

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

KENNETH L. JAKES,)	No. M2015-02471-COA-R3-CV
)	
Plaintiff/Appellee,)	
)	
v.)	On Appeal From The
)	Sumner County Chancery Court
SUMNER COUNTY BOARD)	Criminal Court Judge Dee David Gay
OF EDUCATION,)	
)	No. 2014CV53
Defendant/Appellant.)	

**SUMNER COUNTY BOARD OF EDUCATION’S
EMERGENCY MOTION FOR REVIEW OF STAY ORDER**

Sumner County Board of Education respectfully moves the Court pursuant to Tennessee Rule of Appellate Procedure 7 and Tennessee Rule of Civil Procedure 62.08 to stay enforcement of the Sumner County Chancery Court’s judgment in this action pending appeal.

A stay is needed because the chancery court (Criminal Court Judge Dee David Gay) has ordered the Board to develop, adopt, and implement a new public records policy by March 1, 2016, authorizing telephone and electronic requests for inspection of records under the Tennessee Public Records Act. There is no authority requiring governmental entities in Tennessee to accept electronic or telephone requests under the Act. And there is no reason to rush development and implementation of such an unprecedented policy—at the taxpayers’ expense—without first obtaining authoritative guidance from this Court as to whether the Act requires it. In light of the novel issues of public importance presented in this case, the risk of irreparable harm to the Board, and the lack of any harm to other parties if a stay is granted, the Court should stay the chancery court’s judgment pending appeal.

BACKGROUND

1. Plaintiff Kenneth Jakes is a self-proclaimed “public records request expert.” Trial Tr. at 353 (**Exhibit 1**). He boasts of making requests “from probably every municipality in the state of Tennessee and a big, large portion of the counties” numbering “in the upper hundreds . . . [m]aybe in the upper thousands.” *Id.* at 306, 317. For example, Jakes “made records requests with Nashville Electric Service that took [him] about one year to review,” appearing in person “Monday through Friday from 1:00 to 4:00 . . . every day for a year.” *Id.* at 312.

2. After hearing from a friend that the Sumner County Board of Education did not accept phone or e-mail requests for public records, Jakes decided to test the Board’s policy. *Id.* at 323. He believed challenging the Board’s policy “would hold th[e] potential” to change the policy of “every governmental entity in this state.” *Id.* at 371.

3. To challenge the Board’s policy, Jakes sent a batch of e-mails to the Board in March 2014 demanding to inspect the Board’s public records policy. He also left a voicemail message with a Board employee inquiring about the e-mail. The Board employee who received the messages promptly told Jakes that he had not made a proper request under the Board’s public records policy and immediately explained how he could submit a public records request to the Board. As the employee explained, a citizen may request to inspect Board records by: (1) appearing in person to make the request; or (2) submitting a written request through the U.S. postal service.

4. Numerous state and local governmental entities across Tennessee have adopted the same or substantially similar public records policies. This is certainly true among school boards. *See* List of Policies (**Exhibit 2**). The Board has identified 72 Tennessee school boards with published public records policies, and *not one* expressly permits e-mail or phone requests.

Additionally, at least 12 school boards require requests to be made in person or via U.S. Mail and explicitly prohibit e-mail requests.

5. In the process of handling Jakes' requests, the Board conferred with the Tennessee Office of Open Records Counsel to confirm that the Board did not have to accept e-mail requests under existing Tennessee law. Trial Tr. at 231–32 (**Exhibit 3**).

6. Because he was “ready to make history,” Trial Tr. at 378, Jakes brought this action against the Sumner County Board of Education under the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-505. Jakes claimed that the Act required the Board to accept his e-mail and telephone requests for public records. Compl. ¶ 19 (**Exhibit 4**).

7. The case was assigned through interchange to Criminal Court Judge Dee David Gay, who tried the case and entered his Findings of Fact and Conclusions of Law and Order on November 13, 2015.

8. In that order, the court held that Jakes' initial e-mail (but not a later e-mail) and his voicemail message both “complied with the TPRA.” Order at 13 (**Exhibit 5**). According to Judge Gay, the requests were “sufficiently detailed to enable the custodian to identify the specific records requested” and “that is all that is required to make a request to inspect public records.” *Id.*

9. Judge Gay further held that the Board's policy of requiring requests to be made in person or via U.S. mail violated the Act. The court ordered the Board to adopt a new policy by March 1, 2016, and ordered that “until a new policy is adopted . . . all requests for the inspection of public records shall be processed in a manner consistent with this opinion.” *Id.* at 24.

