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

JOSE MARCUS PERRUSQUIA, Petitioner, v. THE CITY OF MEMPHIS, Respondent.	No.

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

Petitioner Jose Marcus Perrusquia submits this Memorandum of Law in Support of his Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access (the "Petition"). For the reasons set forth in the Petition and herein, the Court should grant the Petition, order Respondent the City of Memphis (the "City") to immediately produce the requested public records to Mr. Perrusquia, and grant Mr. Perrusquia costs, including reasonable attorneys' fees.

INTRODUCTION

Law enforcement officers are public servants. It is axiomatic that the public has an interest in overseeing their actions, as well as the actions of the government agencies responsible for their supervision. The City and its Memphis Police Department ("MPD") created a Performance Enhancement Program ("PEP") "to improve the performance of [MPD] members through coaching, training, and

professional development." (Pet. ¶ 8; McAdoo Decl. Attach. 1 at 2.)[1] A key component of the PEP is written Performance Improvement Plans in which an MPD employee, their supervisor, and their work station commander all agree upon a course of action to help the MPD employee improve their on-the-job performance. (Pet. ¶ 8; McAdoo Decl. Attach. 1 at 3, 6-8.)

On December 26, 2020, Mr. Perrusquia requested written Performance Improvement Plans for three MPD officers—Officer Colin Berryhill, Officer Eric Kelly, and Officer Justin Vazeii—who had been the subject of MPD disciplinary proceedings. (Pet. ¶ 5; Perrusquia Decl. ¶ 6, Attach. 1 at 1, 3, 5.)[2] The City denied Mr. Perrusquia's public records request for these Performance Improvement Plans, claiming that "the records requested are exempt from disclosure" pursuant to Tenn. Code Ann. § 10-7-504. (Pet. ¶ 6; Perrusquia Decl. ¶ 7, Attach. 1 at 1, 3, 5.)

There is no exception for records pertaining to proactive efforts by the government to improve the job performance of its employees in the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-501, *et seq.*, (the "TPRA"), or any other state law. To the extent the City may argue that the requested public records are exempt pursuant to Tenn. Code Ann. § 10-7-504(d), a narrow exemption for limited categories of employee assistance program records, that exception does not apply to the requested records. Accordingly, the City's refusal to satisfy Petitioner's public

[1] Mr. McAdoo's Declaration is Exhibit B to the Petition. Pincites are to the pagination of the underlying document, if applicable, and do not take into account the exhibit cover page.

[2] Mr. Perrusquia's Declaration is Exhibit A to the Petition.

records requests is without foundation in law and the Court should order the City to produce the requested Performance Improvement Plans to Mr. Perrusquia, and award Mr. Perrusquia costs and attorneys' fees in connection with this Petition.

FACTUAL BACKGROUND

The MPD Performance Enhancement Program

The City describes the Performance Enhancement Program as

> a structured system designed to identify and manage behaviors that result in performance related problems. It is a non-disciplinary system that is designed to improve the performance of Department members through coaching, training, and professional development as described in this policy. The intent of PEP is to provide non-disciplinary intervention, as needed, to assist members in order to provide the highest level of service and satisfaction to the public.

(Pet. ¶ 8; McAdoo Decl. Attach. 1 at 2.) Whether it is remedial driving education for officers who have had numerous accidents, or additional training on the proper use of Tasers, the PEP is intended to offer targeted measures to make sure MPD officers are able to do their job to the best of their ability. At the heart of the PEP are two features: a structured, objective means for identifying officer performance problems, and a written plan to help the officer overcome those performance issues.

The structured process for identifying MPD officers who require PEP assistance relies upon eleven "performance indicators" that are subdivided into "PEP Indicator Entries." (Pet. ¶¶ 9-10; McAdoo Decl. Attach. 1 at 3-4.) The PEP "will identify and evaluate the behavior of members who have been involved in [specified] incidents" within specified time frames. (Pet. ¶ 10; Perrusquia Decl.

