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APPELLATE COURT CLERK
NASHVILLE

Appellant-Petitioner,

v.

COA No. M2010-642-COA-R3-CV

**Appeal from Chancery Court
For the State of Tennessee
Twentieth Judicial District**

and

Trial Court No. 10-137-IV

**REAGAN FARR, in his official capacity as
Commissioner of Tennessee Department of
Revenue**

Appellees-Respondents.

Pursuant to Tennessee Rule of Appellate Procedure 2, Appellant-Petitioner Larry H. Coleman (“Coleman”) requests this Court to establish an expedited schedule for consideration of this appeal. In support of this motion, Coleman states as follows:

INTRODUCTION

Coleman seeks access to certain, specific public records in the possession of Appellees-Respondents that show how two unelected public officials distributed \$120 million in taxpayer money to six private entities.

Respondent Reagan Farr, Commissioner of the Tennessee Department of Revenue, has refused to make those records available to Coleman on two grounds: (1) that such records constituted confidential “tax information” and “tax administration information”; and (2) that they

were protected by the Federal “deliberative process privilege.” The trial court rejected both such arguments.

Respondent Matthew Kisber, Commissioner of the Tennessee Department of Economic and Community Development, offered an additional justification for withholding the records at issue – Tennessee Code Annotated § 4-3-730(c) – which provides that, with the assent of the Attorney General, Commissioner Kisber can withhold any public record he deems “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.” Declining to review or “second-guess” the decision of Commissioner Kisber despite evidence in the record directly undermining the reasonableness of that decision – and ignoring its duty under Tenn. Code Ann. § 10-7-503(c)(2) to order redaction (as opposed to complete withholding) of documents containing confidential information “whenever possible” – the trial court held, after an expedited hearing, that Commissioner Kisber could shield the documents at issue from public disclosure for a period of five years notwithstanding the requirements of the Public Records Act.

Mr. Coleman has appealed the decision of the trial court set forth in its Final Order on Petitioner’s Petition for Access to Public Records dated March 4, 2010 (the “Order”),¹ and, consistent with his right to “expeditious hearings” under the Public Records Act, Tenn. Code Ann. § 10-7-501 *et. seq.*, respectfully requests that this Court expedite this matter on appeal.

ARGUMENT

Coleman has appealed the Order pursuant to Rules 3 and 4 of the Tennessee Rules of Appellate Procedure. Pursuant to Advisory Committee Comment (a) to Rule 4 of the Tennessee Rules of Appellate Procedure, “an expedited schedule of appellate review may be established as permitted by Rule 2.” Tenn. R. App. P. 2 provides that “[f]or good cause, including the interest

¹ A copy of the Order is attached hereto.

of expedited decision upon any matter,” this Court may “suspend the requirements or provisions of any of [the Rules of Appellate Procedure].”

Coleman submits that good cause exists to expedite this matter on appeal, for at least three reasons.

First, the Public Records Act specifically contemplates “expeditious hearings” on any petition by a citizen of Tennessee to inspect public records. Tenn. Code Ann. § 10-7-505(b). Indeed, the General Assembly’s intent to expedite review of petitions for access to public records is plain from the language of the statute, which, among other provisions, (1) provides for an immediate “show cause” hearing upon the filing of a citizen’s petition for access to public records; (2) waives of the requirement of a formal written response to such petition, and the generally applicable time periods for filing such a response, “in the interest of expeditious hearings”; and (3) provides that the trial court’s decision constitutes a final judgment on the merits. See Tenn. Code Ann. § 10-7-505(b). Having recognized Coleman’s interest in expedited hearings at the trial court level, it necessarily follows that Coleman is equally entitled to expedited appellate review of the trial court’s decision. If the trial court erred in denying Coleman’s petition and he is entitled to some or all of the documents at issue, then that decision must be made expeditiously in order to preserve the “interest in expeditious hearings” established by the General Assembly in Tenn. Code Ann. § 10-7-505(b).

