

No. M2022-01610-COA-R3-CV

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

STACY JACOBSON,

Petitioner – Appellant,

v.

TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES,

Respondent – Appellee.

On Appeal from the Davidson County Chancery Court
Case No. 22-0662-I

PETITIONER-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	8
STATEMENT OF THE CASE	9
STATEMENT OF THE FACTS	10
I. Ms. Jacobson’s Public Records Request.	10
II. Case File No. 2020-008.....	11
STANDARD OF REVIEW.....	13
SUMMARY OF ARGUMENT.....	14
ARGUMENT	16
I. The trial court erred when it permitted DCS to redact Case File No. 2020-008 in a way that improperly exceeded the scope of Tenn. Code Ann. § 37-5- 107(c)(4)(C).....	16
A. The plain language of Tenn. Code Ann. § 37-5- 107(c)(4)(C) limits redactions to those found in that section of the Tennessee Code.	18
B. The prefatory reference to CAPTA in Tenn. Code Ann. § 37-5-107(c)(4)(A) signals the General Assembly’s intent to, at a minimum, comply with CAPTA’s public disclosure requirements for child death investigations.	21
C. Rule 16 is not a proper basis for redacting a DCS child death investigation case file.	22
D. The trial court’s decision to permit redactions outside those set forth in Tenn. Code Ann. § 37-5- 107 is also contrary to public policy.	25

II. DCS must produce all related investigative files pursuant to Tenn. Code Ann. § 37-5-107.27

III. Ms. Jacobson should be awarded her reasonable attorneys’ fees and costs. 31

CONCLUSION 33

CERTIFICATE OF SERVICE..... 35

CERTIFICATE OF COMPLIANCE..... 36

RULE 27(E) ADDENDUM..... 37

TABLE OF AUTHORITIES

Cases

<i>Appman v. Worthington</i> , 746 S.W.2d 165 (Tenn. 1987).....	30
<i>Ark. Dep't of Health v. Westark Christian Action Council</i> , 910 S.W.2d 199 (Ark. 1995).....	14
<i>Arnold v. City of Chattanooga</i> , 19 S.W.3d 779 (Tenn. Ct. App. 1999)	32
<i>Arnwine v. Union Cnty. Bd. of Educ.</i> , 120 S.W.3d 804 (Tenn. 2003).....	24
<i>Clarke v. City of Memphis</i> , 473 S.W.3d 285 (Tenn. Ct. App. 2015)	32, 33
<i>Eng. Mountain Spring Water Co. v. Chumley</i> , 196 S.W.3d 144 (Tenn. Ct. App. 2005)	28
<i>Friedmann v. Marshall Cnty.</i> , 471 S.W.3d 427 (Tenn. Ct. App. 2015)	13, 32
<i>Gleaves v. Checker Cab Transit Corp.</i> , 15 S.W.3d 799 (Tenn. 2000).....	18, 19
<i>Graham v. Caples</i> , 325 S.W.3d 578 (Tenn. 2010).....	24
<i>Green v. Green</i> , 293 S.W.3d 493 (Tenn. 2009).....	28
<i>Grove Fresh Distribs., Inc. v. Everfresh Juice Co.</i> , 24 F.3d 893 (7th Cir. 1994).....	26
<i>Hawks v. City of Westmoreland</i> , 960 S.W.2d 10 (Tenn. 1997).....	18
<i>Henry v. White</i> , 250 S.W.2d 70 (Tenn. 1952).....	19

<i>In re Kaliyah S.</i> , 455 S.W.3d 533 (Tenn. 2015).....	13
<i>In re Recs. of Dep't of Child. & Fam. Servs.</i> , 873 So. 2d 506 (Fla. Dist. Ct. App. 2004)	25
<i>Lightbourne v. McCollum</i> , 969 So. 2d 326 (Fla. 2007)	14
<i>Lind v. Beaman Dodge, Inc.</i> , 356 S.W.3d 889 (Tenn. 2011).....	13
<i>Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc.</i> , 87 S.W.3d 67 (Tenn. 2002).....	25
<i>Memphis Publ'g Co. v. Holt</i> , 710 S.W.2d 513 (Tenn. 1986).....	23
<i>Memphis Publ'g Co. v. City of Memphis</i> , 871 S.W.2d 681 (Tenn. 1994).....	14, 32
<i>Schneider v. City of Jackson</i> , 226 S.W.3d 332 (Tenn. 2007).....	32
<i>State ex rel. Miami Herald Publ'g Co. v. McIntosh</i> , 340 So. 2d 904 (Fla. 1976)	26
<i>State v. Williams</i> , 690 S.W.2d 517 (Tenn. 1985).....	28
<i>Swickard v. Wayne Cnty. Med. Exam'r</i> , 475 N.W.2d 304 (Mich. 1991)	14
<i>Young v. Frist Cardiology, PLLC</i> , 599 S.W.3d 568 (Tenn. 2020).....	19
Statutes	
2014 Tenn. Laws Pub. Ch. 771 (H.B. 1505).....	17
42 U.S.C. § 5106a	17

Tenn. Code Ann. § 10-7-503	19, 20
Tenn. Code Ann. § 10-7-505	8, 9, 14, 31
Tenn. Code Ann. § 1-3-121	9
Tenn. Code Ann. § 37-1-409	11
Tenn. Code Ann. § 37-1-612	11
Tenn. Code Ann. § 37-5-107	<i>passim</i>
Tenn. Code Ann. § 37-5-124	11
Tenn. Code Ann. § 67-5-2201	20
Other Authorities	
<i>Child Welfare Policy Manual</i> , U.S. Dep’t of Health & Hum. Servs., § 2.1A.4, Question/Answer 8 (Sept. 2012), https://perma.cc/R6HH-5N9Q	18
<i>Full</i> , Am. Heritage Dictionary Eng. Language (5th ed. 2022), https://perma.cc/QZX2-S4CD	28
<i>Full</i> , Merriam-Webster, https://perma.cc/3TCD-NN6W	28
H.R. Rep. No. 104-430 (1995) (Conf. Rep.)	26
<i>Pertinent</i> , Black’s Law Dictionary (11th ed. 2019).....	30
Tenn. R. App. P. 4.....	10
Tenn. R. Civ. P. 54.02.....	10
Tenn. R. Civ. P. 59.04.....	10
Tenn. R. Crim. P. 1.....	24
Tenn. R. Crim. P. 16.....	<i>passim</i>

The Tennessean v. Tennessee Department of Children’s Services,
No. 12-1769-II (Davidson Cnty. Chancery Ct. filed Jan. 23, 2013)
..... 11, 25

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in holding that the Department of Children’s Services (“DCS”) may redact its case file on a deceased child whose death was investigated for child abuse or neglect pursuant to Tennessee Rule of Criminal Procedure 16 (“Rule 16”), contrary to the language of Tenn. Code Ann. § 37-5-107, which limits redactions to those in that section of the Tennessee Code?

Suggested answer: Yes.

