

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

JOHN BECKER,

Petitioner,

v.

THE UNIVERSITY OF TENNESSEE,

Respondent.

No. 208439-1

**MEMORANDUM OF LAW IN SUPPORT OF BECKER’S PETITION  
FOR ACCESS TO PUBLIC RECORDS  
AND TO OBTAIN JUDICIAL REVIEW OF DENIAL OF ACCESS**

Petitioner John Becker (“Petitioner” or “Mr. Becker”) submits this Memorandum of Law in Support of his Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access (the “Petition”). For the reasons set forth in the Petition and in this Memorandum of Law, the Court should grant the Petition, order the University of Tennessee (“Respondent” or “UT”) to immediately produce the requested public records to Mr. Becker, and grant Mr. Becker reasonable costs, including reasonable attorneys’ fees.

**INTRODUCTION**

In 1999, UT co-founded UT–Battelle, LLC (“UT–Battelle”) with Battelle Memorial LLC to operate Oak Ridge National Laboratory on behalf of the Department of Energy. Pet. ¶¶ 5–7. On August 29, 2022, Mr. Becker, a journalist at WBIR-TV, the Knoxville NBC affiliate, made a public records request to the University of Tennessee which, as narrowed on November 8, 2022, sought all records received by specified UT employees, including UT President Randy Boyd, David L.

Miller, Jeff Smith, Brian Dickens, Luke Lybrand, Jamie Blessinger, and Stacey Patterson<sup>1</sup> “from Oak Ridge National Laboratory or UT Battelle LLC from January 1, 2022 to present,” and “all operating agreements, partnership agreements, or other agreements regarding the formation and operation of UT Battelle between and including UT and Battelle Memorial Institute.” Pet. ¶ 12.

On March 15, 2023, Charles Primm, UT’s Public Records Coordinator, informed Mr. Becker that some records were available for inspection, but others were being withheld. Specifically, Mr. Primm asserted that UT was withholding records because (1) they are in draft form; (2) they contain trade secrets; (3) they are exempt under the federal Procurement Integrity Act; (4) UT does not consider them “to be public records because the recipient received them in their capacity other than their University employment, such as their capacity as a UT Battelle board member”; and/or (5) they relate to applicants for academic appointments. Pet. ¶ 19.<sup>2</sup> Mr. Primm further explained that UT was also withholding public records based on a

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<sup>1</sup> David L. Miller is the University’s Senior Vice President and Chief Financial Officer, Jeff Smith was the University’s Interim Vice President for Research and is now the Vice President for National Labs, Brian Dickens is the University’s Chief Human Resources Officer, Luke Lybrand is the University’s Treasurer, Stacey Patterson is the former president of the University’s Research Foundation and liaison for the University to UT–Battelle, Jamie Blessinger is the executive assistant to the University’s president. Pet. ¶¶ 13–18; *see also* 2d McAdoo Decl. ¶¶ 4–12 (attached as Exhibit A to this memorandum).

<sup>2</sup> Mr. Primm’s March 15, 2023 email also communicated that records or portions thereof that describe ongoing or proposed research projects would be withheld, Pet. ¶ 20. The parties have met and conferred about this aspect of UT’s denial, and Petitioner does not contest this basis for withholding; accordingly, the parties have determined they will not brief this issue. Further, Mr. Primm’s email also alleged that Mr. Becker’s request was not a proper request for records under the TPRA, Pet. ¶ 36, an argument Respondent has subsequently withdrawn.

sample list of a variety of inapplicable state and federal statutes and three different privileges. Pet. ¶ 21.

On June 15, 2023, Mr. Becker’s undersigned counsel responded to UT, challenging its purported bases for withholding large portions of records responsive to Mr. Becker’s request. Pet. ¶ 25. On July 14, 2023, Thomas Harold Pinkley, Associate General Counsel of the University, responded to the undersigned’s June 15, 2023 correspondence, upholding the University’s denials of access. Pet. ¶ 31.

Among the records initially withheld by UT were the operating agreements for UT–Battelle. Pet. ¶¶ 24–25, 32. Originally, UT claimed that the operating agreements were not public records “under trade secrets law and under the Federal Procurement Integrity statute.” Pet. ¶ 32. Nevertheless, UT eventually provided Mr. Becker with access to the UT–Battelle operating agreements on August 11, 2023, and August 22, 2023, through Mr. Becker’s colleague, John North, but redacted significant portions of the agreements based on a claim of state trade secrets and a federal law involving economic espionage. Pet. ¶¶ 37–39.

UT’s asserted bases for withholding public records responsive to Mr. Becker’s request are contrary to the TPRA’s language and the precedent interpreting it. The University’s denial seeks to drastically expand justifications for withholding public records by, among other things, importing all of federal law into the TPRA, significantly curtailing the applicable definition of public record, expanding trade secret law past its current limitations to include information that has no commercial value, and applying a privilege for which there is no binding precedent. Put simply,

UT has not and cannot carry its burden—factually or legally—to show that there is a state law basis to withhold or redact the documents at issue.

## ARGUMENT

### I. The TPRA must be interpreted broadly in favor of public access.

“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 Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74–75 (Tenn. 2002)). 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 Child. & Fam. Servs.*, 87 S.W.3d at 74 (the TPRA “serves a crucial role in promoting accountability in government through public oversight of governmental activities”).

To further this important policy goal, the General Assembly has specified 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). Accordingly, Tennessee’s courts have held that the TPRA is a “clear mandate in favor of disclosure.” *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998). Consistent with this broad construction, records are presumptively public 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)); *see also* Tenn. Code Ann. § 10-

7-503(a)(2)(B) (“The custodian of a public record . . . shall promptly make available for inspection any public record not specifically exempt from disclosure.”). Given “this clear legislative mandate,” the presumption of openness applies “even in the face of serious countervailing considerations.” *City of Memphis*, 871 S.W.2d at 684.

To fully effectuate the broad legislative mandate in favor of disclosure, exemptions to the TPRA should be narrowly construed. *See, e.g., Home Builders Ass’n of Middle Tenn. v. Williamson Cnty.*, 304 S.W.3d 812, 817 (Tenn. 2010) (“[S]tatutes of taxation are to be strictly construed . . . in favor of the taxpayer . . . . Where there is doubt as to the meaning of a taxing statute, the doubt must be resolved in favor of the taxpayer.” (quoting *Memphis Peabody Corp. v. MacFarland*, 365 S.W.2d 40, 42–43 (Tenn. 1963))); *Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (holding that Florida public records act “is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose” (citation omitted)); *Ark. Dep’t of Health v. Westark Christian Action Council*, 910 S.W.2d 199, 201 (Ark. 1995) (holding that “[i]n conjunction with” Arkansas’s requirement that its public records law be “liberally construe[d] . . . to accomplish its broad and laudable purpose,” the Arkansas Supreme Court “narrowly construe[s] exceptions to the FOIA to counterbalance the self-protective instincts of the government bureaucracy” (citations omitted)); *Swickard v. Wayne Cnty. Med. Exam’r*, 475 N.W.2d 304, 307–08 (Mich. 1991) (“[W]e keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed.” (citation omitted)).

