

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

KARRIE MARREN,)
)
 Petitioner,)
)
 v.)
)
 TENNESSEE SCHOOL BOARDS)
 ASSOCIATION,)
)
 Respondent.)

FOG
No. 19-1512-I
DAVIDSON COUNTY CHANCERY CT
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MEMORANDUM AND ORDER

This matter came before the Court on May 19, 2020, on Petitioner Karrie Marren’s Motion to Show Cause under the Tennessee Public Records Act (“TPRA”), Tenn. Code Ann. §§ 10-7-501, *et seq.*, against Respondent Tennessee School Boards Association (“TSBA”). Oral argument on the motion was conducted by videoconference. Participating in the hearing were Attorney Braden H. Boucek, representing Petitioner, and Attorney Charles W. Cagle, representing TSBA.

I. BACKGROUND

Petitioner Dr. Karrie Marren is a parent and resident of Williamson County, Tennessee. She made a public records request to TSBA on November 2, 2019, requesting public records relating to (1) training of school board members, (2) certain communications with school board members, legislators, and other elected officials, and (3) TSBA’s position statements on governance and allocation of public funds. TSBA responded on December 2, 2019, stating that the school board training materials are materials of the Tennessee Department of Education. TSBA provided a link to some of those materials and attached materials for 2018-2019. TSBA

did not provide any documents in response to Petitioner's second and third requests, stating that TSBA is a private nonprofit organization that is not subject to the TPRA.

Petitioner filed a Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access ("Petition") on December 17, 2019. She asserts that TBSA is the "functional equivalent" of a governmental agency and is subject to the TPRA. TBSA answered on January 31, 2020, claiming it is exempt from all public records requests under Tenn. Code Ann. § 10-7-503(d)(3).

II. STIPULATIONS OF FACT AND POSITION OF THE PARTIES

The parties submitted agreed stipulations of fact with attached exhibits, as amended. They agree that the Petition, Answer, and Amended Stipulations of the Parties obviate the need for discovery and that the Motion to Show Cause is dispositive of the issues raised in the Petition. The parties stipulate as follows:

Venue, Jurisdiction, and the Parties

1. The Chancery Court sitting in and for the 20th Judicial District has jurisdiction and venue over the subject matter of the petition and the parties hereto.

2. Dr. Karrie Marren (Petitioner) is a citizen of the State of Tennessee. The parties stipulate that at all times relevant, Petitioner was authorized to make public records request under Tennessee law.

3. The Tennessee School Boards Association (TSBA) is an organization whose membership is comprised of local school boards that are created by statute, ordinance or private act.

TSBA

4. TSBA is a not-for-profit corporation domiciled in Davidson County, Tennessee.

5. TSBA holds tax exemption under 26 U.S.C. § 501(c)(3) of the Internal Revenue Service Code of the United States and has held such status since 1984.

6. TSBA is governed by a board of directors comprised of 18 members. Nine (9) of these members are elected in regional membership

meetings held in the fall of each calendar year. Five (5) officers also serve as Board members.

7. In addition, there are four (4) members of the board of TSBA who are chosen as “at-large” members.

8. All members of the board of directors of TSBA are elected school board members from district boards (e.g., county, municipal or special school district) that are dues-paying members of the TSBA.

9. There are no personal memberships in TSBA and no school board is compelled to join TSBA.

10. As a not-for-profit corporation, TSBA is required to file an annual report of fiscal activity as mandated under federal law. This is accomplished through the filing of an IRS Form 990. The Form 990 for TSBA is a public document, which has been published according to the provisions of Tenn. Code Ann. § 10-7-503(d)(3).

11. The admissibility of the items attached as exhibits attached to the Petition and Motion for Show Cause and designated as Exhibits 1 – 7, are stipulated.

12. TSBA’s 2018 IRS Form 990 is attached as Exhibit 8. The admissibility of Exhibit 8 is also stipulated.

13. In 2018, TSBA received 90.25% of its funds from “public support.” *See* Ex. 8 at 17.

14. Most of the remaining percentage of TSBA’s revenues derived from investment income, membership dues appropriated from local school funding sources as well as revenues paid by the [School Board] Academy for providing the training mandated by statute, seminars and workshops, and its annual convention.

