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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, COUNTY OF DAVIDSON

THOMAS WESLEY	)	
Petitioner,	)	
v.	)	No. 21-1278-I
TENNESSEE DEPARTMENT OF HUMAN RESOURCES	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF
PETITION FOR ACCESS TO PUBLIC RECORDS

Petitioner Thomas Wesley hereby submits this Memorandum in Support of his Petition for Access to Public Records ("Petition"). Mr. Wesley submitted a request under the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503 *et seq.*, for a copy of a report prepared by McKinsey & Co. in connection with the State's response to the COVID-19 pandemic. Respondent Tennessee Department of Human Resources ("DOHR") denied the request in full, asserting (i) the deliberative process privilege and (ii) that the McKinsey report contained confidential information regarding operational vulnerabilities. This Court should grant the Petition and order DOHR to disclose the requested McKinsey report.

BACKGROUND

In April 2020, the State contracted with McKinsey & Company, Inc. to provide consulting services regarding the State's response to the COVID-19 pandemic. Petition, Exhibit 1 (McKinsey Contract). Pursuant to the contract, McKinsey agreed to "provide government efficiency assessment and review to identify potential performance improvements and assist the State's response to the COVID-19 pandemic including but not limited to cost efficiency, citizen and State

employee experience, overall government effectiveness, State government department review, and fiscal benchmarking and forecasting." *Id.*, ¶ A.1(a). In particular, McKinsey agreed to provide consulting services regarding the State's COVID-19 response in connection with: (i) "re-opening Tennessee," *id.*, Attachment B; (ii) the State government's operations as an employer and provider of public services, *id.*, Attachment C; and (iii) the role and operations of the "Unified Command Group," *id.*, Attachment D.[1]

In March 2021, *The Tennessean* reported that McKinsey had submitted a final report to the State in September 2020 but that the State had refused to release a copy of the report to the public.[2] On September 26, 2021, Mr. Wesley submitted a request to DOHR under the Tennessee Public Records Act for a copy of the McKinsey report. Petition, Exhibit 2. DOHR denied the request the next day, invoking the deliberative process privilege and asserting that the report "contain[s] confidential information that is subject to the exception for information regarding operational vulnerabilities pursuant to Tenn. Code Ann. § 10-7-504(i)(1)(B)." Petition, Exhibit 3.

LEGAL STANDARD

The Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503 *et seq.*, "governs the right of access to records of government agencies in this state." *Cole v. Campbell*, 968 S.W.2d 274, 275 (Tenn. 1998). "Through its provisions, the Act serves a crucial role in promoting accountability in

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[1] The "Unified Command Group" is a group appointed by the Governor "to streamline coordination across the Tennessee Emergency Management Agency (TEMA), Tennessee Department of Health and Tennessee Department of Military." *Gov. Bill Lee Establishes COVID-19 Unified Command*, Office of the Governor (Mar. 23, 2020), https://www.tn.gov/governor/news/2020/3/23/gov--bill-lee-establishes-covid-19-unified-command.html.

[2] *See* Natalie Allison, *McNally: Lee Should Release Secret Report*, The Tennessean, Mar. 19, 2021, at 5A; *see also* Natalie Allison, *Lee Won't Release McKinsey & Co. Report*, The Tennessean, Mar. 10, 2021, at 4A.

government through public oversight of governmental activities." *Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002).

The Act defines "public records" broadly to include "all documents … regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10–7–503(a)(1)(A); *see also Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) (describing the Public Records Act as "an all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity" (quoting *Bd. of Ed. of Memphis City Sch. v. Memphis Pub. Co.*, 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979)). Under the Act, all public records "shall, at all times during business hours, … 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." Tenn. Code Ann. § 10-7-503(2)(A). The Act requires custodians of public records to "promptly make available for inspection any public record not specifically exempt from disclosure" and to respond to the request in no later than seven business days. *Id.* § 10-7-503(2)(B).

The Public Records Act enumerates statutory exceptions to disclosure. *Id.* §§ 10-7-503(d)-(e) & 504. Of relevance here, the Public Records Act provides that the right of public access shall not be denied "unless otherwise provided by state law." *Id.* § 10-7-503(a)(2). The Act also provides that "[i]nformation that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity" "shall be treated as confidential." *Id.* §§ 10-7-504(i)(1)(B) & (i)(1). The government bears the burden of proving by a preponderance of evidence that the withholding of the requested record is justified under one of the exceptions. *Id*. § 10-7-505(c). "Unless it is clear that a record or class

of records is legally exempt from disclosure, the requested record must be produced." *Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346, 360 (Tenn. 2008). "There is a presumption of openness for government records," *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 864 (Tenn. 2016), and the Public Records Act is construed "liberally in favor of 'the fullest possible public access to public records,'" *Memphis Publ'g Co.*, 87 S.W.3d at 79 (quoting Tenn. Code Ann. § 10-7-505(d)).