10. Given the important and novel issues presented, the Board decided to appeal the court's order. The Board filed a notice of appeal on December 10, 2015.

11. The chancery court initially stayed its judgment for 30 days. The court announced the stay at the November 13 hearing and entered an order formally granting the stay on November 30. Nov. 13 Hr’g Tr. at 44 (**Exhibit 6**); First Stay Order (**Exhibit 7**).

12. On December 9, 2015, the Board filed a motion (**Exhibit 8**) to continue the stay during the pendency of this appeal. Jakes also filed a post-judgment motion seeking to alter or amend the court’s denial of his request for attorneys’ fees and seeking discretionary costs.

13. On December 16, 2015, the court entered an order extending the stay until a hearing to resolve the pending post-judgment motions. Second Stay Order (**Exhibit 9**).

14. On January 25, 2015, the court held the hearing on the post-judgment motions. The court denied all of the motions, including the Board’s request for a stay pending appeal. The court announced that any “stay will be up on March 1[, 2016], and by that time I expect the School Board to have a policy of compliance with the law.” Stay Hr’g Tr. at 42 (**Exhibit 10**). The court also stated its view that “[t]his case has nothing, absolutely nothing to do with [whether] the defendant must accept an email as part of the policy.” *Id.* at 41. Instead, the court suggested that the Board might be able to comply with the court’s ruling by accepting requests submitted through a website portal (rather than the e-mail submission that was at issue during trial) and requests submitted by telephone. *Id.*

15. The court entered an order on February 10, 2016, denying the Board’s request for a stay pending appeal. Denial Order (**Exhibit 11**).

REASONS FOR GRANTING A STAY PENDING APPEAL

16. This Court should stay the chancery court’s judgment pending appeal.

17. *First*, this case involves difficult issues of first impression that are important to hundreds of state and local governmental entities and agencies subject to the Tennessee Public

Records Act. Neither Jakes nor the chancery court has identified any precedent—and the Board is aware of none—requiring public entities to accept electronic or telephone requests for inspection of public records.

18. Moreover, the Board’s policy of requiring requests to be made in person or in writing via U.S. Mail—a policy that many other governmental entities have adopted—is fully consistent with existing precedent. Although a governmental entity may not restrict public records requests solely to a writing, Tenn. Code Ann. § 10-7-503(a)(7)(A), or solely to an in-person appearance, *Waller v. Bryan*, 16 S.W.3d 770, 773–74 (Tenn. Ct. App. 1999), an entity may lawfully require a citizen to choose between an in-person appearance or a written request. This Court has already recognized as much, explaining that “[i]n order to access public records, a citizen must either [1] appear in person during normal business hours at the location where the public records are housed or [2] identify those documents sought by mail.” *Hickman v. Tenn. Bd. Probation & Parole*, M2001-02346-COA-R3-CV, 2003 WL 724474, at *3 (Tenn. Ct. App. Mar. 4, 2003) (footnote omitted).

19. As the Tennessee Office of Open Records advises, “[t]he case law in Tennessee only addresses the fact that a governmental entity is required to accept requests for copies in person or through the mail.” Tennessee Office of Open Records Counsel, Frequently Asked Question No. 25, *available at* <http://www.comptroller.tn.gov/openrecords/faq.asp>. There is no precedent requiring a governmental entity to accept electronic or telephone requests.

20. In denying the Board’s stay request, Judge Gay relied heavily on the Board’s purported “attitude of arrogance” in “continu[ing] to operate in violation of [his] rul[ing].” Stay Hr’g Tr. at 36. “[I]t’s disturbing to me,” the court emphasized, “that [the Board is] still running in violation of my opinion.” *Id.* at 42. But the court’s criticism was unfounded. The court had

already entered verbal (Nov. 13 Hr’g Tr. at 44) and written (First Stay Order; Second Stay Order) stays of its judgment, which relieved the Board from having to adopt and implement a new policy. Additionally, Jakes’ Rule 59 motion triggered an automatic stay of the court’s judgment effective for 30 days after the motion was denied. Tenn. R. Civ. P. 62.02. The Board was not acting “in violation of [the court’s] rule” as the court claimed in denying the Board’s stay request. Stay Hr’g Tr. at 36. It was under no legal obligation to develop and adopt a new policy while these stays were in place.

