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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

STEPHEN ELLIOTT and FW PUBLISHING, INC.,	)	
Petitioners,	)	
v.	)	No. 22-0011-I
WILLIAM LEE, in his official capacity as Governor of Tennessee, and JUAN WILLIAMS, in his official capacity as Commissioner of the Tennessee Department of Human Resources,	)	
Respondents.	)	

RESPONSE TO PETITION FOR ACCESS TO PUBLIC RECORDS

Respondents, Governor Lee and Tennessee Department of Human Resources Commission Williams, by and through their counsel of record, the Attorney General and Reporter for the State of Tennessee, and hereby submit this Response to the Petition for Access to Public Records.

INTRODUCTION

In these turbulent, ever-evolving pandemic times, governmental entities across the country have been called upon to make difficult decisions on how to best and most effectively discharge their duties while simultaneously comporting with constitutional requirements and protecting the health and safety of their leaders, members, staff, and, principally, the citizenry they serve. The COVID-19 pandemic has been wholly unprecedented, and, especially at the beginning of the pandemic, required significant flexibility and ingenuity from government officials as public-health

experts did not even know how the disease was transmitted or how to prevent that transmission. Now, almost two years later, Petitioners seek to "Monday-morning" quarterback the decisions made by the Governor and other state officials by petitioning for access to records that were relevant to, and part of, the ongoing deliberations and decision-making by the Governor and state officials in responding to the COVID-19 pandemic—so that the public can "fully and effectively" evaluate their response.

FACTUAL BACKGROUND

The novel coronavirus ("COVID-19") pandemic is a public health crisis unlike anything seen in the State of Tennessee for over 100 years. The illness was first diagnosed in China in December 2019 and quickly spread worldwide. By March 11, 2020, the World Health Organization had characterized the COVID-19 outbreak as a pandemic.[1] As COVID-19 raged virtually unchecked across the country, public officials everywhere sought to implement measures to protect the public health and welfare, and Governor Lee was no exception. On March 12, 2020, he issued Executive Order No. 14 declaring a public emergency due to the COVID-19 pandemic. And over the next several months, he issued a series of executive orders intended to limit the opportunities of the virus to spread.

For example, on March 22, he issued Executive Order No. 17 which shut down onsite eating and drinking in restaurants and bars, gyms and fitness centers and outside visitors to nursing homes.[2] A week later, on March 30, he issued Executive Order No. 21 which closed businesses that performed close-contact personal services, as well as entertainment and recreational venues.[3]

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[1] *See* World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 – March 11, 2020,* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last updated March 11, 2020).

[2]*See* Executive Orders Governor Bill Lee | Tennessee Secretary of State (tn.gov).

[3]*Id*.

Later that same day, he issued Executive Order No. 22 closing all non-essential businesses for public use and *encouraging* all Tennesseans to stay-at-home except for essential activities and services.[4] Then, just three days later, Governor Lee issued Executive Order No. 23 *requiring* Tennesseans to stay at home except for when engaging in essential services or activities for the next two weeks.[5] On April 13, the Governor issued Executive Order No. 27 which extended the stay-at-home order and the order closing all non-essential businesses until the end of April.[6]

As the ever-broadening scope of these Executive Orders demonstrate, the circumstances and public health risks created by the COVID pandemic were fluid, changing with increasing infection rates and as more information related to the virus was learned. Accordingly, in an attempt to navigate this tightrope between comporting with constitutional requirements and protecting the health and safety of Tennesseans, on March 23, 2020, the Governor established the Unified Command Group ("UCG"), a joint effort to streamline coordination across the Tennessee Emergency Management Agency (TEMA), Tennessee Department of Health and Tennessee Department of Military in implementing the State's emergency management of the COVID-19 pandemic. *See* Declaration of Todd Skelton attached hereto as Exhibit 1. Governor Lee appointed then-Commissioner of the Tennessee Department of Finance and Administration Stuart McWhorter to head the UCG. Commissioner McWhorter subsequently appointed retired Brig. Gen. Scott Brower to serve as chief of staff. Additionally, Todd Skelton, legal counsel to former Governor Haslam, was hired to serve as legal counsel to the UCG. *Id.* In addition to these three individuals, the core members of the UCG included Patrick Sheehan, TEMA Director, Dr. Lisa

[4] *Id.*

[5] *Id*.

[6] *Id*.

Piercey, Commissioner of the Tennessee Department of Health, and Maj. Gen. Jeff Holmes, Adj. General, Tennessee Department of Military. *Id*.

For the next 12-14 months, virtually all operational aspects of the State's response to the COVID-19 pandemic and strategic planning were conducted through UCG. During the first several months, the core members of the UCG regularly met with and advised the Governor and senior staff—providing updates, making recommendations, and discussing plans and strategies for responding to the pandemic, including testing strategies, coordination among the county and metropolitan health departments, procurement strategies, outreach and public messaging planning, contact tracing strategies, mitigation measures, hospital and nursing home support, and, later, vaccine planning and administration. *Id*.

The McKinsey Contract

Soon after its formation, the UCG determined that it needed expert assistance in formulating and implementing the State's emergency management response—among other things, they needed assistance in obtaining the best information possible and identifying gaps or issues in the strategies and plans that UCG was formulating and recommending to the Governor. Accordingly, on April 13, 2020, the State entered into a contract with McKinsey Consulting, Inc. ("McKinsey"). *See* Attach. 1 to Skelton Declaration (the "Contract"). McKinsey is a global management consulting firm found in 1926 that advises on strategic management to corporations, governments and other organizations. Under the terms of the Contract, the State identified three Statements of Work ("SOW") to be performed by McKinsey. These three SOWs "contain[ed] activities and deliverables designed to assist the State addressing the effects of COVID-19 and the State's response." *See* Section A.6 of the Contract. Relevant here are Statements of Work #1 and #3.

Statement of Work #1 is described in the Contract as follows:

> **1.0 Approach & Deliverables**
>
> The goal of this effort is to provide data and best practices to inform the choices that the State will need to make as it re-opens Tennessee's economy, while still working to minimize further spread of COVID-19. These issues are complex and require a data-driven approach informed by best practices from the public and private sectors around the world. Therefore, the activities will begin with a rigorous assessment of Tennessee's current situation and will proceed with *developing a strategy and implementation approach to support State decision-making*, deeply informed by case studies and integrated healthcare, economic, and government service data from Tennessee and elsewhere.

