IN THE COURT OF APPEALS FOR TENNESSEE AT NASHVILLE

ALEX FRIEDMANN, Individually and as a Managing Editor of Prison Legal News, Petitioner / Appellant.	)	
v.	)	Case No. M2014-01413-COA-R3-CV
MARSHALL COUNTY, Joe Boyd Liggett, County Mayor, acting by and through the MARSHALL COUNTY SHERIFF'S DEPARTMENT, Norman Dalton, Sheriff, Respondents / Appellees.	)	

BRIEF OF APPELLANT

Rule 3 Appeal from the Final Judgment of the Chancery Court
for Marshall County, Case No. 17017

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(a) Whether the trial court applied an incorrect legal standard in holding that a records custodian's requirement of personal appearance prior to disclosure of public records does not constitute a “denial” or refusal to disclose those records as contemplated by the Tennessee Public Records Act.

(b) Whether the trial court's finding that the actions of the Respondent did not constitute a “denial” or refusal to disclose is supported by the evidence.

ISSUE TWO: Whether the trial court erred in holding that Respondent's actions were not “willful” as contemplated by the Tennessee Public Records Act.

(a) Whether the trial court applied an incorrect legal standard in holding that a records custodian's refusal to disclose public records is not “willful” if predicated upon the advice of counsel, even when such reliance is unreasonable.

(b) Whether the trial court's finding that the Respondent relied upon the advice of counsel is supported by the evidence.

ISSUE THREE: Whether the trial court erred in failing to award to Petitioner all of the reasonable costs and attorneys fees pursuant to the Tennessee Public Records Act.

STATEMENT OF THE CASE

Petitioner, Alex Friedmann, filed a Petition for Access and to Show Cause with the Marshall County Chancery Court on May 16, 2014. R. 1-34. A trial in this matter was held on June 4, 2014. R. 52. Chancellor J.B. Cox entered a Memorandum Opinion and Order on June 16, 2014. R. 35-46. Petitioner's timely notice of appeal was filed on July 16, 2014. R. 48-50.

STATEMENT OF THE FACTS

Petitioner, Alex Friedmann, is a citizen of Tennessee who works as a journalist and managing editor with the Prison Legal News organization. Ex. 1; R. 8, 69.

This case commenced with a written request for public records, prepared by Petitioner and mailed to Respondent on February 3, 2014. R. 8-9, 56. Petitioner asked that the requested records be provided in electronic format. R. 9.

On February 10, 2014, Respondent denied Petitioner's request in writing and insisted that Petitioner make his request “in person”. R. 10, 58.

On February 19, 2014, Petitioner contacted Respondent to clarify that he intended for the requested records be provided by mail or in electronic format via email. R. 11, 59. Responded replied on February 21, 2014, and again “insist[ed] that [Petitioner] make these request[s] in person.” R. 13, 59.

On February 21, 2014, Petitioner renewed his request for the records. Petitioner informed Respondent that Tennessee law does not require persons requesting access to public records do so “in person”. R. 14, 59. Petitioner also advised Respondent that the Office of Open Records Counsel (OORC) had directly addressed this issue, stating that citizens are not required to make a request to inspect or receive copies of records in person. *Id*. Petitioner further directed Respondent to view the OORC's position on this matter in the FAQ section of the OORC's website and helpfully provided the URL for the FAQ concerning personal appearance. *Id*.

On February 27, 2014, Respondent again denied the Petitioner's request and insisted that Petitioner was required to make his request “in person”. R. 15. This time, though, the Respondent added a condition requiring Petitioner to fill out a form. R. 15, 61. Respondent further instructed Petitioner to direct “legal questions” to the attorney for the Respondent Marshall County, County Attorney William Haywood. *Id*.

On March 12, 2014, Attorney Elisha Hodge, Tennessee Open Records Counsel, contacted the County Attorney and informed him that Respondent's position was contrary to established Tennessee law. R. 19-20, 61-62. Ms. Hodge stated that "[t]he courts in Tennessee have held for a number of years now that a citizen does not have to appear in person in order to make a public records request" and cited extensive case law substantiating the same. *Id*. Ms. Hodge reiterated that "there has been no court that has held that a citizen has to appear in person in order to make a public records request." *Id*. In an attempt to resolve the matter amicably, Ms. Hodge suggested that Respondent accept a signed copy of Respondent's form, along with a photocopy of his identification, by mail and proceed with processing Petitioner's request without requiring that Petitioner show up in person. *Id*.

On March 14, 2014, the in-house counsel for the Prison Legal News, Human Rights Defense Center Staff Attorney Robert Jack, sent a correspondence to Mr. Haywood. R. 17-20, 61-62. Mr. Jack reiterated Petitioner's request for public records and referenced Ms. Hodge's stance on the matter. *Id*. Further, Mr. Jack pointed out that continued refusal to comply with the request may subject Respondent to liability for attorney's fees under Tenn. Code Ann. § 10-7-505(g). *Id*.

On March 19, 2014, Mr. Haywood responded to Mr. Jack with a letter, wherein he stated that Mr. Jack had "misinterpret[ed]" the law and that Respondent was "only obligated to make [the records] available for public inspection." R. 21, 62. Mr. Haywood reiterated Respondent's insistence that Petitioner or his counsel must physically "come to Marshall County". *Id.* Mr. Haywood made no reference to Ms. Hodge's assessment of the situation. *Id*.

On March 24, 2014, Petitioner again renewed his request for the records. R. 22-29, 63. Petitioner's renewed request contained a completed copy of Respondent's form, along with a photocopy of Petitioner's drivers license, and explicitly stated that Petitioner requested the records be sent to him via mail or email. *Id*.

Respondent failed to respond to the March 24, 2014, request within the seven (7) day requirement of Tenn. Code Ann. § 10-7-503(a)(2)(B).

On April 9, 2014, Petitioner contacted Respondent, renewing his request and seeking a response. R. 30, 64.

Respondent failed to respond to the April 9, 2014, request within the seven (7) day requirement of Tenn. Code Ann. § 10-7-503(a)(2)(B).

On April 11, 2014, Petitioner contacted Respondent, renewing his request and seeking a response. R. 31, 65.

Respondent failed to respond to the April 11, 2014, request within the seven (7) day requirement of Tenn. Code Ann. § 10-7-503(a)(2)(B).

On April 17, 2014, Petitioner contacted Respondent, renewing his request and seeking a response. R. 32, 65. Petitioner also notified Respondent that the OORC had issued a formal opinion, dated April 15, 2014, in which Ms. Hodge stated conclusively that:

> to the extent that a requestor is able to sufficiently identify the records for which copies are being requested and has paid all necessary copying, labor and delivery fees associated with producing the requested copies, the requestor is not required to appear in person either to submit a public records request or retrieve the requested records.

R. 33-34, 65.

On April 22, 2014, Respondent again denied Petitioner's request and directed Petitioner to address any further concerns with the County Attorney for Respondent Marshall County, Mr. Haywood. R. 65, 74.

Petition

On May 16, 2014, Petitioner filed a Petition for Access and to Show Cause with the Marshall County Chancery Court. R. 1-34.

Trial

The trial of this case was conducted on June 4, 2014. R. 52. Mr. Haywood represented Respondent at this hearing. *Id*. In opening statements, Mr. Haywood pointed out that Tenn. Code Ann. § 10-7-503 requires proof of residency from a requesting party. *Id*. Mr. Haywood stated his intent to prove to the court that Petitioner had provided as proof of residency a driver's license with an address that was a postal annex post office box. *Id*. Mr. Haywood asserted that Petitioner's request for public records had been denied because Petitioner had failed to provide adequate proof of residence. *Id*. Mr. Haywood assured the court that Respondent would be more than happy to supply the requested documents should Petitioner satisfactorily prove his residence in Tennessee. *Id*. At no time during his representations to the court in opening statements did Mr. Haywood state that Petitioner's request had been denied for failure to make the request in person. *Id*.

