



public funds; rather, the question is whether the particular material in question falls within an exception to the Public Records Act. When the Tennessee Small Business Investment Company Credit Act ("TNInvestco Act") became law on July 9, 2009, there was an existing body of law relating to the Public Records Act and potential exceptions to it. In deciding Petitioner's Petition, the Court has carefully considered this body of law, other applicable law, and the entire record in this case.

### Background and Overview

The TNInvestco Act was passed by the General Assembly on June 18, 2009, and signed into law by Governor Bredesen on July 9, 2009. *See* 2009 Tenn. Pub. Acts, ch. 610. The TNInvestco Act establishes a statutory program for spurring investment in qualified small businesses in Tennessee. These businesses generally must be independently owned and operated with headquarters and principal business operations in Tennessee, and they must not have more than 100 employees, 60% of which must be located in Tennessee. *See* Tenn. Code Ann. § 4-28-102(10). The TNInvestco Act's investment program is designed to deliver the venture capital that these emerging businesses need to create jobs and economic growth within Tennessee.

To infuse capital into the investment program, Respondents are authorized to award six \$20,000,000 investment tax credit allocations among up to six qualified TNInvestcos. *See* Tenn. Code Ann. § 4-28-105(d). To become a qualified TNInvestco eligible to receive one of the six \$20,000,000 investment tax credit allocations, an applicant must have submitted its application by October 1, 2009, demonstrating the capitalization requirements of Tenn. Code Ann. § 4-28-104(b), as well as the applicant's overall strength on the criteria set forth in Tenn. Code Ann. § 4-28-105(c)(1)(A). The TNInvestco Act expressly provides that "[t]he awarding of investment tax credits shall be

in the sole discretion of the commissioner of revenue and the commissioner of economic and community development.” Tenn. Code Ann. § 4-28-105(c)(2).

The qualified TNInvestcos receive the capital they need to invest in qualifying small businesses from participating insurance companies that purchase the investment tax credits awarded to the TNInvestcos under Tenn. Code Ann. § 4-28-105. *See* Tenn. Code Ann. §§ 4-28-102(7) & -103(a). A participating insurance company may take such credits against its gross premiums tax liability in tax years 2012 through 2019 pursuant to the terms and conditions set forth in Tenn. Code Ann. § 4-25-103. By November 30, 2009, each qualified TNInvestco was required to submit irrevocable investment commitments from participating insurance companies and TNInvestcos owners in an aggregate amount of at least the “base investment amount,” which is \$14,000,000 per each \$20,000,000 investment tax credit allocation. *See* Tenn. Code Ann. §§ 4-28-102(4) & -105(b).

The TNInvestco Act further provides that each TNInvestco shall make qualified investments of its base investment amount (\$14,000,000) in qualified small businesses over the investment period of January 1, 2010, through December 31, 2019. *See* Tenn. Code Ann. §§ 4-28-102(6), (10), (12) & -106(a). Such qualified investments are subject to the terms and conditions of Tenn. Code Ann. § 4-28-106, including the requirement found in Tenn. Code Ann. § 4-28-106(b) that TNInvestcos submit their proposed investments in specific businesses to the Department of Economic and Community Development and receive the Department’s determination that such proposals meet the TNInvestco Act’s requirement of making qualified investments in qualified businesses.

Distributions from TNInvestcos, including profits and investment returns, are governed by Tenn. Code Ann. §§ 4-28-108 & -109. For certain distributions, the

TNInvestco must pay the State a profit share percentage of 50%. See Tenn. Code Ann. §§ 4-28-102(9) & -109(a)(1). The TNInvestco Act provides that the State and the TNInvestcos shall work together to structure distributions to minimize any related federal tax obligation. See Tenn. Code Ann. § 4-28-109(c). TNInvestcos must also meet certain annual review and reporting requirements regarding their participation in the investment program. See Tenn. Code Ann. §§ 4-28-110, -111 & -112. Thus, the TNInvestco Act reflects the General Assembly's policy decision to capitalize qualifying small businesses in Tennessee through investment tax credits awarded under the TNInvestco program.

