

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE DIVISION AT NASHVILLE

FILED

AUG - 3 2016

Clerk of the Courts
Rec'd By _____

KENNETH L. JAKES,

Plaintiff/Appellee,

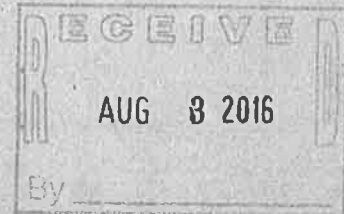
v.

SUMNER COUNTY BOARD OF
EDUCATION,

Defendant/Appellant.

NO. M2015-02471-COA-R3-CV

Sumner County Chancery Court
No. 2014CV53



**MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF
AND MEMORANDUM OF *AMICUS CURIAE*
TENNESSEE SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF DEFENDANT/APPELLANT
SUMNER COUNTY BOARD OF EDUCATION**

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ORAL ARGUMENT REQUESTED

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE DIVISION AT NASHVILLE

KENNETH L. JAKES,

Plaintiff/Appellee,

v.

SUMNER COUNTY BOARD OF
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No. 2014CV53

2016 AUG -3 AM 10:07

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF
IN SUPPORT OF DEFENDANT/APPELLANT

COMES NOW the Tennessee School Boards Association ("TSBA"), by counsel and pursuant to Rule 31(a) of the Tennessee Rules of Appellate Procedure, and moves this Court for leave to file the enclosed *Amicus Curiae* brief in the above referenced matter. As grounds for this motion, TENNESSEE SCHOOL BOARDS ASSOCIATION would show this Court as follows:

1. TENNESSEE SCHOOL BOARDS ASSOCIATION has an interest in this case because it is a not-for-profit organization, created exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. TSBA is recognized in Tenn. Code Ann. § 49-2-2001 as the organization and representative agency of Tennessee's school board members and its membership is comprised of all 141 county, city and special school district boards of education

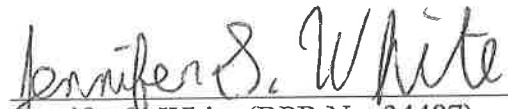
throughout the state. The purpose of TSBA as stated in Article II of the TSBA Constitution and Bylaws, is to work for the general advancement and improvement of public education in Tennessee;


2. The brief of TENNESSEE SCHOOL BOARDS ASSOCIATION in this case would assist this Court because the case is one that affects the rights and responsibilities of school systems acting in their capacity as a local government subject to Tennessee's open records laws. The issue of the interpretation of these laws is statewide in principle and has the potential to affect not only how school systems respond to open records requests but also how local governments respond to open records requests;

3. A memorandum in support of this motion and the proposed brief of TENNESSEE SCHOOL BOARDS ASSOCIATION as *amicus curiae* is filed contemporaneously with this motion.

TENNESSEE SCHOOL BOARDS ASSOCIATION requests that oral argument be granted in this case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

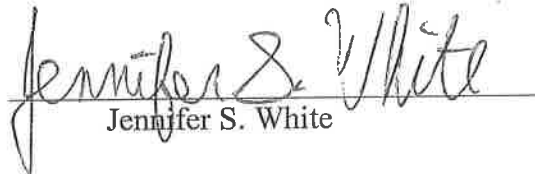
I hereby certify that a true and exact copy of the foregoing motion has been served upon counsel for parties in interest herein:

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On this, 3rd day of August, 2016.


Jennifer S. White

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SUMNER COUNTY BOARD OF
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MEMORANDUM OF *AMICUS CURIAE*
TENNESSEE SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF DEFENDANT/APPELLANT
SUMNER COUNTY BOARD OF EDUCATION

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ISSUES PRESENTED

The amicus curiae adopts the appellant's issues as presented.

STATEMENT OF THE CASE

The amicus curiae adopts the appellant's statement of the case.

STATEMENT OF FACTS

The amicus curiae adopts the appellant's statement of the facts.