2. Did the trial court err in failing to order DCS to release its records of prior investigations involving the deceased child as part of the “full case file” under Tenn. Code Ann. § 37-5-107(c)(4)(C)?

Suggested answer: Yes.

3. Did the trial court err in declining to award Petitioner-Appellant her reasonable attorneys’ fees and costs pursuant to Tenn. Code Ann. § 10-7-505(g), due to DCS’s knowing and willful withholding of public records?

Suggested answer: Yes.

4. Should this Court award Petitioner-Appellant her reasonable attorneys’ fees and costs associated with this appeal pursuant to Tenn. Code Ann. § 10-7-505(g), due to DCS’s knowing and willful withholding of public records?

Suggested answer: Yes.

STATEMENT OF THE CASE

On May 9, 2022, Petitioner-Appellant Stacy Jacobson filed a petition to access public records from DCS pursuant to Tenn. Code Ann. § 10-7-505(a) and Tenn. Code Ann. § 1-3-121. Ms. Jacobson challenged DCS's decision to redact a child death investigation file based on exceptions outside Tenn. Code Ann. § 37-5-107 and its failure to release records from prior investigations pertaining to the deceased child. R. v. 1 at 1–15.¹ The Petition also sought an award of reasonable costs, including reasonable attorneys' fees pursuant to Tenn. Code Ann. § 10-7-505(g). R. v. 1 at 11–14.

The trial court held a show cause hearing pursuant to Tenn. Code Ann. § 10-7-505(b) on June 3, 2022. R. v. 3 at 408, R. v. 4 at 462. The night before the show cause hearing, DCS filed a response. R. v. 3 at 410–34. The hearing was conducted based on affidavits and declarations submitted by both parties. R. v. 3 at 436–50, R. v. 4 at 451–61. DCS submitted the requested public records to the trial court for *in camera* review prior to the June 3, 2022 hearing. R. v. 4 at 462–63.

On June 23, 2022, the trial court denied Ms. Jacobson's Petition, held that the redactions to the investigative file pursuant to Tenn. R. Crim. P. 16 were proper due to pending criminal proceedings, and explained that it did “not reach the issue of the scope of the information that may otherwise be subject to disclosure under the TPRA, the inclusion of the related records, or the construction of the DCS statutes

¹ Cites to the appellate record are formatted herein as “R. v.,” followed by the applicable volume number and page number.

after all criminal proceedings are concluded.” R. v. 4 at 462–69. The trial court did describe the prior investigations by DCS of the deceased child as “related” to Case File No. 2020-008. R. v. 4 at 467–69.

On July 22, 2022, Ms. Jacobson timely filed a motion to alter or amend the portion of the judgment denying her request for the records of prior investigations concerning the deceased child, arguing that the trial court had failed to reach the issue of whether—setting aside the question of permissible redactions—those records were part of the child’s “full case file.” R. v. 4 at 470–71 (citing Tenn. R. Civ. P. 59.04, 54.02(1)). A hearing was held on Ms. Jacobson’s motion to alter or amend on August 26, 2022. R. v. 4 at 499. The court denied the motion on October 17, 2022. R. v. 4 at 499–503. Ms. Jacobson timely appealed on November 15, 2022. R. v. 4 at 506–07; Tenn. R. App. P. 4.

STATEMENT OF THE FACTS

I. Ms. Jacobson’s Public Records Request.

On August 23, 2021, Ms. Jacobson, who was a reporter at WREG-TV in Memphis,² submitted a Tennessee Public Records Act (“TPRA”) request to DCS for “the full case file for Case No. 2020-008,” which pertained to DCS’s investigation into the January 7, 2020 death of a fourteen-year-old boy. R. v. 1 at 1–2, 4–5. The investigation concluded, on June 29, 2021, that the child’s death was caused by abuse and neglect. R. v. 1 at 4, 33, 146. DCS then posted a version of the case file online, but it was largely redacted and did not contain any records from DCS’s

² Ms. Jacobson recently left WREG’s employ.

four previous investigations relating to the deceased child. R. v. 1 at 4–5, 24–150, R. v. 2 at 151–69.

DCS, in an email from General Counsel Douglas Earl Dimond, denied Ms. Jacobson’s request on August 26, 2021. R. v. 1 at 5, 19–22. When asked for the statutory grounds supporting his denial, in a reply email on September 9, 2021, Mr. Dimond listed Tenn. Code Ann. §§ 37-5-124, 37-1-409, 37-1-612, 37-5-107, Tenn. R. Crim. P. 16, and *The Tennessean v. Tennessee Department of Children’s Services*, No. 12-1769-II (Davidson Cnty. Chancery Ct. filed Jan. 23, 2013). R. v. 1 at 6. He pointed Ms. Jacobson to the heavily redacted online version of Case File No. 2020-008. R. v. 1 at 5, 20. DCS also denied Ms. Jacobson’s request to include records from its prior investigations related to the deceased child in the public version of Case File No. 2020-008. R. v. 1 at 5, 20–21.

II. Case File No. 2020-008.

The public record at issue in this appeal is DCS’s full case file for its investigation of the death of a fourteen-year-old boy who died at home on January 7, 2020, due to what DCS determined was abuse and neglect by family members. R. v. 1 at 2–4, 31, 33, 145–46. On the day of the boy’s death, a woman called 911 to report that he had been found unresponsive, and first responders declared him dead when they arrived. R. v. 1 at 2, 31, 133, 145. One of the boy’s siblings was taken to the hospital. R. v. 1 at 3, 98–99. DCS received a call that same day alleging that the boy had died from abuse and warning that other children lived in the house. R. v. 1 at 3, 132–33. DCS opened an investigation into the abuse allegations. R. v. 1 at 2–3, 31. The alleged victims were five

siblings aged six to sixteen, including the deceased. R. v. 1 at 3, 130–31, 147. The alleged perpetrators, according to DCS, were the deceased child’s mother, maternal aunts, and maternal grandmother. R. v. 1 at 3, 31.

On June 29, 2021, DCS closed its investigation into the boy’s death. R. v. 1 at 4, 30. DCS’s notes from June and July 2021 report that the adults living in the home had been arrested. R. v. 1 at 3, 30, 36. The investigation concluded that there was a preponderance of the evidence to substantiate the allegations of an abuse death, physical abuse, psychological harm, environmental neglect, nutritional neglect, medical maltreatment, and educational neglect. R. v. 1 at 4, 33, 146. The case file briefly notes that DCS had previously conducted four investigations related to the deceased child, in 2006, 2008, 2009, and 2015. R. v. 1 at 4, 25. The 2006 investigation, which DCS was unable to complete, described a “Substantial Risk [of] Sexual Abuse,” and the 2015 note described a “Child with Sexual Behavior Problems.” R. v. 1 at 4, 25.

After the investigation’s close, DCS released 152 heavily redacted pages of the case file on its website, labeled Case File No. 2020-008. R. v. 1 at 4, 24–150, R. v. 2 at 151–69. No records from the four other investigations related to the deceased child were included in Case File No. 2020-008. R. v. 1 at 4, 20–21.

