

FILED
CHANCERY COURT

IN THE CHANCERY COURT OF KNOX COUNTY, TENNESSEE
FOR THE SIXTH JUDICIAL DISTRICT AT KNOXVILLE

2024 MAR 11 AM 8:26

J SCOTT GRISWOLD

JOHN BECKER,

Petitioner,

v.

THE UNIVERSITY OF TENNESSEE,

Respondent.

No. 208439-1

**PETITION FOR ACCESS TO PUBLIC RECORDS AND
TO OBTAIN JUDICIAL REVIEW OF DENIAL OF ACCESS**

Pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503, *et seq.* (the "TPRA"), Petitioner John Becker hereby petitions this Court for access to public records, judicial review of Respondent's decisions to deny access to those public records, an order setting an expedited show cause hearing, an order requiring Respondent to file the requested public records under seal to facilitate *in camera* review of them pursuant Tenn. Code Ann. § 10-7-505(b), and reasonable attorneys' fees and costs pursuant to Tenn. Code Ann. § 10-7-505(g). Petitioner also seeks declaratory and injunctive relief pursuant to the TPRA and Tenn. Code Ann. § 1-3-121. Supporting declarations verifying the specified facts alleged herein are attached.

PARTIES

1. Petitioner John Becker is an award-winning journalist and a resident of 4131 Forest Glen Drive, Knoxville, TN 37919, within Knox County, Tennessee. As such, Mr. Becker is a citizen of Tennessee. For eighteen years, Mr. Becker has been reporting for WBIR-TV. Mr. Becker has embedded with U.S. troops during the war

in Iraq, documented a return trip to Vietnam with veterans 50 years after that war, and recorded the journey of two East Tennessee veterans back to France 70 years after D-Day. In addition to anchoring the evening news at WBIR-TV in Knoxville, his recent work includes producing and moderating the half-hour weekly program *Inside Tennessee*. Mr. Becker's work address is 1513 Bill Williams Avenue, Knoxville, TN 37917-3851. Becker Decl. ¶¶ 4-5 (attached hereto as Exhibit A).

2. Respondent University of Tennessee ("UT" or the "University") is Tennessee's flagship public research university, located at 1212 Volunteer Blvd, Knoxville, Tennessee, 37996. Its current president is Randy Boyd. Service of process upon Respondent will be made by delivering a copy of the summons, this Petition, and accompanying declarations to the attorney general of the state, pursuant to Tennessee Rule of Civil Procedure 4.04(6).

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this petition and venue is proper in this Court under Tenn. Code Ann. § 10-7-505(b). This Court also has subject matter jurisdiction over this petition pursuant to Tenn. Code Ann. § 1-3-121.

FACTUAL ALLEGATIONS

Oak Ridge National Laboratory and UT-Battelle LLC

4. Oak Ridge National Laboratory ("ORNL") in Oak Ridge, Tennessee is the U.S. Department of Energy's largest science and energy laboratory.

5. UT-Battelle, LLC ("UT-Battelle") is a limited liability company organized under the laws of Tennessee that administers and operates ORNL on behalf of the U.S. Department of Energy ("DOE") pursuant to a contract between UT-

Battelle and DOE. See Oak Ridge National Laboratory, *ORNL Prime Contract* (last accessed Feb. 12, 2024), <https://primecontract.ornl.gov/>.

6. UT-Battelle's members consist of the University of Tennessee and Battelle Memorial Institute, which each own 50 percent of the LLC. North Decl. Attach. 2 at 35 (attached as Exhibit B).

7. UT-Battelle began operating on July 13, 1999 pursuant to an operating agreement between UT and Battelle Memorial. North Decl. Attach. 4.

8. UT-Battelle currently operates pursuant to an operating agreement entered into by UT and Battelle Memorial on March 13, 2007. North Decl. Attach. 2.

