

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

JOSE MARCUS PERRUSQUIA,

Petitioner,

v.

FLOYD BONNER, JR., in his official
capacity as Shelby County Sheriff, and

AMY WEIRICH, in her official capacity
as Shelby County District Attorney
General,

Respondents.

No. _____

**MEMORANDUM OF LAW IN SUPPORT OF PETITION
FOR ACCESS TO PUBLIC RECORDS
AND TO OBTAIN REVIEW OF DENIAL OF ACCESS**

Petitioner Jose Marcus Perrusquia submits this Memorandum of Law in Support of his Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access (the “Petition”). For the reasons set forth in the Petition and in this Memorandum of Law, this Court should grant the Petition, order Amy Weirich, in her official capacity as Shelby County District Attorney General, and Floyd Bonner, Jr., in his official capacity as Shelby County Sheriff,¹ to immediately produce the requested public records to Petitioner, order the Sheriff to provide to the DA, and the DA to retain, the requested public records, order the DA to comply

¹ All references herein to the “DA” and “DA’s Office” refer to Ms. Weirich in her official capacity as Shelby County District Attorney. All references to the “Sheriff” and “Sheriff’s Office” refer to Mr. Bonner, Jr., in his official capacity as Shelby County Sheriff.

with applicable record retention laws and retain records it receives as part of the DA's official business, and otherwise grant Petitioner reasonable costs, including reasonable attorneys' fees.

INTRODUCTION

On May 29, 2018, Memphis Police Department ("MPD") Officer Brandon Jenkins ("Officer Jenkins") was involved in a physical altercation with an arrestee in the Sally Port connected to the Shelby County Jail, which was recorded on the Sheriff's video cameras (the "Sally Port Footage"). The Sheriff's Office investigated the altercation as an assault and, after completing its investigation, referred the matter to the DA for possible prosecution. After reviewing the investigative materials provided by the Sheriff, including the Sally Port Footage, the DA declined to prosecute Officer Jenkins and, it appears, returned the materials provided by the Sheriff, including the Sally Port Footage, to the Sheriff without retaining copies of those materials.

Mr. Perrusquia, an award-winning Memphis-based journalist, submitted public records requests for the Sally Port Footage to both the Sheriff and the DA; his requests were denied. The Sheriff denied Mr. Perrusquia's request for access to the footage pursuant to an exemption applicable to government building surveillance footage, but, in so doing, the Sheriff ignored an explicit exception to that exemption that requires the disclosure of surveillance footage showing a possible crime or involving public safety or security. The DA denied Mr. Perrusquia's request for access to the footage because the DA's Office apparently

failed to retain a copy of the Sally Port Footage, despite being required to do so by its own public records retention policy and the TPRA. This suit followed.

BACKGROUND

The Video Footage of Officer Jenkins' Altercation with Nechoe Lucas

In May 2018, MPD Officer Brandon Jenkins responded to a domestic disturbance call and took Nechoe Lucas into custody pursuant to an outstanding warrant. (Pet. ¶ 6; Perrusquia Decl. Attach. 1 at 1–2, 5–6.)² Officer Jenkins transported Mr. Lucas to 201 Poplar Avenue (“201 Poplar”), a facility that is operated and maintained by the Sheriff’s Office, which houses the Sheriff’s Office, the Shelby County Jail, and the intake facility for the jail, including the Sally Port, an area in which detainees are processed prior to being admitted into jail. (Pet. ¶¶ 5–6.) According to the case summary of an internal investigation later conducted by the MPD into Officer Jenkins’ conduct that night (Perrusquia Decl. Attach. 1), Mr. Lucas was uncooperative in the Sally Port, and spat on Officer Jenkins. (*Id.* at 5–6; Pet. ¶ 8.) According to the Hearing Summary for Officer Jenkins’ disciplinary hearing,

At one point during [another officer’s body worn camera video of the altercation] it clearly shows the suspect sitting in a chair in the sally port. Each arm[] is

² Documents described in and attached to the Declaration of Mr. Perrusquia, which is filed as an exhibit to Mr. Perrusquia’s simultaneously filed Petition, are cited hereinafter as “Perrusquia Decl. Attach. ___.”

Pincites for the Declaration and its exhibits are to the pagination of the underlying document and do not take into account the exhibit cover page.

handcuffed to an arm rest on the chair. The suspect spits a mouthful of fluids and bloody spittle on Officer Jenkins. Officer Jenkins responds by kicking the suspect in the face. Officer Jenkins punches the suspect several times in the head. The other officers stop Officer Jenkins. Officer Jenkins then kicks the suspect in the head one more time.

(Perrusquia Decl. Attach. 2 at 3; Pet. ¶ 9; *see also* Perrusquia Decl. Attach. 1 at 6 (explaining that after Mr. Lucas was handcuffed to a chair and spat on Officer Jenkins, “Officer Jenkins walked toward Lucas then kicked and punched him in the facial area”); Pet. ¶ 8 (same).)