The redactions to the online document conceal significantly more than just the identifying information regarding the deceased child, his minor siblings, his additional family members, and the individual who reported the harm. Indeed, the redactions cover, among other subjects, DCS’s notes on the initial abuse allegations, interviews with family

members, autopsy results, and analysis setting forth why the abuse allegations were substantiated. R. v. 1 at 11, 24–150, R. v. 2 at 151–69. The online version of the file also omits all records of, or additional facts concerning, DCS’s four prior investigations related to the deceased child. R. v. 1 at 4, 20–21.

During proceedings before the trial court on Ms. Jacobson’s petition for access, DCS submitted the affidavit of Shelby County Assistant District Attorney General Timothy Beacham. R. v. 3 at 437–38. In addition to noting that as of June 2, 2022 there was a criminal prosecution related to Case File No. 2020-008, Mr. Beacham further claimed that “certain information provided in the DCS file inextricably comprised part of the criminal investigation and pending criminal prosecution, implicating the application of Tn. R. Crim. P. 16” and that release of information covered by Rule 16 “would jeopardize the integrity of the criminal proceedings and the rights of the State and the Defendants to a fair trial.” R. v. 3 at 437–38.

STANDARD OF REVIEW

Because this appeal turns on issues of statutory interpretation, which are questions of law, the Court’s standard of review is *de novo*, “giving no deference to the lower court decision.” *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015) (citing *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011)); *see also Friedmann v. Marshall Cnty.*, 471 S.W.3d 427, 432 (Tenn. Ct. App. 2015) (holding the same, in TPRA case).

In TPRA cases, courts must also follow the General Assembly’s directive 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). Additionally, “the burden is placed on the governmental agency to justify nondisclosure of the records.” *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994) (citing Tenn. Code Ann. § 10-7-505(c)).

In line with the statute’s pro-disclosure mandate, courts should also construe TPRA exemptions narrowly. *See, e.g., Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (holding that Florida’s 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)); *Ark. Dep’t of Health v. Westark Christian Action Council*, 910 S.W.2d 199, 201 (Ark. 1995) (holding that “[i]n conjunction with” Arkansas’s requirement that its public records law be “liberally construe[d] . . . to accomplish its broad and laudable purpose,” the Arkansas Supreme Court “narrowly construe[s] exceptions to the FOIA” (citations omitted)); *Swickard v. Wayne Cnty. Med. Exam’r*, 475 N.W.2d 304, 307–08 (Mich. 1991) (“[W]e keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed.” (citation omitted)).

SUMMARY OF ARGUMENT

The trial court’s decisions below fundamentally undermine—and rewrite—a core state transparency law: the requirement that, when a child in Tennessee dies due to what may constitute abuse or neglect, DCS must release the full case file of its investigation with any redactions

limited to those found in Tenn. Code Ann. § 37-5-107. That provision of Tennessee law ensures the public’s ability to timely evaluate the circumstances surrounding such tragedies and, if called for, advocate for any reforms that may be needed to prevent future tragedies. Consistent with that important purpose, the statute permits redactions to DCS case files only on narrow grounds outlined in “this section” of the Code: to conceal the names of the child, the child’s family, and the person making the abuse or neglect allegations. Tenn. Code Ann. § 37-5-107(c)(4)(C). To ensure the public’s full understanding of the tragedy, the statute also requires DCS to disclose the “*full* case file,” not just part of it or a summary. *Id.* (emphasis added). Here, however, the trial court erroneously permitted DCS to redact nearly all of the case file pursuant to Tennessee Rule of Criminal Procedure 16 (“Rule 16”), which falls outside “this section.” R. v. 4 at 462–69. The trial court’s ruling is contrary to the plain language of Tenn. Code Ann. § 37-5-107(c)(4)(C), ignores the conflict between that provision and Rule 16 that must be resolved in favor of the more specific provision, Tenn. Code Ann. § 37-5-107(c)(4)(C), and is contrary to the public policy. The trial court further erred by permitting DCS to withhold all records from its prior investigations related to the deceased child, which form part of the full case file. R. v. 4 at 462–69, 499–503. And, the trial court erred in declining to award Ms. Jacobson her attorneys’ fees and costs based on DCS’s willful, improper denial of her TPRA request. R. v. 4 at 469, 502–

03. Accordingly, Ms. Jacobson respectfully requests that this Court reverse the decision below.

ARGUMENT

I. The trial court erred when it permitted DCS to redact Case File No. 2020-008 in a way that improperly exceeded the scope of Tenn. Code Ann. § 37-5-107(c)(4)(C).

The trial court committed reversible legal error when it held that DCS was permitted to redact the public version of Case File No. 2020-008 based not only on the confidentiality provisions of Tenn. Code Ann. § 37-5-107, but also pursuant to Rule 16. R. v. 4 at 465–69. The proper interpretation of Tenn. Code Ann. § 37-5-107, based on its plain language, would be to limit permissible redactions to the full case file of a child death investigation to those exemptions found in Tenn. Code Ann. § 37-5-107.

Tenn. Code Ann. § 37-5-107 is a comprehensive statutory scheme governing the public disclosure of information about children who have died or suffered a “near fatality” due to abuse or neglect. This statute balances the public’s interest in overseeing DCS and holding it accountable with the family’s and state’s interest in confidentiality. At its heart, Tenn. Code Ann. § 37-5-107 recognizes this simple truth: when a child dies or nearly dies from abuse or neglect, the calculus related to public disclosure changes. When a child dies from neglect or abuse, the only redactions permissible when the results of a DCS investigation are released to the public are those found in Tenn. Code Ann. § 37-5-107.

Tenn. Code Ann. § 37-5-107(c)(4) envisions two levels of public disclosure when DCS investigates a child fatality for abuse or neglect. First, within five business days, DCS must disclose the child’s age, gender, and whether DCS “has had history with the child.” Tenn. Code Ann. § 37-5-107(c)(4)(B). Then, following the closure of DCS’s investigation into a child abuse or neglect fatality, DCS must “release the final disposition of the case, whether the case meets criteria for a child death review and the full case file.” Tenn. Code Ann. § 37-5-107(c)(4)(C). When the full case file is released, “[t]he case file may be redacted to comply with the confidentiality requirements of this section,” Tenn. Code Ann. § 37-5-107(c)(4)(C), which generally limits redactions to the identity of the child, family, and person who made a report of harm, Tenn. Code Ann. § 37-5-107(a).

