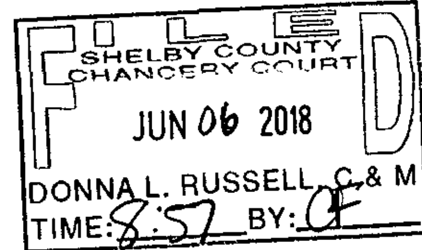
IN THE CHANCERY COURT FOR SHELBY COUNTY, TENNESSEE
THIRTIETH JUDICIAL DISTRICT, AT MEMPHIS

BRADLEY JETMORE,

Plaintiff /Petitioner.

v. **No. CH-17-1754**
PART III



CITY OF MEMPHIS,

Defendant/Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came to be heard in Part III of the Shelby County Chancery Court, the Honorable JoeDae L. Jenkins presiding, on March 28, 2018, upon on the Defendant, ("City of Memphis") Motion to Dismiss, or in the Alternative to Stay, and Plaintiff's, ("Jetmore") Motion for Show Cause Hearing on Petition under the Tennessee Public Records Act ("PRA") for access to the City's unredacted traffic accident or crash, reports. Upon the proof submitted such as the Verified Complaint, the depositions of William Porter and Ruth Murray, the Declarations of Bradley Jetmore, Douglas Friedman, Douglas R Pierce, and Kyle D. Watlington, and other the evidence and testimony presented, as well as the entire record; the Court makes the following proposed findings of facts and conclusions of law to-wit:

Findings of Fact

I. Creation of Crash Reports

1. Pursuant to Tennessee Rule of Civil Procedures 30.02(6), the City designated Sgt. William Porter to testify as to the policies, procedures, practices and/or

guidelines describing how members of the Memphis Police Department create traffic accident reports. (Porter Depo. pp. 6-7)[1].

2. When Sgt. Porter began his career with the Memphis Police Department approximately 43 years ago, crash reports[2] were printed forms completed in the officer's handwriting. (Id. p. 19).

3. Later the City's officers used laptop computers to create crash reports. (Id. p. 19).

4. The City began having its officers use personal data assistants ("PDA") to create crash reports approximately in 2010. The City switched from laptop computers to PDA's because of the expense of obtaining computers for each officer. (Id. p. 22).

5. When the crash reports were handwritten by the officers, the officer would gather driver information, such as name, address, and phone numbers, by talking to these individuals. Generally, the officer would obtain this driver information by looking at the driver license. (Id. p. 22).

6. However, even at this time, the officer was required to ask the driver if the information on the driver license was correct. (Id.).

7. It was necessary for officers to confirm that the address and name on the license was correct because those two items of information would sometimes change and would not be reflected on the license. (Id. p. 27).

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[1] With respect to the other area of inquiry in Jetmore's Notice of Deposition, the City designated Ruth Murray. The original transcripts of both of these depositions were filed on March 23, 2018.

[2] Porter stated that five to seven years ago the State of Tennessee changed the name of "accident reports" to "crash reports." (Porter Depo. p. 24)

8. Once the City transitioned to laptop computers to complete the reports, the method of gathering information, i.e. from a driver license followed by driver verification, was essentially the same as had been done with the handwritten crash report forms. (Id. p. 29).

9. Whether the crash reports were completed via handwriting or laptop, officers would *not* confirm whether the vehicle and drivers' license information was correct by any state database because that would tie up radio traffic. (Id. pp. 31-32).

10. The PDA is a wireless device, like a cell phone, so it relies upon cell phone data and cell phone towers. (Id. p. 36).

11. The application used by the PDA is called "Watson." When completing a crash report using the PDA, the officer will ask the driver for his license and then enter the drivers' license number into the PDA, which would access on the PDA the driver license information along with a photograph of the driver that is stored in a state data based. (Id. p. 38).

12. Whether the crash reports were completed in handwriting, using the laptops, or the PDAs, the same driver information would appear in the reports. (Id. pp. 41-42).

13. The driver's phone number does not appear on a Tennessee drivers' license and the state does not maintain phone numbers in its data base. (Id. pp. 27-28; Pierce Declaration ¶¶ 2, 4; Watlington Declaration ¶¶ 2, 4).

14. Whether the reports were completed in handwriting, using the laptops, or the PDAs, the only method the officer has of obtaining a telephone number for an accident

participant is by obtaining that number directly from the person because the state does not have driver phone numbers. (Id. p. 43).

15. By looking at a copy of a crash report obtained from the State of Tennessee it cannot be determined whether the report was completed using either a laptop or the PDA. (Id. p. 44).

16. Even though the Watson application on the officer's PDA will display driver information after the officer enters the driver license number, the officer will still be required to confirm with the driver if the Watson information is correct and enter the correct name and address if those items are not correct on Watson. (Id. p. 60).

17. The City's current policy in force for use with PDAs does not instruct officers to obtain driver information from any state database. (Id. pp. 51-53, Ex. 7).

18. Rather, the policy instructs officer to obtain information by interviewing witnesses and participants. (Id., Ex. 7 p. 2).

19. If the Watson application is ever unavailable, and "there have been occasions in the past and present where the application has gone down," the officer cannot use Watson and therefore the officer is required to write on a notepad the driver information needed for the crash reports. (Id. p. 59).

20. When the Watson application is again available after the outage, the officer will then use the PDA to complete the crash report. In this situation, the driver information will come from the driver first, although it will not be possible to determine from where the information originated by viewing the crash report. (Id. pp. 62-63).