See Attachment B to Contract (emphasis added). The Contract provides that this "initial phase of work to support the State with implementation advice around re-opening could be completed in roughly eight weeks," and identifies the key deliverables as follows:

- Baseline of COVID-19 and economy in Tennessee, with a range of possible scenarios;
- Initial strategy options for State decision-making on the approach to economic re-opening, including interdependencies and enablers; and
- Ongoing data and reports on the re-opening situation across Tennessee.

Id.

Statement of Work #3 is described in the Contract as "secur[ing] support for the developing role and operations of the UCG," which would be done "via *presenting fact-based options*, sharing case studies and best practices, *proposing management and data approaches*, and facilitating access to McKinsey's ongoing modeling and best practice libraries." *See* Attachment D to Contract (emphasis added). The key deliverables under SOW#3 are described as follows:

- Fact-based options to facilitate UCG decision making in selected topics.
- Targeted analyses in selected deep dive topics.
- Access to the outputs from McKinsey modeling, tools and assets.

Id.

Petitioners' Public Records Requests

On May 15, 2020, Petitioner Elliott sent an email to Todd Skelton, Legal Counsel for the COVID-19 Unified Command & Economic Recovery Group, asking whether "the Unified Command [has] any deliverables associated with contract #66331 with vendor McKinsey and Company beginning 4/13/2020?" *See* Attachment 3 to Elliott Declaration. Despite the ambiguous nature of this email, Mr. Skelton chose to construe it as a request by Petitioner for copies of records pursuant to the Tennessee Public Records Act. *See* Skelton Declaration. In an email dated May 29, 2020, Mr. Skelton responded and initially denied the request on the basis that the requested records were protected from disclosure under the deliberative process privilege. *Id*.

Over two months later, counsel for Petitioner sent a letter to Mr. Skelton requesting that he reconsider the denial of Petitioner Elliott's public records request, arguing that the Tennessee Supreme Court had never recognized the deliberative process privilege and, therefore, such privilege did not exist as an exception to the Public Records Act. *See* Attachment 2 to McAdoo Declaration. Counsel further argued that even if the privilege did exist, "the Unified Command is required to redact the portions that are exempt and produce the remainder of the McKinsey contract deliverables." *Id*.

In response to this request, and in an effort to ensure public access to non-privileged or confidential governmental records, Mr. Skelton agreed to re-examine the relevant documents and to produce copies of any documents that were determined not to be protected by the privilege. *See* Attachment 3 to McAdoo Declaration; *see also* Skelton Declaration. Subsequently, on September 21, 2020, Mr. Skelton produced 83 pages of documents to Petitioner which contained no redactions. *See* Skelton Declaration. Mr. Skelton produced an additional 219 pages of documents

on October 6, 2020, of which 26 pages contained redactions. *Id.* In producing these documents, Mr. Skelton informed Petitioner that information protected by the deliberative process privilege had been redacted. *Id.*

Finally, on October 15, 2020, Mr. Skelton produced the final installment of documents. Mr. Skelton again informed Petitioner that information protected under the privilege had been redacted, and that information protected under HIPAA/privacy reasons had also been redacted. *Id*. Additionally, Mr. Skelton informed Petitioner that he had withheld six documents on the basis of the deliberative process privilege. *Id*. After counsel objected to any redactions based on HIPAA or privacy reasons, on October 27, 2020, Mr. Skelton provided a revised copy of the documents with only redactions of information protected under the deliberative process privilege. *Id*.

Neither Petitioner Elliott nor his counsel made any further objections to the redaction of these documents based on the deliberative process privilege, and in fact, Mr. Skelton had no further communications with Petitioner or his counsel until January 8, 2021, when Petitioner made a second request for copies of "any deliverables associated with contract #66331 with vendor McKinsey and Company beginning 6/13/2020 (date of last produced document)." *See* Attachment 4 to Elliott Declaration. In response, on January 30, 2021, Mr. Skelton produced 100 pages of documents, of which five pages included redactions. *See* Skelton Declaration. Again, Mr. Skelton informed Petitioner that information protected under the deliberative process privilege had been redacted from the documents.

Again, neither Petitioner nor his counsel objected to these redactions and had no further communications concerning these documents until a year later when Petitioner filed this action asserting that the "public should have access to these public records so that they may fully and

effectively evaluate how the State's leaders responded to the ongoing pandemic. . . ." (Petitioner's Memorandum at 3.)[7]

APPLICABLE LAW

A. Tennessee Public Records Act

The Tennessee Public Records Act provides in pertinent part:

> All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, *unless otherwise provided by state law*.

Tenn. Code Ann. § 10-7-503(a)(2)(A) (emphasis added).

The Act defines the term "public record" 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 in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-503(a)(1). In determining what a public record is, the Tennessee Supreme Court has stated that a court should look to the totality of the circumstances. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991).

The Act further provides that it is to be broadly construed in favor of public access, and Tennessee courts have consistently adhered to this policy. Tenn. Code Ann. § 10-7-505(d). The purpose of the Act is to promote public awareness of the government's actions and to ensure the accountability of government officials and agencies by facilitating the public's access to

[7] Petitioners' Petition for Access to Public Records also seeks access to the McKinsey "Efficiencies Report" that was provided to the Tennessee Department of Human Resources pursuant to the Contract. A copy of that report was sent to Petitioners' counsel on January 21, 2022. Accordingly, Petitioners' request for access to this document is moot.

governmental records. *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002).

While the Public Records Act expresses the State's policy of openness to governmental records, the General Assembly nonetheless "recognized from the outset that circumstances could arise where the reasons not to disclose a particular record or class of records would outweigh the policy favoring public disclosure." *Allen v. Day*, 213 S.W.3d 244, 261 (Tenn. Ct. App. 2006) (quoting *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004)). Thus, the Public Records Act "is not absolute, as there are numerous statutory exceptions to disclosure." *Tennessean v. Metro Gov't of Nashville*, 485 S.W.3d 857, 865 (Tenn. 2016). Additionally, the General Assembly "provided for a *general exception* to the Public Records Act, based on *state law*," which includes "statutes, the Tennessee Constitution, the common law, rules of court and administrative rules and regulations." *Id*. at 865-66 (citing *Swift*, 159 S.W.3d at 571-72) (emphasis added).