15. A true and authentic copy of TSBA’s 2020 mission statement is attached as Exhibit 9. [Footnote 1: “It can also be found on TSBA’s publicly accessible website”]

16. TSBA describes its mission statement on its 2020 strategic plan as: “[t]o assist school boards in effectively governing school districts.”

17. In TSBA’s 2020 mission statement, it states that “Objective 1” in fulfilling its goal to provide a functional organizational structure is to “[m]aintain 100% membership of all school boards in Tennessee.”

18. TSBA provides required training to the members of local boards of education. The training is required under Tenn. Code Ann. § 49-2-202(a)(6). Minimum requirements for the training are established by the State Board of Education. Local boards of education also have the option to develop their own training modules and such modules are submitted to the State Board of Education for approval.

19. TSBA describes its involvement in the training of school board members on its website as follows:

In 1990, the Tennessee Legislature mandated that school board members attend one full-day training session each year. The State Board of Education authorized the Tennessee Department of Education to plan and implement the program. The Department of Education contracts with TSBA to conduct all of the training.

20. The rules of the State Board of Education, to wit, Tenn. Comp. R. & Regs. R. 0520-01-02-.11, establish a fourteen (14) hour orientation and training program [for] school board members in the first year of service and a seven (7) hour per year training program for continuing school board members.

21. This rule also establishes the School Board Academy that is administered by the State Department of Education.

22. The School Board Academy administers an annual program consisting of modules approved by the State Board of Education.

23. This rule requires that TSBA “shall” develop and conduct the majority of approved modules.

24. TSBA develops and conducts and will continue to develop and conduct the majority of the approved modules used at the School Board Academy.

25. In 2019, TSBA developed and approved all of the approved modules.

26. This rule also requires that the State Board of Education establish a School Board Academy Advisory Committee. This Committee will be responsible for evaluating academy programs, and recommending an annual program plan prior to the beginning of each school year for approval of the State Board of Education.

27. This rule also requires that the Advisory Committee include the Executive Director and President of the TSBA.

28. The Executive Director and President of the TSBA are currently included on the Advisory Committee.

29. After the Advisory Committee evaluates academy program and makes its recommendations for an annual plan, all modules and training materials are approved by the State Board of Education.

30. All school board members, regardless of local board membership status with TSBA, must satisfy the annual training requirement.

31. TSBA provides an annual report to the Tennessee Department of Education detailing school board members who have attended training sessions and those who have not received the required training.

32. TSBA has a contract with the State of Tennessee through the School Board Academy operated by the Tennessee Department of Education to provide this training and TSBA is reimbursed by the Academy for providing this service.

33. TSBA has continuously had this contract since 1991.

34. The contract with the state is awarded for a period of varying term lengths. Originally, it was for five (5) years. Once or twice during the course of renewals, the contract has been renewed for a 2-year period. Over the last two (2) years, the contract was renewed for a 1-year period.

35. Negotiations have not yet begun for a new contract.

36. The Department of Education has not notified TSBA that its contract will not be renewed in 2020 or beyond.

37. TSBA creates and disseminates model ethical standards for officials and employees of school districts.

38. TSBA provides professional development and training for school board members.

39. TSBA is designated as a participating employer in the state's consolidated retirement system. *See also* Tenn. Code Ann. § 8-35-209(a).

40. Current and former TSBA employees continue to accrue and/or receive retirement benefits through the Local Government category within the Tennessee Consolidated Retirement System.

41. TSBA is included in the definition of a "political subdivision of the state" authorizing it to submit for approval by the state agency, Old Age and Survivors Insurance Agency, or OASI, a plan for extending the benefits of Title II of the Social Security Act. *See also* Tenn. Code Ann. § 8-38-101(9), 108(a).

