COURT OF APPEALS OF TENNESSEE
EASTERN DIVISION

MEGHAN CONLEY, Petitioner-Appellee, v. KNOX COUNTY SHERIFF TOM SPANGLER, Respondent-Appellant.	No. E2020-01713-COA-R3-CV On Appeal from the Knox County Chancery Court Case No. 197897-1 Honorable John F. Weaver

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THIRTEEN MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE

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STATEMENT OF THE ISSUES

Pursuant to Tennessee Rule of Appellate Procedure 31, the Reporters Committee for Freedom of the Press, the Associated Press, Chalkbeat, the E.W. Scripps Company, Gannett, Gould Enterprises, Inc. d/b/a Main Street Media TN, the Institute for Public Service Reporting at the University of Memphis, Meredith Corporation, MLK50: Justice Through Journalism, the National Press Club, the National Press Club Institute, the Tennessee Association of Broadcasters, the Tennessee Coalition for Open Government, and the Tennessee Press Association (collectively "Amici") respectfully submit the following as amici curiae in support of Petitioner-Appellee Meghan Conley ("Professor Conley") in this appeal filed by Respondent-Appellant Knox County Sheriff Tom Spangler (the "Sheriff"). Amici write to address the following:

1. Are government entities required to broadly construe the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-101 *et seq*., (the "TPRA" or the "Act") when responding to public records requests?

2. Is the term "information" synonymous with "public record" in Tenn. Code Ann. § 10-7-503(a)(4)?

3. Must government agencies take a commonsense approach when responding to public records requests under the TPRA?

4. Are contingent fees recoverable under the TPRA's fee-recovery provision, Tenn. Code Ann. § 10-7-505(g)?

STATEMENT OF FACTS

Amici are news outlets and organizations committed to the principles of open government and transparency. Journalists and news organizations regularly rely upon public records in their reporting to keep Tennesseans informed about the actions of state and local government agencies and officials. Amici write because they have a significant interest in ensuring that the TPRA remains an enforceable and effective statute that is broadly construed in favor of public access.

Amici adopt the statement of facts set forth by Professor Conley in her brief.

INTRODUCTION

This case involves a topic of vital importance to journalists in Tennessee: this Court's interpretation of the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-101 *et seq*. (the "TPRA"). The Sheriff's brief proffers numerous arguments that, if adopted by this Court, would undermine the effectiveness of the TPRA and hamper the ability of Tennesseans, including journalists, to monitor the activities of state and local government. Amici write to address these arguments and to emphasize the importance of the TPRA to keeping the public informed regarding the actions of Tennessee government agencies and officials.

ARGUMENT

I. A well-functioning public records process enables journalists to keep the public informed about important issues.

The Supreme Court of the United States has repeatedly recognized the crucial role of journalism in our society. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs."). Journalism not only gives the public information essential to their daily decisions, it equips them with tools for evaluating the performance of government officials. In one poll of American readers, 73% said it was "very/extremely important" for journalists to "hold political leaders accountable." *Holding Power Accountable: The Press and the Public*, Am. Press Inst. (Dec. 18, 2019), https://perma.cc/EV4A-UNH5.

Tennessee journalists regularly rely on access to public records for their reporting. For example, just last month, the *Knoxville News Sentinel* relied on public records to report on the University of Tennessee's expenditure of more than $756,000 in legal fees related to an NCAA investigation. Adam Sparks, *Tennessee athletics director Danny White updates NCAA investigation as legal tab tops $756K*, Knoxville News Sentinel, (Aug. 10, 2021), https://perma.cc/93CA-8EZH. Similarly, last year, public records revealed that FedEx was fined only $7,000 after a temporary worker died as a result of a known hazard. Wendi C. Thomas, *A temp worker died on the job after FedEx didn't fix a known*