## II. The requested documents are public records subject to the TPRA.

The TPRA defines a “public record” as “all documents . . . 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). While UT appeared to concede that most of the requested records are public records, Becker Decl. Attach. 2, it also claimed that some responsive records were not “because the recipient received them in their . . . capacity as a UT Battelle board member.”<sup>3</sup> Pet. ¶ 30. This claim is factually misleading and seeks to improperly circumvent the TPRA.

UT regularly touts its work with UT–Battelle and Oak Ridge National Laboratory as a component of UT’s work. The biography page for UT President Randy Boyd on UT’s website states that Mr. Boyd “serves as the chief executive officer of the statewide university system” and that “[t]he UT system also manages Oak Ridge National Laboratory through its UT–Battelle partnership, where Boyd serves as co-chairman.” 2d McAdoo Decl. Attach. 1. Dr. Patterson’s biography on her current employer’s website, Florida State University, explains that “[i]n her position for the UT system, [Dr. Patterson] had broad responsibilities related to Oak Ridge National [L]aboratory and served as the primary liaison to Battelle Memorial Institute, UT’s partner in the management of ORNL, where she helped align the lab and university interests with innovation across the state.” *Id.* Attach. 8. Similarly, UT’s announcement of both Mr. Smith’s interim appointment and the search for a

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<sup>3</sup> Mr. Becker challenged this assertion in his Appeal Letter, as he does here, but UT did not respond. McAdoo Decl. ¶ 5, Attach. 4.

vice president for research for the UT system states that the position “will have primary responsibility within the University of Tennessee for the UT–Battelle management and operations contract for the Oak Ridge National Laboratory.” *Id.* Attach. 4. The permanent hiring announcement for Mr. Smith and his current UT biography page contain similar statements. *Id.* Attach. 3 (Mr. Smith serves as “the [UT] System’s primary liaison to the ORNL leadership team, the U.S. Department of Energy and Battelle Memorial Institute on matters that relate to the UT–Battelle management and operations contract for ORNL”); *id.* Attach. 5 (noting same, pending approval by the UT Board). Based on these public statements, it is evident that the work of individuals like Mr. Boyd, Mr. Smith, and Dr. Patterson with UT–Battelle and Oak Ridge National Laboratory is a critical component of their employment at UT.

Both of the redacted UT–Battelle operating agreements will likely confirm that UT employees serve on the UT–Battelle board because of their employment at UT and because UT owns half of UT–Battelle. In other words, but for their employment at UT, they would not be on the UT–Battelle board. For example, if current UT president Randy Boyd resigned from his position with UT, it is likely that under the current UT–Battelle operating agreement, he would cease to be a member of the UT–Battelle board. Accordingly, UT–Battelle board records received by Mr. Boyd (and any other UT-employed board member), are public records because they are obtained in connection with the transaction of official UT business. Tenn. Code Ann. § 10-7-503(a)(1) (defining public record).

This conclusion is reinforced by the requirement that the TPRA be construed broadly in favor of access. *Supra* pp. 4–5. In *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, the Tennessee Supreme Court interpreted the phrase “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency” broadly in favor of access to records of a private entity pursuant to a then-newly adopted functional equivalent test. 87 S.W.3d at 75, 79. Here, the definition of “public record,” being construed broadly, as it must be, surely covers the records of UT employees who are only involved with UT–Battelle due to their employment at UT, which is plainly a governmental entity, and UT’s 50% ownership of UT–Battelle.

Permitting UT to evade the TPRA’s transparency requirements by making a false distinction between a UT employee and a position held as a direct result of UT employment would improperly promote circumvention of the TPRA. Statutes must be construed “in a manner to prevent [their] circumvention.” *State ex rel. Matthews v. Shelby Cnty. Bd. of Comm’rs*, 1990 WL 29276, at \*5 (Tenn. Ct. App. Mar. 21, 1990) (holding that the Tennessee Open Meetings Act “is to be construed so as to frustrate all evasive devices” (citation omitted)); *see also Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 666 (Tenn. Ct. App. 2021) (“[W]e may employ the presumption that the General Assembly did not intend to enact a toothless statute or an absurdity.” (citations omitted)).



The records sought are public records received by UT employees in the course of their official business on behalf of UT. To hold otherwise would evade the dictates of the TPRA.

### **III. Respondent cannot categorically withhold draft records.**

The TPRA does not exempt draft records from its scope; thus, UT's claim that drafts of public records need not be produced in response to a TPRA request is wrong. Pet. ¶ 50. A draft document is still either made or received in connection with the official business of UT and is thus a public record under the TPRA. Tenn. Code Ann. § 10-7-503(a)(1) (defining public record).

It is a canon of statutory construction that “the expression of one thing implies the exclusion of others.” *Rich v. Tenn. Bd. of Med. Exam'rs*, 350 S.W.3d 919, 927 (Tenn. 2011). Applying that principle here, the TPRA specifically exempts certain draft documents, but no such exemption applies to the records at issue here. For example, “draft reports” of the Comptroller are an enumerated type of “audit working papers” that are confidential pursuant to Tenn. Code Ann. § 10-7-504(a)(22)(A). *See also id.* § 10-7-504(a)(26)(A)–(B) (noting that job performance evaluations of specified individuals are confidential and defining such evaluations as including “drafts”); *id.* § 10-7-504(p)(2)(A) (making certain drafts of school security reports confidential). By exempting specific draft records from the TPRA, the General Assembly has at least

implied that draft documents are not otherwise categorically exempt from the TPRA.<sup>4</sup> There is thus no statutory basis for UT to withhold drafts of public records.

#### **IV. Federal law is generally inapplicable to the TPRA.**

##### **A. The federal Freedom of Information Act is wholly inapplicable to records subject to the TPRA.**

The courts of this state have long held that “the Public Records Act is not patterned upon FOIA” and is “distinct from FOIA.” *Schneider*, 226 S.W.3d at 343. Thus, Respondent’s position that “federal documents, such as documents prepared by the United States Department of Energy, that would be exempt from disclosure by DOE if DOE received a FOIA request for them, are also exempt from disclosure under Tennessee law,” Pet. ¶ 34, is incorrect for the simple reason that the federal FOIA and the TPRA are entirely separate statutory schemes applying to entirely separate jurisdictions.

Tennessee is not alone in recognizing this distinction—other states to examine the relationship between federal and state public disclosure laws similarly find the two statutory schemes are fundamentally separate. *See, e.g., State v. Gibson*, 2d Dist. Champaign No. 06CA37, 2007-Ohio-7161, ¶ 10 (“[T]he Federal Freedom of Information Act does not apply to state or local government agencies or officers.” (citation omitted)); *Servais v. Port of Bellingham*, 904 P.2d 1124, 1132 (Wash. 1995) (“[T]he exemptions to disclosure in the state Public Disclosure Act are significantly

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<sup>4</sup> The Tennessee Court of Appeals has decided a case that was related in part to access to a draft document and made no mention or even implied that the requested draft document was not a public record under the TPRA. *Noe v. Solid Waste Bd. of Hamblen Cnty./Morristown*, No. E2017-00255-COA-R3-CV, 2018 WL 4057251, at \*5 (Tenn. Ct. App. Aug. 27, 2018).

different from those in the federal Freedom of Information Act.”); *N.C. Press Ass’n, Inc. v. Spangler*, 381 S.E.2d 187, 190 (N.C. Ct. App. 1989) (“The cases that respondents cite interpret the Federal Freedom of Information Act which contains language substantially different from our Public Records Act. The cases are not persuasive here.”). The Ninth Circuit’s opinion in *Kerr v. U.S. District Court*, 511 F.2d 192, 197 (9th Cir. 1975), *aff’d*, 426 U.S. 394 (1976) (citations omitted), is particularly instructive as that court found that the federal FOIA, which “is limited to authorities ‘of the Government of the United States,’” simply cannot be used to create new privileges against disclosure of *state* records.

