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IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

THE ASSOCIATED PRESS, et al., Plaintiffs, v. THE TENNESSEE REGISTRY OF ELECTION FINANCE, et al., Defendants.	No. 20-0404-III

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

For the reasons set forth below, Plaintiffs' motion for judgment on the pleadings (the "Motion") should be granted.

RELEVANT FACTS

The Defendants

Defendant the Tennessee Registry of Election Finance (the "Registry") is an independent entity of the Tennessee State government, created by Tenn. Code §§ 2-10-202 to 2-10-203. (Compl. ¶ 13; Answer ¶ 13.). Pursuant to Tenn. Code § 2-10-101(d) and § 2-10-301(b), the Registry "is responsible for enforcing the laws that govern campaign finance disclosure requirements and campaign contribution limits." (*Id*.) Defendants Paige Burcham-Dennis, Hank Fincher, David Goldin, Paz Haynes, Tom Lawless, and Tom Morton (collectively, the "Registry Members") currently serve as the six members of the Registry. (Compl. ¶ 14; Answer ¶ 14.). Defendant Bill Young ("Director Young") currently serves as Executive Director of the Bureau

of Ethics and Campaign Finance, of which the Registry is a division. (Compl. ¶ 15; Answer ¶ 15.)

The intent of the General Assembly in establishing the Registry was to provide for the enforcement of statutes related to "financial disclosure by public officials, candidates for public office, and lobbyists." Tenn. Code § 2-10-202; *see also id.* § 2-10-205(1)-(2) (explaining that the Registry administers and enforces Tennessee's Campaign Financial Disclosure Act and Campaign Contribution Limits Act). The Registry is "composed of six (6) members appointed as provided" by statute. *Id.* § 2-10-203(a)(1). Pursuant to the Tennessee Code:

> The [R]egistry shall fix the place and time of its regular meetings by order fully recorded in its minutes. No action shall be taken without a quorum present. Special meetings shall be called by the chair on the chair's initiative or on the written request of four (4) members. Members shall receive seven (7) days' written notice of a special meeting, and the notice shall specify the purpose, time and place of the meeting, and no other matters may be considered, without a specific waiver by all the members.

Id. § 2-10-203(f).

The Registry's powers include the ability to assess late filing fees and "a civil penalty for any violation of the disclosure laws . . . " *Id.* §§ 2-10-207(5)–(6); *see also id.* § 2-10-110 (discussing civil penalties that the Registry may impose under the Campaign Finance Disclosure Act); *id.* § 2-10-308 (discussing civil penalties the Registry may impose under the Campaign Contribution Limits Act).

The Registry's Email Vote

The facts regarding the Registry's email vote are straightforward. "[O]n or about April 1, 2020, Director Young contacted the six members of the Registry by email and/or telephone,

asking each Registry Member for his or her vote on whether to recommend[1] a settlement offer made by State Representative Joe Towns to resolve outstanding civil penalties levied by the Registry." (Answer ¶ 31.) "[A] majority of members of the Registry voted to recommend the settlement offer from Representative Towns." (*Id.* ¶ 32.) "Registry Members Paz Haynes, Paige Burcham-Dennis, Hank Fincher, and David Goldin voted, via email, in favor of recommending the approved settlement with Representative Towns." (*Id.* ¶ 33.) "Registry Members Tom Lawless and Tom Morton voted, via email[,] against recommending the proposed settlement with Representative Towns." (*Id.* ¶ 34.) In an email, which is a public record, sent on April 2, 2020, Mr. Morton referred to the email vote as "a roll call vote" and he urged that the results of the email vote "be made public."[2] (Compl. ¶ 36; *id.* Ex. 3 at 1.)

According to Exhibit 2 of the Complaint, which is a public record, Representative Towns owed $65,000 in outstanding civil penalties to the Registry.[3] (Compl. ¶32; *id.* Ex. 2 at 1). Exhibit 2 further reflects that the Registry accepted a settlement offer from Representative Towns in the amount of $20,900. *Id.* According to additional public records of the Registry,

[1] For purposes of this motion only, Plaintiffs assume that the Registry's vote was "to recommend a settlement offer" with Representative Towns. The Complaint alleges that the Defendants voted "to approve a settlement offer" from Representative Towns and Director Young's public record email, attached to the Complaint as Exhibit 2, describes the vote as one "to accept Representative Towns' counsel's settlement proposal." (Compl. Ex. 2 at 2.) To the extent the Court finds the distinction between whether the Registry voted to recommend a settlement offer versus voting to approve or accept the settlement offer legally significant for purposes of whether Defendants' vote violated the OMA—which it is not—Plaintiffs reserve the right to engage in discovery on this and other related issues.

