IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

MEGHAN CONLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 197897-1**
	)	
KNOX COUNTY SHERIFF TOM SPANGLER,	)	
	)	
Respondent.	)	

MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Tenn. R. Civ. P. R. 59 et al, Respondent, Knox County Sheriff Tom Spangler, by and through counsel, moves this honorable Court to alter or amend Paragraphs 3 and 4 of its Order issued on April 9, 2020

MEMORANDUM IN SUPPORT

KCSO fully intends to comply with the Court's direction. Respondent has already notified Dr. Conley that it had no further responsive documents related to Paragraph 2 of the Order. Additionally, the Knox County Sheriff's Office is in the process of developing a method to make arrest report information available for prompt public inspection.[1]

However, Respondent seeks clarification and guidance from the Court regarding Paragraph 3 and 4 of its Order.

> **(3) THAT THE KCSO IS PROHIBITED FROM TREATING ANY WRITTEN REQUEST FOR INSPECTION OR COPIES GENERALLY PHRASED IN TERMS OF INFORMATION SOUGHT AS INSUFFICIENT FOR LACK OF SPECIFICITY OR DETAIL.**

Simply stated, KCSO is unsure how to go about complying with this aspect of the Court's direction. The language above would exclude the KCSO from ever informing a citizen

[1] This would be in addition to the information that has always, at all points relevant to Dr. Conley's requests, been publicly available on the KCSO website including names of inmates/arrestees, dates of arrest, types of charges and if an inmate/arrestee is being held for another agency.

that a request lacks the detail *required* by the Tennessee Public Records Act. By prohibiting KCSO from ever deeming a "generally phrased" as being "insufficient" in detail would force the KCSO to ignore the plain language of the statute. Therefore, Respondent is asking the Court to clarify what requests it would deem as lacking sufficient detail. Tenn. Code. Ann. § 10-7-503(a)(4).

Dr. Conley made numerous public records requests that the Court is interpreting as "generally phrased in terms of information." For example, the Petitioner made each of the following requests several times, even after having been provided with responsive records:

> All public records of communications between Knox County and the Department of Homeland Security – U.S. Immigration and Customs Enforcement regarding a 287(g) program in Knoxville created on or after June 1, 2017.
>
> Public records created on or after June 21, 2013 regarding an intergovernmental service agreement (IGSA) related to detention, transportation, or other services that currently exists or is currently being considered between the Knox County Sheriff's Office and the Department of Homeland Security – U.S. Immigration and Customs Enforcement
>
> From the period of January 1, 2019 to present: Any and all records of communication, including letters, emails, and memoranda, exchanged within and among the Knox County Sheriff's Office, DHS agencies and subagencies (including ICE).

At the hearing, KCSO's employees testified that these requests would require Respondent to look through every single record in its possession and determine if it was *related to* or *regarding* an agreement with ICE. Every invoice, every contract, every memo, and every document. *Then* Respondent would be required to read every email and letter sent by its 1,100 employees, to sort through them, and to compile the records that may be responsive to the above requests. KCSO asserted that these requests failed to comply with the requirements of the Tennessee Public Records Act and were properly denied.

The Court disagreed; however, this leaves KCSO in the untenable position of attempting to guess what future requests the Court might deem has being just "generally phrased" enough and that fail to meet the requirements of Tenn. Code Ann. § 10-7-503(a)(4). In addition, it seems that KCSO cannot rely on prior TPRA cases.

THE STATUTORY FRAMEWORK OF THE TENNESSEE PUBLIC RECORDS ACT

In considering the language of the Tennessee Public Records Act, this Court must follow the well-defined precepts of statutory interpretation. A court must carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing statutes, it is assumed that every word in a statute has meaning *and* purpose. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011). Every word must be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, the plain meaning of the statue is applied without complicating the task. *Lind*, 356 S.W.3d at 895.

Public records are defined as:

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

Tenn. Code. Ann. § 10-7-503(a)(1)(A)(i).

A citizen's right to access a public record is triggered by that citizen making a request for a public record. Tenn. Code Ann. § 10-7-505(a). It appears that the plain language of the statute does explicitly require a citizen to identify *specific records* when making a public records request, or to provide enough detail for the entity to do so.

> **(4)** This section shall not be construed as requiring a governmental entity to sort through files to compile information or to create or recreate a record that does not exist. Any request for inspection or copying of a public record shall be sufficiently detailed to enable the governmental entity to identify the specific records for inspection and copying.

Tenn. Code Ann. § 10-7-503(a)(4). In fact, the Tennessee Legislature purposefully added that explicit language to the Act in 2008. 2008 Tenn. Pub. Acts 1179.