SUMMARY OF THE ARGUMENT

The plain language of the TPRA does not require governmental entities to accept electronic requests. Moreover, the Office of Open Records Counsel agrees that nothing in state law mandates acceptance of such requests. Under the Tennessee Constitution, only the General Assembly is empowered to amend statutory requirements. It is vital that laws be created by the General Assembly and interpreted by the judiciary. Any other scheme threatens the balance of power between the three Tennessee branches of government.

In accordance with Tennessee law, the Sumner County Board of Education adopted a policy that does not permit electronic records requests. This policy allows citizens to request to inspect records: (1) in person; (2) via the U.S. mail; and (3) by calling the Sumner County School's public records request line. Additionally, per the TPRA, citizens can request copies of public records in writing. Despite not permitting electronic inspection requests, these options provide Tennessee citizens with a variety of ways to request access to public records. Since no state law requires governmental entities to accept public records requests electronically, the Court should reverse the lower court's judgement.

Additionally, Jakes' claim is moot. Jakes has not only been provided with a physical copy of the requested policy, but he has also been capable of viewing this policy online since 2011. As

the board has made this policy available to Jakes, there is no claim upon which relief can be granted. Consequently, Jakes' claim should be dismissed on mootness grounds.

ARGUMENT

I. The plain language of the Tennessee Public Records Act does not require governmental entities to accept electronic requests.

The Tennessee Public Records Act ("TPRA") does not require governmental entities to accept citizens' electronic requests to inspect or receive copies of public records. Moreover, the Office of Open Records Counsel opined that records custodians are not required to accept requests sent in that format. As a result, the plain language of the statute should be adhered to until the Tennessee General Assembly changes the law.

a. *The TPRA does not require governmental entities to accept electronic requests.*

Since the plain language of the statute does not require governmental entities to accept electronic requests, the judiciary should decline to read-in additional mandates.¹ Statutory requirements that involve significant public policy concerns should only be altered by the state legislature.²

Article II, Section 1 of the Tennessee Constitution provides for three separate branches of state government.³ Additionally, Article II, Section 2 states, "no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."⁴ The Tennessee Supreme Court has considered how these two sections of the Tennessee Constitution interact. In 1993 the court, in *State v. King*,⁵

¹ *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004).

² *See Lavin v. Jordan*, 16 S.W.3d 362, 369 (Tenn. 2000) (noting that courts do not "typically function as a forum for resolution of public policy issues when interpreting statutes.").

³ T.N. Const. art. II, § 1.

⁴ *Id.* at § 2.

⁵ *State v. King*, 973 S.W.2d 586, 588 (Tenn. 1993).

reaffirmed a holding from the early part of the twentieth century, noting “[t]he separation of powers doctrine arises from the precept that it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct.”⁶ Though these branches are coequal, to remain so each branch must operate within its designated sphere of authority.⁷ As a result, the judiciary must take care to refrain from infringing on the authority of the other branches of government.⁸

Tennessee courts have consistently held that the plain language of a statute requires no added judicial interpretation.⁹ The Tennessee Supreme Court has stated:

The most basic principle of statutory construction is to ascertain and give effect to legislative intent. Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. If the legislative intent is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or constructions, and courts are not at liberty to depart from the words of the statute. Where the language contained within the four corners of the statute is plain, clear and unambiguous, the duty of the courts is simple and obvious, to say *sic lex scripta*, and obey it.¹⁰

Therefore, unless statutory language is ambiguous, additional judicial interpretation is not needed.

The TPRA imposes specific requirements and restrictions on governmental entities. For example, the TPRA requires governmental entities to respond to requests within seven business days,¹¹ and prevents governmental entities from requiring requestors to submit a request in writing or pay a fee to inspect public records.¹² Noticeably absent from the requirements listed in the TPRA is any mention of electronic requests. Indeed, the statute does not mention email or electronic requests at all. If the General Assembly intended to require governmental entities to accept

⁶ *Id.* (quoting *Richardson v. Young*, 122 Tenn. 471, 492 (Tenn. 1910)).

⁷ *See id.*

⁸ *Id.*

⁹ *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997).

