No. M2014-00524-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

THE TENNESSEAN, ET Al.,
Petitioners—Appellants

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,
Respondent – Appellee

DISTRICT ATTORNEY VICTOR JOHNSON, ET AL.,
Intervenors—Appellees

ON APPEAL FROM THE CHANCERY COURT
FOR THE TWENTIETH JUDICIAL DISTRICT
THE HONORABLE RUSSELL S. PERKINS, CHANCELLOR
CASE NO. 14-156-IV

AMICUS CURIAE BRIEF OF TENNESSEE ASSOCIATION OF BROADCASTERS

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STATEMENT OF ISSUES

Tennessee Association of Broadcasters ("TAB") presents this brief to address two issues:

1. Whether the Trial Court's Order requiring the production of certain redacted public records (i.e., documents "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") should be affirmed, after the Trial Court correctly found that Tennessee Rule of Criminal Procedure 16(a)(2) does not provide a "blanket" exception from the Tennessee Public Records Act (the "Public Records Act") for law enforcement records (as argued by Metropolitan Government of Nashville and Davidson County ("Metro Nashville"), the State of Tennessee and the District Attorney General) (collectively, the "Government Parties"). This is the same issue Number 1 stated by Appellants.

2. Whether the Victims' Bill of Rights, Tenn. Code Ann. §40-38-101 to -117, or the Tennessee Constitution creates a "blanket" exception to the Public Records Act, as argued by the Intervenor/Appellee Jane Doe ("Jane Doe").

STATEMENT OF FACTS

TAB adopts the statement of facts set forth by the Petitioners/Appellants in their Brief.

Additionally, by way of identification, TAB is a voluntary association of radio and television broadcast stations located in Tennessee. TAB is organized and exists as a not-for-profit Tennessee corporation. Its purpose includes promoting a high standard of public service among Tennessee broadcast stations, fostering cooperation with governmental agencies in all matters pertaining to national defense and public welfare, and encouraging customs and practices in the best interest of the broadcasting industry and the public it serves.

ARGUMENT

The public's right of access to information held by the government is the bedrock foundation upon which American democracy rests. As James Madison, father of the United States Constitution, warned, "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both . . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry, August 4, 1822, in 9 The Writings of James Madison 103 (Hunt ed. 1910), *quoted in United States v. Mitchell,* 551 F. 2d. 1252, 1258 (D.C. Cir. 1976). In furtherance of this paramount interest, the General Assembly passed the Public Records Act in 1957 mandating that governmental entities grant access to public records to every citizen of Tennessee. The legislative policy behind the Act is enunciated in the enforcement provision that directs courts to construe the Act broadly "so as to give the fullest possible access to public records." Tenn. Code Ann. § 10-7-505(d). The supreme court has observed that the Public Records Act constitutes a "clear mandate in favor of disclosure." *The Tennessean v. Electric Power Bd. of Nashville*, 979 S.W.2d 297, 305 (Tenn. 1998).

I. Tennessee Rule of Criminal Procedure 16 does not provide a blanket exception for law enforcement records

A. The records at issue are Public Records as that term is defined in the Public Records Act

The Public Records Act mandates that, "all state, county and municipal records. . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." *Schneider v. City of Jackson*, 226 S.W.3d. 332, 340 (Tenn. 2007) (quoting Tenn. Code Ann. § 10-7-503(a)). The Tennessee Supreme Court has consistently

held that the Public Records Act creates a simple rule: The public has a right of access to all public records unless there is an exception for access to those public records. Therefore, the first issue is whether the records at issue in this case are "public records." The records at issue in this case are clearly public records, such that neither Jane Doe, the State, nor the District Attorney denies that the records at issue are public records. Metro Nashville, however, repeatedly stated in its briefs that the records "are not public records." (*See* Metro Nashville Brief, p. 6; Metro Nashville Reply Brief, p. 1). Whether this statement was made intentionally or unintentionally, it clearly shows Metro Nashville's profound misunderstanding of the Public Records Act.

"The Public Records Act broadly defines 'public record or records' or 'state record or records' to include 'all 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.'" *Schneider* 226 S.W.3d. at 339 (quoting Tenn. Code Ann. §10-7-301(6)). Further, the Tennessee Supreme Court stated, "the Public Records Act has been described as an 'all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity.'" *Id.* (citations omitted). Obviously, the records at issue relating to the state's prosecution of four individuals constitute records created or received by the government in its official capacity. Therefore, they are public records within the meaning of the Public Records Act.

