


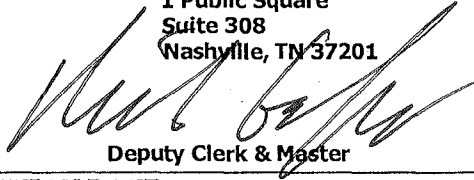
# ORIGINAL SUMMONS

STATE OF TENNESSEE 20 <sup>TH</sup> JUDICIAL DISTRICT CHANCERY COURT	<b>ORIGINAL SUMMONS</b>	CASE FILE NUMBER <div style="font-size: 1.2em; font-family: cursive;">12-1769-II</div>
<b>PLAINTIFF</b> The Tennessean, et al.		<b>DEFENDANT</b> Tennessee Department of Children's Services
<div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <b>TO: (NAME AND ADDRESS OF DEFENDANT)</b>            Commissioner Kathryn O'Day            Tennessee Department of Children's Services            Cordell Hull Bldg., 7<sup>th</sup> Floor            Nashville, TN 37243         </div> <div style="width: 35%;"> <b>Method of Service:</b>  <input type="checkbox"/> G Certified Mail  <input type="checkbox"/> G Davidson Co. Sheriff  <input type="checkbox"/> G *Comm. Of Insurance  <input type="checkbox"/> G *Secretary of State  <input type="checkbox"/> G *Out of County Sheriff  <input checked="" type="checkbox"/> X Private Process Server  <input type="checkbox"/> G Other         </div> </div> <p>List each defendant on a separate summons. <span style="float: right;">*Attach Required Fees</span></p>		
<p><b>YOU ARE SUMMONED TO DEFEND A CIVIL ACTION FILED AGAINST YOU IN CHANCERY COURT, DAVIDSON COUNTY, TENNESSEE. YOUR DEFENSE MUST BE MADE WITHIN THIRTY (30) DAYS FROM THE DATE THIS SUMMONS IS SERVED UPON YOU. YOU MUST FILE YOUR DEFENSE WITH THE CLERK OF THE COURT AND SEND A COPY TO THE PLAINTIFF'S ATTORNEY AT THE ADDRESS LISTED BELOW. IF YOU FAIL TO DEFEND THIS ACTION BY THE ABOVE DATE, JUDGMENT BY DEFAULT CAN BE RENDERED AGAINST YOU FOR THE RELIEF SOUGHT IN THE COMPLAINT.</b></p>		
<b>Attorney for plaintiff or plaintiff if filing Pro Se:</b> (Name, address & telephone number) Robb S. Harvey (BPR 11519) Laurant M. Sturm (BPR 030828) Waller Lansden Dortch & Davis LLP 511 Union Street, Suite 2700 Nashville, TN 37219 (615) 244-6380  	<div style="border-bottom: 1px solid black; padding-bottom: 5px;"> <b>FILED, ISSUED &amp; ATTESTED</b>   <div style="text-align: right; font-size: 1.1em;">DEC 19 2012</div> </div> <div style="padding-top: 5px;"> <b>CRISTI SCOTT, Clerk and Master</b>  <b>By:</b>   <div style="text-align: right; font-size: 0.9em;">             1 Public Square              Suite 308              Nashville, TN 37201           </div> </div> <div style="text-align: right; font-size: 0.8em; margin-top: 5px;">       Deputy Clerk &amp; Master     </div>	
<b>NOTICE OF DISPOSITION DATE</b>		
<p>The disposition date of this case is twelve months from date of filing. The case must be resolved or set for trial by this date or it will be dismissed by the Court for failure to prosecute pursuant to T.R.C.P. 41.02 and Local Rule 18.</p> <p>If you think the case will require more than one year to resolve or set for trial, you must send a letter to the Clerk and Master at the earliest practicable date asking for an extension of the disposition date and stating your reasons. Extensions will be granted only when exceptional circumstances exist.</p>		
<b>TO THE SHERIFF:</b>	<b>DATE RECEIVED</b>   <div style="border-top: 1px solid black; padding-top: 5px;"> <b>Sheriff</b> </div>	

\*\*\*Submit one original plus one copy for each defendant to be served.

ADA Coordinator, Cristi Scott (862-5710)

# ORIGINAL

STATE OF TENNESSEE 20 <sup>TH</sup> JUDICIAL DISTRICT CHANCERY COURT		<b>SUMMONS</b>		CASE FILE NUMBER <b>12-1769-II</b>	
PLAINTIFF <i>The Tennessean, et al.</i>			DEFENDANT Tennessee Department of Children's Services		
TO: (NAME AND ADDRESS OF DEFENDANT) Robert E. Cooper, Jr. Tennessee Attorney General John Siever Bldg., Charlotte Avenue Nashville, TN 37219			Method of Service: G Certified Mail G Davidson Co. Sheriff G *Comm. Of Insurance G *Secretary of State G *Out of County Sheriff X Private Process Server G Other *Attach Required Fees		
List each defendant on a separate summons.					
YOU ARE SUMMONED TO DEFEND A CIVIL ACTION FILED AGAINST YOU IN CHANCERY COURT, DAVIDSON COUNTY, TENNESSEE. YOUR DEFENSE MUST BE MADE WITHIN THIRTY (30) DAYS FROM THE DATE THIS SUMMONS IS SERVED UPON YOU. YOU MUST FILE YOUR DEFENSE WITH THE CLERK OF THE COURT AND SEND A COPY TO THE PLAINTIFF'S ATTORNEY AT THE ADDRESS LISTED BELOW. IF YOU FAIL TO DEFEND THIS ACTION BY THE ABOVE DATE, JUDGMENT BY DEFAULT CAN BE RENDERED AGAINST YOU FOR THE RELIEF SOUGHT IN THE COMPLAINT.					
Attorney for plaintiff or plaintiff if filing Pro Se: (Name, address & telephone number) Robb S. Harvey (BPR 11519) Lauran M. Sturm (BPR 030828) Waller Lansden Dortch & Davis LLP 511 Union Street, Suite 2700 Nashville, TN 37219 (615) 244-6380 			FILED, ISSUED & ATTESTED  DEC 19 2012  CRISTI SCOTT, Clerk and Master By:  1 Public Square Suite 308 Nashville, TN 37201 Deputy Clerk & Master		
NOTICE OF DISPOSITION DATE					
The disposition date of this case is twelve months from date of filing. The case must be resolved or set for trial by this date or it will be dismissed by the Court for failure to prosecute pursuant to T.R.C.P. 41.02 and Local Rule 18.  If you think the case will require more than one year to resolve or set for trial, you must send a letter to the Clerk and Master at the earliest practicable date asking for an extension of the disposition date and stating your reasons. Extensions will be granted only when exceptional circumstances exist.					
TO THE SHERIFF:			DATE RECEIVED		
			Sheriff		

\*\*\*Submit one original plus one copy for each defendant to be served.

ADA Coordinator, Cristi Scott (862-5710)

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, AT NASHVILLE

**THE TENNESSEAN, ASSOCIATED )  
PRESS, CHATTANOOGA TIMES )  
FREE PRESS, KNOXVILLE NEWS )  
SENTINEL, TENNESSEE )  
ASSOCIATED PRESS )  
BROADCASTERS, TENNESSEE )  
COALITION FOR OPEN )  
GOVERNMENT, INC., TENNESSEE )  
PRESS ASSOCIATION, THE )  
COMMERCIAL APPEAL, WBIR-TV )  
CHANNEL TEN, WKRN-TV )  
CHANNEL TWO, WREG-TV )  
CHANNEL THREE, and WSMV-TV )  
CHANNEL FOUR, )**

**Petitioners,**

**v.**

**TENNESSEE DEPARTMENT OF )  
CHILDREN'S SERVICES, )**

**Respondent.**

No. 12-1769-II

COPY

**PETITION FOR ACCESS TO PUBLIC RECORDS**

Petitioners are a coalition of media organizations and reporters who seek access to public records denied by the Tennessee Department of Children's Services, and which involve fatalities and near fatalities of infants, children and youth who have been entrusted to the State of Tennessee's protection. Petitioners file this Petition for access to public records which are within the custody and control of the Tennessee Department of Children's Services ("DCS"), pursuant to the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-501 *et seq.* As grounds for this Petition, the Petitioners state as follows:

1. Petitioners include the following media organizations and entities:

a. *The Tennessean*, the Nashville-based regional daily newspaper which is owned by Gannett Satellite Information Network, Inc.;

b. Associated Press, which gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world;

c. *Chattanooga Times Free Press*, the Chattanooga-based regional daily newspaper which is owned by WEHCO Media, Inc.;

d. *Knoxville News Sentinel*, the Knoxville-based regional daily newspaper which is owned by Scripps Media, Inc.;

e. Tennessee Associated Press Broadcasters, Tennessee's representative board for radio and television member stations of the Associated Press;

f. Tennessee Coalition for Open Government, Inc., a Tennessee public benefit corporation, which is a non-profit and non-partisan coalition of citizen, professional, academic and media groups working to educate Tennesseans about their right to know about the affairs of their government as set out in the Tennessee Constitution and the Tennessee Open Meetings and Public Records laws;

g. Tennessee Press Association, a Tennessee public benefit corporation, which is a trade organization of approximately 125 daily and non-daily newspapers across the State of Tennessee;

h. *The Commercial Appeal*, the Memphis-based regional daily newspaper which is owned by Memphis Publishing Company;

i. WBIR-TV Channel Ten, the Knoxville-based television station which is an NBC network affiliate and is owned by Gannett Pacific Corp;

j. WKRN-TV Channel Two, the Nashville-based television station which is an ABC network affiliate and is owned by Young Broadcasting of Nashville, LLC;

k. WREG-TV Channel Three, the Memphis-based television station which is a CBS network affiliate and is owned by Local TV Tennessee, LLC; and

l. WSMV-TV Channel Four, the Nashville-based television station which is an NBC network affiliate and is owned by Meredith Corporation.

2. Respondent, Tennessee Department of Children's Services ("DCS"), is a state agency established by the laws of the State of Tennessee and subject to the Tennessee Public Records

Act, Tenn. Code Ann. §§10-7-501, *et seq.* DCS's purposes include "protect[ing] children from abuse, mistreatment or neglect" and "keep[ing] children safe." Tenn. Code Ann. § 37-5-102(a)(1).

3. In the first six months of 2012, the State of Tennessee endured the tragedy of the deaths of thirty-one children either under DCS's supervision or with whom DCS had prior contact.

4. The actions of DCS have come under intense public scrutiny in connection with these deaths.

5. Media organizations have made requests under the Public Records Act to DCS for records concerning fatalities and near fatalities of infants, children and youth under DCS supervision or with whom DCS had prior contact over the past few years.

6. The Tennessee Public Records Act is among the broadest in the country. It provides: "All state, county and municipal records shall, at all times during business hours, . . . 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." Tenn. Code Ann. §10-7-503(2)(A).

7. The Tennessee Supreme Court has been one of the most vigilant in the country in protecting the public's right of access, emphasizing the legislative mandate to "interpret the terms of the Act liberally to enforce the public interest in open access to the records of state, county and municipal governmental entities." Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc., 87 S.W.3d 67, 74 (Tenn. 2002) (noting that "the Act serves a crucial role in promoting accountability in government through public oversight of governmental activities"); *see also Tennessee v. Elec. Power Bd. of Nashville*, 979 S.W.2d 297 (Tenn. 1998); Memphis Publ'g Co. v. City of Memphis, 871 S.W.2d 681 (Tenn. 1994) ("Our courts have been vigilant in upholding this clear legislative mandate, even in the face of serious countervailing

considerations.”); *Griffin v. City of Knoxville*, 821 S.W.2d 921 (Tenn. 1991); *Memphis Publ’g Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986).