The altercation was captured on video. A Shelby County Sheriff’s lieutenant, who had been monitoring the video of the Sally Port “entered into the intake area and advised that she witnessed the incident on the camera.” (Perrusquia Decl. Attach. 1 at 6; Pet. ¶ 14; *see also* Perrusquia Decl. Attach. 4 at 3 (Deputy Jailer Tony Long stating, “I called surveillance asked them was it recording. She said yes.”).) “The lieutenant advised Officer Jenkins to take Mr. Lucas to Regional One Hospital,” which Officer Jenkins did. (Perrusquia Decl. Attach. 1 at 6.) The Sally Port Footage, body worn camera footage, and in-car video footage were all reviewed during a subsequent MPD Internal Affairs investigation that resulted in a finding that Officer Jenkins violated MPD administrative regulations governing excessive use of force and personal conduct when he struck and kicked a handcuffed detainee. (Perrusquia Decl. Attach. 1 at 5, 8; Pet. ¶ 10.)

The Sheriff’s Office separately investigated the altercation between Officer Jenkins and Mr. Lucas and prepared a case file (the “Sheriff’s Case File”) that included the Sally Port Footage and interviews with witnesses, including Mr. Lucas.

(Perrusquia Decl. Attach. 4 (copy of Sheriff’s paper investigatory file); *id.* Attach. 3 at 3–4 (December 8, 2020 email from Sheriff’s Office Chief Policy Advisor denying request for the video in the Sheriff’s Case File); *id.* Attach. 5 (February 12, 2021 email acknowledging video and denying request).) The Sheriff’s Case File identifies Mr. Lucas as the “victim.”³ (Perrusquia Decl. Attach. 4 at 13–14; Pet. ¶ 17.)

Documents in the Sheriff’s Case File include at least three instances describing the incident under investigation as an assault.⁴ (Pet. ¶ 20; Perrusquia Decl. Attach. 4 at 5, 8, 10.)

On June 12, 2018, the Sheriff’s Office forwarded the Sheriff’s Case File to the DA for possible criminal prosecution of Officer Jenkins. (Perrusquia Decl. Attach. 6 at 1 (“[I]n the Jenkins case, MPD did not send us anything, but the sheriff’s office did.”); *id.* Attach. 8 at 1 (Perrusquia: “did the DA only review the SCSO’s reports and videos?” Sheriff’s Office: “Yes. whatever the Sheriff sent.”); *id.* Attach. 7 at 1 (noting that Sheriff “delivered” the investigation to the DA on June 12, 2018); Pet. ¶¶ 28–30, 33–34.) According to a letter from the DA to MPD’s then-Director Michael Rallings and then-Sheriff Bill Oldham, the DA “reviewed the written reports and watched all video relevant to this matter” and declined to file criminal

³ Portions of the Sheriff’s Case File that were provided to Mr. Perrusquia through a TPRA request are attached to the Perrusquia Declaration as Attachment 4; it has the case number 1805001151SH but is occasionally referred to in correspondence (including by the DA) as No 18050011S1SH, presumably inadvertently, due to the resemblance between the letter S and the number 5.

⁴ Assault is a misdemeanor criminal offense. Tenn. Code Ann. § 39-13-101 (“A person commits assault who: (1) Intentionally, knowingly or recklessly causes bodily injury to another . . .”).

charges against Officer Jenkins. (Perrusquia Decl. Attach. 7 at 1; Pet. ¶ 29.) The letter states that the DA declined to prosecute Officer Jenkins because Mr. Lucas “pleaded guilty to assaulting Officer Jenkins,” and the DA determined that it would be “difficult, if not impossible, for our office to refute a claim of self-defense by Officer Jenkins.” (Perrusquia Decl. Attach. 7 at 1; Pet. ¶ 29.) The DA closed its file on those grounds. (Perrusquia Decl. Attach. 7 at 1; Pet. ¶ 29.)

Thereafter—in contravention of the TPRA and the DA’s own records retention policy, which requires that with respect to investigations into possible misdemeanor criminal offense charges “recordings . . . received for and during the course of the investigation . . . shall be retained [for] . . . 5 years after completion of investigation” (Perrusquia Decl. Attach. 10 at 1; Pet. ¶ 39)—the DA’s Office returned the Sheriff’s Case File, including the Sally Port Footage, to the Sheriff’s Office. (Perrusquia Decl. Attach. 6 at 1 (“I think we returned the file since there was no prosecution.”); *id.* Attach. 8 at 1 (“Yes, it was all sent back to the sheriff.”); *id.* Attach. 7 at 1 (“[W]e are closing this file in our office and returning the investigation to Sheriff Oldham.”); Pet. ¶¶ 29, 32.) Public records may be disposed of only pursuant to a Records Disposition Authorization (“RDA”). Tenn. Code Ann. § 10-7-509(a) (“The disposition of all state records shall occur only through the process of an approved records disposition authorization.”). The applicable RDA, 11152, like the DA’s Retention Policy, requires that misdemeanor case files be retained for five years “[a]fter completion of investigation, case closure, or the conclusion of all court proceedings.” (Pet. ¶ 40; Perrusquia Decl. Attach. 11 at 1–2.)