Both of these mandatory disclosure provisions, Tenn. Code Ann. § 37-5-107(c)(4)(B)–(C), were added in 2014. 2014 Tenn. Laws Pub. Ch. 771 (H.B. 1505). Prior to the 2014 amendment, Tenn. Code Ann. § 37-5-107(c)(4) only provided that “[t]he department shall release information in the following circumstances: . . . (4) [t]o provide for the public disclosure of information about any case that results in a child fatality or near fatality in compliance with 42 U.S.C. § 5106a(b)(2)(B)(x).” Tenn. Code Ann. § 37-5-107(c)(4)(A). That federal citation is to part of the Child Abuse Prevention and Treatment Act (“CAPTA”), which requires states receiving federal funds to release information on child fatalities and near fatalities caused by abuse and neglect—including information on the state’s prior investigations and services provided to the child, among other things. 42 U.S.C. § 5106a(b)(2)(B)(ix); R. v. 4 at 453–55; *Child*

Welfare Policy Manual, U.S. Dep’t of Health & Hum. Servs., § 2.1A.4, Question/Answer 8 (Sept. 2012), <https://perma.cc/R6HH-5N9Q>. Both the plain language of Tenn. Code Ann. § 37-5-107(c)(4)(C) and the prefatory reference to CAPTA in Tenn. Code Ann. § 37-5-107(c)(4)(A) demonstrate the intent of the General Assembly to provide for release of DCS’s full case file when a child dies from abuse or neglect with redactions to that full case file being limited to those found in Tenn. Code Ann. § 37-5-107. Redactions based on provisions outside of Tenn. Code Ann. § 37-5-107 are not permitted.

A. The plain language of Tenn. Code Ann. § 37-5-107(c)(4)(C) limits redactions to those found in that section of the Tennessee Code.

The trial court erred by failing to engage with the plain text of Tenn. Code Ann. § 37-5-107. Specifically, the trial court overlooked the limiting phrase “in this section”—words that appear nowhere in the Order, but that are central to the outcome of this case, as they bar redactions made pursuant to authorities outside Tenn. Code Ann. § 37-5-107. *R. v. 4* at 462–69.

Core tenets of statutory interpretation and construction require this result. As the Tennessee Supreme Court has instructed, “if ‘the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, “to say sic lex scripta, and obey it.”” *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000) (quoting *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997)). “Therefore, ‘[i]f the words of a statute plainly mean one thing they cannot be given another meaning by judicial

construction.” *Id.* (quoting *Henry v. White*, 250 S.W.2d 70, 72 (Tenn. 1952)). Additionally, courts “must construe a statute so that no part will be inoperative, superfluous, void or insignificant, and the court must give effect to every word, phrase, clause and sentence.” *Young v. Frist Cardiology, PLLC*, 599 S.W.3d 568, 571 (Tenn. 2020) (citations and internal quotation marks omitted).

Here, in contravention of these principles, the trial court essentially erased the words “in this section” from Tenn. Code Ann. § 37-5-107, instead of interpreting and applying that phrase according to its plain meaning. The meaning of the words “in this section” is clear. Tennessee’s statutes are divided into Titles, Chapters, Parts, Sections, Subsections, and Subdivisions—categories going from broad to narrow. *R. v. 2* at 293. Drafters of legislation often use the words “this section” to define and limit a provision’s reach. *R. v. 2* at 239, 296. Doing so is consistent with the General Assembly’s Office of Legal Services’ current “Legislative Drafting Guide,” which provides that the phrase “this section” is the correct way to cross-reference “within the provision being drafted.” *R. v. 2* at 247. The operative Legislative Drafting Guide when Tenn. Code Ann. § 37-5-107 took effect in 2014 likewise instructed that the phrase “this section” is the appropriate way to “be specific when cross-referencing” and “reference a specific . . . section” of the code. *R. v. 2* at 296, *R. v. 3* at 308.

Other portions of the Tennessee Code demonstrate how the limiting phrase “in this section” is used elsewhere. One example of this phrasing is found in the TPRA itself, with Tenn. Code Ann. § 10-7-503 referring to “this section” three times in describing how that provision operates.

Likewise, Tenn. Code Ann. § 67-5-2201 uses “in this section” three times to cross-reference other provisions within that section. The General Assembly also knows how to give a statute broader reach when desired, going beyond “this section” to sweep in other state laws. For example, the TPRA provides that “[i]nformation made *confidential by state law* shall be redacted whenever possible,” referencing state laws generally rather than cabining its reach to one section of the code. Tenn. Code Ann. § 10-7-503(a)(5) (emphasis added).

Here, Tenn. Code Ann. § 37-5-107(c)(4)(C) precisely instructs that redactions may be made for one reason: “to comply with the confidentiality requirements of *this section*.” *Id.* (emphasis added). In this manner, “this section” is a limiting phrase, permitting DCS and the courts to look only at Tenn. Code Ann. § 37-5-107 when assessing a redaction’s propriety—not to other state laws. And the section’s “confidentiality requirements” are clear and limited, applying to (1) information “that directly or indirectly identif[ies] a child or family receiving services from [DCS]” and (2) information that “directly or indirectly . . . identif[ies] the person who made a report of harm pursuant to § 37-1-403 or § 37-1-605.” Tenn. Code Ann. § 37-5-107(a).³ There are no other applicable confidentiality provisions in the relevant section. *Id.* Tenn. Code Ann. § 37-5-107 does not permit redactions based on “state

³ Additionally, subsection (g) requires certain steps be taken when student records are released and subsection (h) requires that DCS “comply with federal and state laws and regulations regarding the release of [drug and alcohol] records.” *Id.* § 37-5-107(g)–(h). These provisions are not at issue in this case.

law” generally, or on any other grounds. The trial court erred in overlooking this plain language and permitting DCS to redact the case file in a manner inconsistent with the dictates of Tenn. Code Ann. § 37-5-107.

B. The prefatory reference to CAPTA in Tenn. Code Ann. § 37-5-107(c)(4)(A) signals the General Assembly’s intent to, at a minimum, comply with CAPTA’s public disclosure requirements for child death investigations.

The prefatory reference in Tenn. Code Ann. § 37-5-107(c)(4)(A) to CAPTA reinforces the conclusion that any redactions to “final disposition” and “full case file” records related to a child death should be limited to those set forth in that section of the Tennessee Code.

CAPTA requires that state departments, like DCS, release, at a minimum,

the cause of and circumstances regarding the fatality or near fatality; the age and gender of the child; information describing any previous reports or child abuse or neglect investigations that are pertinent to the child abuse or neglect that led to the fatality or near fatality; the result of any such investigations; and the services provided by and actions of the State on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality.

R. v. 3 at 449–50. By including a reference to CAPTA’s public disclosure provision, the General Assembly confirmed its intent to comply with that federal transparency law, while also going above and beyond CAPTA’s minimum requirements by requiring DCS to release full case files. This

decision further reinforces that Tenn. Code Ann. § 37-5-107(c)(4)(C) means what it says—redactions should be limited to those items found in that section of the Tennessee Code. The trial court erred in ignoring CAPTA’s requirements and permitting DCS to impose extensive and improper redactions to Case File No. 2020-008.