Attach. 1 at 4.)[3] In other words, once an MPD officer has met a particular threshold for a specified category of incidents, the PEP program process is initiated. Among the categories that are identified and tracked by the PEP are non-lethal use of force, criminal arrests and investigations of subject officer, traffic crashes, departmental disciplinary action, and documented citizen-initiated complaints. (Pet. ¶ 9; McAdoo Decl. Attach. 1 at 3.) The threshold for use of force by an MPD officer is three incidents within a three-month period. (Pet. ¶ 10; McAdoo Decl. Attach. 1 at 3.) For traffic crashes, the threshold is two incidents within a twelve-month period. (Pet. ¶ 10; McAdoo Decl. Attach. 1 at 3.) The thresholds related specifically to violations of MPD rules are tied to "allegations of violations," not just a finding by MPD that the rule was violated. (McAdoo Decl. Attach. 1 at 3.) For example, the thresholds for DR 104 Personal Conduct, DR 107 Courtesy, and DR 301 Excessive Force/Unnecessary are all two alleged violations in a six-month period. (*Id.*)

The MPD PEP coordinator checks for Indicator Entries daily, and "will review the surpassed indicators and associated factor information to determine if a pattern of at-risk behavior exists."[4] (Pet. ¶ 13; McAdoo Decl. Attach. 1 at 6.) "If a

[3] The MPD Manual defines an "Indicator" in the PEP as "Behaviors tracked by PEP assigned thresholds which begin from the date of the first event and continue through a 3, 6, 12, or 18 month time period." (McAdoo Decl. Attach. 1 at 2.)

[4] The MPD Manual defines "associated factors" as "[e]vents that will be considered in order to provide a comprehensive review of a member, once that member has surpassed indicator thresholds." (Pet. ¶ 11; McAdoo Decl. Attach. 1 at 2.)

pattern appears probable" for an officer, the PEP Coordinator will refer the matter to the officer's workstation commander who assigns the appropriate supervisor to determine "if or what intervention is needed." (Pet. ¶¶ 13-14; McAdoo Decl. Attach. 1 at 6.) An "intervention" is defined in the MPD Manual as "[a] proactive management tool intended to improve the efficiency of members and the Department as a whole." (Pet. ¶ 13; McAdoo Decl. Attach. 1 at 2.)

When a Performance Improvement Plan is agreed upon by the officer, supervisor, and workstation commander, the plan's goal is to

> reduce or eliminate identified behaviors that contribute to PEP Indicator Entries. A performance improvement plan must describe the behaviors to be addressed, actions designed to change those behaviors, measures to enable both the member and supervisor to gauge progress and a time-line for reaching the objective of changing, moderating, or eliminating the behavior(s).

(Pet. ¶ 16; McAdoo Decl. Attach. 1 at 3.) The supervisor then monitors the MPD employee's performance after the intervention and Performance Improvement Plan are effectuated and provides follow-up reports three and six months after the initial intervention to the workstation commander. (Pet. ¶ 19; McAdoo Decl. Attach. 1 at 6.) If an MPD employee either does not sign the plan or otherwise refuses to participate, they are "immediately referred to a counseling panel" comprised of the MPD employee's supervisor, workstation commander, and deputy chief. (Pet. ¶¶ 17-18, 22-23; McAdoo Decl. Attach. 1 at 3, 6, 8.)

The Administrative Investigations of Officers Berryhill, Kelly, and Vazeii

All of the officers for whom Mr. Perrusquia requested Performance Improvement Plans were the subject of administrative investigations by MPD's Internal Affairs Department ("MPD Internal Affairs"), which is part of MPD's Inspectional Services Bureau ("ISB").[5] (Pet. ¶¶37, 44, 50.)

The Investigation of Officer Berryhill

MPD Internal Affairs investigated Officer Berryhill for use of excessive force with his Conducted Electrical Weapon, or Taser, during three incidents from May 2018 to April 2019. (Pet. ¶ 37; Perrusquia Decl. Attach. 2 at 1-2.) In the first incident, Officer Berryhill tased a juvenile in the back while he was walking away from Officer Berryhill. (Pet. ¶ 38; Perrusquia Decl. Attach. 2 at 17.) In a second incident, Officer Berryhill "unneccesar[ily] and needless[ly]" tased an arrestee when there were at least four other officers on the scene in "full control of [the arrestee's] arms and hands." (Pet. ¶ 39; Perrusquia Decl. Attach. 2 at 12.) And in a third incident, Officer Berryhill tased a handcuffed arrestee who had reached to pull up his pants. (Pet. ¶ 40; Perrusquia Decl. Attach. 2 at 6–7.) After this tasing, another MPD officer told Officer Berryhill that he had earned the nickname "Taser Face." (Pet. ¶ 41; Perrusquia Decl. Attach. 2 at 6.)

