IN THE COURT OF APPEALS OF TENNESSEE
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 Judge Dee David Gay No. 2014CV53

BRIEF OF AMICUS CURIAE, TENNESSEE MUNICIPAL LEAGUE RISK MANAGEMENT POOL, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Tennessee Municipal League Risk Management Pool, Inc. (the "Pool") hereby respectfully submits this amicus curiae brief to the Tennessee Court of Appeals in this matter.[1]

The Pool is an entity created by Tennessee municipal governments pursuant to Tenn. Code Ann. § 29-20-401, *et seq.* for the purpose of providing "risk management, insurance, reinsurance . . . , self-insurance, or a combination thereof for any and all of the areas of liability or insurability, or both, for such governmental entities." Tenn. Code Ann. § 29-20-401(b). The Pool currently provides such services to more than four hundred and ninety five local governmental entities.

As governmental entities, The Pool's members are required to respond to requests for public records made pursuant to the TPRA. The Court's decision in this appeal regarding the application of Tenn. Code Ann. § 10-7-503 will significantly impact the manner in which The Pool's members operate on a daily basis. The Pool also is responsible for paying legal defense costs incurred by municipal governmental entities across the State of Tennessee for alleged violations of the TPRA. The Pool has a significant financial interest in the outcome of this litigation because the Court's decision could expand the potential liability of governmental entities for claims arising under the TPRA, should public records policies such as the one adopted by SCBOE be found in violation of the Act. The Pool and its members are greatly concerned about whether a governmental entity has the discretion under the TPRA to choose the manner in which it accepts requests for public information.

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[1] The Pool simultaneously has filed a motion pursuant to Rule 31 Tenn. R. App. P. seeking permission to file this Amicus Brief on behalf of the Tennessee Municipal League Risk Management Pool.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Pool adopts the Statement of Issues Presented for Review as previously submitted and set forth in the brief of Defendant-Appellant, Sumner County Board of Education:

(1) Whether the Sumner County Board of Education's public records policy violates the TPRA because it does not permit electronic requests to inspect public records.

(2) Whether [Plaintiff's] request to inspect the Board's public records policy is moot because the requested policy has been publicly available online since 2011 and the Board provided a hardcopy of the policy to Jakes early in this litigation.

In this amicus brief, it is the intention of The Pool to address issue #1 presented by Sumner County Board of Education (hereafter referred to as "SCBOE").

STATEMENT OF THE CASE

The Pool adopts the statement of the case presented by SCBOE in the Brief of Appellant.

STATEMENT OF FACTS

The Pool adopts the statement of facts presented by SCBOE in the Brief of Appellant.

SUMMARY OF THE ARGUMENT

The general purpose of the Tennessee Public Records Act is to allow broad access to public records. The TPRA prohibits records custodians from requiring written requests to inspect documents or assessing a charge to view a public record. The TPRA also requires that the request for inspection of public records be sufficiently detailed so that the custodian can identify the documents to be inspected. Otherwise, the TPRA does not require governmental entities to accept requests to inspect public records in any particular format.

SCBOE's public records policy requires citizens to submit requests to inspect records in person or via U.S. Mail. The trial court erred in this case by finding this policy was in violation of the TPRA and requiring the SCBOE to revise its policy. The TPRA does not require governmental entities to accept public records requests via electronic mail, voicemail, facsimile transmission, or in any other particular format and, therefore, the trial court's mandate to SCBOE requiring revision of its public records policy should be reversed.

Governmental entities and their legislative bodies are in the best position to determine the manner in which they will accept citizens' requests to inspect public records under the TPRA. What will work best for one governmental entity may not work for another, and a blanket rule requiring entities subject to the TPRA to accept certain methods of records requests could cripple a great deal of governmental entities. Entities subject to the TPRA should be allowed the discretion to establish their own policies as to how public records requests are received, so long as the methods are in compliance with the requirements of the TPRA.

ARGUMENT

I. THE TENNESSEE PUBLIC RECORDS ACT DOES NOT REQUIRE GOVERNMENTAL ENTITIES TO ACCEPT ELECTRONIC REQUESTS TO INSPECT PUBLIC RECORDS.

