No. W2023-00293-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

JOSE MARCUS PERRUSQUIA,

Petitioner – Appellant,

v.

FLOYD BONNER, JR. AND STEVE MULROY,

Respondents – Appellees.

On Appeal from the Shelby County Chancery Court
Case No. CH-22-0820-3

PETITIONER-APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the Shelby County District Attorney General's Office (the "DA" or the "DA's Office") a "records custodian" pursuant to Tenn. Code Ann. § 10-7-503(a)(1)(C) as to records it receives and reviews to make a charging determination?

Suggested answer: Yes.

2. If the DA was a "records custodian" pursuant to Tenn. Code Ann. § 10-7-503(a)(1)(C) of the requested public records at issue, should the trial court have issued an injunction requiring the Sheriff (the "Sheriff" or the "Sheriff's Office") to reproduce copies of those public records to the DA's Office and the DA to receive and retain those records?

Suggested answer: Yes.

3. Should the trial court have issued an injunction requiring the DA to retain future records it receives and reviews to make a charging decision, except as permitted by the applicable Records Disposition Authorization?

Suggested answer: Yes.

4. Are the Sheriff and the DA required by the Tennessee Public Records Act ("TPRA"), including Tenn. Code Ann. § 10-7-504(m)(1)(E), to produce a video recording depicting an act or incident involving public safety or security or possible criminal activity in the Shelby County Jail's Sally Port?

Suggested answer: Yes.

5. Did the Sheriff and the DA knowingly and willfully withhold the public records sought here in violation of the TPRA such that Petitioner-Appellant should be awarded reasonable attorneys' fees and costs pursuant to Tenn. Code Ann. § 10-7-505(g) for both the proceedings before this Court and the trial court?

Suggested answer: Yes.

STATEMENT OF THE CASE

On June 6, 2022, Petitioner-Appellant Jose Marcus Perrusquia filed a petition to access public records from the Sheriff and the DA pursuant to Tenn. Code Ann. § 10-7-505(a) and Tenn. Code Ann. § 1-3-121. R. v. 1 at 1.[1] Mr. Perrusquia sought access to a video recording of a jail altercation between an arrestee, Nechoe Lucas, and a Memphis Police Department ("MPD") officer, Brandon Jenkins, that became part of a Sheriff's investigation and was reviewed by the DA's Office to decide whether to charge Officer Jenkins (the "Sally Port Footage"). R. v. 1 at 3, 7, 9–11. Mr. Perrusquia asserted two claims: the first against both the DA and the Sheriff for "Failure to Provide Access to Public Records" and the second against the DA for "Failure to Retain Public Records." R. v. 1 at 14, 16. In addition to declaratory relief, Mr. Perrusquia also sought injunctive relief against the Respondents 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 case file on the [] 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 [Records Disposition Authorization]"; 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

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

alleged to have committed a crime." R. v. 1 at 18–19. 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 19.

The Sheriff's Office responded December 20, 2022, and the DA's Office responded December 21, 2022. R. v. 2 at 222, 234. Mr. Perrusquia filed a consolidated reply on January 6, 2023. R. v. 2 at 256. The trial court held a show cause hearing pursuant to Tenn. Code Ann. § 10-7-505(b) on January 25, 2023. R. v. 2 at 217; R. v. 4 Tr. at 1.[2] The court received affidavits and declarations submitted by both parties. R. v. 2 at 217. The Sheriff's Office submitted the requested public records to the trial court for *in camera* review prior to the January 25, 2023 hearing. R. v. 2 at 217, 223.

On February 6, 2023, the trial court entered an order denying Mr. Perrusquia's Petition. R. v. 3 at 316. The trial court found that "a physical altercation occurred in the Sally Port area of the jail between a Memphis police officer and an arrestee who was being processed into the jail," that the jail was "controlled and operated by the" Sheriff's Office, and that "[t]he altercation was captured by surveillance video inside the Sally Port area of the jail." R. v. 3 at 316. The trial court further found that the video recording at issue in this case was made "part of a [Sheriff's Office] investigative file," which was "delivered" by the Sheriff's Office "to the DA . . . for review for possible prosecution," that the DA's Office

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[2] Because the show cause hearing transcript is not paginated in the same way as the rest of the record, cites to it will indicate that it is the record and volume 4 with "R. v. 4" and then will cite to the page of the transcript with "Tr. at" and, when applicable, with the lines being cited.

"reviewed the [Sheriff's Office] file," and that the DA's Office did not "make or retain copies of the [Sheriff's Office] investigative file or the surveillance video." R. v. 3 at 317.

Based on these findings, the trial court held that the video recording "is a record directly related to the security of a government building," and that the exception found at Tenn. Code Ann. § 10-7-504(m)(1)(E) to otherwise exempt surveillance video of government buildings when such video depicts "an act or incident involving public safety or security or possible criminal activity" "is discretionary." R. v. 3 at 319. Finally, the court found that the Sheriff's Office, not the DA's Office, "is the government entity lawfully responsible for the direct custody and care of the surveillance video in question and is, therefore, the records custodian of the surveillance video." R. v. 3 at 320.