Second, time is of the essence, as the “TNInvestcos” chosen by Respondents are currently looking to distribute the monies they received under the Tennessee Small Business Investment Company Credit Act, Tenn. Code Ann. § 4-28-101 *et. seq.*, (the “TNInvestco Act”). If Coleman is legally entitled to the documents at issue in this case and those documents show that Respondents failed to pick the six TNInvestcos in accordance with the law – or that

Respondents improperly distributed public funds to such TNInvestcos – Coleman must be provided those documents immediately in order to preserve all potential remedies. Conversely, the longer a decision takes, the fewer Coleman’s (and other members of the public’s) potential remedies in the event the records should be made available and reveal wrongdoing, as the funds at issue will have been invested and no longer in the hands of the State or the TNInvestcos it chose. Accordingly, good cause exists to expedite this appeal.

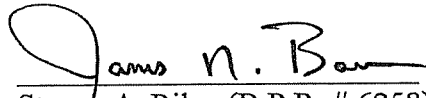
Finally, the General Assembly is currently considering, among other things, expanding the TNInvestco Act to allocate an additional \$80 million in tax credits to the four other entities that Respondents claim scored the highest on the evaluation matrices.² In considering the proposed expansion of the TNInvestco Act, however, the General Assembly – and the public – do not have access to the documents at issue in this case, which show *how* Respondents picked the original six TNInvestcos and the four potential new beneficiaries, and *whether* Respondents have been administering the TNInvestco Act in accordance with the directives of the General Assembly. If the General Assembly and their constituents are entitled to see such information, it makes sense that they see it before the legislation expanding the TNInvestco Act is considered. Otherwise, the information is arguably moot for such a purpose, and the General Assembly will have acted without the benefit of full disclosure from Respondents.

CONCLUSION

For the foregoing reasons, Coleman respectfully requests that this Court expedite this matter on appeal, including, without limitation, briefing and oral argument of the issues on appeal.

² See <http://www.venturenashville.com/advocates-protection-could-derail-tninvestco-locomotive-cms-468>, last checked on March 9, 2010 (copy attached). See also, <http://www.tennessean.com/article/20100303/BUSINESS01/3030369/TNInvestco-tax-credit-documents-will-stay-sealed>, last checked on March 9, 2010 (copy attached).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James N. Bowen". The signature is fluid and cursive, with a large initial "J" and a distinct "B".

Steven A. Riley (B.P.R. # 6258)

James N. Bowen (B.P.R. # 024082)

Riley Warnock & Jacobson, PLC

1906 West End Avenue

Nashville, Tennessee 37203

(615) 320-3700

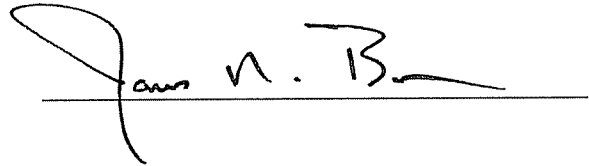
Attorneys for Larry H. Coleman

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served via U.S. Mail and electronic mail this 19th day of March, 2010 to:

Gina J. Barham
Janet Kleinfelter
Office of Tennessee Attorney General
425 5th Avenue North
Nashville, Tennessee 37243
gina.barham@ag.tn.gov
janet.kleinfelter@ag.tn.gov

Attorneys for Respondents

A handwritten signature in black ink, appearing to read "Jan N. B.", is written over a horizontal line.

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MAR 3 - 2010

Day, Co. Chancery Court

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

LARRY H. COLEMAN)

Petitioner,)

v.)

MATTHEW KISBER, in his official capacity)
as Commissioner of Tennessee Department)
of Economic and Community Development)

and)

REAGAN FARR, in his official capacity as)
Commissioner of Tennessee Department of)
Revenue)

Respondents.)

FD 17, TT

Case No. 10-137-IV

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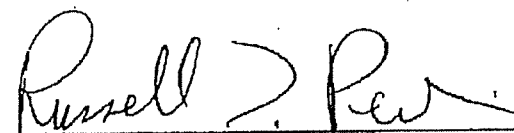
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FINAL ORDER ON PETITIONER'S PETITION FOR ACCESS TO PUBLIC
RECORDS

This matter came to be heard on February 16, 2010 before the Honorable Chancellor Russell T. Perkins on Petitioner Larry H. Coleman's request that, pursuant to Tenn. Code Ann. § 10-7-505(b) of the Tennessee Public Records Act, Respondents show cause why Petitioner's Petition for Access to Public Records should not be granted. Upon considering the Petition, arguments of counsel, the memoranda of law, affidavits and other evidentiary materials submitted by the parties, the documents filed under seal for in camera inspection, the applicable law, and the record as a whole, the Court hereby ORDERS that:

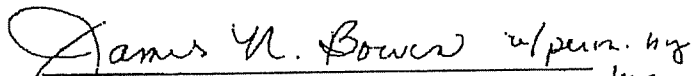
1. For the reasons stated in the Court's Memorandum decision dated March 2, 2010 which is incorporated by reference herein, the Petition is hereby denied.
2. The following public records shall remain confidential and under seal for a period of five (5) years from February 5, 2010:
 - i. the two sets of twenty-five (25) scored evaluation matrices completed by Commissioners Farr and Kisber in connection with their selection of the ten finalists to become qualified TNInvestcos;
 - ii. the Tax Credit Purchase Agreement and Side Letter governing the sale and use of tax credits by qualified TNInvestcos to participating insurance companies; and
 - iii. the Letter of Understanding relating to the sale of investment tax credits by one qualified TNInvestco to a participating insurance company.
3. Petitioner's request for attorneys' fees is denied.
4. Court costs shall be assessed against Petitioner.
5. Pursuant to Tenn. Code Ann. § 10-7-505(b), this Order shall be deemed a final judgment.

It is so ORDERED.



Russell T. Perkins, Chancellor

APPROVED AS TO FORM BY:


Steven A. Riley (B.P.R. # 6258) *in person by*

James N. Bowen (B.P.R. # 024082)
Riley Warnock & Jacobson, PLC
1906 West End Avenue
Nashville, Tennessee 37203
(615) 320-3700

Attorneys for Larry H. Coleman


ROBERT E. COOPER, JR.

Attorney General and Reporter

Gina J. Barham (B.P.R. # 010368)
Janet M. Kleinfelter (B.P.R. # 13889)
Deputy Attorneys General
Office of Tennessee Attorney General
425 5th Avenue North
Nashville, Tennessee 37243
(615) 741-2250

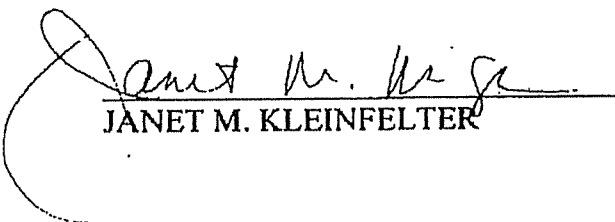
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served via email and U.S. Mail this 3rd day of March, 2010 to:

Steven A. Riley (B.P.R. # 6258)
James N. Bowen (B.P.R. # 024082)
Riley Warnock & Jacobson, PLC
1906 West End Avenue
Nashville, Tennessee 37203
(615) 320-3700
sriley@rwjplc.com
jimbowen@rwjplc.com

Attorneys for Petitioners


JANET M. KLEINFELTER

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

LARRY H. COLEMAN,

Petitioner,

vs.

MATTHEW KISBER, in his official capacity
as Commissioner of Tennessee Department
of Economic and Community Development,

and

REAGAN FARR, in his official capacity as
Commissioner of Tennessee Department of
Revenue,

Respondents.

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CASE NO. 10-137-IV

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DAVIDSON COUNTY, TENN.
CLERK OF COURT
J. L. LEE

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MEMORANDUM

Petitioner, Larry H. Coleman ("Petitioner" or "Mr. Coleman"), is seeking records from Respondents under the Tennessee Public Records Act. Respondents, Matthew Kisber, Commissioner of Tennessee Department of Economic and Community Development ("Commissioner Kisber"), and Reagan Farr, Commissioner of Tennessee Department of Revenue ("Commissioner Farr"), have produced some of the requested records, but are claiming that Petitioner's remaining requests fall within three exceptions to the Public Records Act. This matter was heard in an expedited hearing on February 16, 2010. It is undisputed that all the records at issue are public records.

The question before the Court is not whether the public records should be produced because a large sum of public funds (\$120 million) is implicated or because there is a general, legitimate sense that the public has the right to know about every aspect of the process by which state officials make decisions affecting this large sum of

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,¹ 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.);² 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

¹ Mr. Coleman filed separate affidavits on February 11, 2010 and February 18, 2010, respectively.

² 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.³ 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

³ "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.⁴ 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.⁵

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*

⁴ 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).