In order to execute and administer this policy decision, the Departments of Revenue and of Economic and Community Development were required to formulate additional policies and develop new procedures to: (1) award the investment tax credits to qualified TNInvestcos; (2) facilitate the purchase and future application of the investment tax credits by participating insurance companies; and (3) administer the investment tax credit purchase transactions for the TNInvestco program. See Tenn. Code Ann. §§ 4-28-103 & -106. In administering the TNInvestco Act, the Departments obtained certain information from participants in the TNInvestco program.

Petitioner is a citizen of Tennessee and a principal in one of the applicants that Respondents did not select as a finalist in the TNInvestco program. Between December 17, 2009 and January 20, 2010, Petitioner made several public records requests. As of the February 16, 2010 hearing, Respondents produced certain of the requested documents and certified that certain of the requested documents did not exist. Accordingly, four categories of documents remain at issue: 1) the 25 scored TNInvestco Evaluation Matrices; 2) the Tax Credit Purchase Agreement; 3) the Side Letter; and 4) the Letter of Understanding. These documents were filed under seal for the Court's *in camera* review.

### Evidentiary Record

The evidentiary record in this Public Records Act proceeding consists of: a) correspondence between the parties; b) the affidavits of the parties (Mr. Coleman,<sup>1</sup> Commissioner Kisber, and Commissioner Farr); c) affidavits of principals of four applicants who were not selected by Respondents as one of the ten finalists (Richland Ventures IV LLC, Marathon Partners LLC, Stonehenge Claritas Capital Fund Tennessee LLC, and Delta Capital Advisors L.P.);<sup>2</sup> d) various press releases and similar material; e) documents produced to Petitioner by Respondents; and f) documents not produced by Respondents, but submitted to the Court for *in camera* inspection.

On December 17, 2009, Petitioner sent a letter to Commissioners Kisber and Farr, requesting the scored Evaluation Matrix for each of the twenty-five TNInvestco applications and the commitment letter to the successful TNInvestcos. Commissioner Farr, in a letter dated December 22, 2009, asserted that "the information you have requested constitutes confidential tax information and is not open to public inspection." Petition for Access to Public Records ("Petition"), Exh. B. On January 13, 2010, Petitioner wrote Respondents renewing the earlier public records request and adding a few additional requests, including "any letter or opinion from Bass, Berry & Sims, PLC or any other law firm opining on the State's compliance with Tenn. Code Ann. § 4-28-105." Petition, Exh. C. On January 14, 2010, General Counsel for Commissioner Kisber's Department wrote a letter providing copies of "the irrevocable investment commitments you requested." Petition, Exh. D. The commitment documents for all six

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<sup>1</sup> Mr. Coleman filed separate affidavits on February 11, 2010 and February 18, 2010, respectively.

<sup>2</sup> Some of the material was filed after February 16, 2010 without leave of Court. Given the expedited schedule, the Court considered all of this material, along with material attached to unsworn submissions which would normally not be given any evidentiary value.

TNInvestcos were stamped as "Received" on November 30, 2009 by Commissioner Kisber's office. *See id.*

On January 20, 2010, Petitioner, through legal counsel, sent a letter to Commissioner Kisber's General Counsel raising concerns about "whether the TNInvestco program is being managed in accordance with the requirements of the Act" and renewing Petitioner's demand for the documents requested on January 13, 2010. Similarly, Petitioner, on January 20, 2010, in his role as the requesting citizen under the Public Records Act, wrote a separate letter renewing the request for these same records. On January 29, 2010, General Counsel for the Department of Economic and Community Development conveyed a letter to Mr. Coleman denying the remaining documents as confidential tax information.

Petitioner and the principals of four other companies who were not selected by Respondents as finalists filed affidavits asserting that they do not "object to the release by the State of the scored evaluation matrices reflecting my Firm's scores and ranking vis-à-vis the other applicants." Affidavits of Jack Tyrrell, Mathew A. King, Thomas J. Adamek, Scott A. Zajac, and Larry H. Coleman. Additionally, all five of these principals assert that their respective firms were not "contacted by the State of Tennessee to ask if my Firm objects to the release of the scored evaluation matrices reflecting how the State scored my Firm in the TNInvestco application process." *Id.* Respondents, on the other hand, asserted concern that disclosure of the matrices might harm the unsuccessful applicants and have a chilling effect on future economic development efforts.

