IN THE COURT OF APPEALS OF THE STATE OF TENNESSEE
MIDDLE DIVISION

ON APPEAL FROM THE CHANCERY COURT OF SUMNER COUNTY

KENNETH L. JAKES, Plaintiff/Appellee, vs. SUMNER COUNTY BOARD OF EDUCATION, Defendant/Appellant.	NO. M2015-02471-COA-R3-CV SUMNER CO. CHANCERY COURT NO. 2014CV53 JUDGE DEE DAVID GAY

BRIEF OF PLAINTIFF/APPELLEE KENNETH L. JAKES

COMES NOW Plaintiff/Appellee Kenneth L. Jakes by and through counsel of record and pursuant to Rule 27 of the Tennessee Rules of Appellate Procedure and submit the brief herein.

The Trial Court Record will be referred to as follows: Technical Record: TR Vol. "#", p. "#"; Transcript of Proceedings: TP Vol. "#", p. "#"; Trial Exhibits: TE "#".

ORAL ARGUMENT REQUESTED

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PLAINTIFF/APPELLEE KENNETH JAKES' STATEMENT OF ISSUES

I. Whether or not the Trial Court abused its discretion in failing to award Plaintiff attorney's fees;

II. In the alternative, if the Court finds the Trial Court did not abuse its discretion in failing to award Plaintiff attorney's fees, whether or not the Trial Court abused its discretion in granting Defendant's Motion for Protective Order, which prevented Plaintiff from conducting oral discovery;

III. Whether or not the Trial Court erred in failing to issue a permanent injunction enjoining Defendant from denying records request which are transmitted by conventional methods of communication such as email, facsimile or telephone;

IV. Whether or not the Trial Court's finding of fact that Plaintiff's March 31, 2014 records request was not sufficiently detailed was supported by a preponderance of the evidence.

STANDARD OF REVIEW

Appellate review of findings of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Rule 13 of the Tennessee Rules of Appellate Procedure. If the trial court does not make a finding of fact, there is no presumption of correctness, and the appellate court "must conduct [its] own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. *Ivey v. Trans Global Gas & Oil*, 3 S.W. 3d 441, 446 (Tenn. 1999).

STATEMENT OF FACTS

On February 5, 1991, the Defendant Board adopted a policy titled "School Board Records". The policy states in pertinent part, "The Director of Schools shall maintain all school system records required by law, regulation and Board Policy. Any citizen of Tennessee . . . shall be permitted, upon written request, at a reasonable time, to inspect all records maintained by the school system unless otherwise prohibited by law, regulation, or board policy. A person who has the right to inspect a record may request and receive copies of the document subject to the payment of reasonable costs." (TE No. 1).

On or about March 6, 2014, Neil Siders, a local journalist, was preparing to teach a class to citizens at a meeting held by Sumner United for Responsible Government about how to make public records request. He had presented at the office of a few governmental entities in Sumner County, to include Hendersonville City Hall, the Sumner County Administrative building, Gallatin City Hall, to obtain forms to make public records requests. His last stop was at the Central Office of the Sumner County Board of Education and upon arrival he requested a public records request form from the secretary at the front desk. The secretary was unable to respond to Mr. Siders' request and Mr. Siders was directed to the Director's office. (TP Vol. XI, p. 287-288). Upon arriving at the Director's office, Mr. Siders once again requested a form regarding public records requests. Again, Mr. Siders was not assisted but instead was directed to the Finance Office. Mr. Siders proceeded to the Finance Office and once again requested the public records request form. (TP Vol. XI, p. 287-288). However, once again, Mr. Siders was not assisted but was directed to Mr. Jeremy Johnson, the Director of Communications for the Sumner County Board of Education. Upon speaking with Mr. Johnson, Mr. Siders advised him about his intent to demonstrate to citizens how to make public records request. Mr. Johnson

advised that there were no forms which were available at the school board, however, Mr. Siders could merely submit his records request via email. (TP Vol. XI, p. 289-290). Mr. Johnson did advise Mr. Siders that a generic form was available on the Comptroller's website. (TP Vol. XI, p. 295-296).

On March 10, 2014, Kurt Riley a citizen of Sumner County presented at the Director's office and completed a records request form, in which Mr. Riley requested the following: "Please provide for my review and inspection any and all credit card statements for all employees elected officials and their personnel from July 2013 to the current." This request form was received by Jeremy Johnson on March 10, 2014. (TE No. 13). On or about March 12, 2014, Mr. Riley received a certified letter from Jeremy Johnson in which Jeremy Johnson advised that the records requests made by Mr. Riley would be available on or after March 14, 2014. Further, Mr. Riley was advised to contact Jeremy Johnson and schedule a time for the inspection. Sometime after March 20, 2014, in response to Mr. Riley's records requests, the Defendant posted on its web site a written response to Mr. Riley's request. The opened statement of the page titled "Financial Transparency" is as follows: "On March 10, 2014, Kurt Riley representing Sumner United for Responsible Government (SURG) filed an Open Records Request with our office to 'review and inspect any and all credit card statements for all employees, elected officials and other personnel from July 2013 to current." Thereafter, a link was provided to review the actual records requested by Mr. Riley. The statement further stated, "Mr. Riley visited the Central Office on March 20, 2014 to review and inspect the requested documents. He chose to review the statements from July 2013 and August 2013 during that visit. Mr. Riley flagged and requested additional documentation for seventeen employee P Card statements from those specified months". Once again, the Board provided a link to review the actual request made by

Mr. Riley. The statement proceeds to state "of those seventeen statement and document receipts, ten statements were for purchases made by daycare employees for our school daycare program. Items purchased included snacks, activity supplies, and other expenses. School day-care are self funded paid by fees paid by parents for daycare services. Per Tennessee Department of Education requirements, monies raised through daycare fees can only be used on expenses for the children served in that schools day care." However, the Board concluded the statement by stating "We encourage everyone to review these pages and their links to supporting documentation for each purchased item to further understand how they are used within our school system. We felt like it was important for all citizens to have this information." (TE No. 14).

Sometime before March 21, 2014, Mr. Ken Jakes, the Plaintiff, was informed that the Defendant was denying citizens' requests for records and, thus, Plaintiff sought the records request policy. Mr. Jakes contacted Mr. Johnson via email on or about March 21, 2014, stating "Mr. Johnson, this is a Public Records Request to inspect and review. Please provide the following for my inspection. The Records Request 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 review." (TE No. 5). Mr. Jakes followed up by leaving a voicemail on Mr. Johnson's telephone. In response to such a request, on March 24, 2014, Jeremy Johnson provided the following response via electronic mail. "In keeping with our practice regarding Open Records Request you will need to either submit your request in person or via the postal service." (TE No. 7). Mr. Johnson's statement is not only inconsistent with what he told Neil Siders just days before, it is inconsistent with the 1991 policy.

Further, it was not consistent even with the policy as amended by Director Del Phillips and Jeremy Johnson purportedly on or about March 20th, 2014. During the first week of March, notably after Mr. Siders had advised Mr. Johnson of his intent and after Mr. Riley had made his request, Mr. Johnson and Mr. Phillips met to discuss clarifications to the policy. (TP Vol. X, pp. 58-59). The title of this policy is "School Board Records-AP". The policy states in pertinent part, "A staff member shall be present during all records inspection to maintain the integrity of documents. Appointments will be scheduled for the inspection times to be sure that staffing is available . . .. Requests for inspection or copies of public documents shall be made to the Director's office under the supervision of the Supervisor of Boarding Community Relations. A request for inspection or copies of public documents shall be made in writing on the 'inspection/duplication of records request' form provided by the Office of Open Records Counsel of the Comptroller's Office of the State of Tennessee." (TE No. 1). Nothing in the policy states that the request cannot be made by electronic mail or that such requests have to be made in person. The Board's attorney, Jim Fuqua, was not consulted about the changes to this policy. (TP Vol XI, p. 242).

Mr. Johnson had dealt with the TPRA for years and he knew that a records request could not be required to be in writing. He also knew he could not require a citizen to make a request in person. (TP Vol. X, p. 94). Despite this knowledge the new policy Mr. Johnson assisted in drafting did require request to be in writing or in person. Mr. Johnson frequently referred to the website of the Office of the Open Records Counsel and the Best Practices which is disseminated by the OORC. (TP Vol. X, p. 101). Mr. Johnson acknowledges that the Best Practices requires that that record request should be responded to as promptly as possible (TP Vol. X, p. 103) and responses should be in the most economical and efficient manner possible (TP Vol. X, p. 104).