21. If the driver does not have his or her license with them at the time of the accident, the officer will ask the person their name and date of birth and enter that into

the PDA. (Id. p. 61) If there is a driver license matching that information in the system it will display that license and a photograph of that person. (Id.).

22. Therefore, when a driver does not have a license, the driver information on the crash report will in the first instance come from the driver and not from the state data base. (Id.).

23. When anyone looks at a City of Memphis crash report, it is impossible to determine whether the driver's information came from Watson and the state data base, or from the driver himself. (Id. pp. 62-63).

II. City's Procedures for Public Access to Crash Reports

24. Pursuant to Tennessee Rule of Civil Procedure 30.02(6), the City designated Ruth Murray to testify on behalf of the City as to its policies, procedures, practices and/or guidelines for the maintenance of and public access to traffic accident reports. (Murray Depo. p. 7).

25. Murray has worked for the City since 1973 in the Police Department's Central Records and she has been the supervisor of Central Records since July of 1993. (Id.).

26. Congress passed the Driver Privacy Protection Act ("DPPA") in 1994, 18 U.S.C. §§ 2721-2725, and Tennessee implemented the DPPA with the passage of Uniform Motor Vehicle Records Disclosure Act ("UMVRDA") in 1996. Tenn. Code Ann. § 55-25-101, *et seq*.

27. The passage of these two laws did not change the manner in which the City produced traffic accident reports to members of the public. Specifically, Murray explained

the manner in which the City made crash reports available to the public from some time before July 1993 until November 2017 as follows:

1) The City would make copies of all crash reports available for any member of the public to inspect in a room at 170 N. Main Street, Memphis, Tennessee.

2) The reports would be for accidents that had occurred the day before except for accidents occurring on a weekend, which would be available on the following Monday.

3) There were no redactions to those reports made available to the public.

4) The City fully understood that the members of the public routinely reviewing those reports were telemarketers even though the reports were available to any member of the public.

5) Approximately 15-20 persons would review those reports every day for telemarketing, or commercial, purposes.

6) The City made these records available every day because it knew that the persons routinely inspecting these records were seeking them every day.

(Id. pp. 10-13)

28. On October 18, 2017, *Price v. City of Memphis* was filed in U.S. District Court of the Western District of Tennessee (Memphis), No. 2:17-cv-02772-JTF-cgc (the "*Price* case"). That case accuses the City of violating the DPPA and UMVRDA by releasing as public records, the names, addresses and telephone numbers of individuals identified in crash reports. The plaintiffs in the *Price* case seek monetary damages against the City. There have been no rulings on substantive motions, no injunction of any type was issued instructing the City to stop the release of these records or to redact information from the records, and there have been no agreements filed by the parties that would stop release of these public records. (First Amended Complaint in Price, filed on February 5, 2018 in this case as Ex. B to Jetmore's Opposition to City's Motion to Dismiss).

29. Nonetheless, beginning in November of 2017, the City ceased allowing this public access to the reports, and when Tennessee citizen requestors arrived to look at the records at that time, Murray told them the records were no longer available. (Murray Depo. p. 17). Her only explanation to these requestors was simply that she had been instructed by the City Attorney to cease the City's decades-long practice of making unredacted copies available for inspection. (Id.).

30. Since announcing this November 2017 change in procedure, the only person who has requested to inspect the crash reports is Jetmore and he made two requests, one day after the other. (Id. p. 18).

III. Jetmore's November 2, 2017 Request

31. On November 2, 2017, Jetmore, a Tennessee citizen, made a written request which was hand delivered to Ruth Murray at Central Records at approximately 11:50 a.m. seeking "All traffic accident/traffic crash reports responded to by the department on November 1, 2017." (Id. p. 31, Ex. 9; Verified Complaint ¶ 1).

32. After Murray received this request, she contacted the Memphis City Attorney to see if she could respond to the request. (Murray Depo. p. 32).

33. On November 3, 2017, the City sent Jetmore a written acknowledgement of (not a response to) his request and assigned to it reference number W006618-110317. However, Murray does not know who actually prepared this acknowledgement and it has no name affixed to it. (Id. pp. 32-33, Ex. 10).

34. This response came from the City of Memphis' Customer Help Desk and Murray was not responsible for sending the November 3, 2017 acknowledgement. (Id. p. 33).

35. On November 14, 2017, the City sent Jetmore a response to his request for November 1, 2017 accident reports stating that, "It is not practical for the records you requested to be made promptly available for inspection and/or copying because: It has not yet been determined that the records responsive to your request exist." (Id. ex. 11)

36. This response indicates that it comes from Lameeka Hoof who works for the public records request office. (Id. p. 36).

37. The City has admitted this response was wrong because the crash reports Jetmore requested for November 1, 2017 would necessarily exist because there would have been accidents on November 1, 2017 as there are more than 100 accidents and reports every day in the City. (Id. pp. 39-40).

38. On November 21, 2017, the City sent Jetmore a written response to his request to inspect November 1, 2017 accident reports stating that he should contact Murray to inspect the records. (Id. pp. 40-41).

39. When those records were produced for Jetmore, the driver information was redacted. (Id. p. 44).

IV. Jetmore's November 3, 2017 Request

40. On November 3, 2017, just one day after he had hand delivered his first written request to inspect crash reports, Jetmore submitted another written request to inspect, nearly identical to his first, but seeking reports of crashes on November 2, 2017. (Id. p. 44, Ex. 14).