If the records Petitioners seek in this case were not public records, those same sort of records would have never been released under our supreme court's rulings in *Griffin v. City of Knoxville*, 821 S.W.2d 921(Tenn.1991) (suicide note collected by police) and *Memphis Publishing Company v. Holt*, 710 S.W.2d 513 (Tenn.1986) (investigative files of the Memphis

Police Department). Moreover, even though the supreme court ultimately denied access to the investigative records at issue in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn.1987), the court never suggested that these investigative files were not public records. Rather, in *Appman,* the court held there was an exception that prevented these public records from being disclosed. Accordingly, there can be no serious question that the records sought in this case are public records as that term is defined in the Public Records Act. The only issue is whether those public records are exempted from disclosure under established state law.

B. There is only one Tennessee Rule of Criminal Procedure 16(a)(2) and it applies to both criminal defendants and the public at large

The Government Parties have requested this court to deny public access to requested documents, claiming that Tennessee Rule of Criminal Procedure 16 creates an exception under the Public Records Act. Specifically, the Government Parties argue that the Tennessee Supreme Court recognized such an exception under Rule 16 in *Appman*. Although *Appman* did recognize that Rule 16 creates a limited exception, the Government Parties have misconstrued *Appman* and have sought to broaden the holding of that case far beyond what it actually held.

In *Appman,* two prison inmates charged with the murder of a fellow inmate and counsel for the two inmates made a Public Records Act request for the investigative file relating to that criminal prosecution. Presumably, this request was made under the Public Records Act in an effort to obtain more information than would have been discoverable through criminal discovery under Tennessee Rule of Criminal Procedure 16(a)(1). After the supreme court's decision one year earlier in *Holt*, there may have been some uncertainty as to whether a Public Records Act request would allow for more disclosure than criminal discovery under Rule 16. In *Appman*, however, the court clarified that there was no greater right of discovery under the Public Records Act than under Rule 16, unless the criminal case had been closed or there was no criminal

prosecution to be undertaken. The court ruled that Rule 16(a)(2), which indicates that certain information is not subject to disclosure in criminal discovery, applies with equal force in a Public Records Act request. Accordingly, the court did not allow the criminal defendants or their counsel to obtain any more information through the Public Records Act than they could have obtained through criminal discovery.

Of great significance in *Appman* is the fact that the requestors sought the information through the Public Records Act, and not through criminal discovery. Therefore, *Appman* imposes a limitation on obtaining records of a criminal investigation not just for criminal defendants and their counsel, but for all citizens of Tennessee under the Public Records Act. Accordingly, *Appman* clearly stands for the proposition that Rule 16(a)(2) provides the same limitation on access to records by members of the public under the Public Records Act as it does for criminal defendants under criminal discovery.

Appman establishes that, to the extent Rule 16(a)(2) limits a criminal defendant's right of access to materials held by the state, this same limitation applies with equal weight to any other citizen of Tennessee seeking the same information under the Public Records Act. The Government Parties' extensive discussion about what is or is not discoverable under Rule 16 is completely academic. It is undisputed in this case that the criminal defendants have received the information Appellants seek in this case.[1] Because there is only one Tennessee Rule Criminal Procedure 16, there is no separate aspect of Rule 16 limiting the public's right of access to anything less than what a criminal defendant receives under Rule 16.

Metro Nashville fully recognizes that there is no provision in Rule 16 that purports to limit the public's right of access any more than a criminal defendant's. Metro Nashville,

[1] See Brief of District Attorney and State, p. 36 (admitting criminal defendants have received such discovery, including the photographs and video Appellants are not seeking and which are subject to a protective order).

however, has completely reversed the presumptions of the Public Records Act when it states that Rule 16, "does not contain any provisions requiring materials to be disclosed to members of the public." (Metro Nashville Brief, p. 8) This statement from Metro Nashville presents a completely irrelevant inquiry. The issue is not whether Rule 16 has a provision *requiring* materials to be disclosed to the public. Rather, pursuant to the Public Records Act, the issue is whether Rule 16 contains any provision *prohibiting* disclosure to members of the public.