⁵ 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,⁶ 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

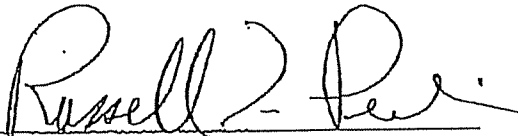
⁶ The Court declines to rule on Petitioner's contention that the statutory tax administration information and sensitive documents exceptions cannot be waived.

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

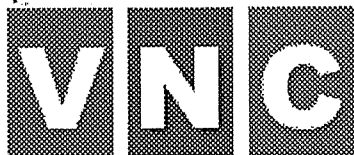
This Court has attempted to balance the public's right to know as provided in the Public Records Act, and the broad discretion possessed by public officials charged with the responsibility of implementing and administering complex statutory schemes designed to promote Tennessee's economy and to maximize 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.



RUSSELL T. PERKINS
CHANCELLOR

cc: Steven A. Riley, Esq.
James N. Bowen, Esq.
Gina J. Barham, Esq.
Janet M. Kleinfelter, Esq.



Welcome Visitor Tuesday, March 16, 2010

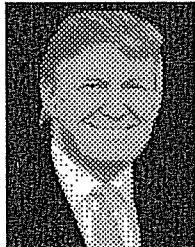


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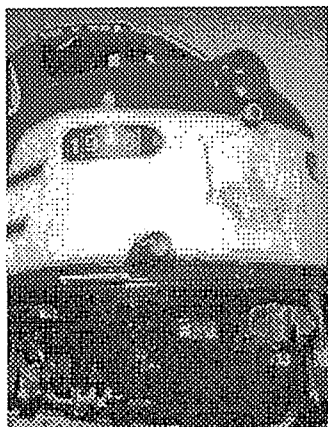
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Advocates: 'Protection' could derail TNInvestco locomotive

By: By Milt Capps Last updated 1:58 p.m.

Posted: Monday, February 22, 2010 9:39 am

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'Spirit of Tennessee'
Bicenntennial Train

The Tennessee *Budget Express* may soon barrel down the tracks, but some key players worry TNInvestco may be sidetracked or derailed.

Facing an extraordinary economy and election season, the General Assembly seems poised to highball-it through annual budget rites, having already delivered a education-reform and -improvement package many view as epochal.

When it comes to legislating expansion or other changes in TNInvestco, however, some legislators are keeping a hand near the brake.

Among other things, stakeholders are awaiting a Davidson County Chancery Court ruling, expected tomorrow, on a petition from venture-capitalist [Larry Coleman](#), who demands access to TNInvestco

documents.

In addition, opposing camps are plying Capitol Hill with arguments pro and con proposed changes in the TNInvestco law, including expansion of monetizable tax-credit allocations that would breath life into as many as four additional TNInvestco funds; and, an apparently lobby-driven initiative that would freight TNInvestco with a "recapture" requirement that was tossed from TNInvestco well before the legislation crossed the finish line, last spring.

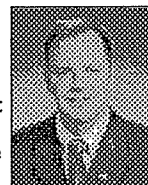


State Rep. Beth Harwell (at left) told VNC Friday, "I think the legislature must proceed with caution, because we have not had a chance to evaluate" TNInvestco's performance thus far. Harwell added that she believes legislators want to understand what "longer-term commitments" are packed aboard the new capital-formation program that was enacted less than nine months ago.

Meanwhile, several persons close to the process, who spoke on condition of anonymity, told VNC that while bill sponsors have introduced Advantage's bill for discussion, they are presently not strongly committed to the provision's passage and are working to hear from all sides.

Friday also, State Revenue Commissioner Reagan Farr was more specific, saying that a "recapture" amendment (Initiated by lobbyists from St. Louis-based Advantage Capital Partners, which lost-out in the recent [TNInvestco](#) competition for funding) would undermine TNInvestco.

Responding to a VNC query, **Farr (at right)** said Feb. 19, "In 2009, during discussions and the subsequent votes on Public Chapter 610, known as the *Tennessee Small Business Investment Company Credit Act*, members of the General Assembly made it very clear the tax credits issued by the legislation should go to funds whose investment goals and strategies clearly aligned with economic development goals of the state of Tennessee. We worked very hard, with lots of input from stakeholders to develop a program that would benefit transformational Tennessee companies and truly diversify our state's economy. Our concern with SB3898 is that it would revert the TNInvestco program back into more of a traditional CAPCO program. Both [ECD] Commissioner [Matt] Kisber and I feel that would be a step backward for Tennessee and would present significant legal challenges to TNInvestco as



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currently established."

