

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

SCRIPPS MEDIA, INC. and PHIL)
 WILLIAMS,)
)
 Petitioners,)
)
 v.)
)
 TENNESSEE DEPARTMENT OF)
 MENTAL HEALTH AND SUBSTANCE)
 ABUSE SERVICES and TENNESSEE)
 BUREAU OF INVESTIGATION,)
)
 Respondents.)

F.O-6
 No. 18-835-II
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MEMORANDUM AND ORDER

This matter came before the Court upon the Petition for Access to Public Records filed by Petitioners Scripps Media, Inc. and Phil Williams (“Petitioners”), pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-101 et seq. (“the Act”). On June 15, 18-22, 2018, the Petitioners sought access to certain public records maintained by the Tennessee Department of Mental Health and Substance Abuse Services (“TDMHSAS”) and the Tennessee Bureau of Investigation (“TBI”) (collectively the “State” and the “Requests”). The State timely responded to the Requests on June 22, 2018, as required by Tenn. Code Ann. § 10-7-503(a)(2)(B), citing the Act’s exemption for public records that are “otherwise provided by state law.”¹

Tennessee courts have held that Tennessee Rule of Criminal Procedure 16 (“Rule 16”) may constitute a “state law” exemption to certain requests made under the Act. *Appman*

¹ The Act provides in pertinent part that “[a]ll 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.” Tenn. Code Ann. § 10-7-503(a)(2)(A).

v. Worthington, 746 S.W.2d 165 (Tenn. 1987); *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004). Most recently, in *The Tennessean v. Metropolitan Gov't of Nashville and Davidson County*, 485 S.W.3d 857 (Tenn. 2016), the Tennessee Supreme Court interpreted Rule 16 as exempting from disclosure records arising out of, or part of, a contemplated or pending prosecution or a collateral challenge to any conviction, even if the records originated from a third party source and were not law enforcement work product. *Id.* at 859.

In the present case, the Requests were made to the State agencies that produced and maintained the subject records in the ordinary course of business, and not as part of a criminal investigation. Moreover, the records were not requested because they were part of an investigative file, but rather as normal business records. At some point prior to or simultaneously with the Requests, the State initiated an investigation into the conduct of the two employees whose records were sought. The State takes the position that, when the investigation commenced, the records became cloaked by the Rule 16 exemption. Petitioners assert that the nature of the records at the time of their creation, which was prior to an investigation, is controlling and that the records are therefore subject to disclosure under the Act.

The question before the Court is whether the *Tennessean* case is sufficiently analogous to the present case, or whether its finding can be construed with such breadth, so as to support the State's position. Before making such a determination, however, the Court must discern whether the controversy is moot given the State has since provided the requested documents. Specifically, the Court must decide whether it is in the public interest to adjudicate this matter in spite of the resolution of the Petitioners' records request. And finally, if the Court finds in favor of the Petitioners, i.e., that this matter is not moot, then the

Court must determine whether the State acted willfully in denying the Requests and is thus liable to the Petitioners for attorney's fees under Tenn. Code Ann. § 10-7-505(g).

For the reasons set forth herein, the Court finds that there is a sufficient public interest in the subject legal controversy to make a finding on the merits, despite the Requests having been satisfied. The Court further finds that the holding in *Tennessean* mandates a broad protection for documents in the possession of an investigative agency relevant to a pending or contemplated criminal action, even if the documents originated from another State agency and were created in the ordinary course of business. Given that finding, the issue of the willfulness of the State's refusal to provide the requested records is moot.

FACTS

The facts in this matter are substantially undisputed. The Petitioners initiated the Requests via e-mail on the afternoon of Friday, June 15, 2018 regarding two State employees, Sejal West and Jason Locke, who worked for the TDMHSAS and TBI. Subsequent requests were made to each agency over the following five business days. The Requests were for the following:

To TDMHSAS on June 15, 2018:

- All travel reimbursement and per diem requests submitted by Sejal West since November 2016;
- All logs of phone calls made on any mobile phone assigned to Ms. West since November 2016;
- Any e-mails between Ms. West and Jason Locke of the Tennessee Bureau of Investigation.

To TBI on June 15, 2018:

- All travel reimbursement and per diem requests submitted by Jason Locke since November 2016;
- All logs of phone calls made on any mobile phone assigned to Mr. Locke since November 2016;
- Any e-mails between Mr. Locke and Sejal West of the Department of Health.