hazard. The fine: $7,000, MLK50: Justice Through Journalism (Dec. 22, 2020), https://perma.cc/FB62-RAHW. And, last month, journalist Levi Ismail reported on public records that showed how state law enforcement had created dossiers on more than 50 People's Plaza protesters. Levi Ismail, *Tenn. Dept. of Safety created confidential dossier of 50+ activists during Nashville protests*, NewsChannel5 Nashville (Aug. 9, 2021), https://bit.ly/3kuqwki. Tennessee public records were crucial to these and countless other news stories that have shined a light on public officials and the inner workings of government in Tennessee. *See, e.g.*, Marc Perrusquia, *Sex, Drugs and Cash: Records Detail Murder Suspect's Steamy Relationship with Ex-Cop*, Inst. for Pub. Serv. Reporting (Jan. 21, 2020), https://perma.cc/9B8H-MWA7 (relying upon internal affairs investigative records to describe relationship between a former Memphis Police Officer and a murder suspect); Kimberlee Kruesi & Jonathan Mattise, *'Tennessee On Me' tourism campaign paid social media influencers to promote Lee's effort, records show*, Associated Press via Tennessean (July 26, 2021), https://perma.cc/ZF6V-8JL7 (Tennessee spent $2.5 million on a program offering flight vouchers to out-of-state residents). Without access to public records, these important stories could not have been written.

For the reasons detailed below, should the Sheriff be successful in this appeal, it would weaken the TPRA—one of the cornerstones of government transparency and accountability in Tennessee, and would negatively affect not only the press, but also Tennesseans more broadly.

II. The Sheriff incorrectly argues that only courts are required to broadly construe the TPRA.

Tennessee law mandates that the TPRA "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d). Despite this plain statement from the General Assembly of its intent regarding how the TPRA should be construed, the Sheriff appears to take a narrow view regarding the Sheriff's Office's legal obligation to provide meaningful access to public records in its possession. For example, the Sheriff states that "the TPRA must be construed liberally *by the courts*."[1] (Br. Appellant at 25 (emphasis in original).) The implication of this statement is that government entities subject to the TPRA—like the Sheriff's Office—do not have to liberally construe the Act when responding to public records requests, only the courts do. This position is at odds with extensive case law addressing how the TPRA should be interpreted.

"The Public Records Act reflects the legislature's effort to create legislation that advances the best interests of the public." *State v.*

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[1] Despite this statement, the Sheriff included a footnote in the reply brief that "acknowledges that there is Tennessee jurisprudence that posits that the TPRA 'access' language should be construed broadly to allow the most possible access to records for citizens; however, there has been no such conjecture regarding attorney's fees." (Appellant's Reply Br. at 9 n.5.) This statement ignores the fact that the attorneys' fee provision is an essential mechanism for providing the public with the broadest possible access to public records because it ensures that members of the press and public will be able to vindicate their statutory right to access public records, when willfully denied, without having to incur attorneys' fees.

Cawood, 134 S.W.3d 159, 167 (Tenn. 2004). "Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007) (citing *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74–75 (Tenn. 2002)). Put simply, the purpose of the TPRA is "to apprise the public about the goings-on of its governmental bodies." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 687 (Tenn. 1994); *see also Cherokee Children & Family Servs.*, 87 S.W.3d at 74 (the TPRA "serves a crucial role in promoting accountability in government through public oversight of governmental activities" (citation omitted)).

The Tennessee Supreme Court has held that the TPRA is a "clear mandate in favor of disclosure," *The Tennessean v. Elec. Power Bd. of Nashville*, 979 S.W.2d 297, 305 (Tenn. 1998). And, as part of this clear mandate, public records are presumptively open and "the burden is placed on the governmental agency to justify nondisclosure of the records." *City of Memphis*, 871 S.W.2d at 684 (citing Tenn. Code Ann. § 10-7-505(c)).

The Sheriff's theory that only Tennessee's courts must broadly construe the TPRA in favor of access should be soundly rejected by this Court. It is inconsistent with the intent of the statute and with well-established case law addressing the proper interpretation of the Act by all entities subject to it.

III. That a government agency is not required to "sort through files to compile information" does not mean it does not have to search for public records that can be identified with information provided by the requester.

