IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

STACY JACOBSON,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**No. M2022-01610-COA-R3-CV**
	)	
TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES,	)	**Chancery Ct. No. 22-0662-I**
	)	
Respondent-Appellee.	)	

ON APPEAL FROM THE JUDGMENT OF THE DAVIDSON COUNTY CHANCERY COURT

BRIEF OF RESPONDENT-APPELLEE

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I

Whether the trial court properly denied Petitioner's petition for access to Department of Children's Services ("DCS") records pursuant to the Tennessee Public Records Act ("TPRA") after determining that the withheld records—an unredacted case file and prior investigative records—were all relevant to an ongoing criminal prosecution and therefore confidential under Tenn. R. Crim. P. 16. (Petitioner's Issues 1 and 2.)

II

Alternatively, whether the trial court's decision to deny Petitioner's petition for access to the prior investigative records may be affirmed on the basis that Petitioner's request sought only a single case file, and DCS is not required to provide prior investigation records when responding to a TPRA request for a single case file. (Petitioner's Issue 2.)

III

Whether Petitioner is properly denied attorneys' fees under the TPRA when the trial court properly denied her petition for access the DCS records. (Petitioner's Issues 3 and 4.)

STATEMENT OF THE CASE AND RELEVANT FACTS

This is a public-records case that derives from an emergency 911 call that was received on January 7, 2020, reporting an unresponsive 14-year-old boy. (Petition, TR Vol. 1, 2 at ¶ 4.) Emergency personnel were dispatched, but the child was pronounced dead at the scene. (*Id.* at ¶ 5.) That same day, a referral of death as a result of suspected child abuse was made to the Tennessee Department of Children's Services ("DCS") pursuant to Tenn. Code Ann. § 37-1-403(c)(1) and § 37-1-405(a)(1). (*Id.* at ¶ 7.) An investigation was convened by a Child Protective Investigative Team ("CPIT") pursuant to Tenn. Code Ann. § § 37-1-406(b). (Case Recording Summary, TR Vol. 1, 24-133.) By statute, each CPIT comprises one person from DCS, a representative from the Office of the District Attorney General, one juvenile court officer or investigator from a court of competent jurisdiction, and one properly trained law-enforcement officer with countywide jurisdiction from the county where the child resides or where the alleged offense occurred. The CPIT's services are coordinated by DCS. *See* Tenn. Code Ann. § 37-1-607(a).

The CPIT investigation resulted in the issuance of criminal indictments on June 10, 2021, against the seven adults who had been residing in the child's home at the time of his death. (Affidavit, TR Vol. 3, 437-38.) With the issuance of these indictments, DCS closed its investigation on June 29, 2021. (Petition, TR Vol. 1, 4 at ¶ 14.)

Petitioner, Stacy Jacobson—a resident of Shelby County and a reporter for WREG television station in Memphis—made a public-records request on August 4, 2021, for a copy of the DCS case file concerning this CPIT investigation. (Attachment to Declaration, TR Vol. 2, 174-77.) DCS

responded, via counsel, on August 12, 2021, by informing Petitioner that a redacted copy of the case file was available on the DCS website and that, as required by the TPRA, the file had been redacted consistent with state law, specifically: Tenn. Code Ann. § 37-1-409, § 37-1-612, § 37-5-107, and Tenn. R. Crim. P. 16. *Id.*

In a follow-up request on August 23, 2021, Petitioner acknowledged that the case file was available on DCS' website but requested "the full case file for Case No. 2020-008," in order "to receive DCS's formal response so I am fully informed as to the legal bases for the redactions." *Id.* In a separate communication, Petitioner's counsel requested that DCS include "the prior investigations in the released case file for Case No. 2020-008." *Id.* DCS, again via counsel, responded on August 26 and provided the legal basis for DCS' redactions consistent with its previous response.

Petitioner filed this action against DCS on May 9, 2022, pursuant to Tenn. Code Ann. § 10-7-505 in Davidson County Chancery Court. A show-cause hearing was held on June 3, 2022 (Transcript, TR Vol. 5), and the chancery court issued a Memorandum and Final Order on June 23, 2022. The court ruled that under Tenn. R. Crim. P. 16, Petitioner did not have a right of access to the requested records during the pendency of the criminal prosecutions relating to the child's death and any collateral challenges to the results of those criminal proceedings. (Memorandum and Order, TR Vol. 4, 462-69.)