Attorney Robert Dalton represented Petitioner at trial. The Petitioner's counsel made clear that neither he nor Petitioner had ever been informed of any issue of residency until the day of the hearing. R. 53. Petitioner's counsel pointed out that Tenn. Code Ann. § 10-7-503 requires reasons for denial to be put into writing. *Id*. Counsel maintained that in every written denial provided by Respondent the only reason that was ever given for denial was that Petitioner must appear in person. *Id*. Petitioner's counsel concluded that the intent of the written denial requirement is to prevent exactly the type of goal-shifting that Respondent was attempting by claiming a different reason for denial than that which was previously stated in writing. *Id*.

Testimony of Sheriff Norman Dalton

The first witness to testify at the hearing was Respondent and Marshall County Sheriff Norman Dalton.[1] R. 53. Respondent testified under direct examination that he initially denied Petitioner's request for public records on the basis of his opinion that requestors had to show up in person. *Id*. Respondent testified that Petitioner eventually mailed to Respondent a completed request form and a photocopy of Petitioner's driver's license. R. 54. Respondent testified that the address on the driver's license provided by Petitioner was 5331 Mount View Road, Number 130, Antioch, Tennessee. *Id*. Respondent claimed that upon receipt of Petitioner's driver's license, Respondent questioned the address on the license. *Id*. Respondent testified that, after he was served with the Petition for Access and to Show Cause, he drove to the address on the driver's license to discover that it was a postal annex drop box in Antioch, Tennessee. R. 54, 57-58. Mr. Haywood entered into evidence photographs taken by Respondent of the interior and exterior of the postal annex building. R. 54; Ex. 2. Next, Respondent testified that he denied Petitioner's public records request based on his discovery regarding the address on Petitioner's driver's license. R. 55. Respondent further testified that he contacted the Department of Safety and Homeland Security to initiate an investigation of Petitioner. *Id*.

At this point in the proceedings, Petitioner's counsel, Attorney Robert Dalton cross-examined Sheriff Norman Dalton. Sheriff Dalton testified that the basis for his denial of the original February 3 request for public records was his impression of the law that requestors had to show up in person and initiate a request by filling out a form. R. 57-58. Respondent further testified that his final denial from April 22 was also based on his belief that requestors had to make requests in person. R. 58, 65. Additionally, Respondent testified that each and every denial between February 3 and April 22 was based solely on his belief that requestors must show up in person. R. 59, 61-63.

1 Attorney Robert Dalton serves as counsel for the Petitioner. Sheriff Norman Dalton is a Respondent. For the sake of clarity, this brief shall attempt to confine the use of the term “Mr. Dalton” to refer exclusively to Sheriff Norman Dalton.

Sheriff Dalton clarified that no issue concerning the Petitioner's residency had ever arisen until after Respondent was served with the Petition for Access and to Show Cause. R. 57-58. In fact, Sheriff Dalton explained, the issue of residency never arose until approximately one (1) week before the trial date of June 4, 2014. R. 57. Sheriff Dalton further admitted that neither Petitioner nor his counsel had ever been placed on notice of any issue concerning residency until the morning of the trial on June 4. R. 67.

Respondent testified that Petitioner's original February 3 request stated Petitioner's address as 5331 Mount View Road, Number 130, Antioch, Tennessee. R. 56-57. When presented with this address on February 3, Respondent indicated that his basis for denial at that time was that requestors of public records had to show up in person to lodge a request. R. 57-58. Respondent acknowledged that Petitioner renewed his request for public records on March 24, 2014, to include a completed request form and a photocopy of Petitioner's driver's license. R. 63.

Despite the address on Petitioner's driver's license being the same as the one provided in Petitioner's original February 3 request, Respondent testified that the address on the license appeared out of the ordinary. R. 55. Respondent testified that the address on Petitioner's driver's license appeared to be an apartment. *Id*. Respondent testified that if the identification provided by a requestor had a physical address that he believed to be the requestor's true address, he would provide the requested records without verifying the address. R. 55-56. However, even though Petitioner's driver's license had what appeared to be a physical address, Respondent testified that it roused his curiosity, prompting him to personally drive to Antioch to investigate. R. 55, 57. Respondent further testified that he did not initiate his investigation of Petitioner's address until after he was served with Petitioner's Petition for Access and to Show Cause. R. 57, 67-68.

When questioned further about Petitioner's driver's license and the address thereon, Respondent found nothing facially wrong with it. R. 65-66. Nevertheless, Respondent insisted that he would only release records to a requestor after investigating the address on the requestor's license, even if the license appears facially valid. R. 66.

Sheriff Dalton explained that he would not release records to a person he did not personally know without first interrogating the requestor. R. 66. In this particular case, Respondent also revealed that he found the fact that Petitioner is an ex-convict to be pertinent in his determination of whether to release the requested records to Petitioner. R. 60.

Respondent testified that he was notified as early as February 21, 2014, of the OORC's stance on the issue of requiring requestors to show up in person. R. 59, 61-65. Respondent acknowledged that the OORC had contacted Mr. Haywood directly in an effort to provide guidance on the issue of whether requestors must show up in person. R. 64. Respondent further recognized that on April 17, 2014, Petitioner notified him that the OORC had issued a formal opinion firmly establishing that requestors do not have to show up in person, either to make a request or to receive the requested records. R. 65. Despite such repeated notice, Respondent testified that he elected to rely on Mr. Haywood's opinion that the OORC had misquoted the law. R. 61, 65.

Testimony of Alex Friedmann

The next witness to testify at the hearing was the Petitioner, Alex Friedmann. Petitioner testified that, regardless of the address on his driver's license, he was a resident of the State of Tennessee at all times that he made a request for public records from Respondent. R. 68. Petitioner testified that no one had informed him that there may be an issue with his residency until immediately prior to the hearing on June 4, 2014. *Id*. Petitioner further testified that neither Respondent nor Respondent's counsel, Mr. Haywood, had ever asked him for his identification and that he only provided it because it was an item on Respondent's form. *Id*.

Conclusion

In closing arguments, Mr. Haywood provided the trial court with several interpretations of the Tennessee Open Records Act. R. 71. Mr. Haywood revealed that, upon receiving the OORC's opinion from Petitioner's attorneys, he discovered that the case law did not require requestors to appear in person. *Id*. Mr. Haywood further disclosed that he “came up with” his theory regarding Petitioner's residency after it became clear that his stance on personal appearance was contrary to established law. *Id*. Further, Mr. Haywood stated that Tenn. Code Ann. § 10-7-503 places an affirmative duty upon Respondent to prove the requestor's residency. *Id*. Mr. Haywood reiterated that Petitioner's failure to prove residency was the current basis for denial. *Id*.

Petitioner's counsel pointed out that none of Respondent's denials prior to the June 4 hearing had anything to do with Petitioner's residency and that such a *post hoc* rationalization could not be raised for the first time on the day of the hearing. R. 71. Mr. Dalton maintained that all of Respondent's denials required Petitioner to show up in person so that he might be subjected to interrogation. R. 72. All of these measures being expressly forbidden by statute and case law, Mr. Dalton stated that Respondent's actions were in bad faith and that, as such, Petitioner should be awarded fees. *Id*.