SCBOE's public records policy requires citizens to submit requests to inspect records in person or via U.S. Mail. The trial court erred in holding that the SCBOE's public records request policy was in violation of the TPRA because there is no provision in the Act which prescribes the format in which entities must accept requests to inspect records. The trial court's ruling goes beyond the express language of the TPRA and should be reversed.

The TPRA does not require that governmental entities accept requests to inspect records in any particular manner; the only specific mandates with regard to requests to inspect public records under the TPRA can be found at Tenn. Code Ann. § 10-7-503(a):

> (4) This section shall not be construed as requiring a governmental entity to sort through files to compile information or to create or recreate a record that does not exist. **Any request for inspection or copying of a public record shall be sufficiently detailed to enable the governmental entity to identify the specific records for inspection and copying.**
>
> (7)(A) **A records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law**; however, a records custodian may require a request for copies of public records to be in writing or that the request be made on a form developed by the office of open records counsel. **The records custodian may also require any citizen making a request to view a public record or to make a copy of a public record to present a photo identification, if the person possesses a photo identification, issued by a governmental entity, that includes the person's address. If a person does not possess a photo identification, the records custodian may require other forms of identification acceptable to the records custodian.**

(Emphasis added).

These express restrictions demonstrate the intent on the part of the Tennessee Legislature to include some limitations it chooses to place on governmental entities regarding their open records policies, but leave other matters to the entities themselves.

Questions of statutory construction are questions of law which are reviewed *de novo* with no presumption of correctness. Jones v. Professional Motorcycle Escort Serv., L.L.C., 193 S.W.3d 564, 567 (Tenn. 2006) (citing Ki v. State, 78 S.W.3d 876, 879 (Tenn. 2002). On the issue of statutory interpretation, the Tennessee Supreme Court has held:

> When construing or interpreting statutes, the essential duty of this Court is to ascertain and carry out the legislature's intent without unduly restricting or expanding a statute's coverage beyond its intended scope. In so doing, we are to examine the natural and ordinary meaning of the language used, without a forced or subtle construction that would limit or extend the meaning of the language. Where the language of the statute is clear and unambiguous, then this Court will give effect to the statute according to the plain meaning of its terms.

Lavin v. Jordon, 16 S.W.3d 362, 365 (Tenn. 2000)(internal citations and quotations omitted).

Additionally, when "ascertaining the intent of the legislature, this Court may look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment." State v. Edmondson, 231 S.W.3d 925, 927 (Tenn. 2007)(relying on State v. Collins, 166 S.W.3d 721, 726 (Tenn. 2005)). Further, courts are directed not to "apply a particular interpretation to a statute if that interpretation would yield an absurd result." State v. Sims, 45 S.W.3d 1, 11 (Tenn. 2001). "[C]ourts must also construe [statutory] words in the context in which they appear in the statute and in light of the statute's general purpose." Lee Medical, Inc. v. Beecher, 312 S.W.3d

515, 526 (Tenn. 2010). A helpful way to discover a "statute's general purpose" is to view the statute against "the tapestry of the law generally." Town of Mount Carmel v. City of Kingsport, 217 Tenn. 298, 302, 397 S.W.2d 379, 381 (1965).

> Courts are not authorized to alter or amend a statute. The reasonableness of a statute may not be questioned by a court, and a court may not substitute its own policy judgments for those of the legislature. Courts must presume that the legislature says in a statute what it means and means in a statute what it says there.

Mooney v. Sneed, 30 S.W.3d 304, 306–07 (Tenn. 2000)(internal citations and quotations omitted). Where language is not included in a statutory scheme, the Court should apply the plain language of the statute and "decline to 'read in'" language that is not included in the statute "to extend the coverage of the statute." Howell v. State, 151 S.W.3d 450, 458 (Tenn. 2004). The absence of language requiring governmental entities to accept requests to inspect records in any specific format is significant and this language should not be "read in" to require the SCBOE to revise its current policy.