Mr. Perrusquia timely appealed the trial court's February 6, 2023 decision on February 28, 2023. R. v. 3 at 324–25; Tenn. R. App. P. 4.

STATEMENT OF THE FACTS

I. Mr. Perrusquia's public records requests.

Mr. Perrusquia, a long-time Memphis-based journalist, made two public records requests that are the basis for this case. R. v. 1 at 1, 14, 132–33, 136.

A. Mr. Perrusquia's public records request to the Sheriff.

Mr. Perrusquia's public records request to the Sheriff was made on October 16, 2020 and sought "case file 1805001151SH (also labeled 18050011S1SH) involving a May 29, 2018 altercation at or near the sally

port at the Shelby County Jail involving Nechoe Lucas and Memphis Police Department officer Brandon Jenkins. That includes reviewing the video in this file." R. v. 1 at 7, 133; R. v. 2 at 159. The Sheriff's Office denied Mr. Perrusquia's request for the video recording on December 8, 2020. R. v. 1 at 7, 133–34; R. v. 2 at 157–58. In its denial, the Sheriff's Office stated "[t]he video is not being provided as that is protected by the security of governmental buildings and surveillance provisions of the TPRA, T.C.A. § 10-7-504." R. v. 1 at 7, 133–34; R. v. 2 at 158. Mr. Perrusquia responded on January 11, 2021, explaining that "the provision you cite states that this exception does not apply to recordings involving possible criminal activity" and that the "incident [depicted in the video recording] was referred to the District Attorney for possible criminal prosecution by employees of the Sheriff's Office because they believe a criminal act may have occurred." R. v. 1 at 8, 134; R. v. 2 at 156. The Sheriff's Office reaffirmed its denial on February 12, 2021, when it told Mr. Perrusquia via email that the requested video recording "is surveillance video necessary for the security of the facility. There is no exception that would allow the release pursuant to the District Attorney General's determination." R. v. 1 at 8, 135; R. v. 2 at 179.

The Sheriff's Office later asserted in a declaration supporting its Response to the Petition that "[a]ny public release of video showing the layout of the facility poses a potential security risk, as it could give individuals advance knowledge of paths and procedures that are followed, potentially allowing them to find 'blind spots' in security or hiding locations for contraband." R. v. 2 at 232.

B. Mr. Perrusquia's public records request to the DA.

On October 13, 2020, Mr. Perrusquia requested that the DA provide him with records related to an MPD internal investigation into the actions of Officer Jenkins during his altercation with Mr. Lucas. R. v. 1 at 9, 135; R. v. 2 at 186. The DA's Office responded that it had not received anything from MPD, but had received a referral from the Sheriff's Office, which included a video recording, and that the DA had "reviewed the written reports and watched all video relevant to this matter." R. v. 1 at 9–10, 135; R. v. 2 at 183, 189. Mr. Perrusquia then requested the video recording from the DA on October 16, 2020. R. v. 1 at 10–11, 135–36; R. v. 2 at 183. In response to his request for the video recording, the DA's Office told Mr. Perrusquia that "we returned the file since there was no prosecution" and that "it was all sent back to the sheriff." R. v. 1 at 11, 136; R. v. 2 at 183, 191.

Mr. Perrusquia thereafter requested that the DA's Office provide him with a copy of its records retention policy. R. v. 1 at 11. The DA's Office's Records Retention Policy provides 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" and that for criminal case files "recordings . . . received for and during the course of the investigation . . . shall be retained" for five years after the investigation is completed for all misdemeanors and for most felonies. R. v. 1 at 12; R. v. 2 at 205.

Relying on the DA's Office's own Records Retention Policy, Mr. Perrusquia requested that the DA's Office "please get [the Sally Port

Footage] back from the Sheriff and release [it] to me in accordance with the Tennessee Public Records Act." R. v. 1 at 12–13, 136–37; R. v. 2 at 198. The DA's Office responded to this request on March 24, 2021, stating:

> This Office regularly discusses and reviews cases with various law enforcement agencies within this jurisdiction in determining pre-arrest and pre-indictment charging decisions. During the course of this review, this Office may access and review 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].

R. v. 1 at 13, 137; R. v. 2 at 197. At no point did the DA's Office contend that it disposed of the requested Sally Port Footage pursuant to a Records Disposition Authorization. R. v. 1 at 14.

In its Response to the Petition, the DA's Office also averred that "[i]f this Office had maintained this video in a criminal case file and the video's contents included any surveillance, as defined in TCA 10-7-504(m)(1)(E) . . . , this Office would deny a Public Records request for such video." R. v. 2 at 251; *see also* R. v. 2 at 251 (explaining that past public records requests for surveillance video to the DA's Office were "routinely denied").