Thereafter, the Chancellor took the matter under advisement. R. 72. The trial court rendered an opinion order disclosure of the public records but denying fees on June 13, 2014. R. 46. This appeal timely followed. R. 48.

ARGUMENT

I. Standard of Review

Tenn. Code Ann. § 10-7-505(g) provides that the trial court has discretion regarding whether it will assess costs and fees in cases involving the Tennessee Public Records Act (TPRA). *Little v. City of Chattanooga*, No. E2013-00838-COA-R3-CV, at *4 (Tenn. Ct. App. Feb. 14, 2014). Discretionary decisions must take the applicable law and the relevant facts into account. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence. *Id.*

When called upon to review a lower court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness. *Lee Med.*, 312 S.W.3d at 525.

Where no findings of fact are made, however, there is nothing in the record upon which the presumption of correctness set forth in Tennessee Rule of Appellate Procedure 13(d) can attach, and the reviewing court should review the record de novo without a presumption of correctness. *Devorak v. Patterson*, 907 S.W.2d 815, 818 (Tenn. Ct. App. 1995); *Little*, E2013-00838-COA-R3-CV, at *5.

II. Introductory Background

The public's right of access to records of governmental agencies under the Public Records Act is very broad. *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).

Tenn. Code Ann. § 10-7-503(a)(2)(A) declares 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."

Tenn. Code. Ann. § 10-7-505(d) is even more strident, requiring that

> "this section shall be broadly construed so as to give the fullest possible public access to public records."

Additionally, Tennessee courts have long recognized the right of the public to examine governmental records. In fact, Tennessee courts were faithful to the doctrine of public access even before the General Assembly codified the doctrine by enacting the Public Records Act in 1957. *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007).

The governmental transparency created by the decisions of both the General Assembly and our courts serve the long and well-established public policy of the state of Tennessee. Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee. *Id.*

Tennesseans who are denied access to governmental records have the right to file a petition in court and "to obtain judicial review of the actions taken to deny the access." Tenn. Code Ann. § 10-7-505(a). At the hearing on such a petition, the governmental entity bears the burden of proof and must justify nondisclosure of the record by a preponderance of the evidence. Tenn. Code Ann. § 10-7-505(c). Thus, unless an exception is established, Tennessee courts must require disclosure "even in the face of serious countervailing considerations." *Memphis Publ'g*, 871 S.W.2d at 684.

The TPRA also makes it possible for a petitioner to recover the attorney fees and costs it incurs in the process of judicially compelling a governmental entity to comply with the provisions of the Act. *The Tennessean v. City of Lebanon*, No. M2002-02078-COA-R3-CV, at *4 (Tenn. Ct. App. Feb. 13, 2004). The reason for this legislative exception to the general "American" rule that each party pays its own attorney fees is to discourage wrongful refusals to disclose public documents. *Id.* It also recompenses a party who has been required to expend time and money to enforce the public's right to access to public documents. *Id.* Consequently, the awarding of attorney fees and costs to successful petitioners furthers the purpose of the Act. *Id.*

> "If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity."

Tenn. Code Ann. § 10-7-505(g).

Thus, a court may award all reasonable costs and attorney fees to a petitioner if:

> (1) the records in question are public records,
>
> (2) the governmental entity refuses to disclose the records, and
>
> (3) the refusal to disclose the records was willful.

We shall now examine the relevance of each of these factors as applied to the instant case.

III. The Records in Question in the Instant Case are Public Records

The records requested by the Petitioner in this case are incontrovertibly public records. As the trial court noted in its Order:

> "Initially, it must be noted that there is apparently no objection made to the content of the records themselves being available to be inspected under the statute. There is apparently no debate that the records in question are of a nature that they are subject to being turned over to a requestor when an open records act request was made. There was no argument of any kind before the Court questioning whether the records were in fact public records and were subject to the act. The Court will act accordingly."

R. 44 ¶ 1.

IV. The Governmental Entity Refused to Disclose the Records

The instant case involves only one set of records requests, but that one set was filed by Petitioner, denied by Respondent, and renewed by Petitioner many times. For ease of reference, the following table summarizes the timeline of the renewed requests and denials:

Request Date	Response Date	Response Type	Response Reason
02/03/14	02/10/14	Denial	"You may come to our facility and **personally** request the information your requesting **in person** … We … can help you **in person**." R. 10.
02/19/14	02/21/14	Denial	"I have spoke with the Sheriff and he insist that you make these request **in person**." R. 13.
02/21/14	02/27/14	Denial	"I have discussed with the Sheriff of your emails. I am forwarding you our form that must be filled out and signed **in person** to obtain records." R. 15.
On March 12, 2014, Elisha Hodge, Open Records Counsel for the Office of Open Records Counsel, personally informs Respondent that the requirement of personal appearance is illegal.			
03/14/14	03/19/14	Denial	"We are more than willing for Mr. Friedmann … to **come to Marshall County** for inspection." R. 21.
03/24/14	None	Denial	Denial by silence. Tenn. Code Ann. § 10-7-503(a)(3)
04/11/14	None	Denial	Denial by silence. Tenn. Code Ann. § 10-7-503(a)(3)
04/17/14	04/22/14	Denial	"We were going on the Open Records Act that they had to show up **in person**." R. 65.

ISSUE ONE: The Trial Court Erred in Holding that Respondents did not "Deny" or "Refuse To Disclose" Public Records as Contemplated by the Tennessee Public Records Act

In spite of the very clear and well-documented factual record with regard to the Respondent's refusal to disclose these documents, the trial court held that Respondents did not "deny" or "refuse to disclose" the public records at issue in the instant case until after the renewed request on March 24, 2014. The trial court's error in this regard results from two primary constituent errors. First, the trial court applied an incorrect legal standard. Second, the trial court based its decision on a clearly erroneous assessment of the evidence.

ISSUE ONE § (a): The Trial Court Applied An Incorrect Legal Standard In Holding That A Records Custodian's Requirement Of Personal Appearance Prior To Disclosure Of Public Records Does Not Constitute A "Denial" Or Refusal To Disclose Those Records As Contemplated By The Tennessee Public Records Act.

(i) The Failure of the Trial Court to Follow Existing, Controlling Case Law

The courts in Tennessee have held for a number of years now that a citizen does not have to appear in person in order to make a public records request. R. 33-34. In fact, as early as 1999 – fifteen (15) years before the litigation in the instant case! – this Court, in *Waller v. Bryan*, 16 S.W.3d 770, 773-774 (Tenn. Ct. App. 1999), explained that

> "If the citizen requesting inspection and copying of the documents can sufficiently identify those documents so that [records custodians] know which documents to copy, a requirement that the citizen must appear in person to request a copy of those documents would place form over substance and not be consistent with the clear intent of the Legislature. The adoption of the [contrary] position would mean that any citizen who was unable to personally appear before the records custodian would be unable to obtain copies of the documents pursuant to the Public Records Act. This restriction would prohibit all Tennessee citizens who are unable, because of health reasons or other physical limitations, to appear before the records custodian from obtaining copies of public documents pursuant to the Public

> Records Act. ***Such a result is not consistent with the clear intent of the Legislature, and this Court will not interpret this statute in such a way as to prohibit those citizens, or those citizens incarcerated, from the rights provided by the Public Records Act."***

(emphasis added).

In 2006, the Tennessee Attorney General supported the *Waller* holding in a formal opinion, concluding that "Tennessee courts have held that a citizen's personal presence is not required in order to request copies of a public record". Op. Tenn. Att'y Gen. No. 06-069 (Apr. 12, 2006).