The Sheriff's brief conflates a critical distinction between what governmental entities must do and what they are not required to do under the TPRA. Specifically, the Sheriff appears to argue that searching for public records based upon specific detail provided by a public records requester is synonymous with sorting and compiling information, the latter of which is not required under the TPRA. (*See, e.g.*, Br. Appellant at 24 (arguing that "[u]nlike the TPRA, which specifies that entities do not have to search or compile records, under FOIA, agencies must 'search' and 'review,' 'agency records for the purpose of locating those records which are responsive to a request.'" (emphasis in original)); *see also id.* at 11 (arguing that "[a] request for any 'public record' related to or regarding any IGSA between KCSO and ICE would require an exorbitant amount of sorting and compiling" (emphasis omitted)); *id.* at 15 (arguing that "Ms. Martin testified that such a request would require sorting through all 1,100 employees' emails and compiling any responsive documents"). The Sheriff's position, however, is not consistent with the language of the Act.

At the heart of the Sheriff's arguments is Tenn. Code Ann. § 10-7-503(a)(4), which provides:

> This section shall not be construed as requiring a governmental entity to sort through files to compile information or to create or recreate a record that does not exist. Any request for inspection or copying of a public record shall be

> sufficiently detailed to enable the governmental entity to identify the specific records for inspection and copying.

This provision clearly distinguishes between "information" on one hand and a "public record" on the other, but the Sheriff appears to construe them as being synonymous.

Tenn. Code Ann. § 10-7-503(a)(1)(A) defines "Public record" as

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

"Information" is not defined in the TPRA. Merriam-Webster defines "information" in pertinent part as "knowledge obtained from investigation, study, or instruction." *Information,* Merriam-Webster (Online Edition), https://perma.cc/DQ94-8CW9. While information is contained in a public record, it is not the same thing as the public record itself. To hold otherwise would be inconsistent with the most basic rules of statutory interpretation, which "always begin with the words that the General Assembly has chosen." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010) (citation omitted).

"Courts must give these words their natural and ordinary meaning. And because these words are known by the company they keep, courts must also construe these words in the context in which they appear in the statute and in light of the statute's general purpose." *Id.* (citations

omitted); *see also Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 52 (Tenn. 2018) ("We presume that the Legislature intended each word in a statute to have a specific purpose and meaning." (citation omitted)).

In Tenn. Code Ann. § 10-7-503(a)(4), the General Assembly did not say that governmental entities are not required to sort through files to identify responsive *public records*. Instead, the General Assembly said that governmental entities did not have to sort through files to compile *information* (*i.e.*, to create a new record) in response to a public records request. For example, under the General Assembly's framework, a public records requester may not request the number of DUI arrests in July 2021, but they may request all DUI arrest reports for July 2021. This critical distinction is reinforced by the General Assembly's use of "public record" in the second sentence of Tenn. Code Ann. § 10-7-503(a)(4).

The Tennessee Supreme Court also highlighted the distinction between information and public records under the TPRA when it explained that "once information is entered into a computer, a distinction between information and record becomes to a large degree impractical." *Elec. Power Bd.*, 979 S.W.2d at 304.[2] Florida takes a similar approach

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[2] In *Electric Power Board*, the Tennessee Supreme Court also held that "it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record." *Id.* at 304. "[A]gencies may not design systems with access in mind, only to claim later that information is unavailable because 'our computers can't do that.'" *Id.* (citation omitted). "Indeed, such a defense invoked at random by an agency would frustrate the purpose of the Public Records Act at nearly every turn." *Id.* Here, the Sheriff invokes just such a defense, arguing that the Sheriff's Office is "unable to search the

under its public records law, which the Tennessee Supreme Court has described as being "similar to Tennessee's." *Cherokee Children & Family Servs.*, 87 S.W.3d at 74; *see also Elec. Power Bd.*, 979 S.W.2d at 302 (citing Florida case law). Under Florida's public records law, there is a distinction between a record and information in a record—the former must be produced to a requester unless it is otherwise exempt whereas the latter need not be provided in response to a public records request. *In re Amends. to the Fla. Rules of Jud. Admin.*, 939 So. 2d 966, 1009 (Fla. 2006) ("The custodian is required to provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request." (citations omitted)).

Sorting and compiling information is different than searching for public records. The Sheriff's attempt to enlarge the limitation in Tenn. Code Ann. § 10-7-503(a)(4) to encompass both should be rejected.

