

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE SECTION
AT NASHVILLE



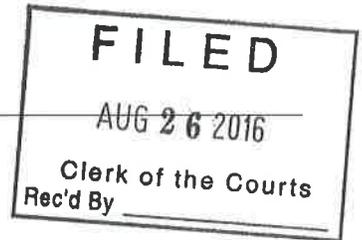
KENNETH L. JAKES,
Plaintiff/Appellee,

v.

SUMNER COUNTY BOARD OF
EDUCATION,
Defendant/Appellant.

)
)
) No. M2015-02471-COA-R3-CV
)
) On Appeal From the Sumner County
) Chancery Court
) Criminal Court Judge Dee David Gay
)
) No. 2014CV53
)

BRIEF OF AMICUS CURIAE,
TENNESSEE RISK MANAGEMENT TRUST



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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES3

ISSUES PRESENTED.....4

STATEMENT OF THE CASE.....5

STATEMENT OF THE FACTS6

SUMMARY OF THE ARGUMENT7

ARGUMENT.....9

 I. Interest of the Amicus Curiae9

 II. The Tennessee Public Records Act.....9

CONCLUSION.....16

CERTIFICATE OF SERVICE18

TABLE OF AUTHORITIES

Cases

Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc., 87 S.W. 3d 67
(Tenn. 2002).....10

Memphis Publ'g Co. v. Holt, 710 S.W.2d 513 (Tenn. 1986).....10

*Metro. Gov't of Nashville and Davidson County v. Bd. of Zoning Appeals of
Nashville and Davidson County*, 477 S.W.3d 750 (Tenn. 2015).....11

Waller v. Bryan, 16 S.W.3d 770 (Tenn. Ct. App. 1999).....10

Statutes

Tenn. Code Ann. § 8-4-60412

Tenn. Code Ann. § 10-7-5037, 9, 11, 12, 13, 14, 17

Tenn. Code Ann. § 10-7-5057, 14

Tenn. Code Ann. § 12-9-1047, 9

Tenn. Code Ann. § 29-20-4017, 9

Other

Tenn. R. Civ. P. 5.....7

Tenn. R. Civ. P. 5.02.....16

ISSUES

The Tennessee Risk Management Trust adopts and incorporates the issues as stated by the Appellant, the Sumner County Board of Education.

STATEMENT OF THE CASE

The Tennessee Risk Management Trust adopts and incorporates the statement of the case as stated by the Appellant, the Sumner County Board of Education.

STATEMENT OF FACTS

The Tennessee Risk Management Trust adopts and incorporates the statement of facts as stated by the Appellant, the Sumner County Board of Education.

SUMMARY OF THE ARGUMENT

The Tennessee Risk Management Trust (“TNRMT”) is a governmental entity composed of counties, school systems, and other municipalities established pursuant to Tennessee Code Annotated sections 29-20-401 and 12-9-104(b). The Trust provides risk management services to its members.

Under the express language of the Tennessee Public Records Act (“TPRA”), citizens possess the right to “view” public records during regular business hours. Tenn. Code Ann. § 10-7-503(a)(2)(A). Citizens have a separate right to obtain copies of public records. *Id.* at § 10-7-503(a)(7).

The Trial Court held that a governmental entity must accept requests to inspect public records by e-mail, voicemail, text messaging, or by facsimile. This ruling is contrary to the express provisions of the TPRA¹. The TPRA does not require an entity to accept requests by any of these methods. Thus, the Trial Court’s ruling should be overturned on that basis.

More importantly, the TPRA requires a governmental entity to produce the document or otherwise respond to the request within seven (7) business days of receipt of the request. *Id.* at § 10-7-503(a)(2)(B). If the entity fails to meet this deadline, the requestor may file a lawsuit and obtain a judgment for his or her attorney’s fees and costs. *Id.* at §§ 10-7-503(a)(3) and 10-7-505. Because of the short time available under the TPRA for entities to respond to requests to inspect records, it is imperative that entities possess the ability to document properly the date and time of receipt. E-mail, text messaging, facsimile messaging, and voice mail messaging do not satisfy this requirement.

Finally, the Trial Court’s ruling creates questions regarding when an e-mail, text message, or voice mail message is received. Is it received at 11:59 p.m. on Friday or at 10:00

¹ The Appellant adopted a policy permitting requests to inspect records to be made in person or by U.S. mail.

a.m. on the following Monday when it is actually read or reviewed? If it is never read or reviewed, is it received? Courts in Tennessee have struggled with this issue in attempting to set up a method for electronic filing. Because of these very questions, Rule 5 of the Tennessee Rules of Civil Procedure require the sender of an e-mail to also mail or fax a letter stating that an e-mail has been sent.

ARGUMENT

A. Interest of Amicus Curiae.

The TNRMT is a governmental entity organized and existing pursuant to Tennessee Code Annotated section 29-20-401 and section 12-9-104(b) (joint or cooperative action by public agencies). The members of the Trust include: sixty (60) Counties, one hundred two (102) School Systems, and forty (40) municipalities and other governmental entities within the State of Tennessee. These members range from counties as large as Hamilton County to the smallest county in the State (Pickett County). All of the members of the Trust are subject to the provisions of the TPRA, Tennessee Code Annotated section 10-7-503.

The Trust also provides risk management and related services to its members, who pool their contributions for the purpose of paying claims and other expenses incurred by members. Those risk management services include indemnification of a governmental entity for legal fees and related expenses incurred in connection with a lawsuit alleging violation of the provisions of the TPRA. Therefore, in addition to the interests of its members, the Trust possesses a separate interest in ensuring compliance by its members with their statutory obligations.

B. The Tennessee Public Records Act.

This case requires this Court to interpret the application of the TPRA, Tennessee Code Annotated section 10-7-503. Significantly, this case does not involve a request for copies of public records. Instead, this case centers upon a request by a Davidson County resident *to inspect* records maintained by the Appellant, the Sumner County Board of Education.

The Appellee, a self-proclaimed “public records expert” and a person whose profession is making public records requests in Tennessee, asserts that he possesses the right to initiate the public records inspection process: (a) by sending a facsimile, an e-mail, or a text message, or (b)

by leaving a voice mail message². Brief of Plaintiff/Appellee at pg. 14. The Appellee further asserts that requests to inspect records are effective even if sent after business hours.³ Finally, the Appellee asserts that a person cannot “be compelled to appear in person to make a records request.” Id.

Generally, the Appellee confuses a request to inspect public records with a request for copies of public records. The TPRA distinguishes between those requests, and the distinction truly makes a difference.

At common law, members of the public possessed no right to access public records. The Tennessee General Assembly passed the TPRA, allowing individuals access to public records and dictating the process that must be followed by both the requesting individual and the governmental entity. See Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc., 87 S.W. 3d 67, 74 (Tenn. 2002); Memphis Publ’g Co. v. Holt, 710 S.W.2d 513, 516 (Tenn. 1986). In interpreting the Act, the Court of Appeals noted: “It is this Court’s duty to apply rather than construe the language of the Public Records Act, since the intent of the Legislature is represented by clear and unambiguous language.” Waller v. Bryan, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999).

Recently, the Supreme Court of Tennessee reiterated the applicable standard for interpreting statutes:

The role of this Court in statutory interpretation is to assign a statute the full effect of the legislative intent without restricting or expanding the intended scope of the statute. In doing so, we first must look to the text of the statute and give the words of the statute “their natural and ordinary meaning in the context in which they appear and in light of the statute’s general purpose.” Therefore, when the language of a statute is clear and unambiguous, we need look no further than the plain and ordinary meaning of the statutory language. That is, “we presume

² Findings of Fact and Conclusions of Law and Order dated November 13, 2015 (“Final Order”), at p. 1.

³ The Board of Education’s policy at issue permitted requests for inspection to be initiated either in person or via mail. Id. at pp. 2-3.

that every word in the statute has meaning and purpose and should be given full effect if the obvious intent of the General Assembly is not violated by so doing.”

Metro. Gov't of Nashville and Davidson County v. Bd. of Zoning Appeals of Nashville and Davidson County, 477 S.W.3d 750, 756 (Tenn. 2015) (internal citations omitted).

With respect to the “inspection” of public records, the TPRA provides in pertinent part as follows:

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

Tenn. Code Ann. § 10-7-503(a)(2)(A) (Tenn. 2016) (emphasis added). Thus, under the plain language of the TPRA, Tennesseans possess the statutory right to “view public records” during normal business hours. The corollary is that an inspection of public records must occur “in person” at the location at which records are maintained.

This interpretation of the statute is consistent with the provisions of subsection (a)(2)(B) of the Act, which addresses the procedure to be utilized by the records custodian when responding to a request for inspection:

(B) The custodian of a public record or the custodian’s designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:

(i) Make the information available to the requestor;

(ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or

(iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce the record or information.

Tenn. Code Ann. § 10-7-503(a)(2)(B) (Tenn. 2016). In addition, this interpretation of the statute is consistent with the provisions of subsection (a)(7)(A) of the TPRA⁴. That subsection states:

(A) A records custodian may not require a written request or assess a charge *to view a public record* unless otherwise required by law

Tenn. Code Ann. § 10-7-503(a)(7)(A) (2016) (emphasis added). In addition, that subsection authorizes the records custodian to “require any citizen making a request to view a public record to present a photo identification . . . issued by a governmental entity, that includes the person’s address.” *Id.*

In short, the express provisions of the TPRA clearly require a person to be physically present at the records custodian’s office in order to “view” public records. That physical presence is necessary in order to “present a photo identification.” A facsimile, letter, e-mail, text message or voice mail message cannot substitute for this physical presence.

Of course, any requestor possesses an option – he or she can request copies of public records. The TPRA expressly authorizes requests for copies of public records to be made in writing. Tenn. Code Ann. § 10-7-503(a)(7)(A) (2016). The TPRA also authorizes public entities to charge persons for copies of public records. *Id.* at § 10-7-503(a)(7)(C); see also Tenn. Code Ann. § 8-4-604.

Professional records requestors, such as the Appellee, engage in a practice of making requests to public entities to “inspect” public records for the purpose of forcing the entity to incur significant costs and expenses. They know that if they only ask to “inspect,” they are not obligated to pay for these costs and expenses.

For example, the Appellee made a request to the City of Hendersonville, Tennessee for “all financial transactions” engaged in by the City during the 2013 calendar year. In response to

⁴ Chapter 722 of the 2016 Tennessee Public Acts substantially modified Tennessee Code Annotated section 10-7-503(a), effective July 1, 2016. The quoted section was not modified by the amendment.

this request, the City expended over 28.6 worker hours identifying the records that would be responsive to the Appellee's request at a cost of \$800.00. In addition to computer-based records, the records custodian retrieved approximately 33 boxes of documents from the City's archives that were responsive to the Appellee's request. Thirty (30) days after the Appellee was advised that the requested documents were available for "inspection," the Appellee conducted his "inspection." After approximately thirty (30) minutes, he advised the custodian that he would be back to review the balance of the documents; however, he never returned.

This incident is not an isolated occasion. The Appellee has made over two hundred (200) requests to inspect documents to the City of Hendersonville since 2013. Between September 28, 2014, through December 18, 2014, the Appellee, on a daily basis, requested the right to inspect the personal credit card statement for the Mayor of the City of Hendersonville.

On another occasion, the City Finance Director reported to the Finance Committee of the Board of Mayor and Aldermen the costs incurred in responding to one of the Appellee's requests. The Appellee then requested the personnel files of the twelve (12) city employees who participated in responding to that request. The City expended over twenty-one (21) hours gathering those files. The Appellee was advised on January 12, 2015, that the documents were available for inspection, but he never appeared in person to inspect those files.

No matter how egregious the actions of the Appellee (or any citizen) may be with respect to requests to inspect public records, all governmental entities, including TNRMT's members, are obligated to comply with the TPRA and make their records available for inspection. Likewise, if those governmental entities fail to comply with the express requirements of the law, citizens, such as the Appellee, have the right to file a lawsuit pursuant to Tennessee Code Annotated section 10-7-505. The entity will incur attorney's fees and costs in connection with

the defense of that lawsuit. In addition, the entity may be required to pay the requestor's attorney's fees and reasonable costs if the entity's failure to disclose is deemed willful. Id. at § 10-7-505(g). The law requires the entity to make records available "immediately" unless immediate disclosure is not practicable. Id. at § 10-7-503(a)(2)(B). Then, the law requires the entity to respond to the request no later than seven (7) business days. Id. If an entity misses that deadline, it constitutes a denial of the request, and the person making the request has the right to file a lawsuit. Id. at § 10-7-503(a)(2)(B).

Consequently, compliance with the seven (7) day response time is critical for government entities. In this litigation, the Appellee sent his first e-mail to a Sumner County Board employee on March 21, 2014, at 4:34 p.m. – after working hours. Trial Court Opinion, at p. 2. He left a voice mail message for that employee contemporaneously with sending the e-mail. Id. The trial court found that this e-mail and voice mail constituted a "records request" even though the Board's policy stated that requests would be received in-person or by mail. Id. at 14-15. The trial court further found that the Board's policy that it will not accept records requests to inspect records by email, text message, facsimile, telephone or other methods of communication violates the TPRA. Id. at 18.

The trial court's findings are not supported by the very language of the TPRA. The TNRMT members recognize that "we no longer live in a Pony Express world." They also recognize that they incur liability if they fail to respond to a request to inspect public records on a timely basis.

If a person presents a request in person, the requesting party can be directed to the office of the records custodian. The records custodian can then provide the records or, if not practicable, advise the requesting party that a response will be forthcoming within seven (7)

business days. In this scenario, no question exists as to when the request was received. Similarly, a letter mailed to an entity's records custodian at the entity's place of business by "return receipt requested" permits all parties to know when the request was received and the seven (7) business day period for response commences.

Other methods of communication (e.g., text messaging, e-mail messaging, facsimile messaging and voice mail messaging) present opportunities for failure of receipt. The first issue is the identity of the recipient. If an e-mail message is sent at 11:59 p.m. on a Friday to a person who is a high school principal, is that e-mail received at the time it was sent or at the time it was read by the principal? If the high school principal is not the records custodian for the records requested, is that request even received for purposes of the TPRA? If the high school principal forwards the e-mail to the records custodian on the following Tuesday and the records custodian reads the e-mail on Wednesday, does the seven (7) business day period start on Friday when it was received, on Monday when it was read by the principal, on Tuesday when it was received by the records custodian, or on Wednesday when the records custodian finally opened and read the e-mail message?

If a voice mail message is left on the school system's general voice mail system at 10:50 p.m. on the Friday before Christmas break, and the voice mail is not checked until the first Monday in January – more than seven (7) business days later – is the voice mail received when someone listens to the voice mail, when the records custodian listens to the voice mail, or when the requesting party left the voice mail message? Does a text message to a teacher's personal cell phone containing a record request constitute receipt of the request? Does a text message to the records custodian's personal cell phone constitute receipt of the request? Does a facsimile

message to a general facsimile number constitute receipt of the request at the time and day when the machine prints the receipt?

Because of these questions, TNRMT members, like the Sumner County Board of Education, elect to state in their policies that records requests will not be accepted by text messaging, voice mail messaging, or e-mail. These same concerns are reflected in Rule 5.02 of the Tennessee Rules of Civil Procedure. See Tenn. R. Civ. P. 5.02 (Adv. Com. 2010).

CONCLUSION

The TNRMT encourages this Court to consider the practical effect of the Circuit Court's ruling. In essence, an individual such as Mr. Jakes could request inspection of public records by email, without proving state citizenship, on a daily basis. Once requested, the governmental entity would spend untold time and expense compiling the records requested. The issue then becomes follow-through by the requesting party. Specifically, the party who requests by email is under no obligation to actually appear to inspect the documents that have been compiled. There is no financial penalty for making the request to inspect and then not showing up. (Tenn. Code Ann. § 10-7-503(a)(7)⁵). Financial obligation only arises when the inspecting party requests copies. (Tenn. Code Ann § 10-7-503(a)(7)(C)(ii)⁶). The strain on resources is potentially astronomical, as is the potential for abuse. The Circuit Court's interpretation of the TPRA gives a requesting party the power to single-handedly shut down a governmental entity by simply sitting in front of a computer and methodically sending emails requesting to inspect records. That is not the intent of the General Assembly, which is exactly why the statute is drafted as it is.

⁵ "A records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law." Tenn. Code Ann. § 10-7-503(a)(7).

⁶ "The records custodian shall provide a requestor an estimate of the reasonable costs to provide copies of the requested material." Tenn. Code Ann § 10-7-503(a)(7)(C)(ii).

There are additional practical effects to the seven day obligation to respond to a request to inspect imposed on governmental entities. For instance, there is no guarantee that a requesting party will actually email the request to inspect to the correct individual within the governmental entity. If, for example, the email is sent to a school employee such as the janitor or cafeteria cook within a school, as opposed to the custodian of records, it can hardly have been the General Assembly's intent that the seven (7) days begin running at that time. By appearing in person, the requesting party can be directed to the correct individual to fulfill the records inspection request. Very clearly under the statute, the governmental entity's obligation to respond within seven (7) days does not begin until the requestor appears in person.

For the reasons stated above, the Tennessee Risk Management Trust respectfully submits that this Court should reverse the Circuit Court's decision that the public records policy of the Sumner County Board of Education violates the provisions of the TPRA. The Circuit Court's ruling essentially undermines the ability of a governmental entity to effectively respond to requests pursuant to the TPRA, and facilitates abuse of the system provided for by the statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of August, 2016, a true and exact copy of the foregoing has been delivered via United States Mail, postage prepaid and properly addressed to:

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