This Court's opinion in *Waller* is the leading case on this issue in the state of Tennessee. This Court's opinion in *Waller* has been the leading case on this issue in the state of Tennessee since it was first penned in 1999. Or, in other words, as this Court itself so clearly and succinctly phrased the issue over a decade ago,

> "*Waller* is controlling authority."

Jones v. Crumley, No. E2003-01598-COA-R3-CV, at *3 (Tenn. Ct. App. Sep. 20, 2004).

Indeed, *Waller's* holding that records custodians cannot require personal appearance is so well-established and routine that the Office of Open Records Counsel even has a "Frequently Asked Question" (FAQ) dedicated to the issue.[2]

The trial court's Order in the instant case frequently touches upon the legal standard that is applicable to a requirement to personally appear before a records custodian. In every instance, though, the trial court's Order applies an incorrect legal standard.

2 Office of Open Records Counsel, *Frequently Asked Questions*, Question No. 16, http://www.comptroller.tn.gov/openrecords/faq.asp (last accessed December 15, 2014).

In response to the Petitioner's first request on February 3, 2014, the Respondent said,

> "I am writing you in regards of you public records request. You may come to our facility and personally request the information your requesting in person. You may request this information on Monday thru Friday between 8am and 4pm. We have this information at the jail and can help you in person."

R. 10.

The Tennessee Public Records Act (TPRA) only allows for three possible types of responses by a record custodian to a request for public records:

(i) Make the information available to the requestor;

(ii) Deny the request in writing … The response shall include the basis for the denial; or

(iii) Furnish the requestor a completed records request response form developed by the office of open records counsel …

Tenn. Code Ann. § 10-7-503(a)(2)(B).

Any other action, or lack thereof, constitutes – by operation of law – a denial under the provisions of Tenn. Code Ann. § 10-7-503(a)(3).

The issuance of a denial is very important to the procedural mechanisms of the TPRA. No judicial review of the actions of the governmental entity is available until the requestor has first been "denied". Tenn. Code Ann. § 10-7-505(a).

The Respondent's first letter merely insisted that Petitioner personally appear and did not contain any disclosure of public records. Thus, the response did not "make the information available to the requestor" and Respondent's first letter clearly does not fall within subsection (a)(2)(B)(i). Respondents' first letter was also assuredly not a "completed records response form developed by the" OORC. Thus, Respondents' first letter clearly does not fall within subsection (a)(2)(B)(iii). There exists only one other category, subsection (a)(2)(B)(ii) … "Denial".

As this Court explained in *Contemporary Media, Inc., v. City of Memphis*, No. 02A01-9807-CH00211, at *4 (Tenn. Ct. App. May 11, 1999), "[n]ot every refusal to disclose a public record is wrongful". In fact, there are many valid reasons for denial of various records, including a large number of statutory exemptions. In order to prevent *post hoc* attempts to fabricate bases for denial, however, the TPRA requires that a valid denial "shall include the basis for the denial". Tenn. Code Ann. § 10-7-503(a)(2)(B)(ii).

So … Did the Respondents' first letter on February 10th properly include a basis for denial? Yes, indeed it did. In fact, the letter is quite clear that Petitioner was being denied because the records custodian required that he "personally" appear and make his request "in person".[3] R. 10.

So far, so good … right? First, a requestor made a request for disclosure of certain records. Then, a records custodian issued a denial that complied with the statutory regime by (1) responding within seven business days, (2) issuing the denial in writing, and (3) including in the denial a basis for the denial.

So, the existing statutory regime is working pretty well at this point. Everyone has complied with their statutory duties. As a result, both the requestor and the records custodian know where they stand on resolving the denial. Additionally, they both know the alleged basis for the actions of the other party.

So, now, everyone may still be arguing about whether or not the denial was justified, but we can at least move forward to figure out if the denial was justified or not … right? Wrong.

The procedural mechanisms of the TPRA that allow the resolution of the issue to move forward only work if the requestor has been "denied". In the instant case, the trial court held that the refusal to disclose records in the absence of personal appearance did not constitute a "denial".

3 The very stark difference between the actual evidence and the trial court's findings of fact will be discussed in the sections below.

The trial court ignored the existing statutory categorization of custodian responses and created an entirely new category that does not exist within the Tennessee Public Records Act. The trial court says that

> "[t]he Sheriff …. proposed that Mr. Friedmann come down in person to review the records and to receive copies of the records. This is not a denial as contemplated by the statute."

R. 44 ¶ 2.

Instead of a "denial" under Tenn. Code Ann. § 10-7-503(a)(2)(B)(ii), the trial court creates a new category, a sort of "conditional" non-denial.

In the trial court's formulation, the request is never actually "denied" so long as the records custodian makes any sort of response that includes "conditions" upon disclosure, even where those conditions are wholly unlawful. This, the trial court says, is "sufficient to spark further conversation and renewed requests." R. 44.

In this new category, the requestor becomes a sort of "Charlie on the M.T.A."[4] with respect to the public records. The requestor never gains access to the records, but the request also isn't "denied" for purposes of § 505(a). So, the requestor is on a procedural train that is going in circles and yet "can't get off of that train".[5]

In this formulation, no public records are ever actually disclosed, but they might (possibly) be disclosed (maybe) at some (unknown) time in the future, if the requestor agrees to comply with some additional "conditions" (that are unauthorized by statute, wholly unlawful, and arbitrarily required by the records custodian).

4 *See, e.g., The Kingston Trio - "M.T.A."*, https://www.youtube.com/watch?v=aP1bvY7IqZY (last accessed December 15, 2014).

5 The failure of Charlie's wife to include a nickel in the package with the sandwich is mysterious. After all, she delivers such a package to Scollay Square Station every day. The quality of the sandwiches is itself questionable, though, since Charlie is also apparently unable to trade one of the sandwiches to a fellow passenger for a nickel.

And, worse yet, since requestor has not been "denied" by the records custodian, requestor has no right to judicial review. Tenn. Code Ann. § 10-7-505(a).[6]

The trial court applies this incorrect legal standard repeatedly throughout its factual and legal analysis of the events prior to March 24, 2014. Speaking of the Petitioner's February 21st request, the trial court's Order maintains that

> "14. … Ms. Wright responds to Mr. Friedmann's email informing him that the Sheriff insisted that he come to the jail for the records.
> 15. This email does not deny Mr. Friedman the records, but imposes a condition that he come to the jail for them."

R. 36. Then, speaking of Petitioner's February 27th request, the trial court says,

> "22. … She communicated to him that he must sign the form in person to obtain the records ...
> 24. This response does not deny Mr. Friedmann the record, but it implicitly imposes a condition that he be present to sign the Sheriff's form."

R. 37.

As a result of its applying an incorrect legal standard, the trial court ultimately found that Respondents had not "denied" or "refused to disclose" any public records until approximately the first week of April 2014, in spite of the fact that Petitioner had been constantly seeking access to those records since February 3, 2014. If the correct legal standard is applied – as required by Tenn. Code Ann. § 10-7-503(a)(2) – then every response in the instant case constituted a "denial" or "a refusal to disclose" from February 10th until the date of trial.