At no point did the DA claim the Sheriff's Case File, including the Sally Port Footage, was disposed of pursuant to RDA 11152, or any other RDA. (Pet. ¶ 48.) Rather, after-the-fact, the DA justified the failure to retain the Sheriff's Case File by claiming that "[t]he brief temporary review of another agency's records does not typically warrant such retention as a part of this Office's function. This is not the type of activity envisioned by the legislature in the application of the Tenn. Open Records Act." (Perrusquia Decl. ¶ 24, Attach. 9 at 1; Pet. ¶ 46.)

Mr. Perrusquia's Public Records Requests

Mr. Perrusquia made two TPRA requests for the Sally Port Footage: (1) a request to the Sheriff, whose office operates and maintains the cameras and video footage from 201 Poplar, and (2) a request to the DA, whose office received the footage from the Sheriff when the Sheriff referred its assault investigation of Officer Jenkins to the DA for possible prosecution. (Pet. ¶¶ 21, 27, 31.)

Specifically, on October 16, 2020, Petitioner submitted a request to the Sheriff's Office for the case file it prepared documenting the altercation between Officer Jenkins and Mr. Lucas in the Sally Port, including the Sally Port Footage. (Perrusquia Decl. Attach. 3 at 5; Pet. ¶ 21.) The Sheriff's Office denied Petitioner's request for the Sally Port Footage, claiming that "the security of governmental buildings and surveillance provisions of the TPRA," Tenn. Code Ann. § 10-7-504(m), exempted the footage from disclosure. (Perrusquia Decl. Attach. 3 at 4 (December 8, 2020 email from Sheriff's Office Chief Policy Advisor Debra Fessenden); *id.* Attach. 5 at 1 (February 12, 2021 email from Fessenden); Pet. ¶¶ 22, 26.)

In addition, on October 13, 2020, Petitioner submitted a public records request to the DA for all records connected to the conduct described in MPD case file I2018-026, the internal MPD investigation into Officer Jenkins’ physical altercation with Mr. Lucas. (Perrusquia Decl. Attach. 6 at 4; Pet. ¶ 27.) The case summary of that internal investigation stated that MPD had forwarded the contents of the file to the DA’s Office for a decision about whether to criminally prosecute Officer Jenkins. (Perrusquia Decl. Attach. 1 at 5; *id.* Attach. 6 at 4 (Perrusquia email correspondence with DA’s Office); Pet. ¶ 27.) Petitioner was informed by the DA’s Office that the MPD case file was incorrect—according to the DA’s Office, MPD had not, in fact, forwarded I2018-026 to the DA’s Office, but that the matter had been sent to the DA by the Sheriff. (Perrusquia Decl. Attach. 6 at 1–2; Pet. ¶ 28.) The DA’s Office forwarded Petitioner a copy of a letter from the DA to then-Sheriff Bill Oldham and then-MPD Director Michael Rallings, which stated:

On June 12, 2018, the Shelby County Sheriff’s Office delivered the above-referenced investigation to me. I have reviewed the written reports and ***watched all video relevant to this matter***. Based upon all the facts and circumstances, no criminal charges will be filed by this office against Memphis Police Department Officer Brandon Jenkins, IBM #12584.

...

In the meantime, ***we are closing this file*** in our office and returning the investigation to Sheriff Oldham.

(Pet. ¶ 29; Perrusquia Decl. Attach. 7 at 1 (emphasis added).) The DA’s letter also noted that “[t]he inmate pleaded guilty to assaulting Officer Jenkins.” (Pet. ¶ 29; Perrusquia Decl. Attach. 7 at 1.)

After reviewing that letter, Petitioner submitted a request to the DA's Office for copies of all video within the Sheriff's Case File that was reviewed by the DA, including the Sally Port Footage. (Perrusquia Decl. Attach. 6 at 1; Pet. ¶ 31.) The DA's Public Information Officer, Larry Buser, denied Mr. Perrusquia's request on October 16, 2020, on the grounds that the DA's Office did not retain the requested video, as it had returned the entire file to the Sheriff's Office after declining to prosecute Officer Jenkins. (Pet. ¶ 32; Perrusquia Decl. Attach. 8 at 1; *id.* Attach. 7 at 1.) In a subsequent email, Assistant District Attorney Timothy A. Beacham explained that returning the file to the Sheriff's Office was typical of the DA's conduct. (Perrusquia Decl. Attach. 9 at 1 (March 24, 2021 email stating "[t]his office regularly discusses and reviews cases with various law enforcement agencies. . . . Typically, this Office does not retain those records."); Pet. ¶ 45.)

ARGUMENT

I. The TPRA Must Be Interpreted Broadly in Favor of Public Access.

"The Public Records Act reflects the legislature's effort to . . . advance[] the best interests of the public." *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004). "Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007) (citing *Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74–75 (Tenn. 2002)). The purpose of the TPRA is "to apprise the public about the goings-on of its governmental bodies." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 687 (Tenn. 1994); *see also*

Cherokee Child. & Fam. Servs., 87 S.W.3d at 74 (the TPRA “serves a crucial role in promoting accountability in government through public oversight of governmental activities” (citation omitted)).