Mr. Johnson frequently communicates by email and believes that email is an efficient and economical way to communicate. (TP Vol. X, p. 105-106).

On March 25th, 2014, legal counsel for Plaintiff forwarded an email to the Jim Fuqua, the Board's attorney, requesting that the Board accept an email as a records request and relying on this Court's ruling in Waller v. Bryan. (TE No. 16). Upon receiving this email, which was on March 25th, 2014, Mr. Fuqua merely forwarded such to another attorney as he knew he was not going to be involved in the case and the Board had already decided it would hire an outside lawyer. (TP Vo. XI, p. 241). Despite the fact the case *Waller v. Bryan* was cited, Mr. Fuqua never reviewed this case to determine the Board's responsibilities and he never discussed the case with Elisha Hodge, who was the attorney for the Office of Open Records Counsel. (TP Vol. XI, p. 241). In fact, Mr. Fuqua did not do any research regarding the question raised by Plaintiff's counsel; he only read the statute and consulted with Elisha Hodge. (TP Vol. XI, p. 236). Mr. Fuqua has been practicing law since 1968, was on the Sumner County School Board from 1996 to 2000 and has been the Board's attorney since 2005. (TP Vol. XI, p. 218). Mr. Fuqua is very familiar with the TPRA and has dealt with the TPRA and the applicable federal law for many years. (TP Vol. XI, p. 237). Mr. Fuqua felt he was qualified to give an opinion regarding the requirements of the TPRA. (TP Vol. XI, p. 237). Mr. Fuqua is not aware of the length of time Ms. Hodge has been practice law. (TP Vol. XI, p. 236). Mr. Fuqua previously was an active member of the Tennessee School Boards Association when he was on the school board and is currently a member of the Council of School Board Attorneys, which is an organization sponsored by the Tennessee School Boards Association. In 2014, the TSBA made efforts through the Tennessee Legislature to change the law and allow school boards to charge citizens to inspect records. (TP Vol. XI, p. 239).

Mr. Fuqua contacted Elisha Hodge on or about March 26, 2014 and had a forty-five minute discussion with Ms. Hodge regarding whether or not the Board had to accept a records request via email and another matter. Mr. Fuqua did not have a discussion with Ms. Hodge about any specific case. (TP Vol. XI, p. 241). According to Mr. Fuqua, Ms. Hodge advised the Board did not have to accept an email as a records request, but such should be stated in the Board's policy. (TP Vol. XI, p. 232). Ms. Hodge did not provide Mr. Fuqua a written opinion. (TP Vol. XI, p. 235). Mr. Fuqua never asked Ms. Hodge about whether or not the Board had to accept a records request via telephone or voicemail and never discussed such with Mr. Johnson. (TP Vol. XI, p. 235 & 239).

On March 31, 2014, Mr. Jakes made a second records requests, as follows: "Mr. Johnson, as a public record request to inspect and to review please provide me the following: any and all communication between you and any other party or parties regarding my first public records request for the Board of Education to provide for my inspection the Board of Education Records Policy." Mr. Jakes did not receive a response to his March 31, 2014 request until February 23, 2015 when he received a letter from Mr. Johnson via certified US Mail in which Mr. Johnson advises that such information requested is protected by the attorney/client privilege. Interestingly, on February 19, 2015 the Board Policy Manual was revised with respect to the "Public Records Request Policy", which now states "Unless otherwise required by Law, Sumner County Schools does not require a written request to personally inspect a public record and does not access a charge to view a public record in person unless otherwise required by Law. Citizens electing to make an inspection of public records without a written request should appear in person at the office of the Board of Community Relations Supervisor, Sumner County Schools, 695 E Main Street, Gallatin, Tennessee, 37066, in order to make the request. If a citizen elects to

make a written request to inspect records, so that the Sumner County Schools 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 Controller's Office of the Open Records Counsel to either hand deliver or send the completed form via the US Mail . . .Sumner County Schools will not accept advance requests form for personal inspection of records via email, text message, facsimile, telephone, or other method of communication." (TE No. 4).

LAW AND ARGUMENT

I. THE TRIAL COURT FINDING THAT THE BOARD'S PUBLIC RECORDS REQUEST POLICY VIOLATES THE TENNESSEE PUBLIC RECORDS ACT (TPRA) SHOULD REMAIN UNDISTURBED AS THE TPRA NOR ANY PRECEDENT AFFORDS A GOVERNMENTAL ENTITY THE RIGHT TO IGNORE A RECORDS REQUEST WHICH SUFFICIENTLY IDENTIFIES THE RECORDS SOUGHT.

The Plaintiff would respectfully submit that he Trial Court's ruling that Plaintiff's March 21, 2014 records request made via electronic mail and voice mail were valid records requests pursuant to the TPRA and, thus, the Defendant's refusal to respond to such requests was in violation of the TPRA should remain undisturbed. The Plaintiff further would assert that the Trial Court's ruling that the Board's Public Records Request Policy which was in place at the time of Plaintiff's March 21, 2014 records request and the policy which was enacted in February of 2015 was in violation of the TPRA was proper and should also remain undisturbed. Despite the plain language of the Trial Court's findings, the Defendant has attempted to frame the issues in this case based on a holding that the Defendant must accept an email as a public records request; the Trial Court did not make such a finding. While Plaintiff agrees that a governmental entity is required under the TPRA to respond to any records request it receives including those which are submit by email, facsimile or other accepted forms of communication (*see* Sect. III, *infra.*), the Trial Court did not make a finding that the Defendant must accept an email as a records request. The Trial Court held that a policy which only gives a citizen the right to make a request by two methods: either requiring a citizens to submit requests in person or via U.S. Mail was in violation of the TPRA as the TPRA states explicitly that request for inspection cannot be required to be in writing and this Court held in *Waller v. Bryan*, that a citizen cannot be compelled to appear in person to make a records request. The Plaintiff would respectfully

submit that the Trial Court's holding in this regard should not be overruled as the plain language of the TPRA nor the precedent set by this Court affords the Defendant the right to ignore a records request.

A. THE PLAIN LANGUAGE OF THE TPRA DOES NOT AFFORD THE DEFENDANT THE RIGHT TO IGNORE A RECORDS REQUEST

This Court has held "It is this Court's duty to apply rather than construe the language of the Public Records Act, since the intent of the Legislature is represented by clear and unambiguous language." *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). Thus, if the Court simply applies the plain language of the TPRA it is clear that Plaintiff did make a request to inspect to which the Defendant had a duty to respond. T.C.A. § 10-7-505 states, "Any citizen in Tennessee who shall request the right of personal inspection of any State, County, or municipal records as provided in § 10-7-503 and his request has been in whole or part denied by the official and/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." Further, the TPRA states in pertinent part, "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(a)(2)(A). Thus, the TPRA makes it clear that any citizen who makes a request to inspect "shall not be refused the right of inspection" and if such is denied in whole or in part, the citizen has a right to petition for access to such records. The Defendant essentially asserts that because the TPRA does not require it to accept a records request by email (the Defendant fails to acknowledge the Plaintiff also made the request by

voicemail) the Defendant had the right to simply ignore Plaintiff's requests, however, such is not support by the TPRA. The plain language of the statute requires that if a citizen makes a request, which Plaintiff did, the request "shall not be refused" and if the request is denied, the citizen can petition for access; no language exists affording a governmental entity the right to ignore a request which was received.

The TPRA only has two primary limitations to making a request for inspection. First, the request to inspect "shall be sufficiently detailed to enable the records custodian to identify the specific records to be located or copied." *See* T.C.A. 10-7-503(a)(7)(B). Secondly, the individual performing the inspection may be required to provide identification. *See* T.C.A. 10-7-503(a)(7)(A). Otherwise, other than the right to promulgate reasonable rules regarding copying ,which will be addressed below, the TPRA does not provide any language limiting how such request to inspect is to be made nor does it afford a governmental entity the right to limit how the request is made. In fact, the TPRA provides that the government entity cannot require a citizen to make the request in writing and requires that the government entity to provide the records promptly upon request. The TPRA states in pertinent part, "The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record . . . .A records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law. *See* T.C.A. 10-7-503(a)(1)(B) & (7)(A). Thus, absent from the TPRA is any limitation on how the citizen may make a request and such omission, under the fundamental principles of statutory construction, reveals the intent of the legislature not to afford a governmental entity the right to simply ignore a request for a public record which it receives.

