

IN THE CHANCERY COURT OF  
DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

KARRIE MARREN, )  
 )  
Petitioner, )  
 )  
v. ) Case No. 19-1512-I  
 )  
TENNESSEE SCHOOL BOARDS )  
ASSOCIATION, )  
 )  
Respondent. )

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**MEMORANDUM IN SUPPORT OF MOTION TO SHOW CAUSE**

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Petitioner Karrie Marren respectfully submits this Memorandum in Support of her Motion to Show Cause under the Tennessee Public Records Act (TPRA), codified in Tenn. Code Ann. §§ 10-7-501 *et seq.* Petitioner respectfully requests this Court to order the Tennessee School Boards Association (TSBA) to show good cause for why it is not a functional equivalent of government, subject to transparency under TPRA.

**Legal overview**

The Tennessee Public Records Act governs the public's right of access to the records of government entities. *Cole v. Campbell*, 968 S.W.2d 274, 275 (Tenn. 1998). The Public Records Act, Tenn. Code Ann. § 10-7-503 *et seq.*, provides that "records ... shall at all times, during business hours, be open for personal inspection by any citizen of

Tennessee. ...” to the extent that those records were “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” TPRA further provides that “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. § 10-7-505(a). Public oversight of governmental activities promotes accountability in government, and thus, TPRA must be broadly construed and liberally interpreted “so as to give the fullest possible public access.” Tenn. Code Ann. § 10-7-505(d); *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002).

TPRA applies equally to governmental entities and their functional equivalents. Since first recognizing the functional equivalent doctrine in 2002, Tennessee courts consistently require transparency from notionally private organizations that nevertheless behave and function as government agencies. *See Cherokee Children*, 87 S.W.3d at 79. Requiring disclosure of functional equivalents is a recognition of the reality that “private entities that perform public services often do so as independent contractors.” *Id.* at 78. The functional equivalent doctrine fulfills the statutory requirement that TPRA be interpreted “so as to give the fullest possible public access.” *Id.* at 71; Tenn. Code Ann. § 10-7-505(d). Consequently, “[w]hen a private entity’s relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.” *Cherokee Children*, 87 S.W.3d at 78-79.

When an entity is legally obligated to perform a public function, it has a commensurate obligation of public transparency. The imperatives

behind the functional equivalent doctrine grow as governments increasingly turn to “privatization as a possible solution to perceived problems of inefficiency or expense in the provision of public service.” *Id.* at 76. “Nonetheless, the public’s *fundamental right* to scrutinize the performance of public services and the expenditure of public funds should not be subverted by a government or private entity merely because the public duties have been delegated to an independent contractor.” *Id.* at 79 (emphasis added). Indeed, TPRA itself recognizes the temptation of government to circumvent its disclosure obligations by screening its role with a putatively private entity. Tenn. Code Ann. § 10-7-503(6) (“A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.”).

Over the years, Tennessee courts have applied the functional equivalent doctrine to the following entities:

- the TSSAA, see *City Press Commc’ns, LLC v. Tenn. Secondary Sch. Athletic Ass’n*, 447 S.W.3d 230, 235, 240 (Tenn. Ct. App. 2014);
- a private prison corporation, see *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009);
- the operators of the Gaylord entertainment center, see *Allen v. Day*, 213 S.W.3d 244, 246 (Tenn. Ct. App. 2006);
- an economic development committee, see *Wood v. Jefferson Cty. Econ. Dev. Oversight Comm., Inc.*, No. E2016-01452-COA-R3-CV, 2017 Tenn. App. LEXIS 643 at \*11-12 (Tenn. Ct. App. Sept. 26, 2017);

*compare with Gautreaux v. Internal Med. Educ. Foundation, Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) (internal medicine education corporation

for state university not functionally equivalent where its duties were “merely ministerial” and it “merely acted as a bookkeeper”).

To determine whether a private entity is the functional equivalent of a governmental agency, “courts look to the totality of the circumstances in each case; this is because no single factor is dispositive.” *City Press Commc’ns*, 447 S.W.3d at 235 (citing *Cherokee Children*, 87 S.W.3d at 79). The extent to which “the entity performs a governmental or public” function is the cornerstone of the analysis, “because ‘a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity.’” *Id.* (quoting *Cherokee Children*, 87 S.W.3d at 78-79). In addition to performance of governmental duties, other relevant factors may be: “(1) the level of the government funding; (2) the extent of the government’s involvement, regulation of or control over the entity; and (3) whether it was created by the legislature or had been found earlier to be open to public access.” *Id.* (quoting *Cherokee Children*, 87 S.W.3d at 78-79).