According to the plain language of the TPRA, the general purpose of the Act is to allow Tennessee citizens access to state and local government public records, subject to certain limitations. SCBOE's policy requiring that a citizen make a request to inspect public records either in person or via the U.S. Mail does not circumvent this purpose. The trial court's finding that SCBOE's public records request policy violates the TPRA should be reversed.

II. THE SUMNER COUNTY BOARD OF EDUCATION'S PUBLIC RECORDS POLICY COMPLIES WITH ESTABLISHED CASE LAW ON THE SUBJECT.

The Tennessee Office of Open Records Counsel has shared its position regarding whether entities must accept public records electronically and provides guidance on the issue. On its "Frequently Asked Questions" webpage, the Office of Open Records Counsel poses the following question and answer:

> Is a governmental entity required to accept a public records request for copies via email or fax?
>
> The case law in Tennessee only addresses the fact that a governmental entity is required to accept requests for copies in person or through the mail. However, if the governmental entity decides to accept requests for copies via email or text, the law does not prohibit the entity from doing so. If a governmental entity is going to limit the methods in which it accepts requests for copies, that information should be reflected in the entity's rule or policy.[2]

The trial court cited to Waller v. Bryan, 16 S.W.3d 770 (Tenn. Ct. App. 1999) to support its finding that the SCBOE's policy giving citizens the option to request to inspect records in person violates the TPRA. [Trial Court Findings of Fact and Conclusions of Law p. 16)]. The trial court found that requiring a personal appearance violates the intent of the TPRA "to give the fullest possible access to public records" and to "promptly make available for inspection any public record." [Id.]. It then cited to Waller to support its finding that a requirement for one to appear in person to request a copy of documents "would place form over substance and not be consistent with the clear intent of the Legislature." [Id.].

The Pool submits that the trial court's reliance on Waller is in error because the facts in Waller are distinguishable from this case. In Waller, the issue was "whether or not the Appellant's inability to show up in person at the Chattanooga Police Department

[2] https://www.comptroller.tn.gov/openrecords/faq.asp

'for inspection' of the records prohibits him from obtaining copies of identified records." Waller, 16 S.W.3d at 771. The plaintiff in Waller made a request for copies of photographs taken in the investigation of his murder/robbery case. Id. at 772. The Court of Appeals held that, so long as the citizen's request is sufficiently detailed to allow the custodian of records to identify the documents to be copied, the citizen is not required to appear in person. Id. at 774.

The Pool asserts that the Court's holding in Waller applies only to requests to make copies and does not apply to the facts in this case because the Plaintiff's request was only to inspect, and not for copies. The very definition of "inspect" requires one to look at or to examine an item. The TPRA itself provides that 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) (emphasis added). Thus, if a citizen merely wants to inspect records, as opposed to requesting copies, it would be necessary for the requestor to appear in person to view such records. In other words, to make an inspection of records, one must physically be present to do so, otherwise the request would turn into a request for the governmental entity to provide the requestor with copies of the records. Once the request to inspect has been converted to a request to make copies, then the governmental entity may require that the request be in writing and may charge for copies under the TPRA. The TPRA does not prohibit inspection requests from being made in person, as this is the type of request an inspection of records contemplates. This is one of the options for which SCBOE's open records policy allows, and it does not violate the TPRA.

The Court of Appeals' analysis of the TPRA in Hickman v. Tennessee Bd. of Probation and Parole, No. M2001-02346-COA-R3-CV, 2003 WL 724474 (Tenn. Ct. App. March 4, 2003), supports this argument. In Hickman, the Court held:

> In order to access public records, a citizen must either appear in person during normal business hours at the location where the public records are housed or, if unable to appear in person, the citizen may identify those documents sought by mail to the records custodian so that the records custodian can copy and produce those documents without requiring an extensive search.

Id. at *3. This is precisely the type of policy that SCBOE has adopted and it is compliant with the TPRA.