¹⁰ *Id.*

¹¹ Tenn. Code Ann. § 10-7-503(a)(2)(B)

¹² Tenn. Code Ann. § 10-7-503(a)(7)(A)

electronic requests, this obligation would have been added to the statute.¹³ The absence of this requirement, however, is compelling evidence that the General Assembly never intended to mandate that governmental entities accept electronic requests.¹⁴ Accordingly, because the General Assembly did not include a requirement that governmental entities accept electronic requests, that obligation should not be read into the statute and the plain language of the law should be respected.

Even if the court finds the TPRA to be vague, the *expressio unius est exclusio alterius* canon of statutory construction illustrates that governmental entities are not required to accept electronic requests under this law.¹⁵ According to this canon, a method of statutory interpretation consistently employed by Tennessee courts, “the expression of one thing implies the exclusion of others.”¹⁶ Therefore, if a statute contains a list of requirements it can be presumed that anything not on that list is not required by law.

b. *The Tennessee Office of Open Records Counsel agrees that governmental entities are not obligated to accept electronic records requests.*

The Tennessee Office of Open Records Counsel maintains the position that governmental entities are not required to accept electronic open records requests under the TPRA. Since this state agency is empowered to interpret the TPRA, its opinion should be accorded great weight.

Tennessee courts have consistently accorded “great weight” to state agency interpretations of statutes.¹⁷ Agency interpretations are particularly persuasive evidence where the agency is interpreting a statute that the General Assembly has given it specific authority to administer or

¹³ See *Rich v. Tenn. Bd. of Med. Examiners*, 350 S.W.3d 919, 927 (Tenn. 2011) (noting that if the legislature had intended to add something to a statute the court inferred “it would have included specific language to that effect.”).

¹⁴ *Id.*

¹⁵ *Id.*; See also *Harman v. Univ. of Tenn.*, 353 S.W.3d 734, 738–39 (Tenn. 2011) (“[T]he mention of one subject in a statute signifies the exclusion of other unmentioned subjects, and ‘[o]missions are significant when statutes are express in certain categories but not others.’”).

¹⁶ *Rich*, 350 S.W.3d at 927.

¹⁷ *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998).

enforce.¹⁸ Since agencies interpret such statutes regularly, they are adept at handling questions about a law's implementation in complex situations.¹⁹ As a result of an agency's institutional knowledge of a specialized area of law, Tennessee courts give agency interpretations of such statutes deference.²⁰

The Office of Open Records Counsel has considerable expertise in interpreting the TPRA. This agency's mission is to "answer questions and issue informal advisory opinions as expeditiously as possible to any person, including local government officials."²¹ Additionally, the Office of Open Records Counsel has the authority to educate the public on open records laws, as well as "mediate public records disputes between local governmental entities and citizens."²²

According to the Office of Open Records Counsel's "Frequently Asked Questions" portion of its website, state law does not require governmental entities to accept requests electronically.²³ This is consistent with the plain language of the TPRA, which only mentions two methods via which citizens may submit requests: (1) in person; and (2) in writing.²⁴ Moreover, this opinion is reflected in the Office of Open Records Counsel's Best Practice Guidelines, which state governmental entities may "adopt reasonable rules governing the manner in which records request[s] are to be made and fulfilled."²⁵ Therefore, under the Office of Open Records Counsel's interpretation of the TPRA, a governmental entity is in compliance with the TPRA if it creates an open records request policy that does not accept electronic requests.

¹⁸ *Riggs v. Burson*, 941 S.W.2d 44, 50–51 (Tenn. 1997).

¹⁹ *Consumer Advocate Div.*, 967 S.W.2d at 761.

²⁰ *Riggs*, 941 S.W.2d at 50–51.

²¹ Tenn. Rev. Stat. § 8-4-601(b).

²² Tenn. Rev. Stat. § 8-4-601(b)-(c).

²³ Trial Ex. 15, no. 25.

²⁴ Tenn. Code Ann. § 10-7-503(a)(2)-(7)

²⁵ Trial Ex. 12.

Consequently, as the agency charged with interpreting the TPRA does not believe the law requires governmental entities to accept electronic requests, this opinion should be afforded great weight.

II. The Sumner County Board records policy complies with the TPRA and does not create a “forced election” between requesting to inspect records in person and submitting a request in writing.

