IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
18TH JUDICIAL DISTRICT, SUMNER COUNTY
AT GALLATIN

KENNETH L. JAKES, Plaintiff, v. SUMNER COUNTY BOARD OF EDUCATION, Defendant.	Case No. 2014-cv-53

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Sumner County Board of Education (the "Board"), by and through counsel, submits this memorandum in support of the motion for summary judgment.

FACTS

This case concerns whether a governmental agency is responsible for reproducing material pursuant to a public records request when the governmental agency has already posted the requested material on its website, making it publicly available online. The Board respectfully submits that it has fully complied with its obligations under the Tennessee Public Records Act ("TPRA"), Tenn. Code Ann. § 10-7-101, et seq., by making its own public records policy publicly available online and easily accessible by anyone with an Internet connection. The Board further avers that it is not liable for failure to respond to any public records requests not made in conformance with its public records request policy.

On Friday, March 21, 2014, the plaintiff Kenneth L. Jakes ("Jakes") emailed Jeremy Johnson ("Johnson"), who is the Board and Community Relations Supervisor for Sumner County Schools. SUMF ¶ 1. In his email, Jakes wrote, "Mr. Johnson as a public record request to

inspect and review please provide the following for my inspection. The Records Policy for the Board of Education. If the records policy is on line you can simply provide the link. If not contact me when ready for my review. Thank you, Ken Jakes 615-347-3379." See SUMF ¶ 2 (Compl., Ex. A).

On that same day, Jakes left a voicemail message with Jeremy Johnson to confirm receipt of his email. SUMF ¶ 3 (Mot. Ex. D; Johnson Decl. ¶ 6). The voicemail contains the following message: "Jeremy, this is Ken Jakes. I'm just calling to verify that you did receive according to where my email went to on my public records request. I'm just verifying that. My cell phone is 615-347-3379. It was for a public records request for the records policy of the Board of Education. So, if you will, just give me a call confirming that you did receive my email. Okay, thank you." Id.

The requested material – the "Records Policy for the Board of Education" – is publicly available through the Board's website. See Sumner County Board of Education, Board Policy Manual, "School Board Records," available at http://www.boarddocs.com/tn/scstn/Board.nsf/Public# (navigation: Policies > B - School Board Operations > BE - School Board Records & BE – AP – School Board Records) (last visited August 21, 2014) (adopted Feb. 5, 1991, last revised April 22, 1997). SUMF ¶ 4 (Mot. Exs. A, B; Johnson Decl. ¶¶ 2–3).

The requested policy is publicly accessible and is available to anyone with an Internet connection. SUMF ¶ 5 (Johnson Decl. ¶ 3). The Board has made the requested policy publicly available through its online website since at least as early as August 12, 2011. SUMF ¶ 6 (Johnson Decl. ¶ 4). So, at the time of Jakes's March 21, 2014 email, the requested record was already available online. SUMF ¶ 7 (Johnson Decl. ¶ 5).

Because the Board had already made the material public by posting it online, where it is accessible to anyone with a computer, Jakes's public records request was moot from the outset. In effect, the Board had already responded to such a public records request and no further response from the Board was required. Johnson informed Jakes of the options for properly submitting a public records request to the Board, explaining that Jakes could put his request in writing and send it through the postal service or, in the alternative, Jakes could appear in person to make the request. SUMF ¶ 8 (Compl., Ex. B; Johnson Decl. ¶ 6).

Later, on March 31, 2014, Jakes sent another email to the Board. SUMF ¶ 9 (Compl., Ex. C; Johnson Decl. ¶ 7). In his March 31, 2014 email, Jakes made another records request—this time to be provided with various communications between the Board and "any other party or parties concerning my first public record request" for Jakes's personal inspection and review. Id. This email – as Jakes was already aware – also failed to conform with the Board's policy for making such a written public records requests. SUMF ¶ 10 (Mot. Ex. A; Johnson Decl. ¶ 8).