What Petitioner has done in the instant action is identify a *topic* and ask generally for any potential records related to the general topic, rather than providing the detail necessary to identify specific records. All guidance from the Open Records Counsel's Office supports the KCSO position on this matter. For example, the model public records response form explicitly lists a lack of sufficient detail as the *first* possible basis for a records request denial.

COMPARING THE FREEDOM OF INFORMATION ACT

The intent of the Tennessee Legislature is perhaps most clearly illustrated by looking at a statute that demonstrates the opposite intent, the Federal Freedom of Information Act. In 1966, the United States Congress enacted the Freedom of Information Act ("FOIA"), and it has been continually updated since that time. The state legislature could have adopted the requirements of FOIA but has chosen not to do so. FOIA states the following regarding record requests:

> (a)(3)
> (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) **reasonably describes such records** and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> (B) In making any record available to a person under this paragraph, **an agency shall provide the record in any form or format requested** by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

> (C) In responding under this paragraph to a request for records, an agency **shall make reasonable efforts to search for the records** in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.
>
> (D) For purposes of this paragraph, **the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.**

5 USCS § 552 (**emphasis** added.)

First, unlike the TRPA, a FOIA requestor must only reasonably describe records he is seeking; this is very different than the language of the TPRA. Notably absent is a requirement that the request allow the entity to identify a specific record.

Unlike the TPRA, which specifies that entities do not have to search or compile records, under FOIA, agencies must "search" and "review," "agency records for the purpose of locating those records which are responsive to a request." 5 USCS § 525. *See generally Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Campbell v. SSA*, 446 F. App'x 477, 480 (3d Cir. June 3, 2011); *Miccosukee Tribe of Indians of Fla. v. U.S.*, 516 F.3d 1235, 1257-58 (11th Cir. 2008) (reiterating that agency is obligated to show search was reasonably calculated to uncover all relevant documents); *Williams v. DOJ*, 177 F. App'x 231, 233 (3d Cir. 2006) (recognizing that an agency "has a duty to conduct a reasonable search for responsive records").

Although the TPRA must be construed liberally by the courts, under FOIA, responding agencies are required to interpret the *actual requests* liberally. *Hertz Schram PC v. FBI*, Civil Action No. 12-CV-14234, 2014 U.S. Dist. LEXIS 23390, at *23 (E.D. Mich. Feb. 25, 2014). Public entities that fall under FOIA have an *overt* duty to liberally construe all records requests and provide any record that might be relevant, even if it is not listed in the request. *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. December 8, 1995) ("Accordingly, [requests] should be interpreted to include *subject matter* files on topics of interest to [the

requestor]."); *see also Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1255 (11th Cir. 2008) ("Even if the EPA found the scope of the Tribe's June 3rd request to be ambiguous, it was obliged under FOIA to interpret both that request, liberally in favor of disclosure.").

The Tennessee Public Records Act was first enacted in 1957. Since then, the Tennessee Legislature has had plenty of opportunities to mimic the federal statute by placing a higher burden on governmental entities if the Legislature so desired. However, the Tennessee Public Records act is not patterned after FOIA. *Schneider v. City of Jackson*, 226 S.W.3d 332, 342-43 (Tenn. 2007). Conversely, in 2008 the Legislature went even farther by explicitly requiring citizens to make requests that are *sufficiently detailed* enough to allow an entity to identify the *specific record* requested. 2008 Tenn. Pub. Acts 1179.

Another comparison to consider is discovery requests. During litigation, litigants are allowed by law to seek discovery regarding *anything* that is related to the subject matter of the litigation. Tenn. R. Civ. P. 26.02. The **burden is on requested party** to comply with the request no matter how broad. The words of Tenn. Code Ann. § 10-7-503(a)(4) have be given full effect and this Court must consider that the Legislature deliberately **placed the burden on the requestor** to ensure that her requests are sufficiently detailed to allow a governmental entity the ability to locate the requested records.[2]

Respectfully, prohibiting the KCSO from informing requestors that their requests are not sufficiently detailed enough is simply contrary to purpose of the Act.

[2] Dr. Conley testified that she was aware of the specificity requirement of the Tennessee Public Records Act. Dr. Conley testified that she was "frustrated" that she was supposed to identify specific documents and deliberately kept her requests broad instead of making a more detailed request.

ESTABLISHED JURISPRUDENCE PLACES THE BURDEN ON THE REQUESTOR

A request for all "public records," or "all communications," even if regarding a specific topic is not sufficiently detailed enough to comply with the Tennessee Public Records Act. In making her "generally phrased" requests, Dr. Conley was essentially asking the KCSO to search every single record, document, recording, and device to see if it contained information related to any IGSA with ICE or even just referenced ICE.