#### Discussion

The Tennessee Public Records Act (the "Act") requires public officials to provide Tennessee citizens with access to public records. In simple terms, "public records" are

records created or received by a public entity in some official context. The Act itself contains specific exceptions. Apart from these specific exceptions, which do not apply here, the Act contains a broad, catch all exception.<sup>3</sup> This exception is not limited to statutory non-disclosure provisions outside the Public Records Act itself, but includes, for example, records that are not discloseable under the common law. Despite the specific exceptions and the potential breadth of the catch-all exception, the courts have consistently held that there is a presumption in favor of access to public records.

The Tennessee Supreme Court recently reiterated Tennessee's clear public policy favoring disclosure of public records:

Providing access to public records promotes governmental accountability by enabling citizens to keep track of what the government is up to. Recognizing the importance of providing the public access to governmental records, the Tennessee General Assembly has enacted statutes that clearly favor the disclosure of public records. These statutes contain a presumption that the records listed in Tenn. Code Ann. § 10-7-301(6) (Supp. 2007) and Tenn. Code Ann. § 10-7-503 are to be open to the public, and they direct the courts to construe the statutes broadly to assure the "fullest possible access" to public records. Tenn. Code Ann. § 10-7-505(d). Thus, unless it is clear that a record or class of records is legally exempt from disclosure, the requested record must be produced.

*Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 349, 360 (Tenn. 2008)(internal citations omitted). Under this approach, it has to be clear that a record or class of records is legally exempt from disclosure before a public official can deny a public records request.

The Act has two basic "liability" features. First, the Act has what might be called a "status" feature. If the requestor enjoys the status of being a "citizen" of Tennessee and he or she requests records that are public records not falling within any exception, the Act mandates that the requesting party be afforded access to those records. Although

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<sup>3</sup> "All state, county, and municipal records shall . . . be open for personal inspection by any citizen of this state, . . . unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A).

questions related to expenses and redaction might arise in this context, access is mandatory. Generally speaking, the Public Records Act is neutral on whether or not the requestor's cause is laudatory. Conversely, the separate question of whether or not a requesting party can recover reasonable attorney's fees triggers the second "liability" feature of the Act. Liability for the requesting party's reasonable fees flows from whether the public custodian of the records was "willful" in withholding access to the documents in question. Consequently, if the custodian mistakenly withheld documents in good faith, this good faith does not excuse the custodian from the duty to produce those records (because of the "status" feature mentioned earlier), but a good faith mistake would relieve the custodian from any liability for the requesting party's attorney's fees.

#### Tax Administration

Tennessee law provides that "tax information" and "tax administration information" shall be confidential:

Notwithstanding any provision of law to the contrary, returns, tax information and tax administration information shall be confidential and, except as authorized by this part, no officer or employee of the department and no other person, or officer or employee of the state, who has or had access to such information shall disclose any such information obtained by such officer or employee in any manner in connection with such officer's or employee's service as an officer or employee, or obtained pursuant to the provisions of this part, or obtained otherwise.

Tenn. Code Ann. § 67-1-1702.

The terms, "tax information," "tax administration information," and "tax administration," are defined in Tenn. Code Ann. § 67-1-1701 as follows:

"Tax information" means a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner with respect



to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. "Tax information" does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer[.]

Tenn. Code Ann. § 67-1-1701(8). Further, "[t]ax administration information" means criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; and any other information relating to tax administration[.]" Tenn. Code Ann. § 67-1-1701(7).

"Tax administration" means:

... the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party. "Tax administration" also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements[.]

Tenn. Code Ann. § 67-1-1701(6).

The decision to disclose "tax administration information," other than tax returns, and "tax information" is within the sole discretion of the Commissioner of the Department of Revenue:

The commissioner is authorized to disclose tax administration information, other than returns and tax information, if the commissioner determines that such disclosure is in the best interests of the state; provided, that no provision of law shall be construed to require disclosure of criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards, if the commissioner determines that such disclosure will impair assessment, collection, or enforcement under state tax laws.