The Court's holding in Wells v. Wharton, No. W2005-00695-COA-R3-CV, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2005), also is instructive. In Wells, the requestor used a computer system he had created himself to download public records in bulk from the Shelby County Portal website. Id. at *1. The Shelby County Government subsequently shut down the website because the computer system was overloaded. Id. The requestor then went to the offices to download the information; however, he was still unable to download the records in bulk because either the office computers could not handle the requests, or the office did not provide public access to computers. Id. The requestor thereafter filed suit, claiming that he had been denied access to public records. Id. The Court noted that the requestor, at all times, could have accessed the public records he was seeking by requesting paper copies from the records custodian. Id.

The issue on appeal in Wells was "whether a citizen requesting public records may dictate the manner he or she receives it . . . ." Id. at *7. The Court of Appeals determined that no Tennessee court had addressed the issue, and it looked to other

jurisdictions for guidance. Id. While noting that none of the cases cited from other jurisdictions were binding, the Court stated:

> [t]hese cases illustrate that the issue in the present case depends on whether the purpose of the Tennessee Public Records Act is one of access to the information contained within the public records or one of access to the public records in their normally kept form.

The Court noted further:

> In Tennessee, the purpose of the Public Records Act is to allow maximum access to the information contained within public records [and] in light of the purpose of the Tennessee Public Records Act, we conclude that the Tennessee Public Records Act does not require a custodian of records to provide public records in the manner a citizen requests.

Id. at *9. The Court held that "[a]llowing a custodian of records to choose the manner in which he or she presents public records to citizens is not unreasonable so long as that manner does not distort the record or inhibit access to the record." Id.

While the decision in Wells relates to the format of the production of requested records, the decision is instructive because it supports the argument that, so long as the purpose of the TPRA is being met, the governmental entity should be permitted to designate the format in which it accepts public records requests. As the Court pointed out in Wells, the plaintiff always could have requested copies of the records in paper form; thus, the Shelby County Government was not denying access to those records, but was just not providing them in the format which the plaintiff was requesting. The Pool submits that, with regard to SCBOE's public records policy, the purpose of open access to records under the TPRA is still being met, as citizens are permitted two very clear and simple methods by which they can request to inspect public records.

III. GOVERNMENTAL ENTITIES ARE IN THE BEST POSITION TO DETERMINE THE MANNER IN WHICH THEY RECEIVE REQUESTS TO INSPECT PUBLIC RECORDS WITHIN THE PARAMETERS SET BY THE TENNESSEE PUBLIC RECORDS ACT.

A decision by this Court affirming the trial court's ruling that the SCBOE's open records policy violates the TPRA would have considerable adverse effects on local governmental entities. While the TPRA creates a private cause of action for judicial review of alleged denials of public records requests, the trial court overreached in this case because it sought to establish or influence how SCBOE may accept records requests.

Courts should not delve into policy matters that are in the purview of a local legislative body, such a school board or a City council. Local governmental entities should be allowed to legislate and adopt their own open records policies as they see fit, so long as the policies do not violate the express provisions of the TPRA. In fact, the Legislature recently amended Section 10-7-503 of the TPRA to reserve the power to create written public records policies with the governmental entities themselves. Tennessee Code Annotated § 10-7-503(g) provides the following:

> 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 and shall include:
>
> (1) The process for making requests to inspect public records or receive copies of public records and a copy of any required request form;
>
> (2) The process for responding to requests, including redaction practices;
>
> (3) A statement of any fees charged for copies of public records and the procedures for billing and payment; and
>
> (4) The name or title and the contact information of the individual or individuals within such governmental entity designated as the public records request coordinator.

The Pool submits that Tenn. Code Ann. § 10-7-503(g) reflects the intent of the Legislature to afford governmental entities the discretion to develop their own public records policy in accordance with the TPRA.

