement assessment follow-up report at three (3) months (post intervention monitoring) to the workstation commander and at six (6) months after the initial intervention.” (*Id.* at 6.)

20. “A second performance review session shall be held with any officer who has been entered into the PEP, and receives one or more additional PEP Indicator Entries within a six (6) month period.” (*Id.* at 7.)

21. This second performance review session triggers the development of another Performance Improvement Plan. (*Id.* at 8.)

22. An MPD member will be referred to a counseling panel if they do not assist in the development of a Performance Improvement Plan after the second performance review session or refuses to sign the Performance Improvement Plan. (*Id.*)

23. Similarly, “[i]f the [MPD] member’s complaint history indicates similar conduct, ... a behavior pattern may be evident. If the [MPD] member’s PEP file documents any prior corrective action or failed performance plans, the matter shall be immediately referred to a counseling panel so that a comprehensive plan can be developed to correct the behavior.” (*Id.*)

24. The MPD Manual also identifies a variety of behavior factors that should be considered during any performance review or counseling session. (*Id.* at 8.) These include, among others: “Can formal or informal training correct the problem?” and “Can better interpersonal skills be developed?” (*Id.*)

25. Performance Improvement Plans are maintained by MPD in three places: PEP Coordinator’s files, the applicable Work Station Commander’s PEP Folder, and in “Blue Team,” a platform for collecting MPD employee records. (*Id.* at 6-7.)

26. Based on various portions of the MPD Manual, on information and belief, Blue Team includes a variety of other employment information and records unrelated to the PEP or Performance Improvement Plans, including, among other things, citizen complaints (McAdoo Decl. Attach. 2 at 2), statements of charges, administrative summons and their supporting documentation (*id.* at 6), management referrals (McAdoo Decl. Attach. 1 at 4), response to resistance reports (McAdoo Decl. Attach. 3 at 16, 20, 21, 26, 28, 29), and on the job injuries (McAdoo Decl. Attach. 4 at 6).

27. The MPD Manual lists “some of the most widely used programs” in connection with the PEP as including Anger Management, Cultural Awareness, Conflict Resolution, Remedial Driving, EVOC, Remedial Firearms, MPD Psychological Services, EAP, Counseling/ PEP, Enhanced Remedial Training, Reassignment, Fitness for duty, Communication Skills, Telephone Communications, Verbal Judo, Critical Incident Diffusing, Defensive Tactics, Tactical Response to Critical Incidents, Professionalism and Ethics, Policing with Honor, In-Service Training, Supervisor Counseling, and Peer Training. (McAdoo Decl. Attach. 1 at 9-10.)

28. The MPD Manual’s list of outside resources include CONCERN, Behavioral Health, and Civilian Vehicle Course. (*Id.* at 10.)

The City’s Employee Assistance Program

29. CONCERN is the City’s Employee Assistance Program (“EAP”), which “provides a variety of services, including appropriate assessment, counseling, and referral services to employees.” (McAdoo Decl. Attach. 5 at 6-7.)

30. CONCERN is “designed to identify and resolve production and operational problems associated with employees who are affected by personal problems such as stress, health, marital, family, financial, alcohol and drug, legal, gambling, emotional and other problems.” (McAdoo Decl. Attach. 6 at 1.)

31. City employees and their partners who are “experiencing emotional or mental distress that would not require inpatient care [are] likely appropriate for EAP counseling.” (*Id.*)

32. The MPD Manual requires use of CONCERN when an MPD employee is disciplined for being arrested for an alcohol related incident, “[t]he member[] will be required to attend an approved alcohol treatment program via CONCERN...” (McAdoo Decl. Attach. 7 at 6.)

33. Similarly, if an MPD employee violates DR 121 Narcotics or DR 137 Domestic Violence, the employee is required to attend applicable treatment programs “via CONCERN” or other similar treatment programs. (*Id.* at 9, 12.)

34. Tenn. Code Ann. § 10-7-504(d), which was enacted by 1991 Tennessee Laws Public Ch. 129 (S.B. 741), (McAdoo Decl. Attach. 8), exempts some EAP records from public access.

35. The legislative history for Tenn. Code Ann. § 10-7-504(d) explains that with EAPs: “We’re not talking about a program that has to do with operations. What we are talking about is a program that helps to mend bleeding hearts, to mend broken spirits.” (McAdoo Decl. Attach. 10 6:13-16.)

36. No provision of Tenn. Code Ann. § 10-7-504(d), however, applies to the Performance Improvement Plans requested by Mr. Perrusquia, which are not part of the City’s EAP.

**The City’s Administrative Investigations of
MPD Officers Berryhill, Kelly, and Vazeii**

37. MPD’s Internal Affairs Department (“MPD Internal Affairs”) conducted an administrative investigation, I2019-024, into whether Officer Colin Berryhill’s (“Officer Berryhill”) use of his Conducted Electrical Weapon, or Taser, on three different occasions between May 2018 and April 2019 violated MPD Policies,

including MPD's policy against the use of excessive or unnecessary force.

(Perrusquia Decl. Attach. 2 (the "Berryhill Case Summary") at 1.)

38. In the first incident, Officer Berryhill tased a juvenile in the back while he "was walking away after being ordered [to] by Officer Berryhill." (*Id.* at 17.)