These exceptions to the Public Records Act recognized by state law reflect the General Assembly's judgment that "the reasons not to disclose a record outweigh the policy favoring disclosure." *Allen*, 213 S.W.3d at 261. These exceptions "are not subsumed by the admonition to interpret the Act broadly;" accordingly, "courts are not free to apply a 'broad' interpretation that disregards specific statutory language" setting forth such exceptions. *Id*.

B. Deliberative Process Privilege.

The United States Supreme Court has long recognized a common law consultative, deliberative, decisional, and policy-making privilege of government officials against disclosure. *See, e.g., United States v. Morgan*, 313 U.S. 409 (1941). "The ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions, by protecting open and frank discussion among those who make them within the government. *E.E.O.C. v. Texas*

Hydraulics, Inc., 246 F.R.D. 548, 551 (E.D. Tenn. 2007) (internal quote and citation omitted)*; see also U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S.Ct. 777, 785 (2021) *(*"To protect agencies from being 'forced to operate in a fishbowl', the deliberative process privilege shields from disclosure 'documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.'") (quoting *EPA v. Mink*, 410 U.S. 73, 86-87 (1973); *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8-9 (2001) (privilege is rooted in "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news").

In its simplest form, the deliberative process privilege has been described:

> the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

Matthew W. Warnock, *Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials*, 35 Cap. U. L. Rev. 983, 986 (2007).

The privilege's scope has been summarized as follows:

> The judiciary, the courts declare, is not authorized "to probe the mental processes" of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others—result demanded by exigencies of the most imperative character.

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 326 (D.D.C. 1996), *aff'd sub nom., V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967) (internal citations omitted).

As noted, the deliberative process privilege covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. *Klamath*, 532 U.S. at 8-9, (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). For a governmental document to be protected by the deliberative process privilege, the courts have held that it must be both predecisional and deliberative.[8] *E.E.O.C. v. Texas Hydraulics, Inc*., 246 F.R.D. at 551 (E.D. Tenn. 2007). A document is "predecisional" if it is generated before the agency's final decision on the matter, and it is "deliberative" if "prepared to help the agency formulate its position." *U.S. Fish and Wildlife Serv*., 141 S.Ct. at 786 (citing *Sears, Roebuck & Co.*, 421 U.S. at 150-152). As the U.S. Supreme Court has noted, "[t]here is considerable overlap between these two prongs because a document cannot be deliberative unless it is predecisional." *Id*.

While the privilege is primarily limited to the protection of advisory materials and not purely factual investigative materials, the courts have recognized that in some circumstances the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted from disclosure. *Schell v. United States Dep't of Health & Human Servs.*, 843 F.2d 933, 941 (6th Cir. 1988) (citing *Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242, 256 (D.C.Cir. 1977)). Conversely, documents otherwise considered advisory may reveal very little about the deliberative process, and their disclosure would not cause agency personnel to temper their views. *Id.* Thus, in determining whether a particular document is protected by the deliberative process privilege, "the key issue . . . is whether

[8]Although many cases analyzing the deliberative process privilege are construing "Exemption No. 5" of the Federal Freedom of Information Act, that exemption has been interpreted as co-extensive with the common law discovery privileges of attorney-client, attorney work product and deliberative process. FOIA Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). *See generally Delozier v. First National Bank of Gatlinburg*, 113 F.R.D. 522, 525, n.1 (E.D. Tenn. 1986).

disclosure of the materials would expose an agency's decisionmaking in such a way as to discourage discussion within the agency and hereby undermine the agency's ability to perform its function." *Rugeiro v. United States v. Dept. of Justice*, 257 F.3d 534, 550 (6th Cir. 2001).

ARGUMENT

I. Petitioners Lack Standing Before this Court.

"When a statute creates a cause of action and designates who may bring an action, the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite." *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004). Moreover, while "[t]he scope of appellate review generally extends to the issues raised by the parties," *Dishmon v. Shelby State Community College*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999), appellate courts "must consider the issue of standing, even though it was not raised below by the parties." *Osborn*, 127 S.W.3d at 740 (citing Tenn. R. App. P. 13(b)). As a component of subject-matter jurisdiction, issues of standing "cannot be waived." *Id*.

The Public Records Act makes all non-exempt state, county, and municipal records open for inspection by any "citizen" of Tennessee. Tenn. Code Ann. § 10-7-503(a)(2) and (f). In similar fashion, when access to such non-exempt records is denied, "[a]ny citizen of Tennessee . . . shall be entitled to petition for access" in chancery court. Tenn. Code Ann. § 10-7-505(a). *See also Allen*, 213 S.W.3d at 248 (finding that "Tennessee courts have limited subject matter jurisdiction to adjudicate claims arising under the Public Records Act" to circumstances where the petitioner is a "citizen of Tennessee"); *Scripps Media, Inc. v. Tennessee Dept. of Mental Health and Substance Abuse Services*, 614 S.W.3d 700, 704 (Tenn. Ct. App. 2019).

Neither Petitioner has demonstrated that it is a "citizen" of Tennessee.

Petitioner Elliott avers that he is "a journalist and a *resident* of Davidson County, Tennessee." Petition at ¶1 (emphasis added). But, "'it is a long established proposition that

domicile, not residence, determines State citizenship. . . .'" *Nasco v. Norsworthy* (attached), 785 F. Supp. 707, 709 (M.D. Tenn. 1992) (emphasis in original) (citations omitted). One can, in fact, be a "resident" in multiple jurisdictions, but a citizen in only one. Thus, by failing to plead his citizenship, Petitioner Elliott has failed to demonstrate his standing to bring this action.