Because Rule 16 has no greater provisions denying the public's right of access than a criminal defendant's right of access, members of the public are entitled to the same right of access as criminal defendants. Metro Nashville's suggestion that there must be some specific provision granting public access is completely contrary to the manner in which the Public Records Act is written and has been consistently interpreted. Under the Pubic Records Act, which should be interpreted "so as to give the fullest possible access to public records," the public is entitled to the records unless there is some exception for disclosure. Tenn. Code Ann. § 10-7-503(a). Because the only exception to disclosure in Rule 16 is the same exception that applies to criminal defendants, the public is entitled to the very same information that is made available to criminal defendants.

In its Reply Brief, Metro Nashville essentially admits that the clear language of the Public Records Act and Rule 16 allow public access to the documents Appellants seek. Therefore, Metro Nashville argues that the clear wording of the statute and rule would render a result that is absurd or unconstitutional. In support of their absurdity argument, Metro Nashville presents the logically impossible proposition that Appellant's position would result in criminal defendants and their counsel having a lesser right of access than the general public. Because

criminal defendant and their counsel are a part of the general public, they necessarily cannot have fewer right of access than the general public.

Metro Nashville also believes there is something wrong with the general public being able to comment on a case without the restrictions imposed upon counsel by the Rules of Professional Conduct. A lawyer, unlike the public at large, is an officer of the court whose conduct may be regulated by the Professional Rules of Conduct. The purpose of the Rules of Professional Conduct is to regulate lawyer conduct, not the public at large. Even with the right of access sought in this case, lawyers in a case will have more insight and information about a case than the general public. Therefore, enforcing the public's right of access does not render the Professional Rules of Conduct irrelevant.

Metro Nashville's constitutional argument also fails. Our supreme court long ago rejected an argument that openness in government without a particular exception requires a finding that the law is unconstitutional. *Dorrier v. Dark,* 537 S. W.2d 888, 889-90 (Tenn. 1976) (Open Meeting Act was not unconstitutional because it lacked exceptions). In *Dorrier*, the supreme court stated "it is the Legislature, not the Judiciary that must balance the benefits and detriments and make such changes as will serve the people and express their will." *Id.* at 896. The Government Parties and Jane Doe have essentially presented an argument that the Public Records Act should be changed. That argument, however, should be presented to the General Assembly. As it currently exists, the Public Records Act requires release of the records Appellants have requested, subject to the criminal court's protective order.

Dorrier also states, "Where a constitutional attack is levied on a statute, we are required to indulge every presumption in favor of its validity and resolve any doubt in favor of, rather than against, the constitutionality of the Act." *Id.* at 891. Therefore, the Public Records Act is not

unconstitutional just because someone in government does not like it, or even if it makes their job more difficult. It is remarkable that the Government Parties are seeking to restrict the public's right of access under the guise of protecting the rights of the criminally accused. As shown by who made the records request in *Appman,* criminal defendants and their counsel seek to exercise, not stifle, the right of access. Also, Metro Nashville's argument that Rule 16 should control over the Public Records Act because of their inconsistency is invalid because there is no inconsistency in these two provisions of law.

The Government Parties' repeated citation to *Gannett v. DePasquale*, 443 U.S. 368 (1979), for the proposition that a trial court should minimize the effects of pretrial publicity ignores the fact that such efforts must be done on a case-by-case basis. *DePasquale* involved a courtroom closure. Since that case, the U.S. Supreme Court has repeatedly held that any restriction on the public's right of access must be narrowly tailored for the particular circumstances of that case. *E.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9-10 (1986) (requiring specific findings that a denial of access is necessary to preserve higher values). Appellees, however, seek to apply Rule 16 as a blanket prohibition on access in all cases. Appellees' reliance upon *DePasquale* is misplaced. The full body of U.S. Supreme Court rulings on access to court proceedings has established that an automatic denial of access for all cases is invalid. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (striking down as unconstitutional a state statute requiring courtroom closure during testimony of sex crime victims under age 18).