IV. Government agencies must take a common-sense approach when responding to public records requests.

Courts regularly apply common sense in deciding the issues before them. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 663–64 (2009) ("[D]etermining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and

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narrative body of an employee's email," and instead can only do searches "regarding the contents of a subject line, and the address line (to/from); but in order to determine the contents of an email, each email must be reviewed individually." (Br. Appellant at 7.) The Sheriff's statement is strikingly similar to the excuse that was flatly rejected in *Electric Power Board*.

common sense." (citation omitted)); *State v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979) ("It has been said that statutes must be construed 'with the saving grace of common sense.'" (citation omitted)). Government agencies subject to the TPRA should likewise be required to apply common sense when responding to public records requests.

The Sheriff claims that when it receives a request for "all 'public records,' or 'all communications,' even if regarding a specific topic" the requester is "essentially asking [the Sheriff] to search every single record, document, recording, and device to see if it contained information" requested. (Br. Appellant at 26.) The Sheriff even goes so far as to claim that it must search the records of all of its "patrol officers, jailers and other personnel involved in maintaining custody of those incarcerated both at a remote detention facility and the Knox County City-County building (where courts are held), administrative and support personnel, detectives, courtroom officers, helicopter pilots and crew, process servers, school officers, training officers, marine and shore patrol, a SWAT team, and several other divisions" regardless of the subject matter of the request. (*Id.* at 26 n.15.)

LURR B1 and B2 show the absurdity of the Sheriff's position. LURR B1 included two requests that are both limited on their face; the first is limited to communications "between Knox County and [ICE] regarding a 287(g) program" and the second is limited to public records "regarding any intergovernmental service agreement . . . between [the Sheriff] and [ICE]." (Br. Appellant at 9.) There is hardly a need to search the emails of the members of the Sheriff's marine and shore patrol, for example, for such records. And, indeed, the Sheriff's Office should know

who is communicating with ICE and who is involved with the 287(g) program and the specified agreement.

The Sheriff's assertion is even more absurd when you consider LURR B2. Like LURR B1, it involves two requests. The first seeks "emails and letters between Knox County Sheriff Jimmy 'JJ' Jones and [ICE]" and the second seeks the same for Media Relations Director Martha Dooley. (*Id.*) It is unfathomable why the communications of a member of the SWAT team, for example, would need to be searched for such a request. Such an approach is entirely lacking in common sense.

Moreover, while requesters are required to be adequately specific in their requests, this Court should not expect the public to phrase their requests with the particularity of a government insider. And, similarly, this Court should not allow records custodians to ignore their knowledge about the underlying records when it is convenient for them. Both approaches disregard common sense.

There may well be times when the records of an entire department need to be searched to locate public records sought by a requester who has provided sufficient detail. But to claim that every time a requester asks for "all public records" or "all communications" about a specific topic a search of every record in the possession of every employee of a governmental entity is necessary lacks common sense. Such an approach should not be countenanced by this Court.

V. Contingent fees are recoverable under the fee shifting provision of the TPRA, Tenn. Code Ann. § 10-7-505(g).

The TPRA provides for an award of attorneys' fees in the following scenario:

> If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity. In determining whether the action was willful, the court may consider any guidance provided to the records custodian by the office of open records counsel as created in title 8, chapter 4.

Tenn. Code Ann. § 10-7-505(g). Despite the broad language of this provision, the Sheriff attempts to seed doubt as to whether contingent attorneys' fees are included in "all reasonable costs." In Footnote 21, the Sheriff states:

> Such attorney's fees are only hypothetical, as the written agreement between Counsel for Petitioner and Dr. Conley specifies that Dr. Conley will not pay any attorney's fees and that Counsel for Petitioner will only be paid fees awarded by the Court.

(Br. Appellant at 43 n.21.) The Sheriff's implication, not accompanied by any citation or authority, is that the fact that the fee agreements between Professor Conley and her attorneys, Mr. Fels and Mr. Rivkin, are contingent fee agreements might negatively affect the ability of Professor

Conley, as a prevailing party, to recover reasonable attorneys' fees. This Court should reject this implication.

