

IN THE CHANCERY COURT OF CUMBERLAND COUNTY, TENNESSEE  
FOR THE THIRTEENTH JUDICIAL DISTRICT AT CROSSVILLE

HEATHER MULLINIX,

Petitioner,

v.

THE CITY OF CROSSVILLE,

Respondent.

FILED  
Date 10-16, 2023 at 2 AM/PM  
Entered \_\_\_\_\_  
BEN TOLLETT, CLERK & MASTER  
Cumberland County, Crossville, TN  
By: \_\_\_\_\_ AP

No. 2023-CH-2388

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

Petitioner Heather Mullinix submits this Memorandum of Law in Support of her 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 herein, the Court should order Respondent the City of Crossville (the "City") to file the requested public records under seal so that the Court may conduct an *in camera* review, grant the Petition, order the City to immediately produce the requested public record to Ms. Mullinix, and award Ms. Mullinix reasonable costs, including reasonable attorneys' fees.

**INTRODUCTION**

In this public records case, Ms. Mullinix seeks a copy of a report prepared by the law firm of Robinson, Smith and Wells (the "Robinson Report") at the request of the City. The City denied Ms. Mullinix's public records request for the Robinson

IN THE CHANCERY COURT OF CLATSOP COUNTY, TENNESSEE  
FOR THE THIRTEENTH JUDICIAL DISTRICT AT CROSVILLE

FILED  
10-16-2008 9:00 AM

CLERK OF COURT & MASTER  
CLATSOP COUNTY, TENNESSEE

Case No. 08-24-2888

PLAINTIFF

THE CITY OF CROSVILLE

DEFENDANT

vs.

ALSO TO OBTAIN WRIT OF HABEAS CORPUS  
FOR REMOVAL FROM CUSTODY  
AND TO OBTAIN WRIT OF HABEAS CORPUS  
FOR REMOVAL FROM CUSTODY

Plaintiff further submits that the defendant's failure to provide access to public records and to obtain a writ of habeas corpus for Plaintiff is a violation of the Tennessee Constitution. Plaintiff further submits that the defendant's failure to provide access to public records and to obtain a writ of habeas corpus for Plaintiff is a violation of the Tennessee Constitution. Plaintiff further submits that the defendant's failure to provide access to public records and to obtain a writ of habeas corpus for Plaintiff is a violation of the Tennessee Constitution. Plaintiff further submits that the defendant's failure to provide access to public records and to obtain a writ of habeas corpus for Plaintiff is a violation of the Tennessee Constitution.

INTRODUCTION

In this public records case, Plaintiff seeks a report prepared by the City of Crosville, Tennessee, and the City of Crosville, Tennessee, in the records of the City of Crosville, Tennessee. Plaintiff seeks a report prepared by the City of Crosville, Tennessee, and the City of Crosville, Tennessee, in the records of the City of Crosville, Tennessee.

Report, which looked into the events surrounding the City's closure of the Village Inn on July 27, 2022.

The central issue in this case is whether the City has waived any privileges that might apply to the Robinson Report by discussing it and its contents during a public discussion at an open City Council meeting on August 26, 2022. The minutes and transcription of the relevant portions of the City Council's open meeting show that members of the City Council openly discussed and used the Robinson Report as a sword to justify their positions on the firing of City Manager Greg Wood.<sup>1</sup> Now, the City seeks to use the attorney-client and/or attorney work product privileges as a shield to deny Ms. Mullinix's public records request and subsequent Petition. It is well established that privileges are waived when the party asserting the privilege has used it as both a sword and shield. As such, the City has waived any privileges that might have otherwise applied to the Robinson Report and Ms. Mullinix's Petition should be granted.

### **FACTUAL BACKGROUND**

#### **The City's Closure of the Village Inn and Commission of the Robinson Report**

On July 27, 2022, Crossville police officers arrived at the Village Inn to serve a search warrant in connection with an ongoing narcotics investigation. Pet. ¶ 5; Answer ¶ 5. Upon entering the premises, these officers discovered a number of safety and code violations and contacted other City personnel, including from the

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<sup>1</sup> Ms. Mullinix submitted both the minutes and a transcription of the City's recording of its August 26, 2022 meeting as attachments to her Petition.