**The University's Denial of Petitioner's Records Request for UT
Correspondence and Agreements**

12. On August 29, 2022, Mr. Becker made a public records request to the University of Tennessee which, as narrowed on November 8, 2022, sought all records received by University of Tennessee President Randy Boyd, David L. Miller, Jeff Smith, Brian Dickens, Luke Lybrand, Jamie Blessinger, and Stacey Patterson "from Oak Ridge National Laboratory or UT Battelle LLC from January 1, 2022 to present," and "all operating agreements, partnership agreements, or other agreements regarding the formation and operation of UT Battelle between and including UT and Battelle Memorial Institute." Becker Decl. ¶ 6, Attach. 1.

13. David L. Miller is the University's Senior Vice President and Chief Financial Officer.

14. Jeff Smith is the University's Interim Vice President for Research and served for over twenty years as Deputy for Operations at Oak Ridge National Laboratory.

15. Brian Dickens is the University's Chief Human Resources Officer.

16. Luke Lybrand is the University's Treasurer.

17. Stacey Patterson is the University's former Vice President for Research, Outreach, and Economic Development and former President of the University's Research Foundation. Ms. Patterson was also UT's liaison to UT-Battelle.

18. Jamie Blessinger is the Executive Assistant to the University's president.

19. On March 15, 2023, Charles Primm, UT's Public Records Coordinator, informed Mr. Becker that some records responsive to his request were available for inspection, but others were being withheld because (1) they are in draft form; (2) they contain trade secrets; (3) they are exempt under the federal Procurement Integrity Act; (4) UT does not consider them "to be public records because the recipient received them in their capacity other than their University employment, such as their capacity as a UT Battelle board member"; and/or (5) they relate to applicants for academic appointments. Becker Decl. ¶ 7, Attach. 2.

20. Mr. Primm's March 15, 2023, email also communicated that records or portions thereof that describe ongoing or proposed research projects would be withheld. Becker Decl. ¶ 7, Attach. 2. Petitioner does not contest this basis for withholding.

21. Mr. Primm also provided a list of example statutes that UT claimed exempted some unspecified number of public records from production. Specifically, UT claimed using a “See, e.g.” cite that the following provisions exempted some of the requested public records from inspection: Tenn. Code Ann. “§§ 10-7-5603(a)(1) & (a)4; 10-7-504(a)(9)(C); 47-25-1701 et seq.; 49-7-120; 18 U.S.C. § 1831 et seq.; 41 U.S.C. § 2101 et seq.; 5 U.S.C. § 552 & 552a and applicable privileges including the attorney-client privilege, the joint interest privilege, and the deliberative process privilege.” Becker Decl. Attach. 2.

22. The University provided no facts, affidavits, or privilege logs to support its blanket privilege assertions. Becker Decl. Attach. 2; McAdoo Decl. Attach. 2 (attached as Exhibit C).

23. Mr. Becker’s colleague, John North, inspected the public records that were made available by UT on April 19, 2023. North Decl. ¶ 4.

24. The records Mr. North inspected did not include any operating agreements for UT–Battelle. North Decl. ¶ 5.

25. On June 15, 2023, Mr. Becker’s undersigned counsel, by letter, responded to UT’s partial denial of his request (the “Appeal Letter”) and challenged the University’s purported bases for withholding large swaths of the requested records and portions thereof, including UT’s failure to produce the UT–Battelle operating agreement(s). McAdoo Decl. ¶ 4, Attachs. 1–2.

26. Regarding the lack of operating agreements in the public records made available for inspection, the undersigned noted that “[i]t is hard to imagine how UT

does not have any agreements pertaining to this critical, multi-million-dollar joint venture partially owned by UT.” McAdoo Decl. Attach. 2.

27. In response to the University’s contention that it may withhold draft records, the Appeal Letter communicated that counsel was “aware of no exception to the Tennessee Public Records Act” categorically covering draft documents—because there is none—and “request[ed] that UT produce the withheld draft documents for inspection.” McAdoo Decl. Attach. 2 at 2.

28. The Appeal Letter also communicated, in response to the example list of purported exemptions proffered by Mr. Primm, that the University was required by law to specify every “basis for the denial” of Mr. Becker’s request, Tenn. Code Ann. § 10-7-503(a)(2)(B)(ii), not just “examples of the basis.” McAdoo Decl. Attach. 2 at 2.

