IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, COUNTY OF DAVIDSON

SCRIPPS MEDIA, INC. and PHIL WILLIAMS,	)	
Petitioners,	)	
v.	)	**No.** 18-835-II
TENNESSEE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES and TENNESSEE BUREAU OF INVESTIGATION,	)	
Respondents.	)	

PETITION FOR ACCESS TO PUBLIC RECORDS

Petitioners Scripps Media, Inc. and Phil Williams, pursuant to Tennessee Code Annotated § 10-7-505, hereby petition this Court to obtain access to certain public records of the Tennessee Department of Mental Health and Substance Abuse Services and the Tennessee Bureau of Investigation and for judicial review of these agencies' denial of access to public records. In support of such petition, Petitioners state as follows:

1. Petitioner Scripps Media, Inc. is a corporation that owns and operates television station NewsChannel 5, WTVF in Nashville, Davidson County, Tennessee.

2. Petitioner Phil Williams is the Chief Investigative Reporter for NewsChannel 5 and is employed by Scripps Media, Inc. His actions in seeking such records were in the course and scope of his employment.

3. Respondents are the Tennessee Department of Mental Health and Substance Abuse Services ("TDMHSAS") and the Tennessee Bureau of Investigation ("TBI"). Service of process

upon these agencies of the State of Tennessee may be made upon the Attorney General of the State or to any assistant attorney general pursuant to Rule 4.04 of the Tennessee Rules of Civil Procedure.

Requests to Tennessee Department of Mental Health and Substance Abuse Services.

4. By e-mail dated June 15, 2018, Mr. Williams sent an e-mail to Matthew Parriott, Director of Communications of TDMHSAS asking to personally inspect the following records of that state agency:

(1) All travel reimbursement and per diem requests submitted by Sejal West since November 2016;

(2) All logs of phone calls made on any mobile phone assigned to Ms. West since November 2016; and

(3) Any e-mails between Ms. West and Jason Locke of the Tennessee Bureau of Investigation.

Mr. Parriott responded by e-mail that same day stating "Thank you for your request. We will begin working on it." (A copy of Mr. Williams' e-mail request and Mr. Parriott's response is attached hereto as **Exhibit A**.) The subject of those requests, Ms. Sejal West, was an employee of the TDMHSAS.

5. On Monday, June 18, 2018, Mr. Williams again e-mailed Mr. Parriott of the TDMHSAS requesting that in addition to items previously requested, he would like to personally inspect the following records of that state agency:

Ms. [Sejal] West's electronic calendar since November 2016.

(**Exhibit B** hereto.)

6. On Tuesday, June 19, 2018, Mr. Williams e-mailed Mr. Parriott of the TDMHSAS requesting that he be allowed to personally inspect the following records:

any items in Sejal West's personnel file – or in any other file kept by the Commissioner or her designee – regarding Ms. West's resignation back in January. This request includes, but is not limited to, any complaints, any disciplinary letters/memos, any investigative summaries and any resignation letter/e-mail.

(**Exhibit C** hereto.)

7. On June 20, 2018, Mr. Williams sent an e-mail to Mr. Parriott of the TDMHSAS with the subject line, "Questions about Sejal West." In that e-mail Mr. Williams asked questions regarding Ms. West's job status and whether she had been placed on administrative leave. This e-mail also requested "any e-mail or other written communication" related thereto "as a public records request." Mr. Parriott responded later that day (June 20) and stated that, "The allegation of misuse of state funds is currently under investigation by the Tennessee Comptroller of the Treasury as well as the Tennessee Department of Safety and Homeland Security." Mr. Parriott also stated that Ms. West had been placed on administrative leave with pay pending the outcome of investigations. He declined to comment further based upon these investigations. As to the last record request, he advised there were "No e-mails or other written communications responsive" to that request. In that same e-mail as regards Mr. Williams' prior requests, he advised that "any and all responsive documents will be provided in a timely manner pursuant to Tenn. Code Ann. § 10-7-503, et seq." (Mr. Williams' e-mails and the response thereto are attached hereto as **Exhibit D**.)

Requests to the Tennessee Bureau of Investigation

8. On June 15, 2018, Mr. Williams sent an e-mail to the Tennessee Bureau of Investigation ("TBI") requesting to personally inspect the following documents of that state agency:

(1) All travel reimbursement and per diem requests submitted by Jason Locke since November 2016;

(2) Logs of phone calls made from any mobile phone assigned to him since November 2016; and

(3) Any e-mails between Mr. Locke and Sejal West of the Department of Health.

(Mr. Williams' e-mail is attached hereto as **Exhibit E**.) The subject of those requests, Mr. Jason Locke, had served as the acting director of the TBI.

9. On June 18, 2018, Mr. Williams sent another e-mail to the Tennessee Bureau of Investigation requesting the following documents of that state agency:

> The electronic calendars for Jason Locke for the same time period [since November 2016].

(Mr. Williams' e-mail is attached hereto as **Exhibit F**.)

10. The Tennessee Bureau of Investigation, through attorney Scott Wilder, responded to Mr. Williams by e-mail and an attached letter electronically sent.

The e-mail notified Mr. Williams that:

> I will let you know as soon as I get an idea of the time frame for the records you request and their availability. Based upon the dates requested and the fact many of these are [sic] requests are managed or archived outside TBI, the involved supplier (mobile phone)/custodians (e-mails & calendar) will have to provide us the exact time frame for availability.

Attached to the e-mail from Attorney Wilder was a "Records Production Letter" from Mr. Wilder that acknowledged the records request and stated that within thirty (30) days the records requested would be available or a determination of accessibility and availability will be made. (The e-mail and attached letter are attached as **Exhibit G**.)

11. On June 20, 2018, Mr. Williams sent the TBI an e-mail asking if Mr. Jason Locke still had his TBI issued cell phone and whether the TBI has an internal investigation taking place. Josh Devine of the TBI responded that Mr. Locke still has his TBI issued cell phone and that "There is not an internal investigation at TBI." The e-mail referenced a practice of using an

investigator outside the agency. (Mr. Williams' e-mail and Mr. Devine's response are attached hereto as **Exhibit H**.)

12. On June 21, 2018, Mr. Williams made an additional public record request by e-mail to the TBI seeking to inspect "transaction summaries since July 2, 2016 for any credit cards or p-cards that may have been assigned to Jason Locke." (A copy of that request is attached hereto as **Exhibit I**.)

13. On June 22, 2018, Mr. Williams sent the TBI an e-mail asking to inspect "any text messages between Jason Locke and Sejal West." (A copy of that e-mail is attached hereto as **Exhibit J**.)

Denials of Access

14. By letter dated June 22, 2018 from Deputy Attorney General Janet Kleinfelter to Phil Williams, the TMHDSAS denied all of Mr. Williams' public records requests. The basis given for the refusal was the Tennessee Supreme Court's decision in the case of *Tennessean v. Metro Government of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016). Ms. Kleinfelter stated in her denial letter, "As you may be aware, the District Attorney General for the 20th Judicial District has an open and ongoing criminal investigation concerning the activities of Ms. West." (Letter attached hereto as **Exhibit K**.)

15. By letter also dated June 22, 2018 from Deputy Attorney General Janet Kleinfelter to Phil Williams, the TBI denied all of Mr. Williams' public records requests on the same basis and with the same language as the denial of Mr. Williams' requests to the TMHDSAS. (Letter attached hereto as **Exhibit L**.)

16. By e-mail dated June 25, 2018, Petitioner Mr. Williams asked Deputy Attorney General Kleinfelter to reconsider the denial of his requests for the "non-investigative records" of

the TBI and TDMHSAS he had previously requested. The e-mail stated that her denial letters "clearly misapply" the decision in *Tennessean v. Metro Government of Nashville and Davidson County* that applied to investigative records in a criminal case. Mr. Williams' e-mail pointed out that the requested records were generated in the normal course of business and predated any anticipated investigation. (Mr. Williams' e-mail to Ms. Kleinfelter is attached as **Exhibit M.**)

17. Mr. Williams' e-mail to Ms. Kleinfelter pointed out that at the time of the submission of his initial record requests, no investigation had been opened. He provided the Deputy Attorney General an e-mail that he received that stated the Criminal Investigative Division ("CID") of the Highway Patrol did not open a criminal investigation until Monday, June 18, 2018. (The e-mail is attached as **Exhibit N**.)

18. On July 3, 2018, counsel for the Petitioners sent Ms. Kleinfelter a letter that requested production of the public records previously requested by Mr. Williams. (A copy of that letter is attached as **Exhibit O**.) Ms. Kleinfelter responded by letter dated July 11, 2018 and again denied the requests, citing the *Tennessean v. Metro Government* case and other case law relating to public records requests for "investigative records." In those prior cases, the record requests were made directly to law enforcement officials seeking their investigative files in on-going criminal cases. (A copy of that letter is attached as **Exhibit P**.)

Entitlement to Access

19. As set forth above, Petitioners have attempted to obtain these public records without filing a petition with this Court. Such efforts have been unsuccessful. The State agencies continue to deny access to those records. It is therefore necessary to bring this action for access and for judicial review pursuant to Tennessee Code Annotated § 10-7-505. This Court is granted jurisdiction over this case by that statute.

20. The records sought by Petitioners from the TBI and TDMHSAS are "public records" within the meaning of Tennessee Code Annotated § 10-7-503(a)(1).

> 'Public records' or 'state record or records':
>
> (i) Means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity.

(Emphasis added.) The statute that provides access to public records states that the records shall be open for inspection and that the right of inspection shall not be denied "unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2).

21. Pursuant to Tennessee Code Annotated § 10-7-505(d), there is a presumption in favor of openness and access to public records such as those requested by Petitioners from these agencies. This statutory section, which provides for a judicial review of a denial of access, states that it "shall be broadly construed so as to give the fullest possible public access to public records."

22. This same statute provides that in a proceeding wherein petitioner seeks access and to obtain judicial review of the denial of access that "The burden of proof for justification of non-disclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the non-disclosure must be shown by a preponderance of the evidence." Tenn. Code Ann. § 10-7-505.

23. The State of Tennessee cannot carry its burden of proof to provide justification for its denial of access.

24. The State of Tennessee has relied upon the Tennessee Supreme Court's recent holding in *Tennessean v. Metro Government of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016) and claimed that these records are "relevant to and involved in a pending criminal investigation coordinated by the District Attorney General." (**Exhibit P.**)

25. The records that Petitioners seek are not "investigative records" within the meaning of the case law cited by the State Deputy Attorney General in her denial letters. Those cases dealt with situations where the media or a criminal defense attorney made requests directly to a police department or other law enforcement agency for what was in their investigative files, including witness interviews, investigators' notes and other items which the law enforcement created in the course of a pending criminal case.

26. As noted above, the public records requested by Mr. Williams include travel reimbursement records, per diem expense reports, and electronic calendars. (**Exhibits A, B, C, E, F, I and J**). These records were generated and held in the normal course of these state agencies' regular business. These records were not generated or prepared in connection with any investigation.

27. The records that Petitioners have requested are not "investigative records" and the State's argument is an unwarranted and substantial expansion of the *Tennessean* case rationale that the State relies upon in the denial letters. The public records sought are not criminal discovery documents and Rule 16 of the Tennessee Rules of Criminal Procedure has no application to these requests.

28. The public records requested by Mr. Williams were created before any investigation ever began. In addition, according to the information that he received from the agencies, his public record requests were made before the investigation by the Criminal Investigative Division of the TBI was commenced. The original responses he received from the state agencies did not mention an investigation. (**Exhibits A and G**.) A subsequent e-mail he received from the TBI said that the CID investigation began Monday, June 18, 2018. (**Exhibit H.**) The 2003 Court of Appeals case of *Chattanooga Publishing Company v. Hamilton County*

Election Commission provides that a subsequent investigation does not convert previously obtainable records into records that can be withheld.

29. The documents that Petitioners request in this case are all public records. There is not an applicable exception to the statutory requirement of access to the public. The State's denials are contrary to the public records statutes and the important policies of open access to public records set forth in those statutes.

30. Tennessee Code Annotated § 10-7-505(g) provides that the Court may award "all reasonable costs involved in obtaining the records, including reasonable attorneys' fees" if the government "knew the record was public and willfully refused to disclose it." Clearly, the State knows that the records sought are public. The exception claimed is an attempt to expand the rulings of the courts to records that are clearly not "investigative records." Under the circumstances of these requests, the refusal to disclose such records is willful and entitles Petitioners to an award of all reasonable costs and reasonable attorneys' fees.

31. This petition involves a question of substantial public interest and a question that has started to arise with some frequency. Unless this issue is resolved, Petitioners and other citizens of the state will be faced with denials of access based upon such an overbroad and inaccurate use of the *Tennessean* case rationale.

32. The denial of access for these public records violates the important guarantees of free speech and freedom of press found in the First Amendment to the United States Constitution and Article I, § 19 of the Tennessee Constitution.

33. Petitioners are entitled to full access to these public records and an award of all costs and a reasonable attorneys' fees. A memorandum of law in support of this Petition is filed contemporaneously herewith.