Fire Department and Codes Department. Pet. ¶ 6; Answer ¶ 6. Based on these officers' observations of the conditions at the Village Inn, the facility was closed and its residents instructed to vacate by 8 p.m. that evening. Pet. ¶ 7; *see also* Answer ¶ (admitting that residents were instructed to leave the Village Inn by 8:00 p.m.). The next day, however, the Inn was reopened. Pet. ¶ 8; Answer ¶ 8.

At a specially called City Council meeting the following week on August 2, 2022, according to the City's minutes of that meeting, the City Council voted to retain Robinson, Smith and Wells, a Chattanooga-based law firm to conduct "an independent investigation." Pet. ¶ 11; Answer ¶ 11; Mullinix Decl. Attach. 3 at 2.<sup>2</sup> The law firm's "mission" was to "to determine the events" that transpired July 27-28, 2022 with respect to the Village Inn "and report them back to the City Council," whereupon the City Council would "use the findings however they choose." Mullinix Decl. Attach. 3 at 2.

At that same meeting, then-City Attorney Will Ridley also recommended that City Manager Greg Wood be suspended for his actions related to the Village Inn closure "due to his lack of seeking legal advice, lack of foresight to know that the closure should have gone through the due process in the court system before moving forward with the closure, and due to the fact that Mr. Ridley had relayed the proper process to the employees involved on four different occasions previously." Mullinix Decl. Attach. 3 at 2. The City Council voted to suspend the City Manager for three

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<sup>2</sup> Pagination for exhibits is to the underlying documents pagination. Ms. Mullinix's initial declaration was attached to the Petition as Exhibit A.

weeks “or until the investigation has been completed.” Pet. ¶ 15; Answer ¶ 15; Mullinix Decl. Attach. 3 at 2.

The Village Inn closure and the Robinson Report were also discussed at another specially called public meeting of the City Council on August 16, 2022. 2d Mullinix Decl. Attach. 1 at 2-3.<sup>3</sup> According to the minutes of the August 16, 2022 special meeting, Mr. Wood had submitted his resignation as City Manager and the City Council had received a preliminary report on the Village Inn investigation. *Id.* at 2. The City Council voted to “table discussion” regarding Mr. Wood’s resignation “until the final report has been received.” *Id.* at 3. The Robinson Report was provided to the members of the City Council on August 25, 2022. Pet. ¶ 18; Answer ¶ 18; Mullinix Decl. Attach. 5 at 2.

On August 26, 2022, the City Council held yet another specially called public meeting to consider, based on the Robinson Report, whether to terminate Mr. Wood. Pet. ¶ 20; Mullinix Decl. ¶ 10, Attach. 5 at 2-3. According to the meeting’s minutes, “Mayor Mayberry explained that the City Council voted to wait until the investigation/report was concluded before considering the City Manager’s resignation, which was rescinded August 19.” Mullinix Decl. Attach. 5 at 2. Mayor James Mayberry described the Report as “very lengthy and detailed” regarding the “events leading up to the closing of Village Inn.” Pet. ¶ 21; Answer ¶ 21; McAdoo

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<sup>3</sup> Ms. Mullinix’s second declaration was overnighted on October 12, 2023 for filing on October 13, 2023 as an attachment to a Notice of Filing.