Generally phrased requests are designed to capture as much information as possible and that is not the purpose of the Tennessee Public Records Act. "A Public Records Act request is not a discovery request pursuant to litigation." *Hickman v. Tenn. Bd. of Prob. & Parole*, 2003 Tenn. App. LEXIS 187, at *31-32 (Ct. App. Mar. 4, 2003); *Hodges v. DA Gen. - 20th Judicial Dist.*, No. M2014-02247-COA-R3-CV, 2016 Tenn. App. LEXIS 294, at *14-15 (Ct. App. Apr. 27, 2016)("Under the statutory scheme... the statute does not impose an additional obligation on General Johnson to search the file and determine which records fell within those listed by Mr. Hodges.")

"Like an interrogatory used for discovery, Mr. Jakes employed broad language in his request designed to include as much information from as many sources as possible. Any request to review and inspect public records must be tailored 'to enable the records custodian to identify the specific records to be located or copied.'" *Jakes v. Sumner Cty. Bd. of Educ.*, No. M2015-02471-COA-R3-CV, 2017 Tenn. App. LEXIS 515, at *21-22 (Ct. App. July 28, 2017).

In *Jakes*, the petitioner requested:

> [a]ny and all communications between you and any other party or parties concerning my first public record request for the [BOE] to provide for my inspection the [BOE's] records policy. This is to include but not be limited to the following[:] All emails sent or received, all audible recordings and voice mail by all members, all letters, all memos, all text messages, [and] all text messaging. *Id.*

Although the Court did not explain its reasoning, it could certainly be considered a generally phrased request seeking information but still the Court held that it was not a valid public records request. "A governmental entity is not required 'to sort through files to compile information.' Tenn. Code Ann. § 10-7-503(a)(4). A public record request must be 'sufficiently detailed' to enable the custodian to identify the records sought. Tenn. Code Ann. § 10-7-503(a)(4). Here, the formatting of the email made the request unclear and overly broad." *Id.* This request is remarkably like a request for any communication between ICE and KCSO, or any communication regarding an IGSA.[3]

It might be helpful to consider the requests made in *Little v. City of Chattanooga*, 2012 Tenn. App. LEXIS 666, at *6-7 (Ct. App. Sep. 25, 2012). Although in that case the City was found to have failed to comply with the Public Records Act in *the timing* of its responses, both the trial court and the appellate court determined that several of the petitioner's requests failed to comply with the requirements of Tenn. Code. Ann. 10-7-504(a).

> [T]he Petitioner submitted six requests on June 7, 2011] seeking information regarding the development of sanitary sewer systems .... Four of the requests were virtually identical. For example, one request read as follows:
>
> All documents, reports, maps, diagrams, charts, drawings, blue-prints, papers, information, studies, letters, records, emails, [*7] electronic data processing files or other like materials pertaining to the development, growth, advancement, installation, delivery, placement, or construction of sanitary sewers in the territory identified and designated as Area 12 on Map B-B in Resolution No. 9166, dated January 25, 1972 and adopted by the City of Chattanooga in Ordinance No. 6393, dated February 2, 1972, *from 2003 to 2011.*

---

[3] *See also Reguli v. Vick*, No. M2012-02709-COA-R3-CV, 2013 Tenn. App. LEXIS 733, at *5 **n.4** (Ct. App. Nov. 7, 2013)(Petitioner requested records pertaining to "**how [the entity] put the district committee members in rotation and how you communicate with them in the selection process.**" The trial court determined that the portion of the request relative to the committee was not sufficiently detailed as required by the Public Records Act.)

> The only difference between this request and three others were the different time periods for which the documents were sought – 'from 1993 to 2002,' 'from 1983 to 1992,' and 'from 1973 to 1982.'

Id. Additionally, on June 30, 2011, petitioner submitted the following request:

> The first page of the request read as follows:
>
> All documents, reports, maps, diagrams, charts, drawings, blue-prints, papers, plans, information, studies, letters, records, emails, electronic data processing files or other like material pertaining to, connected to, **discussing or describing in any manner all plans for sanitary sewers in the annexed area identified and designated Area 12** (on Map B-B in Resolution No. 9166, dated January 25, 1972 and adopted by the City of Chattanooga in Ordinance No. 6393, dated February 2, 1972) related to sewer contracts identified by the City as Contracts 79, 64B and 64C. . . . Since 2001?
>
> The June 30 request continued onto a second page where Little **requested documents: 'identifying roads, street lighting and sidewalks' and 'pertaining to the development, growth, advancement, installation, delivery, placement, or construction of storm sewers'** 'North of I-24 on Browns Ferry Road, Burgess Road and O'Grady Drive since 1972' in Area 12; and 'identifying parks and recreational services' located North of I-24 in Area 12.

