IN THE CHANCERY COURT FOR SUMNER COUNTY, TENNESSEE, AT GALLATIN

KENNETH L. JAKES, Plaintiff,	)
vs. #2014-CV-53	)
SUMNER COUNTY BOARD OF EDUCATION, Defendant.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER

FINDINGS OF FACT

I. Plaintiff's Request for the Public Records Policy of the Defendant, and the Defendant's Response

Kenneth Jakes, a resident of Joelton, Tennessee, testified that he had been a "public records expert" and a "professional" in making public records requests in Tennessee since 2006. During that time, he had made many public records requests from numerous municipalities and "most counties". In March of 2014, Jakes had been alerted by a friend, Kurt Riley, that he could not understand why public records requests could not be made by email or telephone at the Sumner County Board of Education, when Riley had no trouble with other government agencies responding to his public records requests by email or telephone. Jakes decided to contact the Sumner County Board of Education for their public records requests for inspection policy.

On Friday, March 21, 2014, at 4:34 p.m., after working hours, Jakes sent the following email to Jeremy Johnson at the Sumner County Board of Education:

> **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 online you can simply provide the link. If not contact me when ready for my review.**
>
> **Thank you,**
>
> **Ken Jakes 615-347-3379 [Trial Exhibit #5]**

Jakes immediately followed up this email with a phone message that was left for Mr. Johnson. The message was as follows:

> **Jeremy, This is Ken Jakes. I'm just calling to verify that you did receive, according to where my email went, on my public record request. (sic) I'm just verifying that. My cell phone number is 615-347-3379. It was for a public record request for the records policy the Board of Education. So if you will, just give me a call confirming that you did receive my email.**

On Monday, March 24, 2014, at 10:14 a.m., Mr. Jakes sent the following email to Jeremy Johnson at the Sumner County Board of Education before Mr. Johnson had had an opportunity to respond to his after-hours email from Friday:

> **Mr. Johnson, please provide me the name and contact information for your Legal Council (sic) for the Board of Education. Thank you, Ken Jakes. [Trial Exhibit #6]**

On Monday, March 24, 2014, at 2:40 p.m., Jeremy Johnson made the following email response for the Sumner County School Board:

> **Mr. Jakes,**
>
> **In keeping with our practice regarding open records requests, you'll need either to submit your request in person or via the postal service. Thanks, Jeremy [Trial Exhibit #7]**

On Monday, March 24, 2014, at 6:57 p.m., after hours, Mr. Jakes sent an email to Mr. Johnson:

> **Mr. Johnson, I request to simply review the Records Policy and this is the response I get from you. Let me give you a response as well, never say your practices have gone unchallenged.**
>
> **You, are about to find out the true meaning of being challenged on an issue. There's no way on earth the Court will rule on your behalf. Opinions are one thing and established legal precedence (sic) is another. Are you ready to make history? I am.**
>
> **Ken [Trial Exhibit #7]**

On Tuesday, March 25, 2014, at 7:32 a.m., Mr. Jakes sent the following email to Mr. Johnson:

> **Mr. Johnson, you left out another way I could obtain your records policy. That method is called DISCOVERY.**
>
> **Ken [Trial Exhibit #7]**

On Friday, March 28, 2014, at 4:39 p.m., after working hours Ken Jakes sent the following email to Mr. Johnson:

> **Mr. Jeremy Johnson, I made a request to inspect and review the Public Records policy of the Board of Education to you by email on March 21, 2014. Furthermore, I followed up the request by phone to your voicemail just shortly after because I did not know which method you would receive first. Monday will be the final day of seven working days to either Provide (sic) my request or inform me of the status of my request when the request will be ready.**
>
> **As of now, I have only received a denial response from you by email informing me that I would have to make my Public Record request in one of two methods. I could request in person or I could request by U.S. Mail. As I am conservative and hold conservative values and principles, I am sending this followup email as a final attempt to resolve this issue before you force me to have to take legal action. Does the School Board have such a surplus of funds to waste because you refuse to provide me the Records Policy for my review? It would appear providing for the children of the schools would be a much better use of public records. Good grief you could have sent it to me online or provided a time for physical inspection much faster then (sic) sending to me the denial response.**
>
> **Please understand where I believe it is a waste of time and money to take legal action I am prepared to do so. I am prepared because I feel sure the law will prevail on my behalf. You have placed me in a position where should you hold firm to the**

denial to provide by email, I have no choice but proceed. I have to protect my right to review should I request in the future, I will (cc) my attorney on this email also.