The TPRA *specifically* states that public records may only be withheld from the public pursuant to “state law.” Tenn. Code Ann. § 10-7-503(a)(2)(A); *see also id.* § 10-7-503(a)(5) (specifying that “[i]nformation made confidential *by state law* shall be redacted whenever possible” (emphasis added)); *id.* § 10-7-503(g)(1) (requiring that local public records policies “shall not impose requirements on those requesting records that are more burdensome than state law”). Thus, Respondent cannot withhold public records on the basis of federal FOIA.

**B. Tenn. Code Ann. § 10-7-504(a)(9)(C) does not create a wholesale federal law exemption to the TPRA.**

UT incorrectly cites Tenn. Code Ann. § 10-7-504(a)(9)(C) to claim that “information that is confidential pursuant to federal law, such as pursuant to the Federal Procurement Integrity Act, is exempt from disclosure under the Tennessee Public Records Act.” McAdoo Decl. Attach. 4. Instead, Tenn. Code Ann. § 10-7-504(a)(9)(C) provides a limited exemption for information received by the Tennessee

Department of Agriculture related to premise identification and animal tracking programs and agriculture-related homeland security events required by federal law or regulation to be confidential. Unsurprisingly, Tenn. Code Ann. § 10-7-504(a)(9)(C) has no applicability in this case and does not sweep all of federal law into the TPRA. In fact, UT’s argument is at odds with language elsewhere in the TPRA, the structure and legislative history of the provision, and the rules of statutory construction.

As a starting point, as discussed *supra*, Tenn. Code Ann. § 10-7-503(a)(2)(A) provides that public records must be disclosed pursuant to the TPRA “unless otherwise provided by *state* law.” (emphasis added); *see also Tennessee v. Metro. Gov’t of Nashville*, 485 S.W.3d 857, 865–66 (Tenn. 2016) (“‘State law’ includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations”—i.e., not federal law). UT’s expansive interpretation of Tenn. Code Ann. § 10-7-504(a)(9)(C) cannot be read in harmony with Tenn. Code Ann. § 10-7-503(a)(2)(A) and is entirely inconsistent with the limitation the General Assembly established in that provision. *Coffee Cnty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 845–46 (Tenn. 2019) (“[S]tatutes that relate to the same subject matter or have a common purpose must be read *in pari materia* so as to give the intended effect to both.” (citation omitted)); *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015) (explaining that courts “seek to adopt the most reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws” (citation and internal quotation marks omitted)).

Moreover, Tenn. Code Ann. § 10-7-504(a)(9)(C) relates to the higher designation at Tenn. Code Ann. § 10-7-504(a)(9)(A), pertaining to records maintained by the state veterinarian, but UT's argument ignores this context. Subdivisions (B) and (C) were added together to Tenn. Code Ann. § 10-7-504(a)(9) in 2006 by passage of House Bill 3982. 2d McAdoo Decl. Attach. 11. Subdivision (B) makes various records of the Tennessee Department of Agriculture confidential and not open for inspection under the TPRA, including those "provided to or collected by the department of agriculture pursuant to the implementation and operation of premise identification or animal tracking programs" and "all contingency plans prepared concerning the department's response to agriculture-related homeland security events." *Id.*; Tenn. Code Ann. § 10-7-504(a)(9)(B). The University would have the Court interpret the next provision as not only applying to the Department of Agriculture, but to the entire TPRA. Instead, Tenn. Code Ann. § 10-7-504(a)(9)(C) should be read to be similarly limited to information received by the Department of Agriculture related to premise identification and animal tracking programs and agriculture-related homeland security events required by federal law or regulation to be kept confidential. In fact, the legislative history for the 2006 law supports this commonsense, contextual reading.

Subdivision (C) was not part of the original House Bill 3982, but rather was added as its lone amendment. 2d McAdoo Decl. Attach. 12. In introducing House Bill 3982, Representative Borchert explained that the original bill "protects the personal and business records of producers and the animal data obtained through the

implementation of tracking process[es] [of] premise and animal identification program[s] by providing that the information will be kept secret and confidential,” and that the amendment further “[p]rovide[s] that information received by the Department of Agriculture, that is required by federal law or regulation to be kept confidential, will be kept confidential . . . . *Simple.*” House Judiciary Comm. Hearing on H.B. 3982, 104th Gen. Assemb., at 38:30–39:15 (Tenn. Apr. 11, 2006) (Statement of Rep. Borchert) (emphasis added).<sup>5</sup> Any other interpretation expands Tenn. Code Ann. § 10-7-504(a)(9)(C) well beyond its contextual limitations and the General Assembly’s clear intent.

Since Tenn. Code Ann. § 10-7-504(a)(9)(C) is limited in scope to information received by the Department of Agriculture in specific contexts, UT’s reliance on FOIA, the Federal Procurement Integrity Act (the “FPIA”), 41 U.S.C. §§ 2101–07, and federal trade secret law, 18 U.S.C. § 1831, is misplaced and should be rejected.

**C. The Federal Procurement Integrity Act on its face does not apply to the requested public records.**

UT also claims that the FPIA, 41 U.S.C. §§ 2101–07, bars release of the requested public records. Pet. ¶ 19. No provision of the FPIA applies. 41 U.S.C. § 2102(a) prohibits federal government employees or contractors from disclosing “contractor bid or proposal information or source selection information,” 41 U.S.C. § 2102(a)(1)–(3), but no UT employee subject to Mr. Becker’s request qualifies as a federal government employee or contractor. Even still, while 41 U.S.C. § 2102(b)

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<sup>5</sup> A true and correct copy of the audio recording and a transcript of the discussion of House Bill 3982 prepared by a licensed and certified Tennessee court reporter are Attachments 13 and 14, respectively, to the Second McAdoo Declaration.

prohibits “knowingly obtain[ing] contractor bid or proposal information or source selection information” before a federal agency procurement contract is awarded, the prohibition is limited “as provided by law.” Here, applicable law—the TPRA—limits the scope of this provision. *Cf.* 45 C.F.R. § 164.512(a)(1) (stating that entities subject to HIPAA may disclose even protected health information when such disclosure is required by state law—e.g., a public records law).

Even if one of the prohibitions in 41 U.S.C. § 2102 (or elsewhere in the FPIA) did prevent the release of the requested public records (and they do not), release would still be permitted (and thus required under the TPRA) under 41 U.S.C. § 2107(2) and (7). 41 U.S.C. § 2107(2) provides that the FPIA does not “restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information.” Thus, even if UT were considered a contractor, it would be permitted (and thus required under the TPRA) to provide access to its own bid or proposal information. Moreover, 41 U.S.C. § 2107(7) provides that the FPIA does not “limit the applicability of a requirement, sanction, contract penalty, or remedy established under another law or regulation.” Here, the TPRA requires disclosure of public records in the hands of Tennessee governmental entities, like UT, and thus, the FPIA does not trump that requirement.