8. In early October 2012, the Governor of the State of Tennessee, Bill Haslam, stated that the work of DCS is “the most fundamental responsibility we have as government.” DCS is among the state’s largest agencies, and is responsible for protecting the most vulnerable of Tennessee residents.

9. It is critical that the public have confidence in DCS. Promoting a culture of openness and transparency is key to creating public confidence.

10. The federal government provides federal funding and resources to states to assist them in providing child and family protection services. The federal Child Abuse Prevention Treatment Act (“CAPTA”), 42 United States Code §5101 *et seq.* requires that states wishing to receive federal funds for these services must submit a compliance plan that includes:

an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes . . . provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality[.]

42 U.S.C. § 5106a(b)(2)(B)(x). Tennessee receives federal funding for these services.

11. Tennessee law mandates that DCS “**shall** release information . . . : (4) to provide for public disclosure of information about any case that results in a child fatality or near fatality in compliance with 42 U.S.C. [United States Code] §5106a(b)(2)(A)(x).” Tenn. Code Ann. §37-5-107(c)(4) (emphasis added). The actual federal code section which the Tennessee General Assembly intended to refer to was 42 U.S.C. §5106a(b)(2)(**B**)(x). (Emphasis added.)

12. The Tennessee General Assembly’s passage of the statutory amendment assigned Section 37-5-107(c)(4) in the Tennessee Code made DCS’s production of records mandatory and not permissive.

13. Federal law does not supersede or preempt the Tennessee Public Records Act. The federal statute, CAPTA, provides a floor and not a ceiling on disclosure of information.

14. The media requests to DCS under the Public Records Act include the letter of *The Tennessean* reporter Anita Wadhvani of September 24, 2012 and her follow-up email request of October 19, 2012. These written requests are attached hereto as Exhibits A and B, respectively. DCS has received additional written requests from media organizations under the Public Records Act for the same records over the past three months.

15. The Public Records Act request of September 24, 2012 (Exhibit A) sought all “[r]ecords of all fatalities or near fatalities of children between January 1, 2009 and June 30, 2012 who - at the time of their fatalities or near fatalities - were either in the custody of [DCS], the subject of an ongoing investigation by [DCS] or the subject of a prior investigation that was closed by [DCS] before their deaths or near-fatal incidents.”

16. In response to that request, the General Counsel of DCS responded on October 2, 2012 (attached hereto as Exhibit C), stating in part:

DCS staff have begun the process of retrieving and preparing the requested records. It is currently estimated that the records should be available on or about October 15, 2012. I will let you know if that date changes.

We comply with federal guidance, which requires the release in child fatalities of the child’s age and gender, but not the child’s race. Therefore, information regarding the race of each child will not be available for review.

DCS provided a fatality spreadsheet and a near fatality spreadsheet for incidents occurring between January 1, 2009 and June 30, 2012 (attached hereto as Exhibit D). These spreadsheets are not original public records relating to any fatality or near fatality of a child under DCS supervision or with whom DCS has had contact. These spreadsheets were prepared by DCS in response to the Public Records Act request.

17. DCS’s response to the request of September 24, 2012 (Exhibit A) is insufficient and does not comport with the Public Records Act. The spreadsheets are not original records of DCS. The spreadsheets provide little if any detail regarding the fatalities and near fatalities of children under DCS’s supervision or with whom DCS had prior contact.

18. A follow-up Public Records Act request of October 19, 2012 (Exhibit B) specified five (5) of the children who died while under DCS's supervision or after some level of contact with DCS and previously identified by DCS on its spreadsheets, and requested "all DCS records in any format available" pertaining to those children. This follow-up request did not supersede the prior request.

19. The General Counsel of DCS responded on October 31, 2012 (attached hereto as Exhibit E). In that letter, DCS stated that "[t]he disclosure process for fatalities and near fatalities requires sensitivity and balance. A child and family's right to privacy must be balanced against the public's right to know. Tennessee's strong public policy against disclosure of child abuse and neglect information must be weighed against the law's authorization of some fuller disclosure of information in fatality and near fatality cases." DCS's General Counsel further stated that DCS would therefore limit its disclosure to that information "authorized by the federal government" and that "no disclosure will be made that exceeds those authorizations."

20. DCS later provided a two-page "summary" for the cases involving the five children identified in the follow-up Public Records Act request. That "summary" is attached hereto as Exhibit F. DCS provided no original public records in connection with its submission, and provided little if any detail regarding the five cases involving the fatality or near fatality of a child.

21. In DCS's "summary" regarding four of the five cases involving the fatality or near fatality of a child, DCS stated that its own "involvement" with those cases or persons acting under DCS supervision was not "pertinent to" the death or near death. DCS has provided no explanation regarding how it determines what is "pertinent" and who determines what is considered to be "pertinent." DCS has provided no investigative reports, fatality reviews, or task force reviews in response to these public records requests. DCS has provided no judicial records in response to these public records requests.



22. On November 28, 2012, Maria De Varenne, Executive Editor and Vice President/News of *The Tennessean*, sent a letter (in collaboration with the newspaper's counsel) to the General Counsel of DCS (letter attached hereto as Exhibit G). Ms. De Varenne pointed out that DCS had failed to respond appropriately to the public records requests and insisted that DCS provide all requested information by December 18, 2012. Ms. De Varenne's letter asked DCS to provide the requested public records so the public could consider "whether any of these tragedies could have been avoided" and encouraged DCS to consider "what can be done to avoid such tragedies in the future." *The Tennessean* requested the State's full compliance with the Public Records Act and production of complete records by December 18, 2012.

23. Numerous other media organizations as well as a citizen organization have joined in the Public Records Act requests made by *The Tennessean*. On December 17, 2012, a written request was made on behalf of numerous organizations, joining in the earlier requests made to DCS by *The Tennessean* (letter attached hereto as Exhibit H). On December 18, 2012, a supplemental request was made on behalf of two additional organizations, joining in the earlier requests made to DCS by *The Tennessean* (letter attached hereto as Exhibit I).

24. After several months of failing to provide records, DCS did not provide the requested records by the requested deadline of December 18, 2012. Instead, late afternoon on December 18, the Tennessee Attorney General's Office provided a "response" on behalf of DCS (attached hereto as Exhibit J), stating that the State of Tennessee had determined "that [DCS] has produced all the documents that it can consistent with the provisions of state and federal law." Further, the State in its response incorrectly interpreted *The Tennessean*'s Public Records Act request as being limited to "all records relating to the five specific children identified in Ms. Anita Wadhwani's request on October 19." The Public Records Act request of September 24, 2012 (Exhibit A) was not so limited, and the follow-up request on October 19, 2012 (Exhibit B) did not limit the scope of the public records requested but selected five of the cases for illustrative purposes. Petitioners' request in this Petition is not limited to those five cases.

25. Pursuant to 42 U.S.C. § 5106a(b)(2)(B)(x) and Tenn. Code Ann. § 37-5-107(c), DCS is required to make available information and records relating to a case where child abuse or neglect has resulted in a child fatality or near fatality.

26. Pursuant to Tenn. Code Ann. § 10-7-503(2)(A), DCS is required to disclose, upon request, records relating to a case where child abuse or neglect has resulted in a fatality or near fatality.

27. DCS has failed to comply with these Public Records Act requests. DCS has not cited a specific exemption under the Tennessee Public Records Act to prevent production of the records requested. DCS has not cited a specific Tennessee statute not contained within the Tennessee Public Records Act to prevent production of the records requested. DCS has not cited a rule or common law exemption which prevents production of the records requested. Neither DCS's response of October 31, 2012 (Exhibit E), nor the Attorney General's response of December 18, 2012 (Exhibit J) provide a basis for the refusal to produce public records.

28. "Any citizen of Tennessee" who submits a public records request and "whose request has been in whole or in part denied . . . shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access." Tenn. Code Ann. § 10-7-505(a).

29. "The burden of proof for justification of nondisclosure of records sought shall be upon the official of and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence." § 10-7-505(c). "[E]xpeditious hearings" are appropriate in Public Records Act cases. Tenn. Code Ann. § 10-7-505(b).

30. The actions of DCS and DCS's non-compliance with the Public Records Act constitute a violation of the law and entitle Petitioners to the relief set forth in Tenn. Code Ann. § 10-7-505(b).

31. Tennessee is one of many states which have volunteered to accept federal funding and resources in connection with child and family protection services.

32. Tennessee has adopted one of the broadest Public Records statutes in the country.

33. Despite the fact that DCS is required to comply with and abide by the broad Tennessee Public Records Act, DCS has taken a far more restrictive approach to producing records concerning fatalities and near fatalities of children under the State of Tennessee's supervision than other states.

34. A recent example of another state's application of the language of CAPTA in connection with its public records statute took place in the bordering Commonwealth of Kentucky. In *Lexington H-L Servs., Inc. & Courier-Journal, Inc. v. Cabinet for Health & Family Servs.*, Opinion and Order, No. 09-CI-1742 (Ky. Franklin Cir. Ct. May 3, 2010), the trial court faced similar arguments from a state agency for non-disclosure of child fatality and near fatality records: "[T]he Attorney General and the Cabinet both assume that keeping this information confidential is somehow in the best interest of the children involved, and that public scrutiny of these tragic events would constitute an invasion of their privacy." *Id.* at 9 (copy of decision attached as Exhibit K). The trial court found that "this bias in favor of confidentiality is directly contrary to the legislative mandate in favor of public disclosure as codified in [Kentucky's] Open Records Act." *Id.* While the court recognized the "legitimate concerns about privacy interests," it found that it was "bound by the Open Records Act to require release of the requested information unless a specific statutory exemption applies." *Id.* at 10.

35. The trial court in *Lexington H-L Servs., Inc. & Courier-Journal, Inc.* also noted the important public policy concerns underlying the release of such records: "The loss of life here may have been a tragic accident that was unavoidable even if the child welfare system had worked perfectly. Or it may have been the result of a systemic failure on the part of the Cabinet that needs to be corrected. Either way, the public has a right to know the facts and make its own

judgment. Without public scrutiny of the events in question, there can be no real accountability.”  
*Id.* at 11.

36. The trial court’s decision in *Lexington H-L Servs., Inc. & Courier-Journal, Inc.* was recently affirmed on appeal, and fees and costs were assessed against the State. \_\_\_\_ S.W.3d \_\_\_\_, 2012 WL 5038337 (Ky. Ct. App. Oct. 29, 2012).

37. Neither 42 U.S.C. § 5106a(b)(2)(B)(x) nor Tenn. Code Ann. § 37-5-107(c)(4) limit the child fatality or near fatality records that DCS is required to disclose. Rather, 42 U.S.C. § 5106a(b)(2)(B)(x) requires a broad disclosure of case “findings or information.”

38. The public has a strong interest in knowing what DCS knew about these children before their deaths and near deaths. The public has a strong interest in knowing what actions DCS took - or failed to take - in order to protect them. This public interest outweighs any privacy concerns DCS has referred to in limiting its disclosure of information. The public has a right, under federal and state law, to understand how children under DCS’s supervision (or with whom DCS had prior contact) died and came close to death. DCS’s disclosure of this information may help to prevent similar tragedies in the future.

39. DCS’s non-production of records is a violation of the Tennessee Public Records Act. Petitioners are entitled to the relief requested below.