C. The Sally Port Footage.

The Sally Port Footage requested by Mr. Perrusquia from both the Sheriff and the DA shows a May 2018 altercation between Officer Jenkins and Mr. Lucas at 201 Poplar, the facility that includes both the Shelby County Jail and its Sally Port. R. v. 1 at 3, 5, 140. According to an MPD internal investigation Hearing Summary,

> [a]t one point during the video it clearly shows the suspect sitting in a chair in the sally port. Each arm[] is 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.

R. v. 1 at 4; R. v. 2 at 151. MPD sustained violations of its excessive force/unnecessary force and personal conduct regulations and suspended Officer Jenkins without pay for 17 days and required that he attend remedial training. R. v. 1 at 5; R. v. 2 at 149.

The Sheriff's Office investigated the altercation as a possible criminal assault by Officer Jenkins against Mr. Lucas. R. v. 1 at 6–7, 145; R. v. 2 at 165, 170, 173–74. The Sheriff's Office sent its investigative file, including the Sally Port Footage, to the DA to decide whether Officer Jenkins should be prosecuted for his actions in the May 2018 altercation with Mr. Lucas. R. v. 1 at 9–10; R. v. 2 at 189, 235.

The DA declined to prosecute Officer Jenkins. R. v. 1 at 9–10; R. v. 2 at 189, 235. For his part in the altercation, Mr. Lucas pled guilty to assault. R. v. 1 at 5; R. v. 2 at 189, 224, 234.

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 TPRA was enacted to benefit the public by permitting public oversight of state and local government, including the Sheriff and the DA. The trial court's decision undermines this very purpose.

Government oversight is undermined by the trial court's erroneous decision that the DA, who received, reviewed, and relied upon the Sheriff's investigative file—including the Sally Port Footage—to make a charging decision, was not a record custodian of those public records and could return them to the Sheriff without maintaining a copy. This decision too narrowly applies the TPRA definition of "records custodian" and ignores relevant precedent that finds governmental bodies have a legal obligation to produce records they receive as part of their official business in response to public records requests. In sum, the ruling below, which is also inconsistent with the applicable Records Disposition Authorization, would countenance circumvention of the TPRA through transferring records to other government agencies.

Government oversight is also undermined by permitting the Sheriff and the DA to withhold a video recording of an altercation between a

restrained citizen and a police officer. This Court should instead find that the Sheriff and the DA are required to release the requested Sally Port Footage upon request pursuant to the applicable TPRA exception to otherwise exempt surveillance recordings of government buildings found at Tenn. Code Ann. § 10-7-504(m)(1)(E). Where, as here, an exception to a public records exemption irrefutably applies, disclosure is required based on the dictates of the TPRA, the context of the provision, and the public interest at stake. To hold otherwise would be contrary to both the language and intent of the TPRA and the rules of statutory construction, including the rules that apply when interpreting the TPRA and statutes that are enacted for the public's benefit generally.

Because of its other rulings, the trial court also denied the injunctive relief and reasonable costs, including reasonable attorneys' fees sought by Mr. Perrusquia. Both injunctive relief as well as reasonable costs, including reasonable attorneys' fees, are authorized by the TPRA and should be granted here to further the aims of the TPRA and because of the weaknesses in the legal justifications put forward by the Sheriff and the DA.

Accordingly, Mr. Perrusquia respectfully requests that this Court reverse the decision below.

ARGUMENT

I. The DA's Office is a "records custodian" of the Sally Port Footage with an obligation to retain it and should have been ordered to receive and retain the requested public records.

The DA has an immensely important responsibility: the prosecution of crime. Tenn. Code Ann. § 8-7-103(1) (a district attorney general must "prosecute . . . all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto"). In fact, "[a] district attorney general is answerable to no superior and has virtually unbridled discretion in determining to prosecute and for what offense." *Tenn. Downs, Inc. v. Gibbons*, 15 S.W.3d 843, 848 (Tenn. Ct. App. 1999); *see also State v. Culbreath*, 30 S.W.3d 309, 313 (Tenn. 2000) ("The prosecutor's discretion to seek a warrant, presentment, information, or indictment is extremely broad and subject only to certain constitutional restraints." (citing *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999))); *Quillen v. Crockett*, 928 S.W.2d 47, 51 (Tenn. Crim. App. 1995) ("Subject to constitutional constraints, the district attorney general's discretion in charging determinations is practically unbridled."). With such power, public oversight is of even greater importance. The trial court's ruling, however, limits that critical oversight by permitting the DA ***not*** to retain public records it receives, reviews, and relies upon in making a charging decision not to prosecute. Such a ruling is contrary to the purpose and provisions of the TPRA. Injunctive relief to enable the DA to re-obtain and retain the Sally Port Footage is more than warranted to fully effectuate the TPRA's purpose.