If federal law does create exceptions to the TPRA (which it does not), the FPIA does not apply to UT or the public records sought here.

**V. The University improperly withheld or redacted public records as trade secrets.**

UT is improperly withholding and redacting public records pursuant to state trade secret law, Tenn. Code Ann. §§ 47-25-1701 *et seq.*, and federal trade secret law, 18 U.S.C. §§ 1831 *et seq.* Pet. ¶ 38. As discussed *supra*, federal law is not a proper basis for withholding Tennessee public records except in very limited circumstances that do not apply here.<sup>6</sup> And state law is similarly unavailing.<sup>7</sup>

In Tennessee, a trade secret is “any formula, process, pattern, device or compilation of information that is used in one’s business and which gives him an opportunity to obtain an advantage over competitors who do not use it.” *Wright Med. Tech., Inc. v. Grisoni*, 135 S.W.3d 561, 588 (Tenn. Ct. App. 2001) (citations omitted); *see also* Tenn. Code Ann. § 47-25-1702(4) (defining trade secret); *Hauck Mfg. Co. v. Astec Indus., Inc.*, 376 F. Supp. 2d 808, 814 (E.D. Tenn. 2005) (explaining that in addition to secrecy “[t]rade secret status specifically requires a [party] to . . . demonstrate the information is not readily ascertainable by others and derives independent economic value from its secrecy”). Tennessee courts consider several factors in evaluating whether information is a trade secret including:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;

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<sup>6</sup> Even if federal law did apply (and it does not), federal and Tennessee trade secret claims “are ‘largely the same.’” *BNA Assocs., LLC v. Goldman Sachs Specialty Lending Grp., L.P.*, 602 F. Supp. 3d 1059, 1065 (M.D. Tenn. 2022) (citation omitted).

<sup>7</sup> Respondent appears to have redacted from its operating agreements information on allocation of profits and losses, *see* North Decl. Attachs. 2, 4; Petitioner does not contest this specific withholding as to the current (2007) operating agreement.



- (3) the extent of measures taken by the business to guard the secrecy of the information;
- (4) the value of the information to the business and to its competitors;
- (5) the amount of money or effort expended by the business in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Wright*, 135 S.W.3d at 589 (citation omitted). To receive trade secret protection for the withheld or redacted public records, UT must establish that they, in fact, contain trade secrets. And even then the proper remedy is limited redaction, not wholesale withholding. Tenn. Code Ann. § 10-7-503(a)(5). While Petitioner has little information to evaluate UT's trade secret assertion, it is unlikely that UT can establish any trade secrets.

For example, the University has asserted that certain subsections of Article IV "Management" in the UT–Battelle operating agreements are trade secrets.<sup>8</sup> North Decl. Attach. 2 at 6; *id.* Attach. 4 at 6. It thus appears UT has redacted and claimed trade secret protection for the composition of its Board of Governors and all information regarding "Matters Reserved to the Executive Group; Committee and Subcommittees; Delegation of Authority." It is difficult to fathom how the composition of the UT–Battelle Board of Governors and the composition and operation of UT–Battelle's Executive Group are trade secrets when UT–Battelle and UT have not kept this information secret. The fact that UT President Randy Boyd has served on the UT–Battelle Board of Governors as vice-chair, chair, and co-

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<sup>8</sup> Curiously, UT redacted the headings in the challenged redacted sections in the 2007 Operating Agreement, but did not do so in the 1999 Operating Agreement.

chairman at different times has been publicized, McAdoo Decl. Attach. 8 (listing Mr. Boyd as vice-chair), 2d McAdoo Decl. Attach. 1 (listing Mr. Boyd as co-chairman); *id.* Attach. 10 (listing Mr. Boyd as chair), and UT–Battelle publicized the composition of its Board of Governors in May 2000, McAdoo Decl. Attach. 9. UT has also announced when Mr. Boyd has appointed someone to the UT–Battelle board. 2d McAdoo Decl. Attach. 10. Moreover, the composition of a board and the composition and authority of a board’s executive group are not information that derives independent economic value from their secrecy because such information is regularly shared with the public. Indeed, the composition of boards, including UT’s, Battelle Memorial’s—and even some of UT–Battelle’s—is public. McAdoo Decl. ¶¶ 6–18; Pet. ¶¶ 43–45; McAdoo Decl. Attach. 8; 2d McAdoo Decl. Attachs. 1, 10. Similarly, the composition of the board of Brookhaven Science Associates, which runs Brookhaven National Laboratory and is jointly owned by a New York university foundation and Battelle Memorial, is public. McAdoo Decl. ¶ 11 & Attach. 10. Surely, these organizations would not make this information public if they could derive independent economic value from it being secret. *See also* McAdoo Decl. ¶¶ 12–18 (identifying seven other national labs that make this information publicly available). Indeed, “workforce composition” has been found not to qualify as privileged commercial information. *Ctr. for Investigative Reporting v. U.S. Dep’t of Labor*, 424 F. Supp. 3d 771, 776–78 (N.D. Cal. 2019) (holding that various companies’ EEO-1 reports, which require federal contractors to furnish the composition of their workforce broken down by gender, race/ethnicity, and general job category, did *not* qualify as privileged commercial or financial information

such that it could be withheld from disclosure under a public records law). The trade secret standard is far more stringent.

Just because a board may engage with financial or business matters does not automatically render their records—let alone their *members*—a trade secret. *Cf. Ortiz Mercado v. P.R. Marine Mgmt., Inc.*, 736 F. Supp. 1207, 1213–14 (D.P.R. 1990) (“While the minutes of the Board of Directors’ meetings discuss more specific information regarding the operations of [the Puerto Rico Maritime Shipping Authority—a government owned corporation], after careful inspection this Court has found no information which could constitute trade secrets . . . .”); *see also id.* (“[A]fter full inspection, we find that the . . . management agreements and their amendments . . . do not divulge any information protected as a trade secret . . . [as t]hese contracts are standard industry agreements which merely outline the rights, duties and remedies of the parties. They discuss no specific trade information which competitors could exploit . . . .”). Indeed, when an Ohio court faced an analogous issue, it determined that the “list of names” of an LLC’s members did not “satisf[y] the test for a trade secret.” *Block Commc’ns, Inc. v. Pounds*, 34 N.E.3d 984, 997 (Ohio Ct. App. 2015); *see also Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 862 (1994) (“Simply hiring personnel who possess the requirements specified by a customer does not convert the employee into a ‘trade secret.’”); *In re Waring*, 406 B.R. 763, 767 (Bankr. N.D. Ohio 2009) (“[N]ames and positions of corporate officers are not trade secrets or confidential business information . . . .”). Here, UT has not proffered any justification for claiming the composition of a board

constitutes a trade secret and such an argument is against both the weight of authority and common sense.

For these same reasons, Respondent's apparent redactions to the board's "executive group" and various subcommittees are also suspect. North Decl. Attachs. 2, 4. Indeed, the public and the press are invested in understanding and evaluating those individuals tasked with governing an institution that exists in "service to humanity."<sup>9</sup> See, e.g., *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 884–85 (2003) (suggesting that disclosure of even purported trade secrets is warranted where "there is a logical nexus between the information and a matter of legitimate public interest").