**WHEREFORE**, Petitioners pray:

1. That process issue and be served upon Respondent, Tennessee Department of Children’s Services.
2. That the Court issue the following orders:
  - a. That Respondent DCS be required to immediately appear and show cause for its refusal to produce documents in responses to the Public Records Act requests made by Petitioners.
  - b. That Respondent DCS be required immediately to forward to the Court for *in camera* review all requested materials which DCS has failed or refused to produce. These

include all case files relating to each of the "fatality" or "near fatality" matters from January 1, 2009 to present, all investigative reports, all fatality reviews, and all task force reviews.

c. That the Court (or the Court's designee, should the Court determine that such delegation would be appropriate) expeditiously review all such records and make such redactions--but only such redactions--as are required under the Public Records Act;

d. That the Court hold that a formal written response/Answer to this Petition is not required and the generally applicable period for filing an Answer under Tenn. R. Civ. P. 12 shall not apply in the interests of an expeditious hearing as provided in Tenn. Code Ann. §10-7-505(b); and

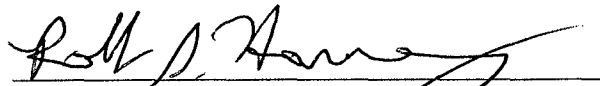
e. That upon the review by this Court or its designee of the records *in camera*, the Court issue an Order in favor of Petitioners requiring that the requested records be immediately made available.

3. That in the event the Court determine that DCS's refusal to disclose these public records is willful, then Petitioners be awarded all reasonable attorney's fees and costs, pursuant to Tenn. Code Ann. § 10-7-505(g).

4. That the costs of this action be taxed against Respondent.

5. That the Court grant such further relief as it deems just and equitable.

Respectfully submitted,



Robb S. Harvey (Tenn. BPR No. 11519)  
Lauran M. Sturm (Tenn. BPR No. 030828)  
WALLER LANSDEN DORTCH & DAVIS LLP  
511 Union Street, Suite 2700  
Nashville, Tennessee 37219  
Tel.: (615) 244-6380  
Fax: (615) 244-6804

*Attorneys for Petitioners*

# THE TENNESSEAN

1100 BROADWAY  
NASHVILLE, TENNESSEE  
37203-3134  
(615) 259-8275  
www.tennessean.com

September 24, 2012

Molly Sudderth, Public Information Officer  
Department of Children's Services  
Cordell Hull Building 7th Floor  
Nashville, TN 37243

Via e-mail: molly.sudderth@tn.gov

Dear Molly:

The Tennessean newspaper requests that you open for inspection and/or copying the following records, electronic files, digital files, photographs, recordings, and/or media in other formats not specified here:

Records of all fatalities or near fatalities of children between January 1, 2009 and June 30, 2012 who – at the time of their fatalities or near fatalities – were either in the custody of the department, the subject of an ongoing investigation by the department or the subject of a prior investigation that was closed by the department before their deaths or near-fatal incidents.

We specifically seek records that would show each child's age, the date of the fatality or near fatal incident, the race, sex and circumstances of the child's death or near death, the county of residence of the child, when the child became known to the department due to a CPS investigation within the three years prior to the fatality or near fatality, whether there was an active investigation or service being provided due to an investigation at the time of the child's fatality or near fatality, whether the child was in state custody at the time of fatality or near fatality, and whether the circumstances surrounding the fatality or near fatality are suspected to meet criteria for abuse and neglect.

According to your Administrative Policies and Procedures, 14.20, this information is required to be reported to Central Intake for each child fatality or near fatality.

The newspaper makes this request under the Tennessee Public Records Act, Tennessee Code Annotated 10-7-503.

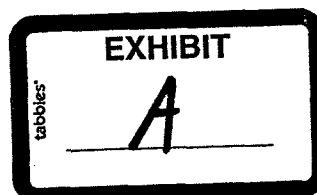
If you or the state declines to meet any part of this request, we ask under TCA 10-7-503 that you cite for us the section of TCA under which you are refusing to open that record.

We also ask that you waive the applicable copying fees for this request. If it is your intention to charge us in connection with this request, we ask that you not perform any work on our behalf until we can be provided an estimate of the costs involved.

If you have any questions, please do not hesitate to contact me. My phone number is (615) 259-8092 and my fax is (615) 259-8093.

Sincerely,

Anita Wadhwani  
Reporter  
The Tennessean



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<https://ammoc01.gannett.com/ViewMessage.aspx?Checksum=11eabe...>

Reply

Reply To All

Forward

Send To Me

View Images

Print



Email

**From:** Wadhwani, Anita  
**To:** Molly Sudderth  
**Subject:** Individual cases

Sent: 10/19/2012 5:35:54 PM



Message

Tags

Molly:

Here are five specific children, three from the Fatality and two from the Near Fatality spreadsheets you provided earlier this week.

I'm interested in all DCS records in any format available for each of these children.

Thanks,  
 Anita

2010 FCB	9 months	Sumner	10/31/2010	Female	Bodily Fractures/Injuries	10/30/2010	NO	NO	YES	YES
2012 FEB	11 months	Rutherford	1/11/2012	Male	Natural (Medical/Physical)	7/28/2011	NO	YES	NO	NO
2011 FDH	15 years	Hawkins	6/12/2011	Male	Vehicle Related Injuries	7/24/2009	NO	NO	YES	YES
2009 NFI	3 years	McNairy	3/18/2009	Female	Drug exposed/Related	8/25/2008	NO	NO	YES	YES
2010 NFAG	8 years	Lincoln	11/9/2010	Male	Medical Maltreatment	11/10/2010	NO	NO	NO	YES

EXHIBIT

B

tabbles



STATE OF TENNESSEE  
DEPARTMENT OF CHILDREN'S SERVICES  
*Office of General Counsel*  
Cordell Hull Building, 7<sup>th</sup> Floor  
436 6<sup>th</sup> Avenue North  
Nashville, TN 37243  
(615) 741-7236  
Fax: (615)-532-2348

October 2, 2012

Anita Wadhvani, Reporter  
The Tennessean  
1100 Broadway  
Nashville, TN 37203

Dear Ms. Wadhvani:

I write in response to your September 24, 2012, e-mailed request to the Department of Children's Services ("DCS") for the following:

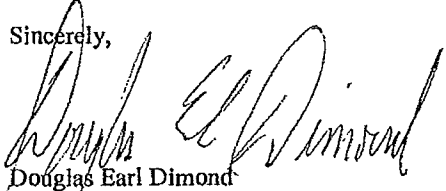
Records of all fatalities or near fatalities of children between January 1, 2009, and June 30, 2012, who, at the time of the fatalities or near fatalities, were either in the custody of the department, the subject of an ongoing investigation by the department or the subject of a prior investigation that was closed by the department before their deaths or near fatal incidents. Specifically, records showing each child's age, the date of the fatality or near fatal incident, the race, sex and circumstances of the child's death or near death, the county of residence of the child, when the child became known to the department due to a CPS investigation within the three years prior to the fatality or near fatality, whether there was an active investigation or service being provided due to an investigation at the time of the child's fatality or near fatality, whether the child was in state custody at the time of fatality or near fatality, and whether the circumstances surrounding the fatality or near fatality are suspected to meet criteria of abuse and neglect.

DCS staff have begun the process of retrieving and preparing the requested records. It is currently estimated that the records should be available on or about October 15, 2012. I will let you know if that date changes.

We comply with federal guidance, which requires the release in child fatalities of the child's age and gender, but not the child's race. Therefore, information regarding the race of each child will not be available for review.

If you have any additional questions please feel free to continue to contact Brandon Gee or Molly Sudderth. Thank you.

Sincerely,

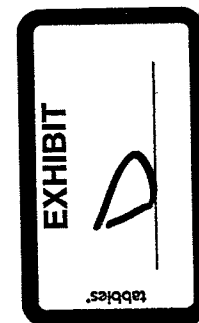
  
Douglas Earl Dimond  
General Counsel





### January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known within 3 years	Open Investigation	Open Assessment	Custody	Abuse Neglect Indicated
2009	1 year	Jackson	1/16/2009	Male	Bodily Fractures/Injuries	9/13/2007	NO	NO	NO	YES
2009	14 days	Sullivan	1/26/2009	Male	Unsafe Sleeping	1/12/2009	NO	YES	NO	NO
2009	1 year	Shelby	1/27/2009	Male	Unsafe Sleeping	6/30/2008	NO	NO	NO	YES
2009	1 year	Greene	2/17/2009	Male	Natural (Medical/Physical)	6/22/2007	NO	NO	NO	NO
2009	2 months	Shelby	2/26/2009	Female	SUIDS	12/31/2008	NO	NO	NO	NO
2009	6 months	White	3/9/2009	Male	SUIDS	8/20/2008	NO	NO	NO	YES
2009	3 years	Campbell	3/13/2009	Male	Fire Related Injuries	3/27/2007	NO	NO	NO	NO
2009	5 months	Haywood	3/19/2009	Female	Natural (Medical/Physical)	12/16/2008	NO	YES	NO	NO
2009	3 months	Hamblen	3/19/2009	Female	SUIDS	12/17/2008	NO	NO	YES	NO
2009	16 years	Washington	4/4/2009	Female	Suicide	10/8/2006	NO	NO	YES	NO
2009	14 years	McNairy	4/20/2009	Male	Suicide	1/22/2009	NO	NO	YES	NO
2009	3 years	Hamilton	4/21/2009	Female	Bodily Fractures/Injuries	1/25/2007	NO	NO	NO	YES
2009	1 months	Marion	5/6/2009	Male	Undetermined	3/31/2009	YES	NO	NO	NO
2009	3 years	Hamilton	5/7/2009	Male	Vehicle Related Injuries	8/7/2008	NO	NO	NO	YES
2009	4 years	Knox	5/10/2009	Male	Drowning	12/4/2008	NO	NO	NO	YES
2009	1 year	Warren	5/13/2009	Female	Fire Related Injuries	1/15/2008	NO	YES	NO	YES
2009	3 years	Warren	5/13/2009	Female	Fire Related Injuries	1/15/2008	NO	YES	NO	YES
2009	2 months	Putnam	5/23/2009	Male	SUIDS	3/19/2009		NO	NO	NO
2009	8 years	Sumner	5/25/2009	Male	Accidental	5/26/2009	NO	NO	YES	NO
2009	10 months	Shelby	5/25/2009	Male	Medical Maltreatment	10/23/2008	NO	NO	NO	YES
2009	17 years	Cheatham	5/26/2009	Female	Suicide	1/25/2008	NO	NO	NO	NO
2009	4 months	Hamilton	5/27/2009	Female	SUIDS	3/19/2009	NO	NO	NO	NO
2009	5 months	Roane	5/28/2009	Male	Accidental	12/19/2008	NO	NO	NO	NO
2009	1 year	Lawrence	6/7/2009	Male	Drowning	8/30/2007	YES	NO	NO	YES
2009	1 month	Carter	6/9/2009	Male	Unsafe Sleeping	4/24/2009	NO	YES	NO	NO