To TDMHSAS on June 18, 2018:

- Ms. West's electronic calendar since November 2016.

To TBI on June 18, 2018:

- The electronic calendars for Jason Locke for the same time period [since November 2016].

To TDMHSAS on June 19, 2018:

- Any items in Sejal West's personnel file—or in any other file kept by the Commissioner or her designee—regarding Ms. West's resignation back in January. This request includes, but is not limited to, any complaints, any disciplinary letters/memos, any investigative summaries and any resignation letter/e-mail.

To TDMHSAS on June 20, 2018:

- Any e-mail or other written communication related to Ms. West's job status and whether she was placed on administrative leave.

To TBI on June 21, 2018:

- Transaction summaries since July 2, 2016 for any credit cards or p-cards that may have been assigned to Jason Locke.

To TBI on June 22, 2018:

- Any text messages between Jason Locke and Sejal West.

It appears that on June 15, 2018, when the first Requests were made, Mr. Locke's wife contacted the State, through Governor Haslam, to communicate her belief that the above-named employees were engaged in an extra-marital affair using public resources. The same day, the State initiated an investigation into the employees' conduct and the Petitioners made the Requests.

On June 22, 2018, the State timely responded to the Requests, denying them pursuant to the Act's state law exemption under Rule 16 and the *Tennessean* case. Specifically, the State asserted that the subject records concerned ongoing investigations into the conduct of Ms. West and Mr. Locke by the District Attorney General for the 20th Judicial District. The Petitioners filed the present action in the Davidson County Chancery Court on July 31, 2018

seeking release of the records. Injunctive proceedings were rendered moot when, on August 10, 2018, the Davidson County Grand Jury declined to return an indictment of either Jason Locke or Sejal West. The State thus determined the subject records were no longer part of a pending or contemplated criminal investigation and provided them to Petitioners on August 14 and 15, 2018.

Despite having received the requested records, the Petitioners seek relief from the Court based upon two arguments:

(i) the Court should rule on the now moot question of law because the underlying issues are of great public concern; and,

(ii) the Petitioners are entitled to attorneys' fees because the State's refusal to provide the requested records was willful.

The Petitioners also continue to assert the requested records are not covered by the Rule 16 exemption and should have been provided upon receipt of the Requests.

LEGAL ANALYSIS

Mootness Doctrine

It is well settled that Tennessee courts are only to decide legal controversies between parties with "real and adverse interests" and not act as an advisor on abstract matters. *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 203 (Tenn. 2009). A case becomes moot when it "has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case." *Id.* at 204.

In *Norma Faye Pyles Lynch*, the Tennessee Supreme Court set forth an analytical model for determining when the above "mootness doctrine" did not preclude judicial review. This model was also used by a specially formed panel of the Supreme Court in *Hooker v.*

Haslam, 437 S.W.3d 409, 417-18 (Tenn. 2014). In both cases, the Court looked to the following criteria in determining whether the circumstances of the case warranted an exception to the mootness doctrine:

(1) when the issue is of great public importance or affects the administration of justice, (2) when the challenged conduct is capable of repetition and of such short duration² that it will evade judicial review, (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and (4) when the defendant voluntarily stops engaging in the challenged conduct.³

Norma Faye Pyles Lynch, 301 S.W.3d at 204 (citations omitted); *Hooker*, 437 S.W.3d at 417-18.

The Court finds the present issue regarding public records disclosure to be one of great public importance. The right to review records is a codification of the “public access doctrine” recognized as a general right of citizens. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). While the State properly asserted that the right to review records is statutory, not constitutional, the issue nevertheless requires resolution and clarification for future requests. Moreover, this question is likely to arise again, since allegations of public officials acting contrary to the law are, unfortunately, an ongoing dilemma in modern society. This likelihood that news organizations, private citizens, et al. will continue seeking access to public information must be considered in assessing mootness.

² In regard to the time it took for fulfillment of the Requests, the Court notes that the speedy resolution of the criminal claims in this case may not be typical, e.g., the criminal investigation in *Tennessean* took substantially longer to resolve. In the present case, before this matter could be adjudicated, the grand jury had returned a decision not to indict the subject employees, which prevented the Petitioners from fully pursuing their claims.