PREMISES CONSIDERED, PETITIONERS PRAY:

1. Petitioners request that, pursuant to Tennessee Code Annotated § 10-7-505, the Court issue an order requiring representatives of the TBI and TDMHSAS to appear at a date certain and to show cause why this Petition for Access should not be granted, and request a prompt and expeditious hearing as provided for in the statute.

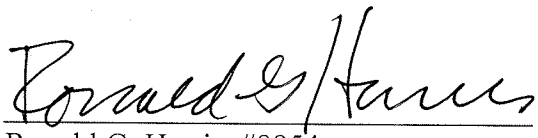
2. Petitioners request an order from this Court that the TBI and TDMHSAS be required to promptly allow inspection and copying by Petitioners of all the requested public records.

3. Petitioners request that they be awarded all their costs incurred in obtaining these records, including reasonable attorneys' fees.

4. Petitioners request any other relief to which they may prove themselves entitled.

Respectfully submitted,

NEAL & HARWELL, PLC

By: 

Ronald G. Harris, #9954
William J. Harbison II, #33330
1201 Demonbreun Street, Ste. 1000
Nashville, TN 37203
(615) 244-1713 – Telephone
(615) 726-0573 – Facsimile
Counsel for Petitioners

VERIFICATION

The undersigned hereby states upon his own personal knowledge that the factual representations contained herein are true and correct to the best of his information and belief.

Phil Williams

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

SWORN to and subscribed before me this 31st day of May, 2018.

PHYLLIS A. STEVENS STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY My Commission Expires NOV. 5, 2018

Notary Public

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, COUNTY OF DAVIDSON

SCRIPPS MEDIA, INC. and PHIL WILLIAMS, Petitioners, v. TENNESSEE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES and TENNESSEE BUREAU OF INVESTIGATION, Respondents.	)	No. 18-835-II

MEMORANDUM IN SUPPORT OF PETITION FOR ACCESS TO PUBLIC RECORDS

Petitioners Scripps Media, Inc. and Phil Williams hereby submit this Memorandum in Support of their Petition for Access to Public Records ("Petition"). For the reasons set forth in their Petition and supported by the legal authority herein, this Court should grant the Petition and order full access to the public records sought from the Tennessee Bureau of Investigation ("TBI") and the Tennessee Department of Mental Health and Substance Abuse Services ("TDMHSAS").

SUMMARY OF ARGUMENT[1]

Beginning June 15, 2018, Mr. Williams made requests to inspect certain public records from the TBI and TDMHSAS. (Exhibits A, B, C, D, E, F, I, and J to Petition for Access.) These requests were for records created in the ordinary course of these two state agencies' business. The

[1] The facts are stated in the Petition for Access filed in this case and verified by Petitioner Phil Williams.

records included such items as travel reimbursement requests, logs of phone calls on agency mobile phones, electronic calendars and other items. These records were not created in the course of any investigation.

These state agencies, through the Tennessee Attorney General's office, have refused such requests on the basis of a pending investigation by the District Attorney General's office with the Tennessee Highway Patrol and Comptroller's office. (Exhibits K, L, and P to Petition for Access). The Attorney General cites the recent Tennessee Supreme Court decision in the *Tennessean v. Metro Government of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016) and claims that these requested records are "investigative records" within the holding of that case. *Id.*

As discussed below, the requested records in this case and the factual circumstances of the requests are much different from the cases cited by the Attorney General. The public records in this case are not "investigative records" and the rationale for the nondisclosure in those prior cases do not apply to the Petitioners' current requests. The Attorney General's office is arguing for an unwarranted and substantial expansion of prior court decisions – an expansion that is contrary to the public records law and the clearly contrary to stated policy of that law.

AUTHORITY AND ARGUMENT

I. OPEN RECORDS ACT REQUIRES ACCESS BE GIVEN

Petitioners seek these records pursuant to the Tennessee Public Records Act. Tenn. Code Ann. § 10-7-503, et seq. The records that Petitioners seek are clearly public records within the meaning of that statutory scheme. Tenn. Code Ann. § 10-7-503(a)(1). The State's denial letters do not argue otherwise.

The Public Records Act provides that the public records "shall 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) (emphasis added). There is a presumption of openness for government records. *Memphis Publishing Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1984). The Public Records Act specifically requires that the statute "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505. The statute provides for "expeditious" judicial review of a denial of access. *Id.* The statute also provides that the burden of proof for justification for nondisclosure sought is on the official and must be shown by a preponderance of the evidence. *Id.* The State of Tennessee cannot meet its burden of proof in this case.

II. THE CASE LAW RELIED UPON BY THE STATE DOES NOT CREATE A BROAD EXCEPTION THAT JUSTIFIES THE DENIALS IN THIS CASE

In the State's initial letters denying access, the state agencies rely upon the Tennessee Supreme Court's ruling in the *Tennessean v. Metro Government of Nashville and Davidson County* ("The *Tennessean*" case) 485 S.W.3d 857. (Exhibits K and L to Petition for Access). The State's response to Petitioner' counsel letter (**Exhibit P** to Petition) also relies upon the *Tennessean* case and three other prior cases for its denial. Neither the facts nor the rationale of any of those cases support their use to block access to the public records in this case.

A. *Tennessean v. Metro Government*

The *Tennessean* case arose the pending criminal cases of four Vanderbilt University football players charged with the rape of a university student in a campus dormitory. The Tennessee Supreme Court opinion described the issue presented to the Court as follows:

> Whether a coalition of media groups and a citizens organization, relying on the Tennessee Public Records Act, have the right to inspect a police department's criminal investigative file while the criminal cases arising out of the investigation are ongoing.

485 S.W.3d at 859 (emphasis added). In that opinion, the Court characterized the requests at issue as follows:

> Following the indictments, the Petitioners, a group of media organizations and a citizens group, made a Public Records Act request to inspect the police department's files regarding its investigation of the alleged criminal conduct by the football players.

Id. (Emphasis added.) The record request in that case sought to inspect any records in the police department's files, specifically including any text messages received or sent and videos provided and/or prepared by any third-party sources. *Id.* at 860.

In that case, the Tennessee Supreme Court relied upon Rule 16 of the Tennessee Rules of Criminal Procedure which governs discovery between the State of Tennessee and criminal defendants. The Supreme Court found that under the circumstances presented in that case, Rule 16 can be viewed as an exception to the Public Records Act.

One of the main rationales cited by the Court to support this result was stated as: "If Rule 16 did not function as an exception to the Act, a defendant would have no reason to seek discovery under Rule 16, but would file a public records request and obtain the entire police investigative file, which could include more information than the defendant could obtain under Rule 16." *Id.* at 871. (Emphasis in original.) The Court relied upon and quoted at length from a decision of the North Carolina Supreme Court that upheld a denial of access to police department recordings between police officers for similar reasons, *Piedmont Publishing Co. v. City of Winston-Salem*, 434 S.E.2d 176 (1993). The *Tennessean* case contained the following quote from that case:

> If we were to adopt the position advocated by the plaintiffs, . . . the files of every district attorney in the state could be subject to release to the public. Among the

> matters that would have to be released would be the names of confidential informants, the names of undercover agents, and the names of people who have been investigated for the crime but not charged. We do not believe the General Assembly intended this result.

Id. at 872. The ability of a criminal defendant to obtain records from the law enforcement authorities through a public records request was a significant reason for denying disclosure in this case and in the other cases relied upon by the State in its response to Petitioners' counsel. The facts of each case cited are much different than the facts in this case. The rationale of those cases for denying disclosure simply do not fit the situation presented by Petitioners' request herein.

B. ***Apperman v. Worthington***

The Deputy Attorney General in her response to Petitioners' counsel also cited *Apperman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987), as did the Tennessee Supreme Court in the *Tennessean* case. (Exhibit P to Petition for Access.) In *Apperman*, it was the criminal defendant who sought records through use of the Public Records Act. The records sought were the "results of investigation by Internal Affairs of the Department of Correction into the murder of Carl Estep, an inmate in a correctional facility operated by the State. . . ." 746 S.W.2d at 166-167. This investigative report was made about the murder which was the subject of the pending criminal case. The Court denied the public records request on the basis that the criminal defendants could not get such memoranda or reports made by state agents or law enforcement agents in connection with the investigation or prosecution of the case, pursuant to Rule 16(a)(2) of the Tennessee Rules of Criminal Procedure. The rationale included the argument that if the defendants could not get these specific investigative reports in discovery under Rule 16 of the Rules of Criminal Procedure, the Court was unwilling to allow the defendants to get them through a Public Records Act request.

C. *Schneider v City of Jackson*

The Deputy Attorney General also cited *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007) in her response to Petitioners' counsel. (**Exhibit P** to Petition for Access.) In that case, the Tennessee Supreme Court expressly declined to adopt a "law enforcement" privilege as an exception to the Public Records Act. *Id.* at 344. The Public Records request in that case asked the City of Jackson police department to turn over "field interview cards generated by police officers of the City." *Id.* at 335. The Court remanded the case for determination of which of the interview cards were involved in an ongoing criminal investigation.

D. *Memphis Publishing Co. v. Holt*

The other case that the State contends supports its position is *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986). (**Exhibit P** to Petition for Access.) In that case, the public records request was submitted directly to the Memphis Police Department and sought the "closed investigative file" on an incident involving a police shoot-out.

The Court briefly discussed the argument whether Rule 16 of the Tennessee Rules of Criminal Procedure created an exception because that Rule at paragraph (a)(2) would not allow discovery of "reports, memorandum or other internal state documents made by state agents or law enforcement officers in connection with the investigation or prosecution of the case." The Court stated that, "By definition this limitation on access to records applies only to discovery in criminal cases." The Court did not recognize a broad exemption for investigative files, but rather simply said that since the investigative file sought is a closed file, Rule 16 "does not come into play in this case." *Id.* at 517.[2]

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[2] The Deputy Attorney General's letter cites that case with an *italicized* quote that Rule 16 "does apply where the files are open and relevant to pending or contemplated criminal action." *Id.* at 517 (emphasis added). (**Exhibit P** to Petition for Access.) Undersigned counsel has not been able to locate that quote at the cited page or in that case.)

E. Scope of Alleged "Investigative Records" Exception

The broad exception to the Public Records Act for "investigative records" that the State now argues in this case is unwarranted, severely undermines the important open access policies of those statutes, and is not supported by Tennessee case law. In each of these cases cited by the Deputy Attorney General, the records sought were truly and without question "investigative records." Indeed, the requests were made to law enforcement agencies involved in investigating a crime. Indeed, the rationale of these cases were shaped by the fact that among the records requested in those prior cases were records created as part of criminal investigations – including investigative reports of the very incidents for which charges had been brought. *E.g.* the *Tennessean v. Metro*, *supra*; *Apperman v. Worthington*, *supra*. These cases dealt with true "investigative records." The decisions discussed Rule 16 of the Rules of Criminal Procedure in the context that the criminal defendant himself would not have been able to obtain those in discovery.

In this current case, the records sought by Petitioners are not "investigative records." They are records made and received in the ordinary course of the transaction of business by these state agencies. The records sought were created well before investigation, including records back to November 2016. The Petitioners' current requests do not seek what was created in the course of any pending investigation. Petitioners did not make their requests to the law enforcement officials investigating or prosecuting the matters at issue (as was the case in the cases the State relies upon). The requests were made to the agencies who created and received the travel reports, expense reimbursement requests, and other documents in the regular conduct of those agencies' business.

Additionally, in this case, Petitioners have received information from the agencies themselves regarding these requests that support the proposition that the initial public records requests at issue herein were made before the investigations that the Deputy Attorney General

relies upon to block disclosure. The initial public records requests were made on June 15, 2018 (**Exhibits A and E** to Petition for Access).[3]

The initial responses from the agencies to these requests did not decline the requests or use any investigation as a reason for non-disclosure. (*E.g.* Exhibits A and G.) Petitioner Williams has received an e-mail stating that the Criminal Investigative Division ("CID") of the Tennessee Highway Patrol did not open a criminal investigation until Monday, June 18, 2018 (**Exhibit N**).

If in fact the public records requests that were made on June 15, 2018, did precede any investigation, they fit well within the facts and rationale set forth in *Chattanooga Publishing Company v. Hamilton County Election Commission*, 2003 W.L. 22 469808 (Tenn. App. 2003) (copy attached). In that case, certain public election records were requested by a Chattanooga newspaper. Objection to disclosure was made under the specific statutory exception for TBI investigative records. The Court found that at the time of the request, "neither the original documents nor photocopies of them were in possession of the TBI, nor was there any investigation underway of the May 7 Hamilton County Primary." *Id.* at 6. The TBI investigation in that case apparently began somewhere between two and eight days after the newspaper's record request. *Id.*

The Court of Appeals in that case reversed the trial court's denial of access stating as follows:

> We are of the opinion that because the election records were unquestionably public records from the time of their creation in May of 2002, and because there were no applicable exceptions to the legislative mandate of accessibility at the time CPC made the request for them, they should have been released to CPC. To hold otherwise, and thereby allow a governmental agency to shield otherwise public information from the daylight of public scrutiny subsequent to a request under the Act, would, as noted by amici curiae, present the potential for abuse of the TBI by

[3] Additional requests were made June 18, 19, 20, 21, and 22 (**Exhibits B, C, D, F, I, and J** to Petition for Access).