A. The DA is a "records custodian" of records it receives in connection with its official business.

The trial court found that "[t]he DA reviewed [the Sheriff's investigative] file but did not open its own file on the matter, nor did the DA make or retain copies of the [Sheriff's] investigative file or the surveillance video. After determining that no prosecution would be pursued, the DA returned the file to the [Sheriff] . . . ." R. v. 3 at 317. The record in this case further demonstrates that the DA not only received and reviewed the Sheriff's investigative file, including the Sally Port Footage, but also relied upon it in deciding not to prosecute Officer Jenkins for repeatedly striking Mr. Lucas while he was restrained. R. v. 2 at 189 (letter from the DA to the Sheriff explaining that the DA had "reviewed the written reports and watched all video relevant to this matter," decided not to prosecute, and returned "the investigation to [the] Sheriff"); R. v. 1 at 4, R. v. 2 at 151 (describing altercation between Mr. Lucas and Officer Jenkins). Based on these undisputed facts and without any supporting citation to precedent, the trial court concluded that "[t]he [Sheriff], and not the DA, is the government entity lawfully responsible for the direct custody and care of the surveillance video in question and is, therefore, the records custodian of the surveillance video." R. v. 3 at 320. The trial court further "decline[d] to obligate the DA to become a records custodian of another governmental entity's record by merely reviewing the record to determine whether or not to pursue criminal prosecution." R. v. 3 at 320. In this manner, the trial court's decision was predicated on a narrow, flawed interpretation of what constitutes a

"records custodian" under the TPRA that fails to take into account the entirety of the statute and could promote circumvention of the law.

A "[r]ecords custodian" is defined in the TPRA as "any office, official, or employee of any governmental entity lawfully responsible for the direct custody and care of a public record." Tenn. Code Ann. § 10-7-503(a)(1)(C). The DA argued and the trial court's decision presupposes a simple, but defective premise: that there can be only one records custodian of a particular public record. As an initial matter, the language of the definition does not contemplate a sole records custodian. A "records custodian" is "***any*** office, official, or employee of any governmental entity," and is not limited to a single governmental entity, office, or official, the first governmental entity, office, or official, or the originating governmental entity, office, or official. Tenn. Code Ann. § 10-7-503(a)(1)(C) (emphasis added).

While there is no judicial construction of the definition of "records custodian," the Court should look to the definition of "public record" and cases interpreting that provision of the TPRA for assistance because the words in statutes "are known by the company they keep, [and] courts must [] construe these words in the context in which they appear in the statute and in light of the statute's general purpose. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526–27 (Tenn. 2010) (citations omitted); *see also Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 665 (Tenn. Ct. App. 2021) (explaining that when construing statutes "we also examine 'the subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment'" (citation omitted)). Notably, the TPRA

broadly defines "[p]ublic 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)(A) (emphasis added). Based on the plain language of this definition, the Sally Port Footage (and the whole Sheriff's investigative file) is both a public record in the hands of the Sheriff, who "made" the document in connection with the transaction of the Sheriff's business, and in the hands of the DA, who "received" it in connection with the transaction of the DA's official business. *See, e.g.*, *Memphis Publ'g Co.*, 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)).

The Tennessee Supreme Court's decision in *Griffin v. City of Knoxville* is instructive. In *Griffin*, the police investigated the death of a state representative, during which they collected three handwritten notes written by the deceased as evidence. 821 S.W.2d 921, 922 (Tenn. 1991). One of the officers "testified that he considered, but did not rely, on the notes" in concluding that the death was a suicide. *Id.* The other officer "testified that he took the notes into his custody for safekeeping." *Id.* The officers made copies of the notes before returning the originals to the family of the deceased. *Id.* Local media outlets requested access to the notes and the investigative file, which was denied, and later filed suit seeking access. *Id.* The Court granted disclosure holding "that the notes were received by the municipal police department in connection

with the transaction of official business and, therefore, are public records subject to inspection." *Id.* Here, the Sally Port Footage was created by the Sheriff's Office, then later ***received*** by the DA's Office in connection with its duties to render a charging determination, just like the handwritten notes were received by the police department in *Griffin*.

One of the cases relied upon by the *Griffin* Court was *Board of Education of Memphis City Schools v. Memphis Publishing Co.*, 585 S.W.2d 629, 631 (Tenn. Ct. App. 1979). *Griffin*, 821 S.W.2d at 923. In *Board of Education*, a newspaper sought access to "applications of those seeking the position of school Superintendent," which were submitted to "a Search Committee, composed of private citizens" established by the Board. 585 S.W.2d at 629. The court ruled that the applications were public records under the TPRA, through their receipt by a government body. "[T]he records in question were in the hands of a public body." *Id.* at 631. "The applicants sought employment with a public body. 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.*" *Id.* (emphasis added).