The Sumner County Board’s records request policy allows individuals to submit requests in person, via telephone, or through the U.S. mail. Since this policy allows Tennessee citizens a variety of ways to request access to public records, it does not create a forced election as suggested by the court below.

The TPRA prohibits governmental entities from requiring: (1) a written request to inspect a record; and (2) a fee to inspect a record.²⁶ This law specifically allows governmental entities to decide whether or not they will require requests for copies of records to be submitted in writing.²⁷ Regardless of how a request is submitted, a governmental entity must typically respond to both requests to inspect and requests for copies within seven business days.²⁸ As long as a governmental entity complies with these requirements, it is free to implement its own policy containing specific procedures on how requests will be accepted and processed.²⁹

Case law has tested and further defined the boundaries of the TPRA. In keeping with the intent of this law, courts have held that governmental entities cannot impose requirements on public records requests that unreasonably restrict access. For example, it is well established that a governmental entity cannot refuse an inmate access to public records on the basis of his or her incarcerated status.³⁰ In *Cole v. Campbell*, the Commissioner of Corrections refused an inmate’s

²⁶ Tenn. Code Ann. § 10-7-503(a)(7)(A)

²⁷ *Id.*

²⁸ *Id.* at § 10-7-503(a)(2)(B)

²⁹ *See* Trial Ex. 12.

³⁰ *Cole v. Campbell*, 968 S.W.2d 274, 277 (Tenn. 1998).

request for public records.³¹ The Commissioner claimed that it was permissible to deny an inmate's request for public records since, by virtue incarceration, inmates were non-citizens.³² The Tennessee Supreme Court held the claim was without merit since no state law prohibited an inmate from requesting public records under the TPRA.³³ Therefore, the Court held that this type of blanket prohibition preventing inmates from requesting public records was impermissible.³⁴

Tennessee courts have also established that a governmental entity cannot require an individual to appear in person to obtain copies of records.³⁵ In *Waller v. Bryan*, the Court noted that requiring an in-person appearance to obtain copies would unfairly prejudice inmates and those with health issues.³⁶ Further, the court emphasized that the intent of TPRA was to allow greater access and imposing an "in-person" requirement would restrict public access to records.³⁷

However, no Tennessee court has definitely resolved the issue of whether verbal or electronic requests must be accepted under TPRA. In *Allen v. Day*, the court analyzed whether a reporter's verbal request for a public record was sufficiently detailed and submitted to the appropriate individual.³⁸ While this case could be interpreted to mean that a verbal request for a copy of a document should be treated as valid under TPRA, the Court did not reach that issue in *Allen*.³⁹ Instead, the Court's analysis focused on whether the request met the TPRA's subject matter jurisdiction requirements, and did not address the sufficiency of the governmental entity's

³¹ *Id.* at 274.

³² *Id.* at 275.

³³ *Id.* at 277.

³⁴ *Id.*

³⁵ *Waller v. Bryan*, 16 S.W.3d 770, 773-74 (Tenn. 1999); *See also Friedmann v. Marshall County*, Tennessee, 2015 WL 4772825, (Tn.Court.App., 2015).

³⁶ *Id.* at 773.

³⁷ *Id.*

³⁸ *Allen v. Day*, 213 S.W.3d 244, 248-250 (Tenn. Ct. App. 2006).

³⁹ *Id.*

procedure for accepting open records requests for inspection or copies.⁴⁰ As a result, *Allen* is not dispositive in the instant case.

Here, the board's policy does not restrict access to public records in the manner warned against in *Cole* or *Waller*. In those cases, governmental entities sought to restrict access by narrowly defining who qualified as a citizen⁴¹ and requiring a personal appearance to request copies of public records.⁴² Neither of those concerns are raised by the board's current policy. Rather than denying public access to records, the board's policy provides multiple ways for citizens to request access to public records.⁴³ Under this policy, citizens of Tennessee can request to inspect records either by: (1) making the request in person; (2) submitting a written request; or (3) calling the Sumner County School's public records request line.⁴⁴ As allowed under state law, the policy requires requests for copies of public records to be in writing.⁴⁵ These options for requesting access arguably go above and beyond what is required by law and allow a variety of ways to request access to public records. Moreover, *Allen v. Day*, which the appellee relies on, is not dispositive in this case. Even if *Allen* stood for the proposition that verbal requests should be accepted as valid public records requests, the Sumner County board policy currently accepts requests to inspect via telephone.⁴⁶ Verbal requests for copies will not be honored, however, since state law allows governmental entities to require a written request for copies.⁴⁷ As a result, the Sumner County policy is not in conflict with either the TPRA or case law.