January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known within 3 years	Open Investigation	Open Assessment	Custody	Abuse Neglect Indicated
2009	4 years	Hamblen	6/15/2009	Male	Natural (Medical/Physical)	9/11/2006	NO	NO	NO	NO
2009	7 years	Bradley	6/15/2009	Female	Vehicle Related Injuries	7/14/2006	NO	NO	NO	YES
2009	8 days	Knox	10/1/2009	Male	Natural (Medical/Physical)	9/25/2009	YES	NO	NO	YES
2009	5 months	Gibson	7/8/2009	Female	Bodily Fractures/Injuries	2/5/2009	NO	NO	NO	YES
2009	15 years	Dyer	8/2/2009	Female	Gunshot Injuries	7/30/2009	YES	NO	NO	NO
2009	17 years	Knox	8/5/2009	Male	Gunshot Injuries	10/24/2006	NO	NO	YES	NO
2009	5 months	Putnam	8/23/2009	Male	Drug exposed/Related	3/3/2009	NO	NO	NO	YES
2009	16 years	Sevier	8/24/2009	Female	Suicide	2/24/2009	NO	NO	NO	NO
2009	17 years	Montgomery	8/27/2009	Male	Bodily Fractures/Injuries	11/27/2007	NO	NO	NO	NO
2009	5 years	Davidson	8/31/2009	Male	Natural (Medical/Physical)	10/3/2006	NO	NO	NO	NO
2009	5 months	Greene	9/2/2009	Female	Undetermined	8/29/2009	NO	YES	NO	NO
2009	1 month	Scott	9/5/2009	Male	Undetermined	7/17/2009	NO	NO	NO	NO
2009	17 days	Lawrence	9/13/2009	Male	Natural (Medical/Physical)	8/28/2009	NO	YES	NO	NO
2009	16 years	Overston	9/29/2009	Female	Drug exposed/Related	6/18/2009	NO	NO	NO	YES
2009	3 months	Sullivan	11/13/2009	Male	Undetermined	10/12/2009	NO	YES	NO	NO
2009	1 years	Anderson	11/26/2009	Female	Natural (Medical/Physical)	12/8/2008	NO	NO	NO	NO
2010	16 years	Madison	1/3/2010	Female	Gunshot Injuries	4/30/2009	NO	NO	NO	NO
2010	11 years	Knox	1/5/2010	Male	Natural (Medical/Physical)	3/27/2009	NO	YES	NO	NO
2010	7 months	Knox	1/7/2010	Male	Undetermined	5/18/2009	NO	NO	NO	NO
2010	1 month	Maury	1/23/2010	Male	Undetermined	12/14/2009	NO	YES	NO	NO
2010	2 months	Davidson	2/2/2010	Male	Natural (Medical/Physical)	11/10/2009	NO	NO	YES	NO

## January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known within 3 years	Open Investigation	Open Assessment	Custody	Abuse Neglect Indicated
2010	3 years	Hamblen	2/18/2010	Male	Bodily Fractures/Injuries	1/11/2007	YES	NO	NO	YES
2010	1 year	Cheatham	2/23/2010	Male	Natural (Medical/Physical)	10/26/2009	NO	NO	NO	NO
2010	15 years	Robertson	2/25/2010	Female	Suicide	12/12/2009	NO	NO	NO	NO
2010	15 years	Maury	2/25/2010	Male	Drug exposed/Related	4/18/2008	NO	NO	NO	NO
2010	15 years	Sullivan	3/14/2010	Female	Vehicle Related Injuries	9/19/2008	NO	YES	NO	NO
2010	13 years	Cheatham	3/27/2010	Male	Gunshot Injuries	9/2/2008	NO	NO	NO	YES
2010	1 month	Montgomery	3/27/2010	Female	Drug exposed/Related	2/19/2010	YES	NO	NO	YES
2010	3 months	Knox	4/3/2010	Male	Unsafe Sleeping	2/16/2009	NO	NO	NO	YES
2010	2 years	Cheatham	4/6/2010	Male	Natural (Medical/Physical)	10/3/2008	NO	NO	NO	NO
2010	3 months	Dyer	4/18/2010	Female	Unsafe Sleeping	1/19/2010	NO	NO	NO	NO
2010	3 years	Hamilton	5/1/2010	Male	Bodily Fractures/Injuries	9/20/2008	NO	NO	NO	YES
2010	1 month	Dickson	5/2/2010	Male	SUIDS	3/30/2010	NO	NO	NO	YES
2010	2 years	Blount	5/7/2010	Male	Unsafe Sleeping	8/29/2008	NO	NO	NO	YES
2010	2 months	Putnam	5/10/2010	Female	Natural (Medical/Physical)	4/6/2010	NO	YES	NO	NO
2010	9 months	Hamilton	5/12/2010	Male	SUIDS	11/4/2009	NO	NO	NO	NO
2010	4 months	Hamilton	5/30/2010	Female	Vehicle Related Injuries	1/27/2010	NO	NO	NO	NO
2010	2 months	Rutherford	6/1/2010	Female	Unsafe Sleeping	3/31/2010	NO	NO	NO	NO
2010	11 years	Montgomery	6/4/2010	Male	Drowning	11/30/2009	NO	NO	NO	YES
2010	3 months	Davidson	6/15/2010	Female	Unsafe Sleeping	2/11/2010	NO	NO	NO	YES
2010	1 year	Sumner	6/20/2010	Male	Drowning	2/18/2010	NO	NO	NO	YES
2010	4 years	Wilson	7/2/2010	Female	Bodily Fractures/Injuries	7/1/2010	NO	NO	YES	YES
2010	1 year	Warren	7/4/2010	Male	Drowning	12/19/2008	NO	NO	NO	NO
2010	2 months	Washington	7/4/2010	Male	Unsafe Sleeping	6/14/2010	NO	YES	NO	NO

January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known within 3 years	Open Investigation	Open Assessment	Custody	Abuse or Neglect Indicated
2010	2 months	Shelby	7/15/2010	Male	Natural (Medical/Physical)	5/11/2010	NO	NO	YES	NO
2010	1 year	Shelby	7/29/2010	Female	Accidental	3/3/2010	NO	NO	NO	NO
2010	1 year	Shelby	8/16/2010	Female	Natural (Medical/Physical)	7/2/2010	NO	NO	NO	NO
2010	1 month	Rutherford	8/18/2010	Male	SUIDS	6/29/2010	NO	YES	NO	NO
2010	1 year	Shelby	8/19/2010	Female	Natural (Medical/Physical)	3/17/2009	NO	NO	YES	NO
2010	6 months	Shelby	9/10/2010	Male	Undetermined	3/1/2010	NO	YES	NO	NO
2010	12 years	Hamblen	9/10/2010	Female	Natural (Medical/Physical)	6/23/2008	NO	NO	YES	NO
2010	11 days	Haywood	9/18/2010	Male	Undetermined	9/8/2010	NO	NO	NO	NO
2010	6 years	Johnson	9/19/2010	Male	Vehicle Related Injuries	4/29/2009	NO	NO	NO	YES
2010	2 months	Knox	10/10/2010	Female	Drug exposed/Related	7/26/2010	YES	NO	NO	YES
2010	9 months	Sumner	10/31/2010	Female	Bodily Fractures/Injuries	10/30/2010	NO	NO	YES	YES
2010	1 year	Roane	11/10/2010	Male	Drowning	10/27/2009	NO	NO	NO	YES
2010	2 months	Shelby	11/13/2010	Male	Accidental	7/27/2010	NO	NO	NO	NO
2010	5 months	Davidson	11/19/2010	Female	Drug exposed/Related	5/26/2010	YES	NO	NO	YES
2010	4 years	Fentress	12/27/2010	Male	Drug exposed/Related	10/23/2008	NO	NO	NO	YES
2011	17 years	Hamilton	1/6/2011	Male	Suicide	5/1/2008	NO	YES	NO	NO
2011	15 days	Johnson	1/24/2011	Male	Natural (Medical/Physical)	1/11/2011	NO	YES	NO	NO
2011	14 days	Cheatham	1/30/2011	Female	Natural (Medical/Physical)	1/20/2011	NO	YES	NO	NO
2011	16 years	Hamilton	2/2/2011	Female	Suicide	2/26/2008	NO	NO	NO	NO
2011	15 years	Shelby	2/3/2011	Male	Gunshot Injuries	4/1/2010	NO	NO	YES	NO
2011	3 years	Shelby	2/6/2011	Male	Drug exposed/Related	12/28/2009	NO	NO	NO	YES
2011	4 years	Shelby	2/9/2011	Female	Natural (Medical/Physical)	5/9/2010	NO	NO	YES	NO

# January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known within 3 years	Open Investigation	Open Assessment	Custody	Abuse Neglect Indicated
2011	9 years	Knox	2/23/2011	Female	Natural (Medical/Physical)	11/17/2008	NO	NO	NO	NO
2011	1 year	Montgomery	2/23/2011	Male	Natural (Medical/Physical)	2/24/2011	NO	NO	NO	NO
2011	17 years	Hawkins	2/26/2011	Male	Suicide	4/20/2010	NO	NO	YES	NO
2011	1 year	Tipton	3/2/2011	Male	Unsafe Sleeping	5/24/2010	NO	NO	NO	YES
2011	4 years	Sullivan	3/11/2011	Female	Accidental	12/17/2009	NO	NO	NO	NO
2011	2 years	Sumner	3/28/2011	Female	Fire Related Injuries	10/16/2008	NO	NO	NO	NO
2011	1 year	Henderson	4/4/2011	Female	Undetermined	1/4/2011	NO	YES	NO	NO
2011	1 year	Weakley	4/4/2011	Female	Drowning	2/14/2011	NO	YES	NO	YES
2011	1 year	Sullivan	4/7/2011	Male	Natural (Medical/Physical)	8/31/2010	NO	NO	NO	NO
2011	1 year	Knox	4/8/2011	Female	Bodily Fractures/Injuries	10/16/2010	NO	NO	NO	YES
2011	1 month	Dyer	4/25/2011	Male	Unsafe Sleeping	3/3/2011	YES	NO	NO	NO
2011	3 months	Knox	5/9/2011	Male	Natural (Medical/Physical)	5/9/2011	NO	YES	NO	NO
2011	2 months	Lauderdale	5/11/2011	Female	Natural (Medical/Physical)	2/23/2011	NO	YES	NO	NO
2011	7 days	Davidson	5/18/2011	Male	Natural (Medical/Physical)	5/14/2011	NO	YES	NO	NO
2011	3 months	Shelby	5/18/2011	Male	Undetermined	5/1/2011	YES	NO	NO	NO
2011	2 months	Cumberland	6/3/2011	Male	SUIDS	3/7/2011	NO	NO	NO	NO
2011	2 months	Anderson	6/9/2011	Female	Accidental	4/4/2011	NO	NO	NO	NO
2011	3 years	Cannon	6/10/2011	Female	Vehicle Related Injuries	3/8/2011	NO	YES	NO	YES
2011	1 year	Crockett	6/11/2011	Female	Bodily Fractures/Injuries	1/12/2010	NO	NO	NO	YES
2011	4 years	Monroe	6/11/2011	Male	Drowning	8/4/2008	NO	NO	NO	NO
2011	15 years	Hawkins	6/12/2011	Male	Vehicle Related Injuries	7/24/2009	NO	NO	YES	YES