Decl. Attach. 1 at 2:16-18.<sup>4</sup> Given the “procedural errors on and before July 27, 2022 by members of the Crossville Police Department, Emergency Management Agency, Codes Department, and Crossville Fire Department,” Mayor Mayberry moved to terminate Mr. Wood. Pet. ¶ 22; Answer ¶ 22; Mullinix Decl. Attach. 5 at 2. The Council members and City Attorney proceeded to discuss the Robinson Report in conjunction with Mayor Mayberry’s motion, referencing the Robinson Report in offering their opinions on whether to terminate Mr. Wood. Pet. ¶¶ 23-24, 26; Answer ¶¶ 23-24, 26; Mullinix Decl. Attach. 5 at 2-3; McAdoo Decl. Attach. 1 at 2:11-3:2; 3:18-4:3, 4:6-5:20; 5:23-6:7, 7:5-8:8. Council Member Art Gernt, for instance, stated that he read the Robinson Report and believed all the participants involved in the Village Inn’s closure acted in good faith and, as such, opposed firing the City Manager. Pet. ¶ 23; Answer ¶ 23; Mullinix Decl. Attach. 5 at 2; McAdoo Decl. Attach. 1 at 3:18-4:3. Council Member Rob Harrison echoed Mayor Mayberry’s description of the Report as “lengthy and detailed,” and concurred with Council Member Gernt’s conclusion that those involved in the closure acted “with good faith and good intentions.” Pet. ¶ 24; Answer ¶ 24; Mullinix Decl. Attach. 5 at 3; McAdoo Decl. Attach. 1 at 4:6-5:21.

The City Attorney, by contrast, recommended terminating the City Manager “[b]ased upon the actions that were [taken] without regard to the law and without regard to previous advice, and taken, in [his] opinion, from review of the report[,] knowingly.” Pet. ¶ 25; Answer ¶ 25; Mullinix Decl. Attach. 5 at 3; McAdoo Decl.

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<sup>4</sup> The undersigned’s declaration is attached the Petition as Exhibit B.

Attach. 1 at 5:23-6-7. Mayor Pro Tem Crawford offered a similar assessment, concluding that based on the Robinson Report the City failed to provide the Village Inn tenants due process. Pet. ¶ 26; Answer ¶ 26; Mullinix Decl. Attach. 5 at 3; McAdoo Decl. Attach. 1 at 6:12-8:8. After these extensive discussions regarding the Robinson Report and its contents, the Council voted to retain City Manager Wood. Pet. ¶ 27; Answer ¶ 27.

### **Ms. Mullinix's Public Records Request and the City's Response**

On September 14, 2022, Ms. Mullinix submitted a public records request to the City seeking a “copy of [the] investigative report distributed to [the] city council by [the] law firm Robinson, Smith [and] Wells of Chattanooga [on] August 25, 2022 regarding closure of the Village Inn.” Pet. ¶ 28; Answer ¶ 28; Mullinix Decl. ¶ 6, Attach. 1. On September 22, the City denied Ms. Mullinix's request, claiming “[t]he records ... are confidential by nature under Tennessee law and are not discoverable.” Pet. ¶ 29; Answer ¶ 29; Mullinix Decl. ¶ 7, Attach. 2. The City provided no other basis for its denial but indicated that it would reconsider its decision if Ms. Mullinix could produce “any legal authority” permitting access to the Robinson Report. Pet. ¶ 29 Answer ¶ 29; Mullinix Decl. ¶ 7, Attach. 2. Presumably, the City's characterization of the Robinson Report as “confidential” is based either on attorney-client privilege, attorney work product privilege, or both.

Undersigned counsel for Ms. Mullinix submitted a letter to City Attorney Randall York presenting legal authority supporting release of the Robinson Report. Pet. ¶ 30; Answer ¶ 30; McAdoo Decl. ¶ 5, Attach. 2. Although Mr. York did not

respond substantively to the undersigned, the City Council held a meeting on February 7, 2023, during which it considered whether to release the Robinson Report. Pet. ¶ 31; Mullinix Decl. ¶ 11, Attach. 6. Mayor Crawford noted that releasing the Report was necessary to achieve complete transparency into the events surrounding the Village Inn’s closure. Pet. ¶ 32; Answer ¶ 32. A decision was postponed until the following week, at which point the City Council summarily resolved to continue withholding the Report. Pet. ¶¶ 34-36; Answer ¶¶ 34-36 Mullinix Decl. ¶ 12, Attach. 7. This action followed.

## 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 (citation omitted) (the TPRA “serves a crucial role in promoting accountability in government through public oversight of governmental activities”).