42. Current and former TSBA employees get OASI benefits under Title II of the Social Security Act.

Dr. Marren's Request and TSBA Response

43. Dr. Marren made a public records request to TSBA on November 25, 2019. *See* Ex. 6.

44. More specifically, Dr. Marren requested:

a. All training materials not posted on your website for the 2019-20 School Board Academy Catalog. This includes, but is not limited to materials for "Board Policy and Operations," "A Deep Dive into Boardmanship,["] "Planning: A Joint Venture" (Part I & II), "Teaming and the School Board," and "Legal Issues Impacting School Boards,"

b. Any and all communications with legislators, school board members, superintendents, or any other elected officials or public officials about your 2018 and 2019 Legislative Agendas,

c. Any and all documents specifically pertaining to TSBA's position statements on governance (particularly TSBA's desire to "reduce state education law for the purpose of eliminating unconstitutional, conflicting, redundant, and unnecessary statutes"), and allocation of public funds (particularly advocacy supporting the idea "that funds raised by general taxation for educational purposes should be administered by public officials and should not be used to support privately operated schools through tuition tax credits, vouchers, or block grants").

45. On December 2, 2019, TSBA responded to Dr. Marren.

46. As to the first request, Ben Torres, Assistant Executive Director and General Counsel for TSBA, replied by email: "the program is administered by the TN Department of Education and all training materials associated with the School Board Academy belong to the Department of Education." *See Ex. 7.*

47. Mr. Torres provided a link to some of the school board academies on TSBA's website, attached 2018-19 materials to the email response for some, explained that others were not yet published, that some had not been requested or created, and that some courses were only available online. *See id.*

48. As to the second and third requests, Mr. Torres did not provide any documents. *See id.*

49. Mr. Torres responded: "TSBA is a private, nonprofit organization and not subject to these requests pursuant to TCA 10-7-503." *See id.*

Position of the Parties

It is the position of the Petitioner, Dr. Marren, that TSBA is the functional equivalent of a governmental agency, subject to the public records requests.

It is the position of TSBA that it is a private, not-for-profit organization that is exempt from all public records requests and that such exemption is granted under the provisions of Tenn. Code Ann[.] § 10-7-503(d)(3).

See Amended Stipulation of the Parties, filed May 14, 2020.

III. ANALYSIS

A. The Tennessee Public Records Act

The issue of whether the Tennessee Public Records Act applies to records in the possession of TBSA presents a question of law. *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002). The TPRA provides:

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

Tenn. Code Ann. § 10-7-503(a)(2)(A). “Public records” or “state records” are defined as all records “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity.” *Id.*, § 10-7-503(a)(1)(A). The issue presented requires the Court to interpret the term “public records” as used in the TPRA using well-recognized principles of statutory construction consistent with legislative intent. *Cherokee Children & Family Servs.*, 87 S.W.3d at 74.

The TPRA further provides that the failure to respond to a public records request “shall constitute a denial and the person making the request shall have the right to bring action as provided in § 10-7-505.” Where access to public records has been denied, the citizen requesting access may file a petition for access to such records and for judicial review of the actions taken to deny access. *Id.*, § 10-7-505(a). The public official of those records bears the “burden of proof for justification of nondisclosure,” which “must be shown be a preponderance of the evidence.” *Id.*, § 10-7-505(c). A court ruling on a petition for access to public records is “empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of [§ 10-7-505],” and shall broadly construe §10-7-505 “to give the fullest public access to public records.” *Id.* § 10-7-505(d).

The TPRA protects the public's right of access to inspect the records of governmental entities. Its purpose 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 governmental records." *Swift v. Campbell*, 159 S.W.3d 565, 570 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. 2005) (citing *Cherokee Children & Family Servs.*, 87 S.W.3d at 74; *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 687-88 (Tenn. 1994)). The TPRA is a "clear mandate in favor of disclosure," and creates a presumption that public records are open to the public. *Id.* (citations omitted).

B. The "Functional Equivalent" Doctrine

The TPRA has been construed to apply equally to government entities and their functional equivalents. Under the functional equivalent doctrine, the definition of "public records" is construed to include "those records in the hands of any private entity which operates as the functional equivalent of a governmental agency." *Cherokee Children & Family Servs.*, 87 S.W.3d at 79.

In this case, the parties have stipulated that TSBA is a private, not-for-profit corporation. The issue presented is whether TSBA, as a private entity, is the functional equivalent of a governmental agency and subject to the TPRA. In making this determination, the Tennessee Supreme Court held in *Cherokee Children & Family Servs.*, that courts are to "look to the totality of the circumstances in each given case, and no single factor will be dispositive." *Id.* The Court outlined the analysis as follows:

The cornerstone of this analysis, of course, is whether and to what extent the entity performs a governmental or public function, for we intend by our holding to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the [TPRA] by contractually delegating its responsibilities to a private entity. Beyond this consideration, additional factors relevant to the analysis include, but are

not limited to, (1) the level of government funding of the entity; (2) the extent of government involvement with, regulation of, or control over the entity; and (3) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.