The only provision of the TPRA which provides the governmental entity the authority to dictate how a citizens exercise their rights under the TPRA relate to requests for inspections is

found at T.C.A. § 10-7-506(a), which states in pertinent part, "In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same . . .; provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats." Using the well established rules of statutory construction it should be evident to the Court the legislature did not intend to afford a governmental entity the right to dictate how a request can be made. "The Court's role in construing statutory language is to ascertain and give effect to the legislative intent without unduly restricting or expending a statute's coverage beyond its intended scope. When the language within the four corners of the statute is unambiguous, the legislative intent must be derived from the statute's face. Therefore, we must follow the natural and ordinary meaning of a statute unless ambiguity requires us to seek clarification." *Bryant v. Genco Stamping*, 33 S.W.3d 761, 764 (Tenn. 2000) (citations omitted). Thus, the Court cannot expand a governmental entities rights as the Defendant proposes as the plain language of the statute sets out clearly the restrictions placed on citizens when making records request.

More importantly, however, had the legislature intended to afford the governmental entity the right to make "reasonable rules governing" making request as it did with regard to allowing citizens to make copies, the legislature would have stated such. It is a well establish principle of construction that "where a legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject." *Id.* The Tennessee Supreme Court also held in *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991), "Normally, it is a rule of statutory construction which is well recognized by our courts, that mention of one subject in a statute

means the exclusion of other subjects that are not mentioned." In *Harkins*, at issue was the proper standard for review on appeal of a criminal court's decision on revocation of a community correction sentence. At the time of the decision, T.C.A. 40-35-402 provided that "the granting or denial of probation, in addition to the lengthy, range or manner of service of a sentence, is subject to a de novo standard of review." *Id.* at 82. However in finding that such did not apply to revocation of community correction sentence and that the abuse of discretion standard applied, the Tennessee Supreme Court held:

> While the statute specifically includes within its scope granting and denying probation, it includes no reference to probation revocation, and omits completely any reference to community corrections sentences, whether such be granted, denied, or revoked. Normally, it is a rule of statutory construction which is well recognized by our courts, that the mention of one subject in a statute means the exclusion of other subjects that are not mentioned . . .. It would appear that if the General Assembly intended to make the revocation of a community corrections sentence (or probation) subject o a de novo standard of review, it could have simply included such in the list of subjects contained in the statute. Its omission is significant, and it would be inappropriate for this Court to imply an entirely new topic into a statute that does not seek to address it in the first instance.

Id. (citations omitted). Likewise, in the case *sub judice*, if the General Assembly desired to afford the governmental entity the right to initiate reasonable rules regarding the method a citizen must use to request for inspection of public records, it seems the General Assembly would have included such in the language of 10-7-506, which specifically addresses reasonable rules which can be implemented when citizens make a request to inspect. However, the General Assembly clearly chose not to and, thus, "it would be inappropriate for this Court to imply an entirely new topic into the statute that does not seek to address it in the first instance." Therefore, a reading of the TPRA reveals that not only does the plain language of the TPRA require governmental entities to have all public records available for inspection during normal business hours, but such

reveals the legislature had no intent to afford the governmental entity the right deny a records request merely because of the method such request was made.

B. IN THE MATTER OF *ALLEN V. DAY*, THIS COURT HELD THAT THE OBLIGATIONS UNDER THE TPRA ARE TRIGGERED WHEN A GOVERNMENT ENTITY RECEIVES A REQUEST WHICH SUFFICIENTLY IDENTIFIES THE RECORDS SOUGHT.

Given the plain language of the TPRA, there simply is no legal support for the Defendant's assertion it had the right to ignore the Plaintiff's request just because it was made pursuant to an email. In fact this Court has flatly rejected the Board's position. A review of the opinion of the Court of Appeals in *Allen vs. Day*, 213 S.W. 3d 244 (Tenn. Ct. App. 2006) confirms such an interpretation of the TPRA.

In the matter of *Allen vs. Day* at issue was whether or not a government entity had to turn over a confidential settlement agreement pursuant to the Tennessee Public Records Act. [1] The Tennessee Court of Appeals held that the settlement agreement had to be disclosed. While there were several issues in this case, the threshold issue was whether or not the Court had subject matter jurisdiction pursuant to the Tennessee Public Records Act . The defendant in *Allen* made the same argument Defendant is asserting in the case *sub judice*: the Court did not have subject matter jurisdiction, meaning the obligation under the TPRA were not applicable, because the Plaintiff did not make a records request pursuant to the Tennessee Public Records Act as she failed to make a formal request pursuant to the statute. In response to such argument the Court of Appeals held as follows,

[1] Despite the Court finding that the settlement agreement had to be disclosed, the Court held that the trial court did not have authority to require it to be filed with the Circuit Court Clerk's office.

> [Defendant] Powers initially contends that neither Gannett or Ms. Burke fulfilled the statutory prerequisites stated above so as to provide the trial court with subject matter jurisdiction to adjudicate their petition. Gannett has conceded that it is not a citizen of Tennessee within the meaning of the statute, however, Gannett asserts that it's employee, Ms. Burke, met the statutory preconditions and thus the trial court properly exercised subject matter jurisdiction over the Petition. Ms. Burke admittedly did not personally appear during Power's normal business hours and request a copy of the settlement agreement from the Power's official records custodian. Gannett asserts however that this failure was not fatal to the acquisition of the subject matter jurisdiction. Ms. Burks affidavit filed on March 2, 2005, revealed that she inquired about the contents of the settlement agreement but that Power's spoke person denied access to the record, saying that the agreement was confidential . . .[A]s the Court alluded to *Waller*, the purpose of the personal appearance requirement is to prevent wasted governmental time and money caused by the endless search through the voluminous records, for a document which was insufficiently identified by the Petitioner. **Powers does not argue that Ms. Burks request was insufficiently described nor does it argue that it lacked notice of Ms. Burks' request due to her failure to personally appear before Power's official records custodian. Power's simply contends that Ms. Burke did not comply with the literal language of the statute and therefore she should be precluded from contesting the denial of access to the settlement agreement. To strictly construe the subject matter jurisdiction requirements, as Powers suggests, would be to defeat the clear language of the act which states that the access is to be broadly construed so as to give the fullest possible access to public records.** Tennessee Code Annotated 10-7-505 (d). Clearly in this case the denial of access by Power's spokesperson constitutes the denial by an official or designee of an official within the meaning of the Tennessee Code §10-7-505(a). 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 jurisdiction requirement and that the trial court properly exercised jurisdiction.

Allen vs. Day, 213 S.W.3d 244, 249 (Tenn. Ct. App. 2006)(emphasis added). The plain language of this Court's ruling sets the precedent that if the records request is received and acknowledged and such sufficiently identifies the records sought, if the TPRA is to be broadly construed to give the "fullest possible access to public records" a governmental entity has a duty to respond. Defendant cannot provide any binding authority to overcome this precedent as such precedent has not been overruled by statute or by a subsequent appellate ruling.

In fact, such precedent has been solidified by subsequent legislative action. The Tennessee Legislature made major revisions to the TPRA in 2008 and did not make any changes which sought to abrogate *Allen v. Day*. As the Legislature is imputed with the knowledge of appellate opinions, the fact the Legislature did not change the law in regard to the method of request actually solidifies the Court's ruling in *Allen v. Day*. In the matter of *Neff v. Cherokee Ins. Co*, 704 S.W.2d 1 (Tenn. 1986), the Tennessee Supreme Court held, "The Legislature is presumed to have knowledge of the state of the law on the subject under consideration at the time it enacts legislation." *Id.* at 4. A review of the 2008 revisions demonstrate that the changes do not affect the relevant holding in *Allen v. Day*, to wit: the method of the request is not material as long as the request is received and the request sufficiently identifies the records requested.

The two sections which were referenced in *Allen v. Day* were T.C.A. 10-7-503(a) and 10-7-505. With regard to section 503(a), though such was completely replaced by the Legislature in 2008, such did not affect the holding of *Allen v. Day*. The previous section required that the request be made "during normal business hours". The new section removed that requirement and simply required that the records be *available* during normal business hours. The new section reads, "All state, county and municipal records shall at all times, during business hours . . .be open for personal inspection by citizens of Tennessee . . .". Thus, if any implication is to be made it is that the Legislature responded to the Court's ruling in *Allen v. Day* by removing the requirement that request had to be made during normal business hours.

