IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

THE TENNESSEAN, ASSOCIATED PRESS, CHATTANOOGA TIMES FREE PRESS, KNOXVILLE NEWS SENTINEL, TENNESSEE COALITION FOR OPEN GOVERNMENT, INC., ASSOCIATED PRESS BROADCASTERS, WZTV FOX 17, WBIR-TV Channel Ten, WTVF Channel Five, THE COMMERCIAL APPEAL, and WSMV-TV Channel Four,	)	
Plaintiffs-Petitioners,	)	
v.	)	No. M2014-00524-COA-R3-CV
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	Davidson County Chancery Court No. 14-156-IV
Defendant-Respondent.	)	

BRIEF OF INTERVENORS-APPELLEES DISTRICT ATTORNEY GENERAL VICTOR S. JOHNSON, III, AND STATE OF TENNESSEE

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2. Whether the trial court properly exercised its discretion in admitting affidavits submitted by the State Defendants in support of their response in opposition to the Plaintiffs' petition for access to records. (Appellants' Issue 4).

3. Whether the trial court erred in ruling that certain records of the Metropolitan Nashville Police Department were subject to disclosure under the Public Records Act, where the court applied an unduly narrow construction of Tenn. R. Crim. P. 16(a)(2) in ruling that the records were not protected from inspection and failed to balance the State's and the criminal defendants' constitutional right to a fair trial against the public's legislatively enacted right of access to records. (Appellants' Issues 1, 2 and 3).

STATEMENT OF THE CASE

Plaintiffs are a number of different news organizations in Tennessee. On February 5, 2014, Plaintiffs filed suit pursuant to Tenn. Code Ann. § 10-7-505 against the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), seeking access to the records contained in the investigative file of the Metropolitan Police Department ("Metro Police") with respect to their investigation of an alleged rape that had occurred on the campus of Vanderbilt University. (TR Vol. 1 at 1-12). Metro had denied access to the investigative file on the grounds that the records were part of an ongoing criminal investigation and prosecution and, therefore, were protected from disclosure under Tenn. R. Crim. P. 16(a)(2). In their petition, Plaintiffs asserted that because Tenn. R. Crim. P. 16(a)(2) protects only work product (i.e., documents or records created by the district attorney general, state agents, and law enforcement officers) from inspection, they were entitled to access under the Public Records Act to any records received or collected by the district attorney general and law enforcement officers that were created by third parties. (*Id*).

On February 11, 2014, District Attorney General Victor S. Johnson, III, and the State of Tennessee (the "State Defendants") sought to intervene, arguing that many of the records sought by the Plaintiffs were subject to a protective order entered by the criminal court in the ongoing criminal case, *State of Tennessee v. Banks, et al.*, No. 2013-C-2199 (Davidson County Crim. Ct.), and that State Defendants had an interest in ensuring that this protective order was upheld. (TR Vol. 1 at 44-57). On

February 13, 2014, the victim of the alleged rape, filing under the pseudonym of "Jane Doe," sought to intervene to protect her constitutional rights under Art. I, §35, of the Tennessee Constitution. (TR Vol. I at 72-86). Both motions to intervene were granted. (TR Vol. I at 87-92). A previously scheduled show cause hearing was reset for March 10, 2014. (TR Vol. 1 at 94-95).

On February 24, 2014, Metro, the State Defendants, and Jane Doe filed separate responses to Plaintiffs' petition for access. (TR Vol. I at 96 – Vol. III at 316). Metro filed the affidavit of Metro Chief of Police Anderson in support of its response. (TR Vol. II at 233-35). The State Defendants filed the affidavits of District Attorney General Johnson and Becky Roberts in support of their response. (TR Vol. II at 147-199). Jane Doe filed her own affidavit in support of her response. (TR Vol. I at 116-119).

Also on February 24, 2014, the trial court determined that it would conduct an *in camera* inspection of the records at the office of the District Attorney General prior to the show cause hearing (TR Vol. III at 317-321). The trial court further ordered the State Defendants to prepare an index of these records that would identify the type of record and the source of the record, to file the index under seal upon completion of the inspection. (*Id.*).

The trial court conducted its *in camera* inspection on March 6, 2014, and the State Defendants subsequently filed the index of records under seal with the court. (TR Vol. V at 608). That same day, Plaintiffs filed their reply to the responses of Metro, the State Defendants and Jane Doe (TR Vol. III at 338-358; 367 – Vol. V at

602); they also filed a motion to strike the affidavits filed by Metro, the State Defendants, and Jane Doe. (TR Vol. III at 359-366).

A show-cause hearing was held on March 20, 2014, which consisted of oral argument by counsel for the parties. The only evidence submitted to the trial court was either through affidavit or through the court's own *in camera* inspection of the records. (TR Vol. VI at 664-797). On March 11, 2014, the trial court issued an order finding that it had subject-matter jurisdiction to determine whether Plaintiffs should be granted access to records in an ongoing criminal investigation[1] and prosecution, and denying the Plaintiffs' motion to strike the affidavits. (TR Vol. V at 628-629).

On March 12, 2014, the trial court issued its memorandum opinion and order in which it rejected Plaintiffs' construction of Tenn. R. Crim. P. 16(a)(2) and instead concluded that the Tennessee Supreme Court had construed the rule expansively to cover work product *and other material produced in discovery*. (TR Vol. V at 630-650). However, citing it concern that excluding all the records in the investigative and prosecutorial file might be construed as the adoption of a law-enforcement privilege, the trial court also concluded that records that were submitted to Metro Police but 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)." (*Id.* at 642-43). The trial court found that there were four categories of documents that fell within these parameters and ordered their disclosure to the Plaintiffs: (1) text

[1]Metro had raised the issue of the trial court's jurisdiction in a motion filed on March 3, 2014. (TR Vol. III at 322-31).

messages, minus any photographic or videographic images; (2) Vanderbilt access-card information; (3) Pano-scan data relating to Vanderbilt University premises; and (4) emails recovered from potential witnesses and the criminal defendants that were not addressed to officials related to Metro Police of the District Attorney's office. (*Id.* at 643).