To further this important policy goal, the General Assembly has specified that the TPRA “shall be broadly construed so as to give the fullest possible public access to public records.” Tenn. Code Ann. § 10-7-505(d). Thus, Tennessee’s courts have held that the Public Records Act is a “clear mandate in favor of disclosure.” *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *see also Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) (explaining that “the legislative mandate of the Public Records Act [is] very broad and . . . require[s] disclosure of government records even when there are significant countervailing considerations” (citing *City of Memphis*, 871 S.W.2d at 684)). Consistent with this broad construction, public records are presumptively open and “the burden is placed on the governmental agency to justify nondisclosure of the records.” *City of Memphis*, 871 S.W.2d at 684 (citing Tenn. Code Ann. § 10-7-505(c)).

To fully effectuate the broad legislative mandate in favor of disclosure, exemptions to the TPRA must be narrowly construed. *See Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (holding that Florida public records act “is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose” (citation omitted)); *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 to counterbalance the self-protective instincts of the government bureaucracy” (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)).⁵

II. The Sheriff’s Office Violated the TPRA When It Denied Mr. Perrusquia’s Request Because Tenn. Code Ann. § 10-7-504 Does Not Exempt the Sally Port Footage from Disclosure.

A closed criminal investigative file compiled by the Sheriff’s Office is a public record under the TPRA. *Memphis Publ’g Co. v. Holt*, 710 S.W.2d 513, 518 (Tenn. 1986). The Sheriff’s Office recognized this requirement, producing portions of the Sheriff’s Case File to Petitioner upon his request. (Perrusquia Decl. Attach. 3 at 4 (December 8, 2020 email from Fessenden stating “[t]he redacted documents are ready for your inspection”); *id.* Attach. 4 (copy of portions of Sheriff’s Case File obtained pursuant to Mr. Perrusquia’s TPRA request); Pet. ¶¶ 18, 22.) Video footage within a closed investigative file, as a general matter, is no exception. *See* Tenn. Code Ann. § 10-7-503(a)(1)(A)(i) (broadly defining public record to include, among other things “films . . . or other material, regardless of physical form”). Simply put, the Sheriff cannot carry the burden of justifying withholding the Sally Port Footage from public disclosure. *City of Memphis*, 871 S.W.2d at 684 (“[T]he

⁵ Decisions cited in this Memorandum of Law from outside Tennessee are attached as Exhibit 1.

burden is placed on the governmental agency to justify nondisclosure of the records.” (citing Tenn. Code Ann. § 10-7-505(c)).

The Sheriff’s only stated reason for withholding the Sally Port Footage was Tenn. Code Ann. § 10-7-504. (Pet. ¶ 22; Perrusquia Decl. Attach. 3 at 4.)

Presumably, the Sheriff relied upon Tenn. Code Ann. § 10-7-504(m):⁶

(m)(1) Information and records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection. For purposes of this subsection (m), “government building” means any building that is owned, leased or controlled, in whole or in part, by the state of Tennessee or any county, municipality, city or other political subdivision of the state of Tennessee. Such information and records include, but are not limited to: . . .

(E) Surveillance recordings, whether recorded to audio or visual format, or both, ***except segments of the recordings may be made public when they include an act or incident involving public safety or security or possible criminal activity.***

(Emphasis added).

The Sally Port Footage is not covered by this exemption because the stated exception applies. Tenn. Code Ann. § 10-7-504(m)(1)(E) specifically provides for the release of segments of surveillance recordings that “include an act or incident involving public safety or security or possible criminal activity.” The “act or

⁶ In two emails responding to Mr. Perrusquia’s request for the Sally Port Footage (as part of the Sheriff’s Case File), Ms. Fessenden made cursory reference to that exemption, stating that the Sally Port Footage was “protected by the security of governmental buildings and surveillance provisions of the TPRA,” (Perrusquia Decl. Attach. 3 at 4; Pet. ¶ 22), and that it was “necessary for the security of the facility.” (Perrusquia Decl. Attach. 5 at 1; Pet. ¶ 26.)

incident” of an MPD Officer handcuffing an arrestee to a chair, then kicking and punching him in the face, (Perrusquia Decl. Attach. 1 at 5–6; Pet. ¶ 8), is one that inarguably involves public safety or security. Mr. Perrusquia’s own reporting speaks to this fact: last year, the *Daily Memphian* published articles by Petitioner documenting MPD officers’ excessive use of force against individuals who they had already restrained. *See, e.g.*, Marc Perrusquia, *‘Taserface’ Bodycam Footage Reveals Officer’s Liberal Use of Stun Gun*, *Daily Memphian* (May 17, 2021), <https://bit.ly/3hakh4N> (detailing body worn camera footage of MPD officer using electroshock taser on handcuffed individual); Marc Perrusquia, *Former MPD Officer Faces Criminal Charge*, *Daily Memphian* (May 11, 2021), <https://bit.ly/3jAk1Oe> (“Prosecutors have filed criminal charges against a former Memphis police officer who sprayed gushes of a chemical agent into the face of a mentally disabled man as he was restrained in handcuffs.”). Indeed, MPD found that Officer Jenkins violated administrative regulations regarding the excessive use of force and inappropriate personal conduct in his treatment of Mr. Lucas. (Perrusquia Decl. Attach. 1 at 8; Pet. ¶ 10.)

