

**IN THE CHANCERY COURT OF TENNESSEE  
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

**JOSE MARCUS PERRUSQUIA,**

**Petitioner,**

vs.

**THE CITY OF MEMPHIS,**

**Respondent.**

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**No. CH-22-0595  
Part II**

**Entered**  
DEC 10 2024 **D**

**M.B.** \_\_\_\_\_

**ORDER ON PETITION FOR ACCESS TO PUBLIC RECORDS**

Following a show cause hearing held on August 30, 2022 and supplemental briefing by both parties, this matter came before the Court on September 16, 2024 for a ruling upon Petitioner Jose Marcus Perrusquia’s Petition for Access to Public Records in which Petitioner seeks access to all written Performance Improvement Plans for three current or former Memphis Police Department (“MPD”) officers: Colin Berryhill, Eric Kelly, and Justin Vazeii. Performance Improvement Plans (“PIPs”) are part of MPD’s Performance Enhancement Program (“PEP”).

Petitioner and Respondent have submitted a Joint Stipulation of Facts and Evidence, which the Court relies upon and incorporates by reference into this Order.

The public’s right to examine governmental records has been recognized by Tennessee’s courts for more than a century. *Conley v. Knox Cnty. Sheriff*, No. E2020-01713-COA-R3-CV, 2022 WL 289275, at \*3 (Tenn. Ct. App. Feb. 1, 2022). Further, this right was codified in 1957 when the Tennessee Legislature enacted the

Tennessee Public Records Act (“TPRA”). *Taylor v. Town of Lynnville*, No. M2016-01393-COA-R3-CV, 2017 WL 2984194, at \*2 (Tenn. Ct. App. July 13, 2017); *see also Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007). The TPRA broadly defines public records to include “all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity.” Tenn. Code Ann. § 10-7-503(a)(1)(A)(i). “Given this definition, the TPRA has been described as an all-encompassing legislative attempt to cover all printed matter created or received by the government in its official capacity.” *Schneider*, 226 S.W.3d at 339-340. The TPRA is thus intended to facilitate the public’s access to government records. *Tennessean v. Metro. Gov’t of Nashville*, 485 S.W.3d 857, 864 (Tenn. 2016).

“There is a presumption of openness for government records.” *Tennessean*, 485 S.W.3d at 864. “The Public Records Act, however, is not absolute, as there are numerous statutory exceptions to disclosure.” *Id.* at 865. The Act itself recognizes the necessity of withholding some information from the public domain. *Adams v. Tennessean*, No. M2001-00662-COA-R3-CV, 2022 WL 192575, at \*3 (Tenn. Ct. App. Feb. 7, 2002). Tenn. Code Ann. § 10-7-504, and numerous other statutes, “create classes of confidential records not subject to inspection.” *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991). Thus, the General Assembly included specific exceptions from disclosure in the public records statutes themselves and also

acknowledged and validated both explicit and implicit exceptions from disclosure found elsewhere in state law. *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004).

A citizen who requests the right of personal inspection and whose request has been in whole or in part denied shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access. Tenn. Code Ann. § 10-7-505(a). The Act provides for an expedited hearing and a truncated procedure with regard to disputes concerning the disclosure of public records. *Brewer v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2023-00788-COA-R3-CV, 2023 WL 8281582, at \*6 (Tenn. Ct. App. Nov. 30, 2023).

The burden of proof for justifying nondisclosure or demonstrating that a record is statutorily exempt from disclosure rests with the agency that has denied access. *Tennessean v. Elec. Power Bd. of Nashville*, 979 S.W.2d 297, 301 (Tenn. 1998) (citing Tenn. Code Ann. § 10-7-505(c)). The Act provides that the justification for the nondisclosure must be shown by a preponderance of the evidence. Tenn. Code Ann. § 10-7-505(c). “A public official can justify refusing a Tennessee citizen access to a governmental record only by proving by a preponderance of the evidence that the record in controversy” comes within an exemption. *Memphis Pub. Co. v. Holt*, 710 S.W.2d 513, 517-518 (Tenn. 1986).