Based on these facts, Jakes now asserts three causes of action against the Board: 1) for denial of his public records request, 2) for a declaratory judgment, and 3) for a show-cause hearing. The Board respectfully requests that the Court grant the Board's motion for summary judgment and dismiss the Complaint with prejudice as each of these counts fails as a matter of law.

LAW & ARGUMENT

The Court should grant the Board's motion and dismiss this case with prejudice because (I) the Board did not deny Jakes's request and instead fulfilled its obligations under TPRA by making the requested policy material publicly available on the Internet; (II) no justiciable controversy exists, mooting the request for declaratory relief; (III) the show-cause relief claim fails for lack of a condition precedent; and (IV) Jakes's March 31, 2014 email is not a valid public records request as it failed to conform to the Board's known public records request policy under TPRA.

I. THE BOARD DID NOT DENY THE REQUEST AND MET ITS DISCLOSURE OBLIGATIONS BY POSTING THE REQUESTED POLICY RECORD ONLINE.

The Board fulfilled its obligations under the Tennessee Public Records Act because Jakes had public access to the requested policy documents through the Board's website. Tenn. Code Ann. § 501, et seq. The TPRA "does not require a custodian of records to provide public records in the manner a citizen requests." Lance v. York, 359 S.W.3d 197, 203 (Tenn. Ct. App. 2011). In Tennessee, "the purpose of the Public Records Act is to allow maximum access to the information contained within public records," and not necessarily to allow "access to the public records in their normally kept form." Wells v. Wharton, No. W2005-00695-COA-R3-CV, 2005 WL 3309651, at *9 (Tenn. Ct. App. Dec. 7, 2005) (copy attached).[1] A custodian of records may choose the manner in which he or she presents public records to citizens "so long as that manner does not distort the record or inhibit access to that record." Id.

While the particular manner of disclosing public records at issue in this case – posting to the Internet – has not been addressed directly by Tennessee courts, secondary authorities in Tennessee support the rule, recognized by sister courts, that making material available through

[1] The Board submits the referenced unreported and extra-jurisdictional cases and secondary source material under a separate Notice of Filing Case Law and Materials in Support of Defendant's Motion for Summary Judgment.

the Internet satisfies public records requests for that material. See Tenn. Att'y Gen. Op. No. 00-014 (Jan. 26, 2000), available at http://www.tn.gov/attorneygeneral/op/2000/op/op14.pdf ("[T]he Internet is a means of 'remote electronic access' within the contemplation of Section 10-7-123 of the Public Records Act and that access to public records may be provided over the Internet.") (copy attached). In addition, the Tennessee Office of Open Records Council even suggests that it is a "best practice" to "post as many records ... on [the entity's] website whenever possible." See Office of Open Records Council & Advisory Comm. on Open Gov't, "Best Practice Guidelines for Records Custodians Responding to Requests for Public Records" (Jan. 1, 2009), http://www.comptroller.tn.gov/repository/OpenRecords/FormsSchedulePoliciesGuidelines/BestPracticesGuidelines.pdf (copy attached) [hereinafter "Best Practice Guidelines"].

Several jurisdictions have addressed this issue and held that posting materials online satisfies disclosure requirements under similar state and federal public records acts. See, e.g., Tax Analysts v. United States Dept. of Justice, 845 F.2d 1060, 1065 (D.C. Cir. 1988) (a governmental agency "need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access") (copy attached); Meyer v. Comm'r of Internal Revenue Serv., Case No. 10-767 (JNE/JJK), 2010 WL 4157173, at *5 (D. Minn. Sept. 27, 2010) ("The IRS makes this information available on the IRS website or in the public library. Because this material is already publicly available, the IRS need not disclose it to Plaintiff via his FOIA request.") (copy attached); City of West Chicago v. United States Nuclear Regulatory Comm'n, 547 F. Supp. 740, 751 (N.D. Ill. 1982) ("It is well established that factual material already on the public record need not be disclosed on a FOIA request.") (copy attached); Crews v. Internal Revenue, No. CV 99-8388 CBM (RCX), 2000 WL 900800, at *6 (C.D. Cal. Apr. 26, 2000) (items publicly available in the IRS reading room or on the internet were not subject to

