

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

THE TENNESSEAN, ASSOCIATED PRESS,)
CHATTANOOGA TIMES FREE PRESS,)
KNOXVILLE NEWS SENTINEL,)
TENNESSEE COALITION FOR OPEN)
GOVERNMENT, INC., ASSOCIATED)
PRESS BROADCASTERS, WZTV FOX 17,)
WBIR-TV Channel Ten, WTVF Channel Five,)
THE COMMERCIAL APPEAL, and)
WSMV-TV Channel Four,)

Plaintiffs/Petitioners,)

vs.)

CASE NO. 14-0156-IV

METROPOLITAN GOVERNMENT OF)
NASHVILLE AND DAVIDSON COUNTY,)
ET AL.,)

Defendant/Respondent,)

DISTRICT ATTORNEY VICTOR S.)
JOHNSON, STATE OF TENNESSEE, and)
JANE DOE,)

Intervenors.)

CLERK & MASTER
DAVIDSON CO. CHANCERY CT
D.C. & M.

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FILED

MEMORANDUM AND FINAL ORDER

Several news outlets sued a municipality under the Public Records Act seeking records in the police department's file received from third parties in a highly-publicized rape case. The alleged incident, which occurred in a university dormitory, resulted in the State prosecuting four men for rape who had been members of the university's football team. The State Attorney General intervened in this Public Records Act case on behalf of the prosecutor and the State. The victim of the alleged crime intervened, using a pseudonym, seeking to protect her interests in privacy and in being treated with dignity under the Tennessee Victims' Bill of Rights. In broad sweep, the central question here is

whether the Public Records Act compels a prosecutor to produce sensitive records received from third parties while the underlying criminal prosecution is still pending.

Background and Overview

In late June 2013, the Police Department of the Metropolitan Government of Nashville and Davidson County (“Metro”) was notified by the Vanderbilt University Campus Police about an alleged rape that had occurred on campus on June 23, 2013. Metro Police immediately began an investigation, which resulted in four individuals being indicted in August 2013 on five counts of aggravated rape and two counts of aggravated sexual battery. Additionally, one of the four individuals was also indicted on one count of unlawful photography and one count of tampering with evidence. All four individuals subsequently pled not guilty in Davidson County Criminal Court. On October 2, 2013, Assistant District Attorney General Tom Thurman and counsel for these four individuals agreed to a protective order that was issued by the Davidson County Criminal Court. This Agreed Protective Order specifically provides that “any and all photographs and videos provided in discovery by the State shall not be disseminated in any manner to any person other than the defense team.” Agreed Protective Order attached hereto as “Exhibit” (hereinafter “Exhibit”).

On October 17, 2013, a reporter with *The Tennessean* made a request to the Metro Police Department in which he requested copies of “[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus in which the [four individuals] are charged” and “[a]ny records regarding the case recently concluded against Boyd by his plea bargain.”¹ Exhibit A to Petitioners’ Complaint. This request specifically requested copies of any “text messages received or sent and videos provided and/or prepared by any third party sources.” *Id.*

¹ Another student entered a conditional guilty plea to a charge of trying to help cover up the alleged rape.

On October 23, 2013, Metro denied the request based upon the authorities set forth in Exhibit B to Petitioners' Complaint and in particular the provisions of Tenn. R. Crim. P. 16(a)(2). *The Tennessean* renewed its demand in a letter from its counsel on October 28, 2013. *See* Exhibit C to Complaint. Metro responded on October 31, again denying the request. *The Tennessean* then directed its demand for the records in question to Mayor Karl Dean. *See* Exhibit E to Complaint. Mayor Dean, by letter from the Metro Director of Law, denied the request on November 21, 2013. *See* Exhibit F to Complaint.

On February 4, 2014, counsel for *The Tennessean* sent a letter to Metro renewing *The Tennessean's* original October 17 request and adding the rest of the petitioner news organizations as additional requestors. *See* Exhibit G to Complaint. Metro responded that same day that it was still denying the request and further noted that a protective order had been entered in the ongoing criminal case that covered many of the records requested. *See* Exhibit H to Complaint. Petitioners then filed suit against Metro on February 5, 2014.