Please contact me any way you need to.
Home 615-876-6220 Cell 615-347-3379
Work 615-227-1993
Fax 615-227-1863
Email ken.jakes@comcast.net
Thank you, Ken Jakes [Trial Exhibit #8]

On Monday, March 31, 2014, at 9:29 a.m., Mr. Jakes sent the following email to Jeremy Johnson:

Mr. Johnson, as a Public Record request to inspect and review please provide me the following

Any and all communications between you and any other party or parties concerning my first Public Record request for the Board of Education to provide for my inspection the BOE Records Policy.

This is to include but not to be limited to following. All emails SENT or RECEIVED. All audible recordings and voicemail by all parties.
All letters.
All memos.
All text messages.
All text messaging.
Should for any reason you not understand this request please contact me.
Ken Jakes
Cell 615-347-3379
Home 615-876-6220

On April 9, 2014, Kenneth Jakes filed a complaint against the Sumner County Board of Education alleging the denial of a Public Records request for "inspection and review" for the "Records Policy" of the Sumner County Board of Education. The complaint was filed under the provisions of T.C.A. §10-7-505 of the Tennessee Public Records Act.

II. The Evolving Policy by the Defendant Involving Public Open Records Requests for Inspection

The Court finds that the Defendant's policy for accepting open records requests until March 24, 2014, the date Defendant responded by email, was unclear, inconsistent, and at one time, required all open record requests for inspection to be in writing - a clear violation of the law. On March 24, 2014, the Defendant's website revealed that a records request for inspection required the request to be in writing – a violation of the law. [Trial Exhibit #2] The website revealed that the "School Board Records Policy Manual" was adopted on February 5, 1991, and was last revised on April 22, 1997. This is the website link that Jeremy Johnson neglected to mention to the Plaintiff in his original email request when Plaintiff asked Defendant to provide a link to any website.

On March 24, 2014, Jeremy Johnson specifically advised Plaintiff by email that "[i]n keeping with our practice regarding open record requests, you will need to either submit your request in person or via the postal service." Therefore, on March 24, 2014, the Defendant's policy had been changed to add that an inspection request could also be made "in person". Specifically, the Defendant was advised on March 24, 2014, that he "needed" (emphasis added) to submit his request for inspection in one of two ways: (1) in person, or (2) via the postal service.

Additionally, on February 19, 2015, after this lawsuit was filed, the Defendant "retired" the policy for School Board Records which had been in effect since April 22, 1997. This retired policy was the same policy for open records requests inspections that had been posted on the Defendant's website, the day the Plaintiff made his inspection request: "any citizen of Tennessee, state official, or other authorized person shall be permitted, upon written request (emphasis added) at a reasonable time to inspect all records" [Trial Exhibit #1] – again, a clear violation of the law. Finally, on February 19, 2015, the Defendant officially revised its Public Records Request Policy as to

"Requests to Inspect Public Records" [Trial Exhibit #4]. The specific policy is now set out in Section III of the Revised Policy:

> A. Unless otherwise required by law, SCS does not require a written request to personally inspect a public record and does not assess a charge to view a public record in person unless otherwise required by law. Citizens electing to make an inspection of public requests without a written request should appear in person at the office of the Board and Community Relations Supervisor, Sumner County Schools, 695 East Main Street, Gallatin, Tennessee 37066 in order to make the request.
>
> B. If a citizen elects to make a written request to inspect records, so that the SCS will prepare the records in advance of the citizen actually appearing in person to inspect the records, then the citizen must make the advanced written request on the form developed by the Tennessee State Comptroller's Office of Open Records Counsel and either hand deliver or send completed via the U. S. Mail to the Board and Community Relations Supervisor, Sumner County Schools, 695 East Main Street, Gallatin, Tennessee 37066. This form is available for retrieval at the Office of the Board and Community Relations Supervisor or SCS, or on SCS's website. SCS will not accept advanced request forms for personal inspection of records via email, text message, facsimile, telephone, or other method of communication.

The Court specifically notes that the Defendant's Policy for Request of Inspection of Public Records did not prohibit records request for inspection by email, text message, facsimile, telephone, or other method of communication until February 19, 2015, and that Policy appears to remain in effect at this date, and that it will be followed by the Defendant in the future. Although the Defendant's policy does not now "require a written request", – one can "elect to make a written request to inspect", but it specifically will not accept any other form of communication, except for the requestor to come in person. All of this results in a "forced" election of a written request or a "forced" election to appear in person. There are still two options in the present policy: the same two options emailed to the Plaintiff on March 24, 2014.