> such agency. Such an interpretation would also run counter to both the letter and spirit of the Public Records Act.

Id. at 6 (emphasis on "subsequent" in original, other emphasis added).

In the response letter from the Deputy Attorney General, she states that there was a "request" made by Governor Haslam to the Department of Safety and Homeland Security to conduct an investigation into the activities of Mr. Locke and Ms. West on Friday, June 15, 2018. (**Exhibit P**) (the same day as Petitioners' initial requests). That letter also states the District Attorney General's office "subsequently joined the investigation on Monday, June 18, 2018." (**Exhibit P**).

Regardless of whether an investigation was commenced the same day, three days later or at any other time thereafter, the rationale of the Court of Appeals in the Chattanooga publishing company case should still be applicable. A government agency should not be allowed "to shield otherwise public information from the daylight of public scrutiny" by any such argument. The "potential for abuse" by state agencies to block the "legislative mandate of accessibility" was properly noted there and would also exist if the arguments now advanced by the State in denying access in this case are allowed to stand. *Chattanooga Publishing, supra* at 6.

This Court needs to deny this unwarranted expansion of the concept of an exception for "investigative records." The media has and will face similar arguments in response to other cases unless such argument is judicially rejected. The State's claim that routinely prepared non-investigative public records cannot be disclosed if an investigatory agency has sought, or may seek, to obtain those records in connection with an investigation runs directly counter to both the letter and policy of the Public Records Act and must be rejected now.

III. THE DENIAL OF THESE REQUESTS FOR ACCESS VIOLATE IMPORTANT CONSTITUTIONAL GUARANTEES

The denial of access under these circumstances also conflicts with the freedom of press and freedom of speech contained in the United States and Tennessee constitutions. The First Amendment to the United States Constitution (made applicable to the states through the Fourteenth Amendment) guarantees freedom of the press and freedom of speech. The Tennessee Constitution in Article I, § 19 contains a strong and even more specific statement of these rights. As to the freedom of press, it states:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.

Tennessee Constitution, Article I, § 19 (emphasis added).

The Tennessee Supreme Court has stated its belief that "the news media have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and access the performance of duty by public officials." *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978). The State's denial seeks to stop the full exercise of those rights.

In performing that role and exercising that important constitutional right, Petitioners have asked state agencies for access to public records that relate to the conduct of a high-ranking state official. The fact that the State of Tennessee may have also decided to investigate this official should not allow the State to dispense with these constitutional rights.

IV. PETITIONERS REQUEST THE COURT ISSUE A SHOW CAUSE ORDER FOR A PROMPT HEARING

Petitioners request a prompt hearing on this Petition. Tennessee Code Annotated § 10-7-505 provides for "expeditious hearings." That statute provides that:

> Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party to immediately appear and show cause, if they have any, why the petition should not be granted.

Tenn. Code Ann. § 10-7-505(b) (emphasis added).

The normal rules regarding the times for filing a Complaint and Answer are not applicable. The statute specifically states that:

> A formal written response to the petition shall not be required and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings.

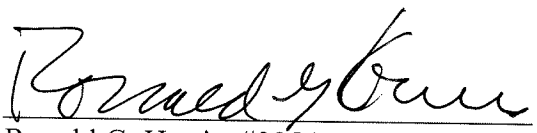
Tenn. Code Ann. § 10-7-505(b) (emphasis added).

Petitioners have requested a prompt and expeditious hearing and requests the Court shall set such a hearing at the earliest convenient time.

Petitioners have also requested attorneys' fees pursuant to Tennessee Code Annotated § 10-7-505(9). Petitioners submit a hearing and briefing by the parties on that issue can take place at a later time, consistent with, or based upon the Court's ruling on the access issues.

Respectfully submitted,

NEAL & HARWELL, PLC

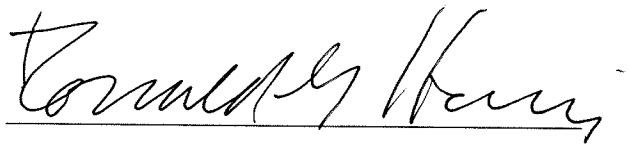
By: 

Ronald G. Harris, #9954
William J. Harbison II, #33330
1201 Demonbreun Street, Ste. 1000
Nashville, TN 37203
(615) 244-1713 – Telephone
(615) 726-0573 – Facsimile
rharris@nealharwell.com
jharbison@nealharwell.com
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 31st day of July, 2018.

(X) Hand	Janet M. Kleinfelter, Esq.
( ) Mail	Deputy Attorney General
( ) Fax	315 Deaderick Street, 20th Floor
( ) Fed. Ex.	Nashville, TN 37243
( ) E-Mail	



IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

SCRIPPS MEDIA, INC., and PHIL WILLIAMS,	)	
Petitioners,	)	
v.	)	No. 18-835-II
TENNESSEE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES and TENNESSEE BUREAU OF INVESTIGATION,	)	
Respondents.	)	

RESPONSE TO PETITION FOR ACCESS TO PUBLIC RECORDS

Respondents, the Tennessee Department of Mental Health and Substance Abuse Services (the "Department") and the Tennessee Bureau of Investigation ("TBI"), by and through their counsel of record, the Attorney General and Reporter for the State of Tennessee, hereby submit this Response to the Petition for Access to Public Records.

INTRODUCTION AND BACKGROUND

On the morning of Friday, June 15, 2018, Governor Haslam received several emails from Kim Locke alleging that her husband, former Acting TBI Director Jason Locke, and Sejal West, an employee of the Department, had engaged in an extra-marital affair and that they had used state property and/or funds to engage in such affair. One of the emails further alleged that Mr. Locke had threatened Ms. Locke with a gun. *See* emails attached hereto as Exhibit 1. That same day, Governor Haslam requested the Tennessee Department of Safety and Homeland Security to

conduct an investigation into these allegations. On Monday, June 18, 2018, the Governor requested that the Comptroller's Office assist in the investigation. That same day, the District Attorney General for the 20th Judicial District announced that he was joining the ongoing investigation to determine if there had been any violations of criminal statutes. Thereafter, the District Attorney General's Office led and coordinated the ongoing criminal investigation.

At approximately 4:00 p.m. on Friday, June 15, 2018, Petitioner Phil Williams made a public records request to both the TBI and the Department. *See* Exh. A and E to Petition. Mr. Williams made subsequent requests to the Department on June 18, 19, and 20, 2018. *See* Exh. B – D to Petition. Mr. Williams also made subsequent requests to the TBI on June 18, 20 and 22nd. *See* Exh. F, H, and J to Petition. Among other things, Mr. Williams requested copies of Mr. Locke's and Ms. West's travel claims, electronic calendars, emails, phone calls and text messages. *Id.*

On June 22, 2018, counsel for the Department and TBI sent a letter to Mr. Williams informing him that because the records he had requested were part of an ongoing criminal investigation, the Department and TBI could not, *at this time*, provide the requested records. In a subsequent letter dated July 11, 2018, counsel for the Department and TBI reiterated that the records Mr. Williams had requested were relevant to and involved in the pending criminal investigation coordinated by the District Attorney General's Office with the Tennessee Highway Patrol and the Tennessee Comptroller's Office, but that once the criminal investigation was completed, if there was no ensuing prosecution, the requested records would be made available to Mr. Williams.

Thereafter, on August 10, 2018, the Davidson County Grand Jury issued a report finding that neither Mr. Locke nor Ms. West had committed a violation of any criminal statute. The

Grand Jury issued this report after hearing testimony from the Tennessee Comptroller's Office, the Tennessee Department of Safety and Homeland Security and the Tennessee Highway Patrol. See https://www.wsmv.com/news/grand-jury-acting-tbi-director-did-not-break-any-laws/article_924a24cd-f9a1-5068-9245-5f753517df59.html. With the issuance of this report, the criminal investigation was closed.

It is undisputed that, on the same day that the Grand Jury issued its report, the District Attorney General's office made available to Mr. Williams (and others) copies of the investigative file. Thereafter, on August 14, 2015, the TBI made copies of all its records available to Mr. Williams and on August 15, 2016, the Department made copies of its records available to Mr. Williams.[1]

On July 31, 2018, Petitioners filed a petition pursuant to Tenn. Code Ann. § 10-7-505(a) seeking access to the records sought by Mr. Williams in his requests of June 15, 18, 19, 20 and 22 to the TBI and the Department. However, copies of all records responsive to these requests have now been made available to Mr. Williams and there are no other records to be provided.[2] Accordingly, the TBI and the Department submit that, to the extent Petitioners are seeking an order from this Court concerning the disclosure of the records in question, that issue is moot and there is no judicial relief with respect to such records that this Court can grant. The TBI and the Department further submit that Petitioners have failed to demonstrate, under the applicable authorities, that they are entitled to an award of attorney's fees. Accordingly, the TBI and the Department submit that the Petition should be dismissed in its entirety and with prejudice.

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[1]The Department has contacted Mr. Williams twice to let him know that a copy of all records is available, however, to date, Mr. Williams has not responded or otherwise come to pick up the copy.

[2]It should be noted that Mr. Williams only requested to inspect the records in question; however, because of the delay in production from the ongoing criminal investigation, the District Attorney General's Office, the TBI and the Department all made copies of their records available to Mr. Williams.

ARGUMENT

I. The Petition for Access to Public Records Is Moot as Petitioners Have Been Provided With All Requested Records.

Petitioners acknowledge that all of the records requested by Mr. Williams, and more, have been provide by the TBI, the Department and the District Attorney General's office.[3] Numerous state and federal courts have recognized that once a party produces the records sought pursuant to a public records request, the controversy surrounding the records is moot. *See Coats v. Smyrna/Rutherford County Airport Authority,* No. M2000-00234-COA-R3-CV, 2001 WL 1589117, at *3 (Tenn. Ct. App. Dec. 13, 2001); *see also Cabinet for Health & Family Servs. V. Courier-Journal, Inc.*, 493 S.W.3d 375, 382-83 (Ky. Ct. App. 2016) (cases cited therein).

Petitioners, in their supplemental memorandum in support of the Petition for Access, tacitly acknowledge that their Petition for Access to the requested records is moot and that there is no meaningful relief this Court could grant under Tenn. Code Ann. § 10-7-505, but argue that this Court should find that the "public interest" exception to the doctrine of mootness applies, citing to two unreported decisions of the Court of Appeals involving public records requests, *Webber v. Bolling*, C.A. No. 177, 1989 WL 151496 (Tenn. Ct. App. Dec. 13, 1989) and *Chattanooga Publishing Co. v. Hamilton County Election Commission*, No. E2003-00076-COA-R3-CV, 2003 WL 22469808 (Tenn. Ct. App. Oct. 31, 2003). In the *Webber* case, the court did not engage in any analysis but simply stated its belief that the "accessibility of public records is a matter of great public concern." 1989 WL 151496, at *2. In the *Chattanooga Publishing* case, the court held that because "the accessibility of public *election* records, and the right of the public to assure itself that the election process is free, fair, and transparent, is likewise of great public concern," the "public interest" exception to the mootness doctrine was applicable. 2003

[3] *See* Petitioners Supp. Memo. at 2.

WL 22469808, at *3 (emphasis added). Neither of these cases are binding precedent, nor provide (as persuasive authority) a sufficient basis for invoking the public interest exception, particularly not in light of more recent binding Supreme Court authority.

Tennessee courts follow certain rules of judicial restraint so that they stay within their province "to decide, not advise, and to settle rights, not to give abstract opinions." *Hooker v. Haslam*, 437 S.W.3d 409, 417 (Tenn. 2014) (quoting *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co.*, 301 S.W.3d 196, 203 (Tenn. 2009)). The mootness doctrine is one such rule. "The mootness doctrine provides that before the jurisdiction of the courts may be invoked, 'a genuine and existing controversy, calling for present adjudication' of the rights of the parties must exist.'" *State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007) (quoting *State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961)). Thus, in order for this Court to render an opinion, it must be faced with a live controversy. *Honeycutt ex rel. Alexander H. v. Honeycutt*, No. M2015-00645-COA-R3-CV, 2016 WL 825852, at *2 (Tenn. Ct. App. Mar. 2, 2016). Such controversy must remain alive, i.e. justiciable, through the course of litigation. *Norma Faye Pyles Lunch Family Purpose LLC*, 301 S.W.3d at 203-04. A case ceases to be justiciable when it "no longer serves as a means to provide some sort of judicial relief to the prevailing party." *Id.* at 204.