Id.; see also *City Press Commc'n, LLC v. Tenn. Secondary Sch. Athletic Ass'n*, 447 S.W.3d 230, 235 (Tenn. Ct. App.), *perm. app. denied* (Tenn. 2014) (holding the TSSAA serves as the functional equivalent of the State Board of Education by directing and managing interscholastic athletic programs of schools across the state). Each of those factors is considered below based on the parties' stipulated facts.

1. *Level of Government Funding of TSBA*

The first factor is the level of government funding of TSBA, which may be direct or indirect funding. In *City Press*, for example, the court of appeals found that the Tennessee Secondary School Athletic Association's ("TSSAA") received indirect government funding, where the vast majority of its revenues came from contracts and gate receipts of school tournament games that are part of the athletic programs and activities of the public schools. 447 S.W.3d at 236. Even though these tournament revenues did not come directly from a state agency, the court of appeals found that the funding was indirect where the TSSAA is the only athletic association that the State Board of Education officially recognizes and designates to supervise and regulate public school interscholastic athletic activities. *Id.* The court of appeals also relied on the fact that the State Board of Education, through regulations, recognizes and expressly authorizes public schools to voluntarily maintain membership in the TSSAA. *Id.* The court of appeals affirmed the trial court's finding that TSSAA's tournament revenues constituted indirect government funding. *Id.*

Here, the parties stipulate that TSBA receives 90.25% of its funding from "public support." See Amended Stipulation, ¶¶ 12-13. These revenues come from several sources as

reported on TSBA's Internal Revenue Service Form 990, the financial report required of not-for-profits corporations that are tax exempt under 26 U.S.C. § 501(c)(3). The revenues received by TSBA include membership dues from local school board members and contract and program service revenues for various educational programming and training services.

By statute, the State expressly recognizes TSBA as the "organization and representative agency of the members of school boards of this state." Tenn. Code Ann. § 49-2-2001(a). That statute further provides:

(b)(1) The commissioner of education, the department of education, the state board of education, and the boards of education of counties, cities and special school districts are authorized and empowered to cooperate with Tennessee school boards association in its in-training programs for school board members and in encouraging and fostering cooperation among the school boards of this state.

(2) Any board of education is authorized to become affiliated with the Tennessee school boards association.

(3) The various boards of education are authorized to use the organization of the Tennessee school boards association in coordinating the policies, control and management of the schools under their respective jurisdictions.

(c) Membership dues and necessary traveling expenses of school board members and directors of schools incurred in attending meetings of the Tennessee school boards association may be paid as other expenses are paid by boards of education.

(d) The Tennessee school boards association is authorized to receive funds in the form of dues from its members

Id., § 49-2-2001 (b) – (d). Like the legislative recognition and designation given to the TSSAA by the state as described in *City Press*, the legislature in this case recognizes and expressly authorizes local boards of education to become members of TSBA, to cooperate with TSBA's in-training program, to pay membership dues and travel expenses for TSBA meetings. The state further authorizes TSBA to receive funds in the form of dues from its members.

The state mandates that all individual members of local boards of education must attend annual training. Tenn. Code Ann. § 49-2-202(a)(6). The State Board of Education sets the minimum requirements for this training. *Id.*; Tenn. Comp. R & Regs. 0520-01-02.-11. The State Department of Education is responsible for administrating the required training through the “School Board Academy.” Tenn. Comp. R & Regs. 0520-01-02.-11. The School Board Academy’s training program consists of modules approved by the State Board of Education. *Id.* TSBA is designated by regulation as the entity that “shall develop and conduct the majority of the approved modules” for the School Board Academy. *Id.*

The parties stipulate that TSBA develops and conducts, and will continue to develop and conduct, the majority of the approved modules for the School Board Academy. In 2019, TSBA developed and conducted all of the approved modules. TSBA currently has a contract with the State through the School Board Academy to provide the required school board member training, TSBA is reimbursed by the School Board Academy for providing that training, and TSBA continuously has held this contract since 1991.