The testimony at trial revealed that the Defendant had not been consistent with the processing of open records requests for inspection up until March 24, 2014. As late as the first part of March, 2014, there had been no forms available to make inspection requests. Also, certain members of the media could make requests by email, and one witness was advised that all that was needed to make a request was "to shoot an email" to Jeremy Johnson.

III. The Volume of Public Records Requests Received by the Sumner County Board of Education

On March 24, 2014, Jeremy Johnson was responsible for the processing of all public records requests for the Defendant. Mr. Johnson testified that he was the Community Relations Supervisor at the Sumner County Board of Education and that he had been employed by the Defendant since 2008. He testified about his numerous duties with the Defendant, but his main responsibility was as the spokesperson for the Sumner County Board of Education and liaison for the Director of Schools and the professional staff for the Board of Education. In his capacity as the Community Relations Supervisor, he had been involved with Open Government initiatives through online website communications and online requests for transcripts.

This Court had been concerned about the possible volume of open records requests received by the Board and the possible burden of handling numerous requests before hearing any evidence in this case. Was the volume of requests a burden on the daily routine of operating the schools in Sumner County? Was more "manpower" needed to process open records requests? Was there a legitimate administrative reason to require requests only to be made in person or in writing? Did the

policy balance the government's need to function efficiently and maintain the integrity of the records with the public's right to access records pursuant to the TPRA? The evidence at trial revealed that the answers to these questions were clear and unequivocal "noes".

Mr. Johnson stated that the volume of public records requests was only twelve to fifteen per year (emphasis added) and that he was able to handle all public records requests along with all his other duties with the Defendant. The Court does not find that the cost estimates to changing the school board policy requests as to inspection of public records, as testified to by Chris Brown, to be a credible estimate of the costs to have to change the methods of receiving inspection requests to include email or telephone, the two specific methods that he had researched for costs.

CONCLUSIONS OF LAW

The Tennessee Public Records Act (hereinafter referred to as TPRA) begins with the following requirements concerning public records request for inspection:

- All state, county, and municipal records shall, at all times during business hours, ... be open for personal inspection by any citizen of this State, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law. T.C.A. §10-7-503(2)(A).
- The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. T.C.A. §10-7-503(2)(B).

The TPRA clearly sets out time limitations for the custodian of the records:

- In the event it is not practical for the records to be promptly available for inspection, the custodian shall within seven business days:

  (i) Make the information available to the requester;
  (ii) Deny the request in writing or by completing a records request response form developed by the Office of Open Records Counsel. The response shall include the basis for the denial; or
  (iii) Furnish the requester a completed records request response form developed by the Office of Open Records Counsel stating the time reasonably necessary to produce the record or information. T.C.A. §10-7-503(2)(B).

The consequences for a failure to respond to a request are as follows:

- Failure to respond to the request as described in subsection (a)(2) shall constitute a denial and the person making the request shall have the right to bring an action as provided in §10-7-505. T.C.A. §10-7-503(3).

The only limitations on requests for inspection are as follows:

- Any request for inspection or copy of a public record shall be sufficiently detailed to enable the records custodian to identify the specific records to be located or copied. T.C.A.§10-7-503(7)(B).

- 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 government 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. T.C.A. §10-7-503(7)(A).

- A records custodian may not require a written request or assess a charge to view a public record (emphasis added) unless otherwise required by law; however, a records custodian may require a request for copies (emphasis added) of the public records to be in writing or that the request be made on a form developed by the Office of Open Records Counsel. T.C.A. §10-7-503(7)(A). [Note: In this section dealing with requests for records, a distinction is made between requests for inspection and requests for copies.]

The Court finds that the "Best Practice Guidelines for Records Custodians Responding to

Requests for Public Records" [Trial Exhibit #12] (hereinafter referred to as BPG) provides some assistance in the application of the Tennessee Public Records Act.

- To the extent possible, a governmental entity should have a written public records policy properly adopted by the appropriate governing authority. The policy should be applied consistently...the policy should include: (a) the process for making requests to inspect public records and/or to receive copies of public records; (b) the process for responding to requests (including the use of required forms); and (c) whether and when fees will be charged for copies of public records. Guideline Number 1, BPG.

- The policy 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. Guideline Number 1, BPG.

- Whenever possible one person within each governmental office, department or division should be designated as a public records request coordinator. This person will insure that requests made pursuant to the TPRA are routed to the appropriate records custodian and that requests are fulfilled in a timely manner...Guideline Number 2, BPG.

- A records custodian should make requested records available as promptly as possible in accordance with T.C.A. §10-7-503. Guideline Number 3, BPG.