One of the fundamental principles of statutory construction is that the legislature is presumed to know the state of the law at the time of the passing of any law. An excellent example of this principle of statutory construction can be found in the matter of *State v. Powers*,

101 S.W.3d 383 (Tenn. 2002) in which the Tennessee Supreme Court addressed the marital communication privilege and construction of T.C.A. 24-1-201. As the Supreme Court explains in *Powers*, the marital communication privilege evolved over time and in *Adams v. State*, the Tennessee Supreme Court set forth the criteria for communication which were subject to the privilege. However, in a 1993 case, *State v. Hurley*, the Court found the privilege was only enforceable by the witness spouse. The next year, in response to *Hurley*, the Tennessee Legislature amended T.C.A. 24-1-201 to state that both spouses could assert the privilege. In *Powers*, the Defendant attempted to argue that the amendment abrogated the *Adams* case and, thus, a spouse, regardless of the communication, whether confidential or not, could not be allowed to testify against another spouse. The Tennessee Supreme Court rejected this argument stating,

> It is clear the amended statute expressly overturns the rule in *Hurley* that vested the privilege solely in the testifying spouse and provides that either spouse may assert the privilege. However, it is not clear the legislature intended to abolish the *Adams* factors. We conclude the legislature had no such intent. . . .The 1995 amendment showed no clear intent on the part of the legislature to alter [the *Adams* definition of confidential]. The statute does not define "confidential," "communications," or "privileged." Therefore, the meaning of those terms must be provided by the existing case law, including *Adams*. The legislature is presumed to know the state of existing case law. Thus, it would have been necessary for the General Assembly to explicitly abolish the *Adam* factors if that had been the intent. The 1995 statute, however, fails to mention the factors at all.

Id. at 393 & 394. Likewise, in the case *sub judice*, when the General Assembly specifically amended T.C.A. 10-7-503(a), given the state of the law pursuant to *Allen v. Day*, if the General Assembly intended to afford governmental entities the right to deny records request that were not made precisely according to the statute or its own policy, the General Assembly would have done so as it was presumed the General Assembly knew of the holding in *Allen v. Day* at the time of the 2008 Amendment. Clearly, the amendment does not even suggest such

authority. In fact, the inference is just the opposite. The 2008 Amendment specifically states that the entity must be open for public records inspections during normal business hours and the custodian of records must respond promptly and may take up to seven (7) days to respond if the records are not immediately available. There is not even a suggestion that the manner in which the citizen makes the request affects the duties of the governmental entity. Therefore, under the well-established principles of statutory construction the fact that the Tennessee General Assembly did not abrogate *Allen v. Day* in these changes, the intent of the General Assembly was that this Court's finding that a governmental entity cannot put form over substance when responding to a public records request is the proper construction of the TPRA.

C. THE DEFENDANT HAS FAILED TO CITE TO ANY AUTHORITY THAT CAN OVERCOME THE PLAIN LANGUAGE OF THE TPRA OR THE PRECEDENT SET BY *ALLEN V. DAY.*

The Defendant makes a valiant effort to side step the plain language of the TPRA, the well-established rules of statutory construction and this Court holding in *Allen v. Day* and afford itself the right to ignore records requests made by citizens by making the argument that a governmental entities are "largely responsible for adopting their own policies". In making such a bald assertion, the erroneously relies on the following: 1) the assertion the plain language of the TPRA does not compel the Defendant to accept an email as a records request; 2) a response to frequently asked questions on the Office of Open Records Counsel's website, which has no binding authority on this Court; 3) a 2003 unreported case, *Hickman v. Tennessee Board of Probation & Parole*, which actually supports the Plaintiff's position in this case; and 4) the argument *Allen v. Day* is not applicable to the case *sub judice*. As addressed below, the Plaintiff respectfully submits such assertions should be unavailing.

1. **The absence of an express requirement in the TPRA that a governmental entity must accept a records request via email does not equate to the authority to ignore a records request submitted by a citizen.**

Initially, the Court should be reminded that the Trial Court did not hold that the Defendant had to accept an email; the Court only held the current policy of only accepting a request in person and via U.S. Mail was in violation of the TPRA and precedent set by this Court. Nonetheless, the Defendant argues that it has the right to dictate the method of the request as the TPRA does not "expressly require custodians to accept emails to inspect public records". The Defendant reasons that because the TPRA does provide "other express restrictions", the absence of such restriction is to be construed as an intent of the General Assembly not to restrict a governmental entity in this regard. The Defendant relies upon the principle of statutory construction which states, "[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 categories but not others." *See* Def's Brief, p. 15-16. The proper application of this principle is provided above and a review of the very case upon which Defendant cites, *Harman v. Univ. of Tenn.*, 353 S.W.3d 734 (Tenn. 2001), demonstrates such does not apply in this matter as Defendant asserts.

Harman involved the demotion of a professor who sued pursuant to the Tennessee Public Protection Act (TPPA), commonly referred to as the Whistle Blower Act. In finding that the TPPA was not applicable in a demotion, as opposed to a termination, the Supreme Court held, "We note that the legislature did not include any terms indicating that other actions by the employer, such as "demotion", might also give rise to an action under the statute. The 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. [citation omitted]. The legislature could have used terms in addition to "discharged" or "terminated" had it intended to target discriminatory activity beyond discharge or termination as it has done in other instances." *Id.* at. 738-739. In *Harman*, the plaintiff was asking the courts to create a whole new cause of action under the TPPA for a demotion or other retaliatory conduct and the Supreme Court rightly refused to do so as clearly had the Legislature wanted to add demotions as part of the prohibited activity, the Legislature would have chosen to do so. Such a situation is not analogous to the case at bar. Despite the Defendant's assertions, as this Court held in *Allen v. Day*, the TPRA is not silent on whether or not a governmental entity can reject a request it receives; the TPRA explicitly states that a governmental entity *cannot* refuse a request to inspect. "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(a)(2)(A). (emphasis added). Had the Legislature intended to afford a governmental entity the right to refuse a request to inspect depending on the method of the request, similar to adding a demotion as part of a cause of action under the TPPA, the Legislature, instead of saying "unless otherwise provided by state law" would have stated "unless the citizen fails to make the request pursuant to the policies of the governmental entity" or other similar language. In essence, Defendant is attempting to use a specific rule of construction to overcome the primary rule of statutory construction: "Where the statutory language is not ambiguous, . . .the plain and ordinary meaning of the statute must be given effect." *Id.* at 738, *quoting Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000). The term "shall not refuse such right by any citizen of this state, unless otherwise provided by law" is not ambiguous and the plain and ordinary

meaning of such words does not contemplate a governmental entity refusing a citizen the right to inspect based solely on the method of the request.

2. Neither the law nor the facts in this matter support the Defendant's argument the OORC's statements to Jim Fuqua are entitled to deference.

The Defendant's assertion that the Office of Open Records Counsel's statements to Jim Fuqua are entitled to deference should fail for several reasons. First, Elisha Hodge's statements to Jim Fuqua are not before the Court. During the course of Jim Fuqua's testimony, who was the attorney for the Defendant when the request by Plaintiff were made, Mr. Fuqua attempted to testify as to the advice he received from Elisha Hodge, the attorney for the Office of the Open Records Counsel (OORC) at the time, however, Plaintiff's counsel made a hearsay objection and the Court ruled that the statements could come in for the purpose of the effect such had on Mr. Fuqua's mind set, but not for the truth of the matter asserted. (TP Vol. XI, p. 231).Therefore, the statements were not submitted for the truth of the matter asserted, to wit: the legality of the Defendant refusing Plaintiff's email. Given such state of the record, even if the Court was to accept the assertion the OORC's opinion is entitled to deference such opinion is not before the Court for the Court to consider.

The Defendant attempts to enter the opinion of the OORC through the "Frequently Asked Questions", which are published on the OORC's website, however, the Defendant misstates the opinion of the OORC. The FAQ which Defendant references deals with request **for copies**, not request for inspection. *See* Def's Brief, p. 18. No. 25 of the Frequently Asked Questions states, "Is a governmental entity required to accept a public record request **for copies** via email or fax?" (emphasis added). Request for copies are in a different category and the Legislature has made

specific requirements for request for copies as opposed to request for inspections. Request for copies can be required to be in writing, they can be required to be on a form provided by the OORC and the governmental entity can charge for the copies and the labor to make such copies. *See* T.C.A. 10-7-503(a)(7)(A) & (C). No such requirements exist for request for inspection and the TPRA states that a request for inspection *cannot* be refused.