In 2019, MPD Internal Affairs found that Officer Berryhill's use of his Taser in all three instances violated MPD Rules involving Excessive Force/Unnecessary

[5] Officer Kelly was also the subject of an administrative investigation by MPD's Security Squad, which is also a part of MPD's ISB. (Pet. ¶ 46.)

Force and compliance with MPD's weapons regulations. (Pet. ¶ 42; Perrusquia Decl. Attach. 2 at 23.) Officer Berryhill resigned from the Memphis Police Department on October 29, 2020, one day before the administrative hearing on the Statement of Charges against him. (Pet. ¶ 43; Perrusquia Decl. Attach. 3 at 1-2.).

The Investigations of Officer Kelly

Officer Kelly was the subject of two administrative investigations by ISB. The first, I2019-003 ("Kelly Investigation I"), was for use of excessive force and not complying with regulations on reporting the response to resistance to arrest during an incident on January 5, 2019. (Pet. ¶ 44; Perrusquia Decl. Attach. 4 at 1.) Officer Kelly was alleged to have knelt on an arrestee's shoulder in response to resistance. (Pet. ¶ 44; Perrusquia Decl. Attach. 4 at 7.) MPD Internal Affairs found that Officer Kelly did not use excessive force but failed to comply with regulations in reporting his response to resistance to the arrest. (Pet. ¶ 45; Perrusquia Decl. Attach. 4 at 15.)

Officer Kelly was the subject of another administrative investigation, S2019-015 ("Kelly Investigation II"), this one conducted by the ISB Security Squad, for violating a host of MPD Rules: DR 104 Personal Conduct, DR 304 Compromising Criminal Cases, DR 108 Truthfulness, DR 608 Accessing Reports and Records With No Legitimate Purpose, DR 903 Unauthorized Passengers, DR 125 Member Under Investigation, and DR 110 Consorting With Persons Of Bad Or Criminal Reputation, in connection with a relationship he had with a murder suspect over several months in 2018. (Pet. ¶ 46; Perrusquia Decl. Attach. 5 at 1.) Officer Kelly

abruptly retired on November 8, 2019 before his continued Administrative Hearing related to these charges. (Pet. ¶ 47; Perrusquia Decl. Attach. 5 at 12-14.) On August 27, 2020, Officer Kelly was criminally indicted on three charges of Official Misconduct by the Shelby County Grand Jury based on the same allegations. (Pet. ¶ 48; Perrusquia Decl. Attach. 6 at 1-4.) On September 23, 2021, Office Kelly pled guilty to one count of Official Misconduct and entered into a judicial diversion program. (Pet. ¶ 49; Perrusquia Decl. Attach. 7 at 3-8.)

The Investigation of Officer Vazeii

Officer Vazeii was subject to an administrative investigation by MPD Internal Affairs, I2019-028 ("Vazeii Investigation") for allegedly violating MPD's Rules during a July 31, 2019 incident, including DR 101 Compliance with Regulations to wit: Search and Seizure ("Search and Seizure"), DR 120 Neglect of Duty ("Neglect of Duty"), and DR 130 Inventory and Processing Recovered Property ("Inventory & Processing"). (Pet. ¶ 50; Perrusquia Decl. Attach. 8 at 1, 13.) Officer Vazeii found a bag of marijuana in the pocket of a detainee but did not arrest him. (Pet. ¶ 51; Perrusquia Decl. Attach. 8 at 3.) It was also alleged by the complainant that Officer Vazeii improperly conducted a body cavity search. (Perrusquia Decl. Attach. 8 at 2.)

MPD Internal Affairs initially found that Officer Vazeii was not in violation of its Search and Seizure regulation but was in violation of the Neglect of Duty and Inventory & Processing regulations. (*Id.* at 13.) A subsequent administrative hearing on February 11, 2020 affirmed the finding that Officer Vazeii had violated

the Neglect of Duty regulation, but not the Inventory & Processing Recovered Property regulation. (*Id*. at 22.) Officer Vazeii was suspended without pay for eight days. (*Id.* at 22-23.)