The current, heavily redacted Case File No. 2020-008 includes the age and gender of the deceased child and includes the conclusions DCS reached regarding the cause of the child’s death. R. v. 1 at 31, 33, 132, 146. However, Case File No. 2020-008, as redacted, does not disclose, as CAPTA requires, the circumstances regarding the child’s death, records of prior, related investigations, the results of those investigations, or the services provided by DCS or actions of DCS pertinent to the child abuse or neglect that led to the child’s death. In other words, while the General Assembly requires DCS to exceed CAPTA’s minimum disclosure requirements by releasing its full case files, DCS’s current disclosure falls far below those minimum requirements given the file’s near-complete redaction. Limiting the redactions to those found in Tenn. Code Ann. § 37-5-107 and, as discussed *supra* at Section I.A, including DCS’s records from its four prior investigations related to the deceased child, would likely bring DCS’s disclosure of Case File No. 2020-008 into compliance with CAPTA, as Tenn. Code Ann. § 37-5-107(c)(4)(A) requires.

C. Rule 16 is not a proper basis for redacting a DCS child death investigation case file.

Despite the limitation in Tenn. Code Ann. § 37-5-107 permitting redactions only as denoted in “this section,” the trial court erroneously

applied Rule 16 to permit DCS to redact Case File No. 2020-008. R. v. 4 at 468. This decision not only ignored the plain language of Tenn. Code Ann. § 37-5-107(c)(4)(C), it violated a fundamental tenet of statutory construction requiring courts to resolve a conflict between two statutory provisions by applying the more specific provision over a more general one. As such, this Court should reverse the trial court’s decision and find that Rule 16 is not a proper basis for redaction or withholding of child death investigation records involving abuse or neglect.

Rule 16 governs criminal discovery and “does not authorize the discovery or inspection of . . . internal state documents made by . . . state agents or law enforcement officers in connection with investigating or prosecuting the case,” or of “statements made by state witnesses or prospective state witnesses.” Tenn. R. Crim. P. 16(a)(2). Tennessee courts have found that Rule 16 is a TPRA exception applicable to records related to pending or contemplated criminal proceedings but not closed criminal case files. *E.g., Memphis Publ’g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986) (finding a closed investigative file of the Memphis Police Department was subject to disclosure under the TPRA and that Rule 16 was inapplicable). Because, as discussed *supra*, Tenn. Code Ann. § 37-5-107(c)(4)(C) requires disclosure of the full case file of a child death investigation for abuse or neglect, subject to limited redactions set forth in that section of the Tennessee Code, and Rule 16 generally exempts open or contemplated criminal proceeding records from public disclosure, these two provisions are in conflict. The trial court failed to acknowledge, let alone resolve, this conflict, which is at the heart of this case.

“Where a conflict is presented between two statutes, a more specific statutory provision takes precedence over a more general provision.” *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010) (citing *Arnwine v. Union Cnty. Bd. of Educ.*, 120 S.W.3d 804, 809 (Tenn. 2003)). Tenn. Code Ann. § 37-5-107 is a very specific provision, governing the release of DCS’s case files on child deaths and near deaths due to alleged abuse or neglect. Rule 16, meanwhile, is a general provision, reaching “all criminal proceedings conducted in all Tennessee courts of record.” Tenn. R. Crim. P. 1(a). Because the two provisions directly conflict on the issue of permissible redactions to DCS case files on child deaths, the specific Tenn. Code Ann. § 37-5-107(c)(4)(C) controls over the general Rule 16. Accordingly, Tenn. Code Ann. § 37-5-107(c)(4)(C) is the only basis upon which DCS may redact information from the full case files released by DCS after child fatalities and near fatalities.

The trial court held the opposite: that Rule 16 permitted DCS’s sweeping redactions. R. v. 4 at 466–69. In so holding, the trial court failed to analyze the limiting language in Tenn. Code Ann. § 37-5-107(c)(4)(C) permitting redactions under “this section.” R. v. 4 at 462–69. Nor did the trial court address how Rule 16 could permit such redactions to the DCS case file at issue despite falling outside of “this section.” R. v. 4 at 467–68. As a result, the trial court’s holding that Rule 16 was a proper basis for redacting Case File No. 2020-008 and for withholding in their entirety the records from the four prior, related investigations performed by DCS regarding the deceased child should be reversed.

D. The trial court’s decision to permit redactions outside those set forth in Tenn. Code Ann. § 37-5-107 is also contrary to public policy.

The trial court’s ruling is not only incorrect as a matter of law; it also undermines the strong public policy reasons supporting limiting redactions of child-death case files to those set forth in Tenn. Code Ann. § 37-5-107. The public has a keen interest in access to this type of file, which can shed light on what role, if any, DCS played in the lives of children who died from abuse or neglect. *See Memphis Publ’g Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002) (observing that access to public records, through the TPRA, “serves a crucial role in promoting accountability in government through public oversight of governmental activities”); *In re Recs. of Dep’t of Child. & Fam. Servs.*, 873 So. 2d 506, 513 (Fla. Dist. Ct. App. 2004) (finding, as to release of child case records in abuse matter, that disclosure is “a prerequisite to correcting [the state’s] shortcomings” and thus “coincides with the interests of all the children who may suffer as a consequence of failures in the state’s efforts to protect them from abuse”). Similarly, as the trial court explained in a case involving the pre-amendment version of Tenn. Code Ann. § 37-5-107(c)(4), after a child’s death from abuse or neglect, the State can no longer “protect or provide for the child, and its efforts or lack thereof become a key concern.” R. v. 2 at 204 (*The Tennessean v. Tennessee Department of Children’s Services*, No. 12-1769-II (Davidson Cnty. Chancery Ct. filed Jan. 23, 2013)).

The trial court’s order in this case permits heightened secrecy surrounding DCS’s investigation of a boy’s death, which hinders the

“effort to provide public accountability for the actions or inaction of public officials.” H.R. Rep. No. 104-430, at 522 (1995) (Conf. Rep.) (discussing amendments to CAPTA). If this Court adopts the trial court’s reasoning and holds that Rule 16 bars disclosure until related criminal cases make their way through the courts, the public will routinely be prevented from obtaining timely access to child death case files. Yet timely access is essential for the public to be able to effectively oversee DCS and hold it accountable for its actions or inactions. Indeed, public and press interest in a tragedy fades over time, reducing the likelihood of reform. *See, e.g., Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”); *State ex rel. Miami Herald Publ’g Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976) (“News delayed is news denied. To be useful to the public, news events must be reported when they occur.”).

Here, if the trial court had ordered the prompt disclosure of Case File No. 2020-008 with redactions limited to those set forth in Tenn. Code Ann. § 37-5-107, it would have provided the public with prompt necessary information to assess the tragedy and advocate for any required reforms. Instead, the trial court inhibited the public’s ability to evaluate DCS’s performance in this case by permitting the near indefinite redaction of nearly the entire document under Rule 16, including almost all information on how the child died and why DCS concluded his death was caused by abuse and neglect. These redactions are inconsistent not only with the text of Tenn. Code Ann. § 37-5-107, but also with the very

purpose behind mandating the disclosure of a deceased child’s full case file. For these reasons, too, this Court should reverse the decision below and order that the requested public records be promptly provided to Ms. Jacobson, with redactions limited to those required by Tenn. Code Ann. § 37-5-107.