production via Freedom of Information Act requests) (copy attached); Maese v. Tooele Cnty., 273 P.3d 388, 395 n.8 (Ct. App. Utah 2012) (citing Utah Code Ann. § 63G-2-2-1(12) (2011) for the proposition that "a government entity shall provide access to an electronic copy of a record in lieu of providing access to its paper equivalent" under certain conditions) (copy attached); State of Ohio ex rel. Patton v. Rhodes, No. C-100258, 2011 WL 192749, at *1 (Ohio Ct. App. Jan. 21, 2011) (governmental agency posted requested records online after commencement of the action, and court held "[b]ecause the auditor produced the requested records after the commencement of this action, the action is dismissed as moot, and the summary-judgment motion is overruled as moot") (copy attached).

Here, the Board posted the requested record to the Internet on the Board's website and, therefore, made the requested record publicly available to everyone, including Jakes, through the Internet. SUMF ¶ 4. The Board is allowed to select the manner in which it makes material available for public inspection. Lance, 359 S.W.3d at 203; Wells, 2005 WL 3309651, at *9. And here, the Board selected to proactively upload the subject document to the Internet, where it was publicly available even prior to Jakes's request. SUMF ¶ 5. In posting this material online, the Board was following a "best practice" suggested by the Tennessee Office of Open Records Counsel, even though those guidelines are not binding on records custodians. See Best Practice Guidelines (Jan. 1, 2009). Thus, there was no requirement that the Board respond to the records request because the Board had already provided for an alternative form of access to these documents. See, e.g., Tax Analysts, 845 F.2d at 1065; Meyer v. Commissioner of Internal Revenue Serv., 2010 WL 4157173, at *5; City of West Chicago, 547 F. Supp. at 751; Crews, 2000 WL 900800, at *6.

Allowing records custodians, like the Board, to fulfill their obligations under TPRA by

making records publicly available on the Internet also supports the public purpose of TPRA, which is to allow maximum access to information contained in public records. Wells, 2005 WL 3309651, at *9. By encouraging such a rule, records custodians like the Board are incentivized to post records online, thereby increasing public access to records by making them immediately available from anywhere there is an Internet connection.

This rule also makes common sense. The public posting of records effectively moots the need for a public records request because the record is already public, thereby saving both citizens' and custodians' time and resources in making or responding to such requests. It also makes good public policy to allow this method of fulfilling disclosure obligations as technology moves toward a more digital environment. As more and more public records are kept electronically, posting is easier and more efficient, as well as, more familiar to citizens wishing to review such documents.

The Court should grant the Board's motion because Jakes's public records request claim is moot (as it was preemptively responded to) because the Board previously disclosed the requested record on the Board's website, where it was publicly accessible, not only to Jakes, but to anyone. The Board respectfully requests that the Court dismiss Count I of Jakes's Complaint with prejudice.

II. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THE DECLARATORY JUDGMENT REQUEST BECAUSE NO CONTROVERSY EXISTS.

Since the Board had already complied with its disclosure obligations by posting the requested record online, the Court should dismiss the claim for a declaratory judgment because there is no substantial controversy between the parties. The Tennessee Declaratory Judgments Act, Tenn. Code Ann. §§ 29-14-101, et seq. (2008), provides for the equitable remedy of declaratory judgment; but, "in order for such remedy to lie, there must be a showing of a

'substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant a declaratory judgment.'" Hatcher v. Chairman, 341 S.W.3d 258, 261 (Tenn. Ct. App. 2009) (citing Evers v. Dwyer, 358 U.S. 202, 204, 79 S.Ct. 178, 179, 3 L.Ed.2d 222 (1958)). Where "a case has lost its character as a present, live controversy, or the questions involved have been deprived of their practical significance, the courts have refused to decide them because they are then 'moot' or 'academic.'" Id. Tennessee courts are not permitted to "give advisory opinions." Id. at 263.