3. The Defendant has misstated this Court's ruling in *Hickman*.

Defendant asserts that in the matter of *Hickman v. Tennessee Board of Probation & Parole*, 2003 WL 724474 (Tenn. Ct. App., March 4, 2003) "this Court has expressly recognized that custodians can lawfully adopt policies substantively identical to the Board's public-records policy requiring citizens to submit inspection requests in person or by U.S. Mail." This is a misstatement of the Court's ruling as the issues were 1) whether or not the records requested were confidential, 2) the format in which the board had to respond and 3) whether or not the board had to do a manual search of its records. *Id.* at *8. At the trial court level, because the plaintiff was an inmate and had sent his request via U.S. Mail, an issue existed whether or not the board received plaintiff's request as the custodian of records denied ever receiving the request. However, this was not an issue at the appellate level as this Court found the board admitted to receiving the request during litigation and the board would have denied it anyway.

In *Hickman*, an inmate sought records from the Tennessee Board of Probation and Parole, however, the Board denied it ever received the request. (Ironically, though this is the primary case upon which Defendant has relied, the method of request was U.S. Mail, thus, Defendant has conceded, in part, that U.S. Mail is not always reliable). The Court ultimately determined that Hickman was entitled to records, however, the Defendant has insisted that the *dicta* in the case

confers authority on the Board to only provide two methods of requests. The language upon which Defendant relies, states, "In order to access public records, a citizen must either appear in person during normal business hours at the location where the public records are housed or, if unable to appear in person, the citizen may identify those documents *sought by mail* to the records custodian so that the records custodian can copy and produce those document without requiring an extensive search. The custodian may charge a fee for each document that is meant to cover both copying the item and delivering the copies." Id. at *3. (*relying* on *Waller v. Bryan*, 16 S.W.3d 770,774 (Tenn. Ct. App. 1999)(emphasis added). Initially, it should be noted, this statement of the law references the *delivery* of the records NOT the method of the request.

Further, the Defendant twists the words of the Court and the facts. The policy of the defendant board in *Hickman* at the time was, "If a person cannot, or chooses not to come to the place where the records are kept, the person may contact the Board and request copies of the records." *Id.* at *11. Nothing within the Board's policy required that such request must be by U.S. Mail; the Defendant in this case merely tries to confuse the issue as Hickman did make his request by mail. Therefore, to the extent that this Court's ruling is a tacit approval of the board's policy in *Hickman*, such does not translate into approval of the Defendant's policy in this matter as the two policy are not similar. As the real issue in *Hickman* was whether or not the records requested should be disclosed, it is difficult to imagine that this Court would have ruled any differently had Hickman sent his request by email as opposed to U.S. Mail. Indeed, the *Hickman* Court correctly states that there only two ways for a citizen to make a records request. Citizens can either make the request in person or if they do not want to appear in person, they do not have to do so, but can merely notify the government entity which records they want to inspect or be copied. *However, nothing in Hickman states that such request must be by U.S. Mail*

or that such request cannot be over the phone, by facsimile or by electronic mail. Thus, contrary to Defendant's assertion, *Hickman* actually reinforces the proposition that as long as a citizen sufficiently identifies the records requested, the governmental entity has a duty to respond.

4. The Defendant erroneously asserts *Allen v. Day* is not applicable to the case at bar.

The Defendant argues, "The Court's decision [in Allen v. Day] turned on the proper construction of the TPRA's express jurisdictional requirements, which are not at issue in this case." Def's Brief, p. 22. Such is a simplistic reading of this Court's holding in *Allen v. Day*. Similar to the Defendant in this case, the defendant in *Allen* was attempting to assert that the TPRA is not applicable because of the method in which the records had been requested. In this case, in essence, the Defendant is saying it did not have any obligation to respond to Plaintiff's request via electronic mail because the manner in which the Plaintiff made his request was against its policy. This is the same argument the defendant was making in *Allen* as both defendants are stating the obligations under the TPRA are not triggered based solely on the method the citizen used to make the request. And the fact that the method of request at issue in *Allen* were required by statute as opposed to a random policy chosen by a governmental entity buttresses Plaintiff's position in this case. This Court has found even though the method of the request was not pursuant to the explicit statutory requirements of the TPRA, the Court would not put form over substance and found that the defendant in *Allen* was obligated under the TPRA to respond to the request. Certainly, if this Court found the statutory language should not limit a citizen in his or her method of making a request, the fact a citizen's request is not precisely pursuant to a governmental entity's random policy cannot be a reason to ignore the requirements

of the TPRA. Therefore, the Plaintiff would respectfully submit that this Court's ruling in *Allen* provides binding precedent which is controlling in this matter.

D. EVEN IF THIS COURT DECIDES THE DEFENDANT HAS THE RIGHT TO PROMULGATE REASONABLE RULES, REFUSING TO ACCEPT ELECTRONIC MAIL IS NOT REASONABLE.

In contemporary times, it is difficult to imagine any rationale which would find that email is not an appropriate method of communication. Currently, the federal courts in Tennessee not only allow, but, with rare exceptions, require all filings to be electronic. Recently, Shelby County, one of the largest counties in Tennessee, pursuant to Rule 5B of the Tennessee Rules of Civil Procedure, began allowing pleadings to be filed electronically. Since 2004, pursuant to Rule 5A of the Tennessee Rules of Civil Procedure, certain pleadings can be filed in state court via facsimile. Since 2010, pursuant to Rule 5.02 of the Tennessee Rules of Civil Procedure, service of certain pleadings can be achieved via electronic mail to opposing counsel. For several years, the Clerk of this Court has afforded litigants and their attorney's the option of receiving electronic delivery of the Court's rulings. Certainly, it cannot be argued with any sincerity that if electronic or facsimile transmission is sufficiently acceptable and reliable for the delivery and acceptance of documents within our justice system, that such is not sufficiently acceptable and reliable to deliver and receive a records requests, which does not have the potential ramifications of a legal pleading. Nonetheless, the Defendant has made such an argument since the inception of this case and persists in this argument on appeal. The Defendant argues that "legitimate policy interest and concerns support the Board's conclusion that electronic requests should not be utilized in requesting access to the Board's public records." The Defendant cites three basic reasons to support its position: 1) emails are not secure; 2) email is not a reliable form of

communication; 3) emails are costly form of communication. On their face, each of these reasons are nonsensical as demonstrated below, especially when it is understood that the evidence at trial established that the Defendant only receives 12-15 records requests a year. (See Order, p. 8).

The Defendant asserts communicating by email creates a unreasonable risk to the security of its computer system. Such is a fantastic assertion which has no basis in fact. The best evidence that Defendant does not believe its own assertion is in the Defendant's brief; the Defendant reveals that the "Board's computer system . . . handles approximately 4,500 email accounts". Def's Brief, p. 24. Additionally, Defendant asserts some employees handle up to 300 emails a day. *Id.* at 25. Therefore, according to Defendant's Brief, the Board potentially receives up to 1,350,000 emails in one day! Surely, if email was not a secure mode of communication, the Defendant would not allow such a volume of emails to be routed through its computer system. Indeed, at trial, Mr. Johnson testified that he frequently uses email to communicate with other employees and that such is an efficient and economical manner to communicate. (TP Vol. X, p. 105-106).

Chris Brown, the Board's Assistant Director for Information Services, testified about a phantom risk if the Board accepted 12-15 more emails a year by suggesting that such exposes the Board system to viruses, but Mr. Brown admitted during cross examination that the Board has on its website, as evidence on a print out of the Board's website, a link which allows anyone to send an email to Deanna Hughes, who is an employee of the Defendant. (TP XI, p. 274)(*See* TE 17). Mr. Brown further admitted that the Board could create a link on its website which would allow the public to request records by email. (TP XI, p. 275). Certainly, if creating a link to send an email to a specific employee is not a security risk, creating a link that allows citizens to email a

records request to a specific employee is not a significant security risk. Mr. Brown attempted to assert that the Board "delisted all of [their] email addresses from our website" due to security issues, including Johnson's email address, however, this proved to be false at trial. (TP XI, p. 260). Not only was it refuted by the Exhibit 17, which contains a link to an employee's email address, but it was soundly refuted by Exhibit 20, which was a screen shot of the Board's website on the date of trial which contained Mr. Johnson's email address. (TP XII, p. 345) (*See* TE 20).