³ The burden of persuasion would typically be on the government entity arguing mootness; however, the burden shifts to the petitioner if the government has ceased withholding records on its own accord. *Norma Faye Pyles Lynch*, 301 S.W.3d at 206 (citations omitted). It is undisputed that the State provided the records at issue, albeit because of a change in circumstances, not because of a reversal of position. Here, the State turned over the requested records after there was no criminal indictment returned as to Ms. West and Mr. Locke. The government’s capitulation was a function of timing, not a change in position. Thus, the State has the burden of persuasion that the issue is moot.

In light of the Court's finding that the public interest exception to mootness potentially applies in this case, the Court turns to the four-pronged analysis laid out in *Norma Faye Pyles Lynch* and *Hooker* to determine whether the Court should exercise its discretion and decide the issues presented here on this basis. Under that analysis, the Court must address the following threshold considerations: (1) whether the rights and claims are personal to the parties, (2) whether the issue is of significant importance to the public and the administration of justice generally, (3) whether the situation is likely to arise in the future, and (4) whether the record is sufficiently accurate regarding what occurred. *Norma Faye Pyles Lynch*, 301 S.W.3d at 210-11 (citations omitted); *Hooker*, 437 S.W.3d at 418.

The first three factors in the above test support a finding that the Court should apply the public interest exception to the mootness doctrine. In regard to whether the record is sufficiently accurate as to the events underlying the Petitioners' Request, the uncertainty here lies in whether the Requests were made before or after Governor Haslam initiated the investigation. The parties assert, and the Court agrees, that such a technicality is not controlling in this case. Instead, the key issue is whether the public records at issue changed character prior to the deadline for their disclosure.

Finally, the *Norma Faye Pyles Lynch* and *Hooker* analysis requires that the Court balance the interests of the parties before determining whether the public interest exception overrides the mootness doctrine. The Court must address: (1) whether a finding will assist public officials in performing their duties, (2) whether the situation is likely to reoccur, (3) the degree of urgency, (4) the costs and difficulties of relitigating the same issue, and (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependant. *Norma Faye Pyles Lynch*, 301 S.W.3d at 211 (citations omitted); *Hooker*, 437 S.W.3d at

418. The first two factors are more applicable than the third and fourth factors, since this case has been short lived, and there is no actual urgency given the records have been provided. That said, clarity in the law regarding public record disclosure obligations is much needed, due to the intrinsic importance of transparency in government and the frequency of such requests. As discussed above, it is likely this issue will arise again. Finally, in regard to the fifth factor, the issue as to which records are cloaked with a Rule 16 exemption necessarily involves questions such as who created the records, when did they create them, who seeks access to them, and from whom is access sought. However, the issue itself is a legal one.

For all of the reasons set forth above, with primary reliance on *Norma Faye Pyles Lynch* and *Hooker*, the Court finds that the public interest exemption to the mootness doctrine applies in the present case. Therefore, the Court must rule on the underlying issue of whether the requested records were exempted from disclosure by Rule 16.

Rule 16 Exemption to Public Records Act

The State must prove the records requested are exempt from disclosure under the Act by a preponderance of evidence. Tenn. Code Ann. § 10-7-505(c). The controlling case on this issue is *Tennessean*, decided by the Tennessee Supreme Court just two years ago. In *Tennessean*, the Court thoroughly reviews the history of the Act and public records issues in general. 485 S.W.3d at 864-66.

The right of citizens to access the State's public records was codified in the Act in 1957. *Id.* at 864. "The Public Records Act has been amended over the years, but its intent has remained the same—to facilitate the public's access to government records." *Id.* at 864

(citing *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004)). The Act states as follows:

[A]ll documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Id. citing Tenn. Code Ann. § 10-7-503(a)(1)(A). There is a “presumption of openness to records of government entities.” *Id.* (citing *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994)).

The exceptions to the Act are also detailed in *Tennessean*. Originally there were two categories of exceptions—medical records of patients in state hospitals and military records related to national or state security. *Tennessean*, 485 S.W.3d at 865. Over time, the Tennessee Legislature has amended that list and there are now forty exceptions, including a catch-all exception for circumstances “provided by state law” including “statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations.” *Id.* at 865-66 (citing *Swift*, 159 S.W.3d at 571-72).