While reaffirming its previous determination that it had subject-matter jurisdiction, the trial court declined to rule on whether the disclosure of the records would violate the criminal defendants' constitutional rights to a fair trial or Jane Doe's constitutional rights under the Victim's Bill of Rights, but instead, declared that it would "defer" to the criminal court on these issues. (*Id.* at 643-646). The trial court also stated that it would defer to the trial court with respect to the protective order prohibiting the disclosure of all videos and photographs provided in discovery, but indicated that it would "abide by and honor" that protective order. (*Id.* at 645).

Finally, in order to "do no harm" while the criminal prosecutions are pending, the trial court entered a separate order pursuant to Tenn. R. Civ. P. 62 staying that portion of its order providing for access to the four categories of records pending appeal. (TR Vol. V at 651-52). Plaintiffs filed a notice of appeal on March 17, 2014. (TR Vol. V at 655-56). On March 19, 2014, Plaintiffs filed a motion requesting that this Court expedite its appeal. This Court granted that motion March 24, 2014. (TR Vol. VI at 661).

STATEMENT OF THE FACTS

In late June 2013, Metro was notified by the Vanderbilt University Campus Police about an alleged rape that had occurred on campus on June 23, 2013. Metro Police immediately began an investigation of the incident. (TR Vol. I at 120). Shortly thereafter, Metro Police contacted the office of District Attorney General Victor S. Johnson, III, for advice and assistance with their investigation. (TR Vol. II at 148). In August 2013, Metro Police presented the criminal case to the grand jury, which returned an indictment against four individuals charging each with five counts of aggravated rape and two counts of aggravated sexual battery. Additionally, one of the four individuals was indicted on one count of unlawful photography and one count of tampering with evidence. (*Id.*). All four individuals subsequently pled not guilty in Davidson County Criminal Court. Trial is currently set for two of the defendants in August 2014; a trial date has not yet been set for the other two defendants. (*Id*).

Before Metro Police submitted this case to the grand jury, its investigative file was reviewed by the District Attorney's office. Once the indictment was returned, this investigative file became part of the prosecutorial file, and the case was assigned to a deputy district attorney. (*Id*). Metro Police's investigation in this case is still active and ongoing, and any additional information that Metro Police collects or gathers during its investigation is made part of the prosecutorial file. (*Id.* at 149).

On October 2, 2013, the parties to the criminal case agreed to a protective order that was issued by the Davidson County Criminal Court pursuant to Tenn. R. Crim. P. 16(d)(1). This protective order specifically provided that "any and all photographs

and videos provided in discovery by the State shall not be disseminated in any manner to any person other than the defense team." (TR Vol. V at 649). All photos and videos have been provided in discovery by the State to counsel for the criminal defendants. (TR Vol. VI at 645).

The alleged rape on Vanderbilt's campus and the subsequent criminal investigation and prosecution have received and continue to receive significant publicity, including national public attention. (TR Vol. I at 1; Vol. II at 152-199). On October 17, 2013, a reporter with *The Tennessean* made a request to the Metro Police in which he requested copies of "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus in which Vandenburg, Banks, Batey and McKenzie are charged" and "[a]ny records regarding the case recently concluded against Boyd by his plea bargain."[2] (TR Vol. 1 at 13). In particular, the request sought copies of any "text messages received or sent and videos provided and/or prepared by any third party sources." (*Id.*)

On October 23, 2013, Metro denied the request on the grounds that the records were protected from disclosure under Tenn. R. Crim. P. 16(a)(2). (TR Vol. at 14). The Tennessean renewed its demand in a letter from their counsel on October 28, 2013. (TR Vol. I at 15-20). Metro responded on October 31, again denying the request. (Tr Vol. I at 21-22). *The Tennessean* then directed its demand for the records in question to the Mayor. (TR Vol. I at 23-25). By letter from the Metro Director of Law, the Mayor's office denied the request on November 21, 2013. (TR Vol. I at 26).

[2] Another individual, Chris Boyd, pled guilty to a reduced charge of trying to help cover up the alleged rape.

The Tennessean took no further action with respect to its public-records request until January 31, 2014, when counsel for *The Tennessean* sent a letter to Metro renewing *The Tennessean's* original October 17 request, and adding the rest of the Petitioner news organizations as additional requestors. (TR Vol. I at 27-28). Metro responded on February 4, 2014, that it was still denying the request and further noted that a protective order had been entered in the ongoing criminal case that covered many of the records requested. (TR Vol. 1 at 29). Petitioners then filed suit against Metro on February 5, 2014.

STANDARD OF REVIEW

This is an appeal from a decision of the trial court after a final hearing on the merits. This Court's review of the judgment of a trial court sitting without a jury is *de novo* upon the record. *See Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). There is a presumption of correctness as to the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). The trial court's conclusions on matters of law are reviewed *de novo*, with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *see also Reguli v. Vick*, No. M2012-02709-COA-R3-CV, 2013 WL 5970480, at *2 (Tenn. Ct. App. Sept. 10, 2013), *perm. app. denied* (Tenn. April 8, 2014).

Plaintiffs have also appealed the trial court's denial of their motion to strike certain affidavits submitted by the State Defendants. The admissibility of evidence is within the sound discretion of the trial judge. Accordingly, this Court's review of a trial court's evidentiary rulings is whether the trial court abused its discretion. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT CERTAIN METRO POLICE RECORDS WERE NOT SUBJECT TO DISCLOSURE UNDER THE PUBLIC RECORDS ACT.

Tennessee's Public Records Act, in general, provides that

> [a]ll state, county and municipal records shall, at all times during business hours, . . . be open for 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).

Tenn. Code Ann. § 10-7-503(a)(2)(A) (emphasis added). A "public record" is defined as all "documents . . . 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." Tenn. Code Ann. § 10-7-503(a)(1).

A. The trial court properly ruled that Tenn. R. Crim. P. 16(a)(2) protects from inspection work product and other material produced in discovery.