Further, the Sally Port Footage also involves “possible criminal activity.” The Sheriff created an assault report that explicitly identifies Mr. Lucas as the “victim,” (Perrusquia Decl. Attach. 4 at 13–14; *id.* Attach. 1 at 6; Pet. ¶¶ 16–17), and includes interviews with witnesses to the incident who were informed by Sheriff’s Detective Will Greever that the Sheriff’s Office was investigating the case as an assault. (Perrusquia Decl. Attach. 4 at 5, 8, 10; *see also id.* Attach. 1 at 6

(MPD explaining that the Sheriff “generated an assault report” related to this altercation); Pet. ¶¶ 16, 20.) The Sheriff’s Case File was delivered to the DA’s Office on June 12, 2018, for a determination by the DA’s Office as to whether it would file criminal charges against Officer Jenkins. (Perrusquia Decl. Attach. 7 at 1; Pet. ¶ 29.) The DA “reviewed the written reports and watched all video relevant to [the] matter,” before concluding that the DA’s Office had a less than reasonable likelihood of “refut[ing] a claim of self-defense by Officer Jenkins,” because “[t]he inmate pleaded guilty to assaulting Officer Jenkins.” (Perrusquia Decl. Attach. 7 at 1; Pet. ¶ 29.) Both the fact that the Sheriff investigated the matter as an assault and referred it to the DA, along with the fact that Mr. Lucas pled guilty to a crime—assaulting Officer Jenkins—demonstrate that the Sally Port Footage involves “possible criminal activity” and is not exempt from disclosure under Tenn. Code Ann. § 10-7-504(m)(1).

The TPRA expressly carves out segments of recordings that “include an act or incident involving public safety or security or possible criminal activity” from the exemption for surveillance recordings “directly related to the security of [a] government building.” Here, the Sally Port Footage falls squarely in this exception and must be released pursuant to the TPRA.⁷

⁷ While it is Petitioner’s position that the documentary evidence here is more than sufficient to support a finding that the exception in Tenn. Code Ann. § 10-7-504(m)(1)(E) applies, to the extent the Court deems it necessary, Petitioner would respectfully request that the Court order the Sheriff to provide the Court with a copy of the Sally Port Footage for *in camera* review. *See, e.g., Schneider*, 226 S.W.3d at 336 (noting that “the Chancellor directed the City immediately to provide him the requested documents for *in camera* inspection”).

III. The DA's Office Violated the TPRA When It Denied Petitioner's Request Because It Was Required to Retain the Sally Port Footage under the TPRA and Its Own Retention Policy.

The TPRA broadly defines “public record” as essentially anything “made *or received* pursuant to law or ordinance or *in connection with the transaction of official business by any governmental entity.*” Tenn. Code Ann. § 10-7-503(a)(1) (emphasis added). When a record, like the Sheriff's Case File, including the Sally Port Footage, is received by the DA's Office in the course of its work, it becomes a public record in the hands of the DA's Office and must be retained as required by the TPRA. *See City of Memphis*, 871 S.W.2d at 686–87 (rejecting restrictive definition of records as only encompassing those *created* by an agency, and noting statutory definition “includes material made or *received* in connection with the transaction of official business” (emphasis in original)); *Bd. of Educ. of Memphis City Schs. v. Memphis Publ'g Co.*, 585 S.W.2d 629, 631 (Tenn. Ct. App. 1979) (“The applications *were received* by that body in its official capacity in connection with aforesaid business. Those applications became part of that body's records.” (emphasis added)); *accord Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) (“We have approved the holding of our intermediate court, in *Board of Education v. Memphis Publishing Co.*, that applications of applicants for the position of superintendent of schools in the hands of a city school board search committee were public records subject to inspection, because “[t]he applications *were received* by that body in its official capacity in connection with aforesaid business.” (emphasis added)). This rule is clear from the TPRA's statutory language and judicial decisions interpreting it.

The DA's Office received the Sally Port Footage from the Sheriff's Office as part of the Sheriff's Case File, in connection with the transaction of its official business as prosecutor for Shelby County. (Pet. ¶¶ 29–30; Perrusquia Decl. Attach. 7 at 1 (“[T]he Shelby County Sheriff's Office *delivered* the above-referenced investigation to me.” (emphasis added)).) Accordingly, the DA's Office was required to retain those records for public inspection like any other public record in its custody. The courts of this state have applied this principle to applications for superintendent received by a city school board, *Bd. of Educ. of Memphis*, 585 S.W.2d 629, to a private developer's subleases received by an agent of the City of Memphis to analyze the developer's use of City-owned land, *Creative Rests., Inc. v. City of Memphis*, 795 S.W.2d 672, 678 (Tenn. Ct. App. 1990), and to records received by a private non-profit held to be the functional equivalent of a government agency, *City Press Commc'ns, LLC v. Tenn. Secondary Sch. Athletic Ass'n*, 447 S.W.3d 230, 241 (Tenn. Ct. App. 2014). Most relevant to Petitioner's request, the principle has also been applied by the Tennessee Supreme Court to records (a deceased's handwritten notes) received by a municipal law enforcement agency while investigating a death. *Griffin*, 821 S.W.2d at 921.