January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known within 3 years	Open Investigation	Open Assessment	Custody	Abuse Neglect Indicated
2011	6 years	Hancock	6/13/2011	Male	Natural (Medical/Physical)	4/13/2011	NO	YES	NO	NO
2011	1 year	Shelby	6/15/2011	Male	Bodily Fractures/Injuries	11/22/2010	NO	NO	NO	YES
2011	2 years	Davidson	7/22/2011	Male	Natural (Medical/Physical)	1/19/2010	NO	YES	NO	NO
2011	1 year	Sullivan	7/24/2011	Male	Fire Related Injuries	1/13/2010	NO	NO	NO	NO
2011	3 years	Hawkins	7/25/2011	Female	Bodily Fractures/Injuries	1/19/2010	NO	NO	NO	YES
2011	5 years	Marion	8/8/2011	Male	Natural (Medical/Physical)	9/17/2009	NO	NO	NO	NO
2011	14 years	Claiborne	8/24/2011	Male	Vehicle Related Injuries	4/7/2011	NO	NO	NO	YES
2011	1 year	Dyer	9/16/2011	Female	Undetermined	5/8/2010	NO	YES	NO	NO
2011	24 days	Hamilton	10/10/2011	Female	Unsafe Sleeping	9/20/2011	NO	YES	NO	NO
2011	1 year	Knox	10/18/2011	Female	Drowning	3/23/2011	NO	NO	YES	NO
2011	7 months	Sullivan	10/19/2011	Male	Natural (Medical/Physical)	9/24/2011	NO	YES	NO	NO
2011	18 years	Haywood	10/23/2011	Male	Natural (Medical/Physical)	5/23/2011	NO	NO	YES	NO
2011	11 years	Benton	10/25/2011	Female	Accidental	11/10/2009	NO	NO	NO	NO
2011	11 years	Coffee	11/6/2011	Male	Natural (Medical/Physical)	12/4/2008	NO	NO	NO	NO
2011	3 years	Madison	11/10/2011	Female	Natural (Medical/Physical)	1/20/2010	NO	NO	NO	NO
2011	17 years	Madison	11/15/2011	Female	Drug exposed/Related	1/5/2009	NO	NO	NO	YES
2011	19 days	Cumberland	11/20/2011	Female	Natural (Medical/Physical)	11/3/2011	NO	YES	NO	NO
2011	4 months	McMinn	12/23/2011	Male	Unsafe Sleeping	7/29/2011	NO	NO	NO	NO
2011	3 months	Cocke	12/30/2011	Female	Undetermined	9/22/2011	NO	NO	NO	YES

## January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known within 3 years	Open Investigation	Open Assessment	Custody	Abuse Neglect Indicated
2012	11 months	Rutherford	1/11/2012	Male	Natural (Medical/Physical)	7/28/2011	NO	YES	NO	NO
2012	1 year	Wilson	2/8/2012	Female	Bodily Fractures/Injuries	1/8/2012	NO	NO	YES	YES
2012	1 month	Anderson	2/10/2012	Female	Unsafe Sleeping	2/10/2012	YES	NO	NO	NO
2012	1 year	Knox	2/15/2012	Female	Natural (Medical/Physical)	9/15/2011	NO	YES	NO	NO
2012	6 months	Henry	2/16/2012	Male	Natural (Medical/Physical)	8/12/2011	NO	NO	NO	NO
2012	3 years	Henderson	3/8/2012	Female	Undetermined	10/6/2009	NO	NO	NO	NO
2012	15 years	Clay	3/13/2012	Male	Natural (Medical/Physical)	1/12/2009	NO	NO	NO	NO
2012	10 months	Knox	4/11/2012	Male	Drowning	3/16/2012	NO	NO	NO	YES
2012	1 month	Montgomery	4/14/2012	Male	Unsafe Sleeping	2/25/2012	YES	NO	NO	NO
2012	2 months	Sullivan	5/1/2012	Male	Undetermined	2/12/2012	NO	NO	YES	NO
2012	2 months	Knox	5/1/2012	Male	Unsafe Sleeping	2/16/2012	NO	YES	NO	YES
2012	1 month	Claiborne	6/2/2012	Male	Natural (Medical/Physical)	1/27/2011	NO	YES	NO	NO
2012	17 years	Dickson	5/2/2012	Male	Vehicle Related Injuries	5/2/2012	NO	NO	YES	NO
2012	2 months	Cheatham	5/11/2012	Female	Unsafe Sleeping	2/16/2012	NO	YES	NO	NO
2012	12 days	Sullivan	5/20/2012	Female	Unsafe Sleeping	1/8/2012	NO	YES	NO	NO
2012	18 years	Davidson	5/25/2012	Male	Natural (Medical/Physical)	9/14/2009	NO	NO	YES	NO
2012	10 months	Hamilton	5/28/2012	Female	Natural (Medical/Physical)	11/21/2011	NO	NO	NO	NO
2012	4 months	Greene	6/19/2012	Male	Undetermined	6/7/2012	YES	NO	NO	NO
2012	1 month	Grainger	6/22/2012	Female	Undetermined	5/9/2012	NO	YES	NO	NO

## January 1, 2009-June 30, 2012 Fatality Summary

Year	Age	County	Date of Death	Sex	Circumstance	Date Became Known with In-3 Years	Open Investigation	Open Assessment	Custody	Abuse Neglect Indicated
2012	4 months	Shelby	6/25/2012	Female	Undetermined	4/26/2012	YES	NO	NO	NO





STATE OF TENNESSEE  
DEPARTMENT OF CHILDREN'S SERVICES  
*Office of General Counsel*  
Cordell Hull Building, 7<sup>th</sup> Floor  
436 6<sup>th</sup> Avenue North  
Nashville, TN 37243  
(615) 741-7236  
Fax: (615)-532-2348

October 31, 2012

Anita Wadhwani, Reporter  
The Tennessean  
1100 Broadway  
Nashville, TN 37203

Dear Ms. Wadhwani:

I write in response to your October 19, 2012, emailed request to the Department of Children's Services ("DCS") for complete copies of DCS records related to five specified fatality and near fatality cases.

The disclosure process for fatalities and near fatalities requires sensitivity and balance. A child and family's right to privacy must be balanced against the public's right to know. Tennessee's strong public policy against disclosure of child abuse and neglect information must be weighed against the law's authorization of some fuller disclosure of information in fatality and near fatality cases. Faced with these competing priorities, DCS limits the disclosure of information in child abuse and neglect fatalities and near fatalities to those authorized by the federal government. The five federally-authorized disclosures are set out below this paragraph. No disclosure will be made that exceeds those authorizations; that directly or indirectly identifies either a reporter of abuse or neglect or a child and family receiving DCS services; that jeopardizes a criminal investigation or proceeding or that is otherwise contrary to law and public policy.

- I. Cause and circumstance
- II. Age and gender
- III. Description of previous reports or abuse investigations pertinent to the child abuse or neglect that led to the fatality or near fatality
- IV. Result of pertinent investigations
- V. State services and actions on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality



DCS staff have begun the process of retrieving and preparing the requested information for disclosure consistent with the procedures listed above. It is currently estimated that the records should be available on or about November 14, 2012. We will let you know if that date changes.

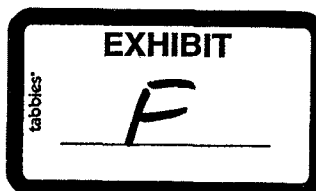
If you have any additional questions please feel free to continue to contact Brandon Gee or Molly Sudderth. Thank you.

Sincerely,

A handwritten signature in dark ink, appearing to read "Doug Dimond", written in a cursive style.

Douglas Earl Dimond  
General Counsel

<b>FDH</b> <b>Sex: Male</b> <b>County: Hawkins</b> <b>Age: 15 years</b> <b>DOD: 6/12/11</b>	<p><b>Circumstances:</b> This custodial youth was in an SUV with his uncle and cousins. The vehicle flipped 3 times and ejected the youth. Law Enforcement was involved in the investigation and it was determined that the driver had drugs in his system at the time of the accident.</p> <p><b>Allegation:</b> Death due to abuse/neglect  <b>Finding:</b> Indicated  <b>Autopsy Results:</b> Head trauma due to car accident</p> <p>Prior involvement not pertinent to the fatality.</p>
<b>FEB</b> <b>Sex: Male</b> <b>County: Rutherford</b> <b>Age: 11 months</b> <b>DOD: 1/11/12</b>	<p><b>Circumstances:</b> This child was living with mother in a shelter. He was diagnosed with pneumonia 2 weeks prior to death and was on medication. Mother found child unresponsive. Despite no evidence of trauma, law enforcement and DCS investigated.</p> <p><b>Allegation:</b> Death due to abuse/neglect  <b>Finding:</b> Unfounded  <b>Autopsy Results:</b> Cause could not be determined</p> <p>Prior involvement not pertinent to the fatality.</p>
<b>FCB</b> <b>Sex: Female</b> <b>County: Sumner</b> <b>Age: 9 months</b> <b>DOD: 10/31/2010</b>	<p><b>Circumstances:</b> On 10/29/10, the child suffered severe non-accidental cranial injury, which led to her death on 10/31/10. On 10/30/10, this child and her sibling were brought into DCS custody due to the seriousness of the child's injuries and the mom's inability to explain the injuries. The alleged perpetrators were the mother and mother's paramour, who were indicated as responsible for the death.</p> <p><b>Allegation:</b> Death due to abuse/neglect  <b>Finding:</b> Indicated  <b>Autopsy results:</b> Blunt force injuries of the head</p> <p>No prior involvement.</p>
<b>NFI</b> <b>Sex: Female</b> <b>County: McNairy</b> <b>Age: 3 years</b> <b>Date of Near Fatality: 3/18/09</b>	<p><b>Circumstances:</b> The child suffered a near fatality while she and siblings were on a trial home visit with their grandmother. The child was found unconscious with a knot on her head and scratches on her face. The child did not know how she got the injuries. Medical examination revealed that she was positive for opiates. The grandmother was indicated for drug exposed child; physical abuse was also indicated but a perpetrator could not be identified.</p> <p><b>Allegation:</b> Drug Exposed Child and Physical Abuse  <b>Finding:</b> Indicated</p> <p>Prior involvement not pertinent to the near fatality.</p>



<b>NFAG</b> <b>Sex: Male</b> <b>County: Lincoln</b> <b>Age: 8 years</b> <b>Date of Near Fatality:</b> <b>11/9/10</b>	<b>Circumstances:</b> The child involved in this near fatality has a history of medical problems including asthma, cardiac problems, absent seizures and sickle cell traits. The child had been out of school due to his medical condition. Upon his return, he presented a doctor's note stating that he could come back to school but did not bring any medications to school with him. The child became unconscious while at school, regained consciousness briefly, was disoriented, and lost consciousness again.  <b>Allegation:</b> Medical Neglect <b>Finding:</b> Indicated  Prior involvement not pertinent to the near fatality.
---	--

November 28, 2012

**VIA HAND DELIVERY**

Douglas Earl Dimond, Esq.  
General Counsel, Tennessee Department of Children's Services  
Cordell Hull Building, Seventh Floor  
436 Sixth Avenue North  
Nashville, Tennessee 37243

Re: *The Tennessean's* Public Records Requests

Dear Mr. Dimond:

We write, as Executive Editor of *The Tennessean* and its counsel, to follow up on the responses of the Tennessee Department of Children's Services ("DCS") to the newspaper's Tennessee Public Records Act requests.

The interactions between *The Tennessean's* editorial board and reporters with Governor Haslam, DCS Commissioner O'Day, and DCS staff in connection with our investigation and reporting have been cordial. However, we do not believe that DCS's release of extremely limited information comports with either the letter or spirit of Tennessee law. We ask that DCS reconsider its approach to refusing to release the requested information.

In early October, Governor Haslam stated that the work of DCS is "the most fundamental responsibility we have as government." DCS is among the state's largest agencies, and is responsible for protecting the most vulnerable of Tennessee residents. It is critical that the public have confidence in DCS, and promoting a culture of openness and transparency is key to creating public confidence. Oversight and transparency are all the more important in light of *The Tennessean's* reporting concerning the dozens of recent cases in Tennessee which tragically resulted in a child's fatality or near fatality.