- A records custodian should strive to respond to all records requests in the most economical and efficient manner possible. For example, when labor charges are going to be assessed, qualified staff persons with the lowest hourly wage should be utilized to produce the requested records. Guideline Number 4, BPG.

- To the extent possible, when records are maintained electronically, records custodians should produce records requests electronically. Records should be produced electronically whenever feasible as a means of utilizing the most "economical and efficient method of producing" records. Guideline Number 5, BPG.

- If a governmental entity maintains a website, records custodians should post as many records and particularly records such as agendas and minutes from meetings, on the website whenever it is possible to do so. A records custodian may direct the requester to the website for requested records. However, a requester may still exercise the right to inspect the public record during regular business hours in the office of the records custodian and/or to receive a copy or duplicate made by the records custodian. Guideline Number 6, BPG.

- When the records custodian is unclear as to the records that are being requested, it is suggested that the custodian contact the requester in an effort to clarify and/or

narrow the request. If, after attempting to clarify the request, the records custodian is still unable to determine what is being requested, the request should be denied based upon the requester's failure to sufficiently identify the requested records in accordance with the requirements of the TPRA. Guideline Number 14, BPG.

When a public records request has been denied, the law is very clear as to the procedure to follow and the accompanying burden imposed upon the government entity:

- Any citizen of Tennessee who shall request the right of a personal inspection of any state, county, or municipal record as provided in §10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access. T.C.A.§10-7-505(a).

- The burden of proof for justification of non-disclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the non-disclosure must be shown by the preponderance of the evidence. T.C.A.§10-7-505(c).

- The Court, in ruling upon the petition of any party proceeding hereunder, shall render written findings of fact and conclusions of law and shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section...T.C.A.§10-7-505(d).

- And this section shall be broadly construed so as to give the fullest possible public access to public records. T.C.A.§10-7-505(d).

From the TPRA and the BPG, it is very clear to this Court that in the application of the TPRA that openness and the accessibility of non-exempt records are favored. It is also very clear that the law has placed no restriction on the form or the format of a request for inspection of public records other than: (1) a request for inspection or viewing cannot be required to be initiated by a written request; (2) any request for inspection of a public record shall be sufficiently detailed to enable the

record custodian to identify the specific records. [1]

I. THE FIRST REQUEST BY EMAIL AND PHONE BY THE PLAINTIFF

The Plaintiff's first email request was:

> **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 online you can simply provide the link.**
> **If not contact me when ready for my review.**

The Plaintiff followed immediately by leaving a voicemail to Mr. Johnson.

> **Jeremy, this is Ken Jakes. I'm just calling to verify that you did receive, according to where my email went, on my public records request (sic)**

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[1] This Court has also reviewed the report of the Tennessee Comptroller of the Treasury Office Open Records Counsel Frequently Asked Questions. [Trial Exhibit #15]

Question #9: May a records custodian require a request to inspect public records be in writing? (emphasis added)

Generally, the answer is No. T.C.A. §10-7-503(a)(7)(A) states that a records custodian may not "require a written request...to view a public record unless otherwise specified by law." Given that a requester is not required to make a request in person and given that a request for inspection is not required to be made in writing, a governmental entity should accept a request for inspection by telephone, if the requester does not want to make a request in person or in writing.

Question #16: Is a citizen required to make a request to inspect or receive copies of a record in person? (emphasis added)

No, as long as the request is sufficiently detailed for the records custodian to know what records are being requested, the request does not have to be in person.

Question #25: Is a governmental entity required to accept public records requests for copies (emphasis added) (different from the request in this case for inspection) via email or fax?

The case law in Tennessee only addresses the fact that a governmental entity is required to accept requests for copies (emphasis added) in person or through the mail. However, if the governmental entity decides to requests for copies via email or texts, the law doesn't prohibit the entity from doing so. If a governmental entity is going to limit the method in which it accepts requests for copies (emphasis added), that information should be reflected in the entity's rule or policy.

I'm just verifying that. My cell phone number 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.