Plaintiffs made a public-records request to the Metro Police for copies of "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus in which Vandenburg, Banks, Batey and McKenzie are charged" and "[a]ny records regarding the case recently concluded against Boyd by his plea bargain." (TR Vol. at 13). This request was denied on the grounds that these records are protected from public disclosure while a criminal investigation and prosecution are ongoing under Tenn. R. Crim. P. 16(a)(2). Petitioners filed suit asserting that Tenn. R. Crim. P. 16(a)(2) protects only work product (i.e., documents or records created by the district attorney general, state agents, and law enforcement officers)

from inspection. They further asserted that records or other evidence received by the district attorney general and law enforcement officers that were created by third parties, however, are not protected and are subject to inspection under the Public Records Act. Noting that "the Tennessee Supreme Court has interpreted Tenn. R. Crim. P. 16(a)(2) somewhat expansively," the trial court rejected Petitioners' construction of the rule and instead found that it "covers work product and other material produced in discovery." (TR Vol. V at 641-42). This construction is entirely consistent with the manner in which Tennessee appellate courts have construed the scope of Rule 16(a)(2) for the past 28 years.

The Tennessee Supreme Court first addressed the construction and application of Tenn. R. Crim. P. 16 as an exception to disclosure and inspection under the Public Records Act in *Memphis Publishing Company v. Holt*, 710 S.W.2d 513 (Tenn. 1986). In that case, disclosure was sought of closed investigative files of the Memphis City Police Department under the Public Records Act. The Supreme Court held that this "exception to disclosure and inspection [Rule 16] does not apply to investigative files in possession of state agents or law enforcement officers, *where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action.*" *Id.* at 517 (emphasis added). Because the investigative files sought to be examined were closed files and not relevant to any pending or contemplated criminal action, the Supreme Court held that Rule 16 did "not come into play in this case." *Id.*

Subsequently, in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987), the Supreme Court was presented with the "issue of whether records of the investigation into the death of an inmate of a state correctional facility are available for inspection under T.C.A. § 10-7-503 of the Public Records Act." *Id* at 165. The Supreme Court noted that the "memoranda, documents and records sought to be inspected by appellees in this case are the results of the investigation by Internal Affairs of the Department of Correction into the murder" of an inmate. *Id.* at 166-67. The Supreme Court held that

> the materials sought by appellees are relevant to the prosecution of the petitioners and other inmates charged with offenses arising out of the murder of Carl Estep. *These prosecutions have not yet been terminated. It necessarily follows under Rule 16(a)(2) that access to materials in the possession of Sergeant Worthington are not subject to inspection* by appellees, who are counsel for the indicted petitioner-inmates.

Id. at 167 (emphasis added). *See also Van Tran v. State*, No. 02C01-9803-CR-00078, 1999 WL 177560, at *5 (Tenn. Crim. App. Apr. 1, 1999) ("[r]ecords relevant to pending criminal action need not be disclosed under the Tennessee Public Records Act"); *McLellan v. Crockett*, 1990 WL 148, at *2 (Tenn. Crim. App. Jan. 4, 1990), *perm. app. denied* (Tenn. Mar. 26, 1990) ("it is clear that the press is not entitled to access to documents in the file of the District Attorney General if there is an 'open' or 'pending' or 'contemplated' criminal action"). *Cf. Freeman v. Jeffcoat*, No. 01-A-109103-CV-00086, 1991 WL 165802, at *7 (Tenn. Ct. App. Aug. 30, 1991) (recognizing that the "clearly declared public policy protects records of an investigation while the investigation is in progress and during the pendency of any prosecution" but ordering

disclosure because only post-conviction proceeding was pending); *but see Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1999) (holding that records in investigative and prosecutorial files are not subject to disclosure even while post-conviction proceeding is pending).

In each of these cases, access was sought to either the *entire* investigative and/or prosecutorial file or to "third party" records contained in these files (*e.g.*, private psychological evaluation of defendant), and in each of these cases, denial of access to the *entire* file(s) or third-party record was upheld by the courts where the files or records were relevant to a pending or contemplated criminal action.[3] Here, there is no question that Metro Police's investigative file and District Attorney General Johnson's prosecutorial file are relevant to a pending criminal action. As discussed below, there, the trial court should have ruled similarly, but its ruling that Tenn. R. Crim. P. 16(a)(2) provides an exception to the Public Records Act that covers work product and other material produced in discovery[4] is certainly consistent with the authorities cited above and should be affirmed.

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[3] Federal courts have also construed the scope and application of Tenn. R. Crim. P. 16(a)(2) consistent with these authorities. *See Crenshaw v. Steward*, USDC No. 3:09-0710, 2011 WL 3236611, at *14 (M.D. Tenn. July 28, 2011) (noting that "Rule 16 of the Tennessee Rules of Criminal Procedure excludes records in pending criminal proceedings from § 10-7-503 until the proceeding is closed and that public access to such records becomes available only after all criminal proceedings, including actions for post-conviction relief and habeas corpus, are final).

[4] The Ohio Supreme Court has held that "information assembled by law enforcement officials in connection with a probably or pending criminal proceeding" constitutes "work product" as it is compiled in anticipation of litigation and, therefore, exempt from disclosure. *See State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 94 (Ohio 1994).

B. The trial court correctly determined that Plaintiffs' constitutional claims were without merit.

Plaintiffs argue that the First Amendment to the United States Constitution and Art. I, §§ 17 and 19, of the Tennessee Constitution provide them with a constitutional right of access to all the records in investigative and prosecutorial files. The trial court correctly dismissed this argument as being without merit.[5]

The United States Supreme Court has long held that no such right exists under the First Amendment. Specifically, in *Houchins v. KQED*, 438 U.S. 1 (1978), the Court held that there is no First Amendment right of press access to government-held information and, in the process, also rejected the idea of a First Amendment right of *public* access.

> There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient." We, therefore, reject the Court of Appeals' conclusory assertion that the *public and the media* have a First Amendment right to government information . . . .