Mr. Perrusquia's Public Records Requests

On December 26, 2020, pursuant to the TPRA, Mr. Perrusquia requested that the City provide him with "all written Performance Improvement Plans for officer Colin Berryhill." (Pet. ¶ 5; Perrusquia Decl. ¶ 6, Attach. 1 at 1.). On the same day, Mr. Perrusquia submitted identical requests for "former MPD officer Eric Kelly" and "officer Justin Vazeii." (Pet. ¶ 5; Perrusquia Decl. ¶ 6, Attach. 1 at 3, 5.) On February 2, 2021, the City responded to all three requests by claiming that "the records requested are exempt from disclosure" under Tenn. Code Ann. § 10-7-504. (Pet. ¶ 6 at Perrusquia Decl. ¶ 7, Attach. 1 at 1, 3, 5.) The City did not assert that the requested public records do not exist. This action followed.

ARGUMENT

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

"The Public Records Act reflects the legislature's effort to … advance[] the best interests of the public." *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004). "Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007) (citing *Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74-75 (Tenn. 2002)). The purpose of the

TPRA is "to apprise the public about the goings-on of its governmental bodies." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 687 (Tenn. 1994); *see also Cherokee Child. & Fam. Servs.*, 87 S.W.3d at 74 (citation omitted) (the TPRA "serves a crucial role in promoting accountability in government through public oversight of governmental activities").

To further this important policy goal, the General Assembly has specified that the TPRA "shall be broadly construed so as to give the fullest possible access to public records." Tenn. Code Ann. § 10-7-505(d). Thus, Tennessee's courts have held that the Public Records Act is a "clear mandate in favor of disclosure." *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *see also Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) (citing *City of Memphis*, 871 S.W.2d at 684) (explaining that the legislative mandate of the Public Records Act [is] very broad and … requires disclosure of government records even when there are significant countervailing considerations"). Consistent with this broad construction, public records are presumptively open and "the burden is placed on the governmental agency to justify nondisclosure of the records." *City of Memphis*, 871 S.W.2d at 684 (citing Tenn. Code § 10-7- 505(c)).

To fully effectuate the broad legislative mandate in favor of disclosure, exemptions to the TPRA must be narrowly construed. *See Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (holding that Florida public records act "is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose")

(citation omitted);[6] *Arkansas Dep't of Health v. Westark Christian Action Council*, 910 S.W.2d 199, 201 (1995) (holding that "[i]n conjunction with" Arkansas's requirement that its public record law be "liberally construed ... to accomplish its broad and laudable purpose," the Arkansas Supreme Court "narrowly construe[s] exceptions to the FOIA to counterbalance the self-protective instincts of the government bureaucracy") (citations omitted); *Swickard v. Wayne Cty. Med. Exam'r*, 475 N.W.2d 304, 307–08 (Mich. 1991) ("[W]e keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." (citation omitted)).[7]

II. The Petition should be granted because no TPRA exemption applies to the Performance Improvement Plans.

The City improperly denied Mr. Perrusquia's public records requests for Officers Berryhill, Kelly, and Vazeii's Performance Improvement Plans. The City asserted that the requested Performance Improvement Plans were exempt under Tenn. Code Ann. § 10-7-504, which contains approximately sixty distinct exemptions to the TPRA, covering a broad range of topics. (Pet. ¶ 6; Perrusquia Decl. Attach. 1 at 1, 3, 5.) As best as Petitioner can tell, the City will argue that the legal basis for withholding the requested public records is Tenn. Code Ann. § 10-7-

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[6] The Tennessee Supreme Court has said that Florida's public records law is similar to the TPRA. *Cherokee Children & Family Servs.*, 87 S.W.3d at 74; *see also Elec. Power Bd.*, 979 S.W.2d at 302 (citing Florida case law).

[7] Decisions cited in this Memorandum of Law that are unpublished or from outside Tennessee are attached as Exhibit A.

504(d) (hereinafter the "EAP Provision"), which provides for the confidentiality of "employee assistance program" ("EAP") records in specified circumstances.