II. DCS must produce all related investigative files pursuant to Tenn. Code Ann. § 37-5-107.

If the Court finds that redactions to child death investigation records are limited to the provisions in Tenn. Code Ann. § 37-5-107, then this Court should also consider, *de novo*, a question of law that the trial court refused to address: whether the “full case file” that DCS is required to release with limited redactions must include records from the prior investigations related to the deceased child. *R. v. 4* at 468–69 (“The Court does not reach the issue of . . . the inclusion of the related records[.]”), 502 (finding that addressing this question would require issuing “an advisory opinion”). This question was raised by Ms. Jacobson’s second claim, *R. v. 1* at 11–13, her memorandum of law, *R. v. 3* at 341–44, and her motion to alter or amend, *R. v. 4* at 470–82.

Tenn. Code Ann. § 37-5-107 requires that “[f]ollowing the closure of an investigation for a child abuse or neglect fatality,” DCS “shall release . . . the *full* case file.” Tenn. Code Ann. § 37-5-107(c)(4)(C) (emphasis added). Here, the available version of Case File No. 2020-008 cannot be considered “full” because it omits *all* of DCS’s records from its four prior investigations related to the deceased child. *R. v. 1* at 5–6, 25.

Courts “must begin with the words” of a statute in order “to ascertain and to give the fullest possible effect to the General Assembly’s intent and purpose.” *Green v. Green*, 293 S.W.3d 493, 507 (Tenn. 2009). Specifically, courts “must (1) give these words their natural and ordinary meaning, (2) consider them in the context of the entire statute, and (3) presume that the General Assembly intended that each word be given full effect.” *Id.* Moreover, “[w]hen a statute’s language is clear and unambiguous, [courts] need not look beyond the statute itself, but rather, [courts] must simply enforce it as written.” *Id.* (internal citations omitted).

When “seeking to determine the ‘natural and ordinary meaning’ of statutory language” used in a statute “the usual and accepted source for such information is a dictionary.” *Eng. Mountain Spring Water Co. v. Chumley*, 196 S.W.3d 144, 148 (Tenn. Ct. App. 2005) (citation omitted); *see also State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985) (relying on dictionary to determine ordinary and natural meaning of words of a statute). The American Heritage Dictionary defines “full” as “Complete in every particular.” *Full*, Am. Heritage Dictionary Eng. Language (5th ed. 2022), <https://perma.cc/QZX2-S4CD>; *see also Full*, Merriam-Webster, <https://perma.cc/3TCD-NN6W> (“[C]omplete especially in detail, number, or duration,” for example, “a full report”).

A case file on a deceased child cannot be complete if it excludes all information and records on DCS’s prior contacts with that child and his family. In Case File No. 2020-008, the only mention of DCS’s four prior investigations related to the deceased child is:

History (not listed above):

INV [REDACTED]/SEE/AUPU (AP: [REDACTED] [REDACTED] Child with Sexual Behavior Problems (AP: [REDACTED] [REDACTED] 09-25-2015

INV [REDACTED]/SEE/AUPU/09-03-2009

INV [REDACTED]/ENN/AUPU/06-18-2008

INV [REDACTED]/Substantial Risk Sexual Abuse/Unable to Complete/04-13-2006

R. v. 1 at 25. The public can hardly learn anything from these few lines about what DCS investigated four different times over a period of more than nine years, what DCS found during those four investigations, and whether anything more could have been done to prevent the child's tragic death. Instead, the only available information is the number and dates of those investigations (assuming "INV" stands for investigation), that the first one was related to "Substantial Risk Sexual Abuse/Unable to Complete," and that the last one involved a "Child with Sexual Behavior Problems." R. v. 1 at 4, 25. Such extremely limited information tells the public almost nothing about DCS's four prior, related investigations related to the deceased child and does not constitute a "full" or complete case file, falling far short of the statutory disclosure requirement. In failing to require DCS to release those records, the trial court functionally, and erroneously, erased the word "full" from its command.

This conclusion is reinforced by the federal government's interpretation of CAPTA's disclosure requirements, which Tennessee specifically cites as a piece of its disclosure requirements related to child death investigations. Tenn. Code Ann. § 37-5-107(c)(4)(A). CAPTA, at a minimum, requires that states release "information describing any previous reports or child abuse or neglect investigations that are pertinent to the child abuse or neglect that led to the fatality or near fatality [and] the result of any such investigations," among other things.

R. v. 3 at 449–50. Black’s Law Dictionary defines “pertinent” as: “Of, relating to, or involving the particular issue at hand; relevant.” *Pertinent*, Black’s Law Dictionary (11th ed. 2019). In other words, prior investigations related to a child abuse or neglect death are plainly “pertinent” to the fatality at issue and, accordingly, must be released as part of the full case file with only the limited redactions permitted pursuant to Tenn. Code Ann. § 37-5-107.

Here, the trial court reviewed the records of the four prior investigations *in camera*. R. v. 4 at 502. In its initial order, the trial court noted on multiple occasions that those prior investigation files were “related” to Case File No. 2020-008. R. v. 4 at 467–69. That very comment itself shows that the older files are pertinent to the abuse or neglect that led to the child’s death—if those records were unrelated to the child’s death and ensuing criminal prosecutions, the trial court could not have found that they were exempt under Rule 16. *See Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987) (explaining that Rule 16 applies “where the files are open and are relevant to pending or contemplated criminal action”).

The trial court’s failure to order DCS to release its records of prior investigations related to the deceased child is contrary to the mandatory disclosure requirements in Tenn. Code Ann. § 37-5-107(c)(4)(C). This improper withholding leaves the public, including the press, in the dark about the child’s history with DCS and the events leading to his death. Accordingly, this Court should reverse and remand with instructions that DCS release the records of its prior investigations of the deceased child

as part of Case File No. 2020-008 with redactions as permitted by Tenn. Code Ann. § 37-5-107.

III. Ms. Jacobson should be awarded her reasonable attorneys' fees and costs.

If the Court agrees that the trial court erred when it permitted redaction pursuant to Rule 16 because redactions to Case File No. 2020-008 should be limited to those found in Tenn. Code Ann. § 37-5-107 and that the records from DCS's prior investigations related to the deceased child must be included in the case file, the Court should also find that Ms. Jacobson is entitled to an award of reasonable costs, including reasonable attorneys' fees, for both the trial court proceedings and the proceedings before this Court pursuant to Tenn. Code Ann. § 10-7-505(g).

Tenn. Code Ann. § 10-7-505(g) provides that “[i]f the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.” Here, this Court should find that DCS both knew that the redactions and withholding of its prior, related investigation records were improper and that DCS willfully refused to disclose a less redacted version of Case File No. 2020-008 that complied with the dictates of Tenn. Code Ann. § 37-5-107 and award Ms. Jacobson reasonable costs, including reasonable attorneys' fees for both the trial and appellate stages of this case.

The Tennessee Supreme Court has explained that “the Public Records Act does not authorize a recovery of attorneys’ fees if the withholding governmental entity acts with a good faith belief that the records are excepted from the disclosure.” *Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) (citing *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999)). “Moreover, in assessing willfulness, Tennessee courts must not impute to a governmental entity the ‘duty to foretell an uncertain juridical future.’” *Id.* (quoting *City of Memphis*, 871 S.W.2d at 689).