As you know, *The Tennessean* has made multiple requests for information, including Anita Wadhvani's letter of September 24, 2012 and her follow up email request of October 19, 2012. Your response of October 2 to Ms. Wadhvani's first written request stated:

DCS staff have begun the process of retrieving and preparing the requested records. It is currently estimated that the records should be available on or about October 15, 2012. I will let you know if that date changes.

We comply with federal guidance, which requires the release in child fatalities of the child's age and gender, but not the child's race. Therefore, information regarding the race of each child will not be available for review.



Ms. Wadhvani received a fatality spreadsheet and a near fatality spreadsheet from DCS. Those responses were insufficient. She then asked for all records relating to five specific children listed on those spreadsheets. She received your October 31 letter with its estimate that information would be available on or after November 14.

In your October 31 letter, you stated:

“The disclosure process for fatalities and near fatalities requires sensitivity and balance. A child and family’s right to privacy must be balanced against the public’s right to know. Tennessee’s strong public policy against disclosure of child abuse and neglect information must be weighed against the law’s authorization of some fuller disclosure of information in fatality and near fatality cases. Faced with these competing priorities, DCS limits the disclosure of information in child abuse and neglect fatalities and near fatalities to those authorized by the federal government. The five federally-authorized disclosures are set out below this paragraph.<sup>1</sup> No disclosure will be made that exceeds those authorizations; that directly or indirectly identifies either a reporter of abuse or neglect or a child and family receiving DCS services; that jeopardizes a criminal investigation or proceeding or that is otherwise contrary to law and public policy.”

Ms. Wadhvani later was provided with a two-page “summary” for these five cases. *See* attached Exhibit A. With respect, DCS’s summary is woefully inadequate. The State’s summary provides little if any detail regarding these fatalities or near fatalities. The State has provided no investigative reports, fatality reviews, or task force reports, among other materials which are covered by *The Tennessean*’s requests. Nor has the State provided any public court records. DCS provided the barest of descriptions of the circumstances underlying the fatality or near fatality of the children. In four of the five summaries provided, the DCS claimed “Prior involvement [of the State] not pertinent to the” fatality or near fatality. Respectfully, who reached that conclusion? On what basis? Where is the oversight for DCS’s actions, and who is responsible for providing that oversight?

While we appreciate DCS’s conclusions about its own conduct, transparency and openness require more. For example, as part of our newspaper’s investigation, we would like to review files to see how many home visits DCS conducted in the months leading up to each

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<sup>1</sup> The five areas listed in your October 31 letter are:

- I. Cause and circumstance
- II. Age and gender
- III. Description of previous reports or abuse investigations pertinent to the child abuse or neglect that led to the fatality or near fatality
- IV. Result of pertinent investigations
- V. State services and actions on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality

fatality or near fatality. We would like to know whether any of these tragedies could have been avoided. We especially would like to know what can be done to avoid such tragedies in the future.

The Tennessee Public Records Act is among the broadest in the country. It provides: "All state, county and municipal records shall, at all times during business hours, ..... 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." Tenn. Code Annotated §10-7-503(2)(A). The Tennessee Supreme Court has been one of the most vigilant in the country in protecting the public's right of access, emphasizing the legislative mandate to "interpret the terms of the Act liberally to enforce the public interest in open access to the records of state, county and municipal governmental entities."<sup>2</sup>

Tennessee law mandates that DCS "shall release information...: (4) to provide for public disclosure of information about any case that results in a child fatality or near fatality in compliance with 42 U.S.C. [United States Code] §5106a(b)(2)(A)(x)." Tenn. Code Annotated §37-5-107(c)(4)(emphasis added).<sup>3</sup> This is a mandatory, not permissive, statute. Federal law does not supersede or preempt Tennessee open records laws. The federal Child Abuse Prevention Treatment Act, or "CAPTA," provides a floor and not a ceiling on disclosures. Unless DCS can provide some specific citation to Tennessee law which imposes an obligation not to respond to fully to *The Tennessean's* requests under the Public Records Act, then its actions do not comport with our state's Public Records Act. We wish to give DCS an opportunity to provide the information requested, or to justify its actions, so that DCS's actions will not be deemed to be a willful violation of Tennessee law and therefore entitle *The Tennessean* to recovery of its attorney's fees and costs in any future proceeding. Such an action is, at least in our view, unnecessary if DCS will view its obligations consistent with the Tennessee Public Records Act.

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<sup>2</sup> *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002) (noting that "the Act serves a crucial role in promoting accountability in government through public oversight of governmental activities."); see also *Tennessean v. Electric Power Bd. of Nashville*, 979 S.W.2d 297 (Tenn. 1998); *Memphis Publishing Co. v. City of Memphis*, 871 S.W.2d 681 (Tenn. 1994) ("Our courts have been vigilant in upholding this clear legislative mandate, even in the face of serious countervailing considerations."); *Griffin v. City of Knoxville*, 821 S.W.2d 921 (Tenn. 1991); *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986).

<sup>3</sup> The federal Child Abuse Prevention Treatment Act ("CAPTA"), 42 United States Code §5101 *et seq.* (which provides federal funding and resources to states to assist them in providing child and family protection services), requires that states wishing to receive federal funds for these services must submit a compliance plan that includes:

an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes...provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality[.]

We would like to address your October 31 objections to the full disclosure requested by *The Tennessean*. We will do so in reverse order.<sup>4</sup> DCS states that it does not intend to disclose any information “that is otherwise contrary to law and public policy.” *The Tennessean* is not asking DCS to violate any law, and there is no such blanket “exemption” under the Tennessee Public Records Act which allows DCS to determine what it will, and will not, disclose. *The Tennessean* is not asking DCS to release any information “that jeopardizes a criminal investigation or proceeding”; however, we do ask that DCS provide information that has already been introduced or considered in court proceedings. *The Tennessean* has not asked DCS to identify any person who has reported abuse or neglect. Last, *The Tennessean* is asking DCS to comply with the Tennessee Public Records Act which provides for broad disclosure, as supplemented by the mandatory language inserted into the Tennessee Code section governing DCS.

We are sure that you must be aware that the disclosures by numerous states to requests similar to those made by *The Tennessean* have been broader than those provided by DCS. DCS’s restrictive approach is puzzling and concerning, in light of the broad mandates of the Tennessee Public Records Act as interpreted by our Supreme Court. Other states operate under the same federal Child Abuse Prevention Treatment Act that we do, yet other states provide access to records such as case files and investigative records. We need look no farther than our border state of Kentucky for recent authority rejecting DCS’s view in refusing open and transparent access to public records. For example, please see the recent decision of the Court of Appeals of Kentucky finding that the state department’s refusal to disclose similar records was a willful violation of the state’s open records act and assessing fees,<sup>5</sup> and the recent opinion of the Attorney General of Kentucky finding that the Cabinet for Health and Family Services (DCS’s counterpart) had violated the state’s open records act in partially denying access to records relating to child placement and a subsequent child fatality.<sup>6</sup>

In light of the statutory mandate in favor of openness, the significant public interest and policy issues concerning the safety of Tennessee children, and the failure of DCS to comply with the letter or spirit of the Tennessee Public Records Act, we make the following requests. Please look into this matter, and make a complete production of the requested records by December 18, 2012. If DCS believes that some limited redaction is necessary to preserve protectable interests, we are more than willing to consider that position. Please discuss this matter with Commissioner O’Day, and we ask that DCS discuss this matter with Governor Haslam as well. In addition, please let us know what steps will be taken to prevent this situation from recurring. This request is made on behalf of *The Tennessean*, its readers, and all citizens of Tennessee.

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<sup>4</sup> In your October 31 letter, you stated: “No disclosure will be made that exceeds those authorizations; that directly or indirectly identifies either a reporter of abuse or neglect or a child and family receiving DCS services; that jeopardizes a criminal investigation or proceeding or that is otherwise contrary to law and public policy.”

<sup>5</sup> *Commonwealth of Kentucky, Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, \_\_ S.W.3d \_\_, 2012 Westlaw 5038337, slip opinion (Ky. App. Oct. 19, 2012).

<sup>6</sup> *In re: The Mountain Citizen/Cabinet for Health and Family Services*, 12-ORD-2012 (Ky. Atty. Gen’l Op. Oct. 10, 2012).



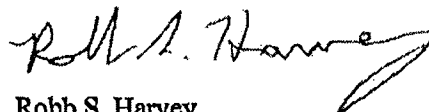
Douglas Earl Dimond, Esq.  
November 28, 2012  
Page 5

Thank you for your anticipated cooperation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maria de Varenne".

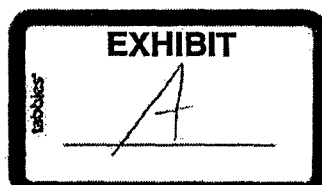
Maria de Varenne,  
Executive Editor and Vice President/News

A handwritten signature in cursive script, appearing to read "Robb S. Harvey".

Robb S. Harvey  
Waller Lansden Dortch & Davis LLP

Enclosure

<b>FDH</b> <b>Sex: Male</b> <b>County: Hawkins</b> <b>Age: 15 years</b> <b>DOD: 6/12/11</b>	<p><b>Circumstances:</b> This custodial youth was in an SUV with his uncle and cousins. The vehicle flipped 3 times and ejected the youth. Law Enforcement was involved in the investigation and it was determined that the driver had drugs in his system at the time of the accident.</p> <p><b>Allegation:</b> Death due to abuse/neglect  <b>Finding:</b> Indicated  <b>Autopsy Results:</b> Head trauma due to car accident</p> <p>Prior involvement not pertinent to the fatality.</p>
<b>FEB</b> <b>Sex: Male</b> <b>County: Rutherford</b> <b>Age: 11 months</b> <b>DOD: 1/11/12</b>	<p><b>Circumstances:</b> This child was living with mother in a shelter. He was diagnosed with pneumonia 2 weeks prior to death and was on medication. Mother found child unresponsive. Despite no evidence of trauma, law enforcement and DCS investigated.</p> <p><b>Allegation:</b> Death due to abuse/neglect  <b>Finding:</b> Unfounded  <b>Autopsy Results:</b> Cause could not be determined</p> <p>Prior involvement not pertinent to the fatality.</p>
<b>FCB</b> <b>Sex: Female</b> <b>County: Sumner</b> <b>Age: 9 months</b> <b>DOD: 10/31/2010</b>	<p><b>Circumstances:</b> On 10/29/10, the child suffered severe non-accidental cranial injury, which led to her death on 10/31/10. On 10/30/10, this child and her sibling were brought into DCS custody due to the seriousness of the child's injuries and the mom's inability to explain the injuries. The alleged perpetrators were the mother and mother's paramour, who were indicated as responsible for the death.</p> <p><b>Allegation:</b> Death due to abuse/neglect  <b>Finding:</b> Indicated  <b>Autopsy results:</b> Blunt force injuries of the head</p> <p>No prior involvement.</p>
<b>NFI</b> <b>Sex: Female</b> <b>County: McNairy</b> <b>Age: 3 years</b> <b>Date of Near Fatality: 3/18/09</b>	<p><b>Circumstances:</b> The child suffered a near fatality while she and siblings were on a trial home visit with their grandmother. The child was found unconscious with a knot on her head and scratches on her face. The child did not know how she got the injuries. Medical examination revealed that she was positive for opiates. The grandmother was indicated for drug exposed child; physical abuse was also indicated but a perpetrator could not be identified.</p> <p><b>Allegation:</b> Drug Exposed Child and Physical Abuse  <b>Finding:</b> Indicated</p> <p>Prior involvement not pertinent to the near fatality.</p>



NFAG  
**Sex: Male**  
**County: Lincoln**  
**Age: 8 years**  
**Date of Near Fatality:**  
**11/9/10**

**Circumstances:** The child involved in this near fatality has a history of medical problems including asthma, cardiac problems, absent seizures and sickle cell traits. The child had been out of school due to his medical condition. Upon his return, he presented a doctor's note stating that he could come back to school but did not bring any medications to school with him. The child became unconscious while at school, regained consciousness briefly, was disoriented, and lost consciousness again.