In *Griffin*, the investigation did not lead to a criminal prosecution—the death in question was found to be a suicide. *Id.* at 923. Nevertheless, because the record in question had been “received by the [police department] in connection with the transaction of official business,” the Tennessee Supreme Court held that the notes

in question were public records.⁸ *Id.* at 924. The instant case is even more compelling than *Griffin* because the Sally Port Footage was not only physically received by the DA's Office, but it was also reviewed by the DA to assess whether to prosecute Officer Jenkins. (Perrusquia Decl. Attach. 7 at 1.) Thus, there is no question that the Sheriff's Case File, including the Sally Port Footage, was received by the DA's Office in connection with the transaction of its official business and, as such, these materials are public records subject to inspection under the TPRA and the DA's Office was obligated to retain them unless a Records Disposition Authorization applied.⁹

Tenn. Code Ann. § 10-7-509(a) provides that “[t]he disposition of all state records shall occur only through the process of an approved records disposition authorization.” The DA's Records Retention Policy similarly states that “[a]ll Public Records of this Office . . . shall be retained pursuant to the Records Disposition Authorization (RDA) established by the Tennessee Public Records Commission.” (Perrusquia Decl. Attach. 10 at 1.) The DA's Records Retention Policy goes on to explain that misdemeanor criminal case files must be retained for “5 years after completion of investigation, case closure or the conclusion of all court proceedings,

⁸ Tenn. Code Ann. § 10-7-301(6) that is cited by the Court in *Griffin* is practically identical to Tenn. Code Ann. § 10-7-503(a)(1)(A)(i), which was added to Tenn. Code Ann. § 10-7-503 in 2016. 2016 Tenn. Pub. Acts. ch. 722 (H.B. 2082).

⁹ “Records disposition authorization’ means the official document utilized by an agency head to request authority for the disposition of records. The public records commission shall determine and order the proper disposition of state records through the approval of records disposition authorizations[.]” Tenn. Code Ann. § 10-7-301(8).

whichever is latest” and then cites to “RDA 11152,” which is the applicable state Records Disposition Authorization for such records.¹⁰ (Perrusquia Decl. Attach. 10 at 1; *see also id.* Attach. 11 at 1 (*Misdemeanor Case Files*, Records Disposition Authorization, RDA 11152).) The Sally Port Footage should have been retained, consistent with RDA 11152 and the DA’s Office’s Records Retention Policy, for at least 5 years after the DA declined to bring charges against Officer Jenkins. The DA violated the TPRA when it returned the Sally Port Footage to the Sheriff instead.

An agency’s obligation to maintain—and provide to the public upon request—public records that it receives cannot be circumvented by “returning” records to the sender, or by reviewing records without ever taking physical custody. An apt comparison can be drawn to decisions in Florida, whose public records law the Tennessee Supreme Court has described as being similar to the TPRA. *Cherokee Child. & Fam. Servs.*, 87 S.W.3d at 74; *see also Elec. Power Bd.*, 979 S.W.2d at 302 (citing Florida case law).¹¹

¹⁰ The DA’s Records Retention Policy also explains that “[a]ll records, other than criminal case file records, maintained by this Office shall be retained not less than 5 years from date of creation.” (Perrusquia Decl. Attach. 10 at 1.)

¹¹ Florida’s definition of public record is nearly identical to Tennessee’s. *Compare* Tenn. Code Ann. § 10-7-503(a)(1)(A)(i) (“all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity”), *with* Fla. Stat. § 119.011(12) (“all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant

In *National Collegiate Athletic Association v. Associated Press*, for example, a Florida appellate court was faced with the question of whether two records prepared by the NCAA (a private non-profit organization), hosted on its secure website, and reviewed (after being accessed via password) by counsel for Florida State University were public records under Florida’s public records law. 18 So. 3d 1201, 1205 (Fla. Dist. Ct. App. 2009). As under the TPRA, under Florida law “a document may qualify as a public record under the statute if it was prepared by a private party, so long as it was ‘received’ by a government agent and used in the transaction of public business.” *Id.* at 1207 (citing Fla. Stat. § 119.011(12)). The court concluded that the documents were public records because “they were ‘received’ by agents of a public agency and used in connection with public business.” *Id.* It did not matter that the public records resided on a remote computer. *Id.* “If that were not the case, a party could easily circumvent the public records laws.”¹² *Id.*

to law or ordinance or in connection with the transaction of official business by any agency”).

¹² The Court of Appeals has held in relation to Tennessee’s other open government statutory scheme, the Open Meetings Act, that it “is to be construed so as to frustrate all evasive devices” and that courts must construe such laws “in a manner to prevent [their] circumvention.” *State v. Shelby Cnty. Bd. of Comm’rs*, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990) (citation omitted); *see also Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 666 (Tenn. Ct. App. 2021) (rejecting a party’s construction of a different statute where “the result is circumvention of the [statute’s] purpose and a largely ineffective statute,” concluding that “we may employ the presumption that the General Assembly did not intend to enact a toothless statute or an absurdity” (citations omitted)). This same rule should apply to the TPRA.