In other words, because the records in *Griffin* and *Board of Education* were received in connection with those public bodies' official business, they were public records that those bodies had to disclose to the public. Here, the DA received the Sally Port Footage and the rest of the Sheriff's investigative file in connection with the DA's official business, R. v. 2 at 189; R. v. 3 at 317—deciding whether to prosecute an individual, just like the police department in *Griffin* received the handwritten notes as part of its investigation and the school board in *Board of Education*

received applications as part of its hiring process. The only factual difference between this case and *Griffin* and *Board of Education* is that the public records in this case were received from another public entity, the Sheriff. That factual distinction does not justify a different result.

While Tennessee has not dealt with the disposition of records by one public body transferring them to another public body, Florida, a state with similar public records laws, has. *Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002) (explaining that Florida's public records law "is similar to Tennessee's"); *see also Tennessean v. Elec. Power Bd. of Nashville*, 979 S.W.2d 297, 302 (Tenn. 1998) (citing Florida case law).[3] In *Chandler v. City of Sanford*, a public records requester sought an unredacted version of an email that the City had transferred to a prosecutor as part of a criminal investigation. 121 So. 3d 657, 658–59 (Fla. Dist. Ct. App. 2013). The prosecutor had reviewed and redacted the records before returning the redacted versions back to the City. *Id.* at 659. The requester challenged the redaction and

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[3] Florida's definition of public records 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 to law or ordinance or in connection with the transaction of official business by any agency").

the City claimed that it "did not have authority to release the original records" because of the prosecutor's "directive and the ongoing criminal investigation and prosecution." *Id.* The trial court found that the City was not a proper party and that the prosecutor was the proper party for the petition for access. *Id.* The requester appealed. *Id.*

The intermediate appellate court, in a published decision, explained that "a governmental agency may not avoid a public records request by transferring custody of its records to another agency." *Id.* at 660 (citing *Tober v. Sanchez*, 417 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1982)). "[T]he City asserts that it was under an order from the executive branch, specifically the [prosecutor], not to produce the original, unredacted email. However, despite this instruction from the [prosecutor], as a matter of law, the City remained the governmental entity responsible for the public records." *Id.* "[T]he City cannot be relieved of its legal responsibility for the public records by transferring the records to another agency." *Id.* "[T]o 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." *Id.* (quoting *Tober*, 417 So. 2d at 1054); *see also* Fla. AGO 92-78, 1992 WL 527487, at *1–2 (Oct. 30, 1992) (explaining that "an agency may not avoid its responsibilities under the Public Records Law by claiming that the records are not in the physical possession of the custodian" and that the government entity was "not relieved of its responsibilities under [Florida's public records laws] by claiming that the records are no longer in its physical possession").

Here, similar to *Chandler*, the DA transferred the records to the Sheriff, but unlike the police department in *Griffin*, the DA did not retain a copy of the Sally Port Footage or the rest of the Sheriff's investigative file, which would have been the proper course of action. *Griffin*, 821 S.W.2d at 922. Given the General Assembly's requirement 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), the trial court's narrow interpretation and application of the TPRA definition of "records custodian" should be reversed. The TPRA's purpose "to apprise the public about the goings-on of its governmental bodies" further supports this conclusion, just as it did in *Chandler*. *Memphis Publ'g Co.*, 871 S.W.2d at 687; *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)).

Statutes should also be construed "in a manner to prevent [their] circumvention." *State ex rel. Matthews v. Shelby Cnty. Bd. of Comm'rs*, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990) (holding also that the Tennessee Open Meetings Act "is to be construed so as to frustrate all evasive devices" (citation omitted)); *see also Nandigam Neurology*, 639 S.W.3d at 666 (rejecting a party's construction of a 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)). The trial court's interpretation of "records custodian," which ignores key precedent on the related definition of "public records," would endorse circumvention, not prevent it, and

would permit governmental bodies to receive and rely upon public records in the course of their public business, but then not retain them, so long as the public records are received from another governmental body and returned to that body.

The DA's Records Retention Policy and the applicable Records Disposition Authorization, which is the only legally permissible method for disposing of public records, Tenn. Code Ann. § 10-7-509(a), also support reversal of the trial court's decision. The DA's Records Retention Policy explains that criminal case file records "include, but are not limited to, correspondence, photographs, recordings, interviews, law enforcement reports, [and other types of records] *received for and during the course of the investigation*." R. v. 2 at 205 (emphasis added). Criminal case file records for misdemeanors must be retained for "5 years after completion of investigation, case closure or the conclusion of all court proceedings, whichever is latest." R. v. 2 at 205. Here, there is no question that the DA received the Sally Port Footage and the rest of the Sheriff's investigative file to perform one of the DA's most fundamental tasks—deciding whether to charge someone with a crime. The requested public records were "received for and during the course of the investigation."