Petitioner moved to alter or amend the judgment on July 22, 2022, under Tenn. R. Civ. P. 59. (Motion, TR Vol 4, 470-71.) After a hearing, the chancery court denied Petitioner's motion, reiterating that

"Petitioner was not permitted access to 'the unredacted Case File No. 2020-008, or the related investigative files' under Tenn. R. Crim. P. 16." (Order, TR Vol. 4, 499-503 (emphasis added).)

Petitioner timely appealed to this Court.

STANDARD OF REVIEW

In this appeal from the chancery court's final judgment, this Court reviews the chancery court's findings of fact de novo with a presumption of correctness unless the record preponderates otherwise. *See Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); Tenn. R. App. P. 13(d). The chancery court's conclusions of law are reviewed de novo, with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *see also Reguli v. Vick*, No. M2012-02709-COA-R3-CV, 2013 WL 5970480 at *2 (Tenn. Ct. App. Sept. 10, 2013), *perm. app. denied* (Tenn. April 8, 2014).

ARGUMENT

I. The Requested Records Were Properly Withheld by DCS under the TPRA Because they Are Relevant to an Ongoing Criminal Prosecution and Therefore Confidential under Tenn. R. Crim. P. 16.

Petitioner challenges the trial court's denial of her petition for access to certain DCS records—an unredacted case file and prior investigative records. Petitioner makes four arguments, (Br. Petitioner-Appellant, 16-27), but none directly addresses the basis for the trial court's decision—that the requested records are relevant to an ongoing criminal prosecution and therefore confidential, and not subject to disclosure under the TPRA, under Tenn. R. Crim. P. 16. (Memorandum and Order, TR Vol. 4, 468-69.) That ruling was eminently correct.

A. The DCS case file and prior investigative records are relevant to an ongoing criminal prosecution and therefore confidential under Tenn. R. Crim. P. 16.

Following the tragic death of a fourteen-year-old boy, DCS convened a Child Protective Investigative Team ("CPIT") pursuant to Tenn. Code Ann. § 37-1-406(b) to investigate any possible child abuse that may have contributed to, or caused, the victim's death. *See* Tenn. Code Ann. § 37-1-607(a). The CPIT investigation resulted in the issuance of criminal indictments on June 10, 2021, against the seven adults who had been residing in the child's home at the time of his death. (Affidavit, TR Vol. 3, 437-38.)

While those criminal prosecutions were ongoing, Petitioner made a public-records request for a copy of the DCS case file concerning this investigation. (Attachment to Declaration, TR Vol. 2, 174-77.) In

response to her request, DCS provided Petitioner with a redacted copy of the investigation file related to the victim's death in accordance with all state confidentiality laws, including Tenn. R. Crim. P. 16. (Attachment 2, TR Vol. 1, 24-150.)

As the trial court observed here, while the TPRA generally provides for access to public records, it also includes several exceptions, including a "state law" exception:

> All state, county and municipal records shall, at all times during business hours, . . . be open for inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, *unless otherwise provided by state law.*

Tenn. Code Ann. § 10-7-503(a)(2)(A) (emphasis added). "State law" under this statute includes the Tennessee Rules of Criminal Procedure, *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 866 (Tenn. 2016), and Tenn. R. Crim P. 16 provides in part as follows:

> 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.

Tenn. R. Crim. P. 16(a)(2). As pertinent here, then, Rule 16 exempts from disclosure any records or information relevant to a "criminal prosecution [that] is contemplated or pending." *Swift*, 159 S.W.3d at 573; *see also Tennessean*, 485 S.W.3d at 870 (records that are "part of a pending, open, or ongoing criminal investigation [are] exempt from disclosure.").

Here, as the trial court found, "the State [was] criminally prosecuting certain family members of the deceased child and those criminal proceedings [were] ongoing" at the time Petitioner made her TPRA request. (Memorandum and Order, TR Vol. 4, at 467.) The court "reviewed *in camera* the redacted portions of the DCS file in Case File No. 2020-008 and the unredacted prior investigative files relating to the same child from 2006, 2008, 2009, and 2015." (*Id.*) Based on the trial court's review of the DCS files, it found that "the redacted information, such as witness interviews and other investigative information, [was] related to the criminal prosecutions of the family members of the deceased child as the alleged perpetrators of abuse." (*Id.* at 467-68.) The trial court therefore properly ruled that "Petitioner . . . is not permitted access to the unredacted Case File No. 2020-008, or the related investigative files, under Rule 16 during the pendency of the criminal proceedings." (*Id.* at 468.)