### **Argument**

TSBA meets the test. It performs a critical role in training and organizing of school boards and setting their ethical standards. TSBA is almost entirely financed by government funds. TSBA’s relationship to government is extensive and subjected to heavy amounts of governmental control. Finally, TSBA is defined by statute as a “political subdivision” of the state, and participates as an employer in the state’s consolidated retirement system. As a “political subdivision,” it can hardly complain about being treated as a functional equivalent of government.

As a functional equivalent, it cannot avail itself of the exemptions under TPRA and must fully disclose any document not protected under the law.

Level of governmental funding

TSBA is funded by government, both directly and indirectly, indicating that it is a functional equivalent.

The “first factor” is consideration of the level of government funding of the entity. *See City Press Commc’ns*, 447 S.W.3d at 235. Governmental funding may be direct, or indirect, as when laws and rules require a governmental entity to recognize and work with a specified outside entity. *See id.* at 236. Recently in *Wood*, the Court of Appeals determined that a budget comprised of over 60% of taxpayer revenue, amounting to expenditures of over a quarter of a million dollars from public funds annually, weighed in favor of declaring the private entity a functional equivalent. 2017 Tenn. App. LEXIS 643 at \*13-14. Likewise, in *City Press Commc’ns*, the Court of Appeals determined that the Tennessee Secondary School Athletic Association (TSSAA) was the functional equivalent of a governmental agency even though it did not directly receive government funding, and only 2% of its revenue came from dues paid by member schools. 447 S.W.3d at 235. The vast majority of TSSAA’s revenue derived from games it regulated. Nevertheless, the Court of Appeals upheld the trial court finding because the state Board of Education “officially recognized and designated” TSSAA in its rules and regulations as the only organization to supervise interscholastic sports. *Id.* at 236.

TSBA’s funding comes from government, both directly and indirectly. *First*, like the ECD in *Wood*, TSBA receives overwhelming

direct government funding. According to its available disclosures to the IRS, TSBA receives approximately 90% of its funds from public support. See Ex. 1 (IRS 2016 990s, showing 91% annual financing through public support); Ex. 2 (IRS 2017 990s, showing 90% annual financing through public support). Dues collected by the TSBA cover membership fees for participant representative school board members, and the state authorizes TSBA to provide services with those dues budgeted for and paid by school boards. Tenn. Code Ann. § 49-2-2001(c) & (d). This well surpasses the 60% threshold that rendered the ECD a functional equivalent in *Wood*. 2017 Tenn. App. LEXIS 643, at \*13-14.

*Second*, like TSSAA, TSBA receives indirect funding. 447 S.W.3d at 236. By law and regulation, it has official recognition and exclusive responsibility to develop modules for and with the state Board of Education, and to coordinate among school boards. Tenn. Code Ann. §§ 49-2-202(a)(6), 49-2-2001. Payment for those statutorily proscribed “constitute[s] indirect government funding.” *City Press Commc’ns*, 447 S.W.3d at 236.

Based on these precedents, TSBA satisfies the first factor.

#### Relationship with government

TSBA has special legal recognition and authority. Its Board is comprised of elected government officials who thereby control its operations, and it work jointly with state and local school boards who maintain influence over TSBA’s functioning.

The second factor “is the extent of government involvement with, regulation of, or control over the private entity.” *City Press Commc’ns*, 447 S.W.3d. at 236. TSSAA was determined to have “substantial

government involvement and control” over their organization and activities. It was the “only organization recognized and designated to supervise interscholastic activities by the state Board of Education.” *Id.* at 236. Its “decision-making authorities consisted of public officials, including public school principals and representatives of public entities.” *Id.* Seventeen of the eighteen members of TSSAA’s governing bodies were public employees. In *Wood*, only one half of EDOC’s board of directors were private individuals and businesses and the other half were public officers. *Id.* The EDOC had no tie-breaking procedure, so public officers voting together could effectively block a proposed action by the EDOC. *Id.* Yet this factor worked in favor of viewing EDOC as a functional equivalent. This factor weighs heavily here.

*First*, TSBA has statutory recognition and authorization. Just like TSSAA, see *City Press Commc’ns*, 447 S.W.3d. at 236, TSBA is recognized and authorized to work with the state Board of Education. See Tenn. Code Ann. § 49-2-2001(a)(1) (TSBA “recognized as the organization and representative agency of the members of school boards of this state” and “authoriz[ing] and empower[ing]” the state board of education to “cooperate” with TSBA); Tenn. Comp. R. & Regs. R. 0520-01-02-.11. As TSBA acknowledges on its own website, “the Tennessee Legislature officially recognized TSBA as ‘the organization and representative agency of the members of school boards of Tennessee’ and authorized TSBA to provide services through membership dues paid by school

boards.”<sup>1</sup> TSBA’s president is entitled, by rule, to a seat on the Advisory Committee for School Board Academy. Tenn. Comp. R. & Regs. R. 0520-01-02-.11(4). TSBA’s legal protections make it a functional equivalent.