Petitioner argues that this factor weighs in favor of finding TSBA is a functional equivalent because 90.25% of its funds are from “public support.” Petitioner further argues that TSBA’s funding constitutes both direct and indirect government funding, just as TSSAA’s funding in *City Press* was found to constitute indirect government funding in light of the legislative designations and authorizations directed to TSBA.

TSBA responds that its primary source of revenues is program service revenues from its contracts with the State. TSBA argues that the State is simply a purchaser of program services, much like the service provider in *Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526 (Tenn. 2011). In that case, the Supreme Court held that a medical education services

provider was *not* the functional equivalent of a government agency merely because it had a contractual relationship with the state. *Id.* at 529-31. TSBA contends that not every private entity that provides contract services to a government agency becomes the functional equivalent of that agency and subject to the requirements of the TPRA. *Cherokee Children & Family Servs.*, 87 S.W.3d at 79. In short, TSBA maintains that it merely does business with the state, but is not the functional equivalent because it has no regulatory or enforcement powers. It also argues that an analysis of TSBA's funding should be limited only to contract revenues for school board training sessions, without consideration of revenues from TSBA's other activities and services.

Based on the stipulated facts, including the fact that over 90% of TSBA's funding is from "public support," coupled with the legislative recognition and designation of TSBA through state statutes and regulations approved by the State Department of Education and State Board of Education, the Court finds that TSBA receives direct and indirect government funding from both state and local governmental agencies. The facts in *Gautreaux* are distinguishable. In that case, the medical service provider merely recorded hours during which university medical school faculty supervised residents, paid those faculty members for their teaching services, and billed insurance companies for the medical services provided to patients. 336 S.W.3d at 528. The Supreme Court found that the university had not delegated the responsibility to manage or administer its teaching program to the service provider, nor it provide educational instruction. *Id.* at 529. The service provider merely acted instead as a bookkeeper, paying the university faculty for their services. *Id.* Here, TSBA develops and conducts the majority of the approved training modules, conducted all of the training in 2019, and has had a contract with and is reimbursed by the School Board Academy for providing this training since 1991. The Court concludes that this

factor weighs in favor of finding TSBA to be the functional equivalent of the state educational agencies.

2. Extent of Government Involvement with, Regulation of, or Control over TSBA

The second factor is the extent of government involvement with, regulation of, or control over the private entity. The discussion above addressing the legislative recognition and designation of TSBA through state statutes and regulations as part of the consideration of the level of government funding of TSBA, also is relevant to the factor of the extent of government involvement with and control over TSBA by the State Department of Education and State Board of Education. The state's recognition and express designation of TSBA as the "organization and representative agency of the members of school boards of this state," as well as its selection to provide the majority of the training modules for the School Board Academy, which is administered by the State Department of Education and approved by the State Board of Education, evidences significant government involvement with TSBA.

The parties also stipulated as to the facts relevant to the governance of TSBA and the School Board Academy. TSBA's board of directors is comprised of 18 members, all of whom are elected school board members from "district boards" (e.g., county, municipal or special school district), and "are dues-paying members of TSBA." By state regulation, TSBA develops and conducts the majority of training for the members of local boards of education. Also by state regulation, the State Board of Education establishes a School Board Academy Advisory Committee that is responsible for evaluating the School Board Academy training programs and recommending an annual program plan at the beginning of each school year for the State Board of Education's approval. The Advisory Committee includes the Executive Director and President of the TSBA.

All school board members, whether or not they are members of TSBA, must comply with the annual training requirements established by the State, the majority of which is conducted by TSBA. TSBA provides an annual report to the State Board of Education with a list of school board members who have or have not received the required training. TSBA also creates and disseminates model ethical standards for school board officials and employees of school districts, and provides other professional development for school board members.

TSBA is designated by statute as a participating employer in the State's consolidated retirement system. Tenn. Code Ann. § 8-35-209(a). TSBA employees receive retirement benefits through the Local Government category. For purposes of federal Old Age and Survivor Insurance Agency ("OASI") benefits of Title II of the Social Security Act, TSBA is included within the statutory definition of a "political subdivision of the state." Tenn. Code Ann. § 8-38-101(9), 108(a). TSBA employees receive OASI benefits.