As the Tennessee Court of Appeals has recently stated with respect to the mootness doctrine:

> Despite the absence of express constitutional limitations on the exercise of their judicial power, Tennessee's courts have, since the earliest days of statehood, recognized and followed self-imposed rules to promote judicial restraint and to provide criteria for determining whether the courts should hear and decide a particular case. These rules, commonly referred to as justiciability doctrines, are based on the judiciary's understanding of the intrinsic role of judicial power, as well as its respect for the separation of powers doctrine in Article II, Sections 1 and 2 of the Constitution of Tennessee.... A moot case is one that has lost its justiciability

> either by court decision, acts of the parties, or some other reason occurring after commencement of the case. *West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d at 625; *McCanless v. Klein*, 182 Tenn. at 637, 188 S.W.2d at 747; *McIntyre v. Traughber*, 884 S.W.2d at 137. A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *Knott v. Stewart County*, 185 Tenn. at 626, 207 S.W.2d at 338–39; *Bell v. Todd*, 206 S.W.3d 86, 96 (Tenn. Ct. App. 2005); *Massengill v. Massengill*, 36 Tenn. App. 385, 388–89, 255 S.W.2d 1018, 1019 (1952). *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 202–04 (Tenn. 2009). "Determining whether a case is moot is a question of law." *Alliance for Native Am. Indian Rights in Tennessee, Inc. v. Nicely*, 182 S.W.3d 333, 338–39 (Tenn. Ct. App. 2005).

Witt v. Witt, No. E201700884COAR3CV, 2018 WL 1505485, at *4 (Tenn. Ct. App. Mar. 27, 2018).

The general rule is that courts should dismiss cases that have become moot regardless of how appealing it may be to do otherwise. *Norma Faye*, 301 S.W.2d at 210. And while Tennessee courts recognize an exception to mootness allowing them "to address issues of great importance to the public and the administration of justice," *id.*, this exception is available, however, only "under 'exceptional circumstances where the public interest clearly appears.'" *Nonprofit Hous. Corp. v. Tenn. House. Dev. Agency*, No. M201401588-COA-R3-CV, 2015 WL 5096181, at *10-11 (Tenn. Ct. App. Aug. 27, 2015) (quoting *Dockery v. Dockery*, 559 S.W.2d 952, 955 (Tenn. Ct. App. 1977)). Consequently, the Tennessee Supreme Court has emphasized that the issue must be "one of great public importance, as where it involves a determination of public rights or interests under conditions which may be repeated at any time." *State v. Rogers*, 235 S.W.3d 92, 97 (citing *McCanless v. Klein*, 188 S.W.2d 745, 747 (Tenn. 1945).

Furthermore, while recognizing that it is within the discretion of the courts to address such issues, the Tennessee Supreme Court has identified certain threshold factors a court must consider in determining the public interest exception should be invoked:

(1) The public interest exception should be invoked only with regard to issues of great importance to the public and the administration of justice;

(2) The public interest exception should not be invoked in cases affecting only private rights and claims personal to the parties;

(3) The public interest exception should not be invoked if the issue is unlikely to arise in the future; and

(4) The public interest exception should not be invoked if the record is inadequate or if the issue has not been effectively addressed in the earlier proceedings.

Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co., 301 S.W.3d at 210-211 (citations omitted).

If these threshold considerations do not exclude the invocation of the public interest exception, the Supreme Court directs that court should then "balance the interests of the parties, the public, and the courts to determine whether the issues in the case are exceptional enough to address" and has identified a number of factors to be considered:

(1) The assistance that a decision on the merits will provide to public officials in the exercise of their duties,[4]
(2) The likelihood that the issue will recur under similar conditions regardless of whether the same parties are involved,
(3) The degree of urgency in resolving the issue,
(4) The costs and difficulties in litigating the issue again, and
(5) Whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependent.

Id. at 211.

In *Norma Faye*, the Supreme Court found that the public interest exception to the mootness doctrine was applicable because (1) it raised questions of condemnation of private property in which a constitutional right was involved; (2) the statute at issue, Tenn. Code Ann. § 13-16-207(f), had not been subject to judicial review or construction and authoritatively deciding

[4] Petitioners' supplemental memorandum fails to identify what substantive issue remains to be adjudicated on the merits.

when the certificate required by that statute must be obtained would assist the public officials in the discharge of their statutory duties; (3) there was a substantial probability that conduct similar to that which gave rise to the dispute would recur as counsel for the City and County had asserted that they would continue to commence condemnation proceedings without first obtaining the certificate of public purpose and necessity unless the Court construed the statute otherwise; and (4) the issue regarding the interpretation of Tenn. Code Ann. § 13-16-207(f) was a question of law. *Id.* at 211-212.

None of these reasons exist in the present case. The dispute in this case does not involve any constitutional rights—the right of access to public records is purely a statutory right. *See Abernathy v. Whitley*, 838 S.W.2d 211, 214 (Tenn. Ct. App. 1992) (holding that there is no constitutional right to examine public records, only a statutory right granted by the General Assembly). Both the Public Records Act and Tenn. R. Crim. P. 16(a)(2) have been subject to significant judicial review—most recently by the Supreme Court in *Tennessean v. Metro. Gov't of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016). Further, there is no evidence in the record that there is a "substantial probability that conduct similar to that which gave rise to the dispute would recur"—as the conduct here was based on the specific facts and circumstances and not on the disputed interpretation of a statute. *See, e.g., In re Lineweaver*, 343 S.W.3d 401, 413 (Tenn. Ct. App. 2010) (court found that case was not moot because the issues involved "the contempt powers of the Juvenile Court Judge as well as the Juvenile Court Referees").

Petitioners do not address any of these threshold considerations, but simply assert that because this case involves the conduct of public officials and could occur again in the future, this Court should exercise its discretion to invoke the public interest exception. But Petitioners fail to identify what "conduct of public officials" needs to be addressed or how a decision on the merits

will provide assistance to public officials in the exercise of their duties. As the Kentucky Supreme Court has noted,

> if all that was required under this public interest exception was that the opinion could be of value to future litigants, the exception "would be so broad as to virtually eliminate the notion of mootness." 331 Ill.Dec. 1, 910 N.E.2d at 81. To invoke this exception, therefore, the party asserting justiciability must show, in addition to the public-question and likelihood-of-recurrence elements, that "there is a need for an authoritative determination for the future guidance of public officers." *See also, Putnam Cnty.*, 301 S.W.3d at 210–11 (discussing factors relevant to the public interest exception and noting that an important one is "the assistance that a decision on the merits will provide to public officials in the exercise of their duties"); *Doe v. Doe,* 172 P.3d at 1071 (noting that under the public interest exception, in cases where "the question involved affects the public interest and an authoritative determination is desirable for the guidance of public officials, [the] case will not be considered moot").

Morgan v. Getter, 441 S.W.3d 94, 102–03 (Ky. 2014).

Here, a decision on the merits will provide little assistance to public officials because this action is entirely dependent on the specific facts and circumstances asserted. It was for this reason that the Court of Appeals declined to invoke the public interest exception in the case of *City of Chattanooga v. Tenn. Regulatory Auth.*, No. M2008-01733-COA-R12-CV, 2010 WL 2867128 (Tenn. Ct. App. July 21, 2010). That case involved a proposed 2006 rate hike filed by the Tennessee American Water Company (TAWC) for the City of Chattanooga. While the administrative case was pending, While the case was pending, TAWC filed a new proposed rate hike in 2008 and sought to dismiss the 2006 case on the grounds that the 2008 case rendered it moot. *Id.* at *3. While finding that the issue in the case—the proposed rate hike—was one that represented the interest of the public at large, the Court of Appeals ultimately declined to apply the public interest exception because of the "fact intensive nature" of the case, which the Court found would be of little assistance to another court in the future. 2010 WL 2867128, at *8. The

Court also declined to apply the public interest exception because it failed to "appreciate any degree of urgency" to consider a case which is no longer a justiciable controversy. *Id.* Rather, the Court noted that if similar issues arise in another rate case, "the right and ability to appeal will be available to all parties." *Id.*

Similarly, under the Public Records Act, the TBI and the Department bear the statutory burden of demonstrating, "by a preponderance of the evidence," that the requested records were not subject to inspection under the Public Records Act. *See* Tenn. Code Ann. § 10-7-505(c). Thus, there is no pure question of law at issue, but rather, any decision on the merits is going to depend significantly on the specific facts and circumstances. Consequently, any decision would provide little assistance either to public officials in the performance of their duties or to another court in the future. *See Racine Edus. Ass'n v. Board of Educ for Racine Unified School District*, 385 N.W.2d 510, 512 (Wis. Ct. App. 1986) ("Deciding cases that are moot should be reserved for those instances where the competing rules are uncertain and where an immediate decision will have a timely impact upon the trial courts. Because of the unique fact situation in this case, the practical effect upon other public records cases is of limited value.")

Moreover, there simply is no degree of urgency present here. The criminal investigation was closed and Mr. Williams was provided access to all of the records (and more) within just a few days. Thus, as the Court of Appeals noted in *City of Chattanooga v. Tenn. Regulatory Auth.*, if similar issues arise with another public records request, "the right and ability to appeal will be available to all parties." 2010 WL 2867128, at *8; *see also Sloan v. Friends of Hunley, Inc.*, 630 S.E.2d 474, 478 (S.C. 2006) (South Caroline Supreme Court found that "no imperative or manifest urgency exists in light of [entity]'s producing the requested documents").

There is no dispute that the issue of access to the records in question no longer presents a justiciable controversy and is moot. The burden is on Petitioners to demonstrate that this case is so exceptional as to justify this Court's exercise of its discretion to invoke application of the public interest. Under the analysis of threshold considerations outlined by the Supreme Court in Norma Faye, Petitioners have failed to establish the existence of an issue of great public importance and this Court should decline to invoke the public interest exception.

II. Petitioners Are Not Entitled to An Award of Attorney's Fees.

Petitioners assert that they are entitled to an award of attorneys' fees pursuant to the following provision of the Act:

> If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.

Tenn. Code Ann. § 10-7-505(g).

The Tennessee Supreme Court has noted that this attorney fee provision is "by its terms a limited award provision." *Memphis Publishing,* 871 S.W.2d at 689; *see Friedmann v. Marshall County*, 471 S.W.3d 427, 436 (Tenn. Ct. App. 2015). Thus, under the plain language of the statute, an award of fees under the Act must first meet the threshold requirement that the governmental entity or official "knew" the record was public *and* "willfully" failed to disclose it. In other words,

> the Public Records Act does not authorize a recovery of attorneys' fees if the withholding governmental entity acts with a good faith belief that the records are excepted from the disclosure. Moreover, in assessing willfulness, Tennessee courts must not impute to a governmental entity the "duty to foretell an uncertain juridical future."

Schneider v. City of Jackson, 226 S.W.3d 332, 346 (Tenn. 2007) (quoting *Memphis Publ'g Co. v. City of Memphis,* 871 S.W.2d at 689). In *Friedmann*, the Court of Appeals stressed that "willfulness" should be measured "in terms of the relative worth of the legal justification cited by a [governmental entity] to refuse access to records." 471 S.W.3d at 439. In other words, "the determination of willfulness 'should focus on whether there is an absence of good faith with respect to the legal position a [governmental entity] relies on in support of its refusal of records.'" *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015) (quoting *Friedmann*, 471 S.W.3d at 438). Accordingly, a finding of "willfulness" and corresponding award of fees under the Public Records Act is appropriate *only* when a governmental entity invokes a legal position that is *not supported by existing law or by a good-faith argument for the modification of existing law*. *Id.* at 290-91 (citing *Schneider*, 226 S.W.3d at 347). Moreover, Tennessee courts will not impute to a governmental entity "a duty to foretell an uncertain judicial future." *Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007). Finally, even if the trial court makes a finding of knowledge and willfulness, the statute does not require the trial court to award attorney's fees. Instead, Tenn. Code Ann. § 10-7-505(g) provides the trial court "may, in its discretion" assess costs and fees. *Nashville Post Co. v. Tennessee Educ. Lottery Corp.*, No M2007-01863-COA-R3-CV, 2007 WL 3072778, at *3 (Tenn. Ct. App. Apr. 14, 2008).

Here, the TBI and the Department did not immediately provide the requested records because they were relevant to an ongoing criminal investigation being conducted jointly by the Tennessee Department of Safety, the Tennessee Comptroller and the District Attorney General. As such, the TBI and the Department believed the records to be exempt from disclosure while that criminal investigation was open pursuant to Tenn. R. Crim. P. 16. The Tennessee Supreme

Court has clearly recognized Tenn. R. Crim. P. 16 is an exception to disclosure and inspection of investigative files under the Public Records Act. That Court first addressed the construction and application of Tenn. R. Crim. P. 16 as an exception to disclosure and inspection under the Public Records Act in *Memphis Publishing Company v. Holt*, 710 S.W.2d 513 (Tenn. 1986). In that case, disclosure was sought of closed investigative files of the Memphis City Police Department under the Public Records Act. This Court held that this "exception to disclosure and inspection [Rule 16] does not apply to investigative files in possession of state agents or law enforcement officers, *where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action.*" *Id.* at 517 (emphasis added). Because the investigative files sought to be examined were closed files and not relevant to any pending or contemplated criminal action, this Court held that Rule 16 did "not come into play in this case." *Id.*

Subsequently, in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987), the Supreme Court was presented with the "issue of whether records of the investigation into the death of an inmate of a state correctional facility are available for inspection under T.C.A. § 10-7-503 of the Public Records Act." *Id* at 165. The Court noted that the "memoranda, documents and records sought to be inspected by appellees in this case are the results of the investigation by Internal Affairs of the Department of Correction into the murder" of an inmate. *Id.* at 166-67. The Court held that

> the materials sought by appellees are relevant to the prosecution of the petitioners and other inmates charged with offenses arising out of the murder of Carl Estep. *These prosecutions have not yet been terminated. It necessarily follows under Rule 16(a)(2) that access to materials in the possession of Sergeant Worthington are not subject to inspection* by appellees, who are counsel for the indicted petitioner-inmates.