A requester may seek judicial review of a denial of a records request. Tenn. Code Ann. § 10-7-505(b). If the trial court finds that the government entity "knew that the record was a public record and willfully refused to disclose it," it may award attorney's fees and costs to the requester. *Tennessean*, 485 S.W.3d at 864–65 (citing Tenn. Code Ann. § 10-7-505(g)).

ARGUMENT

The McKinsey report is indisputably a "public record" under the Public Records Act because it was "made or received … in connection with the transaction of official business by [a] governmental entity." Tenn. Code Ann. § 10-7-503(a)(1)(A)(i). DOHR, however, denied Mr. Wesley access to the McKinsey report on the asserted bases of the deliberative process privilege and an exception for "operational vulnerabilities" under Tenn. Code Ann. § 10-7-504(i)(1)(B). Neither basis is availing.

I. The deliberative process privilege does not justify denial of public access to the McKinsey report.

Although the Public Records Act specifically excepts more than forty categories of records from its public access mandate, *see Tennessean*, 485 S.W.3d at 865 (citing Tenn. Code Ann. §§ 10-7-503(d)–(e) & 504), it includes no specific exception for the deliberative process privilege. Thus, DOHR's invocation of the deliberative process privilege must rely on the "general exception," *Tennessean*, 485 S.W.3d at 865, that the right of public access shall not be denied "unless otherwise

provided by state law," Tenn. Code Ann. § 10-7-503(a)(2). "'State law' includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations." *Tennessean*, 485 S.W.3d at 865–66.

A. There is no provision identifying the deliberative process privilege in the State's Constitution, statutes, court rules, or administrative rules and regulations, and the Tennessee Supreme Court has not recognized the privilege in any of its decisions. The Court of Appeals, however, discussed the deliberative process privilege in *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). There, the court described the privilege as "[p]rotecting the confidentiality of conversations and deliberations among high government officials." *Id.* at 578. The court concluded that "[w]hether the 'deliberative process privilege' may be invoked depends on the governmental official or officials involved." *Id.* It noted that the Governor, for example, "may properly invoke this privilege, should he or she care to, in meetings with staff or cabinet members," but that the assistant district attorney general could not. *Id.* at 578–79. And the court expressly cautioned that "the deliberative process privilege must be applied cautiously because it could become the exception that swallows up the rule favoring governmental openness and accountability." *Id.* at 578. "If governmental employees at any level could claim the privilege, Tennessee's public records statutes and open meetings law would become little more than empty shells." *Id.* Accordingly, the Court of Appeals held that the contents of an assistant district attorney general's file in preparing for a State proceeding were not within the scope of the deliberative process privilege. *Id.* at 579.

Since *Swift*, the Court of Appeals has applied the deliberative process privilege only once, in an unreported decision, *Davidson v. Bredesen*, No. M2012-02374-COA-R3CV, 2013 WL 5872286 (Tenn. Ct. App. Oct. 29, 2013). In that case, the court held that the records at issue—notes from a deputy legal counsel regarding meetings and calls with high government officials—

were within the scope of the deliberative process privilege because they reflected "communications between high government officials and those who advise and assist them in the performance of their official duties," and the bulk of the records contained "no facts, only deliberations." *Id.* at *5.[3]

The McKinsey report is not within the scope of the privilege described by the Court of Appeals because it does not reflect conversations or deliberations among high government officials. In discussing the deliberative process privilege, the Court of Appeals emphasized that the privilege extended only to communications and deliberations among "high government officials." *Swift*, 159 S.W.3d at 578 (stating that "[w]hether the 'deliberative process privilege' may be invoked depends on the government official or officials involved" and rejecting the notion that the privilege would apply to "governmental employees at any level"); *see also Davidson*, 2013 WL 5872286, at *4.