Petitioner makes no argument that the criminal prosecution was not ongoing or that the unredacted case file or prior investigative records are not relevant to those criminal proceedings. Instead, Petitioner argues that the trial court erred in allowing Rule 16 to serve as a basis for the redaction or withholding of records given the confidentiality provisions set forth in Tenn. Code Ann. § 37-5-107(a). (Br. Petitioner-Appellant, 22-24.) Petitioner essentially asserts that § 37-5-107(a) and Rule 16 conflict and that the statute "takes precedence" over the rule. (Br. Petitioner-Appellant, 24 (citing *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010).) Petitioner is incorrect; there is no "conflict" at work here, and Petitioner's reliance on *Graham* is misplaced.

First, there is no competing language to indicate that Rule 16 and § 37-5-107 are in conflict in the context of public-records requests. Rule 16 allows the State to withhold all information and materials that "are relevant" to a pending or contemplated criminal investigation. *Appman v. Worthington*, 746 S.W.3d 165, 167 (Tenn. 1987); *see Tennessean*, 485 S.W.3d at 860. Rule 16 applies to all "materials in the possession of the State," not just law enforcement. *Tennessean*, 485 S.W.3d at 872 (quoting *Piedmont Pub. Co. v. City of Winston-Salem*, 334 N. C. 595, 434 S.E.2d 176, 176-77 (1993)). Meanwhile, § 37-5-107 serves as a separate, independent basis for DCS to protect the confidentiality of its records when Rule 16, or any other state law, does not apply. This is made obvious by the statute itself, which provides that its provisions must yield to other applicable "state laws and regulations." *See* Tenn. Code Ann. § 37-5-107(f) and (h).

Put another way, the legislature made provision for a "state law" exception to the general rule in favor of access to public records, and such "state law" includes both statutes and rules of court. *Tennessean*, 485 S.W.3d at 865-66. A conflict does not materialize just because more than one exception applies to certain records or information. Section 37-5-107 reflects only that certain information about DCS cases *might* be subject to public disclosure if no other state-law exception applies. In this instance, however, another state-law exception *does* apply—namely, Rule 16. Because the unredacted case file and the prior investigative records are confidential under Rule 16, they are not subject to disclosure under the TPRA—notwithstanding § 37-5-107. (TR Vol. 4, 467-68.)

Second, that part of the decision in *Graham* on which Petitioner relies is inapposite. The question in that case was "whether a civil action in general sessions court is commenced for the purposes of tolling the statute of limitations when the original civil warrant is filed with the court clerk but is never issued by the clerk." *Id*. And the Supreme Court ultimately held that the plaintiff's warrant was untimely under Tenn. Code Ann. § 16-15-716 because it was never issued by the clerk. *Id*. at 583.

Accordingly, *Graham* was concerned with two wholly unrelated statutes: Tenn Code Ann §§ 16-15-710 and 16-15-716. Here, Petitioner's argument compares Tenn. R. Crim. P. 16 and Tenn. Code Ann. § 37-5-107. And the statutes considered in Graham were truly in conflict, because they used different language to describe the same action. Section 16-15-710 provided that a civil case commenced upon the "suing out of a warrant," while Section 16-15-716 provided that a civil case commenced once the warrant was "issued by the clerk." *See Graham,* 325 S.W.3d at 582.

Moreover, the Supreme Court has squarely rejected any argument that records or information made confidential by the Rules of Criminal Procedure can be disclosed through a TPRA request. As discussed above, the Court has recognized that "the General Assembly, in adopting the Public Records Act, did not intend to allow litigants to avoid the requirements and limitation of the Rules of Criminal Procedure . . . by invoking the Public Records Act to obtain information not otherwise available to them through discovery." *Tennessean*, 485 S.W.3d at 870-72.

In sum, the trial court properly denied Petitioner's petition for access to the unredacted DCS case file and prior investigative records under Rule 16.

B. In any event, the DCS case file was properly redacted under Tenn. Code Ann. § 37-5-107.

Even if it mattered whether the DCS case file was properly redacted under Tenn. Code Ann. § 37-5-107, Petitioner would be wrong in asserting that the redacted version of the case file exceeded the confidentiality provisions of § 37-5-107. (Br. Petitioner-Appellant, 16-21.) Petitioner contends that § 37-5-107(a) "limits [DCS case file] redactions to the identity of the child, family, and person who made the report of harm," but that the redacted version of the case file made available to her contained further redactions beyond these explicit terms. (*Id.* at 17.) Petitioner insists that any redactions beyond those articulated in § 37-5-107(a) are impermissible because § 37-5-107's "confidentiality requirements are clear and limited." (*Id.* at 20 (citing Tenn. Code Ann. § 37-5-107(c)(4)(C)).) Petitioner's argument fails for several reasons.