Id. at *9. (**emphasis** added.)

Determining these requests were not sufficiently detailed, the trial court noted, "[t]here is no doubt that obtaining public records by direct request to the government can be faster and less expensive than formal discovery in litigation. However, in view of some of the statutory restrictions found in the public records laws, it may be better for the purposes of Dr. Little's case that discovery, pursuant to the Tennessee Rules of Civil Procedure, be attempted. Such discovery can be more open ended [than public records requests]." *Id.*, at *28-29.

The Court of Appeals agreed stating:

> Four other requests that were a part of Ms. Little's first public requests are identical, except for the dates covering the records sought. The sixth listed request calls for all plans for sanitary sewers in Area 12 from 1972 to 2011. The court in the first opinion compared the first June 7 request with her first request on June 30, 2011.Ms. Little's first request, in her June 30, 2011 request was essentially the same as the June 7 request but narrowed the scope of the records at the end of the request

to Contracts 79, 64B and 64C. Her other three requests covered records from 1972 to the present.

Ms. Little's requests do appear to require a sorting through of files to compile the requested records. If so, then such requests are improper and invalid under Tenn. Code Ann. § 10-7-503(a)(4).

Id. (**emphasis** added).

These requests are remarkably similar to Dr. Conley's requests.

DISTINGUISHING HICKMAN

Respectfully, Respondent takes issue with the Court's interpretation of the *Hickman* case. *Hickman v. Tenn. Bd. of Prob. & Parole*, No. M2001-02346-COA-R3-CV, 2003 Tenn. App. LEXIS 187, at *19 n.2 (Ct. App. Mar. 4, 2003). *Hickman* does not stand for the proposition that merely requesting general information is a valid public records request.

Considering the context of *Hickman*, an inmate made a public records request for several categories of records and information, primarily related to parolees. He was seeking a list of all inmates paroled during certain years, their crime classifications and their specific risk factor score. *Id.* Although such a request can be considered "generally phrased" in terms of information, Mr. Hickman was seeking easily identifiable and categorized information. There is a difference between requesting a specific type of information, such as a list of all inmates paroled during certain years or a parolee's crime classifications, and requesting all public records related, regarding or pertaining to any IGSA.

Mr. Hickman did not ask for all public records "related to any parolee;" instead, he sought very specific information about inmates from the Board of Probation and Parole, and the type of information kept by the Board. The information he requested is logically only located in an inmates

file, not potentially in any public record within the Board. Frankly, it appears that the Board just did not want to physically pull and copy all the inmate files.[4]

Additionally, throughout *Hickman*, the Court of Appeals noted that agencies are not required to sort and compile records for a citizen. In discussing the nature of Mr. Hickman's request, the Court noted that Mr. Hickman was also seeking specific risk factor records. *Id.* To determine this information, "[each file] would have to be pulled reviewed to find the individual inmate's specific score." *Id.* The court held that there was, "no language in the Act that would require the Board to go through every parole eligible inmate's file and retrieve the Risk Factor for each so as to compile that information for Mr. Hickman." *Id.* However, the court discussed that a request for all the risk guideline forms would have been a valid public records request as that would not require the Board to sort through each file individually. *Id.* at *32. Likewise, the Board clearly could have simply provided all the parolee inmate files for the years requested by Mr. Hickman.

KCSO acknowledges that the Court of Appeals did hold that it could not determine the "fatal lack of specificity" in Mr. Hickman's generally phrased request. *Id.*, at *34-35. However, that is because the Board made no attempt to explain their reasoning either in the hearing before the trial court or on appeal. *Id.* The Court of Appeals specifically noted that at no point in time did the Board assert, "that it does not have records containing the requested information or that it cannot identify the records requested from the general nature of the request." *Id.*

That is entirely contrary to the instant action. In this case, the testimony from KCSO employees clearly shows that they were not able to identify what records Dr. Conley was

[4] "The memorandum in opposition to summary judgment stated, 'Such a request, as the petitioner states in the letter attached to the petition, of essentially all parole-eligible inmates in the Department of Correction, would be clearly onerous, overly burdensome, time-consuming and expensive.'" *Id.* at fn. 2.

requesting in her repeated, broad requests for any public records *regarding any IGSA with ICE*, or *any communication with ICE* whatsoever. Throughout her interactions with the KCSO, Dr. Conley was provided with a 287(g) contract with ICE, an updated Marshalls contract that involved ICE, as well as, hundreds of pages of emails and training documents related to the 287(g) program and yet she kept making the same requests. Even Dr. Conley cannot describe what other records she was seeking when she made these requests.