41. Although the City admits that the second Jetmore request was hand delivered just one day after the first request, the City did not acknowledge receipt of

Jetmore's second request until November 13, 2017, when it assigned it reference number W006671-111317. (Id. pp. 46-47, Ex. 15).

42. On November 21, 2017, the City sent Jetmore a response to his "request received on 11/03/2017" stating that, "It is not practical for the records you requested to be made promptly available for inspection and/or copying because: The office is still in the process of retrieving, reviewing, and/or redacting the requested records." (Id. pp. 50-51, Ex. 16).

43. This response does not contain a tracking number as did the similar form response to Jetmore's November 2, 2017 request. (Id., Ex. 11) Because the City had responded on that same date (November 21) indicating that the records for accidents of November 1 were available, however, this response clearly did not relate to Jetmore's November 2 request for November 1 accidents.

44. The City provided this November 21, 2017 response to Jetmore's November 3, 2017 request 11 business days after Jetmore's request. Also, on November 21, 2017, the City sent Jetmore an email with reference number W006671-111317 (the reference number previously assigned to Jetmore's request for reports of November 2 accidents) indicating that the records were available and that he should contact Ruth Murray to schedule an appointment to inspect the records. (Id. p. 53, Ex. 17).

V. City's other procedures for records requests

45. The copies of crash reports the City produced to Jetmore in response to both of his requests had all names, addresses and phone numbers redacted. (Id. p. 19).

46. The reports produced to Jetmore did not redact date of birth. (Id. p. 21).

47. The City could not explain why these redactions were made, other than these redactions were directed by the City's legal counsel. (Id. p. 22). The City's attorney claims these redactions were made because of the threat of liability in the *Price* case for disclosing the personal information contained in the report.

48. Murray testified that she never questioned her supervisors or bosses as to why, from before 1993 until November 2017, the City had allowed unredacted copies of crash reports to be made available to the public. (Id. p. 25).

49. The City's position is that it has seven business days to respond to a request to inspect records. (Id. pp. 35-36).

50. The City correctly understands that no one must make a written request to merely inspect public records and the City cannot charge for allowing a member of the public to merely inspect records. (Id. pp. 14-15).

51. By a public records request response form dated November 20, 2017, but without any reference number or any indication as to what records had been requested, the City sent Jetmore an indication that it could not respond to his records request of October 6, 2017, but hoped to do so by November 27, 2017. (Id. pp. 58-59, Ex. 18). The City's response of November 20, 2017 to a request on October 6, 2017 would be 30 business days later.

52. The City could not explain why sometimes the documents from the City responding or acknowledging public records requests had tracking numbers and sometimes they did not have tracking numbers. (Id. pp. 60-61).

53. The City agrees that the public records request for crash reports should be calendared for a timely response, but the City does not know whether that is being done. (Id. p. 64).

54. Jetmore filed this PRA petition for access to unredacted crash reports on December 5, 2017.

CONCLUSIONS OF LAW

I. THE PRA REQUIRES PROMPT ACCESS

1. The provisions of the PRA "create a presumption of openness and express a clear legislative mandate favoring disclosure of governmental records." *Schneider v. The City of Jackson*, 226 S.W. 3d 332, 340 (Tenn. May 25, 2007).

2. The PRA states,

> (A) All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.
>
> (B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any pubic record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:
>
>> (i) Make the information available to the requestor;
>>
>> (ii) Deny 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 of the denial; or
>>
>> (iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce the record or information.

Tenn. Code Ann. § 10-7-503(a)(2).

3. The PRA also explains that a citizen denied access to public records may file a petition to gain access.

> Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party or parties to immediately appear and show cause, if they have any, why the petition should not be granted. A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings. The court may direct that the records being sought be submitted under seal for review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.

Tenn. Code Ann. § 10-7-505(b).

4. The PRA further provides,

> (c) The burden of proof for justification of nondisclosure of records sought 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.
>
> (d) The court, in ruling upon the petition of any party proceeding hereunder, shall render written findings of fact and conclusions of law and shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section, and this section shall be broadly construed so as to give the fullest possible public access to public records.

Tenn. Code Ann. § 10-7-505(c) & (d).

5. It necessarily follows that the production of a public record with impermissible redactions is a denial of access. Otherwise a records custodian could produce a record with every bit of information impermissibly redacted and claim such production of nothing was in compliance with the PRA.

6. The court concludes that Jetmore made a proper request under the PRA for the City's crash reports, and that the relief he requests should be granted.

II. THIS CASE SHOULD NOT BE DISMISSED

7. The City made no attempt to show cause why its decades long practice of producing crash reports for inspection, as it existed before November 2017, should not be immediately reinstated. Rather, the City argues this PRA petition should be dismissed because of the federal court *Price* case. The City relies upon the prior suit pending doctrine.

8. As the City has conceded, the burden of establishing the prior suit pending doctrine is upon it, and it must prove all four of these "essential elements:"

1) The lawsuits must involve *identical* subject matter;
2) The lawsuits must be *between* the same parties;
3) The former lawsuit must be pending in a court having subject matter jurisdiction over the dispute; *and*,
4) The former lawsuit must be pending in a court having personal jurisdiction over the parties.