Recapture is being pushed in Tennessee mainly by Advantage, who say they believe the State should be able to retrieve its tax credits from any errant or underperforming TNInvestcos. TNInvestco funds sell to insurance companies tax credits the funds have been allocated from the State, through a competitive process.



However, opponents of recapture say the insurance industry would probably view any such amendment as substantially increasing the risk of involvement, which would keep some insurers on the sidelines, create deeper discounts on tax credits sold, and drive-down capital realized by the TNInvestco funds.

One result could be that TNInvestco funds hoping to attract insurance-industry participation would have to secure insurance to "wrap" around the funds, as a way to mitigate the cost of making investors whole if the State retracted tax credits the fund had sold to investors.

Critics of recapture say adding such cost to the program would reduce benefits to the State's economy and tilt the program unfairly toward large funds like Advantage and its peers. Advantage was among the firms that had originally introduced "CAPCO" legislation that would probably have been more lucrative for them.

One observer explained to VNC that Advantage and its peers are thought likely to be "large enough to self-insure," or may gain other advantage through such forms as "pre-existing insurance relationships, pre-negotiated wrap agreements, or even umbrella wrap policies already in place.



Explaining the recapture rationale, Advantage lobbyist Scott Zajac told VNC Feb. 12, "The legislative sponsors are simply proposing a material technical correction in the law that allows the state to recapture credits if the TN investments are not made as promised. This protection is in every other capital formation tax credit program including state and federal New Market Tax Credit Programs. TN taxpayers deserve the same protections. Eliminating the state's ability to recapture credits if money is misappropriated, just to make Fundraising 'easier' is not good public policy. We want TNVESTCO to be successful and problem free. Money should be flowing to TN businesses now but apparently something is stalled in the process. The legislative sponsors had this requirement in the initial legislation but it was later removed. No qualified firm should have any trouble whatsoever raising money with this provision."

VNC research indicates Advantage Capital is a leading member of a National Coalition for Capital (NCC), a trade association, which shortly after Gov. Phil Bredesen signed TNInvestco into law in June praised Tennessee for passing what NCC called "one of a kind" TNInvestco legislation, which had no recapture provision. It was five months later that Advantage learned it had failed to win a TNInvestco berth.

Both Advantage and former ally Enhanced Capital Partners are currently lobbying in Minnesota and other states for legislation modeled on the firms' standard CAPCO model. Neither firms' representatives responded to VNC's most recent queries.



Pittco Management Vice President Andrew Seamons, based in Memphis, offered a seemingly balanced view, when asked Saturday, Feb. 20, to comment on the matter. The Pittco firm is closely related to MB Venture Partners, which is competing for a share of the proposed TNInvestco expansion via Memphis Biomed Ventures Tennessee I.

Seamons, a Duke University engineering grad and Harvard MBA, told VNC, "The two most important design goals of the State's investment program have been to (1) most efficiently translate state tax credits into dollars that get invested into Tennessee companies and (2) ensure that the most qualified investors are chosen and that they follow the investment strategy they put forth.

He continued: "While I agree that there should be a means for the State to ensure that TNInvestco winners do follow the rules of the program and stay true to the investment strategy they espoused, there are more efficient ways to add accountability. Stiff direct fines on TNInvestco firms or increased profit participation by the State for infractions would be two examples.

"While the proposed change," Seamons said, "does not directly stipulate an insurance wrap, no insurance company is going to risk forfeiture of tax credits for which they pay due to actions of an investment group they do not directly control. As a result, they will require an insurance wrap or some similar mechanism in order to invest. The practical reality is that the proposed change would reduce the dollars that get invested in Tennessee companies for every dollar of tax credit granted. We as a State need to be every bit as concerned about the efficiency with which these tax credits are translated into investable dollars as we are about the efficiency of current budget items – these tax credits are real Tennessee taxpayer money."

Seamons concluded, "I do not believe that the Tennessee legislators are so naïve as to see any of the groups spending furiously on lobbyists and lawyers and think they are altruistically looking to protect Tennessee taxpayers. I think we should all suspect that any of the groups vying for TNvestco funds are jockeying in some manner to make it more advantageous for themselves."