The applicable Records Disposition Authorization, No. 11152, which is relied upon by the DA in its Records Retention Policy, R. v. 2 at 205, applies to "[r]ecords of district attorney generals criminal investigation," including law enforcement reports—like the Sheriff's investigative file here—"received for the investigation," R. v. 2 at 208. As such, both the DA's Records Retention Policy and applicable Records

Disposition Authorization support the conclusion that the DA was a records custodian of the Sally Port Footage and the remainder of the Sheriff's investigative file, which the DA received and relied upon in making a charging decision.

"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 *Cherokee Child. & Fam. Servs.*, 87 S.W.3d at 74–75). The trial court's ruling does not facilitate access to records, but instead impedes it, contrary to the intent and public policy underlying the TPRA. In this manner, the trial court's narrow interpretation of the definition of "records custodian" is divorced from the TPRA's purpose and would permit circumvention. As such, the trial court should be reversed, and the DA should be found to be a records custodian of the Sally Port Footage and the remainder of the Sheriff's investigative file that it received and relied upon in making its charging decision on Officer Jenkins with a legal obligation to retain it.

B. Injunctive relief is necessary to facilitate access to the Sally Port Footage from the DA and to ensure access to future public records received by the DA in connection with its official business.

The TPRA provides that courts "shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of" the TPRA. Tenn. Code Ann. § 10-7-505(d). In this case, Mr. Perrusquia sought injunctive relief related to the DA's failure to retain the Sally Port

Footage and the rest of the Sheriff's case file. R. v. 1 at 18–19. This Court in *Hickman v. Tennessee Board of Probation & Parole* held that when a petitioner seeks an injunction under Tenn. Code Ann. § 10-7-505(d) the petitioner need not demonstrate the regular requirements for injunctive relief, like irreparable harm, but instead "must only meet the requirements set out in the Public Records Act." No. M2001-02346-COA-R3-CV, 2003 WL 724474, at *5 (Tenn. Ct. App. Mar. 4, 2003). If this Court reverses the trial court's decision and confirms that the DA is a records custodian of the Sally Port Footage, it should order the trial court to grant Mr. Perrusquia the injunctive relief necessary to remedy the DA's failure to retain public records.

At the trial court, Mr. Perrusquia sought an injunction 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 case 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 it receives as part of its decision-making process regarding whether to criminally prosecute persons alleged to have committed a crime." R. v. 1 at 18–19. The first two elements of the injunction are two sides of the same coin and would secure the purposes and intentions of the TPRA by ensuring that the Sheriff's investigative file, including the Sally Port Footage, is available from both records custodians—the Sheriff who created the records and the DA who received the records. While this process may seem unusual, it is not unheard.

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).[4]

The final request for injunctive relief also secures the purposes and intentions of the TPRA. The DA's Office made clear in its pre-suit communications with Mr. Perrusquia that its failure to retain the Sally Port Footage and the rest of the Sheriff's investigative file was consistent with the DA's Office's regular practice. R. v. 1 at 13, 137; R. v. 2 at 197, 250. Thus, absent an injunction requiring the retention of all records the DA's Office receives in the course of making a charging decision, the DA's Office is likely to continue its regular practice of failing to retain records it receives from another government entity when the DA's Office declines to prosecute.

II. Disclosure of the Sally Port Footage is mandatory under the TPRA, not discretionary.

The trial court further erred in holding that release of the Sally Port Footage is discretionary under Tenn. Code Ann. § 10-7-504(m)(1)(E) and its decision should be reversed. R. v. 3 at 319.

The TPRA is a "clear mandate in favor of disclosure." *Swift v. Campbell*, 159 S.W.3d 565, 570 (Tenn. Ct. App. 2004) (quoting *Tennessean*, 979 S.W.2d at 305). It requires that a "custodian of a public record . . . *shall* promptly make available for inspection any public record not specifically exempt from disclosure." Tenn. Code Ann. § 10-7-

[4] A copy of this Florida trial court decision is in the record. R. v. 1 at 56–62.

503(a)(2)(B) (emphasis added). The TPRA further requires that "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) (emphasis added). In other words, if a public record can be released it must be released pursuant to the TPRA. The question, therefore, is whether the Sally Port Footage is "specifically exempt"—if it is not, it must be disclosed. Tenn. Code Ann. § 10-7-503(a)(2)(B).

The Sheriff and the DA claimed below that Tenn. Code Ann. § 10-7-504(m)(1) exempts the Sally Port Footage from release, and that the exception to this exemption in Tenn. Code Ann. § 10-7-504(m)(1)(E) grants the government discretionary authority to decide whether to release segments of government building surveillance video showing possible criminal activity. R. v. 2 at 222–26, 238–40. The trial court agreed. R. v. 3 at 319. All three are incorrect.