The Court finds that these two public record requests for inspection from the Plaintiff complied with the TPRA as "(a)ny request for inspection or copying of a public record shall be specifically detailed to enable the records custodian to identify the specific records to be located or copied." T.C.A. §10-7-503(7)(B). Both the email and the phone message were "sufficiently detailed to enable the custodian to identify the specific records requested" - a request for the records policy for the Board of Education. Under the TPRA, that is all that is required to make a request to inspect public records.[2]

Also the Court notes the opinion of the Court of Appeals in Allen v. Day, 213 S.W.3d 244 (Tenn.Ct.App., 2006). The Court specifically held that "furthermore, it is undisputed that Ms. Burke sufficiently identified the requested document. We therefore find that Ms. Burke's request was sufficient to meet the statutory subject matter jurisdictional requirements and that the trial court properly exercised jurisdiction." Allen at 250 (Tenn.Ct.App., 2006)[3]

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[2] The Court of Appeals in Waller v. Bryan, 16 S.W.3d 770,774(Tenn.Ct.App 1999) was concerned that limiting the format for requests for inspection "would place form over substance and not be consistent with the clear intent of the Legislature." In Waller, the Court was concerned with a requirement that a person must appear in person to request a copy of documents, and the Court reiterated, "(i)f the citizen requesting inspection and copying the documents can sufficiently identify those documents so that the appellees know which documents to copy, a requirement that a person 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." (Emphasis added)

[3] Mrs. Burke was a reporter for The Tennessean who attempted to gain access to the settlement agreement "by initiating direct contact with the trial judge of the civil case in the courthouse hallway." Allen at 247.

The specific wording of the TPRA states that requests for inspection should not be required to be in writing, T.C.A. §10-7-503(7)(A): In the opinion of this Court, the policy stated in response to Plaintiff on March 24, 2014 required a writing and the specific wording of Defendant's entire present policy is a clever arrangement of words which results in a "forced election" to make a request in writing – making the "writing election" a requirement. Also, the specific wording of the present policy, and the policy stated in Defendant's email response on March 24, 2014, allow one other option – to come in person. Under these circumstances, a requirement for the requester to come in person is a violation of TPRA as stated in this opinion below. The request for inspection in this email and phone call was "sufficiently detailed to enable the records custodian to identify the specific record". Therefore, the Court finds that the request for inspection was sufficient under the TPRA as a valid public records request for inspection triggering the other requirements under the TPRA.

The Court finds that the email response from Jeremy Johnson constituted a denial under T.C.A. §10-7-503(a)(3). The response from the Defendant stated that "in keeping with our practice regarding open records requests (no distinction was made between a request for inspection versus a request for copies) you will need (emphasis added) either to submit your request in person or via the postal service." That was the last response to the Plaintiff regarding this request to inspect public records, and the failure to respond to the request as described in subdivision (a)(2) shall constitute a denial and the person making the request shall have the right to bring an action under T.C.A. §10-7-505.

Therefore, the Court must determine whether the denial and the Defendant's policy for the inspection of public records on March 24, 2014, was lawful. In addition, the Board of Education

revised their Public Records Request for Inspection Policy on February 19, 2015, a policy that generally reflects the same requirements for requests for inspection as stated in Mr. Johnson's email on March 24, 2014, with the exception of clarification that nothing else would be accepted as a public records request for inspection.[4]

The open records inspection policy expressed to the Plaintiff via return email to the Plaintiff on March 24, 2014, was clear - he needed (emphasis added) to: (1) Submit his request in person, or (2) via postal service. The present policy "does not require a written request", but allows a citizen to "elect" "to make a written request for inspection," and if a written request is "not elected" by the citizen, then the citizen should appear in person to make a public record request for inspection. As stated above, the "election" wording is a forced election to make a request for inspection in writing – i.e., a requirement to make a request for inspection in writing contrary to the law. The present policy also specifically states that the Defendant will not accept any other form of a request for public inspection. The Court sees no real difference between the new policy and the policy emailed to the Plaintiff on March 24, 2014.

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[4] The present policy for request to inspect public records states (also fully set out on page 6 of this Opinion):

A. Unless otherwise required by law, SCS does not require a written request to personally inspect the public record and does not assess a charge to view a public record in person unless otherwise required by law. Citizens electing to make inspection of public records without a written request should appear in person...

B. If a citizen elects to make a written request to inspect records so that the SCS will prepare the records in advance of the citizen actually appearing in person to inspect the records, then the citizen must make the advance written request on the form developed by the Tennessee State Comptroller's Office of Open Records Counsel and either hand-deliver or send the completed form via the U.S. Mail (to the above address)...SCS will not accept (emphasis added) advanced request forms for personal inspection of records via email, text message, facsimile, telephone, or other method of communication.[Trial Exhibit #4]

The two options given to the public to make public records requests of the Defendant do not "give the fullest possible access to public records". T.C.A.§10-7-505(d). It is a policy that is most convenient to the Defendant to process without concern to the accessibility and convenience to the public. Further, when the individual options are analyzed under the law individually, they present options that are not favored by statute or caselaw.