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 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) (citing *City of Memphis*, 871 S.W.2d at 684) (explaining that the legislative mandate of the Public Records Act [is] very broad and ... requires disclosure of government records even when there are significant countervailing considerations”). 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 § 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);<sup>5</sup> *Arkansas Dep’t of Health v. Westark Christian Action Council*, 910 S.W.2d 199, 201 (1995) (holding that “[i]n conjunction with” Arkansas’s requirement that its public record law be “liberally construed ... to accomplish its

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<sup>5</sup> The Tennessee Supreme Court has said that Florida’s public records law is similar to the TPRA. *Cherokee Children & Family Servs.*, 87 S.W.3d at 74; *see also Elec. Power Bd.*, 979 S.W.2d at 302 (citing Florida case law).

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 Cty. 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)).

## **II. The Robinson Report is undoubtedly a public record.**

Inexplicably, the City denies in its Answer that the Robinson Report is a public record. *Compare* Pet. ¶ 41 (asserting that the Robinson Report is a “public record” under the TPRA) *with* Answer ¶ 41 (denying allegation in paragraph 41 of the Petition). Such a position is unsustainable given the clear definition of a public record in the TPRA.

A “public record” is defined in the TPRA as “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.” Tenn. Code Ann. § 10-7-503(a)(1)(A)(i). There is no question that the Robinson Report was received by the members of the City Council in connection with the transaction of the official business of the City. *Compare* Pet. ¶ 18 (alleging that “The Robinson Report was delivered to the City of August 25, 2022...”) *with* Answer ¶ 18 (admitting allegation in corresponding paragraph of the Petition “to the extent that the report, findings



and confidential advice ... was delivered on August 25, 2022” and was “shared with only the City of Crossville Council members and the city attorney”). As such, the City’s contention that the Robinson Report is not a public record should be flatly rejected.

**III. The Petition should be granted because the City waived any possible privilege that might have applied to the Robinson Report.**

Public records may only be withheld if they are “specifically exempt from disclosure.” Tenn. Code Ann. § 10-7-503(a)(2)(B); *see also* Tenn. Code Ann. § 10-7-503(a)(2) (“those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.”). In other words, all public records must be disclosed in response to a public records request unless they are specifically exempt under state law. Here, the City asserts that the Robinson Report is exempt because it is “attorney-client privileged and work product.”<sup>6</sup> City’s Motion for Summary Judgment (“City’s MSJ”) ¶ 13. While both the attorney-client privilege and the work product privilege may, in appropriate circumstances, exempt public records from release under the TPRA, any purported privileges here were waived by the City and, thus, the Robinson Report is not privileged and is exempt

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<sup>6</sup> The City has also asserted that Tenn. Code Ann. § 23-3-105 and § 23-3-107(6) exempt the Robinson Report from disclosure. Answer at 8 ¶ H. Tenn. Code Ann. § 23-3-105 only prohibits testimony of an attorney, which is not sought here. *Id.* (“No attorney, solicitor or counselor shall be permitted, in giving testimony ...”). Tenn. Code Ann. § 23-3-107(6) does not exist, but to the extent that the City meant to claim that Tenn. Code Ann. § 23-3-107 applies, it too only addresses testimony by an attorney. *Id.* (“Any attorney offering to give testimony...”).

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Motion for Summary Judgment ("City's MSJ") § 13. While both the attorney-client  
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public records from release under the TRPA, any proposed privileges here were  
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<sup>6</sup> The City has also asserted that Tenn. Code Ann. § 22-8-105 and § 22-8-107(a)  
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22-8-105 only prohibits testimony of an attorney which is not sought from an attorney  
subject or co-defendant in a pending lawsuit. Tenn. Code Ann. § 22-8-107(a) does not exist, but to the extent that the City meant to  
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from disclosure pursuant to the TPRA.<sup>7</sup> *See, e.g., State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust*, 209 S.W.3d 602, 616 n. 14 (Tenn. Ct. App. 2006) (“[E]ven when the privilege applies, it may be waived.”).