Tennessee Code Annotated § 10-7-505(a)(2)(B) provides “the custodian of a public record ... shall promptly make available for inspection any public record not specifically exempt from disclosure.” In addition, Tennessee Code Annotated § 10-7-

505(d) states that the Act “shall be broadly construed so as to give the fullest possible public access to public records.” The Court is empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section. Tenn. Code Ann. § 10-7-505(d).

Courts must interpret the terms of the Act liberally to enforce the public interest in open access to the records of state, county, and municipal governmental entities. *Memphis Pub. Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002). At the same time, it is within the power of the Legislature to create, limit, or abolish rights of access to public records. *Moncier v. Harris*, No. E2016-00209-COA-R3-CV, 2018 WL 1640072, at \*5 (Tenn. Ct. App. Apr. 5, 2018). Despite the breadth of the public records statutes’ disclosure requirements, the Tennessee General Assembly recognized from the outset that circumstances could arise where the reasons not to disclose a particular record or class of records would outweigh the policy favoring public disclosure. *Swift*, 159 S.W.3d at 571. Accordingly, “[n]otwithstanding the presumption of openness, in the interest of public policy the General Assembly has provided specific explicit exemptions from disclosure contained in the TPRA itself.” *Patterson v. Convention Ctr. Auth.*, 421 S.W.3d 597, 606 (Tenn. Ct. App. 2013).

Over the years, the General Assembly has added many categories of records that are specifically exempted from the Act, such that “[t]he once all-encompassing Public Records Act is now more narrow.” *Perrusquia v. Bonner*, No. W2023-00293-COA-R3-CV, 2024 WL 1026395 at \*9 (Tenn. Ct. App. Mar. 11, 2024) *citing*

*Tennessean*, 485 S.W.3d at 865. “The exceptions to the TPRA recognized by state law reflect the Legislature’s judgment that the reasons not to disclose a record outweigh the policy favoring disclosure.” *Moncier*, 2018 WL 1640072, at \*5. The Court of Appeals has recognized that “[i]t was the Legislature that opened the door making the records public in the first place. Certainly, in light of subsequent events, the Legislature could decide that its policy was too broad and close the door on certain records.” *Thompson v. Reynolds*, 858 S.W.2d 328, 329 (Tenn. Ct. App. 1993). For instance, in *Moncier v. Harris*, the Court of Appeals observed that Tennessee Code Annotated section 10-7-504(a)(29) was “a completely new addition that brought entirely new categories of personal information under a confidential umbrella, supporting the Legislature’s intent to limit the Public Disclosure Act.” *Moncier*, 2017 WL 946350, at \*7.

Notably, the TPRA’s exceptions “are not subsumed by the admonition to interpret the Act broadly,” and “courts are not free to apply a broad interpretation that disregards specific statutory language.” *Tennessean v. Tennessee Dep’t of Pers.*, No. M2005-02578-COA-R3-CV, 2007 WL 1241337, at \*5 (Tenn. Ct. App. Apr. 27, 2007). The exceptions to the TPRA reflect the Legislature’s judgment that the reasons not to disclose a record outweigh the policy favoring disclosure. *Moncier*, 2018 WL 1640072, at \*5. Where the Legislature has clearly established a statute’s parameters, “courts are not free to apply a broad interpretation that disregards specific statutory language.” *Tennessee Dep’t of Pers.*, 2007 WL 1241337, at \*5.

In this particular context, Tennessee courts have repeatedly recognized that “the General Assembly, not [the] Court[s], establish the public policy of Tennessee.” *Schneider v. City of Jackson*, 226 S.W.3d 332, 344 (Tenn. 2007) (explaining that “[w]hether the law enforcement privilege should be adopted as an exception to the Public Records Act is a question for the General Assembly”); *see also Patterson*, 421 S.W.3d at 613 (“it is the prerogative of the General Assembly to enunciate exceptions to disclosure based on public policy”); *Moncier*, 2018 WL 1640072, at \*5 (“It is within the power of the Legislature to create, limit, or abolish rights of access to public records.”).