Id. at 12 (emphasis in original). The Supreme Court observed that "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act" and concluded that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information

[5] Plaintiffs did not assert any constitutional right of access to the records in their Petition for Access, nor did they raised any such claim in their pre-trial brief. It was only during oral argument Plaintiffs made a reference to their constitutional right of access to the records in question. *See* TR Vol. VI at 709.

within the government's control." *Id.* at 14-15. *See also Pell v. Procunier*, 417 U.S. 817, 834 (1974 ("The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

Similarly, Tennessee appellate courts have consistently held that no constitutional right of access to public records exists under the Tennessee Constitution. In *Abernathy v. Whitley*, 838 S.W.2d 211 (Tenn. Ct. App. 1992), the plaintiff asserted that Tenn. Code Ann. § 10-7-504(a)(2), which exempts investigative records of the Tennessee Bureau of Investigation from inspection under the Public Records Act, was unconstitutional in violation of Art. I, §§ 8 and 19, and Art. XI, § 16, of the Tennessee Constitution. *Id.* at 212.

In rejecting plaintiff's constitutional challenge, this Court stated:

> No connection of said section with the present controversy is demonstrated. The rights of news media to access to public records are synonymous and concurrent with that of the public at large.
>
> *Appellant has no constitutional right to examine public records. That right has been conferred upon her and all members of the public by statute enacted by the General Assembly.* The same General Assembly has, by general law, limited the statutory rights of appellant and the public. The General Assembly has the power to create, limit or abolish a right which is not conferred by the Constitution.
>
> There is no generally recognized state or federal constitutional right of access to public records. *In re Black Panther Party v. Kehoe*, 39 Cal.App.3d 900, 114 Cal.Rptr.

> 725 (1974); *In re Midland Publishing Co., Inc.*, 420 Mich. 148, 362 N.W.2d 580 (1984).
>
> Appellant's arguments about the constitutional right to freedom of expression are not appropriate or relevant to a controversy about the constitutionality of a statute which limits a statutory right of access to public records. Freedom of expression and freedom of access to records are two entirely separate rights, although they are interrelated.

Id. at 214 (emphasis added). This Court further rejected the plaintiff's argument that Art. I, § 19, of the Tennessee Constitution "prohibits laws restraining access to public records," finding that the language of that constitutional provision "fails to disclose any support for this argument." *Id.*

Despite Plaintiffs' attempt to distinguish it[6], this Court's decision in *Abernathy* makes clear that there is no constitutional right of access to public records under the Tennessee Constitute; rather, the right to examine public records is entirely a matter of statute. *See also Higgins v. Gwynn*, No. M2011-00553-COA-R3-CV, 2012 WL 214829, at *2 (Tenn. Ct. App. Jan. 23, 2012); *Allen v. Day*, 213 S.W.3d 244, 248 (Tenn. Ct. App. 2006); *Chellman-Shelton v. Town of Smyrna*, No. 3:04-0403, 2007 WL 2905360, at *8 (M.D. Tenn. Sept. 24, 2007). In light of the above-cited state and federal authority, the trial court was right to reject Plaintiffs' constitutional argument.

[6] *See* Brief of Appellants at 28 n.27.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE AFFIDAVITS SUBMITTED BY THE STATE DEFENDANTS.

Plaintiffs ask this Court to find that the trial court erred in denying their motion to strike the affidavits submitted by the State Defendants. But this is a request for an advisory opinion. The trial court's memorandum opinion clearly reflects that the court did not rely on either of these affidavits in rendering its decision amd Plaintiffs ask this Court to address the issue so that "[f]uture litigants will benefit from this Court's admonition that evidence rules apply in [public records] cases." Brief of Appellants at 23.

Appellate courts do not render advisory opinions. *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 539 (Tenn. 2004) (citing *Veach v. State*, 491 S.W.2d 81, 82 (Tenn. 1973); *Banks v. Jenkins*, 449 S.W.2d 712, 717 (1969)). Moreover, an "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." *Brandy Hills Estate, LLC. v. Reeves*, 237 S.W.3d 307, 318 (Tenn. Ct. App. 2006) (citing Tenn. R. Evid. 103). Given that Plaintiffs seek no relief from the trial court's judgment, they have failed to demonstrate that the trial court's decision to admit the affidavits affected any substantial right.

Furthermore, even if Plaintiffs were seeking some sort of relief from the judgment, they have failed to demonstrate that admission of the affidavits was an abuse of discretion. A trial court is afforded wide discretion in the admission or rejection of evidence and will not be reversed on appeal unless a showing is made that

the trial court arbitrarily exercised its discretion. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992); *Kim v. Boucher*, 55 S.W.3d 551, 555 (Tenn. Ct. App. 2001); *State v. Hawk*, 6888 S.W.2d 467, 472 (Tenn. Crim. App. 1985).

The affidavits in question were the affidavit of District Attorney General Johnson and the affidavit of a paralegal, Becky Roberts. With respect to the affidavit of Ms. Roberts, she simply attested to the veracity of internet searches that she had conducted for media articles concerning the "Vanderbilt football rape case." (TR Vol. II at 152-154). Plaintiffs assert that this affidavit should have been stricken as offering irrelevant information, although they fail to explain why this testimony is irrelevant. Tenn. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence." Evidence of the amount of pre-trial publicity concerning the criminal case was clearly relevant to the Intervening Defendants' assertion that public disclosure of the evidence in the criminal case, before it had been ruled admissible by the criminal court, would violate the constitutional right to a fair trial under the state and federal constitutions.

Plaintiffs assert that General Johnson's affidavit fails to meet the "personal knowledge" requirement of Tenn. R. Evid. 602, which provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

In determining whether a witness is competent for purposes of Rule 602, the trial court must determine whether a witness had a sufficient opportunity to perceive the subject matter about which he or she is testifying. *See* Neil P. Cohen, et al., Tennessee Law of Evidence § 602.4 at 313 (2d ed.) And while the rule fails to define what constitutes "knowledge," the rule does not require "absolute certainty." *Id* at 314. Consequently, a declarant's personal knowledge may be inferred from the statements themselves and the surrounding facts and circumstances. *State v. Land*, 34 S.W.3d 516, 529 (Tenn. Crim. App. 2000) (citing *State v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987)).