Finally, assuming, *arguendo,* that *Hickman* did stand for the proposition that requestors can "generally phrase" their requests by topic, that interpretation would not apply to this case.

The *Hickman* case was decided in 2003, at that time the Tennessee Public Records Act did not contain the explicit language that requests be sufficiently detailed to allow an entity to identify a specific record that it does now.

For the above reasons, Respondent respectfully moves this Court to alter or amend its Order preventing KCSO from being able to properly respond to public records requests that are not sufficiently detailed enough to allow KCSO to identify the record requested.

> **(4)THAT THE KCSO, WITHIN THE NEXT 30 DAYS, SHALL BEGIN STEPS TO IMPLEMENT A SYSTEM, EITHER MANUALLY OR THROUGH A COMPUTER PROGRAM OR SYSTEM, THAT WILL ENABLE IT TO PRODUCE ITS ARREST RECORDS ON A CURRENT BASIS FOR INSPECTION AND VIEWING BY CITIZENS WITH THE CONFIDENTIAL INFORMATION REDACTED AND SHALL COMPLETE IMPLEMENTATION OF THE MANUAL SYSTEM OR COMPUTER PROGRAM OR SYSTEM WITHIN A REASONABLE PERIOD OF TIME.**

Again, the KCSO is in the process of developing a public inspection method for arrest reports. However, in its opinion the Court determined that the KCSO was not allowed to charge for redacting arrest reports prior to allowing an inspection *and* proposes that KCSO had a duty to ensure that arrest reports are available for *immediate* public inspection due to the potential constant

public demand. Therefore, under the Court's reasoning not having arrest reports available for immediate inspection was a violation of the Tennessee Public Records Act.

For this reason, the Court has ordered the creation public access to arrest reports and that Dr. Conley be awarded attorney's fees because the arrest reports were not previously available for immediate inspection. Respondent respectfully takes issue with the Court's reasoning that KCSO could not require the requestor to pay the cost of redaction, and that KCSO had an obligation to maintain arrest reports in an immediately reviewable format.

REDACTION

Respectfully, Respondent reiterates that KCSO was allowed to charge for the labor costs associated with redacting arrest reports prior to inspection prior to a Mach 25, 2020 amendment to the Act.

Furthermore, it is clearly not the intent of the Tennessee Legislature to prevent governmental entities from ever charging for redaction. Tenn. Code. Ann. § 10-7-504(a)(5) specifically states that information made confidential (by law) **shall** be redacted and, "**[c]osts associated with redacting records**, including the cost of copies and staff time to provide redacted copies, **shall be borne as provided by law.**" Tenn. Code. Ann. § 10-7-503(a)(5) (**emphasis** added.) It follows that, if the Legislature intended to disallow any fees for redacting records, why are such fees specifically contemplated by the statute?

Other issues aside, it is undisputed that confidential information **must** be redacted Tenn. Code. Ann. § 10-7-503(c)(2). Additionally, it is undisputed that Tenn. Code. Ann. 10-7-504(a) prescribes a wide variety of information that is not subject to public inspection and that **must** be redacted by a governmental entity prior to disclosure. Tenn. Code. Ann. § 10-7-504(a).

Tenn. Code Ann. § 10-7-504(a)(20)(C) states:

> **(C) Information made confidential by this subsection (a) shall be redacted wherever possible and nothing** in this subsection (a) shall be used to limit or deny access to otherwise public information because a file, document, or data file contains confidential information. **For purposes of this section only, it shall be presumed that redaction of such information is possible. The entity requesting the records shall pay all reasonable costs associated with redaction of materials.**

The rules of statutory construction require that every word in a statute has meaning *and* purpose. *Lind*, at 895. Here, the Tennessee Legislature specifically used the words "made confidential by this **subsection (a)**." If the Tennessee Legislature had intended this to apply only to §10-7-504(a)(20), the legislature would have used the word "subdivision," as it did in every other instance of a limiting clause in Tenn. Code. Ann. § 10-7-504. [5] In order to give full effect to the statute, this Court must assume that the Legislature intended the costs of redacting any information made confidential by subsection (a) of Tenn. Code. Ann. § 10-7-504 to be paid by the requestor. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005).