Tennessee law has long recognized the authority of local governmental entities to exercise discretion in making policy. This understanding is reflected in the immunity provisions of the Tennessee Governmental Tort Liability Act ("GTLA"), Tenn. Code Ann. § 29-20-201, *et seq*. With regard to tort claims brought against governmental entities, the GTLA expressly preserves an entity's immunity from suit when the claim is based on the entity's exercise, performance, or failure to exercise a discretionary function. Tenn. Code Ann. § 29-20-205(1). In Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 85 (Tenn. 2001), the Tennessee Supreme Court analyzed discretionary function immunity, holding:

> Essentially, the discretionary function exception prevents the use of tort actions to second-guess what are essentially legislative or administrative decisions involving social, political, economic, scientific, or professional policies or some mixture of these policies. Doe v. Coffee County Bd. of Educ., 852 S.W.2d 899, 907 (Tenn. Ct. App.1992) (citing United States v. Gaubert, 499 U.S. 315, 323, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991))[3]. The rationale for preserving immunity for certain acts performed by governmental entities is that **the government should be permitted to operate without undue interference by the courts, as courts are often "ill-equipped to investigate and balance the numerous factors that go into an executive or legislative decision."** Bowers

[3] In Gaubert, the U.S. Supreme Court considered the discretionary function exception to the Federal Tort Claims Act, noting that

> [t]he purpose of the exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy . . . . Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs.

Id., 499 U.S. 315, 322–23, 111 S. Ct. 1267, 1273–74 (1991)(internal citations and quotations omitted).

> v. City of Chattanooga, 826 S.W.2d 427, 431 (Tenn. 1992) (quoting Wainscott v. State, 642 P.2d 1355, 1356 (Alaska 1982)); *see also* Carlson v. State, 598 P.2d 969, 972 (Alaska 1979).

Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 85 (Tenn. 2001)(emphasis added).

Although a citizen's right to file a petition for judicial review of an alleged denial to inspect or copy public records is created by the express provisions of Tenn. Code Ann. § 10-7-505, The Pool submits that the courts should not interfere with a governmental entity's discretion to establish public records policies which are compliant with the express provisions of the TPRA.

Further, requiring an entity to accept records requests via e-mail or electronically is considerably difficult given the TPRA's provision for verification of Tennessee citizenship by the records custodian. In 2008, the Legislature amended the TPRA to add the following language:

> The records custodian may also require any citizen making a request to view a public record or to make a copy of a public record to present a photo identification, if the person possesses a photo identification, issued by a governmental entity, that includes the person's address. If a person does not possess a photo identification, the records custodian may require other forms of identification acceptable to the records custodian.

Tenn. Code Ann. § 10-7-503(7)(A).

This language was added to the TPRA to give record custodians the authority to verify, through government-issued photo identification that includes an address, that the person making the public records request is a Tennessee citizen. The Attorney General for the State of Tennessee has issued the opinion that individuals who are not citizens of the State of Tennessee may rightly be denied access to public records under the TPRA. Tenn. Op. Att'y Gen. No. 01-132 (Aug. 22, 2001). Thus, it appears that

verification of Tennessee citizenship is an important factor in determining an individual's right to inspect public records under the TPRA.

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? If the trial court's ruling is affirmed and entities are required to accept requests to inspect records in formats such as via e-mail, telephone, facsimile transmission, or voicemail, such a ruling could undermine the governmental entity's interest in verifying the citizenship of the requestor.[4]

There are a number of other reasons why accepting public records requests electronically may not be a good idea for entities subject to disclosure under the TPRA. First, e-mails are a method of electronic communication which permits and/or supports the anonymity of the sender, and there is no guarantee that an e-mail requestor of public records is a citizen of the State of Tennessee. 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.[5] Likewise, should the records request require a response from the entity's records custodian, there are no guarantees that the response would be received by an actual person.

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[4] Arguably, verification of Tennessee citizenship is less of an issue when a requestor makes a request via U.S. Mail. By sending a request via U.S. Mail, the records custodian would at least have the requestor's return address and a postmark to assist in verification of citizenship.

[5] *See,* https://en.wikipedia.org/wiki/Spambot ("E-mail spambots harvest e-mail addresses from material found on the Internet in order to build mailing lists for sending unsolicited e-mail, also known as spam. Such spambots are web crawlers that can gather e-mail addresses from websites, newsgroups, special-interest group (SIG) postings, and chat-room conversations. Because e-mail addresses have a distinctive format, such spambots are easy to code.")