Under both the attorney-client privilege and attorney work product privilege, the City bears the burden of establishing that the privilege has not been waived. *Id.* (holding in the attorney-client privilege context that “[t]he party asserting the privilege or doctrine also has to demonstrate that it has not waived its protection with regard to the documents being sought”) (citing *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 221 (Tenn. Ct. App. 2002); *Boyd*, 88 S.W.3d at 221 (holding in attorney work product doctrine context that “[t]he party asserting the doctrine must also demonstrate that it has not waived its protection with regard to the documents being sought.”).

Furthermore, both the attorney-client and work product privileges can be waived by voluntarily divulging purportedly privileged information to third parties. *See, e.g., Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002) (citing *Hazlett v. Bryant*, 241 S.W.2d 121, 123 (Tenn. 1951); *Taylor v. State*, 814 S.W.2d 374, 377 (Tenn. Crim. App. 1991)); *see also State v. Buford*, 216 S.W.3d 323, 326 (Tenn. 2007) (finding that attorney-client privilege was waived when a client

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<sup>7</sup> As the Tennessee Supreme Court has explained, privileges “should not be broadly construed.” *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 525 (Tenn. 2010) (citations omitted); *see also State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust*, 209 S.W.3d 602, 616 n. 13 (Tenn. Ct. App. 2006) (“Since a privilege keeps relevant information from the trier of fact, courts typically hold that a privilege is to be strictly construed.”) (citation omitted).

“divulges the communications he seeks to protect”); *Moore Freight Servs., Inc. v Mize*, No. E2021-00590-COA-R3-CV, 2022 WL 325595, at \*15-18 (Tenn. Ct. App. Oct. 12, 2022) (affirming trial court holding that attorney-client privilege was waived as to internal investigation report when party, among other things, listed the report as basis for firing of defendant). Put another way, parties may not use the privilege as both a sword and a shield. *Buford*, 216 S.W.3d at 326 (“A client may not use his or her version of the events, involving the attorney, as a sword while raising the privilege as a shield to prevent the attorney from being used in responding to the attack.”) (quoting *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992)); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 787 (Tenn. Ct. App. 1999) (“Courts have universally held that a party is prevented from invoking the work product doctrine immunity as both ‘sword and shield.’”) (footnote citation omitted).

Even “[p]artial waiver of work product as well as attorney/client privilege can act to waive the entire privilege.” *Arnold*, 19 S.W.3d at 787. Waiver will be found where the party’s use of the document at issue is “unfair and inconsistent with a claim of privilege.” *Id.* (internal quotations and citations omitted); *see also Sharp v. Tennessee Dept. of Commerce and Insurance*, 2017 WL 5197291 at \*3 (Tenn. Ct. App. 2017) (“The work product doctrine may be waived...when the use of the document is unfair and inconsistent with the claim of privilege.”). The exact “scope of waiver by disclosure is defined by the ‘fairness doctrine,’ which aims to prevent

"through the communications he seeks to produce." *Am. Soc. of Civil Engrs.*, 301 U.S. 447, 455 (1938).  
 While the communications he seeks to produce are not "testimonial" in nature, the privilege  
 Oct. 12, 1938) (affirming trial court holding that attorney-client privilege was  
 waived as to letters of investigation reports which party sought to produce. Held,  
 the report is based on facts (not on opinion) and that whether or not the party  
 the privilege as both a sword and a shield. *Rayburn*, 316 S.W.2d at 328 (CA Okla.  
 may not use his or her version of the event. In giving the attorney as a sword  
 while raising the privilege as a shield to prevent the attorney from being used in  
 responding to the attack." (quoting *Am. Soc. of Civil Engrs.*) 301 U.S. 447, 455 (1938) (Tenn. Civ. Ct.  
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 claim of privilege. (For general principles and citations on this point see also *Am. Soc.*  
 Tennessee Dept. of Commerce and Transportation v. *Am. Soc. of Civil Engrs.*, 301 U.S. 447, 455 (1938) (Tenn. Civ.  
 App. 2017) (The work product doctrine may be waived when the use of the  
 document is unfair and inconsistent with the claim of privilege." (The exact scope  
 of waiver by disclosure is defined by the fairness doctrine, which aims to prevent



the prejudice and distortion that may be caused by one party's selective disclose of otherwise protected information.” *Arnold*, 19 S.W.3d at 787.