Tenn. Code Ann. § 67-1-1711. The Court concludes that the TNInvestco documents in question are documents outside the “tax information” and “tax administration information” exceptions because they were not submitted to Commissioner Farr as part of a past or current tax review by the Department of Revenue. Given the Tennessee Supreme Court’s pronouncements, this Court is reluctant to rule that the foregoing tax law exceptions clearly apply to exclude from public disclosure documents gathered under the TNInvestco Act where, as here, no past or current need to apply the Tennessee tax law exists and no need to invoke Tennessee’s tax administrative mechanisms is present.

Sensitive Economic or Community Development Information

The Tennessee Department of Economic and Community Development is charged with the statutory duty to coordinate development services to communities, businesses, and industries in this State. *See* Tenn. Code Ann. § 4-3-703. The Department is further specifically charged with the duty to stimulate the creation of new jobs and income through services to business and industry, *see* Tenn. Code Ann. § 4-3-705; to promote research, development, recruitment, and investments in conservation, and renewable technology business, *see* Tenn. Code Ann. § 4-3-708(1); and to assist new and existing business and industry that relocate or expand in this State and create or retain jobs, *see* Tenn. Code Ann. § 4-3-715. In order to effectively perform these duties, the Tennessee General Assembly has recognized that there may be instances where records or information made or received by the Department is of such a sensitive nature that its disclosure or release would seriously harm the ability of the State to compete or conclude agreements or contracts for economic or community development. Accordingly, the General Assembly has provided an exception to the availability to these records:

(1) Notwithstanding any other provision of law to the contrary, any record, documentary materials, or other information, including proprietary

information, received, produced or maintained by the department shall be considered public unless the commissioner, with the affirmative agreement of the attorney general and reporter, determines that a document or information is of such a sensitive nature that its disclosure or release would seriously harm the ability of this state to compete or conclude agreements or contracts for economic or community development.

(2) If the commissioner, with the agreement of the attorney general and reporter, determines pursuant to subdivision (c)(1) that a document or information should not be released or disclosed because of its sensitive nature, such document or information shall be considered confidential for a period of up to five (5) years from the date such a determination is made. After such period, the document or information made confidential by this subsection (c) shall become a public record and shall be open for inspection.

Tenn. Code Ann. § 4-3-730(c).

It appears that the exception triggered by the certification by the Commissioner of Economic and Community Development in consultation with the Attorney General is at the heart of what is at issue in terms of the TNInvestco documents Petitioner seeks. After a review of the documents presented for *in camera* inspection, the Court agrees with Respondents that the records could reasonably be characterized as sensitive documents that "disclosure or release would seriously harm the ability of our State to compete or conclude agreements on contracts for economic or community development." Affidavit of Commissioner Matthew Kisber, ¶ 12. The Court, therefore, declines to second-guess Commissioner Kisber's decision to not release (or redact) these records at this time. According to the clear statutory language of Tenn. Code Ann. § 4-3-730(c), this exception applies.

#### Deliberative Process Privilege

Respondents are also relying on the deliberative process privilege. This privilege is grounded in the federal common law; it posits that information used in certain governmental deliberations is not discloseable to the public. The deliberative process

privilege has been recognized by the federal courts. While the deliberative process privilege was alluded to in one Tennessee appellate decision in a public records case, this privilege has not been clearly adopted by a Tennessee appellate court. In *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004), the Court of Appeals ruled that the deliberative process privilege did not apply to a federal public defender's request to get a county prosecutor's closed file. The Court ruled that the privilege is closely tied to the office held by the public official in question. There, the Court declined to hold that the privilege applied to an assistant district attorney's work product in preparing for a state court *coram nobis* proceeding. In *Swift*, the Court of Appeals interpreted Tenn. R. Civ. P. 16 to conclude that the records sought were not public records.<sup>4</sup> This Court has been unable to locate any Tennessee appellate court decision that applies the deliberative process privilege to prevent production of public records. This Court, therefore, respectfully declines to adopt this privilege as an exception to the Public Records Act in this trial court proceeding. Consequently, this Court respectfully declines to treat the deliberative process privilege as an exception "otherwise provided by law" to the general requirement that public records must be produced.<sup>5</sup>

#### Waiver

The Court respectfully declines to rule that Respondents have to produce the records in question on the ground of waiver for two basic, interrelated reasons. First, the authorities relied on by Petitioner do not apply in the context of the two statutory exceptions to the Public Records Act relied on by Respondents. *See Arnold v. City of*

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<sup>4</sup> A recent Tennessee Supreme Court decision suggests that our highest court might be reluctant to enforce a common law exception to the Public Records Act based largely on federal legal authority. *See Schneider v. City of Jackson*, 226 S.W.3d 332, 342-44 (Tenn. 2007).