However, a comparison of MPD's Performance Enhancement Program with the language of the EAP Provision and the City's actual EAP demonstrates that the exemption for EAP records does not apply here. Indeed, to hold otherwise would lead to an absurd result and would circumvent the purpose and intent of the EAP Provision.

In particular, the Performance Enhancement Program is missing two critical requirements for application of the EAP Provision. First, the exemption only applies to EAPs as defined by the statute, and the MPD Performance Enhancement Program does not meet that definition. Second, the EAP Provision requires that qualifying EAP records must be "maintained separately from personnel and other records ... open for inspection" to be exempt from the TPRA; Performance Improvement Plans are not maintained in this manner. *Id.* Since the Performance Enhancement Program does not meet the definition of an EAP and Performance Improvement Plans are not maintained separately as required by the EAP Provision, Tenn. Code Ann. § 10-7-504(d) does not except the requested public records from disclosure to Mr. Perrusquia.

A. The Performance Enhancement Program Does Not Meet the Definition of an EAP.

The EAP Provision only applies to an "employee assistance program," which it defines as

> any program that provides counseling, problem identification, intervention, assessment, or referral ***for appropriate diagnosis and treatment, and follow-up services to assist employees*** ... ***who are impaired by personal concerns*** including, but not limited to, health, marital, family, financial, alcohol, drug, legal, emotional, stress or other personal concerns which may adversely affect employee job performance.

Tenn. Code Ann. § 10-7-504(d) (emphasis added). A critical component of this definition is the limitation that the services identified are for employees "who are impaired by personal concerns."[8] *Id.* The City has an EAP: CONCERN, which meets this definition and is focused on helping City employees, including MPD employees, with personal concerns. (Pet. ¶¶ 29-31; McAdoo Decl. Attach. 5, 6.) But the Performance Enhancement Program is not similarly limited and it focuses, instead, on coaching, training, and professional development for MPD's officers. A finding that the EAP Provision applies to MPD's Performance Enhancement Program and its Performance Improvement Plans would be contrary to the language of the provision and common sense. *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 508 (Tenn. 2010) ("[W]e are required to interpret all statutes in a way that makes sense rather than nonsense.") (citations omitted); *Green v. Green*, 293 S.W.3d 493, 507 (Tenn. 2009) (explaining that courts "must (1) give [a statute's]

[8] The legislative history underscores that an EAP is established to address employee personal concerns. (McAdoo Decl. Attach. 9 at 1 (bill summary describes an EAP as "any program which provides counseling, treatment and follow-up services to assist individuals impaired by health, drug, alcohol or mental problems"); McAdoo Decl. Attach. 10 at 21:13-20 (statement by bill sponsor on the House floor explaining that EAPs are "any program that provides counseling, problem identification, intervention, assessment—on and on—regarding the health, marriage, drug, alcohol, or mental health problems").)

words their natural and ordinary meaning, (2) consider them in the context of the entire statute, and (3) presume that the General Assembly intended that each word be given full effect") (citations omitted)*; State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979) ("It has been said that statutes must be construed 'with the saving grace of common sense.'") (citation omitted).

"CONCERN Employee Assistance Program (EAP) is a workplace program designed to identify and resolve production and operational problems associated with employees who are affected by personal problems such as stress, health, marital, family, financial, alcohol and drug, legal, gambling, emotional and other problems." (Pet. ¶ 30; McAdoo Decl. Attach. 6 at 1.) City employees and their partners who are "experiencing emotional or mental distress that would not require inpatient care [are] likely appropriate for EAP counseling." (Pet. ¶ 31; McAdoo Decl. Attach. 6 at 1.) CONCERN falls squarely within the definition of an EAP in Tenn. Code Ann. § 10-7-504(d).

In contrast with CONCERN, the Performance Enhancement Program "is a structured system designed to identify and manage behaviors that result in performance related problems." (Pet. ¶ 8; McAdoo Decl. Attach. 1 at 2.) "It is a non-disciplinary system that is designed to improve the performance of [MPD] members through coaching, training, and professional development." (Pet. ¶ 8; McAdoo Decl. Attach. 1 at 2; *see also* McAdoo Decl. Attach. 1 at 2 (defining a PEP "intervention" as "[a] proactive management tool").) The Performance Enhancement Program is thus not an EAP under the EAP Provision.