Id. at 167 (emphasis added). *See also Van Tran v. State*, No. 02C01-9803-CR-00078, 1999 WL 177560, at *5 (Tenn. Crim. App. Apr. 1, 1999) ("[r]ecords relevant to pending criminal action need not be disclosed under the Tennessee Public Records Act). In *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), the Supreme Court characterized its decision in *Appman* as holding that "Rule 16(a)(2) exempted from disclosure under the Public Records Act all 'open' criminal investigative files that 'are relevant to pending or contemplated criminal action.'" *Id.* (internal citations omitted). In doing so, the Supreme Court specifically recognized the "harmful and irreversible consequences [that] could potentially result from disclosing files that are involved in a pending criminal investigation." *Id.*

More recently, in the case of *Tennessean v. Metro. Gov't of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016), the petitioners argued that Rule 16(a)(2) "did not protect records created by third parties and then provided to or gathered by law enforcement officials, as these records [did] not come within the work product exception" and that to interpret Rule 16(a)(2) "as a blanket exception to disclosure under the Public Records Act for public records that are 'relevant to a pending or contemplated criminal action,' is, in effect, the adoption of a common law law enforcement privilege" rejected by the Supreme Court in *Schneider*. *Id.* at 866. The Supreme Court rejected this argument and held that Metro was not required to disclose the requested investigative records because the records came with the Rule 16 exception. *Id.* at 870.

The TBI and the Department relied on these authorities in declining to immediately provide the requested records as they were relevant to the ongoing criminal investigation and had been specifically sought in that investigation. Petitioners assert that these the protections of Rule 16(a)(2) only apply when the request is made to a law enforcement agency or prosecutor and,

therefore, the TBI's and Department's reliance on these cases was unjustified and willful.[5] However, it should be noted that in the *Appman* case, the public records request was not made to the District Attorney General prosecuting the case, but instead, to the Tennessee Department of Correction—the governmental entity that had created the records. Regardless, the Supreme Court held that because the Department of Correction's records were relevant to the ongoing prosecution, they were not subject to disclosure under the Public Records Act. *See Appman*, 746 S.W.2d at 167. Consequently, it cannot be said that there is "an absence of good faith" with respect to the legal position the TBI and the Department relied on in support of its refusal of records. *See Clarke v. City of Memphis*, 473 S.W.3d at 290.

Moreover, the Petition is devoid of any allegations that the TBI and the Department acted in bad faith or with a dishonest purpose in withholding the documents in question. As stated by the Court of Appeals, "the finding of willfulness . . . in failing to disclose public records is a high standard, requiring more than mere inadvertence, mistake or negligence. Rather, the finding that a [records custodian] willfully withheld public documents requires *evidence* that the withholding entity acting consciously in furtherance of dishonest purpose or moral obliquity." *Greer v. City of Memphis*, 356 S.W.3d 917, 923 (Tenn. Ct. App. 2010) (citing *Arnold v. City of Chattanooga*, 19 S.W.3d at 789) (emphasis in original). In light of this standard and the lack of any allegations, much less evidence, of bad faith, there is no basis for the Petitioners' request for attorney's fees and such request should be denied.

[5] Petitioners also assert that their request for records was made before an investigation had commenced, citing to the *Chattanooga Publishing v. Hamilton County Election Commission* case as authority. However, the question of whether the request was made prior to the commencement of a criminal investigation is a factual issue.

CONCLUSION

For these reasons, Respondents respectfully request that this Court dismiss the Petition for Access to records in its entirety and with prejudice.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

JANET M KLEINFELTER (BPR 13889)
Deputy Attorney General
Public Interest Division
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent by electronic transmission and/or by first class U.S. Mail, postage prepaid, to:

Ronald G. Harris
William J. Harbison II
Neal & Harwell, PLC
1201 Demonbreun Street, Ste. 1000
Nashville, TN 37203

This 20th day of August, 2018.

JANET M. KLEINFELTER
Deputy Attorney General

Email Viewer

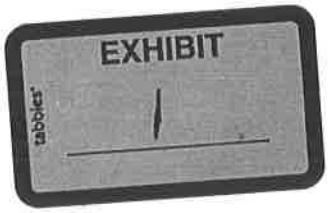
Message | Details | Attachments | Headers | Source

HTML

From: "AECT@gcts.tn.gov" <AECT@gcts.tn.gov>
Date: 6/15/2018 6:52:10 AM
To: "AECT@gcts.tn.gov" <AECT@gcts.tn.gov>
Cc:
Subject: Jason locke

<APP>CUSTOM
<PREFIX></PREFIX>
<FIRST>Kim</FIRST>
<MIDDLE></MIDDLE>
<LAST>Locke</LAST>
<ADDR1>[redacted]</ADDR1>
<ADDR2></ADDR2>
<CITY>Mount Juliet</CITY>
<STATE>TN</STATE>
<ZIP>37122</ZIP>
<EMAIL>[redacted]</EMAIL>
<PHONE_H>615[redacted]</PHONE_H>
<ISSUE>RQ.CONTACTFORM</ISSUE>
<SUBJECT>Jason locke</SUBJECT>
<MSG>
Jason had an affair with Former Deputy Commissioner Sejal West at the Department of Mental Health and Substance Abuse for The State of Tennessee from November 2016 through July 2017. He admitted to me that he drove his state vehicle and she drove her state vehicle to stay in hotels paid for by the State of Tennessee. They each found a reason to be at those locations to continue their affair. When it ended, when her husband, Ben West found out, Sejal West had her husband arrested for domestic violence and [redacted]. Sejal West resigned her position in January 2018. He has done away with the state phone that he used during this affair and was issued a new state phone and began using the WhatsApp to continue the affair, because it is encrypted. She called to tell me this information and I have contacted news channel 5 also.

*** Today's Date (MM/DD/YYYY) ***
6/14/2018
</MSG>
<CUSTOM1>96.61.120.186</CUSTOM1>



Email Viewer

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HTML

From: "Kim Locke" <[redacted]@[redacted]>
Date: 6/15/2018 10:13:23 AM
To: "bill.haslam@tn.gov" <bill.haslam@tn.gov>
Cc:
Subject: Re: Jason Locke

Jason has been terrified that this would come up in his background check. He was also concerned that someone would ask me how much alcohol he consumes. He asked me to lie and say he only has 2-4 drinks a week. I can assure you that is not the case.
I am devastated and I'm very worried for my children.
Sejal West's husband told me that there were numerous trips out of town on state time that they took together, jason only admitted to 2 trips.

Sent from my iPhone

> On Jun 15, 2018, at 6:45 AM, Kim Locke <[redacted]@[redacted]> wrote:
>
> Jason Locke Jason had an affair with Former Deputy Commissioner Sejal West at the Department of Mental Health and Substance Abuse for The State of Tennessee from November 2016 through July 2017. He admitted to me that he drove his state vehicle and she drove her state vehicle to stay at hotels overnight in Knoxville, TN. and in Jackson, Tn. paid for by the State of Tennessee. They each found a reason to be at those locations to continue their affair. When it ended, when her husband, Ben West found out, Sejal West had her husband arrested for domestic violence and [redacted]. Sejal West resigned her position in January 2018. She returned to the Department of Mental Health and Substance Abuse at a lower position. He has done away with the state phone that he used during this affair and used the WhatsApp to continue the affair because it is encrypted. She called me to tell me about the affair and it will be on the news. Sent from my iPhone
> Sent from my iPhone

Close

Email Viewer

Message | Details | Attachments | Headers | Source

HTML

From: "Kim Locke" <[redacted]@[redacted]>
Date: 6/15/2018 1:46:19 PM
To: "bill.haslam@tn.gov" <bill.haslam@tn.gov>
Cc:
Subject: Jason Locke

Sir, I know you're very busy. Can you please let me know you received my emails? I'm very afraid that I'm in danger. He picked up a gun last night and held it in his hands the whole time we talked. I just need to know you're reading this and someone knows.

Sent from my iPhone

Close

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, COUNTY OF DAVIDSON

SCRIPPS MEDIA, INC. and PHIL WILLIAMS,	)	
Petitioners,	)	
v.	)	**No. 18-835-II**
TENNESSEE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES and TENNESSEE BUREAU OF INVESTIGATION,	)	
Respondents.	)	

PETITIONERS' REPLY BRIEF

Petitioners submit this Reply Brief in support of their Petition for Access because the State of Tennessee's Response contains numerous inaccurate characterizations of Petitioners' positions and the applicable law and facts in this case. The State seeks to avoid having the legal issue raised by Petitioners decided on the merits by claiming the Petition for Access is now moot.

The State wrongfully refused to produce those records based upon an unsupportable claim for an unwarranted extension of prior case law interpreting the Public Records Act. It is undeniably certain that if the Court does not decide the legal issue raised herein, the State will assert this same legal position to deny future public records requests from the Petitioners, other media, or the public. The State's subsequent production of the requested records after a two-month delay should not be used to prevent the Petitioners and the public from having this important legal issue decided on the merits.

I. The Case Is Not Moot.

The State of Tennessee seeks to avoid review of their unsupportable legal claim by claiming their subsequent delayed production of the requested public records makes the Petition for Access moot. State's Response at 4-11. Petitioners do not (and have not) "tacitly acknowledge[d]" that their Petition for Access is moot as the State argues. *Id.* at 4. In anticipation of the State's position, Petitioners submitted their Supplemental Memorandum that argued the case is not moot and also argued that the public interest exception applies to allow the Court to fully address the remaining issues herein. Pet. Supp. Memo at 2-6.

There remains "meaningful relief" that this Court can grant under Tennessee Code Annotated § 10-7-505, including (1) the ruling on the legal issue raised by the State's refusal to produce public records based upon a broad "investigative records" exception and (2) the award of attorneys' fees for its failure to do so. There is no general legal principle or even consistent holdings that the production of public records means the controversy surrounding a records request is moot, as the State appears to argue in its Response. State's Response at 4. There is no Tennessee case cited that states this is a general principle of law that must be followed.[1]

The cases cited by the State for the general doctrine of "mootness" are not public records cases. State's Response at 5-7. Instead, the State cites a variety of cases involving disparate factual situations that are cited for broad general proposition of law in cases where the lack of a justiciable controversy was clear. *See, e.g. Hooker v. Haslam*, 437 S.W.3d 409 (Tenn. 2014) (statute repealed before challenge to its constitutionality could be heard); *City of Chattanooga v. Tennessee Regulatory Authority*, 2010 WL 2867128 (Tenn. App. 2010) (the rate increase at issue had been

[1] For its argument, the State cites a Kentucky case and an unreported Court of Appeals case from Tennessee. *Id.* at 4. In the Tennessee case, there is no discussion or an analysis of this point– which was apparently not raised as an issue - rather there is just a recitation of the facts on appeal.

fully superseded and no longer had any effect); *Witt v. Witt,* 2018 WL 1505485 (Tenn. Ct. App. 2018) (holding motion to intervene moot because the divorce action was final). Response at 6. In contrast, the cases cited in Petitioners' Supplemental Memorandum specifically deal with cases where Tennessee courts have analyzed public records requests against a claim of mootness. Pet. Supp. Memo at 2-5.

II. The "Public Interest" Exception to the Mootness Doctrine Clearly Applies to the Legal Issues Raised Herein.

The State's delayed production of the requested public records does not prevent judicial review of the legal issues herein. Even if the mootness doctrine might apply (which Petitioners do not "tacitly acknowledge"), the well-recognized exception for issues of public concern applies to permit full consideration of the legal issues. Petitioners' Supplemental Memorandum sets forth the factors to be considered in determining that this exception applies and how it applies to public records cases. Pet. Supp. Memo at 3-4.

The State's Response inaccurately characterizes Petitioners' position and the cases cited in Petitioners' Supplemental Memorandum. The State claims Petitioners' argument on this issue is solely based upon "two unreported cases" which, according to the State, are not "binding precedent."[2] State's Response at 5. The State's Response fails to mention that the cases Petitioners cited in their Supplemental Memorandum rely upon and quote from the same reported cases that apply the same legal principles as the cases the State relies upon. For example, in Petitioners' Supplemental Memorandum's citation to the *Chattanooga Publishing* case, it is clear that the

[2] The State's Response cites six "unreported cases" in support of its arguments. State's Response at 4, 5, 6, 9, 12, and 14.

quotes on the applicable factors to consider came from *Dockery v. Dockery*, 559 S.W.2d 952 (Tenn. App. 1977).