<sup>5</sup> The phrase, "provided by law," contemplates law that is readily and currently ascertainable, not law expected to be adopted in the future. If this privilege were sufficiently recognized in Tennessee to warrant its use as an exception to the Public Records Act, the factual situation presented here would probably trigger the application of the privilege.

*Chattanooga*, 19 S.W.3d 779, 787 (Tenn. Ct. App. 1999). When the legislature provides for documents to be confidential (or declared confidential by public officials), there has to be, at minimum, an intentional waiver,<sup>6</sup> preferably in the manner prescribed by the legislature, to preserve the legislatively determined public interest. For example, tax administrative information, as evidenced by the record in this case, can be released by an affirmative certification by the Commissioner of Revenue that releasing those records are in the public interest. It follows, therefore, given the Court's decision to not apply the common law, non-statutory deliberative process privilege here, that Petitioner's argument that Commissioner Farr's public statements about the TNInvestco program operated to waive the deliberative process privilege is without merit. Finally, even if the waiver arguments urged by Petitioner apply with equal force to all three exceptions relied on by Respondents, the Court concludes that Respondents' conduct did not amount to a waiver under the authorities relied on by Petitioner. Commissioner Farr's statements to the effect that Respondents had followed the law and applied the scoring matrices did not amount to a waiver of the confidentiality (or the privileged nature) of the documents in question.

#### Attorney's Fees

As mentioned earlier, Respondents' conduct in declining to produce the documents in question would have to constitute a willful refusal to produce the documents before Respondents would be liable for Petitioner's attorney's fees. Petitioner points to the fact that he filed this lawsuit before Respondents released certain documents. After a review of the entire record, the Court concludes that Respondents' failure to produce these records or any of the records at issue was not willful. As

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<sup>6</sup> The Court declines to rule on Petitioner's contention that the statutory tax administration information and sensitive documents exceptions cannot be waived.

Respondents and their counsel grappled with Petitioner's requests under the new TNInvestco Act, it appears that Respondents, acting in good faith, gradually scaled down their insistences over time. This degree of give and take is commendable and should not be chilled by the Court taking a heavy-handed approach to it.

### Conclusion

This Court has attempted to balance the public's right to know as provided in the Public Records Act, and the broad discretion possessed by public officials charged with the responsibility of implementing and administering complex statutory schemes designed to promote Tennessee's economy and to maximize the recovery and investment of Tennessee's tax revenue. The Court, therefore, concludes that this legislatively-determined balance, as confirmed by Tennessee's appellate courts, militates in favor of the Court holding that the tax information and tax administration information exceptions to the Public Records Act do not apply in the unique context presented here. The Court determines, however, that the statutory exception to the Public Records Act that allows the Commissioner of Economic and Community Development (in consultation with the Attorney General) to designate certain public records as sensitive and confidential applies here to shield the documents in question from public disclosure for a period of five years. The records in question, therefore, are confidential and not subject to public disclosure at this time. As indicated above, the Court declines to apply the deliberative process privilege, which is founded in the federal common law, as an exception to the Public Records Act in the absence of a Tennessee appellate decision applying this privilege to prevent the disclosure of public records. The Court directs counsel for Respondents to prepare a proposed Final Order for the Court's approval that: 1) incorporates this Memorandum decision by reference; 2) describes the public records in

detail that will remain confidential and under seal for a period of five years from February 5, 2010; 3) denies Petitioner's request for attorney's fees; and 4) assesses court costs against Petitioner.

A handwritten signature in black ink, appearing to read "Russell T. Perkins", written over a horizontal line.

RUSSELL T. PERKINS  
CHANCELLOR

cc: Steven A. Riley, Esq.  
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