First, Petitioner's interpretation of § 37-5-107(c)(4)(C) ignores Subsection (e) of the statute, which states that "[a]ny 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." Tenn. Code Ann. § 37-5-107(e)(1). As discussed above, DCS was compelled to redact additional information, beyond the exceptions cited in § 37-5-107(a), by "state . . . laws . . . regarding

confidentiality," i.e., Rule 16. *See Memphis Publ'g Co v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986). Petitioner simply ignores this reality and wrongly contends that "Tenn. Code Ann. § 37-5-107 does not permit redactions based on 'state law' generally, or on any other grounds." (Br. Petitioner-Appellant, 20-21.)

A basic tenet of statutory interpretation is that the "language of a statute cannot be considered in a vacuum, but 'should be construed, if practicable, so that its component parts are consistent and reasonable.'" *Bearing Distributors, Inc. v. Gerregano*, No. M2020-01075-COA-R3-CV, 2022 WL 40008, at *5 (Tenn. Ct. App. Jan. 5, 2022) (quoting *Marsh v. Henderson*, 424 S.W.2d 193, 196 (Tenn. 1968)). Thus, "[a]ny interpretation of the statute that 'would render one section of the act repugnant to another' should be avoided." *Id*. (quoting *Tenn. Elec. Power Co. v. City of Chattanooga*, 114 S.W.2d 442, 444 (Tenn. 1937)). Petitioner's argument fails to follow this rule of statutory construction and instead leads to illogical results.

For instance, it would be unlawful for Petitioner to disclose "any information concerning a report or investigation of a report of harm" directly or indirectly derived from those records. *See* Tenn. Code Ann. § 37-1-409(b) and § 37-1-612(b); *see also* Tenn. Code Ann. § 37-5-107(e)(2). Petitioner's interpretation renders the provisions of § 37-5-107(c)(4)(C) inconsistent with and repugnant to the provisions of subsection (e). *Tenn. Elec. Power Co. v. City of Chattanooga*, 114 S.W.2d at 444.

Second, Subsection (d) of § 37-5-107 requires DCS to 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." Before being providing access to such records and information, however, the member is required to sign a form "that outlines the state and federal laws regarding confidentiality and the penalties for unauthorized release of the information." Tenn. Code Ann. § 37-5-107(d)(2). Furthermore, the records and information being reviewed by the member remain in the possession of DCS. *Id*. If Petitioner were correct that § 37-5-107(c)(4)(C) and (D) must be interpreted to allow only for the redaction of identifying information, then the provisions of Subsection (d) would be rendered meaningless and of no effect with respect to those records.

Third, Petitioner's interpretation is entirely inconsistent with the statutory procedures the legislature has enacted for the review of child abuse cases and child fatalities. In 1995, the legislature enacted the Child Fatality Review and Prevention Act of 1995, Tenn. Code Ann. §§ 68-142-101 to -111. This act creates the Child Fatality Prevention team (the state team), as well as local teams for each judicial district. Tenn. Code Ann. §§ 68-142-102, 106. The local teams are required, among other things, to "[r]eview all deaths of children seventeen (17) years of age or younger" and to "[s]ubmit annually to the state team recommendations, if any, and advocate for system improvements and resources where gaps and deficiencies may exist." Tenn. Code Ann. § 68-142-107(a)(2), (5). The state team has among its duties the duty to review the reports from the local teams and to "[r]eport to the governor and the general assembly concerning the state team's activities and its recommendations for changes to any law, rule, and policy that would promote the safety and

well-being of children" and to "[p]eriodically assess the operations of child fatality prevention efforts and make recommendations for changes as needed." Tenn. Code Ann. § 68-142-105(1), (2) and (7).

In order to perform these duties, the legislature has specifically authorized the local teams

> to inspect and copy any other records from any source as necessary to complete the review of a specific fatality and effectuate the intent of this part, including, but not limited to, police investigations data, medical examiner investigative data, vital records cause of death information, and social services records, including records of the department of children's services.

Tenn. Code Ann. § 68-142-108(a).

However, the legislature has declared that all confidential information and records either obtained or created by the state team or any local team in the exercise of their duties "are confidential, are not subject to discovery or introduction into evidence in any proceedings, and may only be disclosed as necessary to carry out the purposes of the state team or local team." Tenn. Code Ann. § 68-142-108(e)(1)-(2). The legislature has further prohibited the "[r]elease to the public or the news media of information discussed at official meetings" and has prohibited any member of a state or local team from testifying in any proceeding about what transpired at a meeting, about information presented at a meeting, or about the opinions formed by the person as a result of a meeting. Tenn. Code Ann. § 68-142-108(e)(3). And finally, the legislature has mandated that each member of a local team, and each person otherwise attending a meeting of a local team, "shall sign a statement indicating an understanding of and adherence to confidentiality

requirements, including the possible civil or criminal consequences of any breach of confidentiality." If Petitioner's interpretation of § 37-5-107(c)(4)(C) were correct, then these provisions mandating the confidentiality of information and records would be superfluous with respect to review of child abuse or neglect fatalities, because DCS would be required to make public its "full case file" with only identifying information redacted.