The *Chattanooga Publishing* case was cited because it was a public records case which arose in a very similar fact situation – an initial refusal followed by a subsequent production of records after an investigation closed. The principles cited therein are not materially different from the principles in the cases that the State relies upon. In the cases cited by Petitioners, the Court of Appeals in this state found public records request cases fell within the public interest exception and were therefore not moot. Pet. Supp. Memo at 2-4.

The case that the State's Response primarily relies upon for its exposition of the "public interest" exception to the mootness doctrine is *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co.*, 301 S.W.3d 196 (Tenn. 2009) (hereinafter "*Norma Faye*). That case was a challenge to a condemnation of plaintiff's private property. Before the appeal could be decided, the government abandoned its plan to acquire the plaintiff's property. The Supreme Court held that the court could fully address the legal issues raised therein, relying upon the public interest exception to the mootness doctrine. In a finding that is similar to the situation presented in this case, the Court stated, "This answer reflects that while the City and County have changed their practices for this plaintiff, they have not completely and permanently abandoned the challenged conduct." 301 S.W.3d at 207 (emphasis added). This opinion written by Mr. Justice Koch and the Court's ruling therein support hearing of the legal issues in this case.

The State's Response cites the *Norma Faye* case for the factors that should be used to determine the applicability of the exceptions to the doctrine of mootness. State's Response at 6-7. As previously noted, these are the same and similar factors previously cited and discussed in

the cases in Petitioners' Supplemental Memorandum.[3] More importantly however, the application of the factors, as articulated in the *Norma Faye* condemnation case, clearly demonstrates that the doctrine of mootness should not be applied in this case and that this Court should rule on the important legal issues raised by the State's conduct.

The Tennessee Supreme Court opinion in *Norma Faye* listed four "circumstances that provide a basis for not invoking the mootness doctrine," and provide a basis for hearing a case. 301 S.W. 3d at 204 (emphasis added). These "circumstances" include the following:

> (1) when the issue is of great public importance or affects the administration of justice;
> (2) when the challenged conduct is capable of repetition and of such short duration that it will evade judicial review;
>
> (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and,
>
> (4) when the defendant voluntarily stops engaging in the challenged conduct.

Id. Only the first and fourth "circumstances" were at issue in the *Norma Faye* case. *Id.* at 205. As discussed hereinafter, the present case involves all the listed "circumstances" for not invoking the mootness doctrine, but instead having the case heard on its merits. *See* discussion *infra* at 10-12.

As to the first of these circumstances, the "public interest" exception, the *Norma Faye* opinion stated that to "guide their discretion" the courts should first address the following "threshold considerations":

> (1) the public interest should not be invoked in cases only affecting private rights and claims personal to the parties;

[3] The State incorrectly asserts that Petitioners do not address any of the "threshold considerations." State's Response at 8. Although the Supplemental Memorandum was submitted prior to the State's Response and was only anticipating what the State might (and consequently did) claim, the Memorandum does discuss these same issues. Pet. Supp. Memo at 3-4.

(2) the public interest exception should be invoked only with regard to 'issues of great importance to the public and the administration of justice';

(3) the public interest exception should not be invoked if the issue is unlikely to arise in the future; and,

(4) the public interest exception should not be invoked if the record is inadequate or if the issue has not been effectively addressed in the earlier proceedings.

Id. at 210-211. In the present case, these "threshold considerations" fully support full review of these legal issues raised by the Petitioners' Petition for Access. These "circumstances" certainly do not "exclude" the invocation of the public interest exception in this case.

Petitioners' Petition for Access is most assuredly not a matter involving "only private rights and claims personal to the parties." Petitioners seek to exercise important rights granted the public by the Legislature under the Public Records Act. They are asking that their rights and the public's rights be vindicated so that the State will not be allowed to frustrate the purposes of the Public Records Act in this way in this case and going forward. The ruling Petitioners seek, that the State's conduct is wrongful and unsupported by statute or prior case law, is aimed at deterring and preventing similar refusals of disclosures of public records. These issues remain even after the State's delayed production and are not just personal to the Petitioners.

These issues being raised are "issues of great importance to the public and the administration of justice." As shown by the statements in the public records cases cited in Petitioners' Supplemental Memorandum, contested public records cases are almost by definition issues of great importance to the public. Petitioners' Supplemental Memorandum at 3-4. Both the *Chattanooga Publishing* and *Webber v. Bolling* cases have

applied this factor to hold the public interest exception should be applied. *Id.* This is particularly true in this case as the State has refused production based upon what is an overly broad and unsupportable exception to the Public Records Act that would have far-reaching negative effects. The State's position, if allowed to continue, would severely undermine the purposes of the Public Records Act and the presumption of openness and access specifically expressed in the statute itself. Indeed, the State's argued reasons for denying disclosure for records, that the records were allegedly relevant to an on-going criminal investigation, would support an argument that this is an important issue for the administration of justice.

The next consideration is to limit the application of the public interest exception if the issue is unlikely to arise in the future. *Norma Faye, supra* at 210-211. This factor clearly militates in favor of applying the public interest exception in this case. The best indicator that this issue will arise again is the State's argument that its interpretation of a broad exception for investigative records is correct and the resulting assurance that it will continue to make that same argument in the future. State's Response at 12-15. Petitioners have recently faced this new broad argument in other circumstances; the State has raised it in other cases. There will be other public records requests made in the future by Petitioners and others seeking public records that the State may consider relevant to an investigation. If this legal issue is not resolved in this case, there will certainly be similar denials based upon the State's apparent belief that it is proper to do so. The issue is certain to arise in the future.

The final consideration is largely inapplicable and does not militate against review. There were no "earlier proceedings" and the record in this case is not inadequate since it is primarily a legal issue.

The Tennessee Supreme Court opinion in *Norma Faye* instructed that if the "threshold considerations do not exclude the invocation of the public interest exception to the mootness doctrine" [which they do not in this case], the courts should then balance the interests of the parties, the public, and the court to determine whether the issues in the case should be addressed. *Norma Faye, supra* at 211. The factors the courts "may consider, among other factors," include the following:

> (1) the assistance that decision on the merits will provide to public officials in the exercise of their duties;
>
> (2) the likelihood that the issue will recur under similar conditions regardless of whether the same parties are involved;
>
> (3) the degree of urgency in resolving the issue;
>
> (4) the costs and difficulties in litigating the issue again; and,
>
> (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependent.

Id. at 211. Each of these factors fully supports applying the public interest exception to defeat the State's argument of mootness in this case.

The first factor that a court may consider is the "assistance that a decision on the merits will provide to public officials in the exercise of their duties." *Id.* at 211. The State incorrectly argues that Petitioners failed to identify "what conduct of public officials needs to be addressed." State's Response at 8. In fact, such conduct and such assistance is clear and self-evident. Petitioners seek a ruling that State officials may not block disclosure of

otherwise produceable public records simply because the State may deem that such record is relevant to an on-going investigation.

In this case, Petitioners sought records that were undisputedly public records which were created in the regular course of state business, well before, and without regard to any investigation. It appears clear that despite the Petitioners' prior pending requests, State officials instead turned the records over to the local District Attorney, then claimed an exception to disclosure for "investigative records." Exhibits K and L to Petition. A ruling in this case is necessary to assist officials in determining their duties in disclosing public records and specifically to prevent improper denials of public records requests on this alleged broad exemption. It is essential that future guidance be given to State and local officials to prevent a reoccurrence of these events which is certain to continue to occur.

As to the second factor, and as discussed above, there is not only a likelihood, but a virtual certainty that this issue will arise again and again. By its own admission, the State intends to continue to take this same legal position in the future. This is not a unique or rare fact situation, particularly because of the breadth and scope of the State's interpretation of "investigative records" that might be deemed "relevant" to an investigation. This issue will arise again and again until definitively resolved by judicial decree.

The third factor, "degree of urgency in resolving the issue," also supports hearing this issue in this case. The urgency comes from the fact that this issue will certainly arise again. A denial by the State will result in no disclosure, or, as in this case, a significant delay in disclosure. Until the courts step in to resolve this issue, the State will continue to argue that the pendency of an investigation can be used to block disclosure of otherwise produceable public records.

The "costs and difficulties in litigating the issue again" factor also supports hearing this issue in this case. Because of the State's refusal to produce the records, Petitioners had to file the Petition to Access and incur costs and attorneys' fees in doing so. The State seeks to avoid having the legal issue resolved due to its subsequent delayed production. The State claims no attorneys' fees should be awarded because of their alleged good faith interpretation of prior case law. State's Response at 15. If the legal issue is not decided here in this case, and no attorney fee award is made, Petitioners are back at "square one" the next time such a denial occurs. These Petitioners (and others) will incur more costs, their requests can be argued as "moot" after a petition is filed, and no attorneys' fee could be awarded due to the same "good faith" argument.

The final factor cited in the *Norma Faye* case concerning the public interest exception is "whether the issue is one of law, a mixed question of law and fact or heavily fact-dependent." This factor also supports hearing what is primarily a legal issue in this case at this time. The relevant facts will not be in dispute – the State has claimed that there is a broad exception to the Public Records Act for "investigative records" that are relevant to a criminal investigation. Exhibits K and L to Petition. It will be undisputed that the public records sought in this case were created by State officials in the ordinary course of business before any investigation and without regard to any investigation.

The State incorrectly argues that the case is entirely dependent on the specific facts and circumstances herein. Response at 9. That is not true. The case cited by the State on this point was a case involving challenge to a public utility rate hike that was wholly superseded by a subsequent new rate decree and thus the original rate hike would never be at issue again. Response at 9.

This case is not about a rare or unique factual situation. As previously noted, this fact pattern has arisen in the past and will arise again in the future. The Court's ruling should be on the legal issue of whether the State or any agency thereof can block disclosure of otherwise produceable public records by relying upon its claim of a broad exemption for "investigative records."

Thus, each of the factors set forth in the *Norma Faye* case support the application of the public interest exception to overcome the State's current claim of mootness. The courts have found that "the accessibility of public records is a matter of great public concern and is of importance in the administration of justice." *Webber v. Bolling,* 1989 WL 151496 (Tenn. App. 1989) at *2. This Court should reach the same conclusion herein.

In addition to the public interest exception, the Tennessee Supreme Court in the *Norma Faye* case, *supra*, discussed other exceptions to overcome mootness claims. One other exception was for "when the challenged conduct is capable of repetition and of such short duration that it will evade judicial review." 301 S.W.3d at 204. As discussed previously, the challenged conduct and legal claim are not only "capable of repetition," but certain to occur. The potential for evading judicial review is also something that can occur again if the State can deny production, wait until after a Petition for Access has been filed and then avoid judicial review by claiming a subsequent delayed production makes the issue moot.

The *Norma Faye* court discussed another basis for not invoking the mootness doctrine – "when the defendant voluntarily stops engaging in the challenged conduct." 301 S.W.3d at 204. Citing United States Supreme Court precedent, Mr. Justice Koch stated, "The Court's decisions reflect a jaundiced attitude about permitting a litigant to cease its

wrongful conduct temporarily to frustrate judicial review and then be free to resume the same conduct after the case is dismissed." *Id.* at 205, *citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000); *United States v. W.T. Grant Co.*, 345 U. S. 629 (1953). The opinion continued by stating that "Accordingly, the United States Supreme Court has concluded that, as a general rule, the voluntary cessation of allegedly illegal conduct does not suffice to moot a case." *Id.* (citations omitted).

The burden of persuading a court that a case has become moot as a result of the voluntary cessation of the challenged conduct is on the party asserting that the case is moot. *Norma Faye, supra* at 206. In the *Norma Faye* case, the Court was not convinced that despite curtailing their efforts against the individual plaintiff, that the City and County had permanently abandoned the challenged conduct. *Id.* at 207. "Where a governmental entity is likely to resume or continue engaging in the allegedly offending conduct as to others, but not the plaintiff, we simply do not believe that voluntary cessation provides an adequate basis for rendering action moot." *Id.* at 208 (emphasis added).

In this case, while the State has belatedly given the requested public records to Petitioners, it is clear that the State will "continue engaging" in the challenged conduct. The "voluntary cessation" exception applies to prevent the State from arguing mootness.

Both the cases cited by Petitioners and the State compel the conclusion that this Court should reject the State's mootness argument and decide the important legal issue raised by the Petition for Access.

III. Petitioners are Entitled to an Award of Attorneys' Fees.

Petitioner alleged in their Petition for Access that they are entitled to an award of attorneys' fees pursuant to the specific provision of the Public Records Act, Tennessee Code Annotated § 10-7-505(g). Petition ¶¶ 30 and 33. That statute provides that the Court may award attorneys' fees if the government "knew the record was public and willfully refused to disclose it."

The States' Response mischaracterizes what is before the Court on this issue. In its Response, the State argues that the Petitioners have failed to allege "bad faith" in their Petition. Response at 15. The language the statute uses is not bad faith, but rather "willful refusal," and that is precisely what Petitioners pled. Petition ¶ 30. The Petition also pled the basis for its claim of the "willful refusal," including the fact that the State knew the records sought were public records and their claimed reason for refusal was "an attempt to expand the rulings of the courts to records that are clearly not 'investigative records.'" *Id.* There is no valid pleading issue whatsoever on this point.