The Tennessee Court of Appeals faced similar situations to the one presented in the instant case in *Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 1999), and *Sharp v. Tennessee Department of Commerce*, No. M2016-COA-R3-CV, 2017 WL 2197291 (Tenn. Ct. App. Apr. 11, 2017), and, in both cases, found that the asserted privileges were waived.

In *Arnold*, the City of Chattanooga commissioned reports related to a possible acquisition of a water company. 19 S.W.3d at 781. A local media outlet then sued for these reports under the TPRA. *Id.* The court explained that “[b]y stating [in a public meeting] that this report existed and its findings supported the feasibility of the acquisition, the City has, in effect, selectively used the reports in a public relations offensive to convince the City Council and the general public that the acquisition was both economically feasible and beneficial.” *Id.* at 788. The court continued,

By making this report a focal point at the two public meetings, the City has, in effect, waived its right to claim the work product privilege. The City has used these reports as a sword in aid of acquiring the water company, and the authorities hold, a party may not use a work product to publicly further its cause offensively as a sword, and then assert the benefit of privilege as a shield.

*Id.* As a result, the court found the city to have waived the work product privilege and required the reports to be disclosed in response to the TPRA suit. *Id.*

The Tennessee Court of Appeals reached a similar conclusion in *Sharp*, another public records case, where the plaintiff sought access to a Tennessee Department of Commerce and Insurance audit investigation report. 2017 WL 5197291 at \*1. The audit had been used to fire an employee and revoke the licenses of several individuals. *Id.* The Court of Appeals noted that “some of the information contained in the report was relied upon as justification for the Department’s intent to dismiss [its employee]” and concluded that “[t]he use of the report in this manner is inconsistent with a claim of privilege.” *Id.* at \*4. Consequently, the court found the department waived any claim of privilege it might otherwise have had. *Id.* at \*4 (citing *Arnold*, 19 S.W.3d at 787).

Similar to *Arnold*, the Robinson Report was the focal point of half the specially called August 26, 2022 City Council meeting and was also discussed at the August 2, 2022 and August 16, 2022 specially called meetings. Pet. ¶¶ 11-27; Mullinix Decl. Attachs. 3, 5; 2d Mullinix Decl. Attach. 1; McAdoo Decl. Attach. 1. The City Council and City Attorney Ridley here, like the city in *Arnold*, not only acknowledged the Robinson Report’s existence, but they also repeatedly invoked the Robinson Report in deliberating and voting on the City Manager’s continued employment. Pet. ¶¶ 20-27; Mullinix Decl. Attach. 5 at 2-3; McAdoo Decl. Attach. 1 at 2-9-3:10, 3:18-23, 4:7-4:12, 4:23-5:13, 5:23-6:7, 7:21-8:8. For example, the minutes of the August 26, 2022 meeting underscore that “Council Member Art Gernt began the discussion stating that after reviewing the report, he felt all parties involved acted in good faith.” Mullinix Decl. Attach. 5 at 2

The transcript of the relevant discussion at the August 26, 2022 specially called meeting is even more telling. Mayor Mayberry began the discussion regarding the Robinson Report and whether to retain Mr. Wood by explaining that “[t]he council received this very lengthy and detailed report on the events leading up to the close of the Village Inn yester – is what we received yesterday.” McAdoo Decl. Attach. 1 at 2:16-19. Then Mayor Mayberry appears to refer to the contents of the Robinson Report when he explains that “[i]n reference to those events, prior to and including July 27th, where there were procedural errors made in the closing and where members of the Crossville Police Department, SWAT team, EMS, codes department, and fire department were all involved, and as was stated in Mr. Wood’s resignation in his capacity as city manager, the responsibility falls on his shoulders.” *Id.* at 2:20-3:2.