It is undisputed that the only information Respondent has asserted must be redacted from arrest reports is information made confidential pursuant to Tenn. Code. Ann. § 10-7-504(a). *See for example*, Tenn. Code. Ann. § 10-7-504(a)(12, 16, 17 and 29). KCSO is also affirmatively prohibited from disclosing personal identifying information of any citizen pursuant to Tenn. Code

---

[5] Reinforcing Respondent's position on this matter is the recent actions of the Tennessee Legislature. On March 25, 2020 the Legislature passed the following amendment to the Tennessee Public Records Act:

> Tennessee Code Annotated, Section 10-7-504(a)(20), is amended by deleting the language "subsection (a)" wherever it appears and substituting instead the language "subdivision (a)(20)" and by deleting the language "this section only" and substituting instead the language "this subdivision (a)(20) only.

2019 Tenn. SB 2247. By deliberately replacing the words subsection with subdivision, the Legislature is acknowledging that prior to this change, entities *were* allowed to charge for any redactions that were required by subsection (a). *See In re Estate of Tanner*, 295 S.W.3d at 614 ("We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed." (citing *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). Therefore, until March 25, 2020, the KCSO was allowed to charge for redactions made pursuant to that subsection prior to allowing inspection. Certainly, it will not attempt to do so now.

Ann. § 10-7-504(a)(29)(A). Therefore, at the time relevant to this action, pursuant to Tenn. Code Ann. § 10-7-504(20)(C), the cost for redacting that type of information from arrest reports was to be paid by the requestor.

DISTINGUISHING ELDRIDGE

There are over 500 exemptions to the Tennessee Public Records Act. Most exemptions are codified in Tenn. Code. Ann. §10-7-504 while other exceptions exist throughout the T.C.A. Tenn. Code. Ann. § 10-7-504 itself contains over 20 subsections that each address a separate category of public records. The Tennessee Legislature took great pains to create and distinguish these varied self-contained categories. For example, subsection (f) applies to records of public employees, subsection (g) applies to law enforcement personnel records and subsection (l) applies to records of the Department of Children Services. Each subsection is self-contained and states within itself that its provisions apply only to that subsection.

For example, subsection (g) explicitly states personal information of law enforcement officers shall be redacted when necessary:

> Tenn. Code Ann. § 10-7-504(g)(1)(A)(i) All law enforcement personnel information in the possession of any entity or agency in its capacity as an employer, including officers commissioned pursuant to § 49-7-118, shall be open for inspection as provided in § 10-7-503(a), except personal information shall be redacted where there is a reason not to disclose as determined by the chief law enforcement officer or the chief law enforcement officer's designee.

Likewise, subsection (h) requires the redaction of records identifying persons involved in executions:

> Tenn. Code. Ann. § 10-7-504 (h)(1) Notwithstanding any other law to the contrary, those parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection…

(2) Information made confidential by this subsection (h) shall be redacted wherever possible and nothing in this subsection (h) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information.

Similarly, subsection (i) requires the redaction of records that might allow unauthorized access to government property:

Tenn. Code. Ann. § 10-7-504(i)(1) Information that would allow a person to obtain unauthorized access to confidential information or to government property shall be maintained as confidential. For the purpose of this section, "government property" includes electronic information processing systems, telecommunication systems, or other communications systems of a governmental entity subject to this chapter. For the purpose of this section, "governmental entity" means the state of Tennessee and any county, municipality, city or other political subdivision of the state of Tennessee. Such records include:

(i)(2) Information made confidential by this subsection (i) shall be redacted wherever possible and nothing in this subsection (i) shall be used to limit or deny access to otherwise public information because a file, document, or data file contains confidential information.

Similarly, subsection (l) prevents the disclosure of any records related to the Department of Children Services investigations:

Tenn. Code. Ann. § 10-7-504 (*l*)(1) All applications, certificates, records, reports, legal documents and petitions made or information received pursuant to title 37 that directly or indirectly identifies a child or family receiving services from the department of children's services or that identifies the person who made a report of harm pursuant to § 37-1-403 or § 37-1-605 shall be confidential and shall not be open for public inspection, except as provided by §§ 37-1-131, 37-1-409, 37-1-612, 37-5-107 and 49-6-3051.

(2) The information made confidential pursuant to subdivision (*l*)(1) includes information contained in applications, certifications, records, reports, legal documents and petitions in the possession of not only the department of children's services but any state or local agency, including, but not limited to, law enforcement and the department of education.