Because of the prohibition on advisory opinions, a court should only accept jurisdiction under the Tennessee Declaratory Judgments Act where there still exists a justiciable controversy. Parks v. Alexander, 608 S.W.2d 881, 891–92 (Tenn. Ct. App. 1980) ("That to maintain an action for a declaratory judgment a justiciable controversy must exist between the persons with adverse interests is well settled."). Theoretical or hypothetical facts and future or contingent events are insufficient to form a justiciable controversy. Id. "The Declaratory Judgments Act does not give courts jurisdiction to render advisory opinions to assist the parties or to allay their fears as to what may occur in the future." Id. Claims that are "based upon assumed potential invasion of rights is insufficient to establish a justiciable controversy under the Declaratory Judgments Act." Id. This holding is true even if the opinion might be helpful to deciding future actions. Combustion Engineering Co. v. Thompson, 191 Tenn. 98, 106–07, 231 S.W.2d 580, 583 (Tenn. 1950) (courts "should not pronounce judgment on abstract propositions, even if its opinion might influence future action under like circumstances").

In public records cases, a plaintiff's claims are moot where the records have been produced, and the court should not engage in any further advisory opinions. See, e.g., Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 60–61 order amended on reconsideration, 457 F. Supp.

2d 30 (D. D.C. 2006) amended, 479 F. Supp. 2d 23 (D. D.C. 2007) ("As a general proposition, 'however fitful or delayed the release of information under the FOIA may be,' once an agency has released all nonexempt material, the courts 'have no further judicial function to perform under the FOIA.'") (copy attached); Doe v. Reed, 697 F.3d 1235, 1239 (9th Cir. 2012) ("If anyone with an internet connection can easily obtain the images of the original documents online, it is not clear why anyone would bother filing an additional public records request.") (copy attached).

Here, there is no justiciable controversy over which this Court could exercise its subject matter jurisdiction under the Tennessee Declaratory Judgments Act. Parks, 608 S.W.2d at 891–92. Because the requested policy is publicly available on the Internet (SUMF ¶¶ 4–5) and was publicly available to Jakes before he made his request to the Board (SUMF ¶¶ 6–7), a "substantial controversy" between the parties never arose. Hatcher, 341 S.W.3d at 261.

To the extent Jakes asks for a declaratory judgment regarding the Board's policy governing the method of public records requests in general, no actual and substantial controversy exists to declare. There is no dispute that the Board allows a person to make an unwritten request for records by appearing in person. SUMF ¶ 12 (Compl., Ex. B; Johnson Decl. ¶ 10). And the Board is free, as a matter of law, to provide a policy that defines the parameters when a citizen elects to make a written request for records. For example, a records custodian has the right to specify that all requests for copies of a public record be made in writing. Tenn. Code Ann. § 10-7-502(7)(A) ("[A] records custodian may require a request for copies of public records to be in writing or that the request be made on a form developed by the office of open records counsel. The records custodian may also require any citizen making a request to view a public record or to make a copy of a public record to present a photo identification ...").

Additionally, a records custodian is free to specify whether or not it will accept written public records requests via email. See Office of Open Records Counsel, Frequently Asked Questions, No. 25, available at http://www.comptroller.tn.gov/openrecords/faq.asp#2 (last visited August 21, 2014) (copy attached).

Jakes's lawsuit seeks information, and the Board has made that information available to Jakes. Long, 479 F. Supp. 2d at 23; Doe, 697 F.3d at 1239. His public records request is moot, and there is no justiciable controversy to declare. Combustion Engineering Co., 231 S.W.2d at 583. The Board's public records policy is consistent with the TPRA and Jakes has not made a proper public records request pursuant to which he can make a claim for relief in the form of a declaratory judgment. Thus, the Board respectfully requests that the Court dismiss Count II of Jakes's Complaint with prejudice.