In fact, the EAP Provision provides examples of the types of personal concerns that trigger its application—none of which match with the MPD Performance Enhancement Program. The EAP definition in Tenn. Code Ann. § 10-7-504(d) cites "health, marital, family, financial, alcohol, drug, legal, emotional, stress or other personal concerns which may adversely affect employee job performance" as a requisite for a program to be an EAP under Tenn. Code Ann. § 10-7-504(d). As the EAP Provision bill sponsor explained, "We're not talking about a program that has to do with operations. What we are talking about is a program that helps to mend bleeding hearts, to mend broken spirits." (Pet. ¶ 35; McAdoo Decl. Attach. 10 6:14-16.) The MPD's Manual's section on the Performance Enhancement Program, however, does not address any of these personal concerns. Instead, other than general references to intervention resources available to MPD personnel outside of MPD through the City's *actual* EAP—CONCERN—and a prefatory statement regarding assisting "members who show symptoms of job stress or personal problems,"[9] the MPD Manual makes plain that the focus of the program is ensuring effective job performance, not assisting officers dealing with personal concerns and therefore, the Performance Enhancement Program is not an EAP and its Performance Improvement Plans would not be excepted from the TPRA pursuant to Tenn. Code Ann. § 10-7-504(d).

This is made even more evident in various portions of the PEP's description. The City defines "INTERVENTION" under the Performance Enhancement Program

[9] (McAdoo Decl. Attach. 1 at 2, 10.)

as "[a] proactive management tool intended to improve the efficiency of members and the Department as a whole." (McAdoo Decl. Attach. 1 at 2.) Similarly, the City's PEP definition of "COUNSELING" constitutes "a meeting between a supervisor and subordinate in a non-punitive setting to discuss the subordinate's performance," which "employ[s] techniques designed to reinforce good performance, improve poor performance, and when appropriate, correct behaviors that precipitate or contribute to Indicator Entries." (*Id.*) Neither of these definitions focus on the personal concerns of the MPD officers involved. The exclusive focus is on the MPD Officer's performance on the job and their efficiency.

Moreover, the predominant focus of the Intervention Resources described in the MPD Manual are job skills unrelated to personal concerns, including remedial driving, cultural awareness, conflict resolution, communications skills, professionalism and ethics, policing with honor, verbal judo, remedial firearms training, tactical response to critical incidents training, and defensive tactics training. (*Id.* at 9-10.)

The fact that some of the Intervention Resources reference the City's EAP does not alter the conclusion that the Performance Enhancement Program is not an EAP itself. If the Performance Enhancement Program was an EAP because of these references, MPD's entire discipline system would be considered an EAP for the same reason. For example, when a DR 137 Domestic Violence violation is sustained, the employee is "required to attend an approved domestic violence and or anger management treatment program via CONCERN or other established

treatment programs…" (Pet. ¶ 33; McAdoo Decl. Attach. 7 at 12.) Similarly, when an employee is found to have violated DR 121 Narcotics, "[t]he member will be required to attend an approved drug treatment program via CONCERN or other established treatment programs…" (Pet. ¶ 33; McAdoo Decl. Attach. 7 at 9; *see also* McAdoo Decl. Attach. 7 at 6 (explaining that if a MPD member violates DR 113 Alcoholic Beverages "[t]he members will be required to attend an approved alcohol treatment program via CONCERN"); Pet. ¶ 32 (discussing same).) It would be absurd to find, based on these referrals to an EAP, that the MPD discipline system is itself an EAP—and the same is true for the Performance Enhancement Program. *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) ("The courts may also presume that … the General Assembly 'did not intend an absurdity.") (citation omitted); *Leech*, 588 S.W.2d at 540 ("Our courts have repeatedly held that absurdities should be avoided, that the courts should not place upon a statute a construction which would work to the prejudice of the public interest, and a construction which impairs, frustrates or defeats the object of a statute should be avoided.") (internal citations omitted). Such a ruling would also countenance circumvention of the TPRA and the EAP Provision and run contrary to the public's interest in transparency. *Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 667 (Tenn. Ct. App. June 18, 2021) (rejecting a party's construction of a statute where "the result is circumvention of the [statute's] purpose and a largely ineffective statute," concluding that "we may employ the presumption that the General Assembly did not intend to enact … an absurdity") (citations omitted);

State v. Shelby Cty. Bd. of Comm'rs, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990) (holding that Tennessee Open Meetings Act "is to be construed so as to frustrate all evasive devices" and that courts have a responsibility to construe laws "in a manner to prevent [their] circumvention") (citation omitted).