*Second*, government involvement with, and control over, TSBA is even more substantial than TSSAA or the ECD in *Wood*. TSBA is comprised of school board members. All members are locally elected government officials. *See* Ex. 5, TSBA’s constitution. TSBA’s constitution also requires that all major policy decisions be determined by TSBA’s governing body, the Delegate Assembly, which is comprised of representatives selected from each local board of education in Tennessee. *Id.* This means that *every* decision made by the Delegate Assembly is influenced by governments. At the end of the day, it is governmental officials who have – to say the least – substantial involvement and control within TSBA. But governmental influence does not end at internal control. The government exerts external influence as well. The law requires the state Board of Education to work with TSBA to create and administer its training program. *See* Tenn. Code Ann. § 49-2-2001(a)(1); Tenn. Comp. R. & Regs. R. 0520-01-02-.11(4). The government, therefore, has “pervasive influence and control” over TSBA. *See Allen*, 213 S.W.3d at 254. The “significant involvement,” *id.*, of government, both within and without, further illustrate that TSBA is a functional equivalent.

<sup>1</sup> Available here at: [tsba.net/about/history-of-tsba/](https://tsba.net/about/history-of-tsba/) (last viewed on Dec. 17, 2019)



TSBA’s “relationship with government is so extensive that the entity serves as the functional equivalent.” *Cherokee Children*, 87 S.W.3d at 78-79. TSBA meets the second factor as well.

#### Legislative creation

The third factor considered when examining whether an entity is functionally equivalent to a governmental agency is whether the entity was created by legislation, or previously subject to the Public Records Act. *City Press Commc’ns*, 447 S.W.3d at 237. In *City Press Commc’ns*, the Court of Appeals recognized that TSSAA was not created via legislation or previously subjected to TPRA. *Id.* Like TSSAA, TSBA is not legislatively created. Yet, by its own acknowledgment, it has had special legislative recognition and authorization to perform a governmental function since 1953.<sup>2</sup> This factor does not weigh strongly in either direction.

#### TSBA’s governmental function

At its heart, TSBA exists to perform a public role: training of, and coordinating among, and setting ethical standards for, elected school board officials. TSBA’s core function is the overwhelming reason why it is a functional equivalent.

The “cornerstone” of the functional equivalency test involves determining whether and to what extent the entity performs a governmental or public function. *City Press Commc’ns*, 447 S.W.3d at 237. Being in charge of interscholastic sports – after all, just an optional

<sup>2</sup> Available here at: [tsba.net/about/history-of-tsba/](https://tsba.net/about/history-of-tsba/) (last viewed on Dec. 17, 2019)

extracurricular activity – was enough of governmental function in *City Press*, because it was “undeniable that *education is a government function*, and that the rule identified below made it clear that the Tennessee State Board of Education viewed the supervision and regulation of athletic activities in public junior and senior high schools of Tennessee as one of its governmental functions.” *Id.* at 238 (emphasis added). Public education is one of the most deeply rooted functions of state government. *See Allen*, 213 S.W.3d at 264 (Tenn. Ct. App. 2006) (Cottrell, J., concurring) (“Certain activities have been traditionally performed by state and local governments in fulfillment of their roles. Prime examples of such activities are law enforcement ... and *education.*”) (emphasis added).

This factor overwhelms the analysis because TSBA is so involved in training and directing school boards. As a matter of law, the Code embeds TSBA as central to school boards. *See* Tenn. Code Ann. § 49-2-2001(b)(3) (providing that TSBA provides the organizational structure for “coordinating the policies, control and management of the schools” under the jurisdictions of the various school boards of education across the state); Ex. 3 (TSBA’s 2018-20 contract with the state to provide professional development and training to school board members across the state). TSBA is responsible for educating all newly elected school board members, maintaining and updating training modules and providing continuing education for all school board members of all the public-school districts in Tennessee. Tenn. Code Ann. § 49-2-202(a)(6); Tenn. Comp. R. & Regs. R. 0520-01-02-.11. Fulfilling another government function, TSBA is charged by law with setting the ethical standards for

school board members in the state. Tenn. Code Ann. § 8-17-105(a); *see also*, Ex. 4, New Member Guide, at 9. TSBA's place in state education far exceeds coordinating extracurricular activities. If TSSAA's attenuated proximity to public education was sufficient to make it a functional equivalent, then TSBA's central role in the state education system and pivotal position with local school boards easily qualifies.