C. *Appman* also establishes that the Chancery Court had jurisdiction

Appman also dispenses with the Government Parties' jurisdiction objection. In *Appman,* the criminally accused were being prosecuted in the Criminal Court of Morgan County. Despite

their pending criminal case, they filed their Public Records Act request in the Chancery Court of Davidson County, more than 100 miles from Morgan County. At no point did the supreme court suggest that the Davidson County Chancery Court lacked jurisdiction over the Public Records Act case.

In this case, the Government Parties argue the Chancery Court should have yielded to the Criminal Court because the Criminal Court proceedings were already underway when Appellants filed their Public Records Act case in Chancery Court. Yet this same sequence of events existed in *Appman,* and still jurisdiction was unquestioned in *Appman.* The doctrine of prior suit pending does not apply to this case because no one has initiated any other Public Records Act request in any other court. Accordingly, the Chancery Court was the first and only court to have any Public Records Act request presented to it related to the matters at issue in this appeal, and there is no other case, prior or otherwise, to which the Chancery Court could have deferred.

Also, Metro Nashville's reliance upon *State v. Drake,* 701 S.W. 2d 604 (Tenn. 1985) (Metro Nashville Brief p. 15) to establish jurisdiction in the criminal court is misplaced. Although *Drake* is an important acknowledgement of the importance of open government in general, it was not a Public Records Act case. Rather, the issue in *Drake* was whether a criminal court could exclude the public from court proceedings. Accordingly, no court other than the criminal court that considered closing its proceedings had jurisdiction to hear the dispute at issue in *Drake.* Because, however, the Public Records Act clearly states that a Chancery Court has jurisdiction to hear Public Records Act cases, Tenn. Code Ann. § 10-7-505(b), the Chancery Court had jurisdiction to hear this case, even if another court may also have had jurisdiction to hear a Public Records Act case had such a request been made, which it was not. Also the public access issue in *Drake*, was raised by those who intervened in a criminal case, yet no one has

intervened in the criminal case here. And no one is seeking records covered by the protective order entered in the Davidson County Criminal Court.

II. Jane Doe's request to have the courts modify the Tennessee Public Records Act is unwarranted and unsupported by controlling authority

The original 1957 Act provided that "[a]ll state, county and municipal records" shall be open for inspection "*unless otherwise provided by law or regulations made pursuant thereto.*" (emphasis added.) In 1984, the legislature amended the emphasized portion to read: "unless otherwise provided by state statute." The Tennessee Supreme Court construed this amendment as reserving to the legislature alone the power to make exceptions to the accessibility of public records. *Holt*, 710 S.W. 2d at 517. In 1991, however, the specific language was further amended to read: "unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a). This change encompasses the Tennessee Rules of Criminal and Civil Procedure as possible exceptions to the Public Records Act. *Schneider,* 226 S.W.3d at 341 (Tenn. 2007).

The change from "state statute" to "state law" arguably broadens the means of limiting access beyond the holding in *Holt* to include exceptions under common law privileges. Other than lower court opinions either reversed or discredited by subsequent holdings of the supreme court, however, no Tennessee Court has found any common law exceptions to the Public Records Act. *Schneider* 226 S.W.3d at 342 (rejecting a common law exception to the Public Records Act but finding it to be "an interesting issue"). Creating such unfounded common law exceptions would be contrary to the legislative policy of construing the Public Records Act broadly "to give the fullest possible access." Indeed, even after the 1991 amendment, the supreme court "has held that the confidentiality of records is a statutory matter that is best left to the legislature." *State v. Cawood,* 134 S.W.3d 159, 167 (Tenn. 2004).

Consistent with the supreme court's long standing acknowledgment that citizens of this state are entitled to the fullest possible access to government records, and its acknowledgment that confidentiality of records is a statutory matter for the General Assembly, the 1991 amendment was never intended to allow courts to create their own exceptions. Rather, the 1991 amendment can be viewed more properly as a reaction to the decision in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987). In *Appman*, the supreme court noted there was no statute that would prohibit a disclosure under the Public Records Act of the state's files in an ongoing criminal investigation. However, the Court ruled that such investigative files in that case were barred from disclosure pursuant to Tennessee Rule of Criminal Procedure 16. The Rules of Criminal Procedure, "became effective on July 13, 1978 upon the Governor's approval of a joint resolution of legislature adopting the rules, and have the force of law." *Id.* at 166. Therefore, *Appman* held Rule 16(a)(2) did constitute state law that was an exception to the Public Records Act. Relying upon a rule of procedure that has been approved by the General Assembly as an exception to the Public Records Act, however, is a far cry from recognition of a new exception without approval of the General Assembly.