What is before the court is a public records request for the Performance Improvement Plans of three MPD officers. Performance Improvement Plans are generated by MPD as part of its Performance Enhancement Program. The City denied Petitioner’s request for these records based on Tennessee Code Annotated section 10-7-504(d), which provides an exception to the TRPA for Employee Assistance Program (“EAP”) records. That provision states as follows:

Records of any employee's identity, diagnosis, treatment, or referral for treatment that are maintained by any state or local government employee assistance program shall be confidential; provided, that any such records are maintained separately from personnel and other records regarding such employee that are open for inspection. For purposes of this subsection (d), “employee assistance program” means any program that provides counseling, problem identification, intervention, assessment, or referral for appropriate diagnosis and treatment, and follow-up services to assist employees of such state or local governmental entity who are impaired by personal concerns including, but not limited to, health, marital, family, financial, alcohol, drug, legal, emotional, stress or other personal concerns which may adversely affect employee job performance.

Tenn. Code Ann. § 10-7-504(d).

Based on the Court's review of the transcript of the show cause hearing that was held before Chancellor Kyle, it appears that there are many aspects of MPD's PEP which are outside the scope of the statutorily defined EAP. MPD treats PEP records, including PIPs as confidential. As such, the Court has before it an issue of statutory interpretation.

This Court's role in statutory interpretation is to determine what a statute means. *Waldschmidt v. Reassure America Life Ins. Co.*, 271 S.W.3d 173, 175 (Tenn. 2008). Specifically, the Court must decide "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." ANTONIN SCALIA & BRYAN GARNER, *Reading Law: The Interpretation of Legal Texts* 33 (2012). Original public meaning is discerned through consideration of the statutory text in light of well-established canons of statutory construction. *State v. Sherman*, 266 S.W.3d 395, 401 (Tenn. 2008).

Tennessee courts give the words of a statute their "natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Ellithorpe v Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015). The Court is to consider the whole text of a statute and interpret each word "so that no part will be inoperative, superfluous, void, or insignificant." *Bailey v. Blount Cnty. Bd. of Ed.*, 303 S.W.3d 216, 228 (Tenn. 2010).

The Court also considers "the overall statutory framework." *Coffee Cnty. Bd. of Ed. v. City of Tullahoma*, 574 S.W.3d 832, 846 (Tenn. 2019). Statutes *in pari*

*materia* – those relating to the same subject or having a common purpose - are to be construed together. *Wilson v. Johnson Cnty.*, 879 S.W.2d 807, 809 (Tenn. 1994). When a statute’s meaning is clear and unambiguous after consideration of the statutory text, the broader statutory framework, and any relevant canons of statutory construction, we “enforce the statute as written.” *Johnson*, 432 S.W.3d at 848.

A court should deem statutory language ambiguous only after employing all the traditional tools of statutory construction, including examining statutory structure and context, and applying well-established canons of statutory construction. To be sure, employing the traditional tools of statutory construction may require some effort. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 970 (11th Cir. 2016).

Effort, however, does not make a text ambiguous. When the plain meaning of a statute is clear after application of the traditional tools of statutory interpretation, a court should not “delve into the legislative history of an unambiguous statute.” *State v. Welch*, 595 S.W.3d 615, 624 (Tenn. 2020); *see also D. Canale & Co. v. Celauro*, 765 S.W.2d 736, 738 (Tenn. 1989). Where there is no ambiguity in the language of an act, comments of legislators, or even sponsors of the legislation, before its passage are not effective to change the clear meaning of the language of the act.