West v. Vought Aircraft Indus., 256 S.W.3d 618, 622 (Tenn. 2008). (emphasis added). If the City cannot establish any one of these four essential elements, its reliance upon the prior suit pending doctrine must be rejected. In fact, the City has not established any of the first three elements. More importantly, this doctrine does not even apply when the prior suit is a federal case.

9. In *West,* the Tennessee Supreme Court stated, "We have also held that the doctrine is inapplicable when the prior lawsuit was brought in a federal court or in the court of a foreign state." *Id.* at 623, n. 5, *citing Hubbs v. Nichols*, 298 S.W.2d 801, 802-

03 (1956). Arguably the doctrine maybe applied in cases involving in rem or quasi rem jurisdiction.[3]

10. In neither the *Price* case nor in this case is jurisdiction founded upon in rem or quasi in rem: plaintiffs in neither case alleges this as a basis of jurisdiction. The relief sought in this case is an injunction against the City. Specifically, Jetmore seeks an injunction to require the City to return to its past decades-old practice of allowing public inspection of unredacted traffic accident reports. This remedy, and jurisdiction for it, is specifically recognized in the PRA. Tenn. Code. Ann. § 10-7-505(d). Jetmore is not seeking an order directed toward any specific thing, including any records. This injunctive relief would relate to documents that do not even exist today, but to documents that will be created in the future. The remedy Jetmore seeks is an injunction requiring a person, the City, to take certain actions. Accordingly, jurisdiction in the instant case is in personam, not in rem. As noted by the Tennessee Supreme Court in *Hubbs*, "where the action first brought is in *personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Hubbs v. Nichols*, 201 Tenn. 304, 308 (1956) (quoting *Kline v. Burke Construction Co.*, 43 S. Ct. 79, 81 (1922)).

11. Therefore, the prior suit pending doctrine does not apply because the prior suit is in federal court.

12. Even if the prior suit pending doctrine applied, the City has not met the essential elements of the doctrine. The case at bar and the *Price* case do not involve the

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[3] Although *West* also said that the doctrine would be applicable if the prior federal court case involved in rem or quasi in rem jurisdiction, that is clearly not the situation here. In rem jurisdiction is defined as, "Power over a thing possessed by a court which allows it to seize and hold the object for some legal purpose; *e.g.*, boat on which narcotics are found." *Black's Law Dictionary*, p. 714 (5th ed.) (citations omitted).

identical subject matter. This case is designed to obtain access to records pursuant to the PRA. At no point in the *Price* case is anyone seeking to obtain access to any records. In fact, Jetmore makes no claim for relief in the *Price* case, either directly by cross-claim, or by counterclaim. *Price* seeks money damages flowing from an alleged violation of rights granted by federal law. The case before this Court seeks to enforce rights granted by state law." Simply because there may be an overlap of some legal issues in two different cases does not mean that the subject matter in those two cases is "identical." Nor are the lawsuits "between" the same parties. In the *Price* case, there is no dispute between the City and Jetmore. In the *Price* case, there are two individuals suing the City as a Defendant, and Jetmore has intervened as a Defendant. Accordingly, all the parties in this case are aligned on the same side in the *Price* case; and, the opposing parties in the *Price* case are not present in this case even though they have been given notice of this case. The common sense understanding of the phrase "a lawsuit between two parties," is that those two parties are on opposite sides of one another. Jetmore and the City are on the same, not opposite, side in the *Price* case. Accordingly, the second essential element is not present. For the foregoing reasons, a dismissal of this case is not appropriate.

III. CRASH REPORTS ARE HISTORICALLY PUBLIC RECORDS THAT ARE NOT EXEMPT FROM DISCLOSURE

A. The "vehicular accident" exception requires public access to driver information

13. The UMVRDA states that, "except as provided in §§ 55-25-105—55-25-107, the department, and any officer, employee, agent, or contractor thereof, shall not disclose personal information about any person obtained by the department in connection

with a motor vehicle record." Tenn. Code Ann. § 55-25-104. Therefore, the specific issues before this Court are 1) what is "personal information" as used in the UMVRDA, and 2) whether the Memphis Police Department is a "department," as that term is used in the UMVRDA.

14. Obtaining information from a local police department, such as the City's, does not constitute obtaining information from the "department" as explained in § 55-25-104. Section 55-25-103(1) actually excludes a local police department when it defines "department" to be "the department of safety, the department of revenue and the county clerk's office when acting as an agent of these departments, or the duly authorized agents or contractors thereof, responsible to compile and maintain motor vehicles records." *See also Mattivi v. Russell*, 2002 U.S. Dist. LEXIS 24409 (D. Col. Aug. 2, 2002)(concluding that Colorado State Patrol was not the "department" under the DPPA with respect to its release of a traffic accident report).

15. Under § 55-25-104, the name, address, phone number, and other identifying information of an accident participant or witness do not constitute "personal information" as that term is defined in the UMVRDA because the definition of personal information excludes information on "vehicular accidents."