Here, General Johnson testified that he is the duly elected District Attorney General for the Twentieth Judicial District, that he has held that position since 1987,1 and that the Metro Police Department contacted his office for advice and assistance in their investigation of the alleged crimes that occurred on the campus of Vanderbilt University in late June 2013. General Johnson further testified about the actions taken by his office with respect to that investigation, including the subsequent indictment of four individuals by the grand jury; he also testified about the amount of pre-trial publicity this case had received and compared it to other cases in his 26-year tenure as District Attorney General. (TR Vol. II at 147-151). Clearly, General Johnson's personal knowledge, if not explicit in his statements, certainly can be inferred from those statements and the surrounding facts and circumstances.

Plaintiffs have failed to demonstrate that the trial court abused its discretion in admitting these affidavits.

III. THE TRIAL COURT ERRED IN RULING THAT CERTAIN METRO-POLICE RECORDS MUST BE DISCLOSED UNDER THE PUBLIC RECORDS ACT.

While the trial court concluded that Tenn. R. Crim. P. 16(a)(2) has been construed to cover work product and other materials produced in discovery, it also ruled 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)." (TR Vol. V at 642). The trial court then determined that Plaintiffs were entitled to access to four categories of records: (1) Vanderbilt access card information; (2) Pano-scan data relating to Vanderbilt University premises; (3) E-mails recovered from potential witnesses and the criminal defendants that were not addressed to officials related Metropolitan Police Department of the District Attorney General's Office; and (4) text messages, minus any photographic or videographic images. (*Id.* at 643).

This ruling is in error for three reasons. First, it is contrary to the precedent discussed above holding that investigative files relevant to pending or contemplated criminal actions are protected by Tenn. R. Crim. P. 16(a)(2) from disclosure under the Public Records Act. Second, the trial court failed to balance the constitutional rights of a fair trial with the legislatively enacted right of access to determine if the disclosure of the records in question jeopardizes the constitutional right to a fair trial. Third, even under the trial court's narrow construction of Tenn. R. Crim. P. 16(a)(2),

the records ordered disclosed by the trial court still fall within the protection of that Rule.

A. The trial court's narrow construction of Tenn. R. Crim. P. 16(a)(2) is inconsistent with established appellate-court precedent.

As discussed above, the Tennessee Supreme Court declared in 1986 that Tenn. R. Crim. P. 16 protects investigative files in the possession of state agents or law enforcement officers, *where the files are open and are relevant to pending or contemplated criminal action*, from disclosure under the Public Records Act. *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986).; *see also Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987) (investigative files in possession of state agents or law enforcement officers, where files are open and relevant to pending or contemplated criminal action, not subject to Public Records Act). Since then, Tennessee appellate courts have consistently construed and applied Rule 16 to hold that investigative files are not subject to inspection as long there is a pending or contemplated criminal action. Indeed, the State Defendants are unaware of a single decision—reported or unreported—where an appellate court has held to the contrary.[7] Thus, that portion of the trial court's ruling which requires disclosure of records not created internally or not reflective of the reconstructive and investigative

[7]Plaintiffs cite *Griffin v. City of Knoxville*, 821 S.W.2d 921 (Tenn. 1991), in support of their position that documents gathered by law enforcement from a third party are public records. But, that case involved a closed investigate file, and "a closed investigative file of a municipal police department is subject to public inspection under Tennessee's Public Records Act." *Id.* at 923 (citing *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986)).

efforts of law enforcement and prosecution is contrary to established precedent and should be reversed.

B. The trial court erred in failing to balance the State's and criminal defendants' constitutional right to a fair trial with the public's legislatively enacted right of access.

The State Defendants asserted below that the disclosure of evidence in the investigative and prosecutorial files prior to trial, i.e., the pre-trial discovery, could violate the State's and the criminal defendants' constitutional right to a fair trial and, therefore, that the trial court should balance that constitutional right against Plaintiffs' right of access in determining whether disclosure was required. In its memorandum opinion, the trial court recognized that adverse pretrial publicity can put a defendant" ability to receive a fair trial at risk and, therefore, that the disclosure of the records in question was a valid concern. (TR Vol. V at 645). The trial court further recognized that the Plaintiffs were seeking records from the investigative and prosecutorial files that "have not yet been disclosed in the criminal court case and have not yet been tested through the crucible of pretrial motions or the Criminal Court's rulings on evidentiary disputes" (*Id.* at 646) Despite these findings, the trial court made no attempt to balance the State's and individual criminal defendants' constitutional right to a fair trial against the Plaintiffs' legislatively-enacted right of access to determine if disclosure would place that constitutional right in jeopardy. The trial court simply stated that it "defers to the oversight of the Criminal Court over the criminal prosecution on such issues." (*Id.*). The trial court had an affirmative constitutional duty to protect the constitutional right to a fair trial. Its

failure to protect that right by ordering the disclosure of the records in question was clearly in error and should be reversed.

Contrary to Plaintiffs' assertion, Tennessee appellate courts have recognized that the constitutional right to a fair trial under Art. I, § 9, of the Tennessee Constitution and the Sixth Amendment to the United States Constitution constitute exceptions to the Public Records Act and that the right of access under the Public Records Act must be balanced against the criminal defendant's right to a fair trial under these constitutional provisions. *See Knoxville News Sentinel v. Huskey*, 982 S.W.2d 359, 362-63 (Tenn. Crim. App. 1998).[8] Also contrary to Plaintiffs' assertion, both the Tennessee and United States Supreme Courts have held that prosecutors have a duty to ensure that a defendant receives a fair trial. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384 (1979) ("The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial. But this responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial."); *State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008) ("While the interests of the State are [prosecutors'] paramount concern, their actions must be tempered by their impartial search for justice and their obligation to see to it that the defendant receives a fair trial.") (citing *State v. White*, 114 S.W.3d 469, 477 (Tenn. 2003); *Burlison v. State*, 501 S.W.2d 801, 806 (Tenn.