A similar conflict exists with respect to the confidentiality provisions of the Tennessee Second Look Commission ("Commission"). That Commission was created by the legislature in 2010 to "review an appropriate sampling of cases involving a second or subsequent incident of severe child abuse in order to provide recommendations and findings to the general assembly regarding whether or not severe child abuse cases are handled in a manner that provides adequate protection to the children of this state." Tenn. Code Ann. § 37-3-803. As with the Child Fatality Review and Prevention Act, the legislature has authorized the Commission to have access to any information that is made confidential pursuant to chapter one of Title 37 but provides that all information made confidential pursuant to state or federal law that is acquired by the Commission in the exercise of its duties remains confidential and is not subject to discovery or introduction into evidence in any criminal or civil proceeding. Tenn. Code Ann. § 37-3-810(a), (d). Additionally, the members of the Commission and any person attending an investigatory meeting are required to sign a statement "indicating and affirming an understanding of and adherence to the confidentiality requirements, including the possible civil or criminal consequences of any violation of

breach of such requirements." Tenn. Code Ann. § 37-3-810(b)(2). Once again, however, under Petitioner's interpretation of Tenn. Code Ann. § 37-5-107(c)(4)(D), these confidentiality provisions are essentially meaningless.

Finally, Petitioner's argument that § 37-5-107(c)(4)(C) does not allow redaction of information relevant to an ongoing criminal prosecution raises the same concerns identified by the Supreme Court in *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), and *Tennessean v. Metro Gov't of Nashville*, 485 S.W.3d 857 (Tenn. 2016)—namely, that "harmful and irreversible consequences [] could potentially result from disclosing files that are involved in a pending criminal investigation." *Schneider*, 226 S.W.3d at 345-46; *Tennessean*, 485 S.W.3d at 871. Similarly, if § 37-5-107(c)(4)(C) and (D) were construed to require DCS to publish its entire case file with only identifying information redacted, a criminal defendant would have no reason to seek discovery but instead could simply obtain a copy of that public file, which would likely contain more information than the defendant could obtain under Rule 16.

For example, it is reasonable to expect that any child-abuse investigation involving a fatality or near fatality would include statements of witnesses. Under Tenn. R. Crim. P. 16(a)(2), discovery of statements made by state witnesses or prospective state witnesses is specifically prohibited. But under Petitioner's interpretation of § 37-5-107(c)(4)(C), a criminal defendant would be able to have access to those statements because DCS would be required to make them public. Such a result cannot have been intended by the legislature, as it "would have

profound adverse consequences for the criminal justice system." *Tennessean*, 485 S.W.3d at 873.

The Supreme Court has "reiterate[d] our obligation to construe statutes in a manner that 'provides for a harmonious operation of the law' and which avoids an absurd result." *Martin v. Powers*, 505 S.W.3d 512, 525 (Tenn. 2016). But Petitioner's interpretation of § 37-5-107(c)(4)(C) and (D) is anything but harmonious with the statute's component parts and, as discussed above, leads to multiple problems. The only interpretation of § 37-5-107(c)(4)(C) that does provide for a harmonious operation of the law" is DCS's interpretation: that child abuse or neglect fatality and near-fatality case files are to be redacted under § 37-5-107 consistent with other state and federal confidentiality requirements, including information that is related to an ongoing criminal prosecution under Tenn. R. Crim. P. 16.

C. DCS's redaction of case files is also not limited by the federal Child Abuse Prevention and Treatment Act.

Petitioner also argues that § 37-5-107(c)(4)(A)'s prefatory reference to the federal Child Abuse Prevention and Treatment Act ("CAPTA") limits the ability of DCS to redact case files to those terms explicitly defined in Tenn. Code Ann. § 37-5-107(a). (Br. Petitioner-Appellant, 21-22.) But again, because the unredacted case file was properly withheld under Rule 16, as the trial court ruled, this additional point in support of Petitioner's argument that the case file was improperly redacted is based the point. In any event, Petitioner is wrong here, too.

