IN THE COURT OF APPEALS
OF THE STATE OF TENNESSEE

CLARA RENEE BREWER; JAMES HAMMOND AND THE TENNESSEE FIREARMS ASSOCIATION, INC.; MICHAEL P. LEAHY AND STAR NEWS DIGITAL MEDIA, INC.; THE TENNESSEAN; RACHEL WEGNER; and TODD GARDENHIRE in his individual capacity; Petitioners/Appellants, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; Respondent/Appellee, PARENTS OF MINOR COVENANT STUDENTS JANE DOE AND JOHN DOE; THE COVENANT SCHOOL; and COVENANT PRESBYTERIAN CHURCH; Intervenors/Appellees.	)	M2023-00788-COA-R3-CV

BRIEF OF RESPONDENT / APPELLEE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

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QUESTION PRESENTED

May individuals or organizations intervene in a Public Records Request lawsuit where the release of the records directly affects them and/or when they may have a constitutional privacy right to assert?

STATEMENT OF THE CASE

The Metropolitan Government adopts the Statement of the Case presented in Appellants' Brief.

STATEMENT OF FACTS

The Metropolitan Government adopts the Statement of the Facts presented in Appellants' Brief. The Metropolitan Government adds these additional facts.

There is an open and ongoing criminal investigation into this shooting and the premature release of investigative files will harm the investigation. (TR 282-290). It is the Metropolitan Nashville Police Department's position that the students and staff present during the shooting, The Covenant School and The Covenant Church, and the MNPD officers who came under gun fire by the assailant are all victims in this case. (TR 453-455, ¶ 3).

MNPD considers all students and staff present during the shooting to be victims. Based upon the particular facts and circumstances in this case, and their location in and around the building while the shooting took place, they are considered victims under Tenn. Code Ann. § 39-13-102 Aggravated Assault, Tenn. Code Ann. § 39-13-103(b)(2) Reckless Endangerment, Tenn. Code Ann. § 39-13-201 (Attempted) Criminal Homicide, or other related criminal offenses. (*Id.*, ¶4).

Similarly, based on the extensive damage to the facilities caused by the assailant, The Covenant School and The Covenant Church are considered victims under Tenn. Code Ann. § 39-13-1002 Burglary and § 39-14-408 Vandalism. (*Id.*, ¶5).

Additionally, the assailant fired shots at MNPD officers, and these officers are also considered victims under Tenn. Code Ann. § 39-13-102 Aggravated Assault, Tenn. Code Ann. § 39-13-103(b)(2) Reckless Endangerment, Tenn. Code Ann. § 39-13-201 (Attempted) Criminal Homicide, or other related criminal offenses. (*Id.*, ¶6).

Until the MNPD completes all aspects of the investigation, these cases remain open. (*Id.*, ¶7). Although the assailant died at the school, the criminal investigative file does not automatically, and instantly,

close. Investigators must still work to gather and analyze evidence in the case to determine if related crimes were committed or are being planned, and whether other people were involved. (*Id.*, ¶ 12).

STANDARD OF REVIEW

The Trial Court's conclusions of law are reviewed *de novo*. Tenn. R. App. P. 13(d). An order allowing intervention is reviewed through an abuse of discretion analysis: "Where ... a common question of law or fact is established, the decision to allow intervention is a matter entrusted to the trial court's discretion, and the decision should not be reversed by an appellate court absent a showing of abuse of discretion." *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996).

ARGUMENT

I. INTERVENTION IS ALLOWED, AND COMMON, IN PUBLIC RECORDS LAWSUITS.

The Tennessee Public Records Act provides a statutory right to access public records. *Tennessean v. Metro. Gov't of Nashville & Davidson Cnty.*, 485 S.W.3d 857, 865–66 (Tenn. 2016).

There is no constitutional right to access public records:

> Despite the fact that TPRA is to be construed broadly in favor of access to public records, a person does not have a constitutional right to examine such records. *Abernathy v. Whitley*, 838 S.W.2d 211, 214 (Tenn. Ct. App. 1992). It is within the power of the Legislature to create, limit, or abolish rights of access to public records. *Id.; see also Friedmann v. Corrections Corp. of America*, 310 S.W.3d 366, 378 (Tenn. Ct. App. 2009) ("[T]he General Assembly has reserved to itself the right to exempt documents from the coverage of the Public Records Act."). The exceptions to TPRA recognized by state law reflect the Legislature's judgment that "the reasons not to disclose a record outweigh the policy favoring 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)).