Further, in contrast to the records at issue in *Davidson*, which contained "no facts, only deliberations," *Davidson*, 2013 WL 5872286, at *5, the report is largely (if not wholly) factual. According to the terms of the State's contract with McKinsey, the McKinsey report includes case studies, examples, data, and reports. For example, regarding "re-opening Tennessee," McKinsey provided the State with "[o]ngoing data and reports on the re-opening situation across Tennessee," Petition, Exhibit 1 at Attachment B, ¶ 1.2, and "case studies and integrated healthcare, economic, and government services data from Tennessee and elsewhere," *id.* at Attachment B, ¶ 1.0. Regarding the State's government operations, McKinsey discussed "existing State employee

[3] The Court of Appeals also has mentioned the deliberative process privilege in *Coleman v. Kisber*, 338 S.W.3d 895 (Tenn. Ct. App. 2010). There, the Court of Appeals noted that the trial court had found that the State had not adopted a deliberative process privilege. *Id.* at 909. However, the Court of Appeals declined to address the issue because it affirmed the trial court on another ground. *Id.*

remote work across State government" and "existing data and practices" on in-person services, and provided case studies and examples. *Id.* at Attachment C ¶ 1.2. And regarding support for the Unified Command Group, McKinsey discussed "[h]ealthcare worker safety protocols, patient protocols, distribution of PPE." *Id.* at Attachment D, ¶ 1.1. Importantly, the contract was clear that "[t]he information included in the Deliverables … will not contain, nor are the Deliverables provided for the purpose of constituting or informing, policy judgments or advice." *Id.* at A.7. The factual information in the McKinsey report is not deliberative material warranting the application of the deliberative process privilege. *See Davidson*, 2013 WL 5872286, at *5; *accord Env't Prot. Agency v. Mink*, 410 U.S. 73, 91 (1973) (stating that the deliberative process privilege incorporated in exemption 5 of the Freedom of Information Act does not protect "purely factual material contained in deliberative memoranda and severable from its context").

Moreover, in addressing the deliberative process privilege under Tennessee law, the Court of Appeals in *Swift* relied on a U.S. Supreme Court case interpreting the deliberative process privilege incorporated in exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. *See Swift*, 159 S.W.3d at 578 (citing *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984)). Under FOIA exemption 5, "[t]he deliberative process privilege shields documents that reflect an agency's preliminary thinking about a problem, as opposed to its final decision about it." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021). The privilege "does not apply … to documents that embody a final decision, because once a decision has been made, the deliberations are done." *Id.* "The privilege therefore distinguishes between predecisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not." *Id.* at 785–86. Thus, here, the

McKinsey report additionally does not fall within the deliberative process privilege because it is not a draft report, but a final one, providing McKinsey's final analysis.

In sum, the report does not fall within the scope of the deliberative process privilege recognized by the Court of Appeals. DOHR thus violated the Public Records Act by denying Mr. Wesley's request.

B. Where a record contains both excepted and non-excepted material, the Public Records Act provides that "[i]nformation made confidential by state law shall be redacted whenever possible, and the redacted record shall be made available for inspection and copying." Tenn. Code Ann. § 10-7-503(a)(5); *see Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) ("An entire [document] should not be deemed exempt simply because it contains some exempt information. Rather, redaction of the exempt information is appropriate."). Here, the terms of the State's contract with McKinsey make clear that the report is largely, if not wholly, factual and non-deliberative. *See supra* pp. 6–7. But to the extent that the McKinsey report includes any information covered by a deliberative process privilege, DOHR should have segregated and redacted that information and disclosed the redacted report to Mr. Wesley. DOHR's blanket denial of access to the McKinsey report on the basis of the deliberative process privilege was unlawful.

II. Section 10-7-504(i)(1)(B) does not justify the denial of access to the McKinsey report.

In denying Mr. Wesley's request, DOHR also stated that the McKinsey report "contain[s] confidential information" regarding "operational vulnerabilities" that is excepted from the Public Records Act pursuant to Tenn. Code Ann. § 10-7-504(i)(1)(B). Petition, Exhibit 3. DOHR's invocation of § 10-7-504(i)(1)(B) is meritless.

Section 10-7-504(i)(1) provides that "[i]nformation that would allow a person to obtain unauthorized access to confidential information or to government property shall be maintained as confidential." The statute does not define "confidential information," but it states that

"'government property' includes electronic information processing systems, telecommunication systems, or other communications systems of a governmental entity." *Id.* § 10-7-504(i)(1).[4] The statute specifies that such records include:

> (A) Plans, security codes, passwords, combinations, or computer programs used to protect electronic information and government property;
>
> (B) Information that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity; and
>
> (C) Information that could be used to disrupt, interfere with, or gain unauthorized access to electronic information or government property.

Id.