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6 Indeed, if the incorrect legal standard that was applied by the trial court in the instant case had been applied in *Waller,* then there could never have been a *Waller* in the first place. Randall Bradford Waller was an inmate in a Tennessee prison. He mailed a request for disclosure of public records to the records custodian for the Chattanooga Police Department in 1998. He was denied and sought judicial review of the denial. On appeal, the records custodians argued that they should be able to deny Mr. Waller's request since he could not appear in person. If the record custodians in *Waller* had prevailed, then Mr. Waller would have been systematically denied his right to access public records, but he would have maintained his right to seek judicial review of those denials. In the instant case, though, the trial court's applied legal standard would have barred Mr. Waller from the courthouse entirely. If a requirement of personal appearance by a records custodian "is not a denial as contemplated by statute", R. 44 ¶ 2, then the Chattanooga Police Department could have merely sent Mr. Waller back a letter "inviting", *Id.*, him to come down and file his records request in person. The police could have, thereby, actually denied Mr. Waller's access to the public records and, perversely, not legally "denied" Mr. Waller in such a way as to allow him access to judicial review.

(ii) Failure of the Trial Court to Comply with Tenn. Code Ann. § 10-7-505(d)

In artificially and erroneously narrowing the application of the terms “denied” and “denial”, the trial court violated the provisions of Tenn. Code Ann. § 10-7-505(d), which requires that

> “this section shall be broadly construed so as to give the fullest possible public access to public documents.”

As it happens, this section contains the very subsection 505(a) that makes the definition and application of the terms “denied and “denial” so important to the proper functioning of the TPRA.

The trial court was required by the plain language of the statute to “broadly construe” the terms contained within § 505. The trial court, however, failed to broadly construe the terms “denied” and “denial”. Indeed, the trial court actually did the complete opposite and construed one of the terms contained in § 505 so narrowly that the judicial review provided for within subsection 505(a) would be nullified as a practical reality.[7]

Even worse, in this instant case, the trial court held that the inclusion of a “condition” was sufficient to avoid finding a “denial” even when the condition in question was wholly unlawful and had been explicitly rejected by a Tennessee appellate court.

As discussed above, the trial court failed to apply the proper case law to the issue and failed to broadly construe the terms “denied” and “denial” in this case. The trial court's Order applied an incorrect legal standard that is not and has not been the law of the state of Tennessee.

Having discussed the incorrect application of law, let us now turn our attention to the factual basis for the trial court's assertion that Petitioner was not “denied” until after March 24, 2014.

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7 Under the trial court's construction of the term “denied” no rational records custodian would ever have to face judicial review of their denials. As long as the custodian responded within the seven days required by § 503, and included some additional, arbitrary hoop through which the requestor must first jump, the courthouse doors are closed to the requestor. In the meantime, the custodian need not release any records and has no liability for costs and fees.

ISSUE ONE § (b) The Trial Court's Finding that the Actions of the Respondent did not Constitute a "Denial" or Refusal to Disclose is not Supported by the Evidence.

The trial court's finding that Respondent's actions did not amount to "denials" is not supported by the facts and its holding is based upon a clearly erroneous assessment of the evidence.

In each instance in which the trial court claims that the actions of Respondents did not constitute a denial or refusal to disclose, the evidence shows that Sheriff Dalton intended and believed otherwise.

Regarding the February 10, 2014, denial, the trial court stated that "[t]he Sheriff …. proposed that Mr. Friedmann come down in person to review the records and to receive copies of the records. This is not a denial as contemplated by the statute." R. 44 ¶ 2.

Sheriff Dalton's testimony directly contradicts this holding no less than three times. First, on direct:

> "Q: When you received that request, did you initially deny it?
>
> A: I did.
>
> Q: For what reason?
>
> A: It was my opinion that they had to show up in person."

R. 53. Then, on cross-examination,

> "Q: So when he first sent you this request on February 3, and you denied it, telling him he had to come there in person, what was the basis for your denial at that time? Was it the one you said in writing or was it something else?
>
> A: The reason for the first denial was my impression of the law that they had to show up in person and request by filling out a form and putting down what records they're requesting, and they view those records, and what records we can allow them to have."

R. 57. And, shortly thereafter,

> "A: The initial denial was my interpretation of the law."

R. 58. At no time does Sheriff Dalton claim that the February 10, 2014, response was anything but a clear and explicit denial.

Next, the trial court found that the February 21, 2014, response was not a "denial":

> "Ms. Wright responds to Mr. Friedmann's email informing him that the Sheriff insisted that he come to the jail for the records. This email does not deny Mr. Friedman the records, but imposes a condition that he come to the jail for them."

R. 36 ¶ 14-15.

And, again, Sheriff Dalton's testimony does not support the trial court's finding:

> "Q: On February 21st, Mr. Friedmann reminds your staff to follow up with him, and Terry Wright does, on February 21st, right?
>
> A: Yes.
>
> Q: And the response from Terry Wright says that 'I have spoke [sic] with the sheriff and he insist [sic] that you make these request [sic] in person.' So, on February 10th, you say 'in person,' and on February 21st, you say 'in person' again, right?
>
> A: That's correct."

R. 59.

The questioning during cross-examination drew a clear link between the February 21 denial and the February 10 denial through their shared phrase: "in person." The implication of this line of questioning is that the denials shared a common underlying basis for denial. Sheriff Dalton was very clear that his February 10th response had been intended as a denial. Sheriff Dalton was afforded ample opportunity to claim that the February 21 response was not a denial, but he did not do so. Instead, he responded in the affirmative to each question presented to him and raised no issue with linking the February 21 denial with the February 10 denial.

Finally, the trial court held that the February 27 denial was, again, something less than a denial:

> "She communicated to him that he must sign the form in person to obtain the records … This response does not deny Mr. Friedmann the record, but it implicitly imposes a condition that he be present to sign the Sheriff's form."

R. 36 ¶ 22, 24. And again, Sheriff Dalton's testimony does not support a finding that the response from

Terry Wright was anything but a denial:

> "Q: On February 27, your assistant administrator, Terry Wright, sent an email to Mr. Friedmann. Again, Mr. Friedmann is told that he must fill out and sign a form 'in person,' right?
>
> A: Yes.
>
> Q: At this point, you knew that the Office of Open Records Counsel had addressed this, and yet you still say 'in person,' right?
>
> A: That's correct.

R. 61.

Here again, there is a clear connection, tying the February 10, 21, and 27 denials together with the common phrase: "in person." Sheriff Dalton had already stated three times, both on direct and cross-examination, that the February 10 response was indeed intended as a denial.

Sheriff Dalton had no issue with the line of questioning that linked all three denials together with a common phrase, purpose, and intent that amount to "Request denied, show up in person."

Absolutely nothing in the testimony at trial or the documentary record supports the trial court's factual finding that these responses were not intended as denials.

V. The Refusal to Disclose the Records in the Instant Case was Willful

> "Regardless of the sometimes varying statements expressed by this court as to a standard for determining whether the refusal was willful and knowing, in actuality our courts have consistently applied the same analysis. That analysis emphasizes the component of the statutory standard that the entity or its officials know that the record sought is public and subject to disclosure.

The Tennessean v. City of Lebanon, No. M2002-02078-COA-R3CV, at *9 (Tenn. Ct. App. Feb. 13, 2004). In the instant case, the records are uncontroversially public records and subject to disclosure. This Court in *The Tennessean* goes on to say that this analysis

> "evaluates the validity of the refusing entity's legal position supporting its refusal; critical to that determination is an evaluation of the clarity, or lack thereof, of the law on the issue involved."

Id. The law of the issue involved in the instant case – the unlawfulness of the requirement to personally appear before a records custodian – is exceptionally clear. (*See discussion of the state of the law on this issue at section IV, above.)*

ISSUE TWO: The Trial Court Erred in Holding that Respondent's Actions were not "Willful" as Contemplated by the Tennessee Public Records Act.