Rule 16, which sets out the discovery guidelines for the State and defendants in criminal proceedings, is among the procedural rules of court that has been recognized as exempting certain materials from requests under the Act. For instance, 16(a)(1) lists what the State must provide to a defendant in discovery, and (a)(2) exempts from disclosure work product materials. The *Tennessean* Court summarized the line of cases interpreting the breadth and application of Rule 16 exemptions in public records matters. *Id.* at 866-70. These cases generally involved requests to law enforcement agencies for materials in their files. *Id.* at 868-870. In *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986), the

media requested closed case files from a local law enforcement agency. The Tennessee Supreme Court found those records were subject to disclosure. In *Appman v. Worthington*, the requested records were Department of Correction “memoranda, documents and records” that were “the results of the investigation by Internal Affairs” of a death at a state run facility. 746 S.W.2d at 166-67. The Court found the records to be “the result of the investigation” and “relevant to the prosecution of the . . . offenses arising out of the [inmate’s] murder.” *Id.* at 167.⁴ Other cases reviewed involved requests for records shielded by a protective order in a civil case and requests for records in a criminal case where post-conviction relief was still being sought - both of which categories were determined to be protected. *Tennessean*, 485 S.W.3d at 869-70 (citing *Ballard v. Herzke*, 925 S.W.2d at 661 and *Swift*, 159 S.W.3d at 575-76).

Finally, in the most recent applicable Tennessee Supreme Court case prior to *Tennessean*, a request for police officers’ field interview cards was remanded to the trial court for a determination of which interview cards related to ongoing criminal investigations and which ones did not. *Schneider v. City of Jackson*, 226 S.W.3d 332, 334 (Tenn. 2007). The Court expressed clear concern about allowing the release of records developed as part of current criminal investigations, but found that the trial court failed to fully develop a record to identify those particular records. *Tennessean*, 485 S.W.3d at 870 (citing *Schneider*, 226 S.W.3d at 345-46).

The above-referenced cases formed the backdrop to the issue in *Tennessean*, which was “whether the Public Records Act applies to allow public access to investigative records that arise out of and are part of a criminal investigation resulting in a pending prosecution,

⁴ See discussion in *Tennessean*, 485 S.W.3d at 868-89.

are not the work product of law enforcement under Rule 16(a)(2), were gathered by law enforcement from other sources in their investigation of the case, and are requested by entities that are not parties to the pending criminal case.” *Tennessean*, 485 S.W.3d at 870. The *Tennessean* Court found that “Rule 16 does not provide for disclosure to a third party of materials subject to discovery between the State and a defendant during the pendency of the criminal case or any collateral challenges to the criminal conviction, [and] the Petitioners cannot gain access to these materials under the Public Records Act, even though the materials may fall outside the substantive scope of Rule 16(a)(2).” *Id.* at 873.

The facts in *Tennessean* are similar to those in the present case, with several key differences. The records request in *Tennessean* was made to the Metropolitan Police Department, a criminal investigative agency. Additionally, the records request included items prepared by a third party, namely Vanderbilt University, and not a law enforcement agency⁵ or other governmental entity. The trial court originally found that these records were subject to disclosure, stating that

records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department are outside the expansive reach of Tenn. R. Crim. P. 16(a)(2).

Davidson County Chancery Court Case No. 14-0156-IV at pg. 13-14 (Memorandum and Final Order, March 12, 2014). The trial court’s finding was not limited to documents from a third party to Metro, but rather any documents not created by the police department. *Id.* In reversing the trial court, the Court of Appeals held that the documents previously found to be subject to disclosure were “‘relevant to a pending or contemplated criminal action’ and

⁵ The list of documents originally requested was long and encompassed police department work product, including witness statements and forensic tests, as well as documents obtained from Vanderbilt. Davidson County Chancery Court Case No. 14-0156-IV at pg. 5-6 (Memorandum and Final Order, March 12, 2014).

therefore not subject to disclosure.” *Tennessean v. Metropolitan Government of Nashville and Davidson County, et. al.*, M2014-00524-COA-R3-CV, 2014 WL 4923162 at *4 (Tenn. Ct. App. Sept. 30, 2014).