One of the fundamental principles of statutory construction is the interpretation principle. SCALIA & GARNER, *Reading Law, supra*, at 33. “Interpretation or construction is ‘the ascertainment of the thought or meaning of the author or of the parties to a legal document as expressed therein according to the



rules of language and subject to the rules of law.” *Id.* at 53 (quoting H.T. Tiffany, *Interpretation and Construction*, in 17 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1, 2 (David S. Garland & Lucius P. McGehee eds. 2d ed., 1900)).

Among the canons that apply here are the semantic canons. The ordinary meaning canon says that words are to be understood in their ordinary, everyday meanings unless the context indicates that they bear a technical sense. And the ordinary meaning rule is the most fundamental semantic rule of interpretation. The ordinary meaning canon presumes that a thoroughly fluent reader can reliably tell in the vast majority of instances from contextual and idiomatic clues which of several possible sense a word or phrase bears.

The grammar canon also applies here and holds that words are to be given the meaning that proper grammar and usage would assign them. Judges rightly presume, for example, that legislators understand such subjects as subject-verb agreement, noun-pronoun concord, the difference between the nominative and accusative cases, and the principle of correct English word choice.

Finally, the Court finds to be relevant the series-qualifier canon, which is when there is a straightforward, parallel construction that involves all nouns and verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.

Applying these rules of construction, this Court finds that Tennessee Code Annotated §10-7-504(d) may have difficulties but it is not ambiguous. So being, the Court will not look to comments of legislators or references of the Petitioner to the legislative history. The Court reads the last section of Tennessee Code Annotated §

10-7-504(d)—“to assist employees of such state or local governmental entity who are impaired by personal concerns, including, but not limited to, health, marital, family, financial, alcohol, drug, legal, emotional, stress, or other personal connections which may adversely affect employee performance”—to refer to counseling, problem identification, intervention, assessment, and referral.

When applied to employees such as the officers and other employees of the MPD, who may often confront very difficult issues on the job, the Court easily sees that this was an issue the Legislature was concerned about when drafting the language of this statute to carve out EAPs from becoming part of personnel records. The Court acknowledges that the public has a right to know of certain relevant matters, but it is clear that Employee Assistance Program documents are exempt from disclosure.

At the show cause hearing before Chancellor Kyle, Lieutenant Laquita Jones, who was the coordinator of the MPD PEP, testified on cross examination about various matters which are outside the parameters of an EAP as defined by the Legislature in Tennessee Code Annotated § 10-7-504(d). Those matters include such things as remedial driving, remedial firearm training, communications skills training, verbal judo training, cultural awareness training, conflict resolution training, critical incident diffusion training, defense tactics training, tactical response to critical incidents training, professional and ethics training, and policing with honor training. These matters, while beneficial resources to officers, are different from the concerns expressed by the Legislature with regard to EAPs.

Because these types of matters fall outside the scope of the EAP, this Court finds that those records should be open for inspection and disclosed. In this manner, the Court agrees with the Petitioner. In contrast, records of any employee's identity, diagnosis, treatment, or referral for treatment should remain confidential.

For whatever reason, MPD's PEP does not mirror Tennessee Code Annotated § 10-7-504(d)'s language and includes a number of subjects outside the statutory definition of EAP. The fact that the City of Memphis, in the Court's view, has defined the Performance Enhancement Program more broadly than the statutory definition of the EAP does not, however, deprive the Memphis Police Department employees who have been assured of and who have relied upon the confidentiality of those records to have those records exposed to public view.

The issue, as the Court sees it, is that none of these records that are at issue have been open to inspection, and that we are going to do a taxidermy after the fact to determine which of the requested documents fall within and which fall without of the Tennessee Legislature's definition of Employee Assistance Program.

In making this ruling, the Court acknowledges that the burden is on the City, among other things, to show that the EAP records are maintained separately from records that are open to inspection, as required for the EAP provision to apply. Tenn. Code Ann. § 10-7-504(d). From the hearing and briefing, it was disclosed that records are maintained on a need-to-know basis, and are contained in the PEP Coordinator's files and with the work station commanders in a separate folder. Further, the City has maintained digital records in a way that are not subject to intermingling with

other employment records, including within the Blue Team application. The Court finds that the City has met its burden of showing that all the documents that are within the Performance Enhancement Program, including the Performance Improvement Plans, are segregated from other files.