The legal issue in the instant case is unusually clear and uncontroverted: Records custodians are not allowed to require personal appearance for record requests.

The published opinion of this Court in *Waller* is well-established, controlling authority. Advisory opinions from both the Tennessee Attorney General and the Office of Open Records Counsel are additionally available. And – in a quite unusual situation for an opinion as old as *Waller* – no substantial limiting or countervailing authority exists in any form.

In a modern legal environment, both the legal clarity of this issue and the length of the legal clarity of this issue are remarkable and rare.

ISSUE TWO § (a): The Trial Court Applied an Incorrect Legal Standard in Holding that a Records Custodian's Refusal to Disclose Public Records is not "Willful" if Predicated upon the Advice of Counsel, Even When Such Reliance is Unreasonable.

The trial court's Order in this case absolves Respondent from liability under the Tennessee Public Records Act by holding that Respondent, as a record custodian, may rely upon the advice of counsel, even when such reliance is unreasonable. The trial court, in so doing, applied an incorrect legal standard that contravenes well-established Tennessee law.

In *Contemporary Media, Inc. v. City of Memphis*, No. 02A01-9807-CH00211 (Tenn. Ct. App. May 11, 1999), the respondent city attempted to claim reasonable reliance upon the advice of counsel as a defense to liability under the Tennessee Public Records Act. The city claimed to believe that the city was vulnerable to being held in contempt of a court order if the city disclosed certain public records within its control. *Id.* at *7. This Court found that, at the time Contemporary Media made its request for disclosure, there existed an opinion of the Tennessee Court of Appeals and an opinion of the Tennessee Attorney General that were in direct contradiction of the advice of the city's counsel. *Id.* at *8-9. This Court then held that "[i]n light of the Court's … opinion … supported by the … Attorney General's Opinion, the [c]ity must be deemed to have known" the relevant controlling law. *Id.* at *9. This Court, thus, vacated the judgment of the trial court and remanded the case "for further proceedings to award reasonable fees and costs." *Id*. at *11.

A similar situation occurred in *The Tennessean v. City of Lebanon*, No. M2002-02078-COA-R3CV, 2004 WL 290705 (Tenn. Ct. App. Feb. 13, 2004), with a similar result. The respondent was a governmental entity that relied on the advice of counsel in reaching a false conclusion of law, namely that the city could justifiably deny access to a confidential settlement agreement. This Court found that, at the time that the petitioner made its request for public records, there existed an opinion of the Tennessee Court of Appeals and an opinion of the Tennessee Attorney General that were in direct contradiction of the respondent's stance. *Id*. at *5. The Court in *The Tennessean* held[8] that reviewing courts should "examin[e] the grounds asserted for the denial of access in view of existing law". *Id*. at *13. The Court then remanded the case to the trial court for an award of "all reasonable fees and costs." *Id.*

8 The opinion in *The Tennessean* contains an insightful discussion of the development of jurisprudence on the issue of willfulness in the context of the Tennessee Public Records Act. The entire discussion is rewarding, but Footnote 9, in particular, merits special attention. The core of the disagreement among the various panels of the Court that rendered the decisions discussed in *The Tennessean* appears to be a latent disagreement over whether the proper standard should be a subjective standard or an objective standard. The cases that emphasize the mindset of the records custodians are essentially advocating for the application of a subjective standard. The cases, such as *The Tennessean*, that emphasize the state of the existing case law and other legal authorities are essentially advocating for the application of an objective standard. As a matter of public policy, the application of the objective standard would appear to be preferable.

In both of the above cases, this Court found that the existence of one opinion of this Court, supported by one opinion of the Tennessee Attorney General, was sufficient to place the records custodian on notice and render their actions "willful".

In the instant case, *Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1999), is a published and controlling opinion that is directly and indisputably contrary to the position of the Respondent. The opinion in *Waller* was sufficient to place the Respondent on notice and render those actions "willful".

In the instant case, as in *Contemporary Media* and *The Tennessean*, the controlling court opinion is also supported by a formal opinion of the Tennessee Attorney General. Op. Tenn. Att'y Gen. No. 06-069 (Apr. 12, 2006). The combination of *Waller* and the opinion of the Attorney General leave absolutely no doubt that the Respondents either knew or should have known that their actions were unlawful.

The strength and clarity of the relevant law in the instant case, though, does not end with one Court of Appeals opinion and one AG opinion. The instant case also had the benefit of the direct, personal participation of Elisha Hodge, Tennessee Open Records Counsel.

The intent of the Legislature to encourage reliance on the Tennessee Office of Open Records Counsel ("OORC") is evidenced by Tenn. Code Ann. § 10-7-505(g): "In determining whether the [refusal to disclose a record] was willful, the court may consider any guidance provided to the records custodian by the office of open records counsel as created in title 8, chapter 4."

On March 12, 2014, Elisha Hodge, Tennessee Open Records Counsel, personally contacted Respondents to inform them that "[t]he courts in Tennessee have held for a number of years now that a citizen does not have to appear in person in order to make a public records request." R. 19-20. Ms. Hodge's correspondence to the Respondents is replete with citations to *Waller* and other controlling authority. *Id.* Eventually, on April 15, 2014, Ms. Hodge even issued a formal opinion that was specifically directed at the behavior of the Respondents. R. 33-34.

Even after all of that – the personal involvement of Open Records Counsel, the citations to controlling authority, and even a formal OORC opinion about themselves – the Respondent failed to amend its behavior. From the denial of the February 3, 2014 request until the issuance of the last denial on April 22, 2014, the Respondent clearly, consistently, and repeatedly refused to disclose the public records in the absence of a personal appearance by the Petitioner.

Many people in this case – including the Petitioner, various attorneys for the Petitioner, and even the Open Records Counsel herself – provided to the Respondent concise and correct statements of the state of the law on the issue. Those same people even provided to the Respondent citations to the controlling legal authorities on the issue. In spite of all of the controlling legal authority being laid before them, the Respondent never deviated from the exact same course of behavior that commenced on February 3, 2014.

Within the factual background of the instant case, it is difficult to imagine a scenario in which a governmental entity could possibly have been more willful in its intentional refusal to follow the law.

As a matter of public policy, it bears noting that the TPRA and the OORC exist as a mechanism to ensure the right of the public to access public records. In the instant case, Mr. Friedmann happened to be a managing editor of a journalistic organization with in-house counsel. His circumstances gave him exponentially more leverage in this dispute with the Respondent that the average member of the public. And, yet, even with the resources available to Mr. Friedmann and his organization, even with the direct personal participation of the Open Records Counsel, this governmental entity wrongfully refused to disclose these public records for almost six (6) months.

And, yet, after such a long period of time and in spite of all of the legal resources that Mr. Friedmann was able to bring to bear on the issue, the Respondent apparently still claims that those actions were merely ignorant of the law but not in willful violation of the law.

If the Respondent is able to escape the liability resulting from its violations of the TPRA by merely claiming that Respondent and counsel for the Respondent were ignorant of the law in the exceptionally egregious factual background of this case, then the average member of the public has little hope of ever overcoming such a burden and showing "willfulness" on the part of a governmental entity.

Mr. Friedmann was able to have in-house counsel call and write Respondent and cite the controlling law. Mr. Friedmann was able to get Open Records Counsel to call and write Respondent and cite the controlling law. Mr. Friedmann was even able to get the Office of Open Records Counsel to create a formal opinion about the actions of the Respondent that cited the controlling law. The average member of the public, for whose benefit the TPRA exists, does not have access to these types of legal resources.