The Court finds there is a close interrelationship between TSBA, the State Department of Education, and the State Board of Education, from TSBA's funding to its governance to its participation in state retirement and insurance benefit programs. The Court concludes these facts, when taken together, evidence substantial government involvement with TSBA.

3. *Created by Legislation or Previously Deemed Subject to the TPRA*

The third factor is whether TSBA was created by legislative act or previously determined to be subject to the TPRA. Although TSBA is expressly recognized and designated by the General Assembly, and has been since 1953, as the organization and representative agency of the members of school boards of this state, Tenn. Code Ann. § 49-2-2001(a), TSBA was not created by legislative act. It further appears to the Court that TSBA has not previously been found

subject to the TPRA, and neither party has cited to any such cases. This factor does not support a finding that TSBA is a functional equivalent of a governmental agency.

4. TSBA's Performance of a Governmental or Public Function

Turning to the cornerstone of the functional equivalence analysis, the parties stipulate that it is TSBA's mission is "[t]o assist school boards in effectively governing school districts," and "[m]aintain 100% membership of all school boards in Tennessee." TSBA provides training to members of local school boards that is required training under state law, Tenn. Code Ann. §49-2-202(a)(6). The State Board of Education establishes the minimum requirements for school board member training.

Education is a government function. *City Press*, 447 S.W.3d at 237. The State Department of Education is charged with training school board members. The State has authorized and empowered TSBA to be the organization to provide such mandatory training. Since 1953, TSBA has been expressly recognized and designated as "the organization and representative agency of the members of school boards of this state." Tenn. Code Ann. § 49-2-2001(a). It is clear that legislature has determined that the training and professional development of school board members is a necessary function of the State Department of Education and State Board of Education. It is also clear that the State Board of Education views the development and implementation of training programs and an annual training plan, with specific minimum requirements that must be approved by the State Department of Education, as one of its governmental functions. Tenn. Comp. R. & Regs. 0520-01-02.-11.

Comparing the factors relevant to TSBA with the analogous factors that the court of appeals found relevant in *City Press*, the same conclusion should be reached. TSBA serves as the functional equivalent of governmental agencies, the State Board of Education and State

Department of Education, by developing and conducting the statutorily mandated local board member educational training for members of county and city school boards and special school districts across the state.

IV. TSBA'S CLAIMS OF LEGISLATIVE PRIVILEGE OR STATUTORY EXCEPTION

TSBA also argues in its response to the Motion to Show Cause that Petitioner's second and third requests for records were properly denied by TSBA because (i) communications with state legislators are privileged, and (ii) TSBA comes within one of the statutory exceptions to the TPRA. Neither argument was pursued during the hearing on Petitioner's Motion to Show Cause; however, the Court does not find either argument to be persuasive.

First, TSBA claims in its response that its communications with legislators are privileged under the separation of powers doctrine of Article II, § 2 of the Tennessee Constitution. TSBA deems Petitioner's request for any and all communications with legislators (among others), about TSBA's 2018 and 2019 legislative agendas is protected because disclosure of those communications would restrict the powers of the legislature to conduct its business. TSBA relies on a Tennessee Attorney General Opinion, explaining that the TPRA, like the Open Meetings Act, should be unenforceable against the legislature because it would allow the judiciary to control the province of the legislature. *See* Tenn. Op. Atty. Gen. No. 05-099, 2005 WL 1839879 (2005) (citing *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App.), *perm. app. denied* (Tenn. 2001)). TSBA also claims a statutory exception for legislative materials under the TPRA, which excludes the legislative branch from the definition of "agency" under the TPRA, and should be applied to Petitioner's request to exclude communications with legislators from disclosure under the TPRA, again citing the analysis provided in the Attorney General's Opinion.¹ *Id.*

¹ Attorney General Opinions are useful, but considered advisory and not legally binding on the

The Court does not find the legislative privilege under the TPRA, as discussed in the Tennessee Attorney General's Opinion based on the decision in *Mayhew* under the Open Meetings Act, to be applicable here. Petitioner did not direct her request to the legislature, asking for its legislative records. Had she done so, a different analysis would be required. Petitioner instead directed her request to TSBA, asking for TSBA's records relating to TSBA's communications with legislators, among others. Any legislative privilege to be asserted is for the legislature to invoke, not TSBA. And, for the same reasons, the Court finds that Petitioner's request for TSBA's communications with legislators, among others, does not constitute a request for legislative materials.