Similarly, Petitioner FW Publishing LLC avers that it "is Tennessee Limited Liability Company with its principal place of business in Nashville, Tennessee." Petition at ¶2. This, too, insufficient to demonstrate the citizenship of this business entity. Unlike corporate entities, the citizenship of a Limited Liability Company is not determined by the State of its organization or the situs of its principal place of business. Rather, as an unincorporated entity, the citizenship of an LLC is determined by the citizenship of each-and-every *member* of the LLC. *See Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009). Petitioner FW Publishing has failed to plead the citizenship of its members. Additionally, Petitioner FW Publishing fails to allege either that it requested or was denied access to any public records. Accordingly, it too has failed to establish standing to pursue this action.

Thus, because standing has not been affirmatively demonstrated by the Petition itself, this Court lacks subject matter jurisdiction over this cause, and the matter should be dismissed.[9]

[9] Petitioners undoubtedly will argue that they should be permitted to file an amended Petition to cure these ills. However, that argument is unavailing. Subject matter jurisdiction pertains to a court's ability to adjudicate a cause of action. It therefore must exist at the outset of the case. An amended pleading cannot bestow subject matter jurisdiction to a court, where it did not exist to begin with. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (holding that "standing is to be determined *as of the commencement of suit*"; emphasis added).

II. Tennessee Courts Have Recognized the Deliberative Process Privilege as Part of the Common Law of this State and, Therefore, as An Exception to the Public Records Act.

A. The Deliberative Process Privilege is recognized as a common law privilege in Tennessee.

Even if Petitioners had satisfied the standing requirements of the statute, they are not entitled to the relief they seek.

Contrary to Petitioners' assertions, Tennessee courts *have* recognized the deliberative process privilege as part of the common law of this State. The privilege was first recognized in *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). In *Swift*, an attorney representing a convicted prisoner on a federal habeas corpus petition sought access to the assistant attorney general's case file under the Tennessee Public Records Act. *Id*. at 568-69. The trial court dismissed the petition based on Tenn. R. Crim. P. 16, the work product doctrine, the law enforcement investigative privilege, and the deliberative process privilege. *Id*. at 568, 570. On appeal, the Court of Appeals found that the records were not subject to disclosure under Tenn. R. Crim. P. 16 which embodies the work product doctrine as it applies to criminal cases. *Id*. at 572-576.

However, in addressing the other grounds upon which the trial court had based its decision, the Court of Appeals stated as follows with respect to the deliberative process privilege:

> *We have no doubt that there exists a valid need to protect the communications between high government officials and those who advise and assist them in the performance of their official duties*. . . . Protecting the confidentiality of conversations and deliberations among high government officials ensures frank and open discussion and, therefore, more efficient government operations. . . . Whether the 'deliberative process privilege' may be invoked depends on the government official or officials involved. *We have not doubt, for example that the Governor may properly invoke this privilege*, should he or she care to, in meetings with staff or cabinet members. We have also held that the Constitution of Tennessee embodies a

> version of the privilege for the General Assembly when it decides to invoke it. (emphasis added).

Id. at 578-79 (emphasis added) (internal citations omitted).[10]

Petitioners dismiss these statements as *obiter dictum* and thus, not controlling authority. (Petitioner's Memorandum at 9.) But the Supreme Court has stated that in the context of dicta, "inferior courts are not free to disregard the pronouncement of a superior court when it speaks directly on the matter before it, particularly when the superior court seeks to give guidance to the bench and bar." *Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 882 (Tenn. 1996). "Trial courts must follow the directives of superior courts, particularly when the superior court has given definite expression to its views in a case after careful consideration." *Id*. at 881. Judge Koch's research and reasoning in *Swift* clearly reflect the Court's careful consideration of all the issues and its definite expression as to the deliberative process privilege and thus, contrary to Petitioner's assertions, should not be disregarded.

The issue of the deliberative process privilege was raised in the case of *Coleman v. Kisber*, 338 S.W.3d 895 (Tenn. Ct. App. 2010), also under the Public Records Act. In that case, the trial court declined to find that the privilege existed as an exception to the Public Records Act. On appeal, the Court of Appeals determined that the records in question were not subject to disclosure under another exception to the Public Records Act, thereby pretermitting the need to address whether the deliberative process privilege was applicable. However, with respect to the privilege, the Court of Appeals made the following cautionary statement:

> Also, we note that the trial court found that Tennessee had not adopted the Deliberative Process privilege and that the Commissioners raised this as an issue on appeal. Because we have

[10] The Court of Appeals declined "to hold that the privilege applies to an assistant attorney general preparing for a hearing in state court involving a writ of error coram nobis" finding that "Tenn. R. Crim. P. 16 adequately protects his or her work product." *Id*. at 579.

> decided this case on another ground, we do not find it necessary to address this issue. *However, our opinion should not be interpreted as an affirmance of the trial court's finding on this issue.*

Id. at 909 (emphasis added).

Finally, in *Davidson v. Bredesen*, No. M2012-02374-COA-R3-CV, 2013 WL 5872286 (Tenn. Ct. App. Oct. 29, 2013), the issue of whether the deliberative process privilege is recognized under Tennessee law was squarely raised by the plaintiff. *Id*. at *2 ("Mr. Davidson also raises the issue of whether the deliberative process privilege is recognized under Tennessee law."). After reviewing its prior opinions in *Swift* and *Coleman*, the Court of Appeals plainly stated that "*this Court has implicitly recognized the existence of the deliberative process privilege, a recognition with which we agree.*" *Id*. at *4. The Court of Appeals went on to note the "valid need" to protect the advice high government officials receive from disclosure, stating

> the privilege recognizes the official's relationship with trusted advisors as a relationship which is fundamental to the process of deliberating toward the result and which is sufficiently important to justify a limitation on the "need to develop all relevant facts in the adversary system [which] is both fundamental and comprehensive."

Id. (internal citations omitted).

The Court of Appeals then concluded that the "deliberative process privilege is a common law privilege which, pursuant to Tenn. R. Evid. 501, can be asserted to prevent the production of a document" and that the "officials who are able to claim the privilege are those vested with the responsibility of developing and implementing law and public policy." *Id*.