Moncier v. Harris, 2018 WL 1640072, at *5 (Tenn. Ct. App. Apr. 5, 2018); *see also Tennessean,* 485 S.W.3d at 865-66 (""State law" [providing exceptions to the TPRA] includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations."), *citing Swift v. Campbell*, 159 S.W.3d 565, 571–72 (Tenn.

Ct. App. 2004); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn.1993)).

Intervention has been allowed in many Public Records lawsuits. Most recently, the victim in the Vanderbilt rape case intervened in the Public Records lawsuit when the *Tennessean* newspaper requested records from the Metropolitan Nashville Police Department. *Tennessean,* 485 S.W.3d at 859. She intervened to prevent disclosure of the investigative file and, particularly, photographs and video images of the assault. Her intervention prompted a vigorous discussion of victims' rights in the context of the Public Records Act.

At the Court of Appeals, the majority determined that the investigative file was "relevant to a pending or contemplated criminal action" and therefore not subject to disclosure. *Tennessean v. Metro. Gov't of Nashville & Davidson Cnty.*, 2014 WL 4923162, *4 (Tenn. Ct. App. Sept. 30, 2014), *aff'd on other grounds,* 485 S.W.3d 857 (Tenn. 2016). The victims' rights argument was pretermitted, but Judge McBrayer dissented. He disagreed with the majority's reasoning and stated that he would find that the victim's rights and interests constitute "state law" exceptions to the Public Records Act. *Id.* at *6.

At the Supreme Court, the majority held that Tennessee Rule of Criminal Procedure 16 governs the disclosure of police investigative files and only the defendants, not the public, may receive information in those files. *Tennessean v. Metro. Gov't of Nashville & Davidson Cnty.*, 485 S.W.3d 857, 874 (Tenn. 2016). Justice Wade dissented and stated that victims' constitutional and statutory rights are broader in scope than the Rule 16 exception, and that the majority should have addressed the possibility that they were exceptions to the Public Records Act. 485 S.W.3d at 882.

The State of Tennessee and the District Attorney were also allowed to intervene in that case because they had interests in the criminal prosecution that were slightly different from the police department:

> The State Attorney General and District Attorney General, Victor Johnson, III, moved to intervene in order to protect the interest of the State in the ongoing criminal prosecution; in addition, as more fully discussed herein, the court in which the prosecution was pending had issued a protective order prohibiting disclosure of certain material produced by the State to the defendants.

Tennessean, 2014 WL 4923162, at *1 (Tenn. Ct. App. Sept. 30, 2014), *aff'd on other grounds,* 485 S.W.3d 857 (Tenn. 2016).

But long before the *Tennessean* case, intervention was allowed in Public Records lawsuits. For example, in *Griffin v. City of Knoxville*, a newspaper and television station manager filed suit for access to a decedent's handwritten notes confiscated at the death scene by the Knoxville Police Department. 821 S.W.2d 921, 921 (Tenn. 1991). The municipality resisted, contending the notes were not public records. The decedent's widow was allowed to intervene, seeking to prevent inspection of the notes based on multiple theories of constitutional, copyright, and privacy violations. *Id.*

Cases involving sealed court files are also instructive – because placing documents and filings under seal prevents them from being public. For example, in *Ballard v. Herske*, a protective order had been entered sealing discovery materials filed with the court clerk. The *Tennessean* sought to intervene to unseal the court files of the private parties involved in the lawsuit. 924 S.W.2d 652, 657–58 (Tenn. 1996). The Court allowed the permissive intervention, emphasizing that the key to the analysis is whether there is a question of law or fact in common with the main action:

> [W]e agree with those federal and state courts in other jurisdictions which have routinely found that third parties,

> including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records. ...
>
> In such circumstances, intervention "is not dependent on, nor is it determined by, the status or identification of the parties nor the nature of the dispute." *Id.* Moreover, the question of intervention is collateral to, and does not have any bearing on, the primary issue—modification of the protective order. What is necessary is that the proposed intervenor demonstrate that its claims have "a question of law or fact in common" with the main action.
>
> Here, as in all such cases, by virtue of the fact that the media entities challenge the validity of the protective order entered in the main action, they meet the requirement of Rule 24.02, that their claim have "a question of law or fact in common" with the main action.

Id.