As to the merits of this request, the statutory authorization for attorneys' fees has only two requirements. First that the government "knew the record was public" and second that it "willfully refused to disclose it." Tenn. Code Ann. § 10-7-505(g). There is no dispute that the records sought were public and the State knew that to be true. Thus the only dispute on Petitioners' claim for attorneys' fees is whether the State's refusal was "willful."

In *Friedman v. Marshall County*, 471 S.W.3d 427 (Tenn. App. 2015), the Court rejected the proposition in *Schneider v. City of Jackson* (which the State relies upon) and other cases that equated the willfulness requirement in the statute to "bad faith." *Id.* at 439.

> To the extent that *Schneider* endorsed a 'bad faith' standard, our reading of the opinion compels us to conclude that 'willfulness' is not measured in terms of 'moral obliquity' or 'dishonest purposes' but rather in terms of the relative worth of the legal justification cited by a municipality to refuse access to records.

Id. at 439 (emphasis added). This opinion also specifically stated "that a heightened showing of 'ill will' or 'dishonest purpose'" is not necessary in order to establish willfulness under the statute. *Id.* at 438.

In this case, the State has argued an incorrect standard for the "willful refusal" requirement in this statute. Petitioners are not required to show bad faith or dishonest purpose in withholding the public records at issue as the State has argued. *Friedman, supra* at 438-439. A finding of willfulness to support an attorney fee award may be found by showing Respondents invoked a legal argument that had no good faith basis in light of existing law. *Clark v. City of Memphis*, 473 S.W.3d 285, 291 (Tenn. App. 2015); *Friedman v. Marshall County, supra.*

Petitioners' original Memorandum in Support sets forth how the State's legal reason for refusal is not supported by the Public Records Act or by existing case law. Pet. Memo in Support at 2-9. That Memorandum demonstrates that neither the facts nor the rationale of the cases relied upon by the State for its refusal (Exhibits K, L, and P to Petition) apply to the situation presented herein and that there is not an exception to the Public Records Act for "investigative records" that is anywhere nearly as broad as the State argued in its refusal to produce these records. *Id.*

The Petitioners' Memorandum, and even the argument contained in the State's Response, makes it clear that the prior case law does not support this unwarranted expansion of an exception. Throughout its Response, the State's arguments are based upon

"investigative files" or "criminal investigative files." Response at 13, 14. In this case, the records sought are clearly not "investigative records." They are records routinely made and received in the ordinary course of the transaction of business by two State agencies. The records sought were created well before any investigation by any State official, including records going back to November 2016. The public records sought were not created for any investigation and cannot properly be considered as "investigative records."

As stated in Petitioners' original Memorandum, in the cases relied upon by the State for its denial, the public records requests were made to the law enforcement officials investigating or prosecuting the criminal cases. Pet. Memo in Support at 3-9. The State attempts to distinguish one of those cases by saying that in the *Appman v. Worthington* case the public records request was not made to a District Attorney General but rather was made to the Department of Corrections. Response at 15. The records requested however, were the "results of investigation by Internal Affairs of the Department of Corrections into the murder of Carl Estep. . ." 746 S.W.2d at 166-167. In that case, the criminal defendant on trial for the murder of Mr. Estep was seeking what truly was an "investigative record" into that crime. The very documents sought were the results of the investigation into the crime at issue. None of the cases relied upon by the State for its denial are based upon the type of records being claimed as an "investigative record" herein.

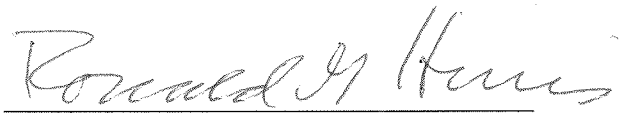
The State knows the Public Records Act requirements and the statutory presumption of openness and access. After the State's initial refusal on June 22, 2018, Petitioner Williams sent a lengthy e-mail to the State setting forth the reasons that his requests were so different from those in *The Tennessean v. Metro Gov't* (Exhibit M to Petition). Before the Petition for Access was filed, Petitioners' counsel sent a letter

detailing the reasons that the prior case law did not support the State's refusal in this case. (Exhibit O to Petition.) The State continued its refusal of production thereby necessitating the filing of the Petitioners' Petition for Access.

Petitioners filed this action because of the State's refusal to produce those public records when requested and also to prevent this type of refusal from continuing as to other future requests. The attorney fee provision in this statute is meant to be a deterrent to a governmental entity refusing to follow the Public Records law. An award of attorneys' fees herein is proper and necessary in this case. The State is claiming a broad exception for "investigative records" that is not supported by existing law or a good faith extension thereof. Petitioners should be awarded all costs and attorneys' fees pursuant to Tennessee Code Annotated § 10-7-505(g).

Respectfully submitted,

NEAL & HARWELL, PLC

By: 

Ronald G. Harris, #9954
William J. Harbison II, #33330
1201 Demonbreun Street, Ste. 1000
Nashville, TN 37203
(615) 244-1713 – Telephone
(615) 726-0573 – Facsimile
rharris@nealharwell.com
jharbison@nealharwell.com
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 7th day of September, 2018.

( ) Hand
(X) Mail
( ) Fax
( ) Fed. Ex.
(X) E-Mail

Janet M. Kleinfelter, Esq.
Deputy Attorney General
301 Sixth Avenue North
Nashville, TN 37243

Ronald G. Harris

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART II

SCRIPPS MEDIA, INC. and PHIL WILLIAMS,	)	
Petitioners,	)	F.O-6
	)	**No. 18-835-II**
v.	)	TT
TENNESSEE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES and TENNESSEE BUREAU OF INVESTIGATION,	)	
Respondents.	)	

FILED
2018 OCT -8 PM 3:14
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.
D.C.&M.

MEMORANDUM AND ORDER

This matter came before the Court upon the Petition for Access to Public Records filed by Petitioners Scripps Media, Inc. and Phil Williams ("Petitioners"), pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-101 et seq. ("the Act"). On June 15, 18-22, 2018, the Petitioners sought access to certain public records maintained by the Tennessee Department of Mental Health and Substance Abuse Services ("TDMHSAS") and the Tennessee Bureau of Investigation ("TBI") (collectively the "State" and the "Requests"). The State timely responded to the Requests on June 22, 2018, as required by Tenn. Code Ann. § 10-7-503(a)(2)(B), citing the Act's exemption for public records that are "otherwise provided by state law."[1]

Tennessee courts have held that Tennessee Rule of Criminal Procedure 16 ("Rule 16") may constitute a "state law" exemption to certain requests made under the Act. *Appman*

[1] The Act provides in pertinent part that "[a]ll 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(a)(2)(A).

v. Worthington, 746 S.W.2d 165 (Tenn. 1987); *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). Most recently, in *The Tennessean v. Metropolitan Gov't of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016), the Tennessee Supreme Court interpreted Rule 16 as exempting from disclosure records arising out of, or part of, a contemplated or pending prosecution or a collateral challenge to any conviction, even if the records originated from a third party source and were not law enforcement work product. *Id.* at 859.

In the present case, the Requests were made to the State agencies that produced and maintained the subject records in the ordinary course of business, and not as part of a criminal investigation. Moreover, the records were not requested because they were part of an investigative file, but rather as normal business records. At some point prior to or simultaneously with the Requests, the State initiated an investigation into the conduct of the two employees whose records were sought. The State takes the position that, when the investigation commenced, the records became cloaked by the Rule 16 exemption. Petitioners assert that the nature of the records at the time of their creation, which was prior to an investigation, is controlling and that the records are therefore subject to disclosure under the Act.

The question before the Court is whether the *Tennessean* case is sufficiently analogous to the present case, or whether its finding can be construed with such breadth, so as to support the State's position. Before making such a determination, however, the Court must discern whether the controversy is moot given the State has since provided the requested documents. Specifically, the Court must decide whether it is in the public interest to adjudicate this matter in spite of the resolution of the Petitioners' records request. And finally, if the Court finds in favor of the Petitioners, i.e., that this matter is not moot, then the

Court must determine whether the State acted willfully in denying the Requests and is thus liable to the Petitioners for attorney's fees under Tenn. Code Ann. § 10-7-505(g).

For the reasons set forth herein, the Court finds that there is a sufficient public interest in the subject legal controversy to make a finding on the merits, despite the Requests having been satisfied. The Court further finds that the holding in *Tennessean* mandates a broad protection for documents in the possession of an investigative agency relevant to a pending or contemplated criminal action, even if the documents originated from another State agency and were created in the ordinary course of business. Given that finding, the issue of the willfulness of the State's refusal to provide the requested records is moot.

FACTS

The facts in this matter are substantially undisputed. The Petitioners initiated the Requests via e-mail on the afternoon of Friday, June 15, 2018 regarding two State employees, Sejal West and Jason Locke, who worked for the TDMHSAS and TBI. Subsequent requests were made to each agency over the following five business days. The Requests were for the following:

To TDMHSAS on June 15, 2018:

- All travel reimbursement and per diem requests submitted by Sejal West since November 2016;
- All logs of phone calls made on any mobile phone assigned to Ms. West since November 2016;
- Any e-mails between Ms. West and Jason Locke of the Tennessee Bureau of Investigation.

To TBI on June 15, 2018:

- All travel reimbursement and per diem requests submitted by Jason Locke since November 2016;
- All logs of phone calls made on any mobile phone assigned to Mr. Locke since November 2016;
- Any e-mails between Mr. Locke and Sejal West of the Department of Health.

To TDMHSAS on June 18, 2018:

- Ms. West's electronic calendar since November 2016.

To TBI on June 18, 2018:

- The electronic calendars for Jason Locke for the same time period [since November 2016].

To TDMHSAS on June 19, 2018:

- Any items in Sejal West's personnel file—or in any other file kept by the Commissioner or her designee—regarding Ms. West's resignation back in January. This request includes, but is not limited to, any complaints, any disciplinary letters/memos, any investigative summaries and any resignation letter/e-mail.

To TDMHSAS on June 20, 2018:

- Any e-mail or other written communication related to Ms. West's job status and whether she was placed on administrative leave.

To TBI on June 21, 2018:

- Transaction summaries since July 2, 2016 for any credit cards or p-cards that may have been assigned to Jason Locke.

To TBI on June 22, 2018:

- Any text messages between Jason Locke and Sejal West.

It appears that on June 15, 2018, when the first Requests were made, Mr. Locke's wife contacted the State, through Governor Haslam, to communicate her belief that the above-named employees were engaged in an extra-marital affair using public resources. The same day, the State initiated an investigation into the employees' conduct and the Petitioners made the Requests.

On June 22, 2018, the State timely responded to the Requests, denying them pursuant to the Act's state law exemption under Rule 16 and the *Tennessean* case. Specifically, the State asserted that the subject records concerned ongoing investigations into the conduct of Ms. West and Mr. Locke by the District Attorney General for the 20th Judicial District. The Petitioners filed the present action in the Davidson County Chancery Court on July 31, 2018

seeking release of the records. Injunctive proceedings were rendered moot when, on August 10, 2018, the Davidson County Grand Jury declined to return an indictment of either Jason Locke or Sejal West. The State thus determined the subject records were no longer part of a pending or contemplated criminal investigation and provided them to Petitioners on August 14 and 15, 2018.

Despite having received the requested records, the Petitioners seek relief from the Court based upon two arguments:

(i) the Court should rule on the now moot question of law because the underlying issues are of great public concern; and,

(ii) the Petitioners are entitled to attorneys' fees because the State's refusal to provide the requested records was willful.

The Petitioners also continue to assert the requested records are not covered by the Rule 16 exemption and should have been provided upon receipt of the Requests.

LEGAL ANALYSIS

Mootness Doctrine

It is well settled that Tennessee courts are only to decide legal controversies between parties with "real and adverse interests" and not act as an advisor on abstract matters. *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 203 (Tenn. 2009). A case becomes moot when it "has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case." *Id.* at 204.

In *Norma Faye Pyles Lynch*, the Tennessee Supreme Court set forth an analytical model for determining when the above "mootness doctrine" did not preclude judicial review. This model was also used by a specially formed panel of the Supreme Court in *Hooker v.*

Haslam, 437 S.W.3d 409, 417-18 (Tenn. 2014). In both cases, the Court looked to the following criteria in determining whether the circumstances of the case warranted an exception to the mootness doctrine:

> (1) when the issue is of great public importance or affects the administration of justice, (2) when the challenged conduct is capable of repetition and of such short duration[2] that it will evade judicial review, (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and (4) when the defendant voluntarily stops engaging in the challenged conduct.[3]

Norma Faye Pyles Lynch, 301 S.W.3d at 204 (citations omitted); *Hooker*, 437 S.W.3d at 417-18.

The Court finds the present issue regarding public records disclosure to be one of great public importance. The right to review records is a codification of the "public access doctrine" recognized as a general right of citizens. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). While the State properly asserted that the right to review records is statutory, not constitutional, the issue nevertheless requires resolution and clarification for future requests. Moreover, this question is likely to arise again, since allegations of public officials acting contrary to the law are, unfortunately, an ongoing dilemma in modern society. This likelihood that news organizations, private citizens, et al. will continue seeking access to public information must be considered in assessing mootness.