[2] Defendants' response to this allegation and exhibit was "Defendants submit that the quoted exhibit speaks for itself and deny Plaintiffs' characterizations and interpretations." (Answer ¶ 36.)

[3] In their Answer, Defendants do not take issue with the authenticity of the provided email but do assert that they are "without sufficient information to admit or deny the remaining allegations in Paragraph 32. The allegations are therefore denied." (Answer ¶ 32.)

attached collectively here as Exhibit 1,[4] no public meeting was held on or about April 1, 2020, nor was there public notice of a meeting, public or otherwise, on or about April 1, 2020.

LEGAL STANDARDS

Judgment on the Pleadings

Any party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." Tenn. R. Civ. P. 12.03. When no counterclaims or cross-claims are raised, the pleadings are closed after the submission of the complaint and the answer. *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 478 (Tenn. 2004).

"[I]n ruling upon a motion for judgment on the pleadings '(a)ll well pleaded allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which are denied are to be taken as false.'" *Trigg v. Middle Tenn. Elec. Membership Corp.*, 533 S.W.2d 730, 732–33 (Tenn. App. 1975) (citation omitted). "'Conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment.'" *Id.* at 733 (citation omitted).

Generally, if a court considers matters outside the pleadings, the motion—whether it is to dismiss or for judgment on the pleadings—should be converted to a motion for summary judgment. Tenn. R. Civ. P. 12.02, 12.03. But there are exceptions to this rule.

> Numerous cases . . . have allowed consideration of matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the . . . judge without converting the motion into one for summary judgment.

[4] Exhibit 1 is comprised of the Registry's online calendars for March and April 2020, which are used to provide public notice of meetings of the Registry. The calendars, which are public records, are also available at: https://www.tn.gov/tref/calendar.2020-03.html and https://www.tn.gov/tref/calendar.2020-04.html, last accessed on July 29, 2020.

Haynes v. Bass, No. W2015-01192-COA-R3-CV, 2016 WL 3351365, at *4 (Tenn. Ct. App. June 9, 2016)[5] (citation omitted) (applying rule in case involving motion for judgment on the pleadings and motion to dismiss)); *see also Harvey v. Shelby Cty.*, No. W2018-01747-COA-R3-CV, 2019 WL 3854297, at *4-5 (Tenn. Ct. App. Aug. 16, 2019) (discussing exception in motion for judgment on the pleadings context); *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016) (applying exception to motion to dismiss). The Court of Appeals has applied this exception to a variety of public records including a quitclaim deed, corporate articles of organization and annual reports, a settlement agreement, and out-of-state divorce court records. *Haynes*, 2016 WL 3351365, at *5 (out-of-state divorce court records); *Singer v. Highway 46 Props., LLC*, M2013-02682-COA-R3-CV, 2014 WL 4725247, at *3 (Tenn. Ct. App. Sept. 23, 2014) (quitclaim deed and a company's articles of organization and annual reports); *Western Express, Inc. v. Brentwood Servs., Inc.*, No. M2008-02227-COA-R3-CV, 2009 WL 3448747, at *3 (Tenn. Ct. App. Oct. 26, 2009) (settlement agreement).

Open Meetings Act.

The Open Meetings Act, Tenn. Code §§ 8-44-101 *et seq.* (the "OMA"), is a cornerstone of governmental transparency in Tennessee. The OMA "implements the constitutional requirement of open government," found in Article 1, Section 19 of the Tennessee Constitution. *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1972). Courts in Tennessee have held that the OMA is remedial in nature and "should, therefore, be construed broadly to promote openness and accountability in government and to protect the public against closed door meetings at every stage of a government body's deliberations." *Metro. Air Research Testing Auth., Inc. v. Metro. Gov't*, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992) (citations omitted); *see also Johnston v.*

[5] Attached, along with all other unpublished cases cited in this Memorandum, as Exhibit 2, pursuant to Local Rule 26.04(b).