Similarly, in *Knoxville News–Sentinel v. Huskey,* the Court of Criminal Appeals held that it was "firmly" established that the public, including the media, may intervene in court proceedings to challenge the terms of a protective order blocking access to court records or proceedings. 982 S.W.2d 359, 362 (Tenn. Crim. App. 1998).

Although Appellants argue for the barest of processes for requesting and receiving public records, nothing in the Public Records Act excepts Tennessee Rule of Civil Procedure 24 from applying. And, as

shown above, intervention by a party that shares a question of law or fact with the primary action has been frequently allowed.

II. INDIVIDUALS AND ORGANIZATIONS ARE OFTEN DIRECTLY AFFECTED BY PUBLIC RECORDS REQUESTS AND HAVE CONSTITUTIONALLY PROTECTED PRIVACY INTERESTS IN RECORDS.

The Public Records Act often involves records that private individuals created and that the government possesses with those individuals' permission (e.g., job or permit application) or without their permission (e.g., criminal investigation pursuant to a search warrant).

Tax records contain personal information about homes. Business records are submitted to the government when bidding for a contract or when an existing contract is audited. Proprietary software is purchased and used by the government. Government employees may use government computers for purely personal emails. *See Brennan v. Giles Cnty. Bd. of Educ.*, 2005 WL 1996625, *5 (Tenn. Ct. App. Aug. 18, 2005) (holding that whether an email is personal or a public record requires a case-by-case, or record-by-record, review).

Individuals may have a constitutionally protected privacy right in some of the records in the government's possession. In *Kallstrom v. City of Columbus,* undercover police officers brought an action under 42

U.S.C. § 1983 for compensatory damages and injunctive relief, alleging that city's disclosure of personal information from their personnel files to counsel for alleged drug conspirators whom they had investigated violated their right to privacy guaranteed by due process clause of Fourteenth Amendment. 136 F.3d 1055, 1059 (6th Cir. 1998). The personal information had been requested under Ohio's Public Records Law.

The Sixth Circuit agreed with the police officers, concluding that the Fourteenth Amendment prohibited the City from disclosing the personal information contained in the plaintiffs' personnel files absent a showing that such disclosure narrowly served a compelling state interest:

> We see no reason to doubt that where disclosure of this personal information may fall into the hands of persons likely to seek revenge upon the officers for their involvement in the *Russell* case, the City created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives. Accordingly, we hold that the City's disclosure of this private information about the officers to defense counsel in the *Russell* case rises to constitutional dimensions, thereby requiring us under *DeSanti* to balance the officers' interests against those of the City.

Id. at 1063 (6th Cir. 1998) (internal footnotes omitted). The Court therefore balanced the public's interest against the danger to the officer:

> While there may be situations in which the release of this type of personal information might further the public's understanding of the workings of its law enforcement agencies, the facts as presented here do not support such a conclusion. The City released the information at issue to defense counsel in a large drug conspiracy case, who is asserted to have passed the information onto his clients. **We simply fail to see how placing this personal information into the hands of the *Russell* defendants in any way increases public understanding of the City's law enforcement agency** where the *Russell* defendants and their attorney make no claim that they sought this personal information about the officers in order to shed light on the internal workings of the Columbus Police Department. We therefore cannot conclude that the disclosure narrowly serves the state's interest in ensuring accountable governance. Accordingly, **we hold that the City's actions in automatically disclosing this information to any member of the public requesting it are not narrowly tailored to serve this important public interest.**

Id. at 1065 (emphasis added).

In the context of Tennessee's Public Records Act, the Sixth Circuit again found that this constitutional exception for personal safety applied to an individual's private records. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee*, 274 F.3d 377, 394–95, (6th Cir. 2001). The exception protected information about exotic dancers who were afraid to make their names and residential addresses public:

> Here, the plaintiffs presented significant evidence that the requirement that applicants submit their names and past and current addresses to a public forum poses serious risks to their personal security. For instance, plaintiff Dawn Pierce,

> an entertainer at Deja Vu, testified that entertainers in the past have been stalked, harassed, and injured by customers, and that she is afraid to make public her name and residential address, as required by the Ordinance, because of serious potential risks to her physical safety and well -being. ... **Applying *Kallstrom* 's reasoning to this context, we find that all sexually oriented business license and permit names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan Nashville cannot publicly release such private information**; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal.

Id. at 394–95 (emphasis added).