Tenn. Code Ann. § 10-7-504(m)(1)(E) is specifically limited by a carve-out for segments of recordings that "include an act or incident involving public safety or security or possible criminal activity," which indisputably describes the Sally Port Footage. *See* R. v. 3 at 317 (trial court finding that the surveillance video was delivered to the DA for review for possible criminal prosecution); R. v. 2 at 224 (Sheriff conceding that the video contains "possible criminal activity"); R. v. 2 at 238–39 (DA conceding same). In other words, the Sally Port Footage is not "specifically exempt from disclosure" under the asserted exemption:

> (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. . . . 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.***

Tenn. Code Ann. § 10-7-504(m) (emphasis added). By the plain terms of the statute, segments of recordings that include an act or incident involving public safety or security or possible criminal activity *are not specifically exempt from disclosure.* As such, they must be made available pursuant to Tenn. Code Ann. § 10-7-503(a)(2)(B) and Tenn. Code Ann. § 10-7-503(a)(2)(A).

The DA and Sheriff argued, and the trial court agreed, that the use of the word "may" in Tenn. Code Ann. § 10-7-504(m)(1)(E) is what made the exception to the exemption discretionary. R. v. 2 at 222–26, 238–40; R. v. 3 at 319. But this conclusion ignores the context in which "may" is used and key precedent on the proper interpretation of "may" in statutes like the TPRA.

The Tennessee Supreme Court has said that "'[m]ay' ordinarily connotes discretion or permission; and it will not be treated as a word of command unless there is something in the context or subject matter of the act or statute under consideration to indicate that it was used in that sense." *Colella v. Whitt*, 308 S.W.2d 369, 371 (Tenn. 1957). Here, the context and subject matter of the TPRA, which mandates disclosure of

non-exempt public records, indicate that release of segments of government building surveillance recordings showing possible criminal activity is mandatory, not discretionary.

City of Memphis v. Bethel, 17 S.W. 191, 195 (Tenn. 1875) reinforces this conclusion. In *Bethel*, the Tennessee Supreme Court cited to U.S. Supreme Court precedent and explained that "where power is given to public officers . . . whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. . . . The power is given, not for their benefit, but for [the public's]." *Bethel*, 17 S.W. at 195 (quoting *Bd. of Supervisors of Rock Island Cnty. v. United States ex rel. State Bank*, 71 U.S. 435, 446–47 (1866)); *see also Town of LaGrange v. Auchinleck*, 573 N.W.2d 232, 237–38 (Wis. Ct. App. 1997) (relying on *Board of Supervisors* to support holding that "the statutory designation of the police chief as the custodian of departmental records is mandatory"); *Great N. Nekoosa Corp. v. Bd. of Tax Assessors of Early Cnty.*, 261 S.E.2d 346, 348 (Ga. 1979) (finding that use of "may" in tax statute was mandatory because, among other things, "in statutory construction 'may' is construed as mandatory 'when such Statute concerns the public interest, or affects the rights of third persons'" (citations omitted)); *Moore v. Buchko*, 154 N.W.2d 437, 439–41 (Mich. 1967) (relying on *Board of Supervisors*, among others, to hold that "may" used in a statute regarding credit for time served in prison was mandatory); 3 Shambie Singer, *Sutherland Statutes & Statutory Construction* § 57.12 (8th ed.) ("[S]tatutes usually are mandatory where they provide that public officers do certain acts or exercise certain power . . . whether they are phrased in imperative or permissive terms."). In

other words, because the General Assembly enacted the TPRA to facilitate disclosure of government records for the public's benefit, not the government's, the permissive language in Tenn. Code Ann. § 10-7-504(m)(1)(E) "is in fact peremptory" because the power is given, not for the benefit of the Sheriff or the DA, but for the public's benefit.

Finally, "when determining whether a provision is permissive or mandatory . . . '[the] prime object is to ascertain the legislative intent from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other.'" *Nandigam Neurology*, 639 S.W.3d at 665 (citations omitted). Here, the consequences that would result from construing Tenn. Code Ann. § 10-7-504(m)(1)(E) as permissive are significant and contrary to the prime object of the TPRA. Permitting agencies to hold unbridled discretion over the disclosure of surveillance recordings depicting "an act or incident involving public safety or security or possible criminal activity" will inevitably lead to a reluctance on the part of government actors to release recordings depicting possible criminal misconduct by government employees (as here). Nothing could be more contrary to the TPRA's "crucial role in promoting accountability in government through public oversight of governmental activities." *Cherokee Child. & Fam. Servs.*, 87 S.W.3d at 74 (citation omitted). Because the language and purpose of the TPRA support a finding that the Sally Port Footage must be released, the trial court's decision should be reversed.

III. Mr. Perrusquia should be awarded reasonable attorneys' fees and costs.

If the Court reverses the trial court, it should grant Mr. Perrusquia's request pursuant to Tenn. Code Ann. § 10-7-505(g) for reasonable costs and reasonable attorneys' fees before the trial court and this Court. 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, the Court should find that the Sheriff and the DA both knew that their refusal to produce and retain the requested public records violated the dictates of the TPRA and that they nevertheless willfully refused to disclose those records upon request.