16. The definition sections of the UMVRDA defines "personal information" to mean,

> information that identifies a person, including an individual's photograph, or a computerized image, social security number, driver identification number, name, address excluding the five-digit zip code, telephone number, and medical or disability information, *but does not include information on vehicular accidents, driving or equipment related violations, and driver license or registration status.*

Tenn. Code Ann. § 55-25-103(8)(emphasis added)

17. One of the critical elements of any report of crash events pertains to the contact information of the parties involved. The City admits that the contact information are precisely what a crash report contains. (Porter Depo. p. 24). The City claims it is required to allow public inspection of all information but must delete the information pertaining to identity and contact data. However, a review of the relevant statute does not support the City's position. The "Who" is an integral part of the accident report. An officer cannot even submit a crash report to his supervisor for approval until it is complete. A report is not considered complete without driver name, address, phone number and date of birth. (Id. pp. 70-71).

18. Tennessee Code Annotated § 55-25-103(8) provides three specific exceptions to the prohibition against releasing personal information. "Information on vehicular accidents" is the first exception listed, *i.e.,* contact information of the accident participants and witnesses. Neither this subsection, nor any other part of the UMVRDA, or any other part of the PRA prohibit public access to accident reports. Indeed, the PRA and § 55-10-108(f) specifically requires that accident reports be released to the public.

19. The contact information is an integral part of the traffic accident report, and by setting forth the three exception at the end of § 103(8), the statute does nothing to indicate that this "Who" information should be eliminated from an accident report. Properly interpreted, the statute provides that the contact information is generally unavailable except for "vehicular accidents." Accordingly, if a member of the public is seeking information about "vehicular accidents," they are entitled to all the information in those vehicular accidents reports.[4]

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[4] Driver license numbers are not available to the public because they (unlike name, address, phone number, and date of birth) are specifically exempt from disclosure. Tenn. Code Ann. § 10-7-504(a)(29).

20. To properly interpret a statute a court should read it the way it was written.

> In construing a statute it is the duty of the court to give every word and phrase meaning. *We must construe the statute so that no part is inoperative, superfluous, void or insignificant.* Statutes are not to be construed so strictly as to defeat the obvious intention of the legislature. Questions involving statutory construction must be answered in light of reason, having in mind the object of the statute, and the mischief it aims at. Therefore, indefinite and unclear words in the statute must be given such interpretation as will express the legislature's intention and purpose.

Loftin v. Langsdon, 813 S.W. 2d 475, 479 (Tenn. App. 1991) (citations omitted, emphasis added). "In construing multiple statutes, our goal is to choose the most reasonable construction which avoids statutory conflict and provides harmonious operation of the laws." *Jakes v. Sumner Cty. Bd. of Educ.*, 2017 Tenn. App. LEXIS 515, *19 (Tenn. Ct. App. April 12, 2017) (*quoting Thurmond v. Mid-Cumberland Infections Disease Consultants, PLC*, 433 S.W. 3d 512, 517 (Tenn. 2014). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall scheme").

21. There is nothing illogical about allowing members of the public to obtain the contact information from an accident report but not allowing them to obtain the same identifying information from a centralized state data base. The primary purpose of the DPPA, and therefore the implementation of the UMVRDA, is to prevent stalking. No argument has been advanced to suggest that stalking may result from release of contact information available on accident reports.

22. Specifically, the "particular spur to action" that resulted in the enactment of DPPA "was the 1989 murder of the television actress Rebecca Schaeffer by a fan that had obtained her address from the *California DMV*." *Maracich v. Spears*, 133 S. Ct. 2191,

2213 (2013) (Ginsburg, J., dissenting) (emphasis added). Ms. Schaeffer's murder was not facilitated by anyone looking at accident reports. The City has not offered an example of anyone being stalked because of information obtained from an accident report. This clear distinction undoubtedly explains why DPPA is written in a way to allow release of information on accident reports or information not from the DMV.

23. The stalking consideration has no application to this case. If a stalker wanted to acquire enough information about another person for some nefarious purpose, that information might be obtained from the centralized records of the State. That sort of inquiry, however, is now prohibited by DPPA. On the other hand, it would be an exercise in futility to try to obtain this contact information about a particular person by seeking it from the accident reports maintained at the local level. The possible stalker, if attempting to obtain that information on a particular person from the local accident reports, would have to wait years, decades, or a lifetime for the subject to have an automobile accident so that the information could be recovered. Moreover, they would have to check multiple jurisdictions to find out if and where the accident occurred. Was it in the city or county, or was it an adjoining county? It is absurd to believe that someone is going to search local accident reports indefinitely in an effort to find a particular person that may never be involved in a traffic accident.

24. Some out-of-state courts have expressed concern that someone might obtain a person's contact information for identity theft. *See Wilcox v. Batiste*, 2017 U.S. Dist. LEXIS 89070 (E.D. Wash. June 9, 2017). However, "Congress was not concerned with identity theft when it enacted DPPA" in 1994. *Mattivi,* 2002 U.S. Dist. LEXIS 24409 at n.1. If Congress or the General Assembly wants to pass laws for this other purpose,

they certainly know how to do so. More importantly, there is no record of any access to accident reports being used for identity theft, stalking, or any other nefarious purposes.

25. There is nothing inherently confidential about a person's name, address and telephone number. *See Moncier v. Harris*, 2018 Tenn. App. LEXIS 176 at *13 (Tenn. Ct. App. Apr. 5, 2018) (observing how Tenn. Code Ann. § 10-7-504(a)(29)(C)(vi) was amended in 2016 to make addresses confidential, but that amendment was revoked in 2017 to clarify that addresses are not confidential). For many decades this information appeared in widely distributed telephone directories. Although printed versions of the directories may not be readily available, this same information is available on the Internet.