This second option, requiring a personal appearance, clearly violates the intent of the Open Records Act "to give the fullest possible access to public records", T.C.A. §10-7-505(d), and to "promptly make available for inspection any public record", T.C.A. §10-7-503(a)(1)(B). The case law determining the requirement of a personal appearance also rejects that requirement to appear in person. In Waller (supra) the Court specifically held, as stated above, that a requirement that a person 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". Further, Waller at 774 and 775, stated,

> This restriction would prohibit all Tennessee citizens who are unavailable, because of health issues or other physical limitations, to appear before the records custodian ... 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.

In Allen, 250 (supra) the Court stated the only reason to request personal appearances:

> As the Court alluded in Waller, the purpose of a personal appearance requirement is to prevent wasted governmental time and money caused by the endless search through voluminous records for a document which was insufficiently identified by petitioner.

There has been no evidence that personal appearances at the Sumner County Board of Education "prevent wasted governmental time and money caused by the endless search of

voluminous records for a document insufficiently identified" – to the contrary: no pressing justification for a personal appearance has been presented by the Defendant for this request that was sufficiently identified.

As recently as June 24, 2015, the Court of Appeals has reiterated that "(i)n construing the TPRA we have previously held that a citizen does not need to make a physical appearance in order to make a records request, citing Waller, and noting that "if a citizen can sufficiently identify the documents which he wishes to obtain copies of so as to enable the custodian of the records to know which documents are to be copied, the citizen's personal presence before the records custodian is not required". Friedmann v. Marshall County, Tennessee, 2015 WL 4772825, (Tn.Court.App., 2015) citing Jones v. Crumley, 2004 WL 2086370 (Tenn.Ct.App., 2004)

The first option, a forced "election" resulting in a requirement (as stated above) to send a request via the postal service, a request in writing, and then wait to receive a reply, is also time consuming. Mail delivery time varies depending on the distance involved, and time is consumed by waiting on the postal service to make a delivery to the defendant and then for the defendant to make a response and then wait for a delivery to the requester.

We no longer live in a Pony Express world. Since the 1830's, we have lived in a telegraph world. Now we have telephones, facsimiles, websites, and forms of internet communication. We live in an instant communication world - communication that used to require days now requires only seconds.

The Best Practice Guidelines state that "records custodian should make requested records available as promptly as possible"; that a records custodian "should strive to respond to all records requests in the most economical and efficient manner possible"; and that "(i)f a governmental agency

maintains a website, records custodian should post as many records, and particularly records such as agendas and minutes from meetings, on the website whenever it is possible to do so".

Further, the argument that a requester has "choices" or can "elect" to make a request in writing is a very hollow argument when one "choice" or "election" is expressly prohibited under the TPRA - a request to inspect public records in writing, "via postal service". The other "choice" or "election" can be extremely inconvenient by having to come in person to the School Board.

The School Board's Policies allow two forced "choices/elections" that contravene or are inconsistent with the policy of the Open Records Act which requires the TPRA to be "broadly construed so as to give the fullest possible access to public records," T.C.A. §10-7-505(d) and present case law. The policies are only for the convenience of the Defendant - an entity which processes only twelve to fifteen requests for public records each year.

Therefore, this Court finds that the policies of the Defendant for accepting requests for public records for inspection by writing or in person, and the new policy specifically prohibiting all other forms for requests for inspection, are in violation of the TPRA.

This opinion is unique as to the facts of this case only – where the Defendant only accepted/s two forms of making a public records request for inspection: only by mail or in person.

II. PLAINTIFF'S SECOND REQUEST ON MARCH 31, 2014

On Monday, March 31, 2014, at 9:29 a.m., the Plaintiff made a second form of a public records request for inspection:

Mr. Johnson, as a public records request to inspect and review, please provide

me the following

Any and all communications between you and any other parties concerning my first public records request for the Board of Education to provide for my inspection the BOE record's policy.

This is to include but not be limited to the following
All emails SENT or RECEIVED.
All audible recording and voice mail by all parties.
All letters.
All memos.
All text messaging.
Should for any reason you not understand this request please contact me.
Ken Jakes cell 615-347-3379
home 615-876-6220 [Trial Exhibit #9]

The Defendant never sent a response to this request. The Defendant responded to the Plaintiff's first request of March 21, 2014, at 4:30 p.m., by setting out the Defendant's policy for request for inspection on March 24, 2014, at 2:40 p.m.

