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**Via Email**

Mayor Bernie Ash  
Chairman, Lebanon City Council  
200 N. Castle Heights Ave., Suite 100  
Lebanon, TN 37087

**Re: Tennessee Open Meetings Violations**

Dear Mayor Ash:

On behalf of my client, Lorrie Hicks (“Hicks”), I write to request that the Lebanon City Council take action to address two recent Tennessee Open Meeting Act (“TOMA”) violations. At Hicks request, the Tennessee Office of Open Records Counsel, Lee Pope, has addressed these issues on two occasions. The first was a letter dated March 22, 2019, a copy of which is also attached to this email. The most recent was his informal advisory opinion dated June 4, 2019, a copy of which is attached. TOMA violations are serious breaches of both the law and public trust and Hicks now requests that the Lebanon City Council take action regarding these violations.

The first violation stems from an email sent by Councilor Burdine to the other members of the City Council on February 18, 2019. In that email, Councilor Burdine emailed the entire City Council with her “intentions” regarding a rezoning request. She explained that she intended to vote to approve the request and explained in detail her reasons for doing so. On February 21, 2019 Councilor Burdine reiterated in another email to three other members of the City Council that the purpose of her prior communication was to inform the City Council of her “intention... regarding this zoning request.” Councilor Burdine included an email she sent to a number of people outside the City Council regarding her vote in this string as well. Finally, on February 24, 2019, Councilor Burdine again emailed the City Council, this time explaining her position regarding two other rezoning requests in the same area of Lebanon and explaining her intent to approve them. All three of these emails are attached.

In the other instance, Hicks and her husband were barred from entering the April 25, 2019 City budget meeting by an armed security guard. The security guard told Hicks that he was told to “lock the doors and not let anyone else in.” Two members of the press did attend the budget meeting, but Hicks was not permitted to. The City has since said that this was a mistake. Assuming this was a mistake, it still

kept an interested citizen from attending an open meeting of her local government, which is her right under both the Tennessee Constitution and TOMA.

The Tennessee General Assembly has declared that it is “the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret.” Tenn. Code. § 8-44-101. To effectuate this policy, the General Assembly included Section 8-44-102(a), which provides that “all meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution.” The Tennessee Supreme Court has explained that TOMA implements the constitutional requirement of open government,” found in Article 1, Section 19 of the Constitution of Tennessee. *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976).

Underlying Tennessee’s clear public policy in favor of open governmental meetings is the fact that democracy works best when the public is informed:

Public knowledge of the manner in which governmental decisions are made is an essential part of the democratic process. The public “must be able to ‘go beyond the decisions reached and be appraised of the ‘pros and cons’ involved if there are to make sound judgments on questions of policy and to select their representatives intelligently.”

*Metro. Air Research Testing Auth., Inc. v. Metro. Gov’t of Nashville & Davidson Cnty.*, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992) (quoting Note, *Open Meeting Statutes: The Press Fights for the “Right to Know”*, 75 Harv. L. Rev. 1199, 1200-01 (1962)).

Tennessee’s courts have found that TOMA is remedial in nature and must “be construed broadly to promote openness and accountability in government, and to protect the public against closed door deliberations at every stage of a government body’s deliberations.” *Id.* (citations omitted). Moreover, “the Act does not make a distinction between technical and substantive violations of its provisions.” *Zselvay v. Metro. Gov’t of Nashville & Davidson Cnty.*, 986 S.W.2d 581, 584 (Tenn. Ct. App. 1998). Rather, “strict compliance with the Act is a necessity if it is to be effective...” *Id.* at 585. And no intent to circumvent TOMA is required for a violation to occur. *Johnston v. Metro. Gov’t of Nashville & Davidson Cnty.*, 320 S.W.3d 299, 311 (Tenn. Ct. App. 2009) (citation omitted).