Congress passed the Child Abuse Prevention and Treatment Act ("CAPTA") in 1974 to create a "focused Federal effort to deal with the

problem [of child abuse]." *See* Child Abuse Prevention Act, 1973: Hearing Before the Subcomm. of Children & Youth of the S. Comm. on Labor & Pub. Welfare, 93d Cong. 2 (1973). This legislation funds state initiatives in support of federal directives regarding the identification, prevention, and treatment of child abuse. 42 U.S.C.A. § 5106a(b)(2)(B). These directives include mandatory reporting within state child-protective agencies, investigation of reports of child abuse or neglect, and preserving the confidentiality of records. *Id*.

Currently, CAPTA makes federal funding for child-welfare programs contingent on each individual state meeting several requirements. One of the requirements is the filing of annual reports with the secretary of the Department of Health and Human Services ("HHS.") 42 U.S.C.A.§ 5106a(c)(6), (d). These annual reports must include aggregate information about the state agency's activities, such as the number of children reported as abused or neglected, the number of those reports that were substantiated, and the number of case workers responsible for all intake and assessment of the reports. *Id*. at § 5106a(d). CAPTA further requires the secretary of HHS to prepare a report based on all of the states' annual reports and present it to Congress and the National Clearinghouse on Child Abuse and Neglect Information. *Id*. at §5106a(e).

Contrary to Petitioner's assertion, though, (Br. Petitioner-Appellant, 21-22), CAPTA federal funding *is not* contingent on state entities limiting redactions to handpicked definitions found in particular sections of state law. Indeed, CAPTA requires states to provide methods to "preserve the confidentiality of all records in order to protect the rights

of the child and of the child's parents or guardians." *Id*. § 5106a(b). Specifically, federal regulation requires that states "provide by statute" that all child abuse records are confidential and "that their unauthorized disclosure is a criminal offense." *See* 45 C.F.R. §§ 1340.14(i)(1).

If Petitioner's argument that Tenn. Code Ann. § 37-5-107(c)(4)(C) limits DCS case file redactions were correct, records that are confidential under other state and federal laws would have to be disclosed if included in the case file. For example, records that are confidential under federal law, such as the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPPA), would have to be disclosed. Similarly, records that are confidential under state law, such as Tenn. Code Ann. § 10-7-504(a)(1) and § 63-2-101(b) (medical records), § 10-7-504(t) (information concerning minor victim of criminal offense, including "[a]ny photographic or video depiction"), Tenn. Code Ann. § 33-3-103 (mental health records), and Tenn. Code Ann. § 33-3-108 (identity of person who reports abuse, exploitation, fraud, neglect, misappropriation or mistreatment to Department of Mental Health and Substance Abuse Services), would be subject to disclosure under Petitioner's interpretation of Tenn. Code Ann. §§ 37-5-107(c)(4)(C) and (D). Such a would be wholly inconsistent with CAPTA and its policy guidelines.

In short, nothing about § 37-5-107's prefatory reference to CAPTA supports Petitioner's contention that DCS must limit any case file redactions to those terms found in § 37-5-107(c)(4)(C) when responding to a TPRA request.

D. Nondisclosure of the DCS records comports with public policy.

Petitioner argues that the trial court's denial of her petition for access to the DCS case file "undermines the strong public policy reasons supporting limiting redactions of child-death case files to those set forth in Tenn. Code Ann. 37-56-107." (Br. Petitioner-Appellant, 25.) But this argument is a nonstarter.

While Tennessee's public policy is reflected in its constitution, statutes, judicial decisions, and common-law rules, "[t]he determination of this state's public policy is primarily the prerogative of the General Assembly." *Hodge v. Craig*, 382 S.W.3d 325, 337 (Tenn. 2012). The State's public policy is therefore reflected in the TPRA, which, as discussed, includes an exception from the general rule in favor of disclosure of public records when "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A). Rule 16 provides an exception for records relevant to an ongoing criminal prosecution, and as the Supreme Court observed in *Schneider*, there are "harmful and irreversible consequences [that] could potentially result from disclosing files that are involved in a pending criminal investigation," because many of the records made available to the public as a result of the criminal discovery process would likely implicate the fair trial rights of a defendant and the constitutional privacy interests of any third parties involved. 226 S.W.3d at 345–46.

Further, Petitioner's public-policy argument is unavailing because the trial court's denial of Petitioner's public-records petition comports with public policy that the privacy rights of children are paramount in

cases of abuse and neglect. As victims of these types of crimes, the children who are suffering from child abuse and neglect are somewhat unique in that they are often unwilling, or unable, to report the crimes being committed against them. Thus, while criminal punishment is presumably a deterrent to the commission of such crimes, numerous perpetrators of child abuse and neglect, having not been identified, are continuing to commit these crimes, and their victims are continuing to suffer. Denying Petitioner's petition for access to certain DCS records protects the privacy of not only the abused child, but also other children in the household, as well as parents, guardians, custodians, and caretakers, so that the threat of confidential information being released does not serve as a deterrent to parties wishing to report crimes of this nature.