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[2] In regard to the time it took for fulfillment of the Requests, the Court notes that the speedy resolution of the criminal claims in this case may not be typical, e.g., the criminal investigation in *Tennessean* took substantially longer to resolve. In the present case, before this matter could be adjudicated, the grand jury had returned a decision not to indict the subject employees, which prevented the Petitioners from fully pursuing their claims.

[3] The burden of persuasion would typically be on the government entity arguing mootness; however, the burden shifts to the petitioner if the government has ceased withholding records on its own accord. *Norma Faye Pyles Lynch*, 301 S.W.3d at 206 (citations omitted). It is undisputed that the State provided the records at issue, albeit because of a change in circumstances, not because of a reversal of position. Here, the State turned over the requested records after there was no criminal indictment returned as to Ms. West and Mr. Locke. The government's capitulation was a function of timing, not a change in position. Thus, the State has the burden of persuasion that the issue is moot.

In light of the Court's finding that the public interest exception to mootness potentially applies in this case, the Court turns to the four-pronged analysis laid out in *Norma Faye Pyles Lynch* and *Hooker* to determine whether the Court should exercise its discretion and decide the issues presented here on this basis. Under that analysis, the Court must address the following threshold considerations: (1) whether the rights and claims are personal to the parties, (2) whether the issue is of significant importance to the public and the administration of justice generally, (3) whether the situation is likely to arise in the future, and (4) whether the record is sufficiently accurate regarding what occurred. *Norma Faye Pyles Lynch*, 301 S.W.3d at 210-11 (citations omitted); *Hooker*, 437 S.W.3d at 418.

The first three factors in the above test support a finding that the Court should apply the public interest exception to the mootness doctrine. In regard to whether the record is sufficiently accurate as to the events underlying the Petitioners' Request, the uncertainty here lies in whether the Requests were made before or after Governor Haslam initiated the investigation. The parties assert, and the Court agrees, that such a technicality is not controlling in this case. Instead, the key issue is whether the public records at issue changed character prior to the deadline for their disclosure.

Finally, the *Norma Faye Pyles Lynch* and *Hooker* analysis requires that the Court balance the interests of the parties before determining whether the public interest exception overrides the mootness doctrine. The Court must address: (1) whether a finding will assist public officials in performing their duties, (2) whether the situation is likely to reoccur, (3) the degree of urgency, (4) the costs and difficulties of relitigating the same issue, and (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependant. *Norma Faye Pyles Lynch*, 301 S.W.3d at 211 (citations omitted); *Hooker*, 437 S.W.3d at

418. The first two factors are more applicable than the third and fourth factors, since this case has been short lived, and there is no actual urgency given the records have been provided. That said, clarity in the law regarding public record disclosure obligations is much needed, due to the intrinsic importance of transparency in government and the frequency of such requests. As discussed above, it is likely this issue will arise again. Finally, in regard to the fifth factor, the issue as to which records are cloaked with a Rule 16 exemption necessarily involves questions such as who created the records, when did they create them, who seeks access to them, and from whom is access sought. However, the issue itself is a legal one.

For all of the reasons set forth above, with primary reliance on *Norma Faye Pyles Lynch* and *Hooker*, the Court finds that the public interest exemption to the mootness doctrine applies in the present case. Therefore, the Court must rule on the underlying issue of whether the requested records were exempted from disclosure by Rule 16.

Rule 16 Exemption to Public Records Act

The State must prove the records requested are exempt from disclosure under the Act by a preponderance of evidence. Tenn. Code Ann. § 10-7-505(c). The controlling case on this issue is *Tennessean*, decided by the Tennessee Supreme Court just two years ago. In *Tennessean*, the Court thoroughly reviews the history of the Act and public records issues in general. 485 S.W.3d at 864-66.

The right of citizens to access the State's public records was codified in the Act in 1957. *Id.* at 864. "The Public Records Act has been amended over the years, but its intent has remained the same—to facilitate the public's access to government records." *Id.* at 864

(*citing Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004)). The Act states as follows:

> [A]ll documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Id. citing Tenn. Code Ann. § 10-7-503(a)(1)(A). There is a "presumption of openness to records of government entities." *Id.* (*citing Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994)).

The exceptions to the Act are also detailed in *Tennessean*. Originally there were two categories of exceptions—medical records of patients in state hospitals and military records related to national or state security. *Tennessean*, 485 S.W.3d at 865. Over time, the Tennessee Legislature has amended that list and there are now forty exceptions, including a catch-all exception for circumstances "provided by state law" including "statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations." *Id.* at 865-66 (*citing Swift*, 159 S.W.3d at 571-72).

Rule 16, which sets out the discovery guidelines for the State and defendants in criminal proceedings, is among the procedural rules of court that has been recognized as exempting certain materials from requests under the Act. For instance, 16(a)(1) lists what the State must provide to a defendant in discovery, and (a)(2) exempts from disclosure work product materials. The *Tennessean* Court summarized the line of cases interpreting the breadth and application of Rule 16 exemptions in public records matters. *Id.* at 866-70. These cases generally involved requests to law enforcement agencies for materials in their files. *Id.* at 868-870. In *Memphis Publishing Co. v. Holt,* 710 S.W.2d 513 (Tenn. 1986), the

media requested closed case files from a local law enforcement agency. The Tennessee Supreme Court found those records were subject to disclosure. In *Appman v. Worthington*, the requested records were Department of Correction "memoranda, documents and records" that were "the results of the investigation by Internal Affairs" of a death at a state run facility. 746 S.W.2d at 166-67. The Court found the records to be "the result of the investigation" and "relevant to the prosecution of the . . . offenses arising out of the [inmate's] murder." *Id.* at 167.[4] Other cases reviewed involved requests for records shielded by a protective order in a civil case and requests for records in a criminal case where post-conviction relief was still being sought - both of which categories were determined to be protected. *Tennessean*, 485 S.W.3d at 869-70 (*citing Ballard v. Herzke*, 925 S.W.2d at 661 and *Swift*, 159 S.W.3d at 575-76).

Finally, in the most recent applicable Tennessee Supreme Court case prior to *Tennessean*, a request for police officers' field interview cards was remanded to the trial court for a determination of which interview cards related to ongoing criminal investigations and which ones did not. *Schneider v. City of Jackson*, 226 S.W.3d 332, 334 (Tenn. 2007). The Court expressed clear concern about allowing the release of records developed as part of current criminal investigations, but found that the trial court failed to fully develop a record to identify those particular records. *Tennessean*, 485 S.W.3d at 870 (*citing Schneider*, 226 S.W.3d at 345-46).

The above-referenced cases formed the backdrop to the issue in *Tennessean*, which was "whether the Public Records Act applies to allow public access to investigative records that arise out of and are part of a criminal investigation resulting in a pending prosecution,

[4] *See discussion in Tennessean,* 485 S.W.3d at 868-89.

are not the work product of law enforcement under Rule 16(a)(2), were gathered by law enforcement from other sources in their investigation of the case, and are requested by entities that are not parties to the pending criminal case." *Tennessean*, 485 S.W.3d at 870. The *Tennessean* Court found that "Rule 16 does not provide for disclosure to a third party of materials subject to discovery between the State and a defendant during the pendency of the criminal case or any collateral challenges to the criminal conviction, [and] the Petitioners cannot gain access to these materials under the Public Records Act, even though the materials may fall outside the substantive scope of Rule 16(a)(2)." *Id.* at 873.

The facts in *Tennessean* are similar to those in the present case, with several key differences. The records request in *Tennessean* was made to the Metropolitan Police Department, a criminal investigative agency. Additionally, the records request included items prepared by a third party, namely Vanderbilt University, and not a law enforcement agency[5] or other governmental entity. The trial court originally found that these records were subject to disclosure, stating that

> records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department are outside the expansive reach of Tenn. R. Crim. P. 16(a)(2).

Davidson County Chancery Court Case No. 14-0156-IV at pg. 13-14 (Memorandum and Final Order, March 12, 2014). The trial court's finding was not limited to documents from a third party to Metro, but rather any documents not created by the police department. *Id.* In reversing the trial court, the Court of Appeals held that the documents previously found to be subject to disclosure were "'relevant to a pending or contemplated criminal action' and

[5] The list of documents originally requested was long and encompassed police department work product, including witness statements and forensic tests, as well as documents obtained from Vanderbilt. Davidson County Chancery Court Case No. 14-0156-IV at pg. 5-6 (Memorandum and Final Order, March 12, 2014).

therefore not subject to disclosure." *Tennessean v. Metropolitan Government of Nashville and Davidson County, et. al.,* M2014-00524-COA-R3-CV, 2014 WL 4923162 at *4 (Tenn. Ct. App. Sept. 30, 2014).

The notable difference between the facts in *Tennessean* and the present case is that the requests were directed to non-investigative State agencies,[6] and the records were developed and retained by those agencies in the ordinary course of business. They were not created for or through an investigation, but rather became part of the investigation after it was commenced. The State takes the position that the records changed in character when the investigation began and that, by becoming part of the investigation, they fell under the Rule 16 exception. Further, the State contends that it does not matter the nature of the records when they were created, but rather their nature when produced. The State relies on the importance of the constitutional rights of criminal defendants, as discussed in detail in *Tennessean*, as well as the public policy that parties should not be able to avoid the discovery rules in the Tennessee Rules of Criminal Procedure to obtain prosecutors' files. *Tennessean*, 485 S.W.3d at 866-73.

The Petitioners take the opposite position—that the nature of the records when they were created is key, not whether they are subsequently provided to another agency as part of an investigation. They rely on *Chattanooga Pub. Co. v. Hamilton County Election Com'n*, E2003-00076-COA-R3-CV, 2003 WL 22469808 (Tenn. Ct. App. Oct. 31, 2003), where the facts are analogous to the facts in this case, i.e., the public records were provided to the investigative agency as a result of a criminal investigation subsequent to their creation. In *Chattanooga Pub Co.*, the Court of Appeals found that the nature of the records *at the time of*

[6] The TBI is, of course, by its very nature an investigative agency, but the TBI records included in the Requests were operational, non-investigative records.

the request controlled how they were classified and whether the Rule 16 exemption applied. *Id.* at *1 and *4. While *Chattanooga Pub. Co.* could arguably be applied to find that the records requested in the present case are not subject to Rule 16 exemption, the more recent ruling in *Tennessean* militates against such a result. Even though the records sought in *Tennessean* were in the possession of the law enforcement agency *because of* an investigation, and the records in the present case were transferred to a law enforcement agency to *initiate* an investigation, the rule in *Tennesseean* applies to documents in the possession of an investigative agency relevant to a pending or contemplated criminal action and affords those records blanket protection pursuant to Rule 16. Thus, even though the records at issue are still public records created "in connection with the transaction of official business by [a] governmental agency," Tenn. Code Ann. §10-7-503(a)(1)(A), and even though the records are not of the same nature or character as the records sought in *Tennessean*, the Court's intention in *Tennessean* appears to be for a broad application of the Rule 16 exemption to protect any documents in an investigative file from disclosure. Under this interpretation, the State acted properly in protecting the records from disclosure.

Willfulness

Because the State properly applied the Act to the Requests, the Petitioners assertions of willfulness are not well taken.

CONCLUSION

The Court finds that the public interest exception to the mootness doctrine, as set out by the Tennessee Supreme Court in *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County,* 301 S.W.3d 196 (Tenn. 2009) and reiterated in *Hooker v. Haslam,* 437

S.W.3d 409 (Tenn. 2014), applies to the present controversy. The Court thus has considered the merits of the subject Petition.

The Court further finds that the Rule 16 exemption to the Act applies in this case based upon the Tennessee Supreme Court's holding in *Tennessean.* In that case, the Court found that

> [t]he media play an important and necessary role in holding government officials accountable. Yet, the General Assembly has rightly recognized that there must be exceptions to the public's right to obtain government records and, in doing so, have provided that the media's role must yield to the need to protect the rights of defendants accused of crimes and the integrity of the criminal justice system during the pendency of criminal cases and any collateral challenges to criminal convictions.

Tennessean, 485 S.W.3d 857, 874. Although the facts of the *Tennesseean* case are different from those in the present case, the Court is persuaded, based upon its reading of the lower court decisions in the context of the Tennessee Supreme Court's decision, that it must give a broad reading to the Rule 16 exemption. Accordingly, the Petition for Access to Public Records is denied. As the State's refusal to provide the requested records was not willful, the Petitioners' request for attorneys' fees is denied. Costs are taxed to the Petitioner.

IT IS SO ORDERED.

ANNE C. MARTIN, CHANCELLOR
CHANCERY COURT PART II

cc: Ronald G. Harris
William J. Harbison II
Neal & Harwell, PLC
1201 Demonbreun Street, Suite 1000
Nashville, TN 37203

Janet M. Kleinfelter
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207

RULE 58 CERTIFICATION
A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

MB
Deputy Clerk and Master
Chancery Court

10/8/18
Date