If the level of legal instruction, citation, and external intervention that Petitioner presented to Respondent in this instant case is not enough to overcome any possible claim that the denials were not "willful" because of reliance on erroneous legal advice, then an unreasonably large burden will have been placed upon the average member of the public who wishes to make use of the TPRA. In the words of the Court in *Waller,* "[s]uch a result is not consistent with the clear intent of the Legislature" when it enacted the TPRA. *Waller,* 16 S.W.3d at 774.

ISSUE TWO § (b): The Trial Court's Finding That The Respondent Relied Upon The Advice Of Counsel Is Not Supported By The Evidence.

(i) Respondents have not Properly Raised the Defense of "Advice of Counsel"

As a threshold issue, it must be noted that Respondents are not entitled to raise the advice of counsel defense. This defense requires that the Respondents prove three elements: (1) that the attorney's advice was sought in good faith, (2) that the client divulged all material facts relating to the case, ascertained or ascertainable by the exercise of due diligence, and (3) that the course of action was commenced pursuant to the attorney's advice. *See Abernethy v. Brandt*, 120 S.W.3d 310, 314 (Tenn. Ct. App. 2002). The burden of proving these elements falls on the Respondents, and no evidence exists within the Record that would support even one of the three elements.

With respect to the third element, though, there is relevant evidence in the record and that evidence clearly establishes that the Respondents did not commence their course of actions pursuant to the advice of the County Attorney.

During his testimony, Sheriff Dalton clarifies, at least three times, the details of the commencement of the denials of Petitioner's requests. First, on direct:

> "Q: When you received that request, did you initially deny it?
>
> A: I did.
>
> Q: For what reason?
>
> A: It was my opinion that they had to show up in person."

R. 53. Then, on cross-examination,

> "Q: So when he first sent you this request on February 3, and you denied it, telling him he had to come there in person, what was the basis for your denial at that time? Was it the one you said in writing or was it something else?

A: The reason for the first denial was my impression of the law that they had to show up in person and request by filling out a form and putting down what records they're requesting, and they view those records, and what records we can allow them to have."

R. 57. And, shortly thereafter,

"A: The initial denial was my interpretation of the law."

R. 58. The Sheriff clearly and repeatedly stresses that all of the original actions were taken by him alone, based upon his interpretation of the law. In fact, the Sheriff even explains the first time he approached the County Attorney about this case:

"Q: Mr. Friedmann sent another email to your office on February 21st that provided notice to your office that the Office of Open Records Counsel had provided an opinion about this exact matter. Were you aware of that?

A: That is when I contacted the county attorney."

R. 59. Thus, the first contact that the County Attorney had with this case was on or about February 21, 2014.

The evidence in the record clearly establishes that (1) the denials of the Petitioner's requests commenced on February 10, 2014, (2) the denials of Petitioner's requests commenced based upon the Sheriff's interpretation of the law, not the County Attorney's interpretation, and (3) the County Attorney was not consulted by the Sheriff until after February 21, 2014.

Thus, the actions of the Respondent were not commenced based upon the advice of the County Attorney, and the Respondents cannot factually sustain the defense of advice of counsel.

(ii) The Respondents Could Not Possibly Have Been Relying Upon the Advice of the County Attorney Before February 21, 2014, or After March 14, 2014.

In its Order, the trial court claims that the Respondent "was initially relying on the advice of counsel … [and] This reliance continued on until the time of the hearing" on June 4th. R. 40 ¶ 53-54.

As discussed in the section immediately above, the testimony of Sheriff Dalton and the documentary record are clear that Respondent could not possibly have been relying upon the advice of the Count Attorney prior to February 21, 2014, because the County Attorney was never even consulted in this matter until February 21, 2014. The trial court's factual findings to the contrary constitute a clearly erroneous assessment of the evidence.

The Record is also establishes that the Respondent could not possibly have relied upon the advice of the County Attorney after March 14, 2014.

In his remarks at[9] trial, the County Attorney made clear that he no longer believed that there was any legal authority for the requirement to personally appear. In fact, in the entirety of his opening remarks, the County Attorney did not even mention the requirement of personal appearance. R. 71. In his closing remarks, the County Attorney "stated that, after getting the opinion [of Open Records Counsel] from Mr. Friedmann's attorneys, he did discover that the case law had said that the requestor did not have to appear in person." R. 71. As is plain from the Record, the County Attorney was provided with a copy of the opinion by Mr. Friedmann's attorneys on March 14, 2014. R. 18, 61.

The Respondent could not possibly have been acting in reliance upon the advice of a County Attorney who believed that the Respondent's course of behavior was in violation of the case law.

9 And "around" the trial, too. See *Sheriff calls Homeland Security on Man Requesting Public Records*, WSMV Nashville, Jun. 4, 2014, available at http://www.wsmv.com/story/25698437/man-says-sheriff-searched-his-house-after-jail-records-request.

The evidence in this case clearly establishes that the Respondent could not possibly have been relying upon the advice of counsel before February 21, 2014, or after March 14, 2014. The trial court's factual findings to the contrary constitute a clearly erroneous assessment of the evidence.

VI. All Reasonable Costs and Attorneys Fees

ISSUE THREE: The Trial Court Erred In Failing To Award To Petitioner All Of The Reasonable Costs And Attorneys Fees Pursuant To The Tennessee Public Records Act

The trial of the instant case was on June 4, 2014. In his opening remarks, William Haywood, the County Attorney for Marshall County, represented to the trial court that the basis for denial of Petitioner's request for public records was his failure to prove residence in this state of Tennessee. R. 52.

Mr. Haywood remarked that Respondent would be more than happy to supply the requested documents if Petitioner could show proof that he is a resident of the State of Tennessee. *Id*. Mr. Haywood made no mention of any denial based on a requirement of personal appearance before the records custodian. The effect of Mr. Haywood's opening statements was to impart a message that Respondents basis for denial was, and had always been, residency.

In his cross-examination of Respondent, Marshall County Sheriff Norman Dalton, the answer to Mr. Haywood's third question revealed that Respondent had, in fact, denied Petitioner's request based on a requirement of personal appearance. This is in direct contradiction of Mr. Haywood's opening statements. R. 53.

Later, the County Attorney admitted that the denials were initially based upon a personal appearance requirement. R. 71. He further revealed that he was fully aware of the case law that makes such a basis for denial illegal. *Id*. The County Attorney also disclosed that he "came up with" the theory that the Respondent should claim that the denial was based on residency after he learned that personal appearance denial was unsound. *Id*.

The same type of legal goal-shifting and *post hoc* rationalizations were apparent in the testimony of Sheriff Dalton. The flaws in the Sheriff's legal and logical justifications, though, was overshadowed by his admissions to engaging in overt behaviors directed against Mr. Friedmann specifically and against people who request records from the Marshall County Sheriff's Department generally.

In his testimony, Sheriff Dalton revealed that he personally drove to the address on Petitioner's driver's license to investigate.[10] R. 54-55, 57. He could not provide the exact date, but he did recall that it occurred approximately one (1) week prior to the hearing and certainly occurred after he was served with Petitioner's Petition for Access and to Show Cause. R. 57, 65. In a surreal moment during trial, Respondent proudly submitted the pictures that he had taken during his long-distance, intimidation-themed excursion as an exhibit in the form of photographs. Ex. 2.