As a last example, subsection (q) restricts the inspection of records pertaining to victims of a sexual offense:

> Tenn. Code. Ann. § 10-7-504 (q)(1) Where a defendant has pled guilty to, or has been convicted of, and has been sentenced for a sexual offense or violent sexual offense specified in § 40-39-202, the following information regarding the victim of the offense shall be treated as confidential and shall not be open for inspection by members of the public:
>
> (4) Nothing in this subsection (q) shall be used to limit or deny access to otherwise public information because a file, document, or data file contains some information made confidential by subdivision (q)(1); provided, that confidential information shall be redacted before any access is granted to a member of the public.
>
> (5) Nothing in this subsection (q) shall be construed to limit access to records by law enforcement agencies, courts, or other governmental agencies performing official functions.

In *Eldridge*, a citizen sought to inspect the telephone records of drug task force members. *Eldridge v. Putnam Cty.*, 86 S.W.3d 572, 573 (Tenn. Ct. App. 2001). The County cited Tenn. Code Ann. § 10-7-504(f) and argued either that the entire telephone record would be confidential or that if produced, the citizen would have to pay for the redaction of confidential information regarding the employees. Tenn. Code Ann. § 10-7-504(f) "protects from disclosure certain public employee information, including an employee's unpublished telephone number, bank account information, social security number, and driver license information, except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job." *Id.*

Tenn. Code Ann. § 10-7-504(f) then goes on to state that

> Information made confidential **by this subsection (f)** shall be redacted wherever possible and nothing in this subsection (f) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information.

This is in direct contrast to Tenn. Code Ann. § 10-7-504(a)(20)(C) which explicitly allows for charging for the redaction of materials made confidential by subsection (a).

> **(C) Information made confidential by this subsection (a) shall be redacted wherever possible and nothing** in this subsection (a) shall be used to limit or deny access to otherwise public information because a file, document, or data file

contains confidential information. **For purposes of this section only, it shall be presumed that redaction of such information is possible. The entity requesting the records shall pay all reasonable costs associated with redaction of materials.**

Eldridge does not apply to this case. The only issue before that court was an analysis of Tenn. Code. Ann. § 10-7-504(f). Arrest reports do not contain public employees' private information, instead it contains information made confidential pursuant to subsection (a). The Legislature deliberately placed the costs for those redactions on *the requestor*, something they chose not to do for redactions made pursuant to subsections (f), (h), (i), (l), (n), and (m) *et. al.* For the reasons above, KCSO respectfully asserts that the Court's reliance on *Eldridge* is misplaced.[6]

IMMEDIATE INSPECTION

The Court has posited that KCSO had an affirmative duty under the Tennessee Public Records Act to maintain arrest reports in a manner that makes them constantly available for inspection without the need of a requestor to wait for redactions to be completed. Respectfully, Respondent does not find a basis for this affirmative duty in the Act.

It is true that under the Act, a records custodian "shall not refuse [the] right of inspection to any citizen, unless otherwise provided by state law," and when a request is made, the records custodian "shall *promptly* make available for inspection any public record *not specifically exempt* from disclosure." Tenn. Code Ann. § 10-7-503(a)(2)(A)-(B).

However, "[t]he [Public Records Act] does not require that a records custodian make a record available immediately upon receipt of a request; dropping what the custodian is doing at the time of the request to find a record may be impractical." *Noe v. Solid Waste Bd.*, No. E2017-00255-COA-R3-CV, 2018 Tenn. App. LEXIS 496, at *9 (Ct. App. Aug. 27, 2018).

[6] Likewise, *Taylor v. Town of Lynnville*, 2017 Tenn. App. LEXIS 469, at *12-13 (Ct. App. July 13, 2017) does not address the provision of Tenn. Code. Ann. § 10-7-504(a)(20)(C).

It is clear that the Legislature does not intend for every type of public record to be immediately available for inspection. There is a specific procedure for when such immediate inspections are not practicable. Tenn. Code Ann. § 10-7-503(a)(2)(B):

> 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 for 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.

Respondent asserts that the need for redactions from a record, is exactly the type of scenario contemplated by the Legislature where a "prompt" inspection would not be "practicable." The Court of Appeals has specifically noted that "simply because the Legislature has declared [that a category documents] are public records does not mean that information in those records that is confidential cannot be redacted from the records *before producing* them in response to a public records request." *Moncier v. Harris*, No. E2016-00209-COA-R3-CV, 2018 Tenn. App. LEXIS 176, at *22 (Ct. App. Apr. 5, 2018)(where Attorney petitioner wanted to inspect unredacted civil forfeiture documents).

Indeed, whenever the Tennessee Legislature thought it necessary for records to be immediately available for inspection, the Act explicitly states it. *See for example*, Tenn. Code Ann. § 10-7-515(a)(overtly requiring county register of deeds to remove any personally identifying information on any document filed or recorded with its office.)