21. Moreover, in refusing to grant the requested stay, Judge Gay excoriated the Board for arguing at trial that Jakes’ request was moot because the requested record has been—and remains—publicly available on the internet. According to the court, that argument was a “ruse” and a “completely, totally unfair position for the school board to take.” *Id.* at 28, 36. But at trial, the court shared the Board’s concerns that the case was moot, stating: “Other than a finding that the law has been violated, I don’t know what else I can do. The policy and the records have been furnished.” Trial Tr. at 427. Moreover, many courts (collected in **Exhibit 12**) have squarely held that a requested document’s public availability moots a public records request. The Board’s reliance on this body of law is hardly grounds to deny the Board a stay pending appeal.

22. In light of the unresolved issues of public importance presented in this case, a stay of the chancery court’s judgment pending appeal is appropriate.

23. *Second*, there is no reason to require the Board to hurriedly adopt, implement, and fund a new public records policy by March 1, 2016, before this Court has the opportunity to resolve the novel issues presented here. If this Court reverses the chancery court’s judgment or modifies it on appeal, the public resources spent developing, adopting, and implementing the

new policy would be wasted. This risk of irreparable harm weighs strongly in favor of granting a stay pending appeal.

24. Developing, adopting, and implementing a new policy would take time. The Board would need to draft a policy without relying on the Tennessee School Boards Association's recommended policy, which conflicts with the chancery court's ruling. It would then need to adopt that policy and allocate the funds to implement it. "Policy Development and Adoption," Sumner County School Board Policy Manual, available at: <http://www.boarddocs.com/tn/sestn/Board.nsf/goto?open&id=8KKR466C08E2>; "Line Item Transfer Authority," Sumner County School Board Policy Manual, available at: <http://www.boarddocs.com/tn/sestn/Board.nsf/goto?open&id=8KRKEJ518519>. It would also need to complete a competitive bidding process before purchasing equipment or services to implement the policy. "Bids and Quotations," Sumner County School Board Policy Manual, available at: <http://www.boarddocs.com/tn/sestn/Board.nsf/goto?open&id=8KKSZVZ7495AB>.

25. Additionally, implementing a new policy would be costly. At trial, the Board's Assistant Director for Information Services, Chris Brown, testified that licensing and equipment upgrades needed to treat all e-mails and phone calls as potential public records requests would cost the Board \$40,000. Trial Tr. at 269–70. Although the chancery court discredited Brown's testimony given the number of requests that the Board has historically received, Order at 39, nobody can deny that developing the policies and purchasing the infrastructure to execute the court's judgment—all by March 1, 2016—would require significant public effort, funds, and time, all of which would be wasted if this Court reverses the chancery court's unprecedented holding on appeal.

26. At the hearing denying the Board's stay motion, the court suggested that, instead of accepting e-mail requests, the Board might be able to comply with the Act by utilizing a website portal to accept and process requests. But as explained in the attached declaration (**Exhibit 13**), that approach would be no less burdensome. It would still require the Board to develop, approve, and finance a new policy. And the associated costs, including \$45,660 worth of new computer equipment and substantial programming and implementation time, are similar to those required to accept e-mail requests safely and reliably.

27. In denying the stay request, the chancery court stated that "our school board can do anything." Stay Hr'g Tr. at 39–40. But whether governmental entities like the Board can, in theory, accept electronic and telephone requests for public records is not the question on the Board's stay motion. The question is whether the Board should be required to do so before this Court has conclusively resolved the issues presented in this case. The risk of irreparable harm to the Board—and other public entities that would understandingly feel compelled to comply with the chancery court's judgment—weighs heavily in favor of granting the Board's requested stay pending appeal.

28. *Finally*, a stay preserving the *status quo* poses no risk of harm to Jakes. Jakes has the public record he requested, which remains publicly available online. Jakes simply filed this lawsuit to challenge the Board's policy (shared by many other governmental entities) of not accepting e-mail or telephone requests. And Jakes—like any member of the public—is fully capable of submitting additional requests for other records in person or by mail, as applicants have done across the state for many years.

29. For these reasons, the Board requests that the Court stay the chancery court's judgment pending appeal.

30. The Board further requests that the Court waive any stay bond requirement. Tennessee Rule of Civil Procedure 62.06 relieves “the state, a county, a municipal corporation, or an officer or agency thereof” of providing any “stay or cost bond or other security.” In the alternative, the Board will post any security that the Court deems appropriate.

31. Reasonable notice of this motion has been given to all parties.

WHEREFORE, the Board respectfully moves this Court to grant a stay of enforcement of the chancery court’s judgment pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served on the following via U.S. Mail and e-mail to:

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on this the 10th day of February, 2016.

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