29. The Appeal Letter also responded to the University’s contention that federal law—including the federal Freedom of Information Act (“FOIA”)—somehow operates to bar disclosure of records under the TPRA, noting that federal FOIA, federal trade secret law and federal procurement laws are not exemptions to the TPRA. McAdoo Decl. Attach. 2 at 2.

30. Finally, the Appeal Letter responded to UT’s contention that “some of the[] records are not considered . . . to be public records because the recipient received them in their capacity other than their University employment, such as their capacity as a UT Battelle board member.” McAdoo Decl. Attach. 2 at 2. Undersigned counsel noted that this position is untenable in light of the fact that “those UT employees serve on the UT Battelle board because of their employment at UT—a 50% owner of

UT Battelle.” *Id.* Indeed, “[the]se records are received by those officials in connection with the transaction of official business of UT because, but for their positions at UT, they would not be on the UT Battelle board.” *Id.*

31. On July 14, 2023, Thomas Harold Pinkley, Associate General Counsel of the University, responded to the Appeal Letter. McAdoo Decl. ¶ 5, Attach. 3.

32. In his July 14, 2023 letter, Mr. Pinkley claimed that it is the University’s position that the requested operating agreement(s) are “not [] public records, both under trade secrets law and under the Federal Procurement Integrity statute, 41 U.S.C. §§ 2101-07.” McAdoo Decl. Attach. 4.

33. Mr. Pinkley’s July 14, 2023 letter did not otherwise link any other purported exemptions identified in Mr. Primm’s March 15, 2023 communication to any other category of records withheld by the University. *See* McAdoo Decl. Attach. 4.

34. In his July 14, 2023 letter, Mr. Pinkley also stated that “federal documents, such as documents prepared by the United States Department of Energy, that would be exempt from disclosure by DOE if DOE received a FOIA request for them, are also exempt from disclosure under Tennessee law[.]” McAdoo Decl. Attach. 4 at 2.

35. Mr. Pinkley further claimed that all of federal law is a basis for withholding public records under the TPRA pursuant to Tenn. Code Ann. § 10-7-504(a)(9)(C), claiming that this subdivision of the statute, “is clearly a stand-alone provision and is not limited to veterinary or agricultural grounds,” which are what

the other portions of Tenn. Code Ann. § 10-7-504(a)(9) pertain to. McAdoo Decl. Attach. 4 at 1-2.

36. Finally, Mr. Pinkley communicated an entirely new basis for noncompliance with Mr. Becker's request: that Petitioner's request for records "received by a list of seven University administrators from ORNL or UT-Battelle over a roughly one-year period was not a proper request under the Public Records Act" as it was "overly broad," among other things. McAdoo Decl. Attach. 4 at 2.

37. Despite Mr. Pinkley's assertion that the UT-Battelle operating agreements were completely covered by purported trade secret exemptions and other federal law, on August 11, 2023, Mr. Primm provided Mr. North with a redacted version of the current, 2007 operating agreement for UT-Battelle in response to Mr. Becker's request. North Decl. ¶ 6.

38. Mr. Primm claimed that redactions were made to the 2007 operating agreement copy pursuant to "Tenn. Code Ann. §§ 10-7-503(a)(2)(A) and 47-25-1701 et seq.; Tenn. Code Ann. § 10-7-504(a)(9)(C) and 18 U.S.C. § 1831 et seq.," and that "[t]hese have to do with trade secrets being protected information." North Decl. Attach. 1.

39. On August 22, 2023, in response to Mr. Becker's request, Mr. Primm provided Mr. North with the original, 1999 operating agreement for UT-Battelle and asserted the same exemptions (Tenn. Code Ann. §§ 10-7-503(a)(2)(A) and 47-25-1701 et seq.; Tenn. Code Ann. § 10-7-504(a)(9)(C) and 18 U.S.C. § 1831 et seq.) as the basis for redactions made to the copy of the current, 2007 operating agreement provided to

Mr. North, stating that “[i]t has been redacted to protect information considered trade secrets.” North Decl. Attach. 3.

40. Mr. Primm also noted that “the subheadings of the relevant sections [of the 1999 operating agreement] are unredacted.” North Decl. Attach 3.