II. Alternatively, DCS Properly Withheld the Prior Investigative Records Because Petitioner Sought Only a Single Case File, of which the Prior Requested Were Not a Part.

Petitioner separately challenges the trial court's denial of her petition for access to DCS's prior investigative records, arguing that DCS was required to provide the "full case file," and the full case file "must include records from the prior investigations related to the deceased child." (Br. Petitioner-Appellant, 8, 27.) As discussed above, however, the trial court properly denied access to the prior investigative records because they were relevant to the ongoing criminal prosecution and therefore confidential under Rule 16. So, this issue is pretermitted. Nevertheless, Petitioner's argument is wrong; accordingly, this Court may affirm the judgment of the trial court with respect to the prior

investigative records on the alternative basis that they were not requested as part of Petitioner's public-records request.

The TPRA requires that any "request for inspection or copying of a public record must be sufficiently detailed to enable the government entity to identify responsive records for inspections and copying." See Tenn. Code Ann. § 10-7-503(a)(4). Here, Petitioner made a sole TPRA request asking for "case No. 2020-008." (Email Public Records Request, TR Vol. 1, 20.) That case file was provided to Petitioner with appropriate redactions. *See* Argument Section I(B) and (C).

It is well settled that, although the TPRA allows the public a right to examine governmental records, it does not require a governmental entity to make guesses as to which records are being requested. *See Jakes v. Sumner Cnty. Bd. of Educ.*, No. M2015-02471-COA-R3-CV, 2017 WL 3219511, at *7 (Tenn. Ct. App. July 28, 2017) (stating that a public-records request must be "sufficiently detailed" to enable the custodian to identify the records sought); *Conley v. Knox Cnty. Sheriff,* No. E2020-01713-COA-R3-CV, 2022 WL 289275, at *4 (Tenn. Ct. App. Feb. 1, 2022), *perm. app. denied* (Tenn. Aug. 3, 2022) (same); *Sharp v. Tenn. Dep't of Com. & Ins.*, No. M2016-01207-COA-R3-CV, 2017 WL 5197291, at *4 n.1 (Tenn. Ct. App. Nov. 9, 2017) (same).

As a practical matter, DCS treats each case file as a separate action, since each investigation is assigned a distinct Case ID number and the status of each case file (active and open or closed) is recorded independently and updated as necessary. Contrary to Petitioner's contention, (Br. Petitioner-Appellant, 29), a particular case file need not

include information and records on all of DCS's prior contacts with that child and his family, for a few reasons.

First, Tenn. Code Ann. § 37-5-107(c)(4)(C) provides that "[f]ollowing 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*." Because each DCS case file pertains to a separate matter, the "full case file" requirement in Subsection (c)(4)(C) can refer only to the distinct incident at issue dealing with the investigation of the child abuse or neglect that resulted in the fatality or near fatality.

Indeed, this interpretation is consistent with the legislative intent expressed in Subsection (c)(4)(A) of the statute, which states that the public-disclosure requirement of a child abuse or neglect fatality or near fatality should comply with CAPTA , 42 U.S.C. § 5106a(b)(2)(B)(ix). And CAPTA requires the disclosure of certain information that pertains only to the case of child abuse and neglect that results in a child fatality or near fatality. Guidance provided in the Child Welfare Policy Manual ("CWPM") issued by the Children's Bureau, an office of the Administration for Children & Families in the U.S. Department of Health & Human Services, specifically counsels against the disclosure of *other* kinds of information. For instance:

> Question 8: Is it permissible under the Child Abuse Prevention and Treatment Act (CAPTA) for the State to disclose to the public information in the child abuse and neglect record that does not pertain to the case of child abuse and neglect that results in a child fatality or near fatality.

> Answer: No. Except as discussed below, States must preserve the confidentiality of all child abuse and neglect reports and records in order to protect the rights of the child and family. Consistent with 106(b)(2)(B)(viii) of CAPTA, reports and records made and maintained pursuant to the purposes of CAPTA shall be made available only to the entities and under the circumstances described in section 106(b)(2)(B)(viii)(I-VI) of CAPTA.

HHS website, Q/A # 8 of the CWPM, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=67 (last visited July 7, 2023).