> The preparer of any document recorded in the office of the county register of deeds shall not place personally identifying information on any document filed or recorded in the office of the county register of deeds, other than a power of attorney. However, the county register shall not refuse to record a document for failure of the preparer to comply with the prohibition contained in this section regarding use of personally identifying information; nor shall the failure to comply with such

prohibition affect the validity or recordability of any document.

Respondent would also bring the *Jetmore* case to the Court's attention as relevant to this matter. *Jetmore v. City of Memphis*, No. W2018-01567-COA-R3-CV, 2019 Tenn. App. LEXIS 476, at *29-30 (Ct. App. Sep. 26, 2019). In that case, the City of Memphis was found to have violated the Public Records Act by not having vehicle accident reports ("crash reports") available for prompt inspection, instead only offering a few reports for inspection after redacting personal information from the reports. *Id.* In finding against the City, both the trial court and the Court of Appeals made two important determinations. First, that at the time of the action, crash reports were public records as defined by Tenn. Code Ann. § 55-10-108(f). And secondly, that the personal information contained in the reports **were not exempted from disclosure** i.e. that the information was not required to be redacted. *Id.* at *29-30.

The Court specifically noted that since the action began, the Legislature had amended Tenn. Code Ann. § 55-10-108(f) to specify that personally identifying information was not subject to disclosure. *Jetmore* at *31-32. The Court noted that this amendment only made it clearer that before the amendment, crash reports did not require redaction.

> We determine that the 2019 amendments do not apply to the instant action because Mr. Jetmore's petition was filed in the trial court in December 2017. However, we do find that the General Assembly's action in so amending the TPRA is indicative of its understanding that such disclosure of personally identifying information in accident reports was not previously prohibited in the statutory scheme.

For those two reasons, the Court found that there could be no delay in allowing a citizen to inspect crash reports, as no redactions were required. *Id.* That is not the case here. In the case at hand it is undisputed that arrest reports contain information that must be redacted prior to them being viewed by a citizen so an immediate inspection is clearly not "practicable." Respondent

asserts that there is nothing in the Tennessee Public Records Act that placed an affirmative duty to ensure that arrest reports be available for *immediate* inspection.[7]

ATTORNEY'S FEES

Although the KCSO is in the process of redacting protected information from all arrest reports in order to make arrest reports available for public inspection, the Public Records Act does not support the Court's ruling that KCSO had a duty to create and maintain arrest reports in a public accessible *redacted* format prior to this case. Therefore, Dr. Conley should not be awarded attorney's fees on this issue.

KCSO does not dispute that it did not inform Dr. Conley she would be able to inspect all arrest reports if she was willing to pay the fee for redacting the reports prior to inspection. However, the evidence developed in the hearing showed that Dr. Conley was well aware that information needed to be redacted from public records *and* that she wanted to inspect arrest reports in order to avoid paying any labor and/or copying charges. Dr. Conley testified that she was not willing to pay any redaction labor charges prior to inspecting arrest reports.

It is clear from the evidence that Dr. Conley was provided with information to seek arrest reports from the records office, including up to 30 completely free reports a day. Furthermore, KCSO has always made immediately publicly available such information as the names of inmates/arrestees, dates of arrest, types of charges and if an inmate/arrestee is being held for another agency.

---

[7] Additionally, unlike FOIA, entities in Tennessee are not required to keep public records in any particular manner, such as to make them available for electronic inspection. "The Tennessee Public Records Act does not however require a records custodian to provide public records in the manner a citizen requests," so long as the manner provided "does not distort the record or inhibit access to the record." *Wells v. A.C. Wharton*, 2005 WL 3309651, at *9 (Tenn. Ct. App. 2005).

Dr. Conley would not have availed herself of any opportunity to inspect arrest reports if it involved paying for the labor to produce the records in a redacted format. As stated above. KCSO feels that until the amendment to Public Records Act enacted on March 25, 2020, such fees would have been appropriate. It is hard to see how Dr. Conley was denied access to records she would have declined to inspect.

Therefore, for the reasons stated above, Respondent moves this Court to alter or amend its determination that Dr. Conley is entitled to attorney's fees regarding the inspection of arrest reports.

Respectfully submitted,

Amanda Lynn Morse (BPR # 032274)
Deputy Law Director
400 Main Street
Suite 612, City-Co. Bldg.
Knoxville, TN 37902
(865) 215-2327
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon Andrew Fels by U.S. Mail at 125 S. Central Street, Suite 203, Knoxville, TN 37902, Petitioner's attorney, this 8th day of May 2020.

AMANDA LYNN MORSE