A. The Victims' Bill of Rights does not create the blanket exception Jane Doe seeks

In her quest to have the Victims' Bill of Rights, Tenn. Code Ann. §40-38-101 to -117, construed as an exception to the Public Records Act, Jane Doe has sought to rely upon federal law and the law of other states. *Schneider*, however, specifically rejected reliance upon the laws of other jurisdictions, including federal law, when interpreting the Public Records Act. *Schneider,* 226 S.W. 3d at 342-43. (stating that federal and other states' open records laws are in

"contrast" to Tennessee's Public Records Act). Every state has open records laws,[2] yet each state has provided a substantially different statutory framework by which the principle of open government is preserved. The federal government's open records law, the Freedom of Information Act ("FOIA"), is also substantially different than the Public Records Act. 5 U.S.C. § 552. Trying to apply the judicial interpretations of one state's open records law or the federal FOIA, to the open records law of this state, without understanding the differences in these various laws, is completely illogical.

FOIA has only nine exceptions, but they are broad and very general in nature. 5 U.S.C. § 552(b). In contrast to the FOIA approach to exceptions, the Public Records Act does not provide a few broad and general exceptions.[3] Tennessee's approach to open records begins with a presumption of openness. *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994). This presumption of openness is evidenced in the narrowness of the exceptions. Instead of a few broad, generalized exceptions, the Public Records Act has hundreds of specific exceptions. As of 2011, there were more than 350 exceptions to the Public Records Act. www.refp.org/tennessee-open-government-guide/appendix (last visited on May 15, 2014). Out of these hundreds of exceptions, the only exception Jane Doe relies upon, the Victims' Bill of Rights, does not create the broad blanket exception she asserts.

In *Holt* the supreme court noted that the Public Records Act,

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[2] A comparison of every state's Open Records and Open Meetings Law may still be found at www.rcfp.org/open-government-guide, the website cited in *Schneider*. 226 S.W.3d at 342, n. 13 (last visited on May 15, 2014).

[3] *Schneider* also rejected reliance upon the laws of other states because of their dissimilarity with Tennessee law. For example in addition to being titled as a freedom of information act, the Illinois Freedom of Information Act is to be construed consistent with the federal FOIA. *See Roulette v. Dept. of Cent. Mgmt. Servs.*, 141 Ill. App. 3d 394, 400, 490 N.E. 2d 60, 64, 95 Ill. Dec. 587, 591 (1st Dist. 1986). Likewise, *Schneider* rejected reliance upon Massachusetts law (Opinion p. 16), because the Massachusetts open records law is also patterned after the federal statute. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 433 n. 11, 446 N.E. 2d 1051, 1055 n. 11 (1983). The Public Records Act is not patterned after other state acts or FOIA. *Schneider,* 226 S.W. 3d 342-43.

> identifies several classes of records not subject to inspection by citizens of this state. Included are investigative files of the Tennessee Bureau of Investigation and the Motor Vehicle Enforcement Division of the Department of Safety and the books and records and other materials in the possession of the Attorney General. Municipal Police Department investigative files are not listed. Neither are they included in the numerous statutes classifying described records as being confidential.

710 S.W.2d at 516. Although the Public Records Act underwent some revision after the *Holt* decision, no revisions to the Act have changed the truth of the above quoted portion of *Holt*. Nor did the Victim's Bill of Rights create the exception Jane Doe seeks. Although she relies upon the Victims' Bill of Rights, Jane Doe fails to address the confidentiality provision actually contained in the Victims' Bill of Rights.

In fact, there are a few provisions of the Victims' Bill of Rights that specifically address confidentiality. Those provisions, however, are not nearly as broad as Jane Doe would like them to be. The specific confidentiality provisions state: "any indentifying information concerning a crime victim *received pursuant to this section* shall be confidential," "any identifying information concerning a crime victim *obtained pursuant to this section* shall be confidential," and "any *information received by the victim* relating to the substance of the case shall be confidential." Tenn. Code Ann. §§ 40-38-110(d)(1), -111(i)(1), -114(b) (emphasis added) Obviously, these few provisions concerning confidentiality under the Victims' Bill of Rights do not provide Jane Doe with the relief she is requesting in this case because of their extremely limited nature, such as only providing confidentiality for information "received pursuant to this section."