After Mayor Mayberry moved to terminate Mr. Wood, Council Person Gernt said, evidently referring to the Robinson Report: “I have gone through this and read this thing and – and just put, I mean, numerous hours into thinking about this. And when I read things, it – I believe all of the participants who were there acted in good faith.” *Id.* at 3:3-10, 3:18-23.

Council Person Harrison then spoke and stated: “I’ve been doing a lot of reading because it was lengthy and detailed” and “[t]he current situation has been unfortunate, and I believe everyone – I believe everyone involved acted with good faith and good intentions, but things got out of hand and proper procedures weren’t followed for whatever reason.” *Id.* at 4:7-8, 4:23-5:2. Council Person Harrison also

commented: “I believe we need to take corrective actions, learn from this, and try to do better, and move on with the good people we have and not go trying to find new people who will have their own imperfections,” before noting some specific corrective actions he would like to see implemented. *Id.* at 5:2-17.

The City Attorney, Mr. Ridley, then explained that “[b]ased upon the actions that were ... taken without regard to the law and without regard to previous advice, and taken, in my opinion, *from review of the report* knowingly, that it is my recommendation that you terminate the city manager.” *Id.* at 6:1-5 (emphasis added).

Mayor Pro Tem Crawford stated his opinion that “we did not give the tenants of that building due process” and “we go *through the report* – ultimately, just like I am in my business, I have to own it if things are going good. I have to own it when things are going bad.” *Id.* at 7:5-6, 7:21-24. Mayor Pro Tem Crawford further stated that “my decision is based off of those facts I mentioned plus trying to protect the city from liability.” *Id.* at 8:3-5.

It was only after the foregoing discussion that included references to the Robinson Report and its contents that the Council members voted on Mayor Mayberry’s motion to terminate the City Manager. *Id.* at 8:12-22. In other words, the City Council used the Robinson Report as a sword to justify its actions, partially disclosed its contents, and now seeks to use the privileges as a shield to prevent the public from accessing the Robinson Report. The Courts in *Arnold* and *Sharp*

concluded that the same conduct constituted waiver of any asserted privileges and, this court should make the same finding here.

The City cannot publicly discuss the existence and contents of the Robinson Report and then claim that the report is privileged and may be withheld from public disclosure. Such actions are inconsistent with the privileges asserted and would likewise be inconsistent with what “[c]ourts have universally held:” that “a party is prevented from invoking the work product doctrine as both a ‘sword and shield.’” *Arnold*, 19 S.W.3d at 787 (footnote citation omitted). As such, the City has waived whatever privileges might otherwise apply and the Court should grant Ms. Mullinix’s Petition.

**IV. The Court should order the City to file the Robinson Report under seal for *in camera* review.**

Tenn. Code Ann. § 10-7-505(b) provides that “[t]he court may direct that the records being sought be submitted under seal for review by the court and no other party.” Consistent with this provision, Ms. Mullinix asks in her Petition that the Court, among other things, “[o]rder the City to provide a copy of the Robinson Report sought in this Petition to the Court for *in camera* review ...” Pet. at 10. Ms. Mullinix reiterates here her request that Court order the City to submit the Robinson Report to the Court under seal for *in camera* review, consistent with Tenn. Code Ann. § 10-7-505(b). Such a ruling would help the Court determine whether the privilege has been waived and would facilitate any potential appellate review by making the Robinson Report a part of the record in this proceeding.

concluded that the same conduct occurred without any asserted privileges and this court should make the same finding here.

The City cannot properly object to the existence and contents of the Robinson report and then claim that the report is privileged and may be withheld from public disclosure. Such actions are inconsistent with the privileges asserted and would likewise be inconsistent with the public policy of the state. The City has waived whatever privileges might otherwise apply and the court should grant the

Robinson Report

IV. The Court should order the City to file the Robinson Report under seal for in camera review.

Tenn. Code Ann. § 10-7-505(b) provides that "[i]f the court may direct that the records being sought be submitted under seal for review by the court and no other party," consistent with this provision the Motion asks in part that the Court, among other things, "order the City to provide a copy of the Robinson Report sought in this Motion to the Court for in camera review..." Part of the Motion asks that the Court order the City to submit the Robinson Report to the Court under seal for in camera review, consistent with Tenn. Code Ann. § 10-7-505(b). Such a ruling would help the Court determine whether the privilege has been waived and would facilitate any potential appeal review by making the Robinson Report a part of the record in the proceeding.