So being, Petitioner is denied access to provisions of the Performance Improvement Plans, as defined in the MPD Manual, that fall within the scope of statutory exemption of an EAP. The City raised concerns that producing any records, including those involving remedial trainings, could reveal information made exempt pursuant to Tenn. Code Ann. § 10-7-504(d). To address this concern, the Court finds that certain redactions are appropriate. The Court envisions four scenarios under its ruling. First, where “(a) ‘None’” is chosen on the “Proposed Action plan” section of Exhibit 22, the City shall release all PIP records without redactions. Second, in situations in which the PIP only selects an action that falls within the scope of statutory exemption of an EAP, the City would release no records because receiving a redacted version would reveal that the PIP was created as to only the protected information. In the third scenario, there may be situations where the PIP only provides for additional trainings and similar actions or discussions unrelated to the protected EAP Provision material. In that case, the City would produce an unredacted version of the PIP. In the fourth scenario, there may be situations in which the PIP provides for both remedial trainings as well as additional action plan items that fall under the protections of the EAP provision. In this situation, the City shall redact any sections that could relate to a referral to a protected service.

Specifically, on the PEP Action Plan (attached to the Joint Stipulation as Exhibit 22), the City may redact rows (c) and (e)-(k) regardless of whether there is material present. In that same document, the “Action Plan Details” section (not including that which already appears on the form) shall be redacted, except for portions that discuss matters related to remedial trainings. Similar redactions can be applied to other records that may be included in a PIP so long as information related to remedial trainings are made available to Mr. Perrusquia. For example, in Exhibit 23, the “Results summary” and “Additional Recommended Action” sections may be redacted, but any discussion related to trainings shall not be redacted. In these latter two scenarios, the City shall not redact portions of the records identifying individuals involved in the creation of the PIP, like the “Member Information” or “Supervisor involved in developing Action Plan.”

The Petitioner has also requested an award of his attorneys’ fees and costs. This is a matter that the statute indicates is committed to the Court’s discretion. The Court, exercising that discretion and failing to find willfulness on the part of the City, will deny the award of attorneys’ fees and costs in this instance.

Therefore, Petitioner’s Petition for Access to Public Records is GRANTED in part and DENIED in part. The Court orders that the PEP records that fall within the scope of the statutory definition of EAP are not subject to disclosure, but other PEP records that fall outside the scope of the statutory definition of EAP are subject to disclosure under the TPRA. Costs assessed against Defendant.

IT IS SO ORDERED, ADJUDGED AND DECREED.

  
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JAMES R. NEWSOM III  
SPECIAL JUDGE  
DATE: December 10, 2024

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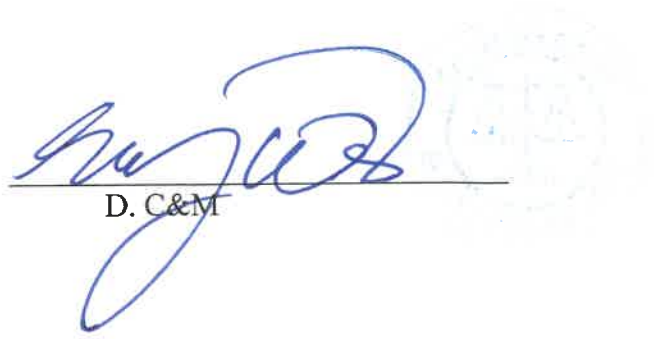
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**CERTIFICATE OF SERVICE**

I hereby certify that I have mailed a copy of the foregoing order to all interested parties in this case to the addresses listed below on this 10th day of December, 2024 via United States Mail, First Class Postage prepaid, to the addresses shown below.

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