III. JAKES'S REQUEST FOR A SHOW-CAUSE HEARING IS MERITLESS BECAUSE OF THE FAILURE OF A CONDITION PRECEDENT.

Jakes's request for a show-cause hearing has no merit based on the failure of a condition precedent. The denial of access to a public record is a condition precedent for the remedy of a show-cause hearing. Tenn. Code Ann. § 10-7-505(a). The TPRA provides that "[a]ny citizen of Tennessee who shall request the right of personal inspection of any ... record ... *and whose request has been in whole or in part denied* by the official and/or designee of the official ... shall be entitled to petition for access ... and to obtain judicial review of the actions taken to deny the access." Tenn. Code Ann. § 10-7-505(a) (emphasis added). Thus, a plaintiff is not entitled to a show-cause hearing where the plaintiff has been granted access to the requested material. Denial of access, then, is a condition precedent to a show-cause hearing.

For all of the reasons previously stated in Sections I and II, supra, the Board did not deny Jakes's public records requests. Instead, Jakes has had ready access to the requested policy

document since before his initial records request (which was moot from the start) was ever made. SUMF ¶¶ 4–7.

As to the second records request, Jakes's March 31, 2014 email fails to constitute a valid public records request under the TPRA and under Board policy interpreting the TPRA. SUMF ¶ 10. As such, the Board has no duty to respond, and Jakes has not been denied access pursuant to a proper public records request. Thus, the Board respectfully suggests that there is no justiciable controversy, as the Board has complied with its disclosure obligations under the TPRA and has no obligation to respond to a non-conforming email. Therefore, Jakes is not entitled to a show-cause hearing because he has not proven (and cannot prove) that he was denied access to any properly-requested public record that was not already publicly available. The Board respectfully requests that the Court dismiss Count III of Jakes's Complaint with prejudice.

IV. JAKES'S SECOND PUBLIC RECORDS REQUEST FAILED TO CONFORM TO BOARD POLICY AND NO RESPONSE IS REQUIRED.

In addition to the March 21, 2014 public records request, which is moot, non-justiciable, and meritless for all the reasons articulated in Sections I–III, supra, Jakes also sent a second email, dated March 31, 2014, requesting that the Board provide him with certain communications that are derivative from his initial public records request. SUMF ¶ 9 (Compl. Ex. C; Johnson Decl. ¶ 7). This email was sent after Jeremy Johnson had already informed Jakes in writing that such a request would need to be submitted in person or via the postal service, in keeping with Board policy under the TPRA. SUMF ¶ 8 (Compl. Ex. B; Johnson Decl. ¶ 6). Jakes did not follow up this email with a voicemail, in person appearance, or U.S. mail submission. SUMF ¶ 11 (Johnson Decl. ¶ 9).

Therefore, Jakes's claims based on his second public records request are, likewise, meritless. While the email records requested in the March 31, 2014 email are not publicly

available online like the Board's public records policy, Jakes's claim still fails as a matter of law because the request fails to conform with the TPRA and the Board's public records request policy under that statute.

The TPRA provides, in pertinent part:

> A records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law; however, a records custodian may require a request for copies of public records to be in writing or that the request be made on a form developed by the office of open records counsel. The records custodian may also require any citizen making a request to view a public record or to make a copy of a public record to present a photo identification, if the person possesses a photo identification, issued by a governmental entity, that includes the person's address. If a person does not possess a photo identification, the records custodian may require other forms of identification acceptable to the records custodian.

Tenn. Code Ann. § 10-7-503(a)(7)(A). Thus, a records custodian is entitled to set up procedures for both unwritten and written requests, such as requiring photo identification and other requirements, so long as such procedures do not violate a citizen's rights under this statute. See Office of Open Records Counsel, Frequently Asked Questions, available at http://www.comptroller.tn.gov/openrecords/faq.asp (last visited August 21, 2014) (allowing records custodians to formulate requirements for requesting copies, charging for employee time, etc.); Waller v. Bryan, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999) (prohibiting records custodian from requiring an in-person appearance from a prison inmate where the requestor could accurately identify the requested documents in writing, but not limiting custodian's ability to set the parameters of such written requests).