Similarly, in *Times Publishing Co. v. City of St. Petersburg*, a Florida appellate court held that a city that “purposely avoided taking possession of draft leases and did not keep documentation of the negotiations . . . improperly delegated its record keeping functions,” and as such violated Florida’s public records laws. 558 So. 2d 487, 492 (Fla. Dist. Ct. App. 1990); *see also id.* at 492–93 (“City officials actively participated in the creation of the policy of non-retention, the effect of which was to evade the broad policy of open government.”); *Tober v. Sanchez*, 417 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1982) (“To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act, as well as the rule that a statute enacted for the benefit of the public is to be accorded a liberal construction.”).

Petitioner’s request that the DA’s Office retrieve the records that it returned to the Sheriff’s Office (Perrusquia Decl. Attach. 9 at 2; Pet. ¶ 43) was appropriate; this Court should order the Sheriff’s Office to provide the DA’s Office with the Sally Port Footage and for the DA’s Office, along with the Sheriff’s Office, to provide a copy of the Sally Port Footage to Petitioner. *See Barfield v. Fla. Dep’t of Law Enf’t*, No. 93-1701, slip op. at 6 (Fla. 2d Cir. Ct. May 19, 1994) (ordering agency to demand requested records from entity to which it had “return[ed]” said records). The DA’s denial of Petitioner’s public records request and the DA’s failure to retain the Sally Port Footage as required by the TPRA and its own Retention Policy was unlawful.

IV. Injunctive Relief Is Warranted to Effectuate the Return of the Sally Port Footage to the DA and to Prevent Future, Similar Violations of the TPRA by the DA's Office.

In addition to seeking an order from the Court finding that Respondents wrongly, knowingly, and willfully withheld the requested Sally Port Footage, Petitioner also seeks equitable relief under the TPRA requiring (1) the Sheriff's Office to provide the DA's Office with a copy of the Sally Port Footage as well as its entire investigative file on the Jenkins matter that it had previously provided to the DA's Office, (2) the DA's Office to receive and retain the Jenkins investigative materials, including the Sally Port Footage, from the Sheriff's Office consistent with the applicable public records retention policy and RDA, and (3) the DA's Office to retain copies of all records that it receives as part of its decision-making process regarding whether to criminally prosecute persons alleged to have committed a crime. (Pet. at 18–19.) Under the TPRA, the Court “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.” Tenn. Code Ann. § 10-7-505(d). The Tennessee Supreme Court has explained that this provision “plainly and in unambiguous language confers upon courts broad powers to grant injunctive remedies that secure the purposes and intentions of the Public Records Act.” *Schneider*, 226 S.W.3d at 348. In deciding whether to grant permanent injunctive relief as a remedy, the Court “should consider such factors as the adequacy of other remedies, the danger that the plaintiff will suffer irreparable harm without the injunction, the benefit to

the plaintiff, the harm to the defendant, and the public interest.” *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 467 (Tenn. Ct. App. 2009).

The DA’s Office acknowledged that its ordinary practice is to disregard the TPRA and violate its own retention policy. Indeed, Assistant District Attorney Timothy A. Beacham, who acts as the DA’s Office’s Public Records and Request Coordinator, informed Petitioner that the DA’s Office “regularly discusses and reviews cases with various law enforcement agencies . . . in determining pre-arrest and pre-indictment charging decisions,” and that while “[d]uring the course of this review,” the DA’s Office “may access and review records of the law enforcement agency,” it “[t]ypically . . . does not retain those records.” (Pet. ¶ 45; Perrusquia Decl. Attach. 9 at 1.) Thus, the other remedies sought by Petitioner, such as ordering the DA to produce the Sally Port Footage, will not adequately address the underlying cause of the DA’s failure to comply with the TPRA. Only a permanent injunction can ensure that the DA’s Office retains *all* records it receives in making charging decisions. The DA will not be harmed by following the public records law and its own policy, and the public interest is considerable.

The DA is duty-bound by statute to “prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto.” Tenn. Code Ann. § 8-7-103(1). Yet as part of that responsibility, the DA “enjoys almost total discretion in the prosecution of criminal cases.” 9 David Louis Raybin, *Tennessee Practice, Criminal Practice and Procedure* § 6:1 (Dec. 2021). Indeed, “[s]ubject to constitutional constraints, the district attorney

general’s discretion in charging determinations is practically unbridled.” *Quillen v. Crockett*, 928 S.W.2d 47, 51 (Tenn. Crim. App. 1995). This discretion is an essential check on law enforcement agencies, as the Tennessee Supreme Court has explained, because “[w]ere it otherwise, prosecutorial discretion would rest not with the District Attorney General, but with police officers who may arrest with or without a warrant depending on the circumstances.” *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 210 (Tenn. 1999).

The practical effect of this “virtually unbridled discretion in determining whether to prosecute and for what offense” is that, “[i]n a very real sense, [District Attorney General] is the most powerful office in Tennessee today. Its responsibilities are awesome; the potential for abuse is frightening.” *Dearborne v. State*, 575 S.W.2d 259, 262 (Tenn. 1978). But it is still a public office, and—in view of its broad power and discretion—public oversight and accountability, including that provided in the TPRA, are essential. Particularly given the strong public interest in fully understanding the DA’s decision not to prosecute cases referred to it by law enforcement agencies, the equitable relief sought here is warranted.