As to UT's withholding of information related to allocation of profits and losses and capital accounts contributions, see North Decl. Attach. 2 at 15–18; *id.* Attach. 4 at 15–18, Respondent has made no showing, whatsoever, that this information as contained in the *July 1999* operating agreement could conceivably constitute "information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it," per state trade secrets law, *Wright*, 135 S.W.3d at 588 (citation omitted). Nor could Respondent allege as much, given that this data is a quarter-century old. See, e.g., *Travelers Prop. Cas. Co. of Am. v. Centex Homes*, No. 11-3638-SC, 2013 WL 707918, at \*1 (N.D. Cal. Feb. 26, 2013) ("Plaintiff concedes that the Guidelines are 'outdated and no longer in

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<sup>9</sup> *About UT-Battelle*, <https://ut-battelle.org/about/> (last accessed May 13, 2024) (stating that UT-Battelle's "founding purpose" is "science in service to humanity").

use.’ Accordingly, it is unclear how Plaintiff’s competitors could derive any economic benefit from their use. Plaintiff argues that the Guidelines are trade secrets, regardless of whether they are outdated, because they were never disclosed to Plaintiff’s competitors. This argument conflates trade secrets with ordinary secrets.”).

**VI. Public records related to academic appointments are disclosable.**

Respondent has, without citation to law, let alone state law, claimed that it can withhold public records “related to applicants for academic appointments to ORNL and/or UT.” Becker Decl. Attach. 2. Respondent’s withholdings on this basis are, once more, unavailing. The Court of Appeals’ decision in *Board of Education v. Memphis Publishing Co.* is squarely on point. There, the court held that the requested applications for the position of superintendent of city schools “were received by that body in its official capacity in connection with aforesaid business”—hence “[t]hose applications became part of that body’s records,” such that their disclosure was required under the Act. 585 S.W.2d 629, 631 (Tenn. Ct. App. 1979).<sup>10</sup>

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<sup>10</sup> Other jurisdictions presented with this question have ruled similarly. *See, e.g., State ex rel. Gannett Satellite Info. Network v. Shirey*, 678 N.E.2d 557, 560 (Ohio 1997) (ruling that “resumes and supporting documentation supplied by . . . safety-director applicants . . . were public records” even where applications were initially submitted to a private company hired by city of Cincinnati and confidentiality provision was contained in contract); *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348 (Ariz. 1991) (ruling that names and resumes of persons in pool of final candidates for position were subject to disclosure, including because they had expressed desire for such position); *Cap. City Press v. E. Baton Rouge Par. Metro. Council*, 696 So. 2d 562, 566–67 (La. 1997) (where no statutory exemption applied to applications for public employment, they must be disclosed, particularly in light of fact that resumes do not tend to contain facts that would expose applicants to “public disgrace” or intrude “into a person’s seclusion, solitude, or private life” (citation omitted)).

Accordingly, any records or portions thereof related to applicants for academic appointments must be disclosed.

**VII. The University’s assertion of attorney-client privilege and “joint interest” privilege is factually unsupported and should be closely scrutinized by the Court.**

Among its list of example exemptions, the University claimed, without any factual explanation or support, that it withheld public records pursuant to the attorney-client and joint interest privilege. Pet. ¶ 21. Presumably, UT’s assertion of the “joint interest privilege”<sup>11</sup> is an assertion of the common interest privilege.<sup>12</sup> UT provided no factual predicate for these privilege assertions. Accordingly, Mr. Becker requests that the Court require UT to make a factual showing establishing each asserted privilege and that the Court closely scrutinize UT’s privilege assertions during the Court’s *in camera* review.

As a starting point, both the attorney-client privilege and common interest privilege must be factually supported by a declaration or affidavit from an attorney involved in the communications. *Boyd*, 88 S.W.3d at 215 n.18 (citations omitted). Thus, UT cannot carry its burden of showing that it has an attorney-client or common interest privilege until, at a minimum, it submits such affidavits. But even then, UT must prove that an asserted privilege applies to the public records it has withheld.

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<sup>11</sup> Counsel for Mr. Becker conducted a Westlaw search for the exact phrase “joint interest privilege” and no Tennessee cases were returned.

<sup>12</sup> The Court of Appeals has explained that “[t]he common interest privilege has frequently been referred to as the ‘joint defense privilege’ because the privilege was originally and is now most commonly invoked in the context of a joint defense. The more accurate term is ‘common interest’ privilege.” *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 n.13 (Tenn. Ct. App. 2002) (citations omitted).

Tenn. Code Ann. § 10-7-505(c) (“The burden of proof for justification of nondisclosure . . . shall be upon the official and/or designee of the official of those records . . .”).

Tennessee’s attorney-client privilege protects confidential attorney-client communications that (i) involve the subject matter of the representation and (ii) are made with the intention that they will be kept confidential. *Boyd*, 88 S.W.3d at 213 & nn.9–10 (citing *Jackson v. State*, 293 S.W. 539, 540 (Tenn. 1927); *Hazlett v. Bryant*, 241 S.W.2d 121, 124 (Tenn. 1951)). “The attorney-client privilege is not absolute, nor does it cover all communications between a client and his or her attorney.” *Id.* Rather, “the purpose of the attorney-client privilege ‘is to shelter the confidences a client shares with his or her attorney *when seeking legal advice.*” *Culbertson v. Culbertson*, 455 S.W.3d 107, 131 (Tenn. Ct. App. 2014) (emphasis added) (citing *Bryan v. State*, 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992)). “The statutory language and longstanding Tennessee law require a showing that the attorney was ‘applied to for advice . . . .’” *State v. Jackson*, 444 S.W.3d 554, 599 (Tenn. 2014) (citing *Jackson v. State*, 293 S.W. at 540). The advice sought must be legal in nature; the privilege does not apply to attorney-client communications where the client seeks business, rather than legal, advice. *Jackson*, 444 S.W.3d at 599–600 (noting that an attorney-client relationship arises only where a lawyer provides *legal* services, and that “[t]he privilege does not apply where one consults an attorney not as a lawyer but as a . . . business advisor” (citations omitted)). “Speaking in confidence is not enough; where one consults an attorney not as a lawyer but as a friend or as [an] . . . adviser . . . , the consultation is not professional nor the statement privileged.” *Id.* at 600

(citations and internal quotation marks omitted) (alterations in original). UT “also has to demonstrate it has not waived” any asserted privileges. *State ex rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Grp. Tr.*, 209 S.W.3d 602, 616 n.14 (Tenn. Ct. App. 2006) (citing *Boyd*, 88 S.W.3d at 221).

While “[t]he common interest privilege does not provide an independent basis for refusing to reveal information or produce documents that would not otherwise be protected by the attorney-client privilege,” *Boyd*, 88 S.W.3d at 214 n.15 (citations omitted), it “widens the circle of persons to whom clients may disclose privileged communications,” *id.* at 214. “However, the privilege applies only to communications given in confidence and intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy.” *Id.* (citations omitted). The elements UT must establish to assert a common interest privilege are:

(1) that the otherwise privileged information was disclosed due to actual or anticipated litigation, (2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation, (3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and (4) that the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information.

*Id.* at 214–15 (citations omitted). The fact that UT owns 50% of UT–Battelle is not enough, by itself, for the common interest privilege to attach to communications and documents shared with UT-employed board members. UT must show more, because “[t]he cooperation required to invoke the common interest privilege must be more than cooperation for business purposes or to address a common problem. The



cooperation must be in the furtherance of a joint strategy for actual or anticipated litigation.” *Id.* at 215 n.16 (citations omitted). UT has made no factual showing, including by attorney affidavit, to prove the common interest privilege attaches to any particular withheld public record.