⁴⁰ *Id.*

⁴¹ *Cole*, 968 S.W.2d at 275.

⁴² *Waller*, 16 S.W.3d at 774.

⁴³ Sumner County Board of Education Board Policy Manual, *Public Records Request Policy*, available at <http://www.boarddocs.com/tn/scstn/Board.nsf/goto?open&id=9CCLKY534F34#> (hereinafter "Sumner County Records Policy").

⁴⁴ *Id.*

⁴⁵ Tenn. Code Ann. § 10-7-503(a)(7)(A)

⁴⁶ Sumner County Records Policy.

⁴⁷ *Id.*

Contrary to the lower court's opinion, the Sumner County board's policy does not require citizens to make a "forced election" between appearing in person and submitting a request in writing.⁴⁸ Instead, the policy states that a citizen may either appear in person and request to inspect records, or submit a request to inspect in writing.⁴⁹ If the citizen submits a request in writing, the records custodian will ensure that the documents are ready to be inspected when the individual appears to review them at an agreed upon date and time.⁵⁰ While this policy does not force a citizen to submit a written request to inspect public records, it does provide an incentive for an individual to submit a request in writing.⁵¹ If a citizen appears in person to request to inspect records, the records custodian could validly respond that the citizen would need to return at a later date to inspect the records.⁵² Making records available to citizens takes time, since documents must first be collected and reviewed by the records custodian to determine if redaction is required by state law.⁵³ By contrast, if the requestor submitted a written request, he/she would only have to appear in person once.⁵⁴ This option is not only allowable under state law, but it is also more convenient for both the records custodian and the requestor.⁵⁵ Moreover, since governmental entities have seven days to respond to open records requests, the amount of time that a citizen would have to wait to review records should remain unchanged regardless of how the request is submitted.⁵⁶

The current policy demonstrates Sumner County's willingness to not only comply with the TPRA, but to go beyond its requirements to provide citizens with access to public records. Furthermore, since the Sumner County Board's policy does not require citizens to make a forced

⁴⁸ R., Vol. VII, at 948.

⁴⁹ Sumner County Records Policy.

⁵⁰ *Id.*

⁵¹ Sumner County Records Policy.

⁵² Tenn. Code Ann. § 10-7-503(a)(2)(B)(iii)

⁵³ Tenn. Code Ann. § 10-7-504(f)(1)

⁵⁴ Sumner County Board Policy.

⁵⁵ *Id.*

⁵⁶ Tenn. Code Ann. § 10-7-503(a)(2)(B)

election, but rather provides an option that benefits both the requestor and the records custodian, the lower court's judgement should be reversed.

III. Jakes' claim that the Sumner County Board should allow him to inspect its records policy is moot.

Jakes claim is moot since he is already in possession of a physical copy of the requested policy and is capable of viewing it online. Moreover, holding that a governmental entity has not made records available by placing them online would discourage openness and have a chilling effect on school boards that already post policies on their websites.

Under Tennessee law, justiciable claims must involve "live issues that are within a court's power to resolve, and parties who have a legal cognizable interest in the resolution of these issues."⁵⁷ In other words, if a claim is no longer capable of providing a legal remedy to the prevailing party the claim is moot.⁵⁸ Moreover, Tennessee law requires a case "remain justiciable (remain a legal controversy) from the time it is filed until the final appellate disposition."⁵⁹

In *Lance v. York*, an inmate claimed a violation under TPRA because a district attorney did not send him copies of a public record within seven days.⁶⁰ During the pendency of the litigation the attorney provided the inmate with copies of the documents he wished to inspect.⁶¹ This Court noted "the gravamen is whether Mr. Lance received the records at all. It is undisputed that he did."⁶² Since Mr. Lance received the records he wished to inspect, this Court dismissed the claim as moot.⁶³

⁵⁷ *State ex rel DeSelm v. Jordan*, 296 S.W.3d 530, 534 (Tenn. Ct. App. 2009).