Second, TSBA claims a statutory exception under the TPRA in its capacity as a nonprofit corporation that is exempt from federal income taxation and makes available to the public its federal financial return (Form 990). Tenn. Code Ann. § 10-7-503(d)(3). While TSBA is a nonprofit corporation, is exempt from federal income taxation, and makes its Form 990 publicly available, the Court finds that this statutory exception argument is superseded by the Court's conclusion that TSBA is the functional equivalent of a governmental agency, as discussed above. Petitioner's request to TSBA was directed to it as the functional equivalent of a governmental agency, and it is subject to the provisions of the TPRA in that capacity. The request was not made to TSBA in its capacity solely as a nonprofit corporation. "[A] governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the [TPRA] by contractually delegating its responsibilities to a private entity." *Cherokee Children & Family Servs.*, 87 S.W.3d at 79.

courts. See *Washington Cnty. Bd. of Educ. v. MarketAmerica, Inc.*, 693 S.W.2d 344, 348 (Tenn. 1985).

V. CONCLUSION

Under the totality of the circumstances of this case, based on the parties' stipulated facts, and applying the holdings and analyses in *Cherokee Children & Family Servs.* and *City Press*, the Court concludes that TSBA is the functional equivalent of a governmental educational agency. As a functional equivalent of a governmental agency, the public records in the possession of TSBA, including its training materials, communications regarding its legislative agendas, and its position statements on state education law and funding, are public records subject to the provisions of the TPRA.

Petitioner requested an award of reasonable costs in obtaining the requested records, including attorneys' fees, under the TPRA, Tenn. Code Ann. § 10-7-505(g). The Court finds that Petitioner did not establish that TSBA knowingly and willfully refused to disclose the requested records in its possession, where TSBA has not previously been deemed to be subject to the TPRA, the TSBA disclosed some of the requested records in its possession, and the TSBA asserted a good faith argument for not disclosing the remaining records requested.

It is, accordingly, ORDERED, ADJUDGED and DECREED that Petitioner's Motion to Show Cause is hereby GRANTED. TSBA is declared to be the functional equivalent of a governmental agency and the records requested by Petitioner that are in the possession of TSBA are declared to be public records as that term is defined under the TPRA.

It is further ORDERED, ADJUDGED and DECREED that TSBA shall comply with the TPRA and make available for public inspection all public records in the possession of TSBA requested by Petitioner not previously provided in accordance with the provisions of Tenn. Code Ann. § 10-5-703, including (i) its communications with legislators, school board members, superintendents, or any other elected officials or public officials about TSBA's 2018 and 2019

Legislative Agendas, and (ii) documents specifically pertaining to TSBA's position statements on governance and allocation of public funds.

It is further ORDERED, ADJUDGED and DECREED that Petitioner's request under the TPRA for an award against TSBA of all reasonable costs involved in obtaining the requested records, including reasonable attorneys' fees, is hereby DENIED, and that TSBA's request for costs and attorneys' fees, as stated in its Answer, is hereby DENIED.

It is further ORDERED, ADJUDGED and DECREED that the Clerk & Master is directed to enter this Memorandum and Order as a final judgment pursuant to Rule 58 of the Tennessee Rules of Civil Procedure and court costs are taxed to Respondent, for which execution may issue, if necessary.


PATRICIA HEAD MOSKAL
CHANCELLOR, PART I

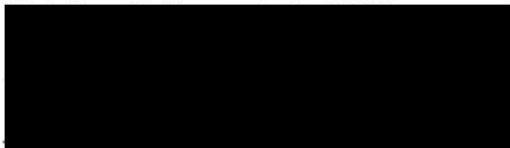
CLERK'S RULE 58 CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing is being forwarded via **U.S. Mail, first-class, postage prepaid**, with a courtesy copy via email, to the following:

Braden H. Boucek, Attorney at Law
Beacon Center of Tennessee



Charles W. Cagle, Attorney at Law
Lewis, Thomason, King, Krieg & Waldrop, P.C.




Deputy Clerk & Master


Date