This Court has noted, and will note again, the unprofessional, rude, and arrogant tone of the Plaintiff's emails that were sent to the Defendant after making the original request. Plaintiff never met Jeremy Johnson. They had never conducted any business together. Plaintiff had never contacted the Sumner County Board of Education before for any purpose. Plaintiff threatened, challenged, intimidated, and made fun of the Defendant through various emails. He specifically asked Mr. Johnson to "provide the name and contact information" for their legal counsel. This was before (emphasis added) Mr. Johnson had had a chance to respond to Plaintiff's original after hours request. [Trial Exhibit #6]

In his next chronological response to the Defendant, the Plaintiff stated:

> ... "and this is the response I get from you. Let me give you a response as well, never say your practices have gone unchallenged. You, are about to find out the true meaning of being challenged on an issue. There is no way on earth the court will rule on your behalf. Opinions are one thing and established legal precedence (sic) is another. Are you ready to make history? I am." [Trial Exhibit #7]

The next message sent by Plaintiff specifically stated:

"Mr. Johnson, you left out another way I could obtain your records policy. That method is called DISCOVERY. [Trial Exhibit #7]

On March 28, 2014, Plaintiff sent the following message:

... does the School Board have such a surplus of funds to waste because you refuse to provide me the records policy for my review? It would appear providing for the children of the schools would be a much better use of public funds..." [Trial Exhibit #8]

Plaintiff's second request is a manifestation of his completely unprofessional, rude, and intimidating attitude by wanting "any and all communications between you and any other party or parties concerning my first public records request for the Board of Education to provide for my inspection of the BOE records policy"; by requesting all emails, all audible recordings, and voice mails by all parties, all letters, all memos, and all text messaging, he demonstrated this unprofessional and bullying attitude.

This second request is in line with Plaintiff's other communications from one who has tried to intimidate, has threatened a lawsuit, and has challenged the policy of the Defendant. Although the Defendant did not respond to the request, and "failure to respond to request shall constitute a denial", T.C.A.§10-7-503(3), the Defendant had explained the Defendant's policy (right or wrong) by email to the Plaintiff before he made this second request.

This Court finds that this second request by the Plaintiff was too broad and was not "sufficiently detailed to enable the records custodian to identify the specific records to be located", and also, the Court finds that a request of this type does not fall within the meaning of the TPRA. Further, Plaintiff cannot use the TPRA to conduct discovery. Waller, supra.

Therefore, the Court finds, for the reasons set out above, that the second request made by the Plaintiff on March 31, 2014, after being informed of the Board's policy on March 24, 2014, was not

valid and was not specific enough to comply with the TPRA. The Court finds that there is no basis for relief on this claim.

III. ATTORNEYS FEES

The Defendant has argued that he is entitled to attorney's fees because the Defendant's refusal to provide the records was "willful". The law concerning this issue is set out in T.C.A. §10-7-505(g):

> 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 attorney's fees, against the non-disclosing governmental entity. In determining whether the action was willful, the Court may consider any guidance provided to the records custodian by the Office of Open Records Counsel as created in Title Eight, Chapter Four.

The Court notes that the Defendant sought the advice of the Open Records Counsel concerning the public records request for inspection in this case. The advice requested was whether the Defendant should accept the request for inspection of public records by email. Further,

> The element of 'willfully' required by the statute has been described as synonymous to a bad faith requirement...stated differently, the Public Records Act does not authorize the recovery of attorney's fees if the withholding government entity acts with a good faith belief that the records are excepted from disclosure...moreover, in assessing willfulness, Tennessee Courts must not impute to a governmental entity 'duty to foretell an uncertain judicial future'. Schneider v. The City of Jackson, 226 S.W.3d 332 at 345 (Tenn.2007)

"(T)he majority of the cases discussing willfulness under the Act have analyzed the issue in terms of the law's clarity at the time when the records request is made, even in spite of references that the willfulness standard is one synonymous to a bad faith". Friedmann v. Marshall County, Tennessee 2015 WL 4772825 (Tn.Ct.App.2015) referring to The Tennessean v. City of Lebanon

2004 WL 290705 (Tn.Ct.App.2004).

The Court finds that there was no showing of an unwillingness to produce a particular record, but rather involved a question or concern of the proper procedure to follow by the Defendant in accepting a request for inspection. As this Court has stated, the Court finds that Jeremy Johnson has been a good employee of the Defendant and that he wore "many hats" concerning his responsibilities and duties with the Sumner County Board of Education. He pursued this records request in good faith. The policy for responding to Open Records requests for inspection by the Defendant had evolved over a period of time but had actually been put into practice before the Plaintiff's request through the Kurt Riley request for open records. The Court finds that the records custodian, Jeremy Johnson, relied upon the advice of staff attorney, Jim Fuqua. Fuqua was the staff attorney for the Board of Education and had been in that position since 2005. Mr. Fuqua relied upon advice from the Open Records Counsel. The Court finds that the clarity of the law as to these particular issues was not clear and that those issues are being resolved by this particular lawsuit. Further, as stated above, both parties had never talked to each other or conducted any business together before this series of events.