Metro. Gov't, 320 S.W.3d 299, 310 (Tenn. Ct. App. 2009) (quoting *Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 436 (Tenn. Ct. App. 1990)) (holding that the OMA "is remedial in nature and thus 'should be liberally construed in furtherance of its purpose"); *State v. Shelby Cty. Bd. of Comm'rs*, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990) (citation omitted) (holding that the OMA "is to be construed so as to frustrate all evasive devices…."). Put another way, the OMA "'is to be construed most favorably to the public and is all encompassing and applies to every meeting of a governing body except where the statute, on its face, excludes its application.'" *Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 145 (Tenn. Ct. App. 1998) (quoting *Shelby Cty. Bd. of Comm'rs*, 1990 WL 29276, at *4).

The Court of Appeals has also found that "strict compliance with the [OMA] is a necessity if it is to be effective…" *Zseltvay v. Metro. Gov't*, 986 S.W.2d 581, 585 (Tenn. Ct. App. 1998). The OMA "does not make a distinction between technical and substantive violations of its provisions." *Id.* at 584.

ARGUMENT

I. The Registry Is a Governing Body Subject to the OMA.

At the heart of the OMA is this principle, enunciated by the General Assembly: it is "the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret." Tenn. Code § 8-44-101(a). To implement this principle, "[a]ll meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee." *Id.* § 8-44-102(a). The Registry is such a governing body, which is required to comply with the OMA's provisions.

A governing body under the OMA is defined as "[t]he members of any public body which consists of two (2) or more members, with the authority to make decisions for or

recommendations to a public body on policy or administration…" Tenn. Code § 8-44-102(b)(1)(A). While the OMA does not define "public body," the Tennessee Supreme Court has:

> It is clear that for the purpose of [the OMA], the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector.

Dorrier, 537 S.W.2d at 892.

In this case, there is no question that the Registry is a body "whose origin and authority may be traced to State . . . legislative action . . . ." The Registry was created by the General Assembly pursuant to Tenn. Code §§ 2-10-202 and 2-10-203, to ensure enforcement of Tennessee's financial disclosure laws for public officials and candidates for public office, among others. Therefore, the Registry is a public body under the OMA.

The Registry is comprised of six members appointed pursuant to statutory requirements, and "[n]o action shall be taken without a quorum present" at Registry meetings. *Id.* § 2-10-203(a), (f). Thus, the Registry is a public body "which consists of two (2) or more members with the authority to make decisions for … a public body on policy and administration…," meaning that it is a governing body. Accordingly, the Registry, its members, and its executive director are subject to the OMA's open government requirements.

II. The Registry's Email Vote Was Not Public and Did Not Take Place in a Properly Noticed Public Meeting, in Violation of the OMA.

A. The Registry's Email Vote Violates the OMA's Secret Votes Prohibition.

The OMA requires that "[a]ll votes of any such governmental body shall be by public vote or public ballot or public roll call. No secret votes, or secret ballots, or secret roll calls shall

be allowed." Tenn. Code § 8-44-104(b). Simply put, "secret votes are prohibited…" *Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 145 (Tenn. Ct. App. 1998) (citation omitted); *see also Zseltvay*, 986 S.W.2d at 583–84 (citing Tenn. Code. 8-44-104(b) (explaining that the OMA requires "that all votes of governmental bodies be public"). Here, the vote was not public, but rather was done via emails sent to Director Young. Defendant Morton said as much in an email to his co-Defendants, among others: "[t]his was a roll call vote the results of which with details should be made public." (Compl. ¶ 36; *id.* Ex. 3 at 1.) There was nothing public about the Registry's email vote. Accordingly, it violates the OMA's prohibition against secret votes.