The Tennessee Attorney General has also recognized the *Kallstrom* right to privacy and exception that allows police officers an opportunity to object to their personnel files being released:

> As cited above, Tenn. Code Ann. § 10-7-503(c) requires custodians of such personnel information to allow the public to inspect it, but to obtain information regarding the person making the inspection and to notify the officer whose records have been inspected within three days. Under *Kallstrom*, however, the custodian of such records is required to give the officer prior notice and an opportunity to be heard if, based on the specific circumstances of the request, the custodian knows or should know that release of the information could potentially threaten the security of the officer or of his or her family members by substantially increasing the likelihood that a private actor will harm them. It therefore appears that Tenn. Code Ann. § 10-7-503(c) does not comply with federal due process requirements where the custodian of information

> knows or should know that release of information could potentially threaten the personal security of a law enforcement officer or his or her family by substantially increasing the likelihood that a private actor will harm them. Under *Kallstrom*, in those circumstances, the officer must receive prior notice and an opportunity to be heard.

Tenn. Op. Atty. Gen. No. 98-230 (Dec. 10, 1998). After this Attorney General opinion was issued, Tenn. Code Ann. § 10-7-504 (g)(1)(A)(i) was amended to provide that law enforcement officer's personal information shall be redacted where the chief law enforcement officer or his/her designee identifies a reason not to disclose. 1999 Tennessee Laws Pub. Ch. 514 (H.B. 1818).

The Tennessee Court of Appeals has also recognized the *Kallstrom* right to privacy and exception in the context of safety:

> The underlying facts in *Kallstrom I* which led the Sixth Circuit to the conclusion that the substantive due process rights of the officers in that case had been violated are quite compelling. The *Kallstrom I* officers were actively working undercover and testifying at the criminal trial of several gang members. Here, the officers neither are actively working undercover nor are they in the midst of a criminal trial of a gang member. We cannot overemphasize the importance of law enforcement personnel to maintaining an orderly society. The fact that their jobs put them in the face of danger on a daily basis cannot be disputed. Nevertheless, after carefully reviewing the facts and the entire record in this case, we cannot conclude the evidence preponderates against the Trial Court's factual findings and resulting conclusion that the officers failed to prove that releasing their photographs would

> place them or their families at a substantial risk of serious harm. The judgment of the Trial Court on this issue is affirmed.

Henderson v. City of Chattanooga, 133 S.W.3d 192, 214 (Tenn. Ct. App. 2003).

For all these reasons, it is reasonable, unsurprising, and appropriate for people, businesses, and other entities to have a keen interest in and concern about their personal or proprietary records being released to the public, including the media.

In this case, the Metropolitan Government supports the intervention of the victims, church, and school. They have an interest that is distinct from the government – to protect their families and communities from future publicity and physical or psychological harm. This is distinct from and in addition to the Metropolitan Government's interest in protecting the integrity of the ongoing, open criminal investigation under Rule 16 of the Tennessee Rules of Criminal Procedure and *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857 (Tenn. 2016), and school safety pursuant to Tenn. Code Ann. § 10-7-504(p).

The Intervenors may wish to emphasize different facts or aspects of the situation. They may wish to make legal arguments different from the government or hire different experts. Their viewpoints and rights should be treated with respect and considered by the courts.

III. THE METROPOLITAN GOVERNMENT SHOULD BEAR NO ATTORNEYS' FEES FOR THIS APPEAL.

Petitioners offer no evidence that the Metropolitan Government has willfully denied the provision of a public record. This is the standard under Tenn. Code Ann. § 10-7-505(g). Because there is no such showing here, the award of attorneys' fees is improper.

In addition, the Appellants have pursued this appeal despite the abundance of cases allowing interventions in Public Records litigation. They are the parties who have delayed the adjudication of the show cause hearing, not the Metropolitan Government. There are no grounds for awarding attorneys' fees.

CONCLUSION

The Metropolitan Government asks that the Court give the Intervenors an opportunity to participate in the show cause hearing so their perspective and legal arguments may be considered. And, because there is no evidence that the Metropolitan Government withheld records, there are no grounds to award attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby state that I have complied with Supreme Court Rule 46 concerning electronic filing. Specifically, the foregoing brief, excluding the Title/Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Attorney Signature Block, and Certificate of Service pursuant to Tenn. R. App. P. 30(e), 3,122 words, according to the word processing system used to prepare it.

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I hereby certify that a true and correct copy of the foregoing has been served via the Court of Appeals electronic filing system and via electronic mail and/or U.S. Mail on the following:

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