39. In the second incident, Officer Berryhill "unnecessar[ily] and needless[ly]" tased an arrestee when there were at least four other officers on the scene in "full control of [the arrestee's] arms and hands." (*Id.* at 12.)

40. In the third incident, Officer Berryhill tased a handcuffed arrestee who had reached to pull up his pants. (*Id.* at 6–7.)

41. After this tasing, another MPD officer told Officer Berryhill that he had earned the nickname "Taser Face." (*Id.* at 6.)

42. MPD Internal Affairs found that Officer Berryhill violated MPD's Excessive Force Policy and Taser Policy in all three incidents. (*Id.* at 23.)

43. Officer Berryhill has since resigned from MPD. (Perrusquia Decl. Attach. 3 at 2.)

44. MPD Internal Affairs conducted an administrative investigation, I2019-003, into whether Officer Eric Kelly's ("Officer Kelly") actions during an arrest on January 5, 2019, including kneeling on an arrestee's shoulder, violated MPD's rules regarding excessive use of force and reporting response to resistance. (Perrusquia Decl. Attach. 4 at 1, 7, 15.)

45. Internal Affairs found that Officer Kelly did not violate MPD's Excessive Force Policy but did violate DR-101 Compliance with Regulations to wit: Response to Resistance. (*Id.* at 15.)

46. The MPD Inspectional Service Bureau's Security Squad conducted another administrative investigation, S2019-015, into whether Officer Kelly's relationship with a murder suspect violated MPD Policies, specifically MPD's policies regarding personal conduct, compromising criminal cases, truthfulness, accessing reports and records with no legitimate purpose, unauthorized passengers in Department vehicles, failure to report being under investigation, and consorting with persons of bad or criminal reputation. (Perrusquia Decl. Attach. 5 at 1.)

47. Officer Kelly resigned before the continuation of his Administrative Hearing on November 8, 2019, causing his case to be held in abeyance before its conclusion. (*Id.* at 12–14.)

48. Nine months later Officer Kelly was criminally indicted for three counts of Official Misconduct based on the conduct alleged in S2019-015. (Perrusquia Decl. Attach. 6 at 1-4.)

49. Officer Kelly pled guilty to one count of Official Misconduct and was entered into a judicial diversion program on September 23, 2021. (Perrusquia Decl. Attach. 7 at 3-8.)

50. MPD Internal Affairs conducted an administrative investigation, I2019-028, into whether Officer Justin Vazeii ("Officer Vazeii") violated MPD Policies, including MPD's policy regarding searches and seizures, inventory and

processing recovered property, and neglect of duty during an incident involving several officers on July 31, 2019. (Perrusquia Decl. Attach. 8 at 1, 13.)

51. During the July 31, 2019 incident, Officer Vazeii frisked a detainee and found a bag of marijuana, but failed to arrest him. (*Id.* at 3.)

52. MPD Internal Affairs initially sustained the neglect of duty and inventory and processing of recovered property charges against Officer Vazeii, but, after an administrative hearing, only the neglect of duty charge was sustained. (*Id.* at 13, 23.)

CLAIM FOR RELIEF

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

54. Pursuant to the TPRA, Mr. Perrusquia requested the Performance Improvement Plans.

55. The Performance Improvement Plans are “public records” within the meaning of Tenn. Code Ann. § 10-7-503(a)(1)

56. The City denied Mr. Perrusquia’s public records requests for the Performance Improvement Plans.

57. No exemption applies to bar disclosure of the Performance Improvement Plans by the City.

58. As set forth above, Mr. Perrusquia’s attempts to obtain these public records without filing a petition with this Court have been unsuccessful. It is therefore necessary to bring this action for access and judicial review pursuant to Tenn. Code Ann. § 10-7-505.

59. The written basis proffered by the City for denying Mr. Perrusquia's public records requests for the Performance Improvement Plans does not justify the denials.

60. Mr. Perrusquia is entitled to access to the public records he requested under the TPRA.

61. Tenn. Code Ann. § 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."

62. The City knew that the Performance Improvement Plans requested by Mr. Perrusquia were public and willfully refused to disclose them.

63. Therefore, Petitioner is entitled to full access to these public records as well as an award of all costs, including reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Petitioner Jose Marcus Perrusquia prays that this Court:

1) Immediately issue an order, pursuant to Tenn. Code Ann. § 10-7-505(b), requiring representatives of the City to appear before this Court and show cause why this Petition should not be granted;

2) Order the City to provide copies of the public records sought in this Petition to the Court for *in camera* review in advance of that show cause hearing;

3) Grant Petitioner a declaratory judgment that the Performance Improvement Plans he requested are public records under Tennessee Law for which no exemption applies and that the City's failure to grant Petitioner access to these public records constitutes a violation of the TPRA;

4) Grant Petitioner a declaratory judgment that the City knew the Performance Improvement Plans he requested were public records for which no exemption applied and willfully refused to grant Petitioner access to them;

5) Order the City to immediately make available to Petitioner copies of Performance Improvement Plans he requested;

6) Grant Petitioner an award of reasonable costs and attorneys' fees pursuant to Tenn. Code Ann. § 10-7-505(g);

7) Grant Petitioner discretionary costs under Tenn. R. Civ. P. 54; and

8) Grant Petitioner all such further relief to which he may be entitled.

Dated: April 26, 2022

Respectfully submitted,

/s/ Paul R. McAdoo
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