B. The Email Vote Was a Meeting under the OMA.

A meeting is defined in the OMA as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter . . . ." Tenn. Code § 8-44-102(b)(2). Then sitting on the Court of Appeals, now-Justice Kirby explained that the convening necessary to constitute a meeting under the OMA may be either "intentional or inadvertent." *Johnston*, 320 S.W.3d at 310. In this case, "[i]t is admitted that on or about April 1, 2020, Director Young contacted the six members of the Registry by email and/or telephone, asking each Registry Member for his or her vote on whether to recommend a settlement offer made by State Representative Joe Towns to resolve outstanding civil penalties levied by the Registry." (Answer ¶ 31.) Similarly, Director Young stated in an email that he had "polled each member of the Registry Board regarding whether to accept the settlement offer of $22,000 from Representative Towns' counsel to resolve outstanding civil penalties owed by Representative Towns of $65,000 to the Registry Board . . . ." (Compl. Ex. 2 at 1.) Director Young "also spoke by phone with each Registry Board member on this

matter . . . ." (*Id.*) After these communications through and with Director Young, the Registry "voted via email 4-2 to accept Representative Towns' counsel's settlement proposal." (*Id.*)

Thus, acting with Director Young as a conduit, and at his behest, a quorum of the Registry Members was convened in order to make a decision—whether to recommend Representative Towns' settlement offer. (Compl. Ex. 2 at 1.) This convening, though in a non-traditional format, is nevertheless a meeting under the OMA.

C. There Was No Public Notice of the Registry's Email Vote.

The OMA "requires public notice of all regular or special meetings of a governmental body." *Souder*, 997 S.W.2d at 145 (citing Tenn. Code § 8-44-103). As discussed above, the Registry's email vote was a meeting under the OMA. As such, the Registry was required to provide public notice of the email vote, but did not do so. (*See* Ex. 1 (Registry's public meeting calendars for March and April 2020 showing only one meeting on March 11, 2020).) This was a violation of the OMA.

III. The OMA Specifically Prohibits the Use of Electronic Communications to Decide or Deliberate Public Business.

The OMA specifically prohibits the use of informal assemblages or electronic communication "to decide or deliberate public business in circumvention of the spirit or requirements" of the OMA. Tenn. Code § 8-44-102(c). "The purpose of this section . . . is to prevent public officials from deciding or deliberating public business in chance meetings, informal assemblages, or by electronic communication. In evaluating chance meetings, informal assemblages or electronic communication the courts look to the substance of the meeting rather than its form, keeping in mind that the statute is to be construed so as to frustrate all evasive

devices."[6] *Shelby Cty. Bd. of Comm'rs*, 1990 WL 29276, at *5 (citation omitted). "In enacting [Section 8-44-102(c)] as a loophole closer, the General Assembly recognized that public officials could evade the literal 'quorum' and 'meeting' requirements of the Act. The provision permits the courts to grant relief when the challenged conduct, though violating the purposes of the Act, does not squarely fall within the literal definitions of the Act." *Id.*; *see also Johnston*, 320 S.W.3d at 312 (quoting Tenn. Code § 8-44-102(c)) ("A violation of the [OMA] can occur inadvertently if the electronic communication has the effect of circumventing 'the spirit or requirements' of the [OMA].")

Here, the Registry Members used email, a form of electronic communication, to vote as to whether to recommend the settlement offer of Representative Towns to resolve outstanding civil penalties levied against him by the Registry. This falls squarely within Section 8-44-102(c)'s prohibitions and is a violation of the OMA. While email is an efficient means of communication, courts must guard against its use by governing bodies to circumvent the OMA's requirements, as the Registry did here. In *Johnston*, the Court of Appeals explained that emails between City Council members in which the members "are clearly weighing arguments for and against [an issue]" was deliberation because the emails "mirror[ed] the type of debate and reciprocal attempts at persuasion that would be expected to take place at a Council meeting, in the presence of the public and the Council as a whole." 320 S.W.3d at 312. As in that case, the use of email by the Registry Members to convey their vote on a settlement with Representative Towns to Director Young likewise mirrors the type of action that one would expect to take place at a Registry meeting, which would be open to the public.

[6] The Court of Appeals in *Shelby County Board of Commissioners* was discussing the same statutory provision, which was then found in Tenn. Code. 8-44-102(d).