Further, it was demonstrated at trial that the Defendant has on its website a feature in which the only way parents and/or students can request transcripts is online; in person requests or requests made via U.S. Mail were prohibited. (*See* TE 17). While such records were not *per se* public records, Mr. Johnson admitted such records were maintained by the school and were requested by members of the public. According to the Board's website, the only way such could be requested was electronically. (TP Vol. XI, p. 174-175). This refutes any assertion by the Defendant that it is not secure for the public to make records requests electronically through the Board's computer system.

It should be further noted by the Court that prior to Plaintiff's request, apparently the Defendant did not have any issue with accepting requests via email. Mr. Jeremy Johnson testified at trial that he has accepted records requests via electronic mail prior to Mr. Jakes' request and no evidence was presented at trial that such was a strain or security issue with the Board's computer system. (See TP Vol. X, p. 95-96).

The Defendant also asserts that emails are not a reliable form of communication. Again, as noted above, despite the unreliability, Defendant's employee routinely communicate via email and prior to this cause of action, Defendant had no issues accepting email requests. The

Defendant claims Mr. Johnson receives over 300 emails a day and that somehow emails prevent Defendant from keeping a log book. The Defendant also asserts "spam" may be an issue and states the computer system erases old emails. Such assertions are not real issues as Mr. Johnson testified that the Board had the capability to create an email address dedicated to receiving email requests and certainly the Board has sufficient control over its email system to ensure multiple individuals receive notice of a records request and that such are preserved. (TP XI, p. 214).

In fact, email is just as reliable than U.S. Mail, despite Defendant's assertions. As Mr. Johnson admitted at trial, the U.S. Mail sometimes does not run or days exist which the Board's central office is closed. Additionally, the mail is initially sorted by an individual who handles mail for 90 people and then it is sent to an individual that handles mail for 3 people. (TP XI, p. 106).When Mr. Johnson is not present, records request are transferred to Del Phillips, the Director of Schools, but no explanation was provided as to what occurs if he is not present. With email, such can be delivered regardless of whether the school is open or whether or not the mail is running that day. Further, the email address can be routed to several people so that an email is not overlooked. In short, Defendant did not provide any cogent evidence that email is not a reliable source of communication, albeit it is not perfect, just like the U.S. Mail.

The final, incredible attempt by the Defendant to convince this Court that email is not an acceptable form of communication is the discredited assertion by Defendant that it would be very costly to accept 12-15 emails a year. The Trial Court found the testimony of Chris Brown, upon which the Defendant heavily relies, regarding the cost of the Defendant accepting records request via email or telephone to not be credible. The Trial Court found, "The Court does not find the cost estimates to changing the school board policy requests as to inspection of public records, **as testified to by Chris Brown**, to be credible estimates 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." (Order, p. 8)(emphasis added). In short, Mr. Brown's testimony was nothing more than fabricated obstacles which Defendant has erected to justify not complying with the Trial Court's Order that the Defendant must comply with the TPRA.

II. THE DOCTRINE OF MOOTNESS IS NOT APPLICABLE TO THE CASE *SUB JUDICE* AS THE ISSUE OF ATTORNEY'S FEES IS JUDICIBLE AND THE TPRA AFFORDS THE COURT JUSIDICTION TO AWARD INJUNCTIVE RELIEF.

The Defendant asserts that the Trial Court's ruling should be reversed on "mootness grounds" as the record requested by Mr. Jakes was available online to the Plaintiff when the request was made and the record was provided during the course of litigation. Such a position ignores the fact that several issues are still judicable and the fact the Trial Court has jurisdiction to award injunctive relief, which is precisely what the Trial Court did.

To support its position the Defendant relies on cases from South Carolina, Oregon, Louisiana, Wisconsin, the 5th Circuit Court of Appeals and the 10th Circuit Court of Appeals, but ignores the plain language of the Tennessee Public Records Act, the very law which is being litigated in the case *sub judice*. T.C.A. § 10-7-501(a)(2)(B) states, "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. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days . . . make such available to the request . . ." Thus, as the Defendant is admitting the policy which was requested by Plaintiff on March 21, 2014 was immediately available via the internet, pursuant to the plain and unambiguous language of the TPRA, the Defendant had a duty under the law to

simply notify Mr. Jakes that it was available for review on the internet. Logically, to "make available for inspection" a governmental entity has to notify the citizen where the record is so he or she can inspect it. Under Defendant's specious logic that because the record was available online, it had been provided to Plaintiff, if Defendant simply kept binders of records in a conference room open to the public, the Defendant would not have to respond to request for inspection of such records. This would defeat the very purpose of the TPRA, which is to provide *access* to records to the public because a citizen does not have access to a record if he or she does not know where the record is located. To further demonstrate the absurdity of Defendant's position, if, for example, the record Plaintiff requested was only available at Hendersonville High School, then the only obligation Defendant would have is to set the record on a counter open to the public and it would be up to Mr. Jakes to roam around the multitude of buildings under the auspices of the Defendant in search of the record he requested. Such a scenario would not be accepted by this Court or any other court because it completely undercuts the explicit purpose of the TPRA: access to the public records. Plaintiff testified that he could not find the record on the Defendant's website and, thus, he did not have access to the record. (TP Vol. XII, p. 487).

While the Plaintiff concedes ultimately the record was provided during the course of litigation, the doctrine of mootness is still not applicable as Plaintiff made a second request for records via electronic mail on March 31, 2014, which will be more thoroughly addressed below. To date, Plaintiff still has not officially be provided these records. On February 23, 2015, the Defendant send a certified letter to Plaintiff advising that the only records responsive to this record was protected by the attorney client privilege. (TE No. 11). The Defendant's letter stated in pertinent part, "This request is being denied for the following reasons(s): . . .All responsive

records represent communication between the Board and counsel." This proved to be false at trial as Mr. Johnson testified that the only records which he forwarded to the Board's attorney were either emails Mr. Jakes had sent or emails that Plaintiff's attorney had sent. (TP Vol. X, p. 159). Such communications clearly were not protected by the attorney client privilege as they did not consist of communication between an attorney and his client; and even if they were, it is difficult to believe that in February of 2015 the Defendant had no intention of waiving the attorney/client privilege as at trial Defendant called its legal counsel and heavily relied on the advice its counsel received from the OORC, which was conveyed to Mr. Johnson. Therefore, such assertion clearly was not in good faith.

Given the fact the Defendant did not respond to two records request by Plaintiff within seven (7) days, under the TPRA, despite the fact the documents were subsequently disclosed, the Defendant has denied Plaintiff's requests. The TPRA clearly defines what constitutes an actionable denial as the TPRA states in pertinent part, "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 as provided in §10-7-505." *See* T.C.A. § 10-7-503(a)(3). As outlined in the preceding paragraph, the Defendant had an obligation to respond promptly but not later than seven (7) days thereafter. Having established the Defendant in fact denied Plaintiff's records request, the question arises whether or not the denial was willful, as pursuant to the TPRA, if the denial was willful, the Plaintiff is entitled to attorney's fees. *See* T.C.A. § 10-7-505(d) and *infra.*, Sect. III. The one Tennessee case upon which Defendant relies regarding mootness, *Lance v. York*, did not have the issue of attorney's fees as the citizen was proceeding *pro se* and, therefore, such is inapposite to this matter. However, a more instructive case is the matter of *Greer v. City of Memphis*, 356 S.W.3d 917 (Tenn. Ct. App. 2010). In *Greer*, the citizen

made a records request on August 9th, 2009 and October 9, 2009, to which the City of Memphis did not respond. The citizen filed a petition with the Circuit Court of Shelby County on October 27th, 2009 and a city employee finally sent the records requested on November 13, 2009. A hearing was held on January 11th, 2010 and despite the fact the records had been provided, the trial court awarded attorney's fees for the denial. This Court overturned the award as the trial court did not make a specific finding of willfulness, but notably this Court did not reverse the trial court on the issue of mootness based on the fact the records had been disclosed at the time of trial. Similarly, in the case *sub judice*, the issue of willfulness was not moot at the time of trial and was ripe for the Trial Court's ruling.

The Defendant's argument of mootness ignores another part of the TPRA which affords a court of proper jurisdiction the authority to award injunctive remedies. The Defendant erroneously argues that the TPRA "authorizes a cause of action for only one form of substantive relief: recovery of the requested public record". Def's Brief, p. 28; however, the TPRA states in pertinent part, "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). Injunctive relief is set forth in Rule 65 of the Tennessee Rules of Civil Procedure. "Injunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in a final judgment. . . An injunction may restrict or mandatorily direct the doing of an act." Therefore, even though the Defendant belatedly responded to one of Plaintiff's records request, the issues in this matter were justiciable as the Plaintiff requested a permanent injunction to restrain the Defendant from enforcing its policy, which was in violation of the TPRA.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE DEFENDANT DID NOT ACT WILLFULY AND IN FAILING TO AWARD PLAINTIFF ATTORNEY'S FEES.