The Redactions to the Operating Agreements

41. UT redacted from the original, 1999 operating agreement, (1) section 4.1(b) entitled “Governors,” presumably including composition of UT–Battelle’s Board of Governors; (2) the entire section 4.3 (except subsection titles) entitled “Matters Reserved to the Executive Group; Committees and Subcommittees; Delegation of Authority”; (3) section 5.1 entitled “Capital Accounts”; (4) section 6.3 entitled “Allocation of Net Profits and Net Losses: Book Allocation”; and (5) section 6.4 entitled “Allocation of Profits and Losses: Tax Allocations.” North Decl. Attach. 4 at 6, 8–10, 14, 15–18.

42. UT made the same redactions to the current, 2007 operating agreement and further redacted section and subsection headings and titles.

43. UT–Battelle previously made public the identities of its Board of Governors, some of whom also publicize their board roles. McAdoo Decl. Attachs. 7–9.

44. Both UT and Battelle Memorial openly publicize the members of their boards. McAdoo Decl. Attachs. 5–6.

45. Many of the entities that manage other national laboratories also make their board compositions public. McAdoo Decl. Attachs. 10–17.

CLAIM FOR RELIEF

Respondent's Improper Withholding and Redaction of Public Records

46. Petitioner incorporates the allegations in paragraphs 1 through 45.

47. Mr. Becker is a citizen of Tennessee with standing to request public records and to bring suit under the TPRA.

48. The records sought by Mr. Becker, including the two operating agreements, are public records within the meaning of Tenn. Code Ann. § 10-7-503(a)(1) because they were made or received by the University and its personnel pursuant to law or ordinance or in connection with the transaction of the University's official business.

49. The University's withholding of information related to academic appointments is unsupported by law.

50. The University's averment that responsive documents may be withheld if they exist in draft form is unfounded, as there does not exist a TPRA exemption for draft records.

51. The asserted federal law exemptions—including, but not limited to, the Defend Trade Secrets Act, the Freedom of Information Act, and the Federal Procurement Integrity Act—are inapplicable and are not the proper basis for withholding public records under the TPRA.

52. Tenn. Code Ann. § 10-7-504(a)(9)(C) does not incorporate all of federal law into the TPRA, but instead only applies to the records or information received by the Tennessee Department of Agriculture specified in Tenn. Code Ann. § 10-7-

504(a)(9)(B), which, upon information and belief, is not included in any of the withheld public records.

53. Upon information and belief, none of the public records withheld based on trade secret law are trade secrets exempt from the TPRA.

54. Moreover, the redacted portions of the two operating agreements are not trade secrets exempt from the TPRA.

55. Upon information and belief, Respondent's invocations of privilege—the attorney-client privilege, the joint interest privilege, and the deliberative process privilege—are improper, because the University has alleged no facts to support such invocations and thus has not and cannot carry its burden to justify withholding the requested public records.

56. Upon information and belief, some or all of the withheld public records are not covered by the attorney-client privilege because the University has not established every element of the privilege, including but not limited to that the communications involved the subject matter of the representation (including that it is legal advice and not business advice), the communications were intended to be kept confidential, and the privilege was not waived.

57. The University has also not carried its burden to show that the attorney-client privilege applies to any withheld public records because the University has not produced an affidavit from its attorney establishing the required elements and has not produced a detailed privilege log.

58. Upon information and belief, some or all of the withheld public records are not covered by the joint interest privilege, more commonly referred to as the common interest privilege because the University has not established every element of the privilege, including but not limited to that the otherwise privileged information was disclosed due to actual or anticipated litigation, that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation, that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and that the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information.

59. The University has also not carried its burden to show that the common interest privilege applies to any withheld public records because the University has not produced an affidavit from its attorney establishing the required elements and has not produced a detailed privilege log.

60. The asserted deliberative process privilege has not been established by statute, binding case law, or other state law, and is not an exception to the TPRA.

61. Alternatively, to the extent the Court finds that a deliberative process privilege has been established in Tennessee and is an exception to the TPRA, such a privilege would not apply to the withheld public records because they were exchanged with UT-Battelle.