E-mails also are a well-known culprit in the exposure of computer systems to harmful programs such as viruses, malware, key loggers, ransom ware, etc. Requiring entities to accept public records requests via e-mails puts their computer systems at considerable risk. A rule of thumb in many offices is, "If you do not recognize the sender, do not open the e-mail."[6] If this rule were applied to public records requests made by e-mail, then a considerable amount of valid public records requests would go unopened. Or, if this rule were disregarded, and e-mails from unknown senders were opened, then governmental entities would be putting their information systems at risk. Even if entities have information systems with built-in e-mail security technology, it is possible that valid public records requests still would be sent to a "spam" folder automatically, putting the governmental entity in a position of technically having received a request to inspect records but, because of unknown identity of e-mail sender or some other unknown security or technical issue existing with the e-mail itself, the records custodian is unable to respond (or is unable to respond in a timely manner under the TPRA). This type of situation implicates one of the public policy concerns advanced by SCBOE in its appellate brief: that records requests made via e-mail easily could become lost or misplaced.

Moreover, requiring entities to accept e-mail records requests would place a sizeable financial burden upon most entities. Secure e-mail systems and the technological infrastructure required to protect the entity may severely affect the budgets of many entities and affect the ability of entities to provide the services for which they are organized. In addition, not only would many smaller entities lack the

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6 This rule of thumb is the first tip offered by McAfee Security as one of several "common-sense precautions to reduce [] exposure and protect your system." *See*, http://www.mcafee.com/us/threat-center/resources/security-tips-13-ways-to-protect-system.aspx

resources to obtain sophisticated technology, but many also would lack readily-available technological consultants or personnel to address the burdens of e-mail records requests.

Accepting public records requests via e-mail and without requiring production of photo-identification also puts governmental entities at the risk of failing to catalog and coordinate inquiries, particularly in situations where a requesting party may send duplicate requests in several different e-mails and to different recipients. Further, accepting e-mail requests to inspect public records may deprive the entity from the ability to log and keep track of requests by citizens, and may create difficulties in recording and maintaining compliance records.

In addition, under Tenn. Code Ann. § 10-7-504, the Tennessee Legislature has determined that certain records, even though public, shall be considered confidential and the confidentiality of those records shall be redacted. Tenn. Code Ann. § 10-7-504(a)(20)(C) provides the following:

> Information made confidential by this subsection (a) shall be redacted wherever possible and nothing in this subsection (a) shall be used to limit or deny access to otherwise public information because a file, document, or data file contains confidential information. For purposes of this section only, it shall be presumed that redaction of such information is possible. The entity requesting the records shall pay all reasonable costs associated with redaction of materials.

Where records first must be redacted before the requestor can view them, human capital must be expended. As an example, of the 446 member entities that are covered by The Pool for purposes of workers' compensation insurance, 105 of these entities (approximately 24%) have fewer than ten full-time employees. For governmental entities stretched to meet the demands of operations with few employees, the risk of

expending human capital to respond to potentially hundreds of bogus or invalid e-mail public records requests would undermine the entity's ability to operate efficiently.

In the instant case, the trial court found that the SCBOE presented no evidence that personal appearances at the Sumner County Board of Education "prevent wasted governmental time and money caused by the endless search of voluminous records for a document insufficiently identified." [Trial Court Findings of Fact and Conclusions of Law p. 16-17]. It found that "no pressing justification for a personal appearance has been presented by the [SCBOE] for [Plaintiff's] request that was sufficiently identified." [Id. at p. 17]. In his brief, Plaintiff asserts that the SCBOE's argument that "legitimate policy interest and concerns supports the [SCBOE]'s conclusion that electronic requests should not be utilized in requested access to the [SCBOE]'s public records" is unreasonable because the SCBOE testified at the trial of this matter that it only receives 12-15 records requests a year. [Brief of Appellee, pp. 30-31].