Plaintiff respectfully submits that the Trial Court erred in not awarding Plaintiff attorney's fees as a review of the law and evidence in this matter establishes that the Defendant's refusal to timely respond to Plaintiff's records request was not based on a good faith belief in the legality of its denial. The Trial Court found, "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." (TR Vol. VII, p. 953). "As an award of attorney's fees is within the discretion of a court, the review of the decision of the Trial Court in this regard is abuse of discretion. A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Friedmann v. Marshall County*, 471 S.W.3d 427 (Tenn. Ct. App. 2015)(citations omitted).

The Trial Court's analysis primarily focuses on whether or not the Plaintiff acted in good faith in determining its legal obligations to respond to Plaintiff's email requests and whether or not the Plaintiff proved there was a conspiracy to deny his records request. However, Plaintiff respectfully submits that such a focus resulted in the Trial Court failing to apply the proper legal standard and consider the relevant facts. The Trial Court ruling should be overturned for the following reasons:

1) The evidence at trial established that Mr. Johnson and Mr. Fuqua, the two agents of the Defendant which made the decision to deny Plaintiff's records requests, both were fully

aware that the state of the law in 2014 was such that a request for inspection could not be required to be in writing. The Trial Court' analysis does not contemplate the reality of the denial: Mr. Johnson denied Plaintiff's request not because it was via email, but because it was not on a form provided by the office of OORC and provided either via U.S. Mail or in person. It is an undisputed fact that just prior to Plaintiff's request Mr. Johnson and Mr. Del Phillips, the Director of Schools, changed the application of the Board's policy by stating explicitly that a request had to be made in writing and on a form provided by the OORC and as Plaintiff failed to do so, his request was denied.

2) The evidence at trial established that Mr. Johnson knew at the time of Plaintiff's requests that he could not compel a citizen to make a request in writing or appear to make a request in person. Nonetheless, despite the plain language of the Board's policy which requires a citizen to make a request on a form, Mr. Johnson insisted at trial that a request could be made either in person or via U.S. Mail. As Mr. Johnson knew both of these methods were not allowed under the TPRA, Mr. Johnson could not have acted in good faith in denying the request.

3) Regardless of the Court's finding on what Defendant's actual practice was, the undisputed facts in this matter establish that Plaintiff made a request via voicemail and Mr. Johnson never consult with Mr. Fuqua or the OORC in deciding not to respond to such request. Failing to even research whether or not a denial is supported by the law is *per se* bad faith.

4) The record is void of any rationale the Defendant used in denying Plaintiff's email request as the statement of Elisha Hodge were not admissible for the truth of the matter asserted and Mr. Fuqua, the attorney for the Defendant, never provide any legal basis for his finding. Mr. Fuqua and Mr. Johnson both had many years of experience with the TRPA and without conducting any independent research or performing any real analysis on the question raised, the

proof only establishes the Defendant simply was told by the OORC it did not have to accept an email. Such proof alone cannot be enough for the Defendant to meet its burden to prove it did not act willfully in denying Plaintiff's records request.

As demonstrated below, the Trial Court abused its discretion in not awarding attorney's fees to Plaintiff as the Trial Court's ruling did not use the proper legal standard and its finding that the Defendant did not act willfully is against logic and reasoning and, therefore, the Plaintiff respectfully submits the Trial Court's ruling should be overturned.

A. A DENIAL OF A REQUEST WITHOUT A GOOD FAITH BELIEF IN THE LEGAL BASIS FOR THE DENIAL CONSTITUTIES WILLFULNESS.

The TPRA states in pertinent part, "If the court finds that the governmental entity, or agent thereof, refusing to disclose the 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 nondisclosing government 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 8, chapter 4." T.C.A. 10-7-505(d). This Court recently clarified the meaning of the term "willful" in the matter of *Friedmann v. Marshall County*, 471 S.W.3d 427 (Tenn. Ct. App. June 24, 2015). In *Friedmann*, the Marshall County Sheriff refused to respond to a written records request which was not hand delivered. Despite being contacted by both legal counsel for the requestor and the Office of Open Records Counsel and being advised that it is well established in Tennessee a governmental entity cannot require a citizen to make a request in person, the Sheriff refused to provide such record. The trial court did not find that the Sheriff's refusal was willful, however,

the Tennessee Court of Appeals found such finding was an abuse of discretion and reversed the trial court on this issue stating, "We agree that a heightened showing of 'ill will' or 'dishonest purpose' is not necessary in order to establish willfulness under the statute. As noted by *The Tennessean* court, *the majority of cases discussing willfulness under the Act have analyzed the issue in terms of the law's clarity at the time a records request is made*, even in spite of references that the willfulness standard is one synonymous to a bad faith requirement." *See Id.* (original emphasis). This Court did acknowledge that some of its previous rulings had addressed bad faith, but stated, "We disagree with *Greer* to the extent that it suggests that evidence of a 'dishonest purpose' or 'moral obliquity' is required for a finding of willfulness under the TPRA. Although we recognize that this Court has used such language when describing willfulness, we do not think such standards should be engrafted into the statute. First, the statute does not state that a bad faith standard is to apply. . . .We do not agree with prior decisions of this Court that have seemingly taken such language and engrafted it into the statutory standard. To the extent that the determination of willfulness under the statute is a 'bad faith' inquiry, that inquiry should focus on whether there is an absence of good faith with respect to the legal position a municipality relies on in support of its refusal of records." *See Id.* Such a finding is supported by the Tennessee Supreme Court's ruling in *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), which states in pertinent part, "The element of 'willfully' required by this statute has been described as synonymous to a bad faith requirement. Stated differently, the Public Records Act does not authorize a recovery of attorney's fees if the withholding governmental entity acts with a good faith belief that the records are excepted from disclosure." *Id.* at 346. Therefore, in determining whether Defendant's actions were willful, the Court simply needs to determine the state of the law at the time of the denial and whether Defendant has made any good faith

arguments in refusing to follow such law. As demonstrated below, the Plaintiff respectfully submits the evidence in this case established that the Defendant did not have a good faith basis for denying either of Plaintiff's records requests.

B. THE DEFENDANT'S POLICY REQURES THAT A REQUEST BE MADE IN WRITING AND MR. JOHNSON ADMITTED HE KNEW THE TPRA DID NOT ALLOW THE DEFENDANT TO REQUIRE THAT A REQUEST BE MADE IN WRITING.

It was established at trial that the plain language of the Defendant's policy as amended by Mr. Johnson and Mr. Phillips on or about March 20, 2014 required the request to be made in writing. (See TE 1). Mr. Johnson testified that in the first week of March, 2014, he and Mr. Phillip met to discuss and draft an administrative policy regarding public records requests. Such policy went into effect March 20, 2014, notably one day before Mr. Jake's request. (TP Vol. X, pp. 58-59). The policy titled "School Board Records - AP" states in pertinent part, "Request for inspection or copies of public documents shall be made to the Director's office under the supervision of the Supervisor of Board and Community Relations. Request for **inspection or** copies of public documents shall be made in writing on the 'Inspection/Duplication of Records Request form provided by the Office of Open Records Counsel of the Comptroller's Office of the State of Tennessee." (*See* Exhibit 1) (emphasis added). Mr. Johnson confirmed at trial that he has had experience with the TPRA for many years and he was fully aware prior to March 21st, 2014, that the TPRA states unequivocally that a request for inspecting cannot be made in writing. (TP Vol. X, p. 94). Therefore, pursuant to the standard set forth above, the Defendant's refusal to accept Mr. Jakes records request because it was not in writing and on a form was willful as such was in violation of the TPRA and Mr. Johnson knew that it was in violation of the TPRA.

At trial, Mr. Johnson feebly attempted to convince the Court that "shall be made in writing" did mean "shall be made in writing" and that now that he has been further educated on the TPRA that he understands why the policy has been misconstrued. Mr. Johnson testified:

> Q. [I]f we look at the [Administrative Practice Policy] it says, "Request for inspection or copies of public documents shall be made in writing on the inspection/duplication of records request from provided by the Office of Open Records Counsel . . .. Is that right?
> A. Yes, sir.
> Q. So you knew that you were implementing a policy that was in violation of the the Tennessee Public Records Act. Is that correct?
> A. No. I don't think we ever interpreted it that way. Again, we're not attorneys, and I don't think we thought about – I don't think we read that language as saying that we were requiring only in writing.