In the *Shelby County* case, the Court of Appeals interpreted and applied Section 8-44-102(c)'s identical predecessor, Section 8-44-102(d). 1990 WL 29276, at *5–6. In that case it was alleged that Shelby County Commissioners engaged "in secret telephone conversations and/or meetings outside the public view and chambers of the Commission and deliberating on and deciding their vote for the person to fill a vacancy on said Commission prior to" a properly noticed public meeting of the Commission. *Id.* at *1. The court held that "[w]hether or not the alleged conduct falls within the [OMA's] definition of 'meeting,' . . . the alleged conduct constitutes informal assemblages of a governing body at which public business was privately deliberated and decided, without public notice, in contravention of the spirit and requirements of the [OMA] all of which is proscribed by [Section 8-44-102(c)]…" *Id.* at *6.

The Defendants violated the spirit and requirements of the OMA by deciding via an email vote whether to recommend settlement with Representative Towns. This conclusion is supported by both the language of Section 8-44-102(c) and the case law interpreting that provision.

IV. Governor Lee's Executive Order Suspending Inapplicable Portions of the OMA Does Not Alter the Outcome of this Case.

On March 20, 2020, Governor Lee issued Executive Order No. 16 ("Order No. 16"), which suspended certain specified—and inapplicable here—portions of the OMA as part of the Governor's COVID-19 response. (Compl. Ex. 1.) Specifically, Order No. 16, in limited circumstances, suspended the OMA's requirement that a quorum of a governing body be physically present in the same location and permitted governing bodies to use electronic means to conduct their meetings. (*Id.* at 4.) Order No. 16 "does not in any way limit existing quorum, meeting notice, or voting requirements under the law . . . ." (*Id.*). This emergency order did not contemplate or authorize the use of email to conduct a governing body's business. Rather, if governing bodies did not meet in person, they were still required to provide public notice of their

meetings, and were required to use video and/or audio means of opening those properly noticed meetings to the public, either via livestreams or by posting "a clear audio or video recording of the meeting available to the public as soon as practicable following the meeting, and in no event more than two business days after the meeting." (*Id.*) Finally, there is nothing in Order No. 16 that permits governing bodies to circumvent Section 8-44-102(c)'s requirement to avoid the use of electronic communication "to decide or deliberate public business in circumvention of the spirit or requirements" of the OMA. Contrary to all these mandates, the Registry's email vote was not taken in a properly noticed public meeting, was not public, and violated Section 8-44-102(c).

CONCLUSION

The OMA "prevents government bodies from conducting the public's business in secret." *Metro. Air Research Testing Auth., Inc.*, 842 S.W.2d at 616. Under the OMA, governing bodies like the Registry are either permitted to vote outside of properly noticed public meetings via email, or they are not. That is the fundamental question before the Court on Plaintiffs' Motion for Judgment on the Pleadings.

Voting by a governing body, like the Registry, is quintessentially the public's business. An email vote is inconsistent with Section 8-44-102(c)'s prohibition against the use of electronic communication to circumvent the spirit and requirements of the OMA. An email vote is also inherently not public, as votes are required to be under Section 8-44-104(b). Finally, the email vote constituted a meeting of the Registry. As such, it was required to be both publicly noticed and open to the public, neither of which was the case here.

For the reasons stated above, Plaintiffs respectfully request that the Court enter judgment on the pleadings in their favor and, pursuant to Tenn. Code § 8-44-106(b)-(d), (1) file written

findings of fact and conclusions of law holding that Defendants' email vote constituted a violation of the OMA; (2) enter a permanent injunction enjoining Defendants from any future violations of the OMA, including but not limited to the use of email to circumvent the OMA by voting on, deciding, and/or deliberating on public business; (3) retain jurisdiction over the parties and subject matter for a period of one year from the date of entry of its final judgment; (4) order Defendants to report in writing semi-annually to the Court on their compliance with the OMA; (5) grant Plaintiffs' an award of their reasonable expenses and costs incurred in this action to the fullest extent allowed under law or statute; and (6) grant such other relief as the Court deems just and proper.

Dated: July 31, 2020

Respectfully submitted,

By: /s/ Paul R. McAdoo
Paul R. McAdoo
Tennessee BPR No. 034066
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
6688 Nolensville Rd., Suite 108-20
Brentwood, TN 37027
Phone: 615.823.3633
Facsimile: 202.795.9310
pmcadoo@rcfp.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July 2020, a copy of the foregoing filing was filed electronically and has been served on all counsel of record via the Court's E-Filing Service and/or e-mail, as agreed to by counsel for Defendants.

/s/ Paul R. McAdoo