Jane Doe claims she simply wants the law applied as it is written, however, the three provisions of the Victim's Bill of Rights Act dealing with confidentiality do not provide the remedy she requests. Indeed, she completely ignores the particular provisions of this act dealing

with confidentiality. In the words of Jane Doe, her "silence is telling." (Jane Doe Reply Brief, p. 9). Jane Doe suggests she is not seeking a blanket exemption, but this is exactly what she is seeking. If her argument were to prevail, all alleged criminal victims would be entitled to the anonymity she seeks because the Victim's Bill of Rights does not distinguish between different types of crimes or their victims. *See* Tenn. Code Ann. § 40-30-102(a) (statute applies to, "All victims of crime").

Because the confidentiality provisions of the Victims' Bill of Rights do not exempt the public records at issue from disclosure, Jane Doe then points to that portion of the Bill of Rights which states that she has the right to "[p]rotection and support with prompt action in the case of intimidation or retaliation from the Defendant and the Defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a). Further, Jane Doe relies upon a portion of the Tennessee Constitution stating that she has the right "to be free from intimidation, harassment, and abuse throughout the criminal justice system." Tenn. Const. Art. I, Sect. 35(b). Then, without any support whatsoever, Jane Doe simply assumes that if the public is entitled to access to certain public records, then she will necessarily be subjected to harassment and intimidation. If there is a case where such harassment can be shown, parties can move for a protective order, subject to all the requirements for a protective order. The fact that "good cause" is needed to obtain a protective order, Tenn. R. Crim. P. 16 (a)(1), shows that a complete blanket exception in all cases, as Jane Doe advocates, is improper.

Obviously, when it enacted the Victim's Bill of Rights, the General Assembly knew how to make certain information confidential, and it did so to only a very limited degree. Likewise, the General Assembly knows how to create many exceptions to the Public Records Act because it has created more than 350 exceptions. Yet none of these exceptions support Jane Doe's effort

to restrict public access as she seeks to do in this case. She is trying to have the Victim's Bill of Rights interpreted broadly to create an exception, in much the same manner that the federal law, FOIA, and other states' laws are broadly interpreted. *Schneider*, however, made clear that exceptions to the Public Records Act, unlike FOIA, are to be interpreted narrowly "to give the fullest possible access to public records," Tenn. Code Ann. § 10-7-505(a), because the Public Records Act requires "specific statutory exceptions." 226 S.W.3d at 343.

Further evidence of Jane Doe's effort to create a broadly interpreted exemption is found in her "definition" of what she seeks to keep secret. She cannot define these records with any particularity. She relies upon a vaguely worded request to keep secret "records (i) that are reasonably likely to lead to intimidation, harassment, and abuse, and (ii) whose release is incompatible with treating her with dignity and compassion." (Jane Doe Brief, p. 25). Yet she offers no procedural or substantive framework as to how this vague determination should be made. And she gives no examples of documents that she wants kept secret, other than photography that is already covered by the protective order. Noticeably absent from the Victim's Bill of Rights is any language requiring confidentiality for records "that are reasonably likely to lead to intimidation, etc."

Moreover, Jane Doe's citation to media reports of alleged rape victims in other states being subjected to purported threats contain no suggestion that those threats in any way resulted from the public's access to public records. (Jane Doe Brief p. 23). As the Victims' Bill of Rights indicates, Jane Doe has a right to be protected from intimidation and retaliation from "the defendant and the defendant's agents or friends." Tenn. Code Ann. §40-38-102(a). Obviously, a criminal defendant and his agents or friends have inside information not available to the public. That limited set of individuals would need no access to public records to harass an alleged

victim. Accordingly, Jane Doe has not shown that the public's right of access to public records will result in threats and harassment. She has no more shown that she will subject to threats than she has shown that every alleged crime victim will be subject to threats.