(TP Vol. X, p. 127).

This is a blatant attempt by Mr. Johnson to avoid the plain language and intent of the Defendant's policy. One does not have to be a learned attorney to know what "shall be made in writing" means. And it is apparent by Mr. Johnson's testimony and the plain language of the policy, which he assisted in creating, that the intent of the amended policy was to require citizens to make the request in writing and on a form. Indeed, this was precisely what was established at trial. The Defendant made as an exhibit at trial (*see* TE No. 18), some of the records requests which were made after the policy change of March 20, 2014. And consistent with the policy, every request which was made after the policy was enacted was made in writing by the citizen making the records on the form "Inspection/Duplication of Records Request". In fact, Mr. Johnson admitted under oath that Mr. Kurt Riley, a Sumner County resident, completed one records requests and submitted such in writing and on a form. (TP Vol. X, p. 129). Additionally, a review of Exhibit 18 reveals that the at least six (6) other requests were made by citizens in writing and on the requisite form. (Inexplicably, the Defendant redacted the other requests). Thus, the Defendant cannot argue with any sincerity that "shall be made in writing" did not mean

"shall be made in writing" as this was precisely the practice of the Defendant and such clearly is in violation of the TPRA.

The Defendant has attempted to make this issue about accepting a request by email, but though the Defendant's refusal was in violation of the law, the plain language of the policy and Defendant's practice as evidence by Exhibit 18 was in clear violation of the law as either Plaintiff had to send a written request for inspection by U.S. Mail, which is violation of T.C.A. 10-7-503(a), which prohibits the a governmental entity from requiring a request for inspection to be in writing, or Plaintiff had to appear at the Board's central office and provide a written request on the form provided by the Office of Open Records Counsel. Therefore, it does not matter whether Mr. Johnson consulted with Jim Fuqua, or whether or not Mr. Fuqua consulted with the Office of Open Records Counsel. Plaintiff was notified that "in keeping with our policy" he had to make the request either via U.S. Mail on the form or in person on the form. The Trial Court analysis overlooks this fact as the Trial Court only focuses on the legality of accepting an email. But the preponderance of the evidence at trial established that even had Mr. Jakes appeared in person, he still would have had to fill out a form and make his request in writing, which clearly is in violation of the TPRA.

C. DEFENDANT'S DENIAL WAS NOT IN GOOD FAITH AS THE DEFENDANT KNEW THE TWO METHODS ALLOWED UNDER THE POLICY WERE PROHIBIT BY THE TPRA AND THIS COURT'S RULING IN *WALLER V. BRYAN.*

Even if the Court does not make a finding that the policy and practice were to require a request in writing and on a form, it is clear that the Defendant willfully violated the TPRA by requiring that Plaintiff submit a written request via U.S. Mail, which is in violation of the law

pursuant to T.C.A. 10-7-503(a), or he had to appear in person, which is violation of this Court's ruling in *Waller v. Bryan*, which stated that a governmental entity could not require an individual to appear in person to make a request. Indeed, the Trial Court held, "[T]he argument that a requestor 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. . . .Therefore, this Court finds that the policies of the Defendant for accepting requests for public records for inspection by writing or in person . . .are in violation of the TPRA." (TR Vol. VII, p. 949). Additionally, the Court held that, "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." Though the Court made such a finding, inexplicably, the Trial Court refused to find that the Defendant had acted willfully. Again, Mr. Johnson testified at trial that he knew that he could not require a request to be made in writing. He further stated that he knew that he could not require a citizen to appear in person to make a records request. Therefore, it was established in the record that the Defendant was fully aware that both avenues which were presented to Plaintiff were individually not lawful.

Not only was Defendant aware both avenues were not lawful, Plaintiff's counsel sent an email to Mr. Johnson and Mr. Fuqua advising that pursuant to *Waller v. Bryan*, a governmental entity could not compel a citizen to appear in person to make a request and, thus, logically, a government entity could not refuse an email. (*See* TE No. 16). Mr. Fuqua testified he did not do any independent research to determine the legality of refusing an email and only consulted with

Elisha Hodge. In fact, he testified that on March 25, 2014, the day Mr. Fuqua received Plaintiff's email, the Board had decided to refer the matter to legal counsel. Notably, this was *before* he Elisha Hodge had given him her opinion on March 26, 2014. Mr. Fuqua testified:

Q. Now, you see in this email . . .I refer to the case Waller v Bryan. Did you look that case up?

A. No. When I got your email, I knew that I was not going to be involved in the case, in this issue much further . . .But I realized at that stage that I wasn't going to be representing the school board on this issue.

Q. So on March 25th, y'all had already decided that you were going to hire a lawyer?

A. Right . . .

(TP Vol. XI, p. 241). Earlier, on direct examination Mr. Fuqua had testified, "I talked to Ms. Hodge for approximately 45 minutes on the 26th of that month. . . " (TP Vol. XI, p. 232).

Thus, despite the legal reasoning presented to Mr. Fuqua and Mr. Johnson, Mr. Fuqua did not do any independent research to determine the legality of refusing Plaintiff's request, but had already decided outside counsel would handle the case. The only reason for outside counsel to be involved would be for litigation, which would only occur if the Defendant decided to deny the records request. And though, ultimately, Mr. Fuqua did speak with Ms. Hodge, such action cannot constitute good faith as clearly the Defendant was just looking for an excuse to deny the request. To find Defendant actions were in good faith would be to find that a governmental entity can ignore its own knowledge and experience with the law, ignore the legal support provided by an opposing attorney and decide to deny a records request. Then once the governmental entity consults with the OORC and receives the opinion it is searching for, it can persist in its denial. The TPRA states that a court can consider the advice provide by the OORC,

it does not say such is conclusive evidence of good faith. The case at bar provide an excellent example of where the advice of the OORC is of minimal value because an experience government employee and an experienced attorney had already decided, despite their own knowledge, that the request would be denied before receiving an opinion from the OORC. Such cannot constitute good faith.

D. THE DEFENDANT NEVER SOUGHT ANY ADVICE ON WHETHER OR NOT IT HAD TO ACCEPT A RECORDS REQUEST VIA VOICEMAIL

The evidence at trial established that the Defendant made no effort to determine whether or not the Defendant had to accept a voice mail as a records request. Mr. Jim Fuqua testified that he did not do any research as to the obligation the Board had to respond to the email or voicemail delivered by Plaintiff; instead, though he had been practicing law since 1968, he contacted Elisha Hodge. He asserted he had a 45 minute conversation with the Elisha Hodge and from this conversation he concluded the Board was no required to respond to the email, however, he testified that he never inquired about the voicemail. (TP Vol. XI, p. 235). Therefore, the Defendant cannot assert that it relied on advice of counsel or the advice of the OORC in deciding not to respond to the voice mail as Mr. Fuqua not only did not discuss this with Ms. Hodge, but Mr. Fuqua never even discussed this with Mr. Johnson. (TP Vol. XI, p. 239).

Further, the evidence at trial established that he OORC opines that a request for inspection via telephone must be accepted by a governmental entity. Indeed, the Office of Open Records Counsel has stated this on its website as follows: "May a records custodian require a request to inspect public records to be in writing? Generally, the answer is No. Tenn. Code Ann. Section 10-7-503(a)(7)(A) states, that a records custodian may not 'require a written request . . .to

view a public record unless otherwise by law.' Given that a requestor is not required to make a request in person and given then the request for inspection is not required to be made in writing, a governmental entity should accept request via telephone, if the requestor does not want to make the request in writing." (TE No. 15). Mr. Johnson testified that he regularly refers to the OORC's website and certainly he could have done so to determine if he had to accept Plaintiff's voicemail as a records request.

Given the fact that the facts at trial clearly established that Defendant made no effort to determine the legality of rejecting a voice mail as a records request and the fact the OORC opines that a records request may be made by telephone, the Trial Court's rationale for finding the denial of Plaintiff's records request was not willful has been undone. The Trial Court found, in pertinent part, "The Court finds that the records custodian, Jeremy Johnson, relied upon the advice of staff attorney, Jim Fuqua. . . .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." However, as set forth above, Mr. Johnson did not rely on the advice of Mr. Fuqua and Mr. Fuqua did not even ask Mrs. Hodge about the voