IN THE COURT OF APPEALS OF THE STATE OF TENNESSEE
MIDDLE DIVISION

ON APPEAL FROM THE CHANCERY COURT OF SUMNER COUNTY

KENNETH L. JAKES, Plaintiff/Appellee, vs. SUMNER COUNTY BOARD OF EDUCATION, Defendant/Appellant.	)	NO. M2015-02471-COA-R3-CV SUMNER CO. CHANCERY COURT NO. 2014CV53 JUDGE DEE DAVID GAY

REPLY BRIEF OF PLAINTIFF/APPELLEE KENNETH L. JAKES

COMES NOW Plaintiff/Appellee Kenneth L. Jakes by and through counsel of record and pursuant to Rule 27 of the Tennessee Rules of Appellate Procedure and submit the brief herein.

The Trial Court Record will be referred to as follows: Technical Record: TR Vol. "#", p. "#"; Transcript of Proceedings: TP Vol. "#", p. "#"; Trial Exhibits: TE "#".

ORAL ARGUMENT REQUESTED

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PLAINTIFF/APPELLEE KENNETH JAKES' STATEMENT OF ISSUES

I. Whether or not the Trial Court abused its discretion in failing to award Plaintiff attorney's fees;

II. In the alternative, if the Court finds the Trial Court did not abuse its discretion in failing to award Plaintiff attorney's fees, whether or not the Trial Court abused its discretion in granting Defendant's Motion for Protective Order, which prevented Plaintiff from conducting oral discovery;

III. Whether or not the Trial Court erred in failing to issue a permanent injunction enjoining Defendant from denying records request which are transmitted by conventional methods of communication such as email, facsimile or telephone;

IV. Whether or not the Trial Court's finding of fact that Plaintiff's March 31, 2014 records request was not sufficiently detailed was supported by a preponderance of the evidence.

STANDARD OF REVIEW

Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Rule 13 of the Tennessee Rules of Appellate Procedure. If the trial court does not make a finding of fact, there is no presumption of correctness, and the appellate court "must conduct [its] own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. *Ivey v. Trans Global Gas & Oil*, 3 S.W. 3d 441, 446 (Tenn. 1999).

SUMMARY OF ARGUMENT

The outcome of this appeal will decide whether or not government entities will be allowed to make the public records request process so technical and cumbersome that the explicitly and primary purpose of the TPRA, which is to allow the fullest possible access to public records, will be diminished. The Defendant in this matter has proven it is determined to make the public records request process as burdensome as possible to citizens. The presence of several governmental entities or their representatives in this matter and their incredible arguments is additional evidence that many governmental entities seek to follow the Defendant's technical approach by refusing to allow citizens to make records request via contemporary forms of communication. Only a bureaucracy which is fearful of the accountability which may ensue if the public can more easily monitor its activity via public records requests would have the nerve to suggest that communicating by electronic mail is dangerous, unreliable and expensive and, therefore, citizens should be denied the convenience of electronic mail. No one disputes the inherent risks of hacking, viruses or spam to those using the internet and electronic mail, but the question is not whether or not communicating by electronic mail has inherent risks; the question should be: does allowing a citizen to make a request via electronic mail ***increase*** the governmental entities risk inherent in the use of electronic mail? An intellectually honest analysis reveals there is no increase in risk to governmental entities which accept records request via email. The facts established at trial in this matter confirm such a conclusion. Jeremy Johnson stated he daily communicated via electronic mail and received up to 300 emails a day. The Defendant also revealed in its initial brief, it manages 4500 email accounts. Thus, the possibility exists that the Defendant's system processes over 1 million emails a day! To suggest the

addition of 12 to 15 emails over the course of year, during which times it handles several million emails, would overly burden the system or place it at a heightened risk is, frankly, dishonest. And the testimony provided by Ken Jakes demonstrated that such an assertion is simply not true. Jakes testified that he has made records requests all across middle Tennessee and almost all of the entities accept email records requests. In fact, he testified he made an email request to the Sumner County government, who is the sister governmental entity of Defendant, and the staff not only responded to the email, but provided the records requested by email. Jakes also testified that he had the same result with two other local governmental entities in Sumner County: the City of Hendersonville and the Hendersonville Police Department. The Defendant attempted to counter this evidence by providing a list of 70 school boards whose policy prohibited the acceptance of electronic mail; however, Jakes and another citizen contacted 31 of these school boards via electronic mail asking the very same question Ken Jakes asked Jeremy Johnson: "where can I find your records request policy?" and all 31 responded via email either providing the document or advising where it can be found on the internet. Therefore, the reality that accepting records requests via email in no way exposes governmental entities to greater risks is evident and should be undisputed.

This begs the question: why is the Defendant and some of its *amici* making such incredible assertions about the dangers and burdens of email? The Defendant and its *amici* have put forth several legal arguments as to why it should not be compelled to accept request for inspection by electronic mail or other contemporary forms of communication. As demonstrated below, none are supported by the TPRA or any previous decision by an appellate court, however, such arguments will be decided on their merits. But the fact the Defendant and its *amici* have attempted to buttress these legal arguments with blatant misrepresentations of the effect of

allowing citizens to use email should reveal to this Court that they are terrified of the accountability they will face if citizens have the convenience and efficiency of the contemporary forms of communication. The Tennessee Risk Management Trust made the ridiculous argument, "The Circuit Court [sic] 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." Not only is such an apocalyptic cry beyond the boundaries of reality, but even if one was so inclined to "single handedly shut down a government entity"; he or she could achieve the same result by sending such requests by mail or in person. This silly hypothetical also demonstrates a fundamental misunderstanding of the record request process as established by the TPRA. A governmental entity has seven (7) business days to advise how and when it will respond to the request, if at all, and has an unspecified amount of time to actually produce the records requested. Therefore, if a governmental entity was inundated with requests that threatened to "shut down a government entity", the entity would have amble time and opportunity to recognize such a malicious effort and take remedial action to avoid any epic results. Further, as the governmental entity has no time limit in which it has to actually produce the records, it would be nearly impossible for the a records request to shut down a government entity.

An equally outlandish assertion was made by the Tennessee Municipal League Risk Management Pool, which suggested that accepting records request via email may result in computers making records requests. "Further, with e-mail records requests, there can be no guarantee that the request is sent by an actual person. E-mails can be generated by other potentially harmful and system-crippling computer programs such as spambots." Apparently, not only should governmental entities fear evil citizens who want to destroy the government one

records request at the time, but similar to the movie the Matrix, computers may rise up in the future and destroy our government.

Then there is the threat that citizens outside the State of Tennessee might have an inordinate interest in the public records of a Tennessee governmental entity. The Tennessee Municipal League Risk Management Pool further argued, "Requiring entities to accept public records requests via e-mail poses significant difficulties for records custodians when considering the issue of verification of citizenship, and raises the question: How does a records custodian verify a requestor's Tennessee citizenship without being able to verify that information in person?" While the threat of a citizen outside Tennessee making a public records request is a more realistic threat than one being made by a computer, is has to be a minimal threat nonetheless. However, such an argument overlooks the operative fact that the person has to appear in person to make the inspection and, thus, the General Assembly has put into a place an effective safeguard from foreign invasion of our public records as the citizen can be compelled to produce his or her identification when they appear to make the inspection. Further, such an argument overlooks the reality that if a citizen can make a request via U.S. Mail, how is this problem any different than when sent by email?

The above fantastic assertions expose desperation and Plaintiff respectfully submits this Court should see through such demagoguery and realize the real motivation behind the robust opposition submitted by Defendant and its *amici*: suppressing scrutiny and accountability by the public by maintaining full control over the records request process. However, public scrutiny and accountability is precisely the purpose of the TPRA. The TPRA affords the unequivocal right to inspect public records and such can only be denied pursuant to state law. *See* Tenn. Code Ann. 10-7-503(a)(2)(A). Defendant nor any of its *amici* has provided any state law which

suggests that the right to inspect can be denied based on the fact the request to inspect has been made by electronic means or similar methods. In fact, the unnecessary game of refusing citizen's request based solely on how the request is made has been fought several times in trial courts and in the appellate courts in Tennessee and each time, this Court saw through such oppressive efforts and such were defeated. The Chattanooga Police Department attempted this in *Waller v Bryan*, by making the same argument Defendant does herein: you have to follow the technical rules and regulations of our department when making a request for inspection of public records. Such was position was rejected and this Court held that it would not put form over substance and as long as a citizen identifies the records sought a governmental entity has to respond. Another entity tried this in *Allen v. Day*, when a reporter made a request for a record, but did not do it in person and during normal business hours. The same outcome occurred: this Court stated the purpose of the TPRA is the fullest access possible and if the citizen identifies the records sought, the record must be provided, unless otherwise protected from state law. Just last year, the Sheriff of Marshall County attempted the same game: he told an editor of a newspaper he had to appear in person to make a request and that a request through the mail was not acceptable. Again, this Court protected the sanctity of the citizens' right to the inspection of public records and found that pursuant to *Waller*, a personal appearance was not required. Thus, it is now a well-established principle of law in Tennessee that a citizen's records request cannot be denied just because it is not in the precise manner as may be dictated by a governmental entity or the law itself. The rationale behind such a principle is very simple and is likewise well established: the purpose of the TPRA is the fullest access to public records as possible and to allow governmental entities to adopt arbitrary, technical and burdensome rules and regulations defeats this purpose.

Despite the plain language of the TPRA and the well-established precedent set by this Court, the Defendant, with the support of its *amici*, appear in yet another effort to stifle the citizen's unequivocal right to inspect public records by making the same old argument: the citizen must make the records request precisely the way a governmental entity dictates. The Defendant does not provide any new precedent or new law or new argument, but yet seeks a different result. Frankly, Defendant has made a mockery of the records request process by its refusal to accept a simple records request by electronic mail for the public records policy, which Defendant claims was immediately available via the internet and the *amici* have joined in this mockery. To allow governmental entities to adopt random and arbitrary rules which will serve as obstacles to citizens seeking to exercise their statutory right to inspect public records is to reward the game Defendant has played with Plaintiff in this matter and will result in empowering certain governmental entities to repel requests for inspection by employing technical rules and regulations. This could have the effect of rendering the TPRA to mere words which have proven to be ineffective and the laudable intent of the TPRA, which is to ensure citizens have the fullest possible access to public records, will be diminished.

LAW AND ARGUMENT

I. THE DEFENDANT CONTINUES TO BE UNABLE TO CITE ANY LAW OR PRECEDENT WHICH AFFORDS A GOVERNMENTAL ENTITY THE OPTION OF IGNORING A PUBLIC RECORDS REQUEST SENT VIA ELECTRONIC MAIL WHICH SUFFICIENTLY IDENTIFIES THE RECORDS SOUGHT.

A. INTRODUCTION

The Defendant begins its argument in its reply brief by erroneously stating: "Jakes does not cite any statutory provision requiring state and local governmental entities to accept electronic requests to inspect public records. The only provision he cites, Tenn. Code Ann. § 10-7-503(a)(2)(A), merely provides that custodian 'shall, at all time during business hours . . .be open for personal inspection by any citizen of this state." Def. Reply Brief, Sec. I (A), p. 3. Curiously, the Defendant fails to provide the complete language of the aforementioned statute, which is the language upon which Plaintiff has primarily relied. The statute states, ""All state, county and municipal records shall, at all times during business hours . . .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." (emphasis added). Ignoring this important and operative language of the TPRA is not only a pattern for the Defendant, but for every governmental entity which filed an amicus brief with the Court.[1] In Defendant's initial brief, according to the Table of Authorities, the Defendant only cited to Tenn.

[1] The Tennessee Risk Management Trust did quote the statute, but attempts to undercut the very purpose of the statute, which creates a statutory right to inspect public records, by interpreting the language to mean it is only a statutory right to inspect during normal business hours. This is a nonsensical interpretation of the statute as other than normal business hours, no other time exists during which a citizen would be allowed to inspect public records.

Code Ann. 10-7-503(a)(2)(A) twice and neither time did the Defendant quote the language from the statute which states explicitly a governmental entity cannot refuse a citizen's right of inspection, unless otherwise provided by state law. *See* Defendant's First Brief, p. 12 & p. 26. Likewise, in the amicus briefs, this unambiguous directive by the General Assembly is intentionally ignored or omitted by each entity which took the time to attempt to instruct the Court on what the TPRA says. The irony of this omission is compounded by fact that the Defendant and the other entities spend pages and pages lecturing the Court on the basic principles of statutory construction. Indeed, the Defendant argues in its initial brief, "Tennessee courts, however, may not 'alter or amend a statute' or 'substitute [their] policy judgments for those of the legislature.' *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005). Def. First Brief, p. 22. The Defendant and its *amici*, however, have failed to provide any law or precedent which affords a governmental entity the authority to refuse the right of inspection, which is explicitly afforded to citizens by the TPRA, just because it was sent via electronic mail. The Defendant and its *amici* attempt to frame the question as whether or not Plaintiff has provided any authority which prohibits a governmental entity from refusing a request for inspection by electronic mail. If the Court follows the plain language of the TPRA, as the Defendant and its *amici* emphatically advocate the Court to do, this is not the proper analysis. Pursuant to the plain language of 10-7-503(a)(2)(A), it is the governmental entity that must establish that under state law it has the authority to refuse the right of inspection. The Defendant and its amici have failed to provide such state law and, therefore, their arguments must fail.

B. THE DEFENDANT'S ARGUMENT THAT "ADVANCE INSPECTION REQUESTS" ARE NOT CONTEMPLATED BY THE LAW IS REFUTED

BY THE PLAIN LANGUAGE OF THE TPRA AND LEGAL PRECEDENT SET BY THIS COURT

As the Defendant cannot provide any law or legal precedent to overcome the plain language of the TPRA, which prohibits a governmental entity from refusing a request for inspection, in its reply brief, the Defendant has employed a new argument and a new term: "advance inspection request". The Defendant (and some of its *amici*) essentially argue that because one has to make an inspection in person, any request to inspect which is not made in person is in effect an "advance inspection request" and, by "permitting citizens to make an inspection request in advance", the Defendant is actually going beyond the statutory requirements of the TPRA. *See* Def. Reply Brief, Sec. I (A), p. 3). Such an argument ignores the plain language of the TPRA, the legal precedent set by this Court and the realities of citizens requesting to inspect public records.

The Defendant argues, "There is simply no authority (statutory or otherwise) requiring custodians to accept such advance requests by electronic means. Instead, governmental entities are permitted to decide for themselves whether to accept such inspection requests." Def. Reply Brief, Sec. I (A), p. 3. Such a bold assertion is false and as set forth above, the Defendant's position is refuted by the plain language of the TPRA. Despite the new twist on its argument regarding "advance inspection requests", the plain meaning of the Tenn. Code Ann. §10-7-503(a)(2)(A) does not change. A request for inspection, whether "advance" or in person, still cannot be refused by a governmental entity. Again, Defendant and its *amici* have repeatedly admonished the Court about deviating from the plain language of the TPRA, but instead of dealing with the plain language which prohibits refusing a request for inspection, they have simply ignored the language. However, the language exists nonetheless and contrary to

Defendant's assertion, it prohibits governmental entities from deciding whether or not it will accept a request for inspection.

C. THE COURT'S HOLDING IN *ALLEN V. DAY* AND *WALLER V. BRYAN* REFUTE THE DEFENDANT'S POSITION THAT A REQUEST FOR INSPECTION CAN BE DENIED BASED ON THE METHOD MADE

Not only is the "advance inspection request" argument refuted by the plain language of the TPRA, it is refuted by this Court's holding in *Allen v. Day*. The case of *Allen v. Day* was fully reviewed in Plaintiff's Response Brief, (*see* Plaintiff's Resp. Brief, pp. 19-23) and this Court held that the Court would not put form over substance to determine whether or not the TPRA was applicable to a specific request to inspect public records. The Court stated:

> [Defendant] Powers initially contends that neither Gannett or Ms. Burke fulfilled the statutory prerequisites stated above so as to provide the trial court with subject matter jurisdiction to adjudicate their petition. Gannett has conceded that it is not a citizen of Tennessee within the meaning of the statute, however, Gannett asserts that it's employee, Ms. Burke, met the statutory preconditions and thus the trial court properly exercised subject matter jurisdiction over the Petition. Ms. Burke admittedly did not personally appear during Power's normal business hours and request a copy of the settlement agreement from the Power's official records custodian. Gannett asserts however that this failure was not fatal to the acquisition of the subject matter jurisdiction. Ms. Burks affidavit filed on March 2, 2005, revealed that she inquired about the contents of the settlement agreement but that Power's spoke person denied access to the record, saying that the agreement was confidential . . .[**A]s the Court alluded to *Waller*, the purpose of the personal appearance requirement is to prevent wasted governmental time and money caused by the endless search through the voluminous records, for a document which was insufficiently identified by the Petitioner**. Powers does not argue that Ms. Burks request was insufficiently described nor does it argue that it lacked notice of Ms. Burks' request due to her failure to personally appear before Power's official records custodian. Power's simply contends that Ms. Burke did not comply with the literal language of the statute and therefore she should be precluded from contesting the denial of access to the settlement agreement. To strictly construe the subject matter jurisdiction requirements, as Powers suggests, would be to defeat the clear language of the act which states that the access is to be broadly construed so as to give the fullest possible access to public records.

Allen vs. Day, 213 S.W.3d 244, 249 (Tenn. Ct. App. 2006)(emphasis added). Therefore, this Court has already held that the personal appearance as explicitly required by the statute at the time was to avoid wasted effort by the governmental entity to find the records sought and, therefore, as long as the request sufficiently identifies the records sought, the TPRA is applicable and the governmental entity has a duty to respond. Thus, a citizen's appearance at the office of the Defendant is not necessary to make a request for inspection as the Defendant attempts to assert. There is not a separate category of requests denominated "advance inspection requests" which are treated differently under the law just because such requests are not made in person during normal business hours. As this Court acknowledged, the clear language of the TPRA requires that the Act to be broadly construed to give the fullest possible access to public records and to hold that an individual has to appear during normal business hours and make a request would put form over substance and unnecessarily restrict the public's access to records.

The Defendant again attempts to argue that *Allen v. Day* is not applicable by stating, "In [Allen v.Day], the Court merely concluded that a custodian cannot claim lack of subject matter jurisdiction based on deficiency with the request procedure when that custodian had already both accepted the request and issued a preemptive denial on the substance of the requested records." Def's Reply Brief, p. 6. Why factually different than the case sub *judice*, it is a distinguishment without a difference. Under Defendant's interpretation of this Court's ruling in *Allen v. Day*, had the custodian stated to the reporter "You are not making the request during normal business hours so I am denying your request..", the Court's ruling would have been different. This position is not supported by the Court's rationale which is quoted above at length, the pertinent part being as follows: "As the Court alluded to *Waller*, the purpose of the personal appearance requirement is to prevent wasted governmental time and money caused by the endless search

through the voluminous records, for a document which was insufficiently identified by the Petitioner. Powers does not argue that Ms. Burks request was insufficiently described nor does it argue that it lacked notice of Ms. Burks' request due to her failure to personally appear before Power's official records custodian." *Id.* Therefore, the legal position that a citizen has to make a request to inspect in person, whether asserted at the time of the request by the custodian, as occurred in the case *sub judice*, or whether made by the custodian's attorney during litigation as occurred in *Allen*, such has been summarily rejected by this Court and such holding is applicable to the case *sub judice*.

Likewise, this Court's ruling in *Waller v. Bryan* is applicable to the case *sub judice* and supports the Plaintiff's position that a custodian cannot dictate how a records request is made. The Defendant and its *amici* argue that the holding in *Waller v. Bryan* only applies to those who have "health or physical limitations that would prevent them from appearing before the records custodians". However, such is a misinterpretation of the holding in *Waller* which is not supported by any subsequent interpretations by this Court.

Initially, it should be noted that nothing within the language of the *Waller* holding suggests its ruling is limited to prisoners or those who may not be able to appear to make a records request. "If the citizen requesting inspection and copying of the documents can sufficiently identify those documents so that [the custodians] know which documents to copy, a requirement that the citizen must appear in person to request a copy of those documents would place form over substance and not be consistent with the clear intent of the Legislature." *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). There is no qualifier that such rationale only applies to those with health or physical limitation. Indeed, the Court repeats this finding in the next paragraph, again without any qualifier. "If a citizen can sufficiently identify the

documents which he wishes to obtain copies of so as to enable the custodian of the records to know which documents are to be copied, the citizens personal presence before the record custodian is not required . . . It is the opinion of this Court that such was the intent of the Legislature." *Id.* at 775. Subsequent opinions by this Court have confirmed that the *Waller* rationale is not limited to prisoner or other citizens who cannot appear for a personal inspection.

In *Allen v. Day*, as outlined above, the Court found that the purpose of the personal appearance had nothing to do with the physical limitations of the citizen, but government efficiency. After reviewing at length the *Waller* opinion, the *Allen* Court held, "As the court alluded to in *Waller*, the purpose of the personal appearance requirement is to prevent wasted government time and money caused by the endless search through voluminous records for a document which is insufficiently identified by the petitioner." Additionally, the petitioner in *Allen* was a reporter, not a prisoner, and actually was able to make an appearance, just not during normal business hours.

Likewise, in *Friedmann v. Marshall County*, 471 S.W.3d 427 (Tenn. Ct. App. 2015), the petitioner was the managing editor for a newspaper who mailed in a request for copies to the Sheriff of Marshall County. He was not a prisoner nor was there any indication in the facts of the case which suggested that the petitioner had any physical or health limitations which would prevent him from appearing at the custodian's office for an inspection. *See Id.* at 429-431. The primary issue before the Court was whether or not Friedmann had to personally appear for a records request. In finding for Friedmann, the Court relied on it ruling in *Waller* and held, "In construing the TPRA, we have previously held that a citizen does not need to make a physical appearance in order to make a records request." *Id.* at 434. Further, again relying on *Waller*, the Court held, "Although the trial court did not consider the Sheriff's Office's initial responses to be

denials of the records *per se* because such responses merely imposed a condition of personal appearance, the imposition of such a condition was not permissible. As is evident from the authorities just cited [including *Waller*], a citizen does not need to make a personal appearance in order to make a records request." *Id.* at 435. Thus, not only is *Waller* applicable to the case *sub judice*, but the subsequent rulings by this Court have established the principle of law in Tennessee that that regardless of a citizen's physical abilities and health, a citizen's personal appearance is not required to make a records request.

D. IF A CITIZEN MUST MAKE A PERSONAL APPEARANCE TO MAKE A REQUEST FOR INSPECTION THE EXPLICIT PURPOSE OF THE TPRA OF PROVIDING THE FULLEST POSSIBLE ACCESS TO PUBLIC RECORDS IS DEFEATED

Defendant's limited interpretation of Tenn. Code Ann. § 10-7-503(a)(2)(A) is further refuted by the express intent of the TPRA to provide the fullest access to records. The limit on access to records is very evident when considering the realities of a citizen making such a request pursuant to Defendant's interpretation. Under Defendant's interpretation, an individual would have to appear during normal business hours (which means NOT during holidays or other times when most citizens are not working) and make a records request. As it would be highly unusual for a governmental entity to have immediate access to the very records the citizen was seeking, this means that the citizen would have to return another time to do the actual inspection. The TPRA states that if the records are not immediately accessible, the governmental entity has seven (7) days to respond and advise when the records will be available for inspection. *See* Tenn. Code Ann. 10-7-503(a)(2)(B). As is evident from each of the records requests submitted to Defendant in 2014, each citizen received a letter stating when the records would be available, which

indicates that the records were not immediately accessible when the citizen made the request. *See* TE, No. 18. Therefore, if a citizen chooses to inspect public records, he or she will have to appear twice during normal business hours. As appearing during normal business hours even once is difficult for most citizens, compelling a citizen to appear twice will certainly make records less accessible to citizens if the TPRA is construed as Defendant asserts.

E. THE RECENT AMENDMENT TO THE TPRA SOLIDIFIES THE CITIZENS STATUTORY RIGHT TO NOT HAVE A REQUEST FOR INSPECTION DENIED UNLESS PROVIDED BY STATE LAW

The Defendant asserts that a recent amendment to the TPRA demonstrates that "custodians can . . . establish a public records policy, tailored to the agency's particular needs and resources, that includes '[t]he process for making requests to inspect public records.'" Def. Reply Brief Sec. I (A), p. 4. However, a review of the actual language of the amendment and the application of basic principles of statutory construction reveal that the amendment to the TPRA confirms that a governmental entity *still* cannot refuse a citizen's right to inspect a public record.

The amendment upon which Defendant relies states in pertinent part, "No later than July 1, 2017, every governmental entity subject to this section shall establish a written public records policy properly adopted by the appropriate governing authority. *The public records policy shall not impose requirements on those requesting records that are more burdensome than state law* . . .". Tenn. Code Ann. 10-7-503(g)(emphasis added). Defendant argues the Court should interpret such an amendment as a *carte blanche* to governmental entities in deciding how to process and respond to records requests, however, Defendant's position is once again refuted by the plain language of the TPRA. The amendment states without any ambiguity that any policy adopted cannot be more burdensome than state law. The amendment does not in any fashion

diminish the citizen's statutory right to inspect records, but in fact, solidifies such right by stating that state law cannot be altered by a governmental entities policy. As set forth herein and in Plaintiff's previous brief, the TPRA does not allow a governmental entity to refuse a citizen's request to inspect, thus, a governmental entity continues to be prevented from refusing a request to inspect records.

Further, given the Court's holding in *Allen v. Day* that a governmental entity cannot put form over substance and reject a public records request even though it is not in person during normal business hours, the fact the General Assembly did not attempt to abrogate such a holding in the recent amendment confirms this Court's interpretation of the TPRA as set forth in *Allen v. Day*. In the matter of *Neff v. Cherokee Ins. Co*, 704 S.W.2d 1 (Tenn. 1986), the Tennessee Supreme Court held, "The Legislature is presumed to have knowledge of the state of the law on the subject under consideration at the time it enacts legislation." *Id.* at 4. As more thoroughly addressed in Plaintiff's response brief, in the matter of *State v. Powers*, 101 S.W.3d 383 (Tenn. 2002), the Supreme Court held that as a Legislature is imputed with the knowledge of prior appellate rulings and, thus, in order to find that the Legislature meant to abolish a previous interpretation of the law, the Legislature would have to clearly indicate an intent to do so. The plain language of the amendment does not provide even a suggestion that the precedent set by this Court in *Allen v. Day* that a custodian cannot dictate the method of the request has been undone. Therefore, this Court's precedent has, in essence, been approved by the Legislature, contrary to any assertion by Defendant.

F. CONCLUSION

The Plaintiff agrees with the Defendant and its *amici* that the fundamental principles of statutory construction should be applied by this Court in interpreting the TPRA, including, construing the Act using the ordinary and customary meaning of the language intentionally used by the General Assembly. However, unlike the Defendant and its *amici*, the Plaintiff requests the Court to consider *all* of the language of the TPRA and not just portions. The TPRA gives each citizen the statutory right to inspect records and a request to do so cannot be denied, unless provided by state law. No state law exists which states a governmental entity can reject a request for inspection because it was submitted by electronic mail or because it was not submitted in person.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD ATTORNEY'S FEES AND DEFENDANT HAS FAILED TO PROVIDE ANY ARGUMENT TO DEMONSTRATE OTHERWISE.

The Defendant's arguments with respect to the award of attorney's fees ignores the realities of Defendant's denial of Plaintiff's record requests as it fails to address the following: 1) Johnson denied Plaintiff's request not because it was via email, but because it was not on a form provided by the Office of Open Records Counsel (hereinafter "OORC") and provided either via U.S. Mail or in person. It is an undisputed fact that just prior to Plaintiff's request, Johnson and Mr. Del Phillips, the Director of Schools, changed the application of the Board's policy by stating explicitly that a request had to be made in writing and on a form provided by the OORC. Mr. Johnson testified at trial that he knew the TPRA prohibited a governmental entity from requiring a request for inspection to be made in writing; 2) the undisputed facts in this matter establish that Plaintiff made a request via voicemail and Mr. Johnson never consulted with Mr. Fuqua or the OORC in deciding not to respond to such request. Failing to even research whether

or not a denial is supported by the law is *per se* bad faith; 3) The record is void of any rationale the Defendant used in denying Plaintiff's email request as the statements of Elisha Hodge, the attorney for the OORC, were not admissible for the truth of the matter asserted and Mr. Fuqua, the attorney for the Defendant, never provided any legal basis for his finding; 4) Jeremy Johnson testified that he knew that you could not compel a citizen to appear in person to make a request and he further testified that he knew that a governmental entity could not require a request to inspect to be made in writing; nonetheless, he denied Plaintiff's request and told him he must use one of the foregoing methods to make the request. Indeed, the Trial Court found that both of these methods were in violation of the TPRA. (*See* TR Vol. VII, p. 947).

Plaintiff will not herein revisit each of these issues which were thoroughly reviewed in Plaintiff's Response brief; however, Defendant utterly failed to address the issue of Plaintiff's request via telephone, as did the Trial Court, and, thus, the Plaintiff reiterates that the Trial Court's ruling is an abuse of discretion and Plaintiff should be awarded attorney's fees in this matter.

The Trial Court's refusal to award Plaintiff attorney's fees is reviewed pursuant to the abuse of discretion standard. *See Friedmann v. Marshall County*, 471 S.W.3d 427 (Tenn. Ct. App. 2015). "Discretionary decision must take the applicable law and the relevant facts into account . . .. A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). "A trial court's discretionary decisions should be reviewed to determine: (1) whether the factual basis of the decision is supported by sufficient evidence; (2) whether the trial court has correctly identified and properly

applied the applicable legal principles; and (3) whether the trial court's decision is within the range of acceptable alternatives." *Flautt & Mann v. City of Memphis*, 285 S.W.3d 856, 872 (Tenn. Ct. App. 2008). From the plain language of the Trial Court ruling, it appears the Trial Court did articulate the proper legal standard in determining whether or not the Defendant's denial was in willful violation of the law. The Court did rely on *Friedmann* and in general states that the issue must be analyzed given the law's clarity at the time. (TR Vol. VII, p. 952-953). However, it is not possible for the Trial Court's decision to be a reasonable alternative as the Court's factual findings regarding Plaintiff's request sent via telephone is not supported by sufficient evidence.

The Trial Court erroneously held, "The Court finds that there was no showing of an unwillingness to produce a particular record, but rather involved a question or concern of the proper procedure to follow by the Defendant in accepting a request for inspection. . .. .[Jeremy Johnson] pursued this records request in good faith. . . .The Court finds the records custodian, Jeremey Johnson, relied upon the advice of staff attorney, Jim Fuqua. Fuqua relied upon advice from the Open Records Counsel. The Court finds that the clarity of the law as to these particular issues was not clear and that those issues are being resolved by this particular lawsuit." (TR Vol. VII, p. 953). The Court made a finding that Johnson had a question or concern of the proper procedure to follow; however, Johnson did not present any testimony which demonstrated he asked any questions or had a concern whether or not he had to accept the voice mail as a records request. The Court also erroneously found that Johnson relied on the advice of counsel, however, Fuqua testified that he never consulted with the OORC about whether or not a voicemail had to be accepted as a records request and he never discussed with Johnson whether or not he had to accept the voicemail as a records request.(TP Vol. XI, p. 235 & 239). Therefore, with respect to

the legality of the voicemail message, the Trial Court's factual findings are not supported by sufficient evidence.

Had Johnson or Fuqua pursued "a question or concern" about the state of the law of accepting a voicemail message as a records request, they would have discovered that in fact the OORC advised that a records request be accepted over the telephone. As the Court noted in its ruling, the website of the OORC states: 'May a records custodian require a request to inspect public records be in writing? Generally, the answer is No. T.C.A. 10-7-503(a)(7)(A) states that a records custodian may not 'require a written request . . .to view a public record unless otherwise specified by law.' Given that a requestor is not required to make a request in person and given that a request for inspection is not required to be made in writing, a governmental entity should accept a request for inspection by telephone, if the requestor does not want to make a request in person or in writing.' (TR Vol. VII, p. 943 & TE No. 15). Such an opinion by the OORC is supported by the state of the law as *Waller v. Bryan* held that a custodian could not compel a citizen to make a records request in person. Logically, if a citizen cannot be compelled to make a request in writing and cannot be compelled to appear in person, a verbal request over the phone is acceptable. This is precisely what Plaintiff did and, contrary to the Court's findings, Johnson never had a question or concern about whether or not he had to respond to such a request and Johnson never spoke with his attorney, Fuqua or the OORC about whether or not he had to respond. Ignorance of the law is no excuse and both Johnson and Fuqua remained willfully ignorant by not pursing in any manner the legal question of the legality of a records request over the phone.

The definition of willfulness, pursuant to this Court's ruling in *Friedmann* and its predecessors is that the custodian is aware the law requires the disclosure of a record, but the

custodian nonetheless refuses to disclose such record. A corollary to such definition is that if the custodian does not make any effort to determine his or her duty under the law and in the state of willful ignorance, denies the record requests which should have been provided under the law, such constitutes willfulness. Therefore, the Trial Court's refusal to award attorney's fees was an abuse of discretion and should be set aside.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERING A PROTECTIVE ORDER WITHOUT SUFFICIENT FOUNDATION WHICH DENIED THE PLAINITFF THE OPPORUTNITY TO EXPLORE THE COMPLEX FACTS OF THIS MATTER

The Defendant creates a procedural rule by asserting that Plaintiff has waived his appeal of the Court's Protective Order because the Plaintiff did not file an interlocutory appeal. The case upon which Defendant relies, *Commissioner of Department of Transportation v. Hall*, 635 S.W.2d 110 (Tenn. 1982), does not state in any manner that a party has waived any issues related to discovery if an interlocutory appeal has not be filed. In fact, the issue was whether or not the trial court had abused its discretion in failing to provide a continuance. *Id.* at 112. The Supreme Court merely observed that instead of pursuing the issue of a continuance, the State should have filed an interlocutory appeal or at trial, prepared a complete and thorough record. The Court ultimately held, "Since neither option was followed and the record fails to show an abuse of discretion by the trial court in denying the continuance . . . the trial court's judgment is reinstated." *Id.* at 112

The Defendant also argues that because Johnson nor Phillips were subpoenaed to trial, Plaintiff has waived his appeal with respect to the protective order. Again, this is a theory with no legal support. No procedural rules exist which require that if a discovery issue arises, a party

must subpoena the individual or records to trial or the issue is waived. Defendant's position is also founded on the supposition that cross examination at trial is analogous to a discovery deposition. Our judicial system long ago abandoned the trial by ambush model, which in turn means that trials are not a discovery tool, but should be the culmination of a robust discovery effort as afforded under the law and the Rules of Civil Procedure. ("The rules of discovery exist, in part, to prevent trial by ambush." *Austin v. City of Memphis*, 684 S.W.2d 624, 632 (Tenn. Ct. App. 1984).

The Defendant also references Plaintiff's failure to make an offer of proof; however, such an argument ignores the fundamental aspect of an offer of proof: a party must have the evidence to make the offer of proof. *See* Tenn. R. Evid. 103(a)(2). How could Plaintiff submit an offer of proof of the testimony Plaintiff would have elicited from a witness if Plaintiff never had the opportunity to depose the witness? Therefore, nothing in the precedent set by an appellate court nor the Tennessee Rules of Civil Procedure support the Defendant's position Plaintiff has waived his appeal of the Trial Court's Protective Order.

The Plaintiff would respectfully submit that the Defendant has not provided any facts or reasoning which support its position that the Trial Court did not abuse its discretion in issuing the Protective Order. As set forth in Plaintiff's response brief, Tennessee law favors a broad policy of discovery of relevant, non-privileged information. This Court has held, "A trial court should decline to limit discovery if the party seeking limitations cannot produce specific facts to support its request. . . If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case." *Id. Duncan v. Duncan*, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990). The Plaintiff respectfully submits that Plaintiff was denied the opportunity to do sufficient written discovery

or depose ANY witnesses which means Plaintiff was denied the fundamental right of discovery which is afforded under Rule 26 of the Tennessee Rules of Civil Procedure. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." Tenn. R. Civ. Pro. Rule 26.02(1). "The Tennessee's discovery and evidentiary rules reflect a broad policy favoring discovery of all relevant, non-privileged information. This policy enables the parties and the courts to seek the truth so that disputes will be decided by facts rather than by legal maneuvering." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 525 (Tenn. 2010). Discovery is also vital in determining additional facts and issues which may not have been contemplated by the pleadings. "Discovery can be used to obtain information which not only relates to the issues apparent from the pleadings, but to formulate additional issues . . .." *Shipley v. Tenn. Farmers Mutual Ins. Co.*, 1991 WL 77540, *8 (Tenn. Ct. App. 1991). By way of example, had Plaintiff been able to depose Johnson or Phillips, Plaintiff would have learned of the fantastic assertions Defendant would be making about its email system and could have further delved into this issue.

The frequency and extent of use of discovery is within the discretion of the Court, however, the language of Rule 26 only provides specific reasons to restrain discovery. "The frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive . . ." *Id.*. There was no finding by the Court that any of the foregoing reasons existed which would justify limiting discovery and, even if the Court made

such a finding, it would not be supported by evidence. Deposing Jeremy Johnson and Del Phillips, both who were instrumental in altering the Defendant's policy just as citizens indicated an interest in financial records, can hardly be characterized as cumulative or duplicative. Nor could it be found to be unduly burdensome or expensive to attend a deposition.

Further, the language affording a party the right to a protective order indicates such was not reasonable in this matter. "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Tenn. R. Civ. Pro. 26.03. Recall, the Defendant only sought a protective order in an effort to avoid discovery before the Court considered its Motion for Summary Judgment. There was no allegation and, more importantly, no finding by the Court that the protective order was necessary to avoid annoyance, oppression or undue burden or expense.

As a result of the Trial Court's Protective Order, Plaintiff was denied the opportunity to depose Jeremy Johnson and Del Phillips, both who were instrumental in altering the Defendant's policy. (TP Vol. X, pp. 58-59). Further, Plaintiff was denied the opportunity to depose Jim Fuqua, who the Defendant presented at trial as one of the primary witness in its effort to demonstrate its denial was not in bad faith. Likewise, the Plaintiff was not allowed to depose Chris Brown, who was a witness which the Court found was not credible. (TP Vol. XI, p. 939). The reason the Court did not find Mr. Brown credible is because he made fantastic assertions about the burden and costs of the Defendant accepting 12-15 records requests a year which may or may not be by email. This finding begs the question: why was Mr. Brown not being forthright with the Court? By way of example, since the trial in this matter, Plaintiff's counsel has learned that Mr. Brown is related to a School Board member. Discovery could have exposed evidence

which established that Mr. Brown was unduly influenced by such Board member or perhaps even Mr. Johnson or Mr. Phillips to give incredible testimony. Plaintiff was denied this information because of the Trial Court's Protective Order. Defendant suggests the abuse of discretion standard was not met because Plaintiff is unable to explain how discovery would have affected the result in this matter. However, if Plaintiff knew what each of these individuals knew, discovery would not be necessary. Plaintiff's lack of knowledge is not an indication no prejudice has occurred; the lack of knowledge is precisely the reason discovery should not have been denied.

Given the foregoing, the Trial Court abused its discretion as the evidence does not support the Trial Court's denial of the discovery process. No explanation or factual support was provided by the Trial Court, nor even suggested by Defendant, which would justify the categorical denial of discovery and, the Trial Court's ruling should overturned in this regard.

CONCLUSION

Given the foregoing law and argument, the Plaintiff respectfully submits that this Court should find that the TPRA does not afford the right to the Defendant to deny public records requests which are received via electronic mail and other methods of contemporary communication such as facsimile and telephone and the Trial Court's Permanent Injunction should be altered in this regard. Additionally, the Court should find that the Trial Court erred in failing to award attorney's fees and award Plaintiff such fees or remand this matter to the Court to determine such fees and to determine discretionary costs. In the alternative, the Plaintiff respectfully submits the Court should remand this matter to the Trial Court to allow the Plaintiff to conduct discovery and to rehear the issue of willfulness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to J. Todd Presnell, 1600 Division Street, Suite 700, Nashville, Tennessee 37203, on this the 26th day of October, 2016.

KIRK L. CLEMENTS