Remarkably, the trial court noted on pages 24 and 25 of its Findings of Fact and Conclusions of Law

> [t]hat non-exempt records should be "open" and not "closed" so that anyone requiring public records would not be thwarted by policies that are only (emphasis added) convenient for the government entity – but with policies that are consistent with openness, efficiency, and promptness that effectively balance the needs of each citizen by giving the "fullest possible access to public records", T.C.A. § 10-7-505(d), without compromising the need of the government to operate.[6]

In footnote #6, the trial court remarked:

> [6] Each government entity operates differently and utilizes their personnel to meet the demands upon the entity. The Sumner County Board of Education operates uniquely and differently from all other government entities to meet the specific needs and demands of the public school system in Sumner County. This Court will not legislate or dictate what methods/formats should be adopted to process public records requests for inspection; however, the Court only recommends that any policy be

> expanded to accommodate the methods of modern communication – beyond a writing or an appearance in person, and the Court only suggests the consideration of the two methods specifically sanctioned by the BPG and the Comptroller's office; website and telephone.

The Pool submits that the trial court's ruling that SCBOE's public records policy violates the TPRA and its remarks in footnote #6 of the order are inconsistent. The trial court recognized that governmental entities operate differently from each other subject to their limitations of personnel to meet the demands of the entity, but yet it held that the SCBOE's public records policy violates the TPRA because it permits inspection requests only in person and via U.S. Mail. Despite its remarks in footnote #6, by finding the SCBOE's policy in violation of the TPRA (when it is not) and requiring it to draft a new policy, the trial court has substituted its judgment for that of SCBOE. No single blanket rule for requests to inspect public records should apply to all governmental entities as it likely would have a detrimental effect on smaller entities throughout Tennessee. The trial court may have determined that, in this instance, the SCBOE did not have to waste governmental time and money in compiling the documents that Plaintiff requested, but this may not be the case with every governmental entity faced with records requests, particularly if the entity is forced to address the risks and costs inherent in addressing records requests via e-mail.

CONCLUSION

The Tennessee Public Records Act does not require governmental entities to accept requests to inspect public records electronically or in any particular format. The trial court substituted its judgment for that of the Sumner County Board of Education in determining that its public records policy was non-compliant with the TPRA. The

Sumner County Board of Education's public records policy is compliant with the TPRA and case law interpreting the TPRA, and the trial court's ruling should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 26, 2016, a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, to the following:

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Byron C. WELLS
v.
A.C. WHARTON, Jr., et al.

No. W2005-00695-COA-R3-CV.
|
Assigned on Briefs June 1, 2005.
|
Dec. 7, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
Aug. 21, 2006.

Direct Appeal from the Chancery Court for Shelby County, No. CH04-1826-3; D.J. Alissandratos, Chancellor.

Attorneys and Law Firms

Byron C. Wells, Memphis, TN, pro se.

Brian L. Kuhn, Shelby County Attorney, Craig E. Willis, Assistant County Attorney, Memphis, TN, for Appellees.

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

OPINION

ALAN E. HIGHERS, J.

***1** In this appeal, we are asked to determine multiple issues including whether the chancery court erred when it granted the defendants' motion to dismiss for failure to state a claim upon which relief may be granted. The plaintiff contends that there were numerous claims made in his complaint sufficient to survive defendants' motion to dismiss. The plaintiff, acting pro se, filed an appeal to this Court. We affirm in part and reverse in part and remand.

I. FACTS & PROCEDURAL HISTORY

Byron Wells ("Mr. Wells" or "Appellant") is a resident of Shelby County who previously accessed public documents via the Shelby County Portal website. Using a computer program that he specially created, Mr. Wells would download public documents in bulk format. After access through the website overloaded its computer system, the Shelby County Government ("Shelby County") closed the website for several weeks. Shelby County eventually reopened access to the website but placed limitations on the amount of data that could be downloaded and the length of connection time. As a result, Mr. Wells could no longer download the documents he desires in bulk format via his specially created program. Mr. Wells attempted to go to the Shelby County offices where the documents are kept to utilize that office's computers to download public records in bulk format. Mr. Wells could not download public records in the same manner, however, because (1) the computers provided for public use to access public records by the office cannot handle such request or (2) the office does not provide a computer for public use to access public records. At all times pertinent to this litigation, Mr. Wells could submit a written request to each office he desired public records from and receive those records in a paper copy.