EAPs provide an important service that allows employees to seek help for their personal problems without fear of retribution from their employers. And that is what the EAP Provision was intended to protect. (McAdoo Decl. Attach. 10 at 19:24-20-2 (sponsor of bill that became the EAP Provision explained it was to make the records of "programs that assist employees in alcohol abuse, marriage, drug abuse, [and] mental health problems… confidential so that employees will come forward and seek help"); *see also id.* at 7:5-11 (discussing how the intent of the bill is to protect government employees who come forward with issues like alcohol and drug problems so that they can seek help without their supervisors finding out and firing them). In contrast, MPD's Performance Enhancement Program is a means for providing remedial training to officers who have shown signs that they are struggling in some part of their job as police officers. This too is important work, but that does not make the Performance Enhancement Program an EAP. The Court should reject any assertion that the Performance Enhancement Program is an EAP and that its records, including the requested Performance Improvement Plans, are exempt from production pursuant to the EAP Provision.

The City should not be permitted to construe the Performance Enhancement Program as an EAP, and thus shelter large swaths of public records from public

scrutiny that have nothing to do with the diagnosis, treatment or referral for treatment for employees who are impaired by personal concerns. Holding police accountable through public records should not be limited to knowing when an officer violates an MPD Rule or a law. It should also include access to public records that show if and when a police department tries to help its officers with their on-the-job performance with coaching, training, and professional development. Any attempt to misapply the EAP Provision to hold that the Performance Enhancement Program is an EAP under Tenn. Code § 10-7-504(d) should be rejected by this Court.

B. Performance Improvement Plans are not maintained separately from other records that are open for inspection, as is required for the EAP Provision to apply.

Pursuant to Tenn. Code Ann. § 10-7-504(d), EAP records are only considered confidential when they "are maintained separately from personnel and other records regarding such employee that are open for inspection." The reason for this limitation is to prevent potential abuse of this provision by governmental bodies in Tennessee. (McAdoo Decl. Attach. 10 at 12:1-8, 16:1-14.) The public records sought here are Performance Improvement Plans, which MPD maintains in several locations and are co-mingled with other public records that are open under the TPRA. As such, even if the Performance Enhancement Program was an EAP under the EAP Provision, Performance Improvement Plans would still not be exempt from the TPRA.

The General Assembly was concerned with this very sort of government overreach that might try to sweep up records that should be open by inappropriately

designating a program as an EAP. During the House Judiciary Committee meeting on March 13, 1991, Representative Purcell explained that "all personnel records presently are open, and that's been an important safety --- an important safeguard for --- I think for the citizens of the state." (McAdoo Decl. Attach. 10 at 11:4-6.) "I would hate to see a situation where someone . . . suddenly designates their entire personnel program an employee assistance program and closes down every personnel record in the city, the county, or in some other place." (*Id.* at 12:1-6.) To that end, the General Assembly accepted an amendment that provided that EAP records under Tenn. Code Ann. § 10-7-504(d) must be maintained separately from other, open records. (*Id.* at 16:2-14.) "There was never any intention by the sponsor … for [EAP] records, frankly to commingle with other records. But this will just clarify that those records that are already open remain open, remain separate; and the employee assistance program records, which are necessary for their purposes, will be closed." (*Id.* at 16:8-14.)