Finally, in scrutinizing UT’s vague and broad privilege assertions this Court must keep in mind that “courts typically hold that a privilege is to be strictly construed.” *Flowers*, 209 S.W.3d at 616 n.13 (citation omitted). Even in documents that contain privileged information, redaction of the privileged information is the correct course, not wholesale withholding. Tenn. Code Ann. § 10-7-503(a)(5) (“Information made confidential by state law shall be redacted whenever possible[.]”).

**VIII. The Court should not recognize the deliberative process privilege, including as an exception to the TPRA.**

UT also lists the deliberative process privilege among its example bases for withholding the requested public records. The Tennessee Supreme Court has explained, in no uncertain terms, that the adoption of a common law privilege as an exception to the TPRA “is a question for the General Assembly.” *Schneider*, 226 S.W.3d at 344 (citation omitted). There are more than 720 statutory exceptions to the TPRA that have been adopted by the General Assembly,<sup>13</sup> and the deliberative process privilege is not among them.<sup>14</sup> Instead, all UT can rely upon to support

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<sup>13</sup> The Tennessee Office of Open Records Counsel maintains a database of statutory exceptions to the TPRA on its website; as of May 13, 2024 that database had 723 entries. *Public Records Exception Database*, Tenn. Comptroller of the Treasury, <http://bit.ly/4aNLONX> (last accessed May 13, 2024).

<sup>14</sup> Tenn. R. Evid. 501’s advisory commission comments, in fact, list 19 privileges and was updated most recently in 2012 but does not include a reference to the deliberative process privilege.

application of the deliberative process privilege as an exception to the TPRA is cursory *dicta* in one case, an unpublished decision in the discovery context that solely relies on the prior case, and a decision that only mentions (but does not apply) the privilege, *see infra*—all of which are inconsistent with the Tennessee Supreme Court’s decisions in *Schneider* and in *Hodge v. Craig*, 382 S.W.3d 325 (Tenn. 2012), among others. As such, the Court should reject UT’s deliberative process assertion.

The first mention of a deliberative process privilege in Tennessee’s appellate case law was in *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). In *Swift*, a public defender sought “the contents of an assistant district attorney general’s files in a case involving a prisoner on death row,” while the state proceeding was being challenged in federal court. *Id.* at 568. “[T]he trial court dismissed the petition based on Tenn. R. Crim. P. 16, the work product doctrine, the law enforcement investigative privilege, and the deliberative process privilege.” *Id.* The Court of Appeals, however, affirmed only on the basis of Tenn. R. Crim. P. 16 and “decline[d] to accredit” the other arguments of the government “because they lack logic and legal support.” *Id.* at 568, 576. In *dicta*, the court assumed the deliberative process privilege existed and might apply under different circumstances. *Id.* at 578; *see also Hill v. Waste Mgmt., Inc.*, No. 1:10-ccv-0033, 2011 WL 3475545, at \*4–5 (M.D. Tenn. Aug. 9, 2011) (concluding that the *Swift* court “assumed that [a] state court decision could serve as a ‘state law’ to except documents from the [TPRA],” and that the discussion of the deliberative process privilege in *Swift* was *dicta*).

The Tennessee Supreme Court’s 2007 decision in *Schneider v. City of Jackson* severely undercuts *Swift*’s cursory *dicta* on the deliberative process privilege. In *Schneider*, *The Jackson Sun* asked the City of Jackson for two categories of public records, one of which is pertinent here: “field interview cards generated by police officers of the City.” 226 S.W.3d at 334–35. The City of Jackson argued that the field interview cards were exempt from disclosure under the TPRA pursuant to an asserted “law enforcement privilege,” which the Court of Appeals in *Schneider* adopted for the first time in Tennessee. *Id.* at 340. The Tennessee Supreme Court unanimously disagreed and refused to adopt such a privilege as an exception to the TPRA. *Id.* at 344. In declining to adopt a common law law enforcement privilege, the Court began by noting that it had never been asked to adopt a common law privilege as an exception to the TPRA and that the Court of Appeals “had not previously applied a common law privilege as an exception to the [TPRA].” *Id.* at 342. The Court thus concluded that “[w]hether the law enforcement privilege should be adopted as an exception to the [TPRA] is a question for the General Assembly,” because “the General Assembly, not this Court, establishes the public policy of Tennessee.” *Id.* at 344 (citations omitted); *see also Johnson v. Advanced Bionics, LLC*, Nos. 2:08-cv-2376, 2:08-cv-2442, 2009 WL 10700764, at \*3–4 (W.D. Tenn. July 28, 2009) (relying on *Schneider* in refusing to adopt and apply a common law privilege).

Relying in part on *Schneider*, Chancellor Perkins in Davidson County reached the opposite conclusion of *Swift* in 2010, in *Coleman v. Kisber*, No. 10-137-IV, at 11–

12 (Tenn. Ch. Ct. Davidson Cnty. Mar. 2, 2010),<sup>15</sup> *aff'd on other grounds*, 338 S.W.3d 895, 909 (Tenn. Ct. App. 2010).<sup>16</sup> In that case, Chancellor Perkins explained that the deliberative process privilege “is grounded in the federal common law,” and that despite the privilege being “alluded to” in *Swift*, “this privilege has not been clearly adopted by a Tennessee appellate court.” *Id.*; *see also id.* at 12 (“This Court has been unable to locate any Tennessee appellate court decision that applies the deliberative process privilege to prevent production of public records.”). Accordingly, the trial court “decline[d] to adopt this privilege as an exception to the Public Records Act.” *Id.*

The final Tennessee appellate decision referencing the deliberative process privilege is the unpublished decision in *Davidson v. Bredesen*, No. M2012-02374-COA-R3-CV, 2013 WL 5872286 (Tenn. Ct. App. Oct. 29, 2013). *Davidson* is not a TPRA case, but instead involved the application of the deliberative process privilege in a discovery dispute with the Governor as a party. *Id.* at \*1. The court did not consider the TPRA and its mandate of transparency, nor did it even cite to *Schneider*.

In light of this background, this Court should reject UT’s claim that it may withhold public records on the basis of a common law deliberative process privilege. The Tennessee Supreme Court in *Schneider* rejected a similar argument for adoption of a common law privilege exception to the TPRA. The Tennessee Supreme Court

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<sup>15</sup> A true and correct copy of this trial court opinion is Attachment 15 to the Second McAdoo Declaration.