On September 10, 2004, Mr. Wells filed suit against A.C. Wharton Jr., William R. Key, Chris A. Turner, Joseph A. Jackson, Shelby County, James Huntziker, and Kevin A. Gallagher (collectively "Defendants" or "Appellees"). Thereafter, Mr. Wells amended his complaint to allege that the limited access provided by Shelby County via the Internet violated the Tennessee Public Records Act; that the Shelby County Mayor's Office denied him copies of payment records between the Memphis Daily News and Shelby County; that officials denied him copies of public records in a format requested by Mr. Wells; and that Defendants' requirement that Mr. Wells must first present a written request before being allowed public access constituted a denial of access to public records. [1]

On October 6, 2004, the chancery court conducted a hearing on Defendants' motion to dismiss and motion to strike. At that time, the chancery court continued the hearing to allow both parties to discuss with each other the feasibility of creating a new system that would allow Mr. Wells the access he desired.

After the parties could not reach an amicable compromise, the chancery court conducted a hearing on Defendants' motion to dismiss, motion to strike, and motion for a protective order and/or to stay discovery as well as Mr. Wells's motion to disqualify Defendants' attorney and motion to strike exhibit obtained by misinformation. On March 2, 2005, the chancery court denied Appellant's motions; granted Defendants' motion to strike and motion to dismiss; and ruled that Defendants' motion for protective order and/or to stay discovery was moot. On March 3, 2005, Mr. Wells filed a motion for relief from judgment and/or motion to reconsider. On March 9, 2005, Mr. Wells filed a memorandum in support of his motion for relief from judgment and/or motion to reconsider. After a hearing on the motion, the chancery court denied Mr. Wells's motion for relief from judgment and/or motion to reconsider.

II. ISSUES PRESENTED

*2 Appellant, acting pro se, filed a timely notice of appeal to this Court and presented numerous issues for review, to include the following:

1. Whether allegations of actual fraud, misrepresentation and other misconduct which may be criminal in nature state a claim upon which relief may be granted;

2. Whether an allegation that Shelby County operates its computer program contrary to Attorney General's opinions state a claim upon which relief may be granted;

3. Whether the chancery court should have disqualified Appellees' attorney from representing Appellees when there is a conflict of interest among Appellees;

4. Whether the chancery court should have disqualified Appellees' attorney from representing all defendants when the attorney writes an opinion stating to his clients that their actions are illegal and then defend them claiming that their actions are not illegal;

5. Whether the chancery court should have disqualified Appellee's attorney because Appellees may have committed a felonious act;

6. Whether Appellees' denial of public records because Appellant filed a lawsuit against Appellees state a claim upon which relief may be granted;

7. Whether Appellees may require any request for public records to be in writing.

8. Whether Appellees' denial of providing a copy of public records in a particular manner state a claim upon which relief may be granted;

9. Whether a claim that Appellees' preferentially treated the Memphis Daily News state a claim upon which relief may be granted;

10. Whether a county official must maintain a computer for the public to access public records;

11. Whether the chancery court can require Appellant provide computer programming for total access to all records for the entire public;

12. Whether the chancery court can demand Appellant to pay for all costs of reviewing county operations to make all records accessible to all members of the public;

13. Whether newly discovered evidence of a substantial change in the operations of Appellees states a claim upon which relief may be granted;

14. Whether the chancery court must provide judicial review of Appellant's claims before granting a motion to dismiss;

15. Whether the chancery court may refuse to allow Appellant to correct the record to state that he would be required to make payments for new computer programs for access to public records which are not available;

16. Whether the chancery court converted Appellees' motion to dismiss to a motion for summary judgment when it considered the County's claims that remote public access to its records would damage the records and that the County has adopted reasonable rules;

17. Whether Appellees refusal to grant a request for access to public records unless Appellant made a written request states a claim upon which relief may be granted; and