26. The interpretation advanced by Jetmore is also entirely consistent with the remainder of the statute. Section 55-25-103(8) also provides an exception for "driver license or registration status."[5] It is impossible to get the status of a particular driver unless you also obtain the identity of the driver.[6] Therefore, when § 103(8) contains its three exceptions beginning with the "but does not include information" language, it is clear the statute is not seeking to eliminate the contact information.

27. If the intended result of the statute was to allow the City to produce only accident reports with the contact information redacted, there would be no need to include the vehicle accident exception in §55-25-103(8). The PRA expressly recognizes that if information in an otherwise public record is confidential, it must be redacted. Tenn. Code Ann. § 10-7-503(c)(2). Accordingly, if any public record contains confidential information (e.g., a Social Security Number) the record must be made available for public inspection,

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[5] The federal DPPA phrases this third exception to personal information as only "driver's status." 18 U.S.C. § 2725(3)

[6] Because many persons have the same or similar names, the identity would have to include more than just names.

but with that item of confidential information redacted. In *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 3d 297, 303 (Tenn. 1998), the Court noted that if redaction and deletion of confidential information was not required, a records custodian could defeat the purpose of the PRA by merely inserting some item of confidential information into public records. *See Elderidge v. Putnam County*, 86 S.W. 3d 572, 574 (Tenn. Ct. App. 2002) (approving of redaction). Therefore, there is no need for the vehicle accident exception of Section 103(8) if it was intended to allow the City's current redactions. The City's interpretation renders the vehicle accident exception completely "inoperative, superfluous, void or insignificant." *Loftin*, 813 S.W. 2d at 479. Essentially, the City is asking the Court to repeal a part of the statute.

B. Section 55-10-108(f) also requires public access to driver information

28. Not only is § 55-25-103(8) written to allow the public to obtain the contact information from a traffic accident report, but this interpretation is also consistent with other statutes in the Code. The General Assembly's intent to allow commercial requestors to obtain unredacted accident reports is confirmed in Tennessee Code Annotated § 55-10-108(f) which states:

> Any report of a motor vehicle accident investigated by the department or prepared pursuant to subsection (b) shall be open to public inspection as a public records under the public records laws codified in title 10, chapter 7. It is an offense punishable as a Class A misdemeanor for any person to knowingly use the written report or information contained in the report for solicitation that is prohibited by a standard of conduct or practice of any profession licensed by the state.

Tenn. Code. Ann. § 55-10-108(f).

29. It is impractical to use accident reports for solicitation purposes, unless you obtain enough contact information (such as name, address and phone number) to contact the person involved in the crash. It was not the intent of the General Assembly to prohibit

those persons who wish to access contact information contained in motor vehicle accidents to prevent solicitation as evidence by the last sentence of the subsection. That sentence clearly envisions that persons may obtain sufficient personal contact information from accident reports to conduct solicitation. The General Assembly has made it clear that motor vehicle accident reports are public documents and that information from those documents can be obtained for solicitation so long as that solicitation is consistent with state standards of conduct for licensed professionals. *See e.g.,* Tenn. Sup. Ct. R. 8, Rules of Professional Conduct 7.3(b)(3) (prohibiting lawyers from such solicitation until more than 30 days after the accident).

30. Section 55-10-108(f) is also significant because it was enacted two years after the state act implementing DPPA. *Compare* 1996 Tenn. Pub. Acts 745 (adopting UMVRDA § 55-25-101, *et seq.* to implement DPPA) *with* 1998 Tenn. Pub. Acts 886 (adopting § 55-10-108(f)). It did not repeal UMVRDA. Both § 55-10-108(f) and § 55-25-103(8) address accident reports and they must be interpreted to provide "harmonious operation of the laws." *Thurmond* 433 S.W. 3d at 517.

31. The legislative history of § 55-10-108(f) clearly shows that the General Assembly's intent was to keep driver information public. Although Defendant did not deny public right of access to crash reports after the enactment of the DPPA and UMVRDA, Chattanooga sought to do so. The Court of Appeals for the Eastern Section upheld the right of Chattanooga to deny a chiropractic clinic the right to obtain unredacted crash reports. *McCallie Chiropractic Clinic v. Dinsmore*, 1998 Tenn. App. LEXIS 80 (Tenn. Ct. App. Feb. 4, 1998). Just a few months later, however, the General Assembly, expressly

addressed *McCallie* and legislatively overturned that decision, thereby conclusively establishing that the public has a right of access to unredacted crash reports.

32. The Tennessee 100th General Assembly undertook revision of § 55-10-108(f) to make clear its intention that unredacted crash reports be open records open to public inspection. It is particularly important to review the legislative intent of these statutes because the judiciary has already once misinterpreted the legislature's will.

33. Before the Senate Judiciary Committee on April 8, 1998, Senator Roy Herron explained, *"The essence of what we're trying to do here is to keep records that have historically been open and the amendment is simple…"* (TR 6) (emphasis added)[7] In making his statements, Senator Herron was expressly addressing "a court of appeals decision that was decided by the Eastern District Court. The case arose out of Chattanooga case, McCallie Chiropractic Clinic versus somebody in the city of Chattanooga." (TR 20). Senator Herron observed the court ruling closed the records but further observed that "for years and years these records have been open." (Id.).