Seamons added he believes the General Assembly should in considering changes to TNInvestco look to Tennessee Technology Development Corporation, which Seamons oversees as a member of the [TTDC](#) board of directors.

He said TTDC "should be a resource for legislators to get facts and analysis on these types of issues – after all, they created [legislatively chartered TTDC] to provide that advisory function." ♦

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TNInvestco tax credit documents will stay sealed

Rejected firms decry lack of disclosure

By Bonna Johnson • THE TENNESSEAN • March 3, 2010

Government documents surrounding a \$120 million state venture capital program will not be made public for five years after a Davidson County chancellor ruled Tuesday that the material is sensitive and should remain under wraps.

That means a Franklin-based venture capital firm shut out of the program won't immediately get to see how the state rated 25 firms that applied for tax credits under the state's TNInvestco program or view the winning scores of six firms chosen to participate.

The ruling drew far different reactions from would-be investors whose applications were rejected and state economic development officials who say the ruling safeguards the government's right to handle business discussions in private.

"What we're talking about is a fundamental right to see what the government is doing," said Larry Coleman, president of Coleman Swenson Booth, an early-stage venture capital fund. His firm, which has invested more than \$63 million in Tennessee-based companies in the past 26 years, was not selected to participate in the tax credit program.

Waiting five years to see the documents doesn't help, Coleman said, adding that he plans to appeal Chancellor Russell Perkins' ruling. "If we can't shine a light on how appointees are spending taxpayer money, it offers opportunity for rascality," Coleman said.

But Matt Kisber, commissioner of the state's Economic and Community Development Department, disagreed.

"I'm pleased by the court's ruling that our department clearly followed the law and was within its right to protect confidential information provided by companies investing in the state of Tennessee," Kisber said in a prepared statement.

"We fully understand the need for open government, and we are committed to upholding that principle while balancing the need of our state to maintain a competitive posture as we seek to attract new investment and create jobs for the people of Tennessee," Kisber said.

Coleman filed a petition in Davidson County Chancery Court in January asking the state Revenue and Economic and Community Development departments to comply with the Tennessee Public Records Act and make public the evaluation matrix for the 25 applicants, along with other documents.

The documents would show whether the state stuck to its own selection criteria and whether the firms that were chosen obtained proper financial commitments, the petition said.


The chancellor agreed with the state's position that disclosure or release of the information would seriously harm the ability of the state "to compete or conclude agreements on contracts for economic or community developments."

Each of the six winners was eligible for \$20 million in aid through a program of tax credits to invest in startup and mid-stage companies.

The idea is that TNInvestco will spur economic development and create jobs.

Winning firms included those run by Nashville

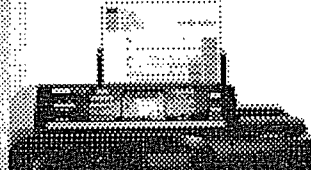
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Revenue Commissioner Reagan Farr said the state has a responsibility to protect the proprietary strategies of participating firms and the confidential taxpayer information of the insurance companies involved.

Program sparks interest

Although it got off the ground last year, the tax credit program continues to stir interest. Lawmakers are being asked to fund at least another \$40 million in tax credits this year so that two alternates can join the program.

Another bill asks the state to install a "recapture" requirement, which advocates say would protect Tennessee taxpayers if any of the venture capital firms don't make qualified investments.

The state would be able to get the tax credits back and distribute them to other firms.

The provision, which would make it more similar to other publicly funded venture capital programs, was removed from the original TNInvestco bill before it was approved last year.

"This is a way of saying if a TNInvestco unintentionally or inadvertently invests in a company that goes offshore or opens a factory in China — in the current statute, the only recourse for taxpayers is to fine the TNInvestco," said Scott Zajac, senior managing director of Advantage Capital Partners, which is pushing the bill and was one of the firms not picked to participate.

State officials don't like the provision; they say it's unnecessary.

"We worked very hard, with lots of input from stakeholders to develop a program that would benefit transformational Tennessee companies and truly diversify our state's economy," Farr said. The "recapture" proposal "would be a step backward for Tennessee and would present significant legal challenges to TNInvestco as currently established," he said.

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