> Question 7: In a case of child abuse or neglect that results in a child fatality or near fatality, is the State required to provide information on the child's siblings, or other children in the household?
>
> Answer: Generally no. The information about another child in the household who is not a fatality or near fatality victim is not subject to the CAPTA public disclosure requirement unless this information is pertinent to the child abuse or neglect that led to the fatality or near fatality. This information in fact may be protected by the confidentiality requirements applicable to titles IV-B/IV-E of the Social Security Act. Finally, States also should ensure that they are complying with any other relevant Federal confidentiality laws. In particular, entities that are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) must ensure that they do not disclose confidential information in violation of HIPAA's privacy regulations.

HHS website, CWPM, Section 2.1A.4, Q/A #7, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68 (last visited July 7, 2023).

In addition, the CWPM provides specific guidance about what information *must* be disclosed in a case of child abuse or neglect that results in a fatality or near fatality:

> Question 8: Section 106(b)(2)(B)(x) of the CAPTA requires states to provide for the public disclosure of findings or information about a case of child abuse or neglect which results in a child fatality or near fatality. Under this provision is there information that a state must disclose to the public?
>
> Answer: Yes. States must develop procedures for the release of information including but not limited to: 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.
>
> State policies must ensure compliance with any other relevant federal confidentiality laws, including the confidentiality requirements applicable to titles IV-B and IV-E of the Social Security Act. States may allow exceptions to the release of information in order to ensure the safety and well-being of the child, parents and family or when releasing the information would jeopardize a criminal investigation, interfere with the protection of those who report child abuse or neglect or harm the child or the child's family.

HHS website, CWPM, Section 2.1A.4, Q/A #8, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68 (last visited July 7, 2023).

This guidance demonstrates that CAPTA does not require public disclosure of all prior reports or investigations. Instead, information

concerning prior investigations should be disclosed as part of the case file if it is "pertinent to the child abuse or neglect that led to the fatality or near fatality." CWPM, Section 2.1A.1, Q/A #8. Here, the trial court found that the prior investigative records are relevant to the ongoing criminal prosecutions—and therefore protected as confidential by Rule 16. (Memorandum and Order, TR Vol. 4, 466-68.) If this Court were to find that the prior investigative files are *not* relevant to the ongoing prosecutions—and therefore not covered by Rule 16—there would be no basis on which to conclude that the records should be considered part of the "full case file," because there would be no basis on which conclude that the records are pertinent to the abuse or neglect leading to the child's fatality. Accordingly, the Court could affirm the judgment denying public-records access on the alternative ground that Petitioner's TPRA request was only for the DCS case file, and the prior investigative records were not part of the DCS case file.

III. Petitioner Is Not Entitled to Attorney's Fees, Since the Trial Court Properly Denied her Petition for Access to Public Records.

Petitioner argues that she is entitled to an award of attorney's fees, both in the trial court and on appeal, under Tenn. Code Ann. § 10-7-505(g). (Br. Petitioner-Appellant, 31.) That statute provides that a court "may, in its discretion, assess all reasonable costs, . . . including reasonable attorneys' fees," if the court "finds that the governmental entity . . . knew that [the requested records were] public and willfully refused to disclose [them]." Tenn. Code Ann. § 10-7-505(g). Petitioner is not entitled to an award of attorney's fees.

For all the reasons discussed above, the trial court properly denied Petitioner's petition for access to public records because it properly determined that DCS withheld records and information that were relevant to an ongoing criminal investigation and therefore confidential under Rule 16. (Memorandum and Order, TR Vol. 4, 468-69.) Because Petitioner did not prevail in the trial court, she was properly denied attorney's fees under § 10-7-505(g). And because Petitioner will not prevail on appeal, she is properly denied attorney's fees in this Court, as well.

Should this Court, however, find reason to reverse the judgment of the trial court, it should remand for a determination whether Petitioner is entitled to an award of attorney's fees under § 10-7-505(g). The statute makes clear that a petitioner must do more than merely prevail on her petition for access to records; she must demonstrate that the denial of her records request was knowing and willful. *See Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) ("[T]he 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."). The trial court would be in the best position to make such a determination. *See Jetmore v. City of Memphis,* No. W2018-01567-COA-R3-CV, 2019 WL 4724839 (Tenn. Ct. App. Sept. 26, 2019) (remanding issue of reasonable attorney's fees to trial court for a determination concerning willfulness under Tenn. Code Ann. § 10-7-505(g)).

CONCLUSION

For the reasons stated, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been sent by the Court's electronic filing system and/or electronic transmission, to:

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Certificate of Compliance

I hereby certify that this brief consists of 7,603 words, in compliance with Tenn. Sup. Ct. R. 46.

/s/ Michael Stahl
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