**Allegation:** Medical Neglect

**Finding:** Indicated

Prior involvement not pertinent to the near fatality.

December 17, 2012

VIA EMAIL [Elizabeth.driver@tn.gov](mailto:Elizabeth.driver@tn.gov) and U.S. MAIL

Elizabeth Driver, Esq.  
Deputy General Counsel, Tennessee Department of Children's Services  
Cordell Hull Building, Seventh Floor  
436 Sixth Avenue North  
Nashville, Tennessee 37243

Re: Public Records Requests

Dear Ms. Driver:

I appreciate the opportunity to speak with you this afternoon. As I mentioned, several additional media organizations are joining in and incorporating the Public Records Act requests that have been made by *The Tennessean* and its reporters. Those requests were referenced in the letter of November 28, 2012 from Executive Editor Maria De Varenne. Their joinder in the requests does not modify those months-old requests, and all ask that the Department of Children's Services provide complete disclosures as requested by Tuesday, December 18, 2012.

The entities joining in those requests are as follows:

- a. Associated Press;
- b. *Chattanooga Times Free Press*;
- c. *Knoxville News Sentinel*;
- d. Tennessee Press Association;
- e. WBIR-TV Channel Ten/Knoxville;
- f. *The Commercial Appeal*;
- g. WREG-TV Channel Three/Memphis;
- h. WKRN-TV Channel Two/Nashville; and
- i. WSMV-TV Channel Four/Nashville.

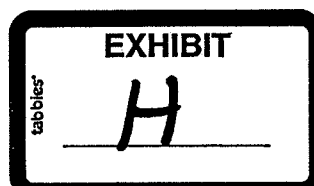
Thank you for your anticipated cooperation.

Sincerely,



Robb S. Harvey  
Waller Lansden Dortch & Davis LLP

cc: All Clients (via email)



December 18, 2012

VIA EMAIL [Elizabeth.driver@tn.gov](mailto:Elizabeth.driver@tn.gov) and U.S. MAIL

Elizabeth Driver, Esq.  
Deputy General Counsel, Tennessee Department of Children's Services  
Cordell Hull Building, Seventh Floor  
436 Sixth Avenue North  
Nashville, Tennessee 37243

Re: Public Records Requests

Dear Ms. Driver:

This letter follows up on our discussion yesterday afternoon and my later letter, which listed additional requestors/petitioners in connection with the Public Records Act requests. We would like to add two additional entities joining in the same requests. The two entities are Tennessee Associated Press Broadcasters and Tennessee Coalition for Open Government.

Following up on your suggestion of yesterday, I appreciate your suggesting that the lawyers have a meeting. We do not believe that a meeting of lawyers at this time would be especially productive. The Public Records Act requests have been pending for months. Both Governor Haslam and Commissioner O'Day met with *The Tennessean's* senior staff on October 2, 2012. Regrettably, it appears that little if any progress has been made toward providing documents in connection with the Public Records Act requests or explaining the DCS's rationale for refusing to do so.

All requestors/petitioners ask that the Department of Children's Services provide complete disclosures by later today, which is the date stated in the letter of November 28, 2012 from *The Tennessean's* Executive Editor and Vice President/News, Maria De Varenne.

Thank you for your anticipated cooperation.

Sincerely,



Robb S. Harvey  
Waller Lansden Dortch & Davis LLP

cc: All Clients (via email)



STATE OF TENNESSEE

Office of the Attorney General



**LUCY HONEY HAYNES**  
CHIEF DEPUTY ATTORNEY GENERAL

**LAWRENCE HARRINGTON**  
CHIEF POLICY DEPUTY

**ROBERT E. COOPER, JR.**  
ATTORNEY GENERAL AND REPORTER  
CORDELL HULL AND JOHN SEVIER STATE  
OFFICE BUILDINGS

MAILING ADDRESS  
P.O. BOX 20207  
NASHVILLE, TN 37202

December 18, 2012

**BILL YOUNG**  
SOLICITOR GENERAL  
TELEPHONE (615) 741-3491  
FACSIMILE (615) 741-2009

Robb S. Harvey  
Waller Lansden Dortch & Davis LLP  
511 Union Street, Suite 2700  
P.O. Box 198966  
Nashville, TN 37219-8966

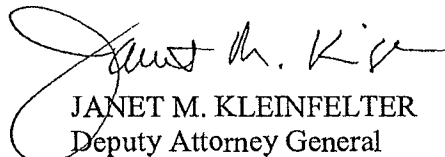
RE: Public Records Request

Dear Mr. Harvey:

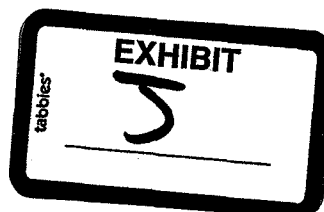
At the request of the Tennessee Department of Children's Services ("DCS"), we are responding to your letters of November 28 and December 17 concerning the public records request made by The Tennessean to the Department. A full consideration of the legal arguments and authorities, including those discussed in your letter of November 28, supports the Department's determination that it has produced all the documents that it can consistent with the provisions of state and federal law.

Accordingly, the State respectfully declines The Tennessean's request for all records of DCS relating to the five specific children identified in Ms. Anita Wadhvani's request of October 19.

Sincerely,

  
JANET M. KLEINFELTER  
Deputy Attorney General

cc: Commissioner O'Day  
Herbert Slatery



**ENTERED**  
MAY 03 2010  
FRANKLIN CIRCUIT COURT  
SALLY JUMP, CLERK

V.

**CABINET FOR HEALTH AND FAMILY  
SERVICES, COMMONWEALTH OF KENTUCKY** **DEFENDANT**

This action is an appeal of decisions by the Cabinet for Health and Family Services (“the Cabinet”), and the Attorney General, to shield records of a child fatality from public scrutiny under the Kentucky Open Records Act, KRS 61.870 *et seq.* The Plaintiff, Lexington H-L Services, Inc. (dba The Lexington Herald-Leader) and Intervening Plaintiff, The Courier-Journal, Inc., are newspapers that seek access to the public records of the Cabinet for Health and Family Services. The public records sought by the newspapers concern the Cabinet’s discharge of its statutory duties to Kayden Daniels, a 20 month old infant who died on May 30, 2009 while in the custody and control of the Cabinet, and the child’s teenage mother, who is also a minor in the custody of the Cabinet. Both the child and the teenage mother had been placed by the Cabinet in its publicly funded foster care program for abused and neglected children. The baby died as a result of drinking toxic liquids that were allegedly part of a meth lab operated by the baby’s teenage father who was aged 19 at the time of Kayden’s death, and who has been charged with murder.<sup>1</sup>

<sup>1</sup> *Commonwealth v. Bryan Daniels*, Wayne Circuit Court No. 09-CR-00069-001



The newspapers filed Open Records requests and the Cabinet denied public access to the records on the grounds that the records are confidential under KRS 194A.060<sup>2</sup>, KRS 620.050<sup>3</sup>, the Health Insurance Portability and Accountability Act of 1996 (HIPPA) and the regulations promulgated to implement that Act, set forth at 45 C.F.R. Parts 160 and 164. The Lexington Herald-Leader appealed the denial of access to the Kentucky Attorney General under KRS 61.880, and the Attorney General issued a ruling<sup>4</sup> on September 11, 2009 upholding the denial on the grounds that KRS 194A.060 provides "a general confidentiality statute" and KRS 620.050(5) provides a specific statutory basis for confidentiality. The Attorney General opined that KRS 620.050(12) does not compel disclosure, even though it allows the Cabinet to disclose such records. The Attorney General's ruling was based solely on state law, and did not reach the Cabinet's argument that HIPPA prohibits the Cabinet, as a health care provider, from providing public access to these records. The Herald-Leader filed this appeal of the Attorney General's ruling on October 9, 2009.

The Courier-Journal filed a similar Open Records request on December 30, 2009,<sup>5</sup> and the Cabinet denied the newspaper's request in a ruling on January 12, 2010.<sup>6</sup> The Courier-Journal filed a motion to intervene, which was granted on January 27, 2010.

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<sup>2</sup> This statute authorizes the Secretary of the Cabinet to promulgate administrative regulations that "protect the confidential nature of all records and reports of the cabinet that directly or indirectly identify a client or patient ..." To date, no administrative regulations implementing this grant of legislative authority have been promulgated. The statute further contains an exception for records where "[d]isclosure may be permitted under state or federal law." KRS 194A.060(1)(b).

<sup>3</sup> This statute governs reports of child abuse and neglect, and provides for confidentiality of child abuse and neglect reports, with certain enumerated exceptions, including a provision that "[i]nformation may be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." KRS 620.050(12)(a).

<sup>4</sup> Copy attached as Exhibit 5 to the Cabinet's summary judgment motion.

<sup>5</sup> *Id.*, Exhibit 6

<sup>6</sup> *Id.*, Exhibit 7.



The Cabinet has filed a motion for summary judgment, and the newspapers have each filed cross-motions for summary judgment. The issues have been fully briefed, and the Court has heard oral arguments on the motions. For the reasons stated below, the motion of the Cabinet is DENIED, and the newspapers' cross-motions are GRANTED.

**Discussion:**

This case squarely presents the issue of whether limited and specific statutory protections for the confidentiality of public records concerning clients who are receiving services from the state's publicly funded foster care system, can be used to shield the Cabinet itself from public scrutiny when a child under the care and protection of the Cabinet has died. The record before this Court is devoid of any legal basis to deny public access to these records.

At the outset, the Court finds that HIPPA simply does not apply to this case. The Cabinet is not a health care provider within the scope of HIPPA in the context of this case, nor is the information that is sought protected health care information.<sup>7</sup> Even if HIPPA applied to the Cabinet, and to the kind of information sought in this case, the specific regulations governing HIPPA provide that there are numerous "standard uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required." 45 CFR 164.512. These "standard uses or disclosures" include cases in which the disclosure "is required by law and the use or disclosure complies with and is limited to the relevant requirement of such law." 45 CFR 164.512(a). Here, for the reasons stated below, the Court finds that disclosure of the requested information is

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<sup>7</sup> The Cabinet does not cite any reported decision which supports the application of HIPPA to prevent public disclosure of this requested information, or to support its implied contention that such a provision would pre-empt other state and federal statutes that require disclosure.

required by the Kentucky Open Records Act, and thus does not fall within any privacy requirements of HIPPA.

The Cabinet's argument is based on two sections of state law, which upon closer scrutiny, are simply inapplicable, or have been misapplied. KRS 194A.060, the general statute allowing the Cabinet to promulgate an administrative regulation governing the confidentiality of Cabinet records concerning clients, has a specific exception that is directly on point here. That statute provides that the Cabinet may not impose by administrative regulation a requirement of confidentiality where "[d]isclosure may be permitted under state or federal law." Here, both state law<sup>8</sup> and federal law<sup>9</sup> not only allow, but indeed compel, the disclosure of these records.