This Court has built upon the Tennessee Supreme Court’s decision in *Schneider* and “stressed that willfulness should be measured ‘in terms of the relative worth of the legal justification cited by [an agency] to refuse access to records.’” *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015) (quoting *Friedmann*, 471 S.W.3d at 439). “In other words, the determination of willfulness ‘should focus on whether there is an absence of good faith with respect to the legal position [an agency] relies on in support of its refusal of records.’” *Id.* (quoting *Friedmann*, 471 S.W.3d at 438). If a public records case defendant “denies access to records by invoking a legal position that is not supported by existing law or by a good faith argument for the modification of existing law, the circumstances of the case will likely warrant a finding of willfulness.” *Id.*

Here, DCS attempted to justify its withholding of the requested public records by relying on Rule 16 while ignoring the limiting language in Tenn. Code Ann. § 37-5-107(c)(4)(C). R. v. 3 at 410–34, R. v. 4 at 483–

90. DCS's reliance on Rule 16 is inconsistent with the plain text of the controlling state law on public access to child-death records, Tenn. Code Ann. § 37-5-107, which limits the grounds for redactions to those found in "this section." There is no ambiguity in Tenn. Code Ann. § 37-5-107 and DCS's position, and the finding of the trial court, are both inconsistent with its plain language and thus, "not supported by existing law or by a good faith argument for the modification of existing law." *Clarke*, 473 S.W.3d at 290. The same is true for DCS's withholding of records of its four prior investigations related to the child, which contravenes its obligation to disclose the "full case file" under Tenn. Code Ann. § 37-5-107. As such, DCS willfully refused Ms. Jacobson's public records request for a less redacted and full version of Case File No. 2020-008 and this Court should exercise its discretion to award Ms. Jacobson reasonable costs, including reasonable attorneys' fees, for both the trial court proceedings and proceedings before this Court.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant respectfully requests that this Court reverse the decision below and 1) order DCS to release Case File No. 2020-008 without redactions other than those found in Tenn. Code Ann. § 37-5-107, 2) order DCS to release records of its prior investigations related to the deceased child with redactions limited to those found in Tenn. Code Ann. § 37-5-107, and 3) award Petitioner-Appellant reasonable costs, including reasonable attorneys' fees, for both trial court and appellate proceedings in this case.

Dated: June 9, 2023

Respectfully submitted,

/s/ Paul R. McAdoo

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 9, 2023, a true and correct copy of the foregoing was served through the court's e-filing system on:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the word-count limit set forth in Tennessee Rule of Appellate Procedure 30(e). Based on the word-count function of Microsoft Word, the total word count for all printed text in the body of the brief exclusive of the material omitted under Tennessee Rule of Appellate Procedure 30(e) is 7,069 words. The Tenn. R. App. P. 27(e) addendum is also not included in this word count. This brief complies with the requirements of Tenn. Sup. Ct. R. 46, § 3.02(a). The text of the brief is 14-point Century Schoolbook font with 1.5 line spacing and 1-inch margins.

Dated: June 9, 2023

/s/ Paul R. McAdoo
Paul R. McAdoo
Counsel for Petitioner-Appellant

RULE 27(E) ADDENDUM

Pursuant to Tenn. R. App. P. 27(e), Petitioner-Appellant submits the following statutes and rules that are relevant to the determination of the issues presented, reproduced in pertinent part.

Tenn. Code Ann. § 37-5-107

(a) All applications, certificates, records, reports and all legal documents, petitions and records made or information received pursuant to this title that directly or indirectly identify a child or family receiving services from the department or that identify the person who made a report of harm pursuant to § 37-1-403 or § 37-1-605 shall be kept confidential and shall not be disclosed, except as provided by this section and §§ 37-1-131, 37-1-409, 37-1-612 and 49-6-3051.

(b) The department may use or release information in the following circumstances:

(1) The department may utilize any information it has or may acquire to provide services to the child; and

(2) The department may release records to a person or entity that may be providing system or program evaluation.

(c) The department shall release information in the following circumstances:

(1) Upon request, the department shall release records to any child abuse review teams or child fatality review teams that are created or authorized by state law to review the activities of the department or to evaluate or investigate the cause of injury to or death of a child;

(2) Records to any law enforcement agency, grand jury or court upon presentation of an appropriate court order;

(3) Upon written request, records to any federal, state or local government entity or agent of such entity that has a need for the information in order to carry out its responsibilities under law to protect children from abuse and neglect in compliance with 42 U.S.C. § 5106a(b)(2)(B)(ix);

(4)(A) To provide for the public disclosure of information about any case that results in a child fatality or near fatality in compliance with 42 U.S.C. § 5106a(b)(2)(B)(x). For purposes of this subdivision (c)(4)(A), “near fatality” means a child had a serious or critical medical condition resulting from child abuse or child sexual abuse, as reported by a physician who has examined the child subsequent to the abuse;

(B) When the department investigates a child fatality for abuse or neglect, the department shall release the following information, to the extent known, within five (5) business days of the fatality:

(i) The child’s age;

(ii) The child’s gender; and

(iii) Whether the department has had history with the child.

(C) Following the closure of an investigation for a child abuse or neglect fatality, the department shall release the final disposition of the case, whether the case meets criteria for a child death review and the full case file. The case file may be redacted to comply with the confidentiality requirements of this section.

(D) Following the department’s final classification of a child abuse or neglect near fatality, the department shall release the full case file. The case file may be redacted to comply with the confidentiality requirements of this section.

(5) Records to any person or entity that provides system or program evaluation at the request of the department;

(6) To the commission on children and youth any and all records requested by the commission that the commission believes necessary to perform its duties and responsibilities pursuant to § 37-3-103, particularly for the purpose of evaluating the delivery of services to children and their families served by the department; and

(7) Upon written request, records to any person who is the subject of a report made to the department, or to the person's parent or legal guardian if the person is a minor and the parent or legal guardian is not the alleged perpetrator of or in any way responsible for the child abuse, child neglect or child sexual abuse against the child whose records are being requested. A person provided access to records pursuant to this subdivision (c)(7) shall maintain the confidentiality of the records except to the extent necessary for proper supervision, care or treatment of the subject of the report.

(d) Pursuant to subdivision (c)(3), the department shall disclose records and information to any member of the general assembly to enable the member to determine whether the laws of this state are being complied with to protect children from abuse and neglect and whether the laws of this state need to be changed to enhance such protection; provided, that the procedures set out in subdivisions (d)(1)--(3) and any other procedures required by law are followed.

(1) If a member of the general assembly receives a written inquiry regarding whether the laws of this state that protect children from abuse and neglect are being complied with or whether the laws of this state need to be changed to enhance protection of children, the member of the general assembly may submit a written request to the department, requesting review of the records and information relating to the inquiry. The member's request shall state the name of the child whose case file is to be reviewed and any other information that will assist the department in locating the information.