According to the City's MPD Manual, the Performance Improvement Plans sought here are kept in three places: the PEP Coordinator's files, the applicable Work Station Commanders PEP Folder, and in "Blue Team." (Pet. ¶ 25; McAdoo Decl. Attach. 1 at 6 (discussing work station commanders creating PEP folders); *id.* (explaining that Performance Improvement Plans are "attached to the Blue Team Alert[] and transmitted electronically to the PEP Coordinator via Blue Team"); *id.* at 7 (noting that completed Performance Improvement Plans are "retained in the members PEP folder for six (6) months after completion then forwarded to the PEP

Coordinator for filing"). While it is not entirely clear from the MPD Manual exactly what Blue Team is, what is clear is that it contains a variety of information and records that are not EAP records. For example, when a citizen makes a complaint regarding the actions of an MPD officer to MPD, that complaint is entered into Blue Team by the Line Supervisor. (Pet. ¶ 26; McAdoo Decl. Attach. 2 at 2.) Similarly, "Statement[s] of Charges, Administrative Summons, along with any support documentation, will be scanned and electronically attached to the Blue Team entry." (Pet. ¶ 26; McAdoo Decl. Attach. 2 at 6.) Management Referrals, which are one of the PEP Indicators, "even if a part of discipline, must be entered into Blue Team separately." (Pet. ¶ 26; McAdoo Decl. Attach. 1 at 4 (emphasis removed).) Response to Resistance Incident reports are completed and saved in Blue Team as are related memos from supervisors. (Pet. ¶ 26; McAdoo Decl. Attach. 3 at 16, 20, 21, 26, 28, 29.) The summary of a Response to Resistance Incident report must include "[t]he reason for the initial police presence; [a] specific description of the acts that led to the use of force; [t]he level of resistance encountered; [and] [a] description of every type of force used." (*Id.* at 21 (lettering sequence removed).) Finally, on the job injuries are recorded in Blue Team. (McAdoo Decl. Attach. 4 at 6.) There are no statutes that categorically except these records from public disclosure under the TPRA. Nor are these records EAP records. Rather, they are public records and the City's co-mingling of public, non-EAP records in Blue Team with Performance Improvement Plans renders the EAP Provision inapplicable in this case, even if the Performance Enhancement Program was an EAP.

The City keeps Performance Improvement Plans in Blue Team along with a variety of other records that are not part of the Performance Enhancement Program, according to the City's MPD Manual. By doing so, it cannot be said that Performance Improvement Plans "are maintained separately from personnel and other records regarding such employee that are open for inspection." For that reason too, Tenn. Code Ann. § 10-7-504(d) does not apply and the requested public records should be released.

III. Mr. Perrusquia Should Be Awarded Attorneys' Fees and Costs.

The TPRA requires that "[i]f the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity." Tenn. Code Ann. § 10-7-505(g). In recent published decisions the Court of Appeals has "stressed that willfulness should be measured 'in terms of the relative worth of the legal justification cited by a municipality to refuse access to records.'" *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015) (quoting *Friedmann v. Marshall Cnty.*, 471 S.W.3d 427, 439 (Tenn. Ct. App. 2015). "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 warrant a finding of willfulness." *Id.*

In *Clarke*, the petitioner sought records from MPD, but did not receive a timely response despite several efforts. *Clarke*, 473 S.W.3d at 286-87. After filing a petition for access, the City responded to the petitioner by stating that it was in receipt of petitioner's request and that the public records request must be dealt with as part of the discovery process in a different civil case. *Id.* at 287. The Court of Appeals held that this response "failed to provide a specific legal reason as to why Mr. Clarke should be denied records, but instead relied upon a hypothesized general barrier to access. Similar to the Tennessee Supreme Court's holding in *Schneider*, we conclude that such reliance is willful in light of existing law." *Id.* at 292.

The City's responses in the instant case—like its response in *Clarke*—did "not articulate a valid reason as to why [the] records request cannot be entertained." *Id.* at 292. As detailed above, there is no question that the records exist, and there is no applicable exception under the TPRA for Performance Improvement Plans. The City's citation to Tenn. Code Ann. § 10-7-504, for the reasons set forth above, is meritless. The City should not avoid an award of reasonable costs, including attorneys' fees, where it cited a plainly inapplicable exemption in an attempt to shield public records from public scrutiny. Based on the facts of this case and the current state of the law, the City should be found to have willfully refused Mr. Perrusquia's public records requests.

CONCLUSION

For the foregoing reasons, the Court should order the City to release the requested Performance Improvement Plans to Petitioner and award reasonable attorneys' fees and costs in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served with the Petition and Summons upon the Respondent.

/s/ Paul R. McAdoo
Attorney