Moreover, KRS 194A.060 is not a self-executing statute directly imposing a veil of confidentiality on all Cabinet records concerning clients. Rather, it merely *authorizes* the Secretary of the Cabinet to "promulgate administrative regulations that protect the confidential nature of all records and reports of the cabinet that directly or indirectly identify a client or patient." KRS 194A.060 was enacted in 1998 as a small part of "an act relating to the reorganization of the Cabinet for Human Resources." 1998 Ky. Acts, c. 426, Section 7. This Cabinet reorganization bill did not purport to impose any new substantive requirements of confidentiality. Rather, the Act dealt only with procedural issues, clarifying the authority of the Secretary to promulgate an administrative regulation on the subject of confidentiality of client records. The reorganization bill did not transform these public records from public to confidential, but rather allowed the Secretary to delineate the procedure for establishing and enforcing state policy on

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<sup>8</sup> The Open Records Act, KRS 61.870 *et seq.*

<sup>9</sup> The Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101 *et seq.*

confidentiality patients or clients information. That legislation specifically provides that this regulatory authority does not extend to situations where, as here, “disclosure may be permitted under state or federal law.”

Apparently, the Cabinet has never promulgated such an administrative regulation. Neither the Cabinet, nor the Attorney General, has cited any such administrative regulation that has been promulgated after the full public participation and legislative oversight process required by KRS Chapter 13A. In the absence of an administrative regulation on point, KRS 194A.060 has no independent statutory prohibition against disclosure of the requested information, and to the contrary, it contains an express authorization for disclosure. By its own explicit language, this statute does not impose a confidentiality requirement on any information where “[d]isclosure may be permitted under state or federal law.” KRS 194A.060(1)(b). Here there is no dispute that federal law permits such disclosure. *See* 42 U.S.C. 5101 *et seq.*, and that state law likewise authorizes the Cabinet to publicly disclose this information. KRS 620.050(12).

Likewise, the Cabinet has ignored the explicit authorization for public disclosure of these records set forth in KRS 620.050(12)(a). KRS 620.050 provides a very detailed statutory framework for the investigation of reports of child abuse and neglect. It provides immunity for persons making child abuse and neglect reports based on reasonable cause. KRS 6320.050(1). It provides immunity for persons conducting investigations [KRS 620.050(2)], and for confidentiality of the “information obtained by the cabinet ... as a result of an investigation.” KRS 620.050(5). However, the statute very explicitly provides an exception to this rule of confidentiality: “Information may be

publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality.” KRS 620.050(12)(a).

All parties concede that the information at issue here falls squarely within this exception to the rule of confidentiality. The Cabinet argues that disclosure is merely authorized and not compelled, and that it retains a broad administrative discretion over any request for public disclosure.

The Cabinet’s legal position is contrary to the plain language of the Kentucky Open Records Act, which provides that “[a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884.” KRS 61.872(1). The Open Records Act further stipulates certain very limited and well defined exceptions to the rule of public disclosure. KRS 61.878. None of those exceptions apply to these requests. Unless the Cabinet can cite a specific exception to the rule that “all public records shall be open”, then the Open Records Act requires disclosure.

The Attorney General relied on the exception to the rule of public disclosure codified at KRS 61.878(1)(l), exempting from public disclosure, “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.” *See* 09-ORD-149, p. 2. The Attorney General’s determination that KRS 194A.060 and KRS 620.050 prohibit or restrict public disclosure is clearly erroneous, and completely contrary to the plain, explicit language of those statutes, which both provide for public disclosure of these records. The Court must apply the plain language of the controlling statute, which provides for general rules of confidentiality but which also provides that “[i]nformation may be publicly disclosed by the cabinet in a case where child abuse or neglect has

resulted in a child fatality or near fatality.” KRS 620.050(12)(a). The plain language of this specific statutory exception to the general rule of confidentiality controls. *See Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005).

The Cabinet’s general enabling legislation, KRS 194A.060(1)(a), explicitly authorizes public disclosure in this case, and there is no administrative regulation that narrows the scope of this authorization. The Cabinet’s specific legislative mandate for the investigation of child abuse and neglect cases likewise authorizes the disclosure of this information because the requested information here concerns “a case where child abuse or neglect has resulted in a child fatality.” KRS 620.050(12)(a). When public disclosure is *permitted* under the Cabinet’s enabling legislation, it is *required* under the Open Records Act. KRS 61.872(1).

Moreover, the legislature has given specific direction that in construing the statute, “free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, *even though such examination may cause inconvenience or embarrassment to public officials or others.*” KRS 61.871. (Emphasis supplied). The Cabinet has cited no other exemption from the Open Records Act, and the Cabinet lacks the standing to assert a privacy interest in this case. To the extent that the Cabinet relies on the exception for the privacy interests of others, the Court notes that the personal privacy exemption of the Open Records Act is narrowly tailored and it applies only to “the type of information about which the public would have little or no legitimate interest but which would be likely to cause serious personal embarrassment or humiliation.” Lexington Fayette Urban

County Government v. Lexington Herald-Leader, 941 S.W.2d 469, 472 (Ky. 1997).<sup>10</sup>

Here, there is the strongest possible legitimate public interest in the information requested, concerning the state's discharge of its statutory duties to dependent and neglected children, which outweighs any privacy interests of any party or other person.

The Court must also note that the very specific statutory authorization for public disclosure of these records, set forth at KRS 620.050(12), cannot be construed, as it has been by both the Attorney General and the Cabinet, as granting unlimited discretion to the Cabinet to keep these records confidential. The legislative history of this authorization for public disclosure demonstrates that it is a requirement of federal law that child welfare agencies must provide for release of such information in child abuse or neglect cases that involve a death. The legislature enacted this provision because the Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101 *et seq.* ("CAPTA") requires that states that accept federal funds for child protective services are *required* to have in effect "provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." 42 U.S.C. 5106a(b)(2)(A)(x).

It would be completely disingenuous, and contrary to law, for this Court to judicially sanction a policy of the Cabinet which effectively undermines, indeed nullifies, this provision of federal law. The Cabinet has argued that KRS 620.050(12) *permits*, but does not *require*, public disclosure, and thus the Court should defer to the administrative discretion of the agency. Yet the Cabinet also candidly admits that it *never* authorizes public disclosure of the requested information, even in cases resulting in

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<sup>10</sup> The Kentucky Supreme Court's narrow interpretation of the privacy exemption from the Open Records Act has been recently re-affirmed in Central Kentucky News-Journal v. George, \_\_\_ S.W.3d \_\_\_, (Slip Op. March 18, 2010, No. 2009-SC-00018-MR).

the death of a child who is in foster care: “The Cabinet has a long-standing decision not to disclose these records so as to allow the victim and the affected family to be spared from unwarranted scrutiny and an unwarranted invasion of their privacy in accordance with KRS 61.878(1)(a).” *See* Cabinet Motion for Summary Judgment and Memorandum in Support, 1/27/10, p. 11. The Cabinet candidly admits it *never* releases this information: “In fact, upon information and belief, the Cabinet has never released the individual child fatality reports to the public as Estep and the Courier are requesting the Court to require in this case.” *Id.*, p. 12. Accordingly, there is no question that these records were willfully withheld, although it is also clear that the Cabinet believes such a policy of intentional withholding of these documents is legally justified.

The Cabinet’s arguments demonstrate not the exercise of administrative discretion, but the wholesale abdication of discretion. All requests are simply denied, regardless of the circumstances, and notwithstanding the specific mandates of state and federal law that allow the public release of this information.

The Attorney General, in this ruling and in a prior ruling heavily relied upon by the Cabinet, 07-ORD-145, finds that the public interest in disclosure is “significant”, yet “must yield to the statutorily recognized interest in protecting the rights of the child and his or her parents or guardians.” (*See* Cabinet Memorandum, 1/27/10, p. 12). Clearly the Attorney General and the Cabinet both assume that keeping this information confidential is somehow in the best interests of the children involved, and that public scrutiny of these tragic events would constitute an invasion of their privacy. This bias in favor of confidentiality is directly contrary to the legislative mandate in favor of public disclosure codified in the Open Records Act.

While the Court recognizes and understands that there are legitimate concerns about privacy interests that are implicated in requests for public information by newspapers, the Court is bound by the Open Records Act to require release of the requested information unless a specific statutory exemption applies. Here, the general statutory confidentiality provisions that are relied upon by the Cabinet provide specific exceptions that are controlling and which explicitly authorize the release of the information. Moreover, the Cabinet's arguments appear to be based more on the culture of the agency, which seeks to avoid public scrutiny, than on any statutory prohibition.

The Cabinet's arguments raise the specter of "unwarranted scrutiny" and "unwarranted invasions of privacy." These arguments, contrary to the plain language of the Open Records Act, assume that public scrutiny is not justified even in the extreme case before this Court in which a 20 month old child in the legal care of the Cabinet died in a meth lab. While it should go without saying, it perhaps must be spelled out in the context of this case: it is not unwarranted for the public, and the press, to want to know what happened when a 20 month old child in the care and legal custody of the Commonwealth of Kentucky winds up dead after drinking toxic substances in a meth lab.

This Court recognizes and understands that public scrutiny necessarily runs the risk that some state officials or employees may be unfairly singled out for criticism, and some individuals may have personal matters exposed to public view. This is likewise the case with criminal prosecutions, which are public by constitutional mandate. *See* Ky. Const. Sec. 11. Unlike the child whose life has been lost, those individuals will have the opportunity to defend themselves and to respond to any allegations that may become part of the public record.



The loss of life here may have been a tragic accident that was unavoidable even if the child welfare system had worked perfectly. Or it may have been the result of a systemic failure on the part of the Cabinet that needs to be corrected. Either way, the public has a right to know the facts and to make its own judgment. Without public scrutiny of the events in question, there can be no real accountability. This is why the legislature has clearly mandated that "free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871.


It is not just the privacy interests of state employees and family members of Kayden Branham that are at stake here. Also at stake are the lives and the welfare of hundreds of other children who are in the state's foster care system. These children have been abused and neglected and, through no fault of their own, are dependent on the Commonwealth of Kentucky to protect their welfare. A foster care system that operates in secret, without public scrutiny or accountability, even in this extreme case where a child in foster care has lost his life, is a system that is operating outside the scope of the legislative mandate for public accountability that is codified in KRS 61.872 and KRS 620.050(12)(a). This reflects a systemic failure that will inevitably lead to covering up, rather than fixing, the problems in the state foster care system, to the detriment of the children who are dependent on the state for their protection and welfare. The interests of these children also must be weighed in the balance.

It is completely warranted and justified for the public and the press to seek answers to the question of why this child died, and whether our child welfare system

worked in this case. Under the Kentucky Open Records Act, the public records related to the death of a child under the protection of the state foster care system are open to public inspection. KRS 620.050(12)(a); KRS 61.872.

### CONCLUSION

For the reasons stated above, the motion of the Cabinet for summary judgment is DENIED and the cross-motions for summary judgment filed by the Lexington Herald-Leader and The Courier-Journal are GRANTED. The Court RESERVES ruling on the award of costs, attorney's fees and statutory penalties under KRS 61.882(5), and grants the Plaintiff and Intervening Plaintiff ten (10) days from the entry of this Order to file any motions and supporting affidavits seeking such relief. The Cabinet shall have ten (10) days thereafter to file any response, and the motions will stand submitted for decision. Upon entering a ruling on any motions filed under KRS 61.882(5), the Court will enter a final and appealable judgment.

  
PHILLIP J. SHEPHERD, JUDGE  
FRANKLIN CIRCUIT COURT, DIV. 1

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