Perhaps most important for purposes of comparison with TSSAA is the language charging each respective organization with their specific responsibilities. Whereas TSSAA was designated as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis," *City Press Commc'ns*, 447 S.W.3d at 238 (citing Tennessee State Board of Education, Administrative Rules and Regulations, Rule 0520-1-2-.26 (1972) (later moved to Rule 0520-1-1-.08)), TSBA is "recognized as the organization and representative agency of the members of the school boards of this state." Tenn. Code Ann. § 49-2-2001(a). Moreover, TSBA is charged with providing the organizational structure for "coordinating the policies, control and management of the schools," under the jurisdictions of the various school boards of education. Tenn. Code Ann. § 49-2-2001(b)(3).

TSSAA establishes a baseline comparison that renders TSBA a functional equivalent.

#### State retirement

TSBA is also treated like a government entity for purposes of retirement and social security. Aside from the factors outlined in *Cherokee Children*, 87 S.W.3d at 79 ("...relevant factors include, but are

not limited to...”), two other related considerations further bolster the functional status of TSBA. *See Gautreaux*, 336 S.W.3d at 529 (“In *Cherokee*, the Court considered four *non-exclusive* factors in determining if an entity is the functional equivalent of a government agency ...”). *First* and foremost, TSBA is defined as a *political subdivision* of the state for purposes of protecting Social Security to state employees and its political subdivisions. This alone should be decisive. If TSBA is, literally, a “political subdivision,” then it must be treated like a governmental entity. It cannot have government levels of protection of Social Security and not have government levels of accountability to public transparency. TSBA more closely resembles an actual equivalent of government when it allows itself to be defined this way. Legal protection of TSBA’s retirement is not just pabulum. *Second*, and relatedly, TSBA is one of the three notionally private entities allowed under the law to participate in the Tennessee consolidated retirement system. *See* Tenn. Code Ann. § 8-35-209(a). Notably, TSSAA – another functional equivalent – also numbers among the three, and the Court of Appeals noted this fact when it ruled that TSSAA was a functional equivalent. *See City Press Commc’ns*, 447 S.W.3d at 238. These statutory preferences further demonstrate that TSBA should be treated like a governmental entity.

TSBA benefits from being treated like an equivalent of government. It must uphold the obligations to the public that come with being an equivalent of government. Taken together, these factors exhibit that TSBA is a functional equivalent of government.

### Obligation to disclose

As a functional equivalent of government, TSBA is bound by the same disclosure obligations as a governmental entity. TPRA does not limit its scope or give courts leeway to exempt records from public inspection. *Cherokee Children*, 87 S.W.3d at 74, 80 (ordering disclosure of any “records in Cherokee’s possession are subject to public access pursuant to the terms of the Tennessee Public Records Act,” not just work performed or money received under contracts with the state). TSBA must any disclose materials in its possession, even if created by private entities if they ultimately reposed those items at TSBA. *City Press Commc’ns*, 447 S.W.3d at 241 (confidential private school documents “lost that status and protection when voluntarily provided to the TSSAA. ...”). Bald assertions of privilege do not trump the freedom of information guaranteed by the TPRA. *Eldridge v. Putnam Cty.*, 86 S.W.3d 572 (Tenn. Ct. App. 2001). In light of a “clear legislative policy favoring disclosure,” *Allen*, 213 S.W.3d at 261, an entity subjected to the TPRA bears the burden of showing a document fits an express exemption. Unless “it is clear” that state law exempts a document from disclosure, a functional equivalent must meet its obligation “*even in the face of serious countervailing considerations.*” *Id.* (quotations omitted, emphasis added). Equally true, the explicit legislative preference in favor of disclosure means that a statutory exemption for non-profits is unavailable when they are functional equivalents. *See Fodness v. Newport & Cocke County Econ. Dev. Comm’n, Inc.*, No. E2004-01491-COA-R3-CV, 2005 Tenn. App. LEXIS 148, at \*1 (Tenn. Ct. App. March 16, 2005) (exemption for non-profits set forth in Tenn. Code Ann. § 10-7-503(d)(1) unavailable to

functional equivalent joint municipal-county economic development commission). The directive to construe TPRA as broadly as possible means that TSBA carries the burden of showing any document it wishes to withhold is protected by a clearly stated exemption to disclosure requirements.

**Conclusion**

This Court should order TSBA to show cause as to why it should not be declared the functional equivalent of a governmental agency and subject to TPRA.

Dated: December 18, 2019

Respectfully submitted,

s/ B.H. Boucek  
BRADEN H. BOUCEK

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