The Sheriff rationalized his investigation in a manner that was unclear and disingenuous. On direct examination, he testified that he questioned the address on license. R. 54. On cross, the Sheriff went further to claim that address was "out of the ordinary" and "got his curiosity up." R. 55. When pressed for a reason for his suspicion, he stated that driver's licenses are required to have the licensee's physical address. *Id*. He went on to testify that the address on Petitioner's driver's license appeared to

10 Petitioner provided a photocopy of his driver's license with his renewed request for public records on March 24, 2014. R. 29. The address on Petitioner's driver's license matched exactly the address on the letterhead of his initial request from February 3, 2014: 5331 Mount View Road, Number 130, Antioch, Tennessee. R. 8.

be an apartment number. *Id*. Sheriff Dalton agreed with counsel for Petitioner that apartments are physical addresses, and yet his suspicion was still so overwhelming that it warranted the expenditure of Respondent's time in personally traveling from all the way from Lewisburg to Antioch to visit the address. R. 56. The Sheriff's reasoning regarding the address simply defies logic:

(1) Driver's licenses must have a physical address;

AND

(2) Petitioner's driver's license has the address of an apartment;

AND

(3) Apartments are physical addresses;

THEREFORE

(4) Petitioner's address warrants investigation because it is not a physical address. (?!)

The illogic of the Sheriff's purported motivation for visiting Mr. Friedmann's address is telling. No rational person could have actually held the chain of beliefs which he claims motivated him to visit the address. Clearly, something other than an interest in the physicality of the address motivated the Sheriff's visit.

The Record reflects that, following Petitioner's renewed request on March 24, 2014, Respondent was completely unresponsive except for a single email directing Petitioner to contact the county attorney. R. 74. Respondent never asked Petitioner for his driver's license, and Petitioner would not have provided it had it not been an item on Respondent's form. R. 68. Under these set it facts, it is safe to assume that had Petitioner simply abandoned his request for public records, no investigation of Petitioner's address would have ever occurred. Yet it did occur, and it only occurred after Respondent was served with Petitioner's Petition for Access and to Show Cause. R. 57, 65.

Having discovered that the address on Petitioner's driver's license was not a physical address, Petitioner did not feel it prudent to contact Petitioner or Petitioner's counsel with his concerns; instead, he elected to reserve this bombshell for the hearing. R. 53, 68.

At some point prior to trial, Sheriff Dalton made a report concerning Mr. Friedmann to the Tennessee Department of Safety and the United States Department of Homeland Security. R. 55. The contents of the report are not clear, but the brazenness of the Sheriff's activity is on full display. Sheriff Dalton did not accidentally admit to these acts of intimidation and retribution against Mr. Friedmann under some withering cross-examination or some such situation. No, Sheriff Dalton proudly announced his activities on direct examination as a volunteered, unresponsive addendum to his testimony. R. 55.

Would that Respondent's improprieties ceased here with actions directed specifically at the Petitioner, yet they continue with actions directed generally at records requestors.

Sheriff Dalton testified repeatedly that he would not “turn [the county's] records over to just anyone.” R. 60.

The Sheriff proclaimed that he would not acquiesce to request for public documents without first interrogating the requestor. R. 66.

Sheriff Dalton made clear that Petitioner's status as an ex-convict[11] figured into his determination of whether to release the requested records to Petitioner. R. 60.

11 Discrimination against convicted felons in the disclosure of public records is itself a violation of the Tennessee Public Records Act. *Cole v. Campbell*, 968 S.W.2d 274 (Tenn. 1998).

The intention of the cost and fees provision of the Tennessee Public Records Act is to prevent exactly the kind of behavior that Respondent has engaged in during the events in this case:

1. Respondent generally handles requests for public records in a manner that is inconsistent with and hostile to the TPRA by:
   (a) bullying requestors;
   (b) improperly interrogating requestors;
   (c) illegally discriminating against certain classes of requestors, such as convicted felons;
   (d) imposing illegal conditions as barriers to access to records; and
   (e) frequently refusing to respond to a request in any manner whatsoever.
2. Respondent engaged in a pattern of intimidation and retaliation against Petitioner for no other reason than the invocation of his rights under the Tennessee Public Records Act;
3. Respondent set upon a course of behavior that ultimately prevented the release of the requested public records for almost six months;
4. Respondent's actions created needless litigation over an issue on which the law was already well-settled and well-established; and
5. Respondent utterly ignored the many attempts by Petitioner, Petitioner's counsel, and the Office of the Open Records Counsel to resolve the issues in this case without litigation.

This Court has found that the trial court abused its discretion in refusing to award attorney's fees with facts not nearly egregious as in the present case.

This Court found that the trial court abused its discretion by improperly applying the statute and "focusing on the amount of documents produced … rather than on whether the proper procedure was followed or the withholding was justified." *Little v. City of Chattanooga*, No. E2011-027-24-COA-R3-CV, 2012 WL 4358174, at *15 (Tenn. Ct. App. Sept. 25, 2012).

In two separate opinions, this Court found that the trial court abused its discretion by reducing the amount of attorney's fees requested by the petitioner. In *Contemporary Media, Inc. v. City of Memphis*, No. 02A01-9807-CH00211, 1999 WL 292264, at *2 (Tenn. Ct. App. May 11, 1999), the petitioner requested $27,939.082 in costs and attorney's fees but the trial court only awarded $12,033.25. This Court found that "the trial court does not explain its reasoning in awarding CMI only a portion of its requested attorney's fees" and vacated and remanded the case for further proceedings to award reasonable fees and costs. *Id*. at *7.

Similarly, in *The Tennessean v. City of Lebanon*, No. M2002-02078-COA-R3-CV, 2004 WL 290705, at *3 (Tenn. Ct. App. Feb. 13, 2004), the trial court reduced the petitioner's request for $24,038.52 to $20,038.52. In that case, the petitioner had no choice but to file in both Chancery and Circuit Court since the city preemptively sought a protective order in Circuit. *Id*. at *2. The trial court reasoned that "those costs directly arising from or generated by the newspaper's Petition for Access in the Chancery Court" were to be excluded and reduced the award accordingly. *Id*. at *3. However, this Court found that "the City's liability for fees incurred in [the Circuit Court] action rest[ed] on the same conduct as its liability in the Chancery Court action" and modified the trial court's order accordingly. *Id*. at *9.

In *Combined Commc'ns, Inc. v. Solid Waste Region Bd.*, No. 01-A-01-9310-CH00441, 1994 WL 123831, at *2 (Tenn. Ct. App. Apr. 13, 1994), "[t]he order of the trial court contained a declaration that the plaintiff was entitled to an award of reasonable attorneys' fees and expenses." This Court upheld the trial court's order based on its finding that "the appellant's actions under the circumstances of this case fit the definition of willfulness required by the statute for the award of attorneys fees and expenses." *Id*. at *3.

The Respondent in the instant case is exactly the type of contumacious custodian that the costs and fees provisions of the TPRA are intended to deter.

This Honorable Court should reverse the trial court's refusal to award costs and fees and remand this case to the trial court with instructions to award all reasonable fees and costs in this case in accord with Tenn. Code Ann. § 19-7-505(g).

CONCLUSION

In light of the foregoing, this Honorable Court should reverse the Order of the trial court to the extent that the Order of the trial court:

1. Held that Respondent did not deny or refuse to disclose public records as contemplated by the Tennessee Public Records Act;
2. Held that Respondent's actions were not “willful” as contemplated by the Tennessee Public Records Act; and
3. Refused to award to Petitioner all of his reasonable costs and attorneys fees in this matter.

This Honorable Court should then:

1. Remand this case to the trial court; and
2. Instruct the trial court to award to Petitioner all reasonable costs and fees incurred in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served by mail upon:

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_____

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