Petitioners dismiss this opinion in a footnote, arguing that, because it is an unpublished opinion and is not a lawsuit under the Public Records Act, it is of no precedential value. (Petitioners' Memorandum at 11, n.3.) Petitioners are wrong. While unpublished decisions are not controlling authority, they nevertheless are persuasive authority. *See* Sup. Ct. R. 4(G)(2); *see*

also State v. Anderson, No. W2014-01971-COA-R3-CV, 2015 WL 2374573, at *5 (Tenn. Ct. App. May 15, 2015) ("Although our own unreported decisions are not binding precedent on this Court, they nevertheless are persuasive authority.") Indeed, the Tennessee Supreme Court has recognized that "many of the best opinions of [Tennessee's] intermediate appellate courts are unpublished," *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886, n. 2 (Tenn. 1991), and itself has cited and relied upon unpublished opinions when "there are very few reported cases dealing with the current issue," *Tidwell v. City of Memphis*, 193 S.W.3d 555, 561, n.6 (Tenn. 2006), or when the unpublished opinion involves similar facts. *Smith County Regional Planning Com'n v. Hiwassee Village Mobile Home Park, LLC*, 304 S.W.3d 302, 314, n.15 (Tenn. 2010). Similarly, the Court of Appeals routinely cites unpublished cases in its opinions and will also rely on an unpublished opinion when it is in fact dispositive. *See Brown v. Knox County*, 39 S.W.3d 585, 589 (Tenn. Ct. App. 2000) (holding prior unpublished opinion to "be well-reasoned" and determining to "follow that precedent in this case"); *TBF Fin. LLC v. Simmons*, No. E2020-00396-COA-R3-CV, 2020 WL 6781245, at *5 (Tenn. Ct. App. Nov. 18, 2020) ("[W]e conclude that *Apexworks* [*Restoration v. Scott*] is applicable here and is, in fact, dispositive. The fact that *Apexworks* is an unpublished opinion does not negate its precedential value in this case."). In fact, that Court has noted that "the distinction between 'published' and 'unpublished' decisions seems of greatly diminished value in an age when both published and unpublished opinions are equally accessible through online legal research, which is now the primary mode of legal research. . . ." *Shelby County Health Care Corp. v. Baumgartner*, No. W2008-01771-COA-R3-CV, 2011 WL 303249, at *15, n.17 (Tenn. Ct. App. Jan. 26, 2011).

Additionally, Sup. Ct. R. 4(D) states in pertinent part that if permission to appeal is denied by the Tennessee Supreme Court, the opinion of the intermediary appellate court may be published *if* it meets one or more of the following standards of publication:

> (i) the opinion establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a set of facts significantly different from those stated in other published opinions;
> (ii) the opinion involves a legal issue of continuing public interest;
> (iii) the opinion criticizes, with reasons given, an existing rule of law;
> (iv) the opinion resolves an apparent conflict of authority, whether or not the earlier opinion or opinions are reported;
> (v) the opinion updates, clarifies, or distinguishes a principle of law;
> (vi) the opinion makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

In *Davidson*, an application for permission to appeal pursuant to Tenn. R. App. P. 11 was sought and denied by the Tennessee Supreme Court. That the *Davidson* opinion was not published would indicate that it does not meet any of Rule 4(D)'s standards of publication, meaning that the *Davidson* opinion, in holding that the deliberative process privilege is a common law privilege in Tennessee, did not establish a *new* rule of law, alter or modify an *existing* rule or law, or update, clarify or distinguish a principle of law. Rather, that rule of law had already been established by the Court in *Swift*—a published opinion.

B. The Deliberative Process Privilege is an exception to the Tennessee Public Records Act.

Petitioners argue that even if Tennessee courts have recognized the deliberative process privilege, this Court should not "adopt" the privilege as an exception to the Public Records Act, but instead defer to the General Assembly because "the Tennessee Supreme Court has held that it

is the General Assembly, not the courts, that should decide whether a privilege, like a deliberative process privilege, should be adopted as an exception to disclosure under the TPRA." (Petitioners' Memorandum at 12.) But this argument is contrary to the plain language of the Public Records Act as interpreted by the Tennessee Supreme Court. As discussed *supra*, in *Tennessean v. Metro Gov't of Nashville*, that Court specifically noted that the General Assembly had "provided for a *general exception* to the Public Records Act, based on *state law*," which includes "statutes, the Tennessee Constitution, the common law, rules of court and administrative rules and regulations." *Id*. at 865-66 (citing *Swift,* 159 S.W.3d at 571-72) (emphasis added). And, as noted in *Swift*, the use of the phrase "state law" reflects the General Assembly's "understanding that statutes were not the sole source of exceptions from the public records statutes' disclosure requirements" and broadens "the permissible sources of exceptions from disclosure to include not only statutes, but also the Constitution of Tennessee, *the common law*, the rules of court, and administrative rules and regulations because each of these has the force and effect of law in Tennessee." 159 S.W.3d at 571-72 (emphasis added).

Tennessee has long been recognized as a common-law state. *Powell v. Hartford Accident & Indem. Co*., 398 S.W.2d 727, 730 (Tenn. 1966). And while the Court's role in declaring public policy is limited, it is less so when Tennessee's public policy is reflected in the state's common law. *Hodge v. Craig*, 382 S.W.3d 325, 337 (Tenn. 2012). The courts develop common-law principles on a case-by-case basis over time through their judicial decisions and such common-law principles and rules govern unless they have been changed by statute. *Metropolitan Gov't of Nashville & Davidson Cnty. v. Allen*, 415 S.W.2d 632, 635 (Tenn. 1967). For almost a decade, the deliberative process privilege has been recognized as part of Tennessee's common law and has

not been changed by statute.[11] Accordingly, Petitioners' argument that this Court should not recognize the deliberative process privilege as a state law that provides an exception to the Public Records Act is simply without merit and should be disregarded.

III. The Tennessee Public Records Act Does Not Authorize This Court to Require Respondents to Provide a Privilege Log or to Conduct a Second Show Cause Hearing.

Petitioners alternatively argue that, if this Court finds that the deliberative process privilege constitutes an exception to the Public Records Act, this Court should require Respondents to submit a detailed privilege log for each of the redacted and/or withheld documents, and that this Court should then conduct a second show cause hearing. (Petitioners' Memorandum at 14.) But Petitioners cite no authority for this proposition. Indeed, such authority cannot exist because Petitioners' proposition is contrary to the language of the Tennessee Public Records Act and the Legislature's clearly expressed intent.