<sup>16</sup> The Court of Appeals noted that it did “not find it necessary to address” the deliberative process privilege issue and its decision, which was made on other grounds, “should not be interpreted as an affirmance of the trial court’s finding on this issue.” *Id.* at 909–10.

also explained in *Hodge v. Craig* that “[t]he determination of this state’s public policy is primarily the prerogative of the General Assembly,” and “when the General Assembly has acted to occupy an area of the law formerly governed by the common law, the statute must prevail over the common law in the case of conflict.” 382 S.W.3d at 337–39. In fact, “the General Assembly’s prerogative to establish Tennessee’s public policy rests on fundamental differences between the judicial and legislative process. . . . Unlike legislative proceedings, judicial proceedings do not provide an open forum for the discussion and resolution of broad public policy issues.” *Id.* The Tennessee Supreme Court has described the TPRA as an “all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity.” *Schneider*, 226 S.W.3d at 339–40 (quoting *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991)); *see also Tennessean*, 979 S.W.2d at 301 (same). This Court should defer to the General Assembly and let it make the policy decision whether to create a deliberative process privilege exception to the TPRA.<sup>17</sup>

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<sup>17</sup> This approach is consistent with numerous Tennessee Supreme Court cases declining to create an exception to the TPRA based on public policy. *Schneider*, 226 S.W.3d at 344 (“Whether the law enforcement privilege should be adopted as an exception to the Public Records Act is a question for the General Assembly.” (citation omitted)); *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004) (“[T]his Court declines to make a public policy exception for the records at issue in this case because it is within the prerogative of the legislature to do so.”); *Tennessean*, 979 S.W.2d at 301 (explaining that the Court had “specifically rejected an invitation to judicially create a public policy exception to the Act” (citation omitted)); *City of Memphis*, 871 S.W.2d at 684 (“A review of the appellate decisions concerning the Public Records Act reveals that our courts have been vigilant in upholding this clear legislative mandate, even in the face of serious countervailing considerations.”); *Memphis Publ’g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986) (“It is the prerogative of the legislature to declare the policy of the State touching the general welfare. And where the legislature speaks

Put simply, the deliberative process privilege has not been established in Tennessee law by statute, rule, or binding case law and should not be adopted here.

**IX. Even if, *arguendo*, the Court recognizes the deliberative process privilege as an exemption to the TPRA, UT has made no showing that it applies and is unlikely to be able to do so in this context.**

As discussed *supra*, the Court should not adopt a common law deliberative process privilege. But even if, *arguendo*, the Court does recognize the asserted privilege, UT has not come close to meeting its burden of showing that such a privilege applies to the withheld public records. First, as with the attorney-client privilege and common law privilege, UT has done nothing to factually establish the application of the deliberative process privilege. Second, it is unlikely that the privilege, as cursorily described in *Swift*, would apply to the requested records because of who the communications are with and who would be asserting it. Finally, UT must also show, among other things, that the requested records are predecisional and deliberative to be afforded protection. UT is unlikely to be able to meet any of these elements.

**A. The deliberative process privilege must be asserted by the agency head and requires a privilege log to carry the burden of demonstrating its applicability.**

To assert the deliberative process privilege, similar to the attorney-client and common interest privileges, UT is required to produce a detailed privilege log describing each document (or portion of each document) that it is withholding and provide a detailed justification of its asserted grounds for non-disclosure, including

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upon a particular subject, its utterance is the public policy . . . upon that subject.” (citation omitted).

specification of how disclosure would damage the interest protected by a deliberative process privilege. In addition, the privilege “must be asserted by the head of the agency involved.” *Hill*, 2011 WL 3475545, at \*5 (citation omitted). Without both, UT cannot carry its burden to show that a possible deliberative process privilege applies.

As one federal court has explained in relation to federal FOIA:

Parties who seek documents through FOIA are at a disadvantage when a government agency refuses to turn over records claiming statutory exemption because the seeking party can only speculate as to the exact nature of the withheld documents. To alleviate this disadvantage, the government agency must create a *Vaughn* Index to “assist the trial court in its de novo review of agency refusals to disclose materials or portions of materials.” The *Vaughn* Court stated that the index would assist the trial court to “(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.”

*Long v. U.S. Dep't of Just.*, 10 F. Supp. 2d 205, 209 (N.D.N.Y. 1998) (citations omitted). UT should be required “to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of ‘conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments.’” *Cuneo v. Schlesinger*, 484 F.2d 1086, 1092 (D.C. Cir. 1973) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973)). “The need for adequate specificity is closely related to assuring a proper justification by the governmental agency.” *Vaughn*, 484 F.2d at 827.

Providing a detailed privilege log along with an assertion by the UT President, presumably in an affidavit or declaration, is necessary here for UT to meet its burden

of showing that a possible deliberative process privilege applies. *See* Tenn. Code Ann. § 10-7-505(c) (“The burden of proof for justification of nondisclosure . . . shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence.”).

**B. The withheld public records are unlikely to be covered by a deliberative process privilege because the officials involved are not sufficiently “high” and because the withheld public records were received from UT–Battelle or Oak Ridge National Laboratory.**

Even though the *Swift* discussion of the deliberative process privilege only spans three paragraphs, the decision twice references the privilege as only applying to “high government officials,” and explains that it would only protect communications between those “high government officials and those who advise and assist them in the performance of their official duties.” 159 S.W.3d at 578 (citing *United States v. Nixon*, 418 U.S. 683, 705 (1974)); *see also id.* (“If governmental employees at any level could claim the privilege, Tennessee’s public records statutes and open meetings law would become little more than empty shells.”). Given the *Swift* Court’s citation to the *Nixon* case, which is based on a separation of powers analysis involving the President and the federal Constitution, it is likely that *Swift*’s iteration of a possible deliberative process privilege would be limited to the Governor and his close advisors. Here, the requests relate to communications between the President of the University of Tennessee and various members of UT’s senior staff and an outside organization that is 50% owned by UT. These are not high government officials whose powers are derived from the Tennessee Constitution and



the fact that the communications are from Oak Ridge National Laboratory or UT–Battelle further undermines any assertion of the privilege.<sup>18</sup>

**C. UT must carry its burden as to every aspect of the deliberative process privilege for each document or portion it seeks to withhold.**

Should this Court find that a deliberative process privilege is recognized in Tennessee and is an exception to the TPRA, the contours of the privilege matter significantly because, as the *Swift* Court explained, the privilege “must be applied cautiously because it could become the exception that swallows up the rule favoring governmental openness and accountability.” 159 S.W.3d at 578. While the contours of a possible privilege are best left to the General Assembly, at the federal level the deliberative process privilege “may only be invoked for documents that are both predecisional and deliberative.” *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 362 (D.C. Cir. 2021) (citation omitted). UT must also carry the burden of “establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (citation omitted). At the federal level, due to the high risk of abuse, “the government may not withhold even those privileged materials unless it also reasonably foresees that disclosure would harm an interest protected by” the privilege. *Reporters Comm.*, 3 F.4th at 369 (citation and internal

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<sup>18</sup> Even under the federal FOIA iteration of the deliberative process privilege, communications are limited to those within an agency or with another governmental agency. 5 U.S.C. § 552(b)(5). For example, the Sixth Circuit in *Lucaj v. FBI* rejected extending the deliberative process privilege under FOIA’s Exemption 5 to groups outside the government, based on the language of Exemption 5, which provides for protections for inter- and intra-agency records. 852 F.3d 541, 546–47 (6th Cir. 2017).

quotation marks omitted). And in states that have adopted the common law deliberative process privilege, the privilege further requires a “weighing of the interests of the government in not disclosing the document against the public’s interest in maintaining a transparent and accountable government and an informed electorate.” *Aland v. Mead*, 327 P.3d 752, 766 (Wyo. 2014).