**V. Ms. Mullinix should be awarded reasonable attorneys' fees and costs.**

The TPRA requires 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.” Tenn. Code Ann. § 10-7-505(g). 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 municipality 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). “If a municipality 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 City willfully refused to disclose the records requested by Ms. Mullinix. As demonstrated above, binding case law, including *Arnold*, demonstrates that the City’s denial is not supported by existing law, or by any good faith argument for modification of existing law.

The Court of Appeals’ published decision in *Friedmann* illustrates why reasonable costs and attorneys’ fees are warranted here. In *Friedmann*, a journalist sought records from the Marshall County Sheriff that were admittedly public. 471 S.W.3d at 429. The Sheriff maintained, however, that the journalist was required

to appear in person to request the records. *Id.* The journalist, his attorney, and the Tennessee Office of Open Records Counsel (the “OORC”) informed the Sheriff’s attorney he could not require that the request be made in person, but the Sheriff insisted on personal appearance to make a public records request, purportedly on the advice of counsel. *Id.* at 430. The trial court granted the journalist’s petition, ordered the Sheriff to produce the requested public records, but declined to award attorneys’ fees. *Id.* at 431. The Court of Appeals reversed the trial court’s denial of the attorneys’ fees request under the abuse of discretion standard, explaining that “[g]iven the state of the law and the communication of that law to both the Sheriff’s Office and the County Attorney, [the Sheriff’s] failure to comply with [the journalist’s] request was willful.” *Id.* at 440-41.

The same is true here. The state of the law is clear and counsel for Petitioner communicated that law to the City’s attorney in a December 20, 2022 letter. Pet. ¶ 30; McAdoo Decl. ¶ 5, Attach. 2. In that letter, counsel for Petitioner directed the City Attorney to *Arnold v. City of Chattanooga* and *Sharp v. Tennessee Department of Commerce*, both of which support Petitioner’s access to the Robinson Report and the inapplicability of either asserted privilege. McAdoo Decl. Attach. 2. As discussed in more detail herein, *Arnold* and *Sharp* make clear that the City’s use of the Robinson Report as a “sword” to publicly justify its actions precludes its use of either asserted privilege as a “shield” to prevent public access to the otherwise public record. *Arnold*, 19 S.W.3d at 788; *Sharp*, 2017 WL 5197291 at \*4. The City, however, chose to ignore those appellate precedents and continues to withhold the



Robinson Report, despite the lack of authority supporting its position. The relative worth of the legal justification offered by the City in withholding the Report is therefore sufficiently low to warrant a finding of willfulness here. Just as the Court of Appeals found that attorneys' fees were necessary in *Friedmann*, the Court here should likewise grant Petitioner reasonable costs, including reasonable attorneys' fees.

### CONCLUSION

For the foregoing reasons and those presented in the Petition, Ms. Mullinix respectfully requests that the Court order the City to file the Robinson Report with the Court under seal so that no other party may access it, order the City to release the requested Robinson Report to Petitioner, find that the City's refusal to provide the Robinson Report to Ms. Mullinix was knowing and willful, and exercise its discretion to award reasonable attorneys' fees and costs in this matter to Ms. Mullinix.

Respectfully submitted,



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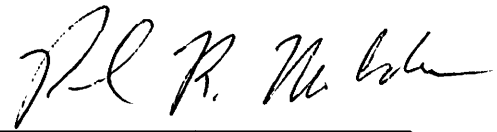
*Counsel for Petitioner*

**CERTIFICATE OF SERVICE**

I certify that on this 13<sup>th</sup> day of October, 2023, I caused a true and correct copy of the foregoing document to be served by U.S. Mail on:

Randall A. York  
Daniel H. Rader, IV  
46 N. Jefferson Avenue  
Cookeville, TN 38501

*Counsel for the City*



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Counsel for Petitioner