The right of access to public records is a statutorily created right. *Allen v. Day*, 213 S.W.3d 244, 248 (Tenn. Ct. App. 2006) ("Neither the Tennessee Constitution nor the United States Constitution grant subject matter jurisdiction to the courts of this State to adjudicate claims which seek access to records in the possession of either a public or private entity.") As such, "the Tennessee legislature has bestowed upon Tennessee courts limited subject matter jurisdiction to adjudicate claims arising under the Public Records Act, where the petitioner seeks access to records in the possession of a government agency." *Id.*; *see also* Tenn. Code Ann. § 10-7-503.

[11] The deliberative process privilege is not the only common law privilege Tennessee courts have recognized. Indeed, there are numerous examples where Tennessee courts have recognized common law privileges. *See, e.g.*, *The Vance v. State*, 230 S.W.2d 987, 990-91 (Tenn. 1950) and *Boyd v. Comdata Network, Inc*., 88 S.W.3d 203, 214 (Tenn. Ct. App. 2002) (common interest privilege); *Smith v. Reed*, 944 S.W.2d 623, 625 (Tenn. Ct. App. 1996) ("fair report" privilege); *Jones v. State*, 426 S.W.3d 50, 58 (2013) ("cabinet-level executive officials 'have an absolute privilege to publish defamatory matter concerning another in communications made in the performance of his additional duties.'"); *Brown v. Birman Managed Care, Inc*., 42 S.W.3d 62, 72 (Tenn. 2001) (testimonial privilege); and *Simpson Strong-Tie Co., Inc. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 22 (Tenn. 2007) (absolute litigation privilege). Finally, the attorney-client privilege is the oldest privilege recognized in Tennessee both at common law and by statute. *Culbertson v. Culbertson*, 393 S.W.3d 678, 684 (Tenn. Ct. App. 2012).

Given the limited nature of the Court's subject matter jurisdiction under the Public Records Act, the Tennessee General Assembly has provided specific procedures for obtaining access to governmental records when access has been denied. *See Moncier v. Harris*, No. E201600209-COA-R3-CV, 2018 WL 1640072, at *10 (Tenn. Ct. App. Apr. 5, 2018); *see also*Tenn. Code Ann. § 10-7-505.

Specifically, Tenn. Code Ann. § 10-7-505(a) provides:

> Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

Tenn. Code Ann. § 10-7-505(b) further instructs that:

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

Thus, in section 10-7-505(b), the Legislature only has authorized the Court to require the defendants to "immediately appear and show cause" and to "direct that the records being sought be submitted under seal for review by the court." It has not authorized the Court to require the defendants to submit a privilege log, nor has it authorized the Court to conduct a second show cause hearing. Instead, by authorizing the trial court to direct that the records be submitted under seal, section 10-7-505 contemplates that the *trial court* shall determine which of the records

submitted under seal are exempt from disclosure. *Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007). Additionally, section 10-7-505 only directs that *a* show cause hearing be held, and that the decision of the trial court constitute a final judgment on the merits. Nothing in the procedure outlined in the statute contemplates or authorizes the court to conduct a second show-cause hearing. Indeed, the holding of a second show cause hearing would be contrary to the Legislature's clearly expressed intent for the expeditious resolution of petitions under section 10-7-505 by "expressly remov[ing] time restraints that normally allow defendants time to evaluate a case and prepare a defense." *Moncier*, 2018 WL 1640072, at *11 (citing Tenn. Code Ann. § 10-7-505(b)).

Finally, the requirement of a privilege long—in addition to not being authorized under the statutory procedure set forth in Tenn. Code Ann. § 10-7-505—is directly contrary to the Public Records Act itself, which provides in pertinent part that

> [t]he custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:
>
> * * *
>
> (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*.

Tenn. Code Ann. § 10-7-503(a)(2)(B) (emphasis added).

As this language reflects, the Tennessee Public Records Act "*only* requires a written denial that include the basis for such denial." *See Sharp v. Tennessee Dep't of Com. & Ins*, No. M201601207-COA-R3-CV, 2017 WL 5197291, at *5 (Tenn. Ct. App. Nov. 9, 2017) (emphasis added); Tenn. Code Ann.§ 10-7-503(a)(2)(B)(ii).

As there is no authority for Petitioners' position that this Court should require Respondents to submit a detailed privilege log and then to conduct a second show cause hearing, the argument is without merit and such request should be denied.

IV. The Redacted and Withheld Documents Are Exempt from Disclosure under the Deliberative Process Privilege.

The withheld and redacted documents are protected from disclosure by the deliberative process privilege. This privilege protects governmental documents that reflect advisory opinions, recommendations, and deliberations that are part of a process by which governmental decisions and policies are formulated. *Klamath Water Users Protective Association*, 532 U.S. at 8-9. As discussed below, the withheld and redacted documents fit squarely within this scope.

The General Assembly gave the Governor the sole responsibility for addressing the dangers presented to the State and its citizens by emergencies[12], and in the circumstances of an emergency beyond local control, authorized the Governor to "assume direct operational control over all or any part of the emergency management functions" within the state and to delegate such powers in his discretion. Tenn. Code Ann. § 58-2-107(a). Those emergency management responsibilities include, but are not limited to:

> (A) Reduction of vulnerability of people and communities of this state to damage, injury and loss of life and property resulting from natural, technological, or manmade emergencies or hostile military or paramilitary action;
> (B) Preparation for prompt and efficient response and recovery to protect lives and property affected by emergencies;
> (C) Response to emergencies using all systems, plans, and resources necessary to preserve adequately the health, safety, and welfare of persons or property affected by the emergency;

[12] The General Assembly has defined "disaster" as "any natural, technological, or civil emergency that causes damages of sufficient severity and magnitude to result in a declaration of a state of emergency by a county, the governor, of the president of the United States." Tenn. Code Ann. § 58-2-101(5). A "major disaster" is one that "will likely exceed local capabilities and require a broad range of state and federal assistance." Tenn. Code Ann. § 58-2-101(5)(B). Finally, the General Assembly has defined an "emergency" as "an occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, that results or may result in substantial injury or harm to the population, or substantial damage to or loss of property involved; provided that natural threats may include disease outbreaks and epidemics." Tenn. Code Ann. § 58-2-101(7).