⁵⁸ *Id.*

⁵⁹ *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203-04 (Tenn. 2009).

⁶⁰ *Lance v. York*, 359 S.W.3d 197, 200-01 (Tenn. Ct. App. 2011).

⁶¹ *Id.* at 205.

⁶² *Id.*

⁶³ *Id.*

The instant case presents a comparable situation. Similar to *Lance*, Jakes was provided a copy of the public record he requested early in the litigation process.⁶⁴ Even though Jakes received a physical copy of this policy, that copy was duplicative since he had originally only requested to inspect the policy and indicated that he would be willing to do so in an online format.⁶⁵ As Jakes can inspect this policy online and has been provided a physical copy, he no longer has a claim upon which relief can be granted.⁶⁶ Therefore, his claim is moot.⁶⁷

Alternatively, Jakes' claim was moot from the outset since he has been capable of inspecting the requested policy online since 2011.⁶⁸ According to the TPRA, "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."⁶⁹ This Court has previously held that public records custodians are not required to make documents available in an online format.⁷⁰ Yet the majority of school systems have placed their board policies online to provide the public with access to information regarding the governance of public schools.⁷¹ Indeed, at least one hundred fifteen systems maintain their board policies online.⁷² Placing these policies online involved considerable time and expense, yet school boards provide electronic access for the benefit of the community. This practice aligns with the intent of the TPRA "to give the fullest possible access to public records."⁷³ However, if placing public records online is not considered making those records

⁶⁴ R., Vol. I, at 23, 26-28.

⁶⁵ Trial Ex. 5.

⁶⁶ *Id.*

⁶⁷ See *Lance*, 359 S.W.3d at 205.

⁶⁸ Sumner County Board Policy.

⁶⁹ Tenn. Code Ann. § 10-7-503(a)(2)(B) (emphasis added).

⁷⁰ *Wells v. A.C. Wharton, Jr., et al.*, 2005 WL 3309651 (Tenn. Ct. App. 2005).

⁷¹ The Tennessee School Boards Association, *Subscribers*, available at <http://tsba.net/wp-content/uploads/2016/06/Subscribers.pdf>.

⁷² *Id.*

⁷³ Tenn. Code Ann. § 10-7-505 (d)

available for purposes of the TPRA, this would remove any incentive for boards to provide online access, effectively contravening the intent of the TPRA.

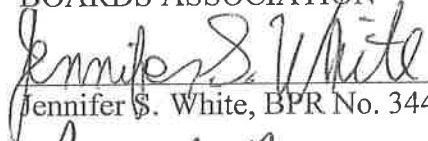
This Court should reverse the lower court's judgement on mootness grounds since Jakes has been capable of viewing the Sumner County Board policy on public records requests since 2011. Even though Jakes was capable of viewing the policy online for approximately three years before litigation was filed, during the course of this litigation the board provided Jakes a physical copy of the requested policy. Under the TPRA, these actions fulfill the requirement of TPRA that records be made available to citizens of Tennessee. Since the board has ensured that Jakes has access to the requested documents, there is no claim upon which relief can be granted, and the court should reverse the lower court's decision.

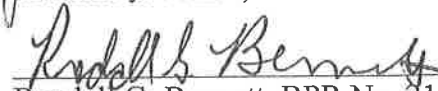
CONCLUSION

Since the TPRA does not require governmental entities to accept electronic requests, it was improper for the chancery court to read that requirement into state law. Moreover, Jakes claim that the Sumner County Board denied him access to its policy on public records is moot since that policy has been publicly available online since 2011. As a result, the amicus curiae respectfully requests that the Court reverse the lower court's judgement and remand it with an order to dismiss.

Respectfully submitted this 3rd day of August 2016

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion has been served upon counsel for parties in interest herein:

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On this, 3rd day of August, 2016.


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