As Mr. Johnson relayed in his email to Mr. Jakes dated March 21, 2014, the Board provides two avenues for requesting public records, consistent with citizens' rights under TPRA: (i) a citizen may request to inspect records without a writing by appearing in person to make the

request,[2] or, (ii) a citizen may request to inspect and/or receive copies of records by making a request in writing through the U.S. postal service. SUMF ¶ 12 (Mot. Ex. A; Compl., Ex. B; Johnson Decl. 10). Where a citizen selects to submit a request in writing, the Board has a policy governing how he or she should submit the written requests. The Board requires that the citizen send any written request in the mail using the form developed by the Office of Open Records Counsel of the Comptroller's Office of the State of Tennessee and directed to the Director's Office under the supervision of the Supervisor of Board and Community Relations for the Board. SUMF ¶ 13 (Mot. Ex. A; Johnson Decl. 11).

The Board crafted its policy governing how it receives non-written and written requests to achieve compliance with TPRA obligations. SUMF ¶ 14 (Johnson Decl. ¶ 12). Citizens must submit non-written requests in person in order to allow the Board a chance to inspect the requestor's photo identification or other form of identification acceptable to the Board. SUMF ¶ 15; see also Tenn. Code Ann. § 10-7-503(a)(7)(A) (allowing a records custodian to require photo identification on any request). Among other reasons, the Board requires photo identification to accompany both non-written and written public records requests to ensure that the requestor is a citizen of the State of Tennessee. SUMF ¶ 16; see also Tenn. Code Ann. § 10-7-503(a)(1)(V)(2)(A) ("All state … records shall, at all times during business hours, … be open for personal inspection *by any citizen of this state* …") (emphasis added).

The Board also has a policy governing written records requests. The Board requires citizens to serve written requests through the U.S. postal service addressed to a specific office—the Director's Office under the supervision of the Supervisor of Board and Community Relations for the Board. SUMF ¶ 17 (Mot. Ex. A; Johnson Decl. ¶ 15). The Board does not permit

[2] The TPRA does not require that records custodians accept public records requests via telephone.

citizens to serve written requests via email. SUMF ¶ 18 (Johnson Decl. ¶ 16). This policy to ensures that public records requests are not lost in spam filters; are not routed to an individual employee who may be on vacation, resigned from employment with the Board, or otherwise unavailable; and are not otherwise subject to the uncertainties of digital communication. Id. Furthermore, the Board's practice is to keep a log of public records requests. SUMF ¶ 19 (Mot. Ex. A; Johnson Decl. ¶ 17). The Board's policies with respect to both non-written and written requests ensure its ability to keep these logs accurate. Id.

Here, Jakes's second email "request" fails to form a valid request to the Board under the TPRA. Jakes sent an email request in violation of the Board's known policy regarding written requests. He did not follow up with a proper non-written request by appearing in-person nor did he schedule an appointment to inspect the relevant documents. Instead, he asked that the Board "provide [him]" with the requested documents. Compl., Ex. C. Without an in-person appearance to inspect the records, Board can only "provide" Jakes with the records by making copies for him. The Board requires citizens to make copy requests in writing. SUMF ¶ 20 (Johnson Decl. ¶ 18). As such, Jakes has failed to state a claim for relief under the TPRA.

The TPRA provides the public with a route to access public information, but it also provides records custodians the ability to craft procedures to ensure that they fairly and efficiently respond to records requests. The TPRA does not provide citizens carte blanche to submit a records request in whatever way they desire. Such a rule would lead to chaos and inefficiency. Indeed, the Office of Open Records Counsel's Best Practices Guidelines recognizes that open records request policies "should balance the governmental entity's need to function efficiently and to maintain the integrity of records with the public's right to access records pursuant to the TPRA." Best Practice Guidelines, p. 2. In this case, Jakes failed to

submit a proper public records request – either written or unwritten – under the TPRA, so the Board had no obligation to respond and cannot be held liable for failure to respond as a matter of law.

CONCLUSION

For all of the foregoing reasons, the Board respectfully requests that the Court grant summary judgment in favor of the Board and dismiss Jakes's Complaint in its entirety with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail to:

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