It is a tremendous stretch of imagination for the Plaintiff to pursue a bad faith/conspiracy argument. The Court notes again that before Jeremy Johnson had the opportunity to answer Plaintiff's email and voicemail message, Plaintiff wanted to know the name and contact information of Defendant's legal counsel. Plaintiff's further communications reveal that he was prepared to go to court and file a lawsuit as soon as he got out of the starting blocks.

Further, Plaintiff's testimony regarding this particular issue of bad faith and conspiracy is not credible - testimony that is pure speculation and pure conjecture that results in no accountability

when stated outside a courtroom on blogs, Facebook, or other social media. Also, most importantly, it is testimony that does not pass the scrutiny for admissible evidence required in a court of law where truth and justice are the ultimate goals.

Therefore, the Court finds that there was no bad faith or unwillingness in denying Plaintiff's request on March 21, 2014, and attorney's fees are not awarded to the Plaintiff.

CONCLUSION

The Court finds that the Defendant has not shown by a preponderance of the evidence the justification for the nondisclosure of Plaintiff's request for the inspection of public records on March 21, 2014, and that the response to the Plaintiff regarding their policy on that date was a violation of the law, as stated in this opinion above. The Court also finds that the revised policy from February 19, 2015, which is now in effect, is in violation of the TPRA.

The Court finds that the Defendant has shown by a preponderance of the evidence the justification for the nondisclosure of Plaintiff's second request on March 31, 2014, a request that was not subject to disclosure under the TPRA, as stated in the opinion above.

The Court also finds that there was no "bad faith" on the part of the Defendant in this matter as stated in the opinion above. Therefore, this Court denies the awarding of attorneys fees to the Plaintiff.

Finally, as stated in the opinion above, this Court finds that the present policy for the requests for inspection of public records violates the provisions of the TPRA. Therefore, this Court enjoins the Defendant from the future use of this policy.

with the TPRA, all requests for the inspection of public records shall be processed in a manner consistent with this opinion:

- That the two options given by the Defendant for an inspection request, consisting of a written request or an appearance in person as they evolved through the various policies of the Defendant, violate the provisions of the TPRA;
- That the specific language of the TPRA only requires:
  1. The request be "sufficiently detailed to enable the records custodian to identify the specific records to be located or copied". T.C.A. §10-7-503(7)(B);
  2. That a "records custodian may not require a written request" for the viewing of public records. T.C.A. §10-7-503(7)(A).[5]
- That non-exempt records should be "open" not "closed" so that anyone requiring public records would not be thwarted by policies that are only (emphasis added) convenient for the government entity – but with policies that are consistent with openness, efficiency, and promptness that effectively balance the needs of each citizen by giving the "fullest possible access to public records", T.C.A. §10-7-505(d),

[5] Because these are the only statutory limitations on the format of a request for inspection, this Court encourages the Defendant to adopt a policy in compliance with the TPRA as soon as possible in order to avoid further problems.

Costs are assessed to the Defendant for which execution may issue.

SO ORDERED and **ENTERED** this the 13th day of November, 2015.

DEE DAVID GAY, JUDGE BY INTERCHANGE

CERTIFICATE OF SERVICE

I do hereby certify that a true and exact copy of the foregoing Order has been mailed postage pre-paid or hand delivered to the following, on this the 13th day of November, 2015.

Mr. Kirk Clement
Attorney for Plaintiff
140 North Main Street
P. O. Box 527
Goodlettsville, Tennessee 37072

Mr. Todd Presnell
Attorney for Defendant
Roundabout Plaza
1600 Division Street, Suite 700
Nashville, Tennessee 37203

Rhonda A. Martin, Judicial Assistant

[6] Each government entity operates differently and utilizes their personnel to meet the demands upon the entity. The Sumner County Board of Education operates uniquely and differently from all other government entities to meet the specific needs and demands of the public school system in Sumner County. This Court will not legislate or dictate what methods/formats should be adopted to process public records requests for inspection; however, the Court only recommends that any policy be expanded to accommodate the methods of modern communication – beyond a writing or an appearance in person, and the Court only suggests the consideration of the two methods specifically sanctioned by the BPG and the Comptroller's office: website and telephone.