[8]Unlike the records in this case, the records at issue in *Huskey* had already been filed with the trial court and, therefore, were court records. Even then, the court held that the right of access to these court records was not absolute but had to be balanced against the defendant's rights to a fair trial. *Id.*

1973); *Watkins v. State*, 203 S.W. 344, 345 (Tenn. 1918)). This duty is clearly sufficient to confer standing on the State Defendants to raise the issue of the criminal defendants' constitutional right to a fair trial, as well as that of the State.

The Sixth Amendment to the United States Constitution provides a person charged with the commission of a criminal offense with the "right to a speedy and public trial, by an impartial jury." Article I, § 9, of the Tennessee Constitution also guarantees a "speedy, public trial, by an impartial jury of the County in which the crime shall have been committed," which is "a trial by a jury free of . . . disqualification of some bias or partiality toward one side or the other of the litigation." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (quoting *Toombs v. State*, 270 S.W.2d 649, 650 (Tenn. 1954)). Furthermore, not only the defendant, but also the State, is entitled to a fair and impartial trial" under the Tennessee Constitution. *State v. Melson*, 638 S.W.2d 342, 362 (Tenn. 1982); *see State v. Morris*, 24 S.W.3d 788, 806 (Tenn. 2000) ("In its constitutional sense, impartiality envisions not only freedom from jury bias against the defendant bus also freedom from jury bias in the defendant's favor."); *Houston v. State*, 593 S.W.2d 267, 272 (Tenn. 1980) (noting that impartiality of jury guaranteed by constitution requires "not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution").

The right to a jury trial envisions that all contested factual issues will be decided by jurors who are unbiased and impartial. *Ricketts v. Carter*, 918 S.W.2d 419, 421 (Tenn. 1996). An unbiased and impartial jury is one that begins the trial

with an impartial frame of mind, that is influenced *only by the competent evidence admitted during the trial and that bases its verdict on that evidence. Durham v. State*, 188 S.W.2d 555, 558 (Tenn. 1945); *see State v. Adams*, 405 S.W.3d 641, 650 (Tenn. 2013) ("Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge."); *State v. Claybrook*, 736 S.W.2d 95, 100 (Tenn. 1987) ("In every criminal case the defendant is entitled to have his guilt or innocence determined by impartial and unbiased jurors who have not been subjected to the influence of inadmissible and prejudicial information . . . .").

The United States Supreme Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. *See Gannett Co., v. DePasquale*, 442 U.S. 368, 378 (1979). Moreover, studies have found that pretrial media coverage does impact jurors' decisions to the detriment of the defendant and arguably, society as a whole. *See* Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 Psychol. Pub. Pol'y & L. 428, 433 (1997) "[J]udicial common sense often reflects a misappraisal or misunderstanding by the courts of the capabilities and weaknesses of human inference and decision making. The courts' assumptions and expectations about jurors' decision-making processes and ability to disregard pretrial publicity are not consistent with social science findings concerning these matters." *Id.* at 455; *see also* Amy L. Otto, Steven D. Penrod & Hedy R. Dexter, *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 Law & Hum. Behav. 453 (Aug. 1994); Norbert L.

Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 Judicature 120 (Nov.-Dec. 1994); James R. P. Olgoff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors*, 18 Law & Hum. Behav. 507 (Oct. 1994). Particularly in a widely publicized case, "the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial." *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 394 (1968). Thus, in order to safeguard the due process rights of an accused, "a trial judge has an affirmative duty to minimize the effects of prejudicial pretrial publicity, and he may take protective measures even when they are not strictly and inescapably necessary." *Gannett*, 443 U.S. at 378; *see also United States v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977) ("[I]t is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process.").

Courts have recognized that the public disclosure of evidenced presented in court in a pretrial proceeding can present a serious threat to a defendant's constitutional right to a fair trial because it can result in the disclosure of evidence inadmissible at trial. *See, e.g.*, *Gannett Co.*, 443 U.S. at 378 ("Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial."); *United States v. McVeigh*, 119 F.3d 806, 813 (10th Cir. 1997) (noting that "suppressed evidence, by definition, will not be admissible at trial, and thus press access to such evidence will not play a significant positive role

in the functioning of the criminal process, as that evidence is simply irrelevant to the process. On the contrary, disclosure of such evidence would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction"); *In re Gannett News Service, Inc.*, 772 F.2d 113, 115 (5th Cir. 1985) (in declining to lift seal on motions in limine to exclude evidence, the court noted that "[t]he likelihood of potential jurors considering this evidence improperly and the difficulty of selecting an impartial jury given the certain widespread dissemination of this evidence mandates that this particular matter be kept under seal only until such time as they are offered in evidence for use at trial"); *United States v. Chagra*, 701 F.2d 354, 364 (5th Cir. 1983) (noting that evidence may be considered in a bail reduction hearing that would not be admissible at trial and public disclosure of such inadmissible evidence would "present a serious threat to the defendant's fair trial right"); *United States v. Kemp*, 365 F.Supp.2d 618, 631-32 (E.D. Pa. 2005) (noting that the "judicial system is not served by making illegally seized or inadmissible evidence available to the public"); *People v. Jackson*, 27 Cal. Rptr. 3d 596, 600 (Ct. App. 2 Dist. 2005) (noting that "[w]idespread dissemination of evidence, which may or may not be admissible at trial, can only complicate the process of selecting an unbiased jury" and, therefore, " '[a]ny disclosure in advance of admission of the evidence in a court proceeding . . . immediately threatens the integrity of the jury pool.'").

Here, the trial court has ordered disclosure of evidence that has "not yet been disclosed in the criminal court case and [has] not yet been tested through the crucible of pretrial motions or the Criminal Court's rulings on evidentiary disputes." (TR Vol. V at 646). In ordering this disclosure, however, the trial court failed to balance the constitutional right to a fair trial with the statutory right of access to determine if disclosure could jeopardize the constitutional right. Where a defendant's right to a fair trial conflicts with the public's right of access, the right of access must yield.

In *Arkansas Gazette Co. v. Goodwin*, 801 S.W.2d 284 (Ark. 1990), the press sought access to investigative files of the state police under Arkansas' Freedom of Information Act before the criminal defendant had been tried. The Arkansas Supreme Court, citing *Gannett*, recognized that it had a duty to weigh the criminal defendant's constitutional right to a fair trial against the public's right of access to public records.