34. The discussion turned to amendments and what the ultimate use of the records might be. Amended language was included that penalized a person holding a professional license whose ethics rules or professional rules of responsibility prohibited solicitation of individuals who were listed on the crash reports. (TR 19-20) There was some discussion questioning the release of driver information to telemarketers because a few senators viewed someone being called by a telemarketer as being "punished." (TR 21) There was also discussion of trying to tighten up on what was termed "misuse" of the

[7] On March 23, 2017, Jetmore filed audio tapes of this legislative history obtained from the Tennessee State Library and Archives. Jetmore also supplied a transcript of those proceedings relating to 1998 Tenn. Pub. Act. 886 as and it is cited herein as "TR__." The City has not disputed the accuracy of that transcript.

information once the record was obtained. Ultimately, however, the General Assembly agreed the public should have full access to crash reports with penalties imposed upon any misuse of that full access, as now reflected in § 55-10-108(f). Senator Herron explained the history of traffic crash reports as open records in some detail.

> These records have been open, and they've been available to the public. What we're talking about is records that are generated by public officials, police officers, state troopers, sheriff's deputies; folks who serve the public. And we're talking about their reports being public. They've been public and recently the court of appeals ruled that they would no longer be so. And the attorney general apprised of that decision. They don't think they are. Everybody thought they are. Everybody considered them such. The Department of Safety until just recent days has had them open.

(TR 12).

35. Importantly, Senator Herron turned his attention to the driver information contained in the traffic crash reports, stating,

> Now there are others out there that don't have to be the ilk that we lawyers are. They're going to be Mothers Against Drunk Driving concerned about what's happening in these accidents that are being caused. And they want to have a look-see at these cases here involving drunk drivers. It may be some other group that's concerned about a particular intersection. The records ought to be public. If the press wants to find them, or the public citizens wants to find them; police officers are generating them; they ought to be public records, on that issue and for that issue I bring this legislation... But on the fundamental issue of whether records generated by the law enforcement officers in these cases, I will say to you quite frankly they should be. And there're a lot of people out there whose lives may be saved if enough folks are doing enough work like MADD mothers and others who are trying to stop these sorts of situations. I would submit to you that ah, that the legislation should go forward; improve it if you will, but stop it not, I request.

(TR 13).

36. The final bill with the current language of § 55-10-108(f) passed by an overwhelming majority of the legislature. (TR 22). Clearly, the legislature was concerned not only with the availability of crash reports as a public record, but also explored the

requestors' ultimate use of personal information that is released coincidently with the traffic crash report. Thus, the legislature clearly intended that names, addresses and telephone numbers would be disclosed with the rest of the crash report because the legislature chose to penalize misuse of the personal information (name, address, telephone number) within the records once the release occurred.

37. Significantly, this legislative intent, as reflected in the plain language of § 55-10-108(f), is entirely consistent and "harmonious" with the "vehicular accident" exception § 55-25-103(8).

38. Although the UMVRDA generally prohibits disclosure of personal information held by the state, it also contains an express exception for information of vehicular accidents. Driver information is an integral part of the information of a vehicular accident. If the intended effect of UMVRDA was to allow public release of only redacted crash reports, this result would be obtained without inclusion of the "vehicular accident" exception. To conclude that the "vehicular accident" exception does not allow release of accident driver information would render this exception "inoperative, superfluous, void or insignificant." *Loftin,* 813 S.W. 2d at 479.

39. Also, when the Court of Appeals ruled in 1998 that crash reports were not public records, the General Assembly quickly reversed that decision. The General Assembly observed that crash reports have been public historically, and it enacted § 55-10-108(f) to expressly confirm that they would remain public and that the drivers' names, address and phone numbers would remain public as well. In so doing, the General Assembly considered, but rejected an effort to prohibit commercial solicitation use of crash reports. Rather, the General Assembly allowed full access for commercial

purposes, but reminded all persons to use the reports consistent with their professional obligations.

40. Therefore, the Court orders the City of Memphis to resume its practice of making unredacted copies of crash reports available for inspection by the public within one business day after the accident, except for any statutorily prohibited personal data, such as any drivers' license number, that might appear on the reports and should be redacted.

IV. THE COURT DOES NOT FIND THE CITY'S ACTION IN REDACTING RECORDS AND DELAYING THEIR PRODUCTION TO BE WILLFUL

41. The PRA provides:

> If the Court finds 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 asset all reasonable cost involved in obtaining the record, including reasonable attorneys' fees against the non-disclosing governmental entity.

Tenn. Code. Ann § 10-7-505(g)

42. In the only Tennessee Supreme Court case addressing this provision, the Court observed,

> The element of "willfully" required by this statute has been described as synonymous to a bad faith requirement. Stated differently, the Public Records Act does not authorize a recovery of attorneys' fees if the withholding governmental entity acts with a good faith belief that the records are excepted from the disclosure.

Schneider v. City of Jackson, 226 S.W. 3d. 332, 346 (Tenn. 2007) (citation omitted). In *Schneider,* Jackson sought to rely upon a common law exception to the PRA to suggest that it had a good faith reason to deny access to certain police records. The Court noted, however, that this common law exception had never been recognized in Tennessee and the Court refused to recognize that exception. The Court also ruled that Jackson's refusal

to produce certain financial records was willful because a city contract specifically stated these records were confidential "except as otherwise required by the Tennessee Open Records Law." *Id.* at 348. Accordingly, the Court concluded that the records custodian's refusal to produce the records in that case was willful.