The McKinsey report is not within the scope of information deemed confidential under § 10-7-504(i)(1)(B). For starters, it is unlikely that the information in the McKinsey report identifies "areas of structural and operational vulnerability" that would interfere with or disrupt services in the State. As explained above, McKinsey provided the State with case studies, factual analyses, and data and reports regarding re-opening the State, the State's government operations, and the Unified Command Group. Moreover, read in context, subsection B—like the rest of section 10-7-504(i)—plainly concerns information about *computer* systems or other communications systems, not information such as that contained in the McKinsey report.

First, the preamble of the law states that the "narrow limitation" to the Public Records Act created by section 504(i) was "necessary" based on "[t]he General Assembly['s] find[ing] that there is a danger of computer crime and other abuse of electronic data management programs and

[4] "Governmental entity" means "the state of Tennessee and any county, municipality, city or other political subdivision of the state of Tennessee." Tenn. Code Ann. § 10-7-504(i)(1).

resources used by public entities in the State of Tennessee." 2001 Tennessee Laws Pub. Ch. 259 (S.B. 1473), 102nd Gen. Assemb. (May 22, 2001).

Second, subsection B is a subset of the information described in § 10-7-504(i)(1)—*i.e.*, information that would provide a person with "unauthorized access" to "government property" defined as the "electronic information processing systems, telecommunication systems, or other communications systems of a governmental entity." Moreover, subsection B is sandwiched between two subsections that expressly address "electronic information" and "government property." *See id.* §§ 10-7-504(i)(1)(A), (C).

Third, in an opinion letter, the Office of Open Records Counsel explained that "the General Assembly's sole intent in enacting [Tenn. Code Ann. § 10-7-504(i)(1)(B)] was protecting 'the technical infrastructure security coding of the state's computer system … [and the] personal credit and debit and personal identification numbers' of anyone doing business with the state or a political subdivision of the state." Letter from Elisha D. Hodge, Office of Open Records Counsel at 2 (Jan. 13, 2009) (quoting *Public Records: Hearing on H.B. 867 Before the House of Representatives*, 102nd Sess. (May 14, 2001) (statement of Rep. Matthew Kisber, Member, Tennessee General Assembly)), *available at* https://comptroller.tn.gov/content/200bdam/cot/orc/documents/oorc/advisory-opinions/0901courtroomfootage.pdf. When he introduced the bill on the House floor, Representative Kisber explained:

> What this bill proposes to do is to place the technical infrastructure security coding of the state's computer systems under confidential status. The reason this is necessary is to protect the state's information from computer hackers and reduce the possibility the computer system and network can be compromised.

Id. (quoting Rep. Kisber). And the Legislative Record describes the House and Senate Bills preceding the enactment of § 10-7-504(i) as bills to "[e]xclude[] computer codes and computer access information and other certain information of state or political subdivision thereof from

definition of public records." S.B. 1473, Tenn. Legis. Rec. at 100, 102nd Gen. Assemb.; H.B. 0867, Tenn. Legis. Rec.at 249, 102nd Gen. Assemb.

Here, the consulting services that McKinsey provided did not concern information regarding access to the State's computer systems or technical networks. Nothing in the government contract identifies a topic relating to the technical infrastructure security coding of State computer systems. Rather, the McKinsey report was a "government efficiency assessment and review to identify potential performance improvements and assist the State's response to the COVID-19 pandemic." Petition, Exhibit 1 (McKinsey Contract), ¶ A.1(a). Because the McKinsey report does not include information within the scope of § 10-7-504(i)(1)(B), DOHR's denial of public access to the McKinsey report was without basis.

Where a requested record contains some information that falls within the scope of Tenn. Code Ann. § 10-7-504(i)(1), the government is not free to deny the request in its entirety. Rather, the document containing such information "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." Tenn. Code Ann. § 10-7-504(i)(2). Thus, DOHR's denial of access to the entire McKinsey report on the basis that it contains confidential information under § 10-7-504(i) contravenes the plain language of that statutory provision. If the report actually contains any information within the scope of § 10-7-504(i)(1)(B), DOHR was required to redact that information and disclose the redacted report to Mr. Wesley.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and order that the requested McKinsey report be disclosed. Petitioner further respectfully requests that pursuant to Tenn. Code

Ann. § 10-7-505(b), this Court order DOHR to immediately appear and show cause as to why the Petition should not be granted.

Petitioner also has requested attorneys' fees pursuant to Tenn. Code Ann. § 10-7-505(g). Petitioner respectfully requests that a hearing and memoranda on the issue of attorneys' fees take place following the Court's ruling on the issue of DOHR's denial of public access.

Dated: December 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via mail and e-mail to the following on this 17th day of December, 2021.

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