> If the question is whether a defendant can or cannot receive a fair trial, as required by the fourteenth amendment to the United States Constitution, then conflicting law must give way to a defendant's right to due process. Suffice it to say, FOIA must give way in this instance to 'due process.'

Id at 285; *see id.* at 288 (Turner, J., concurring) ("An individual's constitutional right to a fair trial dictates that the public's legislatively-enacted right to know be subordinated for so long as the constitutional rights of the individual might be in jeopardy.").

In *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987), the issue was whether the press had a qualified right under the First Amendment or under

Florida's public records laws[9] to attend pretrial discovery depositions and to obtain copies of those depositions in a criminal case. The Florida Supreme Court first noted that

> [t]he question of public access to pretrial criminal proceedings directly implicates a variety of constitutional rights; the due process right to a fair trial under the fifth and fourteenth amendments; the right to a speedy and public trial by an impartial jury in the venue where the crime was allegedly committed under the sixth amendment; the rights of the public and press under the first amendment; and the privacy rights of the accused and other trial participants under the first amendment and article I, section 23 of the Florida Constitution. It also implicates the state's interest in inhibiting disclosure of sensitive information and the right of the public to a judicial system which effectively and speedily prosecutes criminal activities. It is the balance between these rights which is at issue . . . .

Id. at 380. The court further noted that the United States Supreme Court's ruling in *Seattle Times Co v. Rhinehart*, 467 U.S. 20 (1984), suggests that "public access to discovery information at the moment it is first discovered presents unacceptable hazards to other constitutional rights because of uncertainty as to the nature and content of the information." *Id.* at 383.

The Florida Supreme Court concluded that where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield; accordingly, the court held that the plaintiffs had neither a qualified right under the First Amendment or under Florida's public record laws to the pretrial

[9]The Tennessee Supreme Court has recognized that Florida's public records act is similar to Tennessee's. *See Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002).

discovery deposition. *Id* at 380-84. In reaching this conclusion, the court specifically found that providing access to pretrial discovery under either the public records laws or a constitutional provision of open courts, would present serious constitutional concerns for both the accused and innocent parties, and would severely undermine the adversarial system and that it would not assist in the trial or resolution of criminal charges but "would carry us even farther from the central aim of a criminal trial—trying the accused fairly." *Id.* at 383-84. *See also Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32, 34 (Fla. 1988) (concluding that "it is the responsibility of the judicial branch to ensure that parties receive a fair trial" and holding that the statutory right of access to records must be balanced against the right to a fair trial). Other courts are in accord. *See United States v. Loughner*, 807 F. Supp. 2d 828, 835-36 (D. Ariz. 2011) (defendant's Sixth amendment right to a fair trial trumped disclosure under Arizona's public records law); *Gifford v. Freedom of Infor. Comm'n*, 617 A.2d 479, 484 (Conn. Sup. Ct. 1992) (where public's right of access implicates a defendant's right of due process and prejudices the constitutional and statutory obligation of state prosecutors to prosecute, the right of access must yield).

The Tennessee Supreme Court has recognized the harm that can result from the disclosure of evidence in a pending criminal investigation prior to trial. In *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), the press sought access to, among other things, copies of field interview cards prepared by the City of Jackson police department. The City of Jackson declined to provide access to the field interview cards upon the basis of a "law enforcement privilege," which the Supreme

Court ultimately declined to recognize as an exception to the Public Records Act. The petitioners then argued that because the City had relied solely on this privilege at the show cause hearing and had failed to offer proof that any of the field cards were protected under Tenn. R. Crim. P. 16, they were essentially estopped from raising this ground on appeal and, therefore, that petitioners were entitled to full access to the cards. 226 S.W.3d at 344.

While recognizing that the City had failed to demonstrate which, if any, of the cards were exempt from disclosure under Rule 16 and that the City had had plenty of opportunity to review the cards prior to the show-cause hearing, the Supreme Court declined to grant petitioners full access to the field cards:

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

Id. at 345-46 (emphasis added).

The purpose of Tennessee's public records act is to promote accountability in government through public oversight of governmental activities. *Gautreaux v. Internal Medicine Educ. Foundation, Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011); *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002). But a number of courts have found that the public disclosure of pre-trial discovery in criminal proceedings prior to trial would do little to serve that

purpose. *See, e.g., Tacoma News, Inc. v. Cayce*, 256 P.3d 1179, 1191 (Wash. 2011) (disclosure of pre-trial discovery before a criminal trial would not enhance the basic fairness or the appearance of fairness, of the criminal proceeding that is essential to public confidence in the criminal justice system); *Commonwealth v. Selenski*, 996 A.2d 494, 500 (Pa. Sup. Ct. 2010) (public access would not play a positive role in the fairness of the criminal trial or the overall confidence in the criminal justice system); *Gifford v. Freedom of Infor. Comm'n*, 617 A.2d at 482 (making pre-trial discovery immediately accessible to the public would constitute a "fatal compromise" to the effective prosecution of crime); *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d at 384 (disclosure of pre-trial discovery before trial would severely undermine our adversarial system). And here, based upon its own *incamera* inspection of the records, the trial court found that disclosure of the records in question would "shed very little light on official government conduct." (TR Vol. V at 639).

Under these circumstances, any right of access that the Plaintiffs have under the Public Records Act must yield to the State's and the criminal defendants' constitutional right to a fair trial. Disclosure of these records must wait until such time as they are admitted at trial or the criminal case is closed.

C. Even under the trial court's narrow construction of Tenn. R. Crim. P. 16(a)(2), the records ordered disclosed are still protected from disclosure.

Even if the trial court were correct that Tenn. R. Crim. P. 16(a)(2) does not protect records that are not created internally or that do not reflect the reconstructive and investigative efforts of law enforcement, the records ordered to be disclosed do

not fall into either of these categories. Metro Police and the District Attorney obtained copies of emails and text messages and the Vanderbilt access-card information either through search warrants issued pursuant to Tenn. R. Crim. P. 41(c) and Tenn. Code Ann. §§ 40-6-103 and 104 or through subpoenas issued pursuant to Tenn. Code Ann. § 40-17-123.[10] An examination of the procedures that must be followed in order to obtain a search warrant or subpoena demonstrate that significant investigative efforts on the part of law enforcement and the prosecution are required.