43. Therefore, our supreme court has established an objective standard for determining willfully, *i.e.*, whether the custodian knew or should have known that the records should have been disclosed. Since *Schneider's* brief discussion of "willfully," the court of appeals has offered "varying judicial statements" about how to measure willfulness. *See Friedmann*, 471 S.W. 3d at 436. Although bad faith, and therefore willfulness, could mean the *Black's Law Dictionary* definition, which includes an element of "fraud, sinister motive, dishonest purpose, ill will, or similar intent," the court of appeals has now concluded *Schneider* did not hold that "willful" means ill will bad faith. *Id.* Rather, *Friedmann* held bad faith is determined "by applying the Tenn. R. Civ. P. 11 standard of whether the argument for the refusal of access was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Id* at 437. (citations omitted)

44. After a lengthy and detailed analysis, *Friedmann* stated, "We agree that a heightened showing of 'ill will' or 'dishonest purpose' is not necessary in order to establish willfulness under the statute." *Id.* (citation omitted) Further, "the majority of cases discussing willfulness under the Act have analyzed the issue in terms of the law's clarity at the time a records request is made, even in spite of references that the willfulness standard is one synonymous to a bad faith requirement." *Id.*

45. As further noted by the Tennessee Court of Appeals, "If a municipality 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 want a finding of willfulness." *Clark v. City of Memphis*, 473 S.W. 3d 285, 290 (Tenn. Ct. App. 2015)

46. In its deposition, the City sought to rely upon instruction of legal counsel as justification for its redactions, however,

> [I]t matters not that a records custodian sought out legal advice if the legal position adopted by the records custodian is without any basis in the law or a good faith argument for a modification of the law. After all, governmental entities are themselves charged with fostering access to public records under the TPRA. When a governmental entity is confronted with a public records request, it assumes ultimate responsibility for a faithful and legal administration of the TPRA. Indeed, a governmental entity "cannot remain unknowledgeable of the [TPRA] and authority interpreting it and thereby immunize itself from liability for attorneys fees. A request for access to a public record imposes a duty on the entity to inform itself of its legal obligation." Although deference to counsel may certainly be advisable, we are of the opinion that such deference does not countenance against a finding of willfulness in situations where there is no good faith legal argument for the denial of access.

Taylor v. Town of Linville, 2017 Tenn. App. LEXIS 469 at *24 (Tenn. Ct. App. July 13, 2017) (quoting *Tennessean v. City of Lebanon* 2004 W.L. 290705 at *9 n. 8 (Tenn. Ct. App. Feb. 13, 2004)).

47. The issue of redaction of driver information from crash reports because of DPPA and UMVRDA is a case of first impression in this state, and the City has been sued in the *Price* case for monetary damages. For these reasons, the Court does not conclude that the City's redactions were willfully improper.

48. Defendant's justification for the redaction was the threat of potential liability for each alleged improper disclosure of personal information under Tennessee Code

Annotated § 55-25-104, as posed by the federal lawsuit styled *Price v. City of Memphis*, Western District of Tennessee civil docket number 17-CV-2772 (hereinafter, the "federal lawsuit"). The federal lawsuit plaintiffs seek monetary damages on a class action basis, based on the alleged wrongful disclosure of public information contained in traffic accident reports.

49. Defendant's reasons for redaction, the threat of potential liability due to the disclosure of individuals' names, addresses, and telephone numbers may constitute a legitimate legal reason for withholding the records and presents a question of first impression in Tennessee jurisprudence.

50. Defendant's delay in producing traffic accident reports was not a denial of the request without justification, and that the redaction of the names, addresses, and telephone numbers within those documents was legally justified.

51. Defendant's refusal, therefore, to produce the records promptly is not willful in the context of Tennessee Code Annotated § 10-7-505.

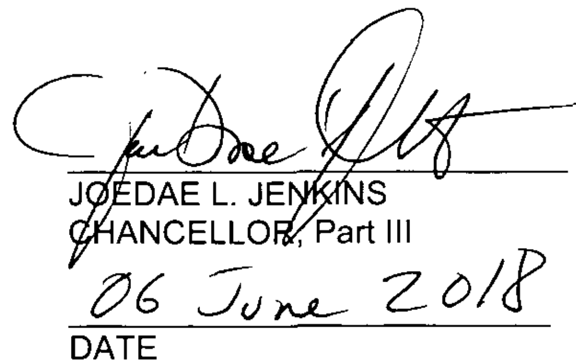
52. A stay shall be issued with respect to the methodology of disclosure at this point in time pending resolution by the appellate courts. Specifically, pending resolution by the appellate courts, the City is not required to make unreacted crash reports available for inspection upon request, as sought by Plaintiff's lawsuit.

53. Defendant's January 8, 2018 Motion to Dismiss, or in the Alternative, To Stay should be denied in part and granted in part as indicated below.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion to dismiss is **DENIED**. **THE ALTERNATIVE REQUEST** for a stay pending adjudication by

the Appellate Courts is **GRANTED** pursuant to T.C.A. § 10-7-505. Cost are assessed to the Defendant, for which let execution.

SO ORDERED.



JOEDAE L. JENKINS
CHANCELLOR, Part III

06 June 2018
DATE

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2018, a copy of this foregoing document was served upon the Defendant's counsel as indicated below by first class mail and email.

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