(2) The member shall sign a form, before reviewing the records and information, that outlines the state and federal laws regarding

confidentiality and the penalties for unauthorized release of the information. All records and information being reviewed by any member shall remain in the department's possession.

(3) After reviewing the records and information, if the member requests additional information, the department shall discuss the circumstances related to the records and information being disclosed.

(e)(1) Any person or entity, including the commission on children and youth, that is provided access to records under this section shall be required to maintain the records in accordance with state and federal laws and regulations regarding confidentiality.

(2) It is an offense for any person who has received or has been provided access to confidential information pursuant to this section to knowingly disclose or knowingly cause to be disclosed the information to any person or entity not otherwise provided access to the records by law.

(3) A violation of this subsection (e) is a Class B misdemeanor.

(f) Upon placement of a child in the custody of the department of children's services, all state, county and local agencies shall, notwithstanding any state laws or regulations to the contrary, grant access to any and all records in their possession that relate to the child for use by the department of children's services to determine a child's condition, needs, treatment or any other area of management; provided, however, that release of health care information must be consistent with the laws and policies of the departments of health, mental health and substance abuse services, and intellectual and developmental disabilities. The department of children's services shall comply with federal statutes and regulations concerning confidentiality of records. Any records that are confidential by law upon the enactment of this legislation shall be maintained as confidential by the department of children's services.

(g) Except as otherwise provided pursuant to 20 U.S.C. § 1232g(b)(1), prior to the release of student records, the local education agency must give written notice to the student and parent as required by 20 U.S.C. § 1232g(b)(1), and must provide the parent with a copy of all records released.

(h) Release of drug and alcohol records must comply with federal and state laws and regulations regarding the release of these records.

(i) Except as provided for in subsection (c)(2), nothing in this section shall ever be construed to permit or require the department to release or disclose the identification of the person making a report of harm in accordance with § 37-1-403.

(j) The department, in consultation with the commission on children and youth, shall adopt rules and regulations that may be necessary to establish administrative and due process procedures for the disclosure of records and other information pursuant to this section.

Tenn. Code Ann. § 10-7-505

(a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

(b) Such petition shall be filed in the chancery court or circuit court for the county in which the county or municipal records sought are situated, or in any other court of that county having equity jurisdiction. In the case of records in the custody and control of any state department, agency or instrumentality, such petition shall be filed in the chancery court or circuit court of Davidson County; or in the chancery court or circuit court for the county in which the state records are situated if different from Davidson County, or in any other court of that county having equity

jurisdiction; or in the chancery court or circuit court in the county of the petitioner's residence, or in any other court of that county having equity jurisdiction. Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party or parties to immediately appear and show cause, if they have any, why the petition should not be granted. A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings. The court may direct that the records being sought be submitted under seal for review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.

(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.

(d) The court, in ruling upon the petition of any party proceeding hereunder, shall render written findings of fact and conclusions of law and shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section, and this section shall be broadly construed so as to give the fullest possible public access to public records.

(e) Upon a judgment in favor of the petitioner, the court shall order that the records be made available to the petitioner unless:

(1) There is a timely filing of a notice of appeal; and

(2) The court certifies that there exists a substantial legal issue with respect to the disclosure of the documents which ought to be resolved by the appellate courts.

(f) Any public official required to produce records pursuant to this part shall not be found criminally or civilly liable for the release of such records, nor shall a public official required to release records in such public official's custody or under such public official's control be found

responsible for any damages caused, directly or indirectly, by the release of such information.

(g) If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity. In determining whether the action was willful, the court may consider any guidance provided to the records custodian by the office of open records counsel as created in title 8, chapter 4.

Tenn. R. Crim. P. 16

(a) Disclosure of Evidence by the State.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial;

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the state shall disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) the defendant's relevant written or recorded statements, or copies thereof, if:

(I) the statement is within the state's possession, custody, or control; and

(II) the district attorney general knows—or through due diligence could know—that the statement exists; and

(ii) the defendant's recorded grand jury testimony which relates to the offense charged.

(C) Organizational Defendant. Upon a defendant's motion, if the defendant is a corporation, limited liability company, limited liability partnership, partnership, association, or labor union, the court may grant the defendant discovery of relevant recorded testimony of any witness before a grand jury who was:

(i) at the time of the testimony, so situated as an officer or employee as to have been able legally to bind the defendant regarding conduct constituting the offense; or

(ii) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant regarding that alleged conduct in which the witness was involved.

(D) Codefendants. Upon a defendant's request, when the state decides to place codefendants on trial jointly, the state shall promptly furnish each defendant who has moved for discovery under this subdivision with all information discoverable under Rule 16(a)(1)(A), (B), and (C) as to each codefendant.

(E) Defendant's Prior Record. Upon a defendant's request, the state shall furnish the defendant with a copy of the defendant's prior criminal record, if any, that is within the state's possession, custody, or control if the district attorney general knows—or through due diligence could know—that the record exists.

(F) Documents and Objects. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the state's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(G) Reports of Examinations and Tests. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:

(i) the item is within the state's possession, custody, or control;

(ii) the district attorney general knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

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

(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rule 6 and Rule 16(a)(1)(A), (B), and (C).

(4) Failure to Call Witness. The fact that a witness's name is furnished under this rule is not grounds for comment on a failure to call the witness.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall permit the state, on request, to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, the defendant shall permit the state, on request, to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial; or

(iii) the defendant intends to call as a witness at trial the person who prepared the report, and the results or reports relate to the witness's testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of:

(A) reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorneys or agents in connection with the investigation or defense of the case; or

(B) a statement made by the defendant to the defendant's agents or attorneys or statements by actual or prospective state or defense witnesses made to the defendant or the defendant's agents or attorneys.

(3) Failure to Call Witness. The fact that a witness's name is on a list furnished under this rule is not grounds for comment on a failure to call the witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's attorney, or the court if:

(1) the evidence is subject to discovery or inspection under this rule, and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time, for good cause shown, the court may deny, restrict, or defer discovery or inspection, or grant other appropriate relief. On a party's motion, the court may permit the party to make such showing, in whole or

in part, by written statement that the court will inspect ex parte. If relief is granted following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party's written statement.

(2) Failure to Comply with a Request. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;

(B) grant a continuance;

(C) prohibit the party from introducing the undisclosed evidence; or

(D) enter such other order as it deems just under the circumstances.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

(3) Procedure in Child Pornography Cases. In any criminal history proceeding relating to the sexual exploitation of minors under title 39, chapter 17, part 10 that involves documents or objects discoverable pursuant to Rule 16(a)(1)(F), the court shall, on motion of the state:

(A) Deny any request by the defendant to copy or photograph any documents or objects depicting sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.

(B) For the purposes of subdivision(d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant's attorney, and any individual the

defendant may seek to qualify to furnish expert testimony at trial. The Court may, in its discretion, permit other individuals to have access to the documents or objects if necessary to protect the rights of the defendant.

(C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.