V. Petitioner Should Be Awarded Attorneys’ Fees and Costs.

“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.” Tenn. Code Ann. § 10-7-505(g). 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*, 226 S.W.3d at 346 (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).

In recent published decisions the Court of Appeals has “stressed that willfulness should be measured ‘in terms of the relative worth of the legal justification cited by a [governmental entity] to refuse access to records.’” *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015) (quoting *Friedmann v. Marshall Cnty.*, 471 S.W.3d 427, 439 (Tenn. Ct. App. 2015)). “In other words, the determination of willfulness ‘should focus on whether there is an absence of good faith with respect to the legal position a [governmental entity] relies on in support of its refusal of records.’” *Id.* (quoting *Friedmann*, 471 S.W.3d at 438). “If a [governmental entity] 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.*

This standard is met in this case as to both the Sheriff's Office and the DA's Office. Petitioner pointed the Sheriff's Office to the applicable exception for recordings “involving public safety or security or possible criminal activity,” to the general TPRA exemption for “government building” security footage. (Perrusquia

Decl. Attach. 3 at 2; Pet. ¶ 24.) The Sheriff's Office refused to address the exception and incorrectly re-stated that "[t]here is no exception that would allow the release pursuant to the District Attorney General's determination." (Perrusquia Decl. Attach. 5 at 1; Pet. ¶ 26.) The Sheriff's own assault investigation of Officer Jenkins' altercation with Mr. Lucas, the Sheriff's referral of the matter to the DA for possible criminal prosecution, and Mr. Lucas pleading guilty to assaulting Officer Jenkins directly contradict the Sheriff's justification for withholding the Sally Port Footage as all three are plain indications that the requested footage involved both "possible criminal activity" and, especially because it involved an allegation of excessive use of force by law enforcement, "public safety or security."

Similarly, Petitioner sent the DA's Office its own Retention Policy, noted that the Policy required the DA's Office to retain the Sheriff's Case File, including the Sally Port Footage, for five years, and stated, "I'm going to ask that you please get these records back from the Sheriff and release them to me in accordance with the Tennessee Public Records Act." (Perrusquia Decl. Attach. 9 at 2; Pet. ¶ 43.)

Assistant District Attorney Beacham responded that when the DA's Office reviews cases referred to it by law enforcement for a charging decision,

this Office may access and reviews records of the law enforcement agency. Typically, this Office does not retain those records. The brief temporary review of another agency's records does not typically warrant such retention as a part of this Office's function. This is not the type of activity envisioned by the legislature in the application of the [TPRA].

(Perrusquia Decl. Attach. 9 at 1; Pet. ¶¶ 45–46.) The DA’s position is contradicted by the definition of a public record in the TPRA, Tenn. Code Ann. § 10-7-503(a)(1)(A)(i), and case law applying that definition, including the Tennessee Supreme Court’s decision in *Griffin*. The DA’s position is not supported by existing law or by a good faith argument for the modification of existing law.

For these reasons, the DA’s Office and Sheriff’s Office should be ordered to pay all reasonable costs incurred by Petitioner in obtaining the Sally Port Footage, including reasonable attorneys’ fees in this proceeding.

CONCLUSION

The DA’s decision to charge—or not charge—a criminal suspect affects all members of the public. This is particularly true when the criminal suspect is a law enforcement officer. The DA is required under the TPRA to retain the records it uses to perform this important function and to make the records available for public inspection unless otherwise exempt.

Moreover, the Sheriff’s contention that the Sally Port Footage is exempt from disclosure is belied by its own criminal investigation of the incident involving Officer Jenkins, the Sheriff’s decision to refer the matter to the DA, and Mr. Lucas pleading guilty to assaulting Officer Jenkins. As such, the exemption asserted by the Sheriff as its basis for refusing Petitioner’s public records request is inapplicable because the footage depicts “possible criminal activity” and matters of “public safety or security.”

For the foregoing reasons, Petitioner respectfully requests that the Court grant his petition and order the DA and Sheriff to immediately make copies of the

Sally Port Footage available to Mr. Perrusquia. Petitioner also respectfully requests that the Court enter a declaratory judgment that the Sally Port Footage is a public record to which no exemption to disclosure applies, that the DA had a legal obligation to retain the Sheriff's Case File, including the Sally Port Footage, and that the DA's and Sheriff's failure to grant access to Mr. Perrusquia to the Sally Port Footage violated the TPRA. Petitioner additionally respectfully requests that the Court order the Sheriff to return to the DA its copy of the Sheriff's Case File, including the Sally Port Footage, and for the DA to retain the Sheriff's Case File, including the Sally Port Footage, as required by Tennessee law. Petitioner further respectfully requests issuance of a permanent injunction requiring the DA to retain all records that it receives in the course of rendering decisions whether to prosecute an alleged crime. Finally, Petitioner respectfully requests reasonable costs and attorneys' fees in connection with this action, and all further relief to which Petitioner may be entitled.

Respectfully submitted,

/s Paul R. McAdoo
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served with the Petition and Summons upon Respondents.

/s Paul R. McAdoo
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