62. Alternatively, to the extent the Court finds that a deliberative process privilege has been established in Tennessee and is an exception to the TPRA, such a

privilege would not apply to some or all of the withheld public records because some or all of the information in the withheld public records is factual and not deliberative in nature and because some or all of the information in the withheld public records is postdecisional and not predecisional.

63. Alternatively, to the extent the Court finds that a deliberative process privilege has been established in Tennessee and is an exception to the TPRA, such a privilege would not apply to the withheld public records because the University did not assert the privilege in a detailed affidavit and no detailed privilege log was provided to Petitioners in support of withholding those records.

64. Alternatively, to the extent the Court finds that a deliberative process privilege has been established in Tennessee and is an exception to the TPRA, such a privilege would not apply to the withheld public records because the public interest in these records outweighs any interests in secrecy.

65. The University's assertion that Mr. Becker's public records request is not a "proper request" under the TPRA is unsupported by law, as the request was indeed reasonably described, discrete in scope, and otherwise an appropriate request for records squarely subject to the Act. Any withholding based on the breadth or language of Mr. Becker's public records request is thus improper.

66. To the extent the University cites to any other purported basis to withhold public records not otherwise asserted to date, such bases are waived and inapplicable to the requested public records.

67. Mr. Becker is entitled to access the requested public records, except those he has specifically noted he is not challenging.

68. Tenn. Code Ann. § 10-7-505(g) provides that the Court may award “all reasonable costs involved in obtaining the records, including reasonable attorneys’ fees” if the government “knew the record was public and willfully refused to disclose it.”

69. UT knew that the requested public records were non-exempt public records and willfully refused to disclose them.

70. Mr. Becker is entitled to access to the requested public records as well as an award of all reasonable costs, including reasonable attorneys’ fees.

PRAYER FOR RELIEF

WHEREFORE, Petitioner John Becker prays that this Court:

A. Immediately issue an order, pursuant to Tenn. Code Ann. § 10-7-505(b), requiring Respondent to appear before this Court and show cause, if they have any, why this petition should not be granted;

B. Immediately issue an order pursuant to Tenn. Code Ann. § 10-7-505(b) requiring Respondent to file the withheld public records and unredacted versions of the two operating agreements under seal for review by the Court *in camera* and no other party with an explanation regarding what exemptions are being asserted for which records and/or redactions;

C. Immediately issue an order requiring Respondent to provide the Court and Petitioner with a detailed privilege log for the requested public records that were withheld on the basis of privilege;

D. Grant Petitioner a declaratory judgment that the records sought are public records under Tennessee Law for which no exemption applies and that the University's failure to grant access to Mr. Becker to these public records constitutes a violation of the TPRA, which was knowing and willful;

E. Order Respondent to immediately provide Mr. Becker with copies of the records he requested;

F. Grant injunctive relief against the University pursuant to Tenn. Code Ann. §10-7 505(d) and Tenn. Code Ann. § 1-3-121 to secure the purposes and intentions of the TPRA;

G. Grant Petitioner reasonable costs and attorneys' fees pursuant to Tenn. Code Ann. § 10-7-505(g);

H. Grant Petitioner discretionary costs under Tenn. R. Civ. P. 54; and

I. Grant Petitioner all further relief to which he may be entitled.

Respectfully submitted,



Paul R. McAdoo (BPR No. 034066)

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6688 Nolensville Rd. Suite 108-20

Brentwood, TN 37027

Phone: 615.823.3633

Facsimile: 202.795.9310

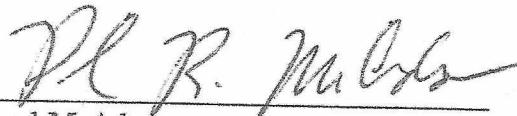
pmcadoo@rcfp.org

Counsel for Petitioner

COST BOND

We hereby acknowledge ourselves sureties in this cause pursuant to Tenn.
Code Ann. § 20-12-120.

Reporters Committee for Freedom of
the Press

A handwritten signature in cursive script, appearing to read "P. R. McAdoo", written over a horizontal line.

Paul McAdoo