(D) Recovery from emergencies by providing for the rapid and orderly restoration and rehabilitation of persons and property affected by emergencies;
(E) Provision of an emergency management system embodying all aspects of pre-emergency preparedness and post emergency response, recovery, and mitigation; and
(F) Assistance in anticipation, recognition, appraisal, prevention, and mitigation of emergencies which may be caused or aggravated by inadequate planning for, and regulation of, public and private facilities and land use.

Tenn. Code Ann. § 58-2-101(8).

Pursuant to the authority vested in the Governor by Tenn. Code Ann. § 58-2-107(a)(1), the Governor can issue executive orders, proclamations and rules, which have the force and effect of law; can suspend any law, order, rule or regulation prescribing the procedures for conduct of state business if strict compliance would in any way hinder or delay necessary action in coping with the emergency; can utilize all available recourses of the state government to cope with the emergency; and transfer the direction, personnel or functions of state departments and agencies for the purpose of performing or facilitating emergency services. Tenn. Code Ann. § 58-2-107(a)(2), (e)(1)-(4). Additionally, the Governor is directed to utilize the services and facilities of existing officers and agencies of the state "as the primary emergency management forces of the state" and is authorized to appoint "executive, professional, technical, clerical and other personnel as may be necessary." Tenn. Code Ann. § 58-2-107(h), (i).

As discussed *supra*, pursuant to this statutory authority, the Governor established the UCG to streamline coordination across the Tennessee Emergency Management Agency (TEMA), Tennessee Department of Health and Tennessee Department of Military to better assist him in developing and implementing the State's emergency management of the COVID-19 pandemic. And McKinsey was quickly retained to provide expert assistance to these state officials in identifying issues and strategizing over possible solutions, as well as developing and implementing plans and programs to respond to the pandemic.

Petitioners now seek access to copies of certain documents that were provided to UCG and/or the Governor to assist them in their decision-making process on how best to respond to the COVID-19 pandemic and that were either withheld in their entirety or were partially redacted under the deliberative process privilege. [13]

The Withheld Documents

In response to Petitioners' public records request, UCG withheld the following six documents:

- A 2-page document identifying key strategic issues to be addressed.
- An 11-page document titled "Scenario Planning May 29, 2020" (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which contains strategies and "wargaming" for a variety of possible hypotheticals or scenarios.
- An 11-page document titled "Scenario Planning June 5, 2020" (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which contains strategies and "wargaming' for a variety of possible hypotheticals or scenarios.
- A 15-page document titled "Economic Scenario Planning June 5, 2020) (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which contains strategies and "wargaming for a variety of possibly hypotheticals or scenarios specifically dealing with the Tennessee economy.
- A 47-page document titled "DRAFT THEC Tabletop Exercise Scenarios" (labeled "Preliminary working document: subject to change. Proprietary and Confidential") which discusses the issues and strategies for addressing issues that might arise with respect to the educational institutions under the Tennessee Higher Education Commission (THEC); and
- A 1-page document titled "Potential bold moves to combat COVID-19" and labeled "Confidential – Working Draft".

[13] Per this Court's order, copies of these documents have been filed with the Court under seal for *in camera* inspection.

Redacted Documents

- 10-page document title Check-In: Impact of COVID-19 on Tennessee dated April 2, 2020 – 2 pages - Evaluation Criteria for prioritization of alternate care sites (document is labeled "Confidential, Proprietary, Pre-Decisional")

- 16-page document titled Economic relief for individual residents of States dated April 11, 2020 (labeled "Confidential, Proprietary, Pre-Decision") –

    - Page titled "For programs requiring significant state-led implementation, States can consider several immediate measures"
    - Page titled "D.2. Actions States could consider to raise awareness for the Recover Rebate"
    - Page titled "States and businesses can work together to provide immediate relief to residents" and identifying "What States can do"
    - Page titled "Longer-term interventions can help States' economies come back even stronger" and identifying "What States can do" and "How businesses can help"

- 9-page document titled "UCG and ERG Check-in" dated April 16, 2020 (labeled "Preliminary working document: subject to change, Proprietary and Confidential")
    - Page titled "Swim lane example: Tennessee could define responsibilities across all domains of COVID-19 response"
    - Page titled "Illustrative decision rights: Responding to new, localized outbreaks"
    - Page titled "Illustrative battle rhythm: What routines and cadences might work best for Tennessee's COVID response" – specifically outlines internal decision-making processes & responsibilities
    - Page titled "Additional topics for consideration"

- 17-page document titled "Facts on Tennessee's COVID-19 Outbreak" dated April 24, 2020 (labeled "Preliminary working document: subject to change, Proprietary and Confidential")
    - Page titled "Potential Metrics to Monitor" and identifying "Foundational" and "Potential" metrics
    - Page discussing "which thresholds" state should consider that would trigger state action

- 17-page document titled "Facts on Tennessee's COVID-19 Outbreak" dated April 24, 2020 (labeled "Preliminary working document: subject to change, Proprietary and Confidential")
    - Page titled "Potential Metrics to Monitor" and identifying "Foundational" and "Potential" metrics

- Page discussing “which thresholds” state should consider that would trigger state action

- 10-page document titled “Decision meeting to align on UCG data” dated April 26, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
  - Page titled “Potential Metrics to Monitor” and identifying “Foundational” and “Potential” metrics
  - Page titled “Potential metrics and thresholds to inform state action” – specifically range of external thresholds

- 6-page document titled “Considerations for Testing via Housing Authorities” dated April 29, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
  - Page titled “Considerations for maximizing participation in housing authority testing initiatives

- 12-page document titled “UCG Check in” dated May 13, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
  - Page titled “Next steps on after action review work”

- 9-page document titled “COVID-19 response support: Progress to date and next steps” dated May 17, 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
  - Page titled “Priorities moving forward—COVID-19 response support”
  - Page titled “Summary of progress to date across 3 SOWs”

- 1-page document titled “Review of higher education proposal—questions for consideration” and specifically discussing “specific questions about best practices” (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)

- 1-page document titled “For discussion: potential checklist for pressure-testing safeguarding proposals”