A search warrant may be requested only by law enforcement or the prosecuting attorney and may be issued by a magistrate only on the basis of a sworn affidavit that "set[s] forth facts tending to establish the grounds of the application, or probable cause for believing the grounds exist." Tenn. Code Ann. § 40-6-104. "Probable cause requires reasonable grounds for suspicion, supported by circumstances indicative of an illegal act." *State v. Stevens*, 989 S.W.2d 290, 293 (Tenn. 1999). Thus, an affidavit in support of an application for a search warrant must include more than conclusory allegations. *State v. Smotherman*, 201 S.W.3d 657, 662 (Tenn. 2006). "The affidavit must present facts upon which a neutral and detached magistrate, examining the affidavit in a commonsense and practical matter, can determine whether probable causes exists for the issuance of a search warrant." *Id.*

A search warrant may be issued to search for and seize any of the following: (1) evidence of a crime; (2) contraband, the fruits of crime, or items otherwise

[10] Additionally, the Vanderbilt access-card information was part of the records "made, compiled or collected" by the Vanderbilt University Police Department, whom the trial court found to law enforcement officers for purposes of Tenn. R. Crim. P. 16(a)(2). (TR Vol. V at 644).

criminally possessed; (3) property designed or intended for use, or that has been used in a crime; (4) person whose arrest is supported by probable cause; or (5) person who is unlawfully restrained. Tenn. R. Crim. P. 41(b). Once issued, the search warrant may be executed only by a law enforcement officer to whom it is directed, and shall command the law enforcement officer to search promptly the person or place named and to seize the specified property or person. Tenn. R. Crim. P. 41(c) and (e).

Similarly, a judicial subpoena may be requested only by law enforcement officers and such request must be supported by an affidavit stating with particularity the following:

> (1) A statement that a specific criminal offense has been committed or is being committed and the nature of the criminal offense;
>
> (2) The articulable reasons why the law enforcement officer believes the production of the documents requested will materially assist in the investigation of the specific offense committed or being committed;
>
> (3) The custodian of the documents requests and the person, persons or corporation about whom the documents pertain;
>
> (4) The specific documents requested to be included in the subpoena; and
>
> (5) The nexus between the documents requested and the criminal offense committed or being committed.

Tenn. Code Ann. § 40-17-123(c). Before a request for a judicial subpoena is granted, the judge must find, among other things, that "[p]roduction of the requested documents will materially assist law enforcement in the establishment of investigation of the offense." Tenn. Code Ann. § 40-17-123(d)(1)(B).

These procedures clearly reflect that significant investigatory effort on the part of law enforcement and/or the prosecution is required in order to obtain search warrants and judicial subpoenas. Moreover, only law enforcement and prosecutors can obtain records and evidence under these procedures for which strict compliance is required. *See State v. Moats*, 403 S.W.3d 170, 177 (Tenn. 2013). Here, the text message, emails and access-card information were obtained through search warrants and subpoenas that could only be obtained through the investigatory efforts of Metro Police. Thus, even under the trial court's narrow construction of Rule 16(a)(2), the records are protected from disclosure under the Public Records Act.[11]

The trial court also ordered the disclosure of "Pano-scan data relating to Vanderbilt University premises," which the trial court acknowledged had been made by Metro Police. (TR Vol.V at 635).[12] This order is contrary to the trial court's own ruling that records "that were not developed internally . . . are outside the expansive reach of Tenn. R. Crim. P. 16(a)(2)" (TR Vol. V at 643), in other words, that records that *were* developed internally are protected. Moreover, the ordered disclosure of this record is contrary to Tennessee Supreme Court precedent holding that documents

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[11]Plaintiffs argue that these records are "court records" subject to disclosure under the Public Records Act because Tenn. R. Crim. P. 41(f) requires materials obtained in connection with court-issued search warrants to be filed with the court clerk. Brief of Appellants at 21-22. This argument is without merit. Tenn. R. Crim. P. 41(f) provides that "[t]he officer executing the warrant shall promptly make a return, *accompanied by a written inventory of any property taken.*" Contrary to Plaintiffs' assertions, only an *inventory* of the property seized pursuant to a search warrant is to be filed, not the actual property or records seized. Accordingly, there is no legal basis for Plaintiffs' arguments that records obtained pursuant to a search warrant are "court records" subject to disclosure under the Public Records Act.

[12]A pano-scan is a camera that allows law enforcement to take high-resolution 360-degree panoramic images of crime scenes.

sealed by a protective order pursuant to the Rules of Criminal or Civil Procedure are not subject to inspection under the Public Records Act, as well as the trial court's stated intent to honor the protective order entered by the criminal court.

In the pending criminal prosecutions, a protective order prohibiting the disclosure of any video or photographs provided in discovery by the State was entered by the Davidson County Criminal Court on October 2, 2013. District Attorney General Johnson has provided copies of all photographs and videos in his possession to the criminal defendants in discovery. (TR Vol. V at 645). Thus, all videos and photographs, including the pano-scan, are currently sealed by virtue of the protective order. The Tennessee Supreme Court has long recognized that the Rules of Civil and Criminal Procedure are state laws and that documents sealed by a protective order pursuant to either of these rules are not subject to inspection under the Public Records Act. *See Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996); *see also Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999); *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (1998). Recognizing this holding, the trial court declared that it "abides by, and honors, the Agreed Protective Order issued by the Criminal Court" and declined to order the production of any videos and photographs. (*Id.*). Plaintiffs have stated that they are not appealing this ruling. Brief of Appellants at 12, n.11. Accordingly, the trial court's ordered disclosure of the pano-scan was clearly in error and should be reversed.

CONCLUSION

For these reasons, that part of the judgment of the trial court exempting from disclosure work product and other materials produced in discovery should be affirmed; that part of the judgment requirement the disclosure of records should be reversed, and Plaintiffs' complaint should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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