The notable difference between the facts in *Tennessean* and the present case is that the requests were directed to non-investigative State agencies,⁶ and the records were developed and retained by those agencies in the ordinary course of business. They were not created for or through an investigation, but rather became part of the investigation after it was commenced. The State takes the position that the records changed in character when the investigation began and that, by becoming part of the investigation, they fell under the Rule 16 exception. Further, the State contends that it does not matter the nature of the records when they were created, but rather their nature when produced. The State relies on the importance of the constitutional rights of criminal defendants, as discussed in detail in *Tennessean*, as well as the public policy that parties should not be able to avoid the discovery rules in the Tennessee Rules of Criminal Procedure to obtain prosecutors’ files. *Tennessean*, 485 S.W.3d at 866-73.

The Petitioners take the opposite position—that the nature of the records when they were created is key, not whether they are subsequently provided to another agency as part of an investigation. They rely on *Chattanooga Pub. Co. v. Hamilton County Election Com’n*, E2003-00076-COA-R3-CV, 2003 WL 22469808 (Tenn. Ct. App. Oct. 31, 2003), where the facts are analogous to the facts in this case, i.e., the public records were provided to the investigative agency as a result of a criminal investigation subsequent to their creation. In *Chattanooga Pub Co.*, the Court of Appeals found that the nature of the records *at the time of*

⁶ The TBI is, of course, by its very nature an investigative agency, but the TBI records included in the Requests were operational, non-investigative records.

the request controlled how they were classified and whether the Rule 16 exemption applied. *Id.* at *1 and *4. While *Chattanooga Pub. Co.* could arguably be applied to find that the records requested in the present case are not subject to Rule 16 exemption, the more recent ruling in *Tennessean* militates against such a result. Even though the records sought in *Tennessean* were in the possession of the law enforcement agency *because of* an investigation, and the records in the present case were transferred to a law enforcement agency to *initiate* an investigation, the rule in *Tennessean* applies to documents in the possession of an investigative agency relevant to a pending or contemplated criminal action and affords those records blanket protection pursuant to Rule 16. Thus, even though the records at issue are still public records created “in connection with the transaction of official business by [a] governmental agency,” Tenn. Code Ann. §10-7-503(a)(1)(A), and even though the records are not of the same nature or character as the records sought in *Tennessean*, the Court’s intention in *Tennessean* appears to be for a broad application of the Rule 16 exemption to protect any documents in an investigative file from disclosure. Under this interpretation, the State acted properly in protecting the records from disclosure.

Willfulness

Because the State properly applied the Act to the Requests, the Petitioners assertions of willfulness are not well taken.

CONCLUSION

The Court finds that the public interest exception to the mootness doctrine, as set out by the Tennessee Supreme Court in *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196 (Tenn. 2009) and reiterated in *Hooker v. Haslam*, 437

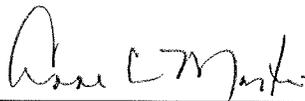
S.W.3d 409 (Tenn. 2014), applies to the present controversy. The Court thus has considered the merits of the subject Petition.

The Court further finds that the Rule 16 exemption to the Act applies in this case based upon the Tennessee Supreme Court's holding in *Tennessean*. In that case, the Court found that

[t]he media play an important and necessary role in holding government officials accountable. Yet, the General Assembly has rightly recognized that there must be exceptions to the public's right to obtain government records and, in doing so, have provided that the media's role must yield to the need to protect the rights of defendants accused of crimes and the integrity of the criminal justice system during the pendency of criminal cases and any collateral challenges to criminal convictions.

Tennessean, 485 S.W.3d 857, 874. Although the facts of the *Tennessean* case are different from those in the present case, the Court is persuaded, based upon its reading of the lower court decisions in the context of the Tennessee Supreme Court's decision, that it must give a broad reading to the Rule 16 exemption. Accordingly, the Petition for Access to Public Records is denied. As the State's refusal to provide the requested records was not willful, the Petitioners' request for attorneys' fees is denied. Costs are taxed to the Petitioner.

IT IS SO ORDERED.



ANNE C. MARTIN, CHANCELLOR
CHANCERY COURT PART II

cc: Ronald G. Harris
William J. Harbison II
Neal & Harwell, PLC
1201 Demonbreun Street, Suite 1000
Nashville, TN 37203

Janet M. Kleinfelter
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail
upon all parties or their counsel named above.

MB
Deputy Clerk and Master
Chancery Court

10/8/18
Date