- 9-page document titled UCG follow up on approach to testing for COVID-19 dated May 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)
  - Page titled “Executive Summary”
  - Page titled “Detailed testing assumptions and calculations – highly preliminary and subject to update/additional refinement

- 11-page document titled “UCG follow up on approach to testing for COVID-19” dated May 2020 (labeled “Preliminary working document: subject to change, Proprietary and Confidential”)

- Page titled "Executive Summary"
- Page titled "Detailed testing assumptions and calculations – highly preliminary and subject to update/additional refinement

- 15-page document titled "UCG follow up on approach to testing for COVID-19" June 2020 (labeled "Preliminary working document: subject to change, Proprietary and Confidential")
  - Page discussing COVID-19 total TN healthcare system testing costs
  - 3 Pages discussing costs of comprehensive testing of relevant populations, cost and population assumptions and testing capacity

- Multi-page document titled "Governor's Dashboard TN" for following dates: May 8-9, 11-14, 16, 18-23, 26-28, 30-June 6 and June 8-13

As the titles of many of these documents reflect, these documents are clearly pre-decisional and contain policymaking options for UCG and the Governor to consider and debate, including tentative assumptions that were later refined and/or rejected, and charts and other analyses of raw data that were non-final and incorporated by UCG and the Governor as part of their deliberative process. Other documents, such as the daily "Governor's Dashboard" documents, are reflective of the issues that UCG and the Governor were considering and seeking guidance from McKinsey, or they are reflective of issues McKinsey was raising for the UCG and the Governor to consider in the development of their strategy to respond to the COVID-19 pandemic.

These documents were an integral part of the deliberative process by which emergency management decisions were made by the Governor and UCG member agencies and disclosure of these documents would only serve to chill that deliberative process. *See* Skelton Declaration and Declaration of Brandon Gibson attached hereto as Exhibit 2. While a state-declared[14] state of emergency currently does not exist, COVID-19 does, as does the need to address and respond to issues raised by COVID-19. Those activities are, in fact, ongoing. *See* Gibson Declaration.

[14] A federally-declared state of emergency is still in existence. See https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx

Disclosure of the withheld and redacted documents would allow Petitioners and the public to probe the editorial and policy judgment and/or reconstruct the predecisional judgments of the UCG and the Governor in responding to the COVID-19 pandemic and would expose those governmental officials to public criticism.[15]

The withheld and redacted documents represent some of the analytical tools used by the Governor and UCG in responding to the COVID-19 pandemic. Requiring the public disclosure of these analytical and advisory tools only will serve to discourage public officials from seeking expert assistance from organizations like McKinsey in the future. *See* Gibson and Skelton Declarations. Public disclosure of the documents would also expose the Governor's and UCG's decision-making process in such a way as to discourage open and frank communications amongst governmental officials and, further, the memorialization of such information and analysis in writing. Such a consequence would only undermine the development and implementation of strategies and plans in responding to future emergencies. Uninhibited and effective decisionmaking—particularly in the context of a worldwide pandemic—should be encouraged. But revealing deliberations made by government officials, including those regarding what factual information should be gathered and considered during the exercise of their duties, would certainly stifle the candid discussion between government officials that are necessary in crisis situations. *See Hamilton Sec. Group Inc. v. U.S. Dep't of Housing & Urban Dev.* 106 F.Supp.2d 23, 33 (D.D.C. 2000).

Accordingly, the withheld and redacted documents are protected by the deliberative process privilege and not subject to disclosure under the Public Records Act.

[15] Indeed, Petitioners have indicated that disclosure of these documents is necessary so that the "public . . . may fully and effectively evaluate how the State's leaders responded to the ongoing pandemic. . . ." (Petitioners' Memorandum at 3.)

V. Petitioner's Request for Attorney's Fees Should Be Denied.

Even if the Court concludes that the records at issue are not protected from disclosure under the deliberative process privilege, and—thus—were improperly withheld, Petitioners still are not entitled to any attorney's fees.

Section 10-7-505(g) of the Public Records Act states that a court "may, in its discretion, assess all reasonable costs, . . . including reasonable attorneys' fees," if the court "finds that the governmental entity . . . *knew* that [the requested records were] public and *willfully refused* to disclose [them]" (emphasis added). Accordingly, merely prevailing on a petition for access to records is insufficient to justify an award—the petitioner must demonstrate a willful refusal to produce a known public record.

> [T]he Public Records Act does not authorize a recovery of attorneys' fees if the withholding governmental entity acts with a good faith belief that the records are excepted from the disclosure. Moreover, in assessing willfulness, Tennessee courts must not impute to a governmental entity the "duty to foretell an uncertain juridical future."

Schneider v. City of Jackson, 226 S.W.3d 332, 346 (Tenn. 2007) (quoting *Memphis Publ'g Co v. City of Memphis,* 871 S.W.2d 681, 689 (Tenn. 1994)). Thus, the "willfulness" analysis of the Public Records Act "should focus on whether there is *an absence of good faith* with respect to the legal position [the government] relies on in support of its refusal of records." *Friedman v. Marshall County*, 471 S.W.3d 427, 438 (Tenn. Ct. App. 2015) (emphasis added).

Here, the State did not provide the requested records based on the clear and unambiguous language in *Swift v. Campbell* and *Davidson v. Bredesen* in which the Court of Appeals recognized the deliberative process privilege as a common law privilege. The State further did not provide the requested records based on the good faith belief that disclosure of such records would expose the deliberations and decision-making of the Governor and UCG in responding to the COVID-19

pandemic. Thus, the Governor and UCG had a good faith reason to believe that the records were exempt from disclosure. Additionally, in producing the records, the State made a good faith effort to minimize redactions in the interest of ensuring public access to non-privileged information. Accordingly, and as a matter of law, Petitioners cannot demonstrate "willfulness" in this case. *See Schneider*, *supra*, and *Friedman*, *supra*.

CONCLUSION

For these reasons, Respondents respectfully request that this Court deny the Petition for Access to Public Records and dismiss it in its entirety and with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent by email transmission and/or by first class U.S. Mail, postage prepaid, to:

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this 24th day of January 2022.

/s/ *Janet M. Kleinfelter*
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