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 *Memphis Publ'g Co.*, 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, the Sheriff and DA argued that they were not required to produce the Sally Port Footage because the exception to the exemption in Tenn. Code Ann. § 10-7-504(m)(1)(E) afforded them the discretion to decide whether to release the requested segment of surveillance video showing both an actual crime and possible criminal activity. R. v. 2 at 222–26, 238–40. Despite the trial court agreeing with them, R. v. 3 at 319, the exception to the exemption in Tenn. Code Ann. § 10-7-504(m)(1)(E) is not discretionary, as discussed *supra*, because of the structure and purpose of the TPRA. Under the TPRA, if a record can be released, it must be released. Tenn. Code Ann. § 10-7-503(a)(2)(B) (explaining that the TPRA requires that a "custodian of a public record . . . shall promptly make available for inspection any public record not specifically exempt from disclosure"); Tenn. Code Ann. § 10-7-503(a)(2)(A) (requiring under the TPRA that "those in charge of the records *shall not* refuse such right of inspection to any citizen, unless otherwise provided by state law" (emphasis added)). And relevant cases

support this conclusion because courts commonly look past the use of "may" and instead focus on the purpose behind the provision for deciding whether "may" is, in fact, mandatory rather than discretionary. *See supra*, Section II.

The DA's argument before the trial court that it was not a records custodian is similarly infirm and justifies an award of reasonable costs, including reasonable attorneys' fees, at both the trial and appellate levels. R v. 2 at 240–44; *see also* R. v. 3 at 320. As discussed *supra*, the DA's position that it was not a records custodian of the requested public records—nor of any records the DA reviews when it declines to prosecute—is contrary to the TPRA's express language, statutory intent, and purpose. *See supra*, Section I. Moreover, the DA's position conflicts with applicable case law interpreting the definition of "public records" received by a government agency—just as the DA's Office received the Sally Port Footage in this case. *E.g.*, *Griffin*, 821 S.W.2d at 923–24.

Therefore, this Court should exercise its discretion and award Mr. Perrusquia reasonable costs, including reasonable attorneys' fees, for both the trial court proceedings and proceedings before this Court.

CONCLUSION

For the foregoing reasons, Mr. Perrusquia respectfully requests that this Court reverse the decision below and (1) determine that the DA was a "records custodian" of the Sally Port Footage and the remainder of the Sheriff's investigative file and that the DA had a legal obligation to retain the requested public records; (2) grant Mr. Perrusquia the injunctive relief he requested; (3) conclude that the Sheriff and the DA

were required to disclose the Sally Port Footage in response to Mr. Perrusquia's public records request pursuant to Tenn. Code Ann. § 10-7-504(m)(1)(E); and (4) grant Mr. Perrusquia reasonable costs, including reasonable attorneys' fees, for both the trial and appellate proceedings.

Dated: August 14, 2023

Respectfully submitted,

/s/Paul R. McAdoo

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 14, 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 8,073 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: August 14, 2023

/s/ Paul R. McAdoo
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RULE 27(E) ADDENDUM

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

Tenn. Code Ann. § 10-7-503

(a)(1) As used in this part and title 8, chapter 4, part 6:

(A) "Public record or records" or "state record or records":

(i) Means 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; and

(ii) Does not include the device or equipment, including, but not limited to, a cell phone, computer, or other electronic or mechanical device or equipment, that may have been used to create or store a public record or state record;

(B) "Public records request coordinator" means any individual within a governmental entity whose role it is to ensure that public records requests are routed to the appropriate records custodian and that requests are fulfilled in accordance with § 10-7-503(a)(2)(B); and

(C) "Records custodian" means any office, official, or employee of any governmental entity lawfully responsible for the direct custody and care of a public record.

(2)(A) All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal 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.

(B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:

(i) Make the public record requested available to the requestor;

(ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or

(iii) Furnish the requester in writing, or by completing a records request response form developed by the office of open records counsel, the time reasonably necessary to produce the record or information.

Tenn. Code Ann. § 10-7-504

(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:

(A) Information and records about alarm and security systems used at the government building, including codes, passwords, wiring diagrams, plans and security procedures and protocols related to the security systems;

(B) Security plans, including security-related contingency planning and emergency response plans;

(C) Assessments of security vulnerability;

(D) Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity; and

(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. In addition, if the recordings are relevant to a civil action or criminal prosecution, then the recordings may be released in compliance with a subpoena or an order of a court of record in accordance with the Tennessee rules of civil or criminal procedure. The court or administrative judge having jurisdiction over the proceedings shall issue appropriate protective orders, when necessary, to ensure that the information is disclosed only to appropriate persons. Release of any segment or segments of the recordings shall not be construed as waiving the confidentiality of the remaining segments of the audio or visual tape.

(2) Information made confidential by this subsection (m) shall be redacted wherever possible and nothing in this subsection (m) shall be used to limit or deny access to otherwise public information because a file or document contains confidential information.

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.