There is no doubt that contingency fee arrangements are permitted under Tennessee law. *See Wright v. Wright*, 337 S.W.3d 166, 177 (Tenn. 2011) (listing as the eighth factor in the reasonable attorneys' fees analysis "[w]hether the fee is fixed or contingent").

> Contingent fee arrangements serve a two-fold purpose. First, they enable clients who are unable to pay a reasonable fixed fee to obtain competent representation. Second, they provide a risk-shifting mechanism not present with traditional hourly billing that requires the attorney to bear all or part of the risk that the client's claim will be unsuccessful.

Alexander v. Inman, 903 S.W.2d 686, 696 (Tenn. Ct. App. 1995) (citations omitted). These purposes are just as important in the context of the TPRA's fee shifting provision as they are in the context of other fee shifting provisions.

Courts have repeatedly found that fee recovery is permissible under fee shifting statutes in situations like this one, where the only fee to be paid to an attorney is if they win the case and are awarded fees. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) ("And where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee. All of this is consistent with and reflects our decisions in cases involving court-awarded attorney's fees."); *Cunningham v. FBI*, 664 F.2d 383, 385 n.1 (3d Cir. 1981) (noting in FOIA case that "[a]s a general matter, awards of attorneys' fees where otherwise authorized are not obviated by

the fact that individual plaintiffs are not obligated to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards." (citation omitted)); *Hornal v. Schweiker*, 551 F. Supp. 612, 616 (M.D. Tenn. 1982) ("Courts have consistently awarded attorney fees under fee shifting statutes similar to the [Equal Access to Justice Act] when the plaintiff was represented without charge."); *see also* 1 Robert L. Rossi, Attorneys' Fees § 6:14 (3d ed. 2021) ("Where a litigant incurs no legal fees because he or she is represented without charge by a legal services organization, the courts have generally held that an award of attorneys' fees to the party is proper" and the same is true when it is an individual attorney whose sole compensation is a possible fee award). This is because "awarding fees even where the legal services are provided at no cost promotes the policies that generally underlie fee statutes: encouragement of private enforcement of the law and the deterrence of improper conduct." 1 Rossi, Attorneys' Fees § 6:14. Consistent with these principles, this Court has held that Tenn. Code Ann. § 10-7-505(g)'s purpose "is to discourage wrongful refusals to disclose public documents." *Little v. City of Chattanooga*, No. E2013-00838-COA-R3-CV, 2014 WL 605430, at *4 (Tenn. Ct. App. Feb. 14, 2014) (citations omitted).

The trial court below explained that, here, "the fee in this case is hybrid in nature. No fee comes from the client. The fee is contingent in the sense that the attorney would receive compensation only if the client prevailed and only if awarded a fee under the Act." (Technical R. v. 7 at 991.) "For purposes of encouraging access to public records, this type of fee arrangement is commendable." (*Id.*)

The only means under Tennessee law to enforce the TPRA is to file suit against the government body that is improperly withholding public records. Without hybrid agreements like the ones between Professor Conley and her attorneys, the ability of the public to bring TPRA enforcement actions (and to have access to legal counsel in such cases) would be severely diminished. Moreover, limiting the type of fee arrangements that can result in fee recovery under the TPRA would be inconsistent with the General Assembly's dictate that the TPRA is to "be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d). In sum, this Court should reject the Sheriff's suggestion that the fee arrangement in this case is not one for which fee recovery is permitted under the TPRA.

CONCLUSION

For the reasons stated above, Amici urge the Court to affirm the judgment of the trial court, award attorneys' fees and costs to counsel for Professor Conley, and remand this case to the trial court for calculation of appellate fees and post-judgment interest.

Dated: September 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Tenn. Sup. Ct. R. 46, § 3.02(a). This brief contains 4,100 words, excluding the parts of the brief exempted by Tenn. Sup. Ct. R. 46, § 3.02(a), and the text of the brief is 14-point Century Schoolbook font with 1.5 line-spacing and 1-inch margins.

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 8, 2021, a true and correct copy of the foregoing was served via the Court's e-filing system on:

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