B. Courts should be extremely reluctant to create common law exceptions to the Public Records Act, and have not done so previously

Because the confidentiality provision of the Victims' Bill of Rights does not provide the relief Jane Doe seeks, what she in reality is requesting is that this Court fashion a common law exception to the Public Records Act that would extend beyond existing statutes. As previously noted, the supreme court has never recognized a common law exception to the Public Records Act. *Schneider,* 226 S.W. 3d at 342. The supreme court has noted that the Public Records Act is an "all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity." *Griffin,* 821 S.W.2d at 923. The General Assembly has been so very active in creating exceptions over the past quarter of a century that this Court should be reluctant to make additional exceptions.

In 1987, the Tennessee House of Representative established a Special Committee on Open Records. In February 1988, the committee submitted its report to the House Judiciary Committee and the 95th General Assembly. That report identified 89 separate exceptions to the Public Records Act. *Updating Tennessee's Public Records Law*, 24 Tenn. Bar J. 24, 26 (Sept./Oct. 1988). From 1988 to 2011, the exceptions grew enormously, from 89 to more than 350. Each session of the General Assembly has added approximately eight or nine new exceptions every year.

Open government in general, and open records in particular, continues to be a fertile field for legislative activity. This past session of the 108th General Assembly saw the following bills introduced relating to open records:

Bill	Subject
SB 2073/ HB 2217	School Safety Plans
SB 2263/ HB 2136	Alcoholic Beverage Commission Records
SB 2254/ HB 2361	Sexual Assault Victims
SB 2326/ HB 1944	Bank Information
SB 2117/ HB 2072	Drug Court Information
SB 2570/ HB 2322	Performance Evaluations of Tricore employees
SB/2060/ HB 1821	Lottery winner names

See www.capitol.tn.gov/legislation (last visited May 6, 2014). Despite the enormous and continuous activity the General Assembly has had in the area of open records, including the creation of numerous exceptions relating to law enforcement, the General Assembly has never seen fit to create the sort of blanket exception Jane Doe requests this Court to create.

This past session of the General Assembly expressly addressed the issue Jane Doe asks this Court to address. Of the above listed bills, SB 2254/HB 2361 is of particular significance to this case, and it is attached as Appendix A. This bill provides substantially more confidentiality for an alleged rape victim than provided by the Victims' Bill of Rights. This bill specifically amends the Public Records Act and states in part,

> (A)Identifying information about an alleged victim of a sexual offense under title 39, chapter 13, part 5, including the name, address and telephone number of the alleged victim, shall be confidential. No portion of any report, paper, picture, photograph, video, court file, or other document in the custody or possession of any public officer or employee which identifies an alleged victim of a sexual offense shall be made available for public inspection or copying. No public officer or employee shall disclose any portion of a report, paper, picture, photograph, video, court file or other document which tends to identify such alleged victim, except pursuant to subdivision (a)(24)(B).

Id. As with much proposed legislation, this bill was subject to several amendments reflecting the give and take of compromise to correctly reflect the public policy of this state. Although this bill provides an additional exception to the Public Records Act, it still does not provide the broad blanket exception to the Public Records Act that Jane Doe requests this Court to find. Even if

this bill had been the law when Appellants made their open records requests, Appellants would still be entitled to the requested records with necessary redactions. Tenn. Code Ann. § 10-7-504(f)(2)

Jane Doe is asking the Court to create an exception to the Public Records Act found in neither the Victims' Bill of Rights nor in the recent legislation. Jane Doe is therefore requesting this Court to effectively nullify the acts of the General Assembly and create a common law exception to the Public Records Act. This Court, however, should interpret the law as it is written, not as Jane Doe suggests that it should have been written. Jane Doe's Briefs are in large part an argument to the General Assembly about the wisdom of her position. The General Assembly, however, considered the interests of all affected parties when it created the Public Records Act and its many exceptions, including the recent bill. When the legislature shows itself to be intensely interested in refining open government law, the courts should be reluctant to encroach upon this legislative effort.

In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the supreme court affected one of the most significant changes in the common law of this state when it adopted the comparative fault system. The *McIntyre* court first observed that contributory negligence had been a part of this state's common law since the creation of this state, because contributory negligence was part of the English common law brought to this country when this country was formed. *Id.* at 54. Therefore, in eliminating more than 200 years of common law precedent, the supreme court was compelled to address the contention that it should not change the system if the General Assembly did not see fit to do so. The supreme court stated:

> However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those, such as contributory negligence, conceived in the judicial womb. Indeed, our abstinence would sanction "a mutual state of inaction

> in which the court awaits action by the legislature and the legislature awaits guidance from the court."