The Attorney General, on behalf of District Attorney General Johnson and the State of Tennessee, moved to intervene on February 11, 2014. After a hearing on February 13, 2014, this Court granted the Attorney General's motion to intervene to protect the interests of District Attorney General Johnson and the State of Tennessee in this proceeding. On that same date, the Court allowed the alleged victim to intervene in this case using the pseudonym Jane Doe.

The Court conducted an *in camera* inspection of the records at the prosecutor's office on March 6, 2014.² On March 10, 2014, the Court held a hearing on the merits. Prior to the hearing, the parties filed briefs.

²The Court, in deference to the Agreed Protective Order issued by the criminal court, did not examine the photographs or the videotapes in the prosecutor's file before the parties could be heard on the merits.

Facts³

The alleged rape occurred in the early morning hours of June 23, 2013. It is alleged that four members of the Vanderbilt University football team raped Ms. Doe and that at least one of them videotaped the alleged assault. Also, a fifth member of Vanderbilt's football team later entered a conditional guilty plea for his alleged role in attempting to cover up the incident. Ms. Doe was apparently unconscious during the alleged assault, which is alleged to have occurred in a dormitory room. It appears that Ms. Doe's image may have been captured by building surveillance cameras as she lay unconscious and partially disrobed in the hall of the dormitory for some period of time. More than one member of the football team may have helped carry Ms. Doe into the dormitory room where the alleged assault occurred.

An investigation ensued involving the Vanderbilt University Police Department ("VUPD"), the Metropolitan Police Department, and at least one law enforcement agency in California where one or more of the student suspects or student witnesses lived. There was cooperation between the police departments. VUPD took written statements. Also, the Metropolitan Police Department and the prosecutor's office took statements, several recorded in audio form.

The Metropolitan Police Department did background checks on several individuals who may have been witnesses or suspects. Four men, who had been members of the Vanderbilt University football team, were indicted on rape, unlawful photographing, and/or other related charges. The rape indictments initially listed Ms. Doe's real name, but were later redacted to protect her identity. There were text messages and videos or photographs transmitted through smart phones in close proximity in time to

³ This recitation of "Facts" is offered in the same view that courts list the factual allegations in a civil complaint when considering a motion to dismiss for failure to state a claim. The Court is not adopting this statement of "Facts" as findings of fact.

when the alleged rape occurred. These text messages and videos were collected by the Metropolitan Police Department through the use of subpoenas, search warrants, and other investigative tools. The search warrants themselves, along with actual potential evidence, were all produced to counsel for the defendants in the criminal case. As previously stated, the Criminal Court entered the Agreed Protective Order prohibiting the dissemination of “any and all photographs and videos provided in discovery by the State[.]” Exhibit.

In a Public Records Act proceeding, it is not unusual for the positions of the parties on all sides of the dispute to be tweaked to streamline or clarify the issues presented to the Court on an expedited basis. Here, after examining the pleadings, the briefs, the records presented for *in camera* review, and the argument at the hearing on March 10, 2014, it appears that Plaintiffs may be seeking some or all of the following material from the Metropolitan Police Department:

1. All of the building surveillance tapes in the investigative file from three locations on the Vanderbilt University campus, including the Vanderbilt University dormitory where the alleged assault occurred - all with the image of Ms. Doe redacted;
2. All of the videos and photographs in the investigative file, except that Plaintiffs are not seeking photos or videotapes of the alleged assault or any photos or videotapes of Ms. Doe;
3. All of the text messages and E-mails that the Metropolitan Police Department received from third parties in the course of its investigation;
4. Written statements of the defendants and witnesses provided to the Metropolitan Police Department by Vanderbilt University;
5. Vanderbilt access card information;

6. Reports and E-mails provided to the Metropolitan Police Department by Vanderbilt University;
7. Metropolitan Police Department forensic tests performed on telephones and computers;
8. T.B.I. DNA reports;
9. Forensic reports prepared by private laboratories hired by the Metropolitan Police Department; and
10. The following items made or collected by the Metropolitan Police Department:
 - a) police reports and supplements;
 - b) search warrants;
 - c) crime scene photographs;
 - d) Pano-scan data relating to Vanderbilt University premises;
 - e) background checks and other personal information regarding Ms. Doe, defendants, and witnesses;
 - f) cell phone information obtained through several search warrants;
 - g) photographic images and text messages recovered from the cell phones of five individuals who were charged with criminal offenses, except any photographs or videos depicting Ms. Doe or the alleged sexual assault;
 - h) statements of Ms. Doe, defendants and witnesses; and
 - i) video recovered from a student witness's computer, except any photographs or videotapes depicting Ms. Doe or the alleged sexual assault.

*The Records in Question*⁴

On March 6, 2014, this Court conducted an *in camera* inspection of the records in question.⁵ The records were in five large (3 to 4 inch) three-ring binders, one small binder (approximately 50 pages), and one file folder (approximately 50 pages). One of the large folders contained 76 DVDs or CDs, but five of them (numbers 41, 72, 74, 75 and 76) were not in the binder during the Court's *in camera* inspection. The small binder contained text messages, investigative summaries, and other material prepared or gathered by the Metropolitan Police Department and/or the District Attorney General in the investigation. The other four large binders separately contained: 1) search warrants, affidavits in support of search warrants, and related material; 2) offense reports, statements taken by the Metropolitan Police Department, medical records, written statements taken by VUPD, information captured from the Vanderbilt University website, and various photographs; 3) California search warrants and related materials, Vanderbilt Police reports regarding other incidents that might relate to one or more of the defendants in the underlying criminal prosecution, Vanderbilt initial and supplemental police reports containing witness statements; and 4) surveillance photos, criminal background checks by Regional Organized Crime Information Center and other sources, and witness statements. There was a general index and an index for each binder. The general index was filed with the Court under seal on March 7, 2014.

The binder containing the CDs and DVDs contained: 1) cell phone data; 2) audio recordings from interviews conducted by the Metropolitan Police Department and/or the District Attorney's Office with witnesses, including Coaches Franklin and Hand from

⁴ The Court hereby approves the entire section of this Memorandum and Final Order entitled "The Records in Question" as a statement of the evidence under Tenn. R. App. P. 24(c) regarding the Court's *in camera* inspection of the records.

⁵ This *in camera* inspection lasted from 9:00 a.m. to 12:32 p.m. on March 6, 2014, minus a fifteen minute break.

Vanderbilt; 3) reports; 4) information related to search warrants; 5) photos and videotapes; and 6) a recording of a voicemail from one of the defendants in the criminal case to one of his friends. Although each criminal prosecution is different, the material in the file was the kind of material that a prosecutor would expect to gather to pursue a case where there has been an accusation of rape by more than one alleged perpetrator. All of the material the Court reviewed had been produced to the defendants through discovery in the criminal case, except the material in the file folder marked “work product.” This folder contained primarily E-mails between representatives of the District Attorney’s Office and members of the Metropolitan Police Department.⁶

Discussion and Rulings

The Tennessee Public Records Act

Former United States Supreme Court Justice Louis Brandeis wrote: “Sunlight is said to be the best of disinfectants[.]” Louis D. Brandeis, *Other People’s Money and How Bankers Use It* 92 (2d ed. 1914). It is this time-honored principle of transparency and openness in government that undergirds Tennessee’s Public Records Act.

The Tennessee Public Records Act (the “Act”) requires public officials to provide access to public records. As mentioned in the briefs, Tennessee stands at the forefront in the breadth and reach of its Public Records Act. In Tennessee, public records are defined broadly to include records made or received by the government or public entity in an official capacity. The definition of “records” itself is exhaustive. The Act itself contains specific exceptions, which do not apply here, as well as a broad, catch-all exception.⁷ This exception is not limited to statutory non-disclosure provisions outside the Act itself,

⁶ After an examination of this material during the Court’s *in camera* review, the Court concludes that the material in this file folder is all non-discloseable “work product” under Tenn. R. Crim. P. 16(a)(2) and the cases upholding this exception.

⁷ “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).

but includes, for example, records that are not discloseable under Tennessee's common law, administrative law or constitutional law. Despite the specific exceptions and the breadth of the catch-all exception, the courts have consistently held that there is a presumption in favor of access to public records. See *Schneider v. City of Jackson*, 226 S.W.3d 332, 340 (Tenn. 2007).

The Act has two basic, practical 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 questions related to expenses and redaction might arise in this context, access is generally mandatory without any inquiry regarding the custodian's conduct or the requesting party's reasons for seeking the records in question.⁸ Conversely, the question of whether or not a requesting party can recover reasonable attorney's fees triggers the second basic feature of the Act. The public custodian of the records will be liable for the requesting party's reasonable fees if the public custodian 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 could relieve the custodian from any liability for the requesting party's attorney's fees.

Here, it is undisputed that Plaintiffs are citizens who have properly invoked the Public Records Act by requesting the records in question from the Metropolitan Police Department. It is undisputed that all the records sought are public records made or received by the Metropolitan Government in its official capacity. It is also undisputed that, except for the possible exception of a small number of TBI records, none of the

⁸ There might be a limited context, not applicable here, where a requestor's purpose in seeking certain public records can be questioned as a predicate for gaining access to the records.

records sought fall under one of the Public Records Act's specific enumerated exceptions. It is clear, therefore, that the records in question are required to be made available for inspection by Plaintiff unless Metro or the State can prove by a preponderance of the evidence that the records fall within the "unless otherwise provided by state law" exception. Tenn. Code Ann. § 10-7-503(a)(2)(A).

As mentioned earlier, the crux of the Public Records Act is to shed light on the activities of government. Here, although Plaintiffs' requests may well be focused on bringing the official governmental conduct of the Metropolitan Police Department and the Office of the District Attorney General into the sunlight, the records themselves appear to be focused on what happened between private individuals in a dormitory building of a private university, and the nature and extent of any newsworthy involvement by other students or employees of the University. What happened in that dormitory and any examination of the conduct of Vanderbilt students and employees regarding the incidents in question are newsworthy and may have included criminal activity that breached the peace and dignity of the State of Tennessee, but the Court's review of the records and of the text messages shed very little light on official government conduct.

Impact of Rule 16 of the Tennessee Rules of Criminal Procedure

Tenn. R. Crim. P. 16(a)(2) provides:

[T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

Tennessee appellate courts appear to have declared directly, or by implication, that Tenn. R. Crim. P. 16(a)(2) bars public access to records in official investigative files in pending criminal cases under the Public Records Act until after all criminal

proceedings are final, including post-conviction and habeas corpus proceedings. See *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987); *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986); *Swift v. Campbell*, 159 S.W.3d 565, 576 (Tenn. Ct. App. 2004). The Tennessee Supreme Court has held that a protective order may serve as a shield against a public records request and that the party seeking to obtain public records covered by a protective order should intervene in the case where the protective order was entered to seek to have it modified or set aside. See *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996). In *Ballard*, the Court upheld a protective order entered in a civil case. Although it may not yet be a settled question about whether a records requestor may intervene in a criminal case to challenge a protective order, it appears, at a minimum, that such an attempt should be made under *Ballard* before a Court hearing a Public Records Act case may order the inspection of records covered by a protective order issued by another court.

Plaintiffs here are focusing on the language of Tenn. R. Crim. P. 16(a)(2) and its work product thrust for the proposition that public records received from third parties by the Metropolitan Police Department as part of their investigation of the alleged rape of Ms. Doe do not fall within the “except as otherwise provided by state law” exception of the Public Records Act. Plaintiffs argue that: 1) the Tennessee cases do not squarely hold that everything in a police department’s file or prosecutor’s investigative file is necessarily shielded from disclosure while a criminal prosecution is pending; 2) the actual language of Tenn. R. Crim. P. 16(a)(2) and its actual work product thrust preclude such a conclusion; and 3) all of the records Plaintiffs are requesting that the Metropolitan Police Department received from third parties are beyond the scope of the Tenn. R. Crim. P. 16(a)(2) exemption and, accordingly, must be produced.

The Tennessee Supreme Court has interpreted Tenn. R. Crim. P. 16(a)(2) to be a state law exception to the Public Records Act under the so called “catch-all” or “as otherwise provided by state law” exception. See *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007); *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987). Similarly, the Tennessee Supreme Court has held that Tenn. R. Crim. P. 16(a)(2) exempted all “open” criminal investigative files that “are relevant to pending or contemplated criminal action.” *Appman*, 746 S.W.2d at 166. Although there is no general law enforcement exception and *Appman* rejected the notion that courts can adopt a public policy exception to the Public Records Act - even in the face of compelling countervailing interests, the Tennessee Supreme Court has interpreted Tenn. R. Crim. P. 16(a)(2) somewhat expansively.

Plaintiffs urge that Tenn. R. Crim. P. 16(a)(2) is a work product rule and that documents reviewed by the Metropolitan Police Department from third parties are not covered by the Tenn. R. Crim. P. 16 exemption to the Public Records Act. The Court, however, believes that *Schneider*, *Appman*, and the language of Tenn. R. Crim. P. 16(a)(2) command a more nuanced result.

In *Schneider*, the Tennessee Supreme Court held that there was no generalized, cognizable law enforcement privilege under Tennessee common law that could be used as an exception under the “except as otherwise provided by state law” exemption under the Public Records Act. The *Jackson Sun* requested field interview cards generated by local police officers and financial records of a minor league baseball team that leased and operated a stadium owned by the city. The Tennessee Supreme Court reversed the Court of Appeals’ adoption of the law enforcement privilege with respect to the police field interview cards. The Court held that courts could not adopt an exception to the Public Records Act on public policy grounds and that the police interview cards could not be

withheld from public access on that ground. Given that this law enforcement privilege did not already exist, the Tennessee Supreme Court held that courts were powerless to create one. The Supreme Court, however:

recognize[ed] that harmful and irreversible consequences could potentially result from disclosing files that are involved in a pending criminal investigation, [and concluded] that a remand to the trial court is appropriate to allow the City an opportunity to review the field interview cards and to submit to the trial court for *in camera* review those cards or portions of cards which the City maintains are involved in an ongoing criminal investigation and exempt from disclosure.

Schneider, 226 S.W.3d at 345-46. The Court made this ruling by relying on *Appman* and Tenn. R. Crim. P. 16(a)(2) without making any reference to the language of Tenn. R. Crim. P. 16(a)(2). It appears, therefore, that the Tenn. R. Crim. P. 16(a)(2) exception announced by *Appman* and followed by *Schneider* is not limited to work product.

It appears that Tenn. R. Crim. P. 16(a)(2) covers work product and other material produced in discovery. This Court, therefore, declines to adopt a blanket rule that material received from third parties is always and in every case outside the non-disclosure restriction contained in Tenn. R. Crim. P. 16(a)(2). The rulings in *Appman* and *Schneider* cannot be reconciled with Plaintiffs' blanket assertion that all third party records are subject to public inspection under the Public Records Act while the criminal prosecution is still pending.

Taking a case-by-case view as a trial court, the Court concludes that exempting all the records from review under Tenn. R. Crim. P. 16(a)(2) would be tantamount to adopting a law enforcement privilege for pending criminal cases that may not necessarily be called for by the language of Tenn. R. Crim. P. 16(a)(2). The Court concludes that records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department are outside

the expansive reach of Tenn. R. Crim. P. 16(a)(2). Based on the Court's review of the record and the *in camera* material, Plaintiffs are entitled to the text messages, minus any photographic or videographic images.⁹ These text messages¹⁰ existed contemporaneously or close in time to when the alleged assault occurred and do not reflect the mental impressions or investigative tactics of the Metropolitan Police Department. The Court directs that these text messages be redacted to delete Ms. Doe's name or any of her identifying information. The Court concludes that the TBI material identified earlier in this Memorandum and Order is not discloseable under the separate TBI exemption contained in Tenn. Code Ann. § 10-7-504(a)2(A). Under the analysis mentioned above, Plaintiffs are also entitled to inspect the Vanderbilt access card information, Pano-scan data relating to Vanderbilt University premises, E-mails recovered from potential witnesses and the criminal defendants which were not addressed to officials related to Metropolitan Police Department or the District Attorney General's Office.¹¹ All of the produced material has to have all videos and photos redacted from them, along with Ms. Doe's name and any other identifying or personal information about her, such as where she lives. All of the other materials will be preserved and not disclosed, in keeping with the interpretation of Tenn. R. Crim. P. 16(a)(2) that this Court has attempted to glean from *Appman*, *Schneider*, and the other authorities cited in this Memorandum and Final Order.

Deference to the Criminal Court

This Court has previously ruled that it has subject matter jurisdiction to hear this Public Records Act case. This Court determines that it should exercise its discretion to

⁹ These images are covered by Judge Watkins' Agreed Protective Order and cannot be disclosed.

¹⁰ The Court concludes that these text messages are not witness statements that can be shielded from disclosure. Instead, these text messages are memorializations of conduct related to the alleged crime and the alleged cover up.

¹¹ Many of the records received by the Metropolitan Police Department were made, compiled or collected by the Vanderbilt University Police Department - law enforcement officers under Tenn. R. Crim. P. 16(a)(2).

defer to the Criminal Court on three issues: 1) the Agreed Protective Order issued on October 2, 2013; 2) the protection of the constitutional rights of the accused in the criminal case; and 3) the protection of the privacy and dignity of the alleged victim under the Victims' Bill of Rights. First, for the reasons discussed below, the Court has decided not to allow the inspection of any of the videos or photographs covered by the Agreed Protective Order entered by the Criminal Court. Secondly, the Court agrees with the insinuations of certain of the parties that the Criminal Court is better suited to protect the constitutional rights of the criminal defendants to a fair trial and to protect Ms. Doe's rights as an alleged rape victim to be treated with dignity in the criminal proceedings. The Court, therefore, has focused on the issues raised by the parties under Tenn. R. Crim. P. 16(a)(2) and its interpretation by the appellate courts.

On October 2, 2013, the Criminal Court Judge in the related criminal case entered an Agreed Protective Order providing that "any and all photographs and videos provided in discovery by the State shall not be disseminated in any manner to any person other than the defense team." Exhibit. Given that all of the photographs and videos sought by Plaintiffs in the Public Records Act case were produced in discovery in the criminal case and are shielded from dissemination by the Agreed Protective Order, this Court exercises its discretion to defer to the Criminal Court and respectfully declines to require any photographs or videos to be produced for Plaintiffs' inspection here. The Court concludes that, to the extent the photographs and videos protected from disclosure by the Agreed Protective Order entered by the Criminal Court and the records sought by Plaintiffs in this Public Records Act overlap, the criminal case and this Public Records Act are essentially, in this limited fashion, parallel proceedings. In instances where there are

parallel proceedings or there is overlap between a criminal case and a civil case, the criminal case usually takes precedence.¹²

Although the Criminal Court's Agreed Protective Order does not cite Tenn. Rule Crim. P. 16, it is obviously an order managing discovery in the criminal case. Additionally, the Criminal Court may have entered the Agreed Protective Order to help protect the defendants' right to a fair trial, to help prevent any further dissemination of allegedly unlawful photography, and to protect the privacy and dignity of Ms. Doe. To the extent that Plaintiffs are seeking to look behind the drawn curtain established by the Agreed Protective Order entered by the Criminal Court, the courts have held that such an effort must be directed to the court which issued the protective order. *See Ballard v. Herzke*, 924 S.W. 2d 652, 662 (Tenn. 1996). This court, even if it had the judicial power to entertain Plaintiffs' effort to shine a light on the criminal investigation by looking behind Judge Watkins'¹³ Agreed Protective Order, the Court, as a matter of discretion and deference, respectfully declines to do so. The Court abides by, and honors, the Agreed Protective Order issued by the Criminal Court.

The Metropolitan Government and the State assert that disclosure of records contained in an active criminal case could violate the criminal defendants' Sixth Amendment constitutional right to a fair trial in their criminal cases and the state constitutional guarantee of a "speedy, public trial, by an impartial jury of the County in which the crime shall have been committed." Tenn. Const. art. I, § 9. The concern about adverse pretrial publicity is valid because such publicity can put at risk the defendants' ability to receive a fair trial. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979). Here, Plaintiffs are seeking records from the criminal investigative file compiled and

¹² *See Bell v. Todd*, 206 S.W.3d 86, 93-94 (Tenn. Ct. App. 2005).

¹³ Judge Watkins is an experienced, accomplished Criminal Court Judge whose orders command the respect and deference of this Court.

maintained by the Metropolitan Police Department that are also in the prosecutor's file in the Office of the District Attorney General. These records have not yet been disclosed in the criminal court case and have not yet been tested through the crucible of pretrial motions or the Criminal Court's rulings on evidentiary disputes. The Court, therefore, defers to the oversight of the Criminal Court over the criminal prosecution on such issues.

The Victims' Bill of Rights focuses on how victims are treated during the course of criminal prosecution and ancillary proceedings, such as efforts to recover restitution from offenders and/or criminal injury compensation from the State. Consequently, the courts handling criminal cases routinely oversee the proceedings where victims are protected and treated with dignity – usually with the able, day-to-day assistance of local prosecutors and officers of the court, their staff, and others. This Court, which does not hear criminal cases, is not usually called upon to make determinations about the treatment of crime victims. Consequently, this Court defers to the court overseeing the criminal prosecution as the court of first resort in protecting the rights of Ms. Doe under the Victims' Bill of Rights. This Court, by its ruling and a stay that it is issuing today, has decided to “do no harm” while the criminal prosecutions and possible appeal of this Memorandum and Final Order run their course.

Conclusion

Based on the foregoing, the Court declares that certain of the records (described more particularly in this Memorandum and Final Order) Plaintiffs have requested are Public Records that do not fall into any exception recognized by the appellate courts of Tennessee and that they should be made available for inspection under the Public Records Act. By separate Order entered today under Tenn. R. Civ. P. 62, the Court is STAYING this portion of the Memorandum and Final Order to allow this matter to be

considered by the Tennessee Court of Appeals before any records are produced for inspection. Apart from the records the Court has determined should be released, the Court hereby DISMISSES, with prejudice, the remainder of Plaintiffs' Verified Complaint,¹⁴ except that the Court holds in abeyance Plaintiffs' request for attorneys' fees pending the completion of all appeals. The purpose of holding Plaintiffs' request for attorneys' fees in abeyance is to allow any appeals to run their course without any potential delay that might be associated with determining whether an award of attorneys' fees is warranted under the Public Records Act.

Under Tenn. R. Civ. P. 54.02, the Court expressly determines that there is no just reason for delay and hereby DIRECTS the entry of final judgment on the rulings contained in this Memorandum and Final Order. The Court taxes two-thirds of the court costs to the Metropolitan Government of Nashville and Davidson County and to the State of Tennessee, jointly and severally, and one-third of the court costs to Plaintiffs. The Court hereby holds in abeyance, pending appeal, whether any party will be able to recover discretionary costs under Tenn. R. Civ. P. 54.04 against Plaintiffs, the Metropolitan Government of Nashville and Davidson County, and/or the State of Tennessee. No court costs are assessed against Ms. Doe.

IT IS SO ORDERED.


RUSSELL T. PERKINS, CHANCELLOR

cc: Robb S. Harvey, Esq. (via facsimile)
Lora Barkenbus Fox, Esq. (via facsimile)
Janet M. Kleinfelter, Esq. (via facsimile)
Edward M. Yarbrough, Esq. (via facsimile)

¹⁴ To the extent that Plaintiffs are asserting constitutional claims implicating the freedom of the press under the federal and/or Tennessee Constitution, the Court dismisses these claims as being without merit.

EXHIBIT

FILED

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Port

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V

STATE OF TENNESSEE

VS.

CASE NO: 20013-C-2199

BRANDON E. BANKS,
CORY LAMONT BATEY,
JABORIAN DASHON MCKENZIE,
BRANDON ROBERT VANDENBURG

FILED
11/16/13
DAVIDSON CO. CLERK OF COURT
D.C. & H.

AGREED PROTECTIVE ORDER


As evidenced by the signatures below, the State of Tennessee and the defendants have agreed that any and all photographs and videos provided in discovery by the State shall not be disseminated in any manner to any person other than the defense team. In addition to any other penalties this Court or any other body might lawfully impose, any dissemination shall be considered to be a violation of defendant's bond.


Entered this 2nd day of Oct, 2013.

Monte D. Watkins
Hon. Monte D. Watkins, Judge

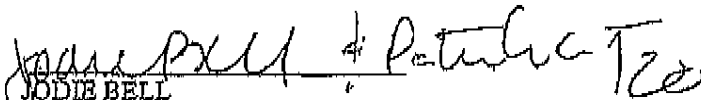


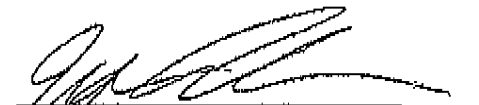
AGREED TO:


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 MARK SCRUGGS
 Attorney for Brandon E. Banks


 WORRICK ROBINSON
 Attorney for Cory Lamont Batey


 JODIE BELL
 Attorney for Jaborian Dashon McKenzie


 NATE COLBURN
 Attorney for Brandon Robert Vandenburg

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

THE TENNESSEAN, ET AL,)
)
 Plaintiffs/ Petitioners,)
)
 vs.)
)
 THE METROPOLITAN GOVERNMENT OF)
 NASHVILLE & DAVIDSON COUNTY,)
)
 Defendant/Respondent,)
)
 DISTRICT ATTORNEY VICTOR S.)
 JOHNSON, STATE OF TENNESSEE, and)
 JANE DOE,)
)
 Interveners.)

CASE NO. 14-0156-IV

VP
D.C. & H
CLERK & MASTER
DAVIDSON CO CHANCERY CT

2014 MAR 12 PM 5:45

FILED

ORDER

Under Tenn. R. Civ. P. 62, the Court, on its own initiative, hereby STAYS the portion of the Memorandum and Final Order entered on March 12, 2014, allowing Plaintiffs to inspect certain records under the Public Records Act, pending appeal. Specifically, the Court determines that this case involves sensitive material and unique questions of law under the Public Records Act, the Crime Victims' Bill of Rights and corresponding statutes, and other applicable law that an appellate court should have an opportunity to consider before these sensitive records are released. *See* Tenn. R. Civ. P. 62.07. Additionally, as an aspect of the uniqueness of this case, the criminal cases relevant to the records in question are still pending, with the trial involving two of four defendants set to commence in August 2014. The Court concludes that no bond is necessary under Tenn. R. Civ. P. 62.06.

IT IS SO ORDERED.


RUSSELL T. PERKINS, CHANCELLOR

cc: Robb S. Harvey, Esq. (via facsimile)
Lora Barkenbus Fox, Esq. (via facsimile)
Janet M. Kleinfelter, Esq. (via facsimile)
Edward M. Yarbrough, Esq. (via facsimile)

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

THE TENNESSEAN, ET AL,)
)
 Plaintiffs/ Petitioners,)
)
 vs.)
)
 THE METROPOLITAN GOVERNMENT OF)
 NASHVILLE & DAVIDSON COUNTY,)
)
 Defendant/Respondent,)
)
 DISTRICT ATTORNEY VICTOR S.)
 JOHNSON, STATE OF TENNESSEE, and)
 JANE DOE,)
)
 Interveners.)

CASE NO. 14-0156-IV

CLERK & MASTER
DAVIDSON CO CHANCERY CT
N.C. 8M

2014 MAR 12 PM 5:46

FILED

ORDER

The Court hereby DIRECTS that the index associated with the *in camera* inspection be maintained under seal, pending further orders of the Court. On March 5, 2014, this Court entered an Order indicating that the index did not need to be filed with the Court; however, the State of Tennessee filed the index with the Court on March 7, 2014, based on statements made by the Court in a prior hearing or status conference. After considering the record and discussing this in court with counsel for the parties during the hearing on the merits on March 10, 2014, the Court concludes that the index should remain under seal because: 1) the Court previously indicated to the parties that the index could be filed under seal; and 2) the index is associated with the prosecution's investigative file, which this Court opines should not be released in any aspect until the Court of Appeals has had the opportunity to consider this case.

IT IS SO ORDERED.


RUSSELL T. PERKINS, CHANCELLOR