TOMA contemplates two primary forms of relief for citizens who bring suit under its provisions. First, “any action taken at a meeting in violation of this part shall be void and of no effect.” Tenn. Code. § 8-44-105. In addition, “[t]he court shall permanently enjoin any person adjudged by it in violation of this part from further violation of this part,” Tenn. Code § 8-44-106(c), and the court retains jurisdiction for a year to monitor compliance, including ordering defendants “to report in writing semiannually to the court of their compliance with this part,” *id.* § 8-44-106(d). The Court of Appeals has explained that with these latter remedies, “[t]he Legislature obviously felt that the use of injunction and the application of judicial oversight to the activities of a governmental body in violation of the Act was the best guarantee of subsequent compliance.” *Zselvay*, 986 S.W.2d at 585.

The Act itself specifically addresses electronic communication, like email, explaining that “[n]o ... electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.” Tenn. Code § 8-44-102(c). “A violation of the Open Meetings Act can occur inadvertently if the electronic communication has the effect of circumventing ‘the spirit or requirements’ of the Act.” *Johnston*, 320 S.W.3d at 312 (citations omitted).

The lone case in Tennessee to address the interplay between email and TOMA is the Court of Appeals decision in *Johnston*. Crucial to the court’s decision was the definition of “deliberate as “to examine and consult in order to form an opinion .... [T]o weigh arguments for and against a proposed course of action.” *Id.* at 311 (quoting *Neese*, 813 S.W.2d at 435). The court separated the emails at issue into three categories: (1) emails that merely disseminated information, such as “emails from affected residents stating their position to the Council members;” (2) “emails between individual council members, not copied to the full Council, discuss[ing] strategy for gaining passage of the ... ordinance;” and (3) emails where “Council members are clearly weighing arguments for and against the [ordinance].” *Id.* at 312. Categories 1 and 2 were found not to be violations of TOMA because they did not include the weighing of arguments for and against the ordinance. *Id.* The third category, however, was found to violate TOMA because the emails weighed arguments for and against the proposed ordinance which “mirror the type of debate and reciprocal attempts at persuasion that would be expected to take place at a Council meeting, in the presence of the public and the Council as a whole.” *Id.*

Councilor Burdine’s attached emails go much farther than simply forwarding emails from her constituents without comment to the other members of the City Council. Her February 18, 2019 email explained in detail her position on rezoning 110 S. Hatton, including eleven bullet points explaining why she intended to vote for the rezoning and was sent to the entire City Council. In her February 24, 2019 email regarding rezoning 113 and 118 S. Greenwood, which was also sent to the entire City Council, Councilor Burdine explained why she is in favor of rezoning those properties too and refers back to her arguments regarding rezoning 110 S. Hatton. This sort of email advocacy violates TOMA and is the type of communication that mirrors the discussion one would expect “to take place at a Council meeting, in the presence of the public and the Council as a whole.” *Johnston*, 320 S.W.3d at 312.

The barring of Hicks and her husband from the April 25, 2019 budget meeting is similarly problematic and violates TOMA.

Rather than request that the City redo the rezoning votes for 110 S. Hatton, 113 S. Greenwood, and 118 S. Greenwood from the beginning, Hicks requests that the City take action on each rezoning request that can “cure” its violations of TOMA. The Court of Appeals has explained that “cure” can be accomplished if there is “a new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue.” *Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 436 (Tenn. Ct. App. 1990) (citation omitted). This could

be accomplished at a single meeting but should include the full “new and substantial reconsideration” that is discussed in the *Neese* case, including affording the public “ample opportunity to know the facts and to be heard with reference to the matters at issue.” Merely ratifying the City Council’s prior vote “by a perfunctory crystallization of its earlier action” is not sufficient. *Id.*

In lieu of the permanent injunction and year of judicial oversight that would come with a judicial finding that the City violated TOMA, Hicks requests that the City bring in an outside person or group, like the Tennessee Office of Open Records Counsel or the Tennessee Coalition for Open Government, to conduct detailed, mandatory training for every member of the City Council, the City Attorney, the City’s department heads, and yourself regarding TOMA and its requirements.

It is Hicks’ hope that the City will take prompt action to address these TOMA violations. No violation of TOMA should be taken lightly and go unaddressed. I request the courtesy of a response by June 26, 2019. I look forward to your response.

Very truly yours,

AARON | SANDERS PLLC



Paul R. McAdoo

Cc: City of Lebanon Council  
Andrew Wright, City Attorney

Enclosures