Id. at 56. (citations omitted).

The Public Records Act was never "conceived in the judicial womb." Rather, it is entirely a creation of the General Assembly. Moreover, the concern in *McIntrye* about legislative inaction clearly does not apply with respect to open records. The General Assembly has been extremely active with respect to open records. Therefore, because the Public Records Act is solely the creation of the General Assembly, and because the General Assembly has shown itself to be extremely active in the modification, revision, and creation of new exceptions for the Public Records Act, it would be improper for the courts of this state to create the common law exception Jane Doe seeks.

Even after the Public Records Act 1991 amendment, the supreme court reaffirmed one of the principles of its 1986 decision in *Holt*: "It is the prerogative of the legislature to declare the policy of the State touching the general welfare. And where the legislature speaks upon a particular subject, its utterance is the public policy . . . upon that subject." *Tennessean*, 979 S.W.2d at 305, *quoting Holt*, 710 S.W.2d at 517. Jane Doe's request for a judge-made exception to the Public Records Act is completely contrary to all the Tennessee Supreme Court's relevant decisions and the General Assembly's intent.

C. There is no constitutional right to the exception Jane Doe seeks

Because there is no support in the Victims' Bill of Rights or common law, Jane Doe is asking this Court to find or create a constitutional right that has never been found to exist before. She is seeking a constitutional exception that would seal all records related to any alleged victims of any crime. Although she makes this request in the context of a sex crime, her request to this Court contains no basis in constitutional authority for why such an exception would not

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been mailed, by placing in the U.S. Mail, postage paid to:

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on this the 15th day of May 2014.

Douglas R. Pierce

APPENDIX A

SB 2254/HB 2361

SENATE BILL 2254

By Massey

AN ACT to amend Tennessee Code Annotated, Title 10, Chapter 7, Part 5 and Title 16, Chapter 3, Part 4, relative to public records.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 10-7-504(a), is amended by adding the following language as new subdivision (24):

(24)

(A) Identifying information about an alleged victim of a sexual offense under title 39, chapter 13, part 5, including the name, address, and telephone number of the alleged victim, shall be confidential. No portion of any report, paper, picture, photograph, video, court file, or other document in the custody or possession of any public officer or employee which identifies an alleged victim of a sexual offense shall be made available for public inspection or copying. No public officer or employee shall disclose any portion of a report, paper, picture, photograph, video, court file or other document which tends to identify such alleged victim, except pursuant to subdivision (a)(24)(B).

(B) Subdivision (a)(24)(A) shall not be construed to prohibit disclosure of personal information:

(i) To any person pursuant to a court order requiring release under § 10-7-505;

(ii) To any person upon application, notice to the district attorney general, good cause shown and approval by the criminal court where charges relating to the incident are filed or may be filed;

(iii) To any person or agency upon written consent of the alleged victim or other person legally responsible for the care of the alleged victim;

(iv) By a law enforcement agency, acting in accordance with its written policies, to further the interests of public safety or a criminal investigation; or

(v) By the district attorney general of the judicial district in which the alleged offense occurred, and any person to whom such district attorney general, in the discretion of the district attorney general, chooses to release the information, including counsel for a criminal defendant charged with the offense or a related offense; however, counsel for a criminal defendant shall not disclose any personal information about the alleged victim, other than the name of the alleged victim, to the defendant or any other persons unless granted leave to do so by the district attorney general or a court of competent jurisdiction.

(C) A court, authorizing the release of information under this part, may order any restrictions upon the disclosure authorized in subdivision (a)(24)(B)(i), as it deems necessary and proper.

(D) Nothing contained in this subdivision (a)(24) shall be construed to require a court to exclude the public from any stage of a civil or criminal proceeding.

(E) Nothing contained in this subdivision (a)(24) shall be construed to affect or limit the confidentiality provisions of § 37-1-612 or § 37-1-409.

SECTION 2. Tennessee Code Annotated, Section 16-3-406, is amended by adding the language ", including title 10, chapter 7," immediately after the word "laws".

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.