“A document is predecisional if it was generated before the agency’s final decision on the matter.” *Reporters Comm.*, 3 F.4th at 362 (citations and internal quotation marks omitted); *see also Animal Legal Def. Fund, Inc. v. Dep’t of Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (“To be predecisional, the document must precede[], in temporal sequence, the decision to which it relates . . . .” (citation and internal quotation marks omitted)). Put another way, to be predecisional, a document “generally must have been created during an agency’s deliberations about a policy, as opposed to documents that embody or explain a policy that the agency adopts.” *Reporters Comm.*, 3 F.4th at 362 (citation and internal quotation marks omitted). But, “even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.” *Coastal States*, 617 F.2d at 866.

“A document is deliberative when it is prepared to help the agency formulate its position, and it reflects the give-and-take of the consultative process[.]” *Reporters Comm.*, 3 F.4th at 362 (citations and internal quotation marks omitted). In fact, the government has “to establish that the documents contributed to the deliberative process.” *Animal Legal Def. Fund*, 44 F. Supp. 2d at 299. Moreover, “factual

information generally must be disclosed.” *Reporters Comm.*, 3 F.4th at 365 (citation omitted). “While the fact/opinion distinction is not a wooden rule, it is a ‘rough guide’ for sifting out non-deliberative factual content from deliberative” content. *Id.* (citations omitted).

To establish that it reasonably foresees that disclosure would harm an interest protected by the privilege, UT must “articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld.” *Id.* at 369 (quoting H.R. Rep. No. 114-391, at 9 (2016)). “Agencies cannot rely on mere speculative or abstract fears, or fear of embarrassment to withhold information . . . [n]or may the government meet its burden with generalized assertions[.]” *Id.* (citations and internal quotation marks omitted). “[T]he foreseeability requirement means that agencies must concretely explain how disclosure ‘would’—not ‘could’—adversely impair internal deliberations.” *Id.* at 369–70 (citation omitted). “A perfunctory state[ment] that disclosure of all the withheld information—regardless of category or substance—would jeopardize the free exchange of information between senior leaders within and outside of the [agency] will not suffice.” *Id.* at 370 (citations and internal quotation marks omitted). “Instead, what is needed is a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward.” *Id.*

Should the Court recognize a common law deliberative process privilege, including as a TPRA exception (which it should not), UT must carry its burden, Tenn.

Code Ann. § 10-7-505(c), to show each and every one of these foregoing elements as to each document or portion of a document to which it claims the deliberative process applies, *id.* § 10-7-503(a)(5). UT is unlikely to be able to carry each of these burdens.

**X. Any additional bases for withholding not already proffered are waived.**

To the extent Respondent asserts any exemptions not specifically claimed in either the denial or in its responsive letter to Mr. Becker's undersigned attorney, it has waived those as a basis for opposing this Petition. "The principle of waiver . . . is defined as the voluntary relinquishment or abandonment of a known right or privilege." *Felts v. Tenn. Consol. Ret. Sys.*, 650 S.W.2d 371, 375 (Tenn. 1983) (citations omitted). Express waiver "may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct." *Chattem, Inc. v. Provident Life & Accident Ins. Co.*, 676 S.W.2d 953, 955 (Tenn. 1984) (quoting *Baird v. Fidelity-Phenix Fire Ins. Co.*, 162 S.W.2d 384, 389 (Tenn. 1942)); *see also Nat'l Parks Resort Lodge Corp. v. Perfetto*, No. E2017-01330-COA-R3-CV, 2018 WL 2411590, at \*3 (Tenn. Ct. App. May 29, 2018) ("Waiver may be proved by acts and declarations manifesting an intent and purpose not to claim the supposed advantage or by a course of acts in conduct, by so neglecting and failing to act, as to induce a belief that it was the party's intention and purpose to waive." (citing *Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 772 (Tenn. Ct. App. 1998))). Implied waiver requires "(1) [l]ack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a

character as to change his position prejudicially.” *Chattem*, 676 S.W.2d at 955 (quoting *Provident Wash. Ins. Co. v. Reese*, 373 S.W.2d 613, 615 (Tenn. 1963)). Here, Respondent has both expressly and impliedly waived assertion of any exemptions not expressly stated in its denial of Mr. Becker’s records request and the ensuing communications.

Under the TPRA, a government entity that denies a public records request must “[d]eny the request in writing or by completing a records request response form developed by the office of open records counsel. *The response shall include the basis for the denial[.]*” Tenn. Code Ann. § 10-7-503(a)(2)(B)(ii) (emphasis added). In its denial, Respondent claimed that some documents “are not being made available, since state and federal laws contain a number of exemptions from their disclosure requirement” and then using “\*\*” to point to a list of *examples* of statutes and privileges UT claimed were the basis for redactions or wholesale withholding of public records. Becker Decl. Attach. 2. Tenn. Code Ann. § 10-7-503(a)(2)(B)(ii) requires an agency to provide the *actual* basis for denial—not just examples. Counsel for Mr. Becker pointed out this flaw in his June 15, 2023 letter to the University and asked it to “[p]lease provide all bases for withholding records or redacting records, not just examples.” Pet. ¶ 28; McAdoo Decl. Attach. 2 at 2. The University did not supplement any additional basis for withholding or redacting public records in its subsequent July 14, 2023 letter. McAdoo Decl. Attach. 4. Respondent had a legal responsibility to identify the bases for all denials and it had an opportunity to amend its initial response but chose not to.

Accordingly, Respondent has expressly waived assertion of any exemptions not expressly stated in its denial and subsequent communication with counsel for Mr. Becker. And Mr. Becker has relied upon UT's failure to assert other exemptions in bringing this suit. Requesters should not be left to guess what the basis for a denial is should they file suit, like here. As such, UT should be prohibited from raising any new grounds for withholding public records or redacting them.

**XI. Mr. Becker should be awarded attorneys' fees and costs.**

“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 explained that “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 exempted from the disclosure.” *Schneider*, 226 S.W.3d at 346 (citing *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999)).

The Court of Appeals has “stressed that willfulness should be measured ‘in terms of the relative worth of the legal justification cited by [an agency] to refuse access to records.’” *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015) (quoting *Friedmann v. Marshall Cnty.*, 471 S.W.3d 427, 439 (Tenn. Ct. App. 2015)). “In other words, the determination of willfulness ‘should focus on whether there is an absence of good faith with respect to the legal position [an agency] relies

on in support of its refusal of records.” *Id.* (quoting *Friedmann*, 471 S.W.3d at 438). If a public records defendant “denies access to records by invoking a legal position that is not supported by existing law or by a good faith argument for the modification of existing law, the circumstances of the case will likely warrant a finding of willfulness.” *Id.*

Here, UT attempted to justify its withholding of the requested public records by relying upon numerous arguments that are wholly unsupported by law, facts, or both. *See supra*. As such, UT should be found to have willfully refused Mr. Becker’s public records request and the Court should exercise its discretion to award reasonable attorneys’ fees and costs in this matter.

### CONCLUSION

Respondent’s bases for denying access to the public records sought by Mr. Becker are inapplicable given the clear mandates of the Tennessee Public Records Act. For the reasons herein, the Court should conduct an *in camera* review, find that the requested public records are not exempt from disclosure under the TPRA, order the requested records released, and award reasonable costs and attorneys’ fees to Petitioner.

Respectfully submitted,

/s/ Paul R. McAdoo

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 13, 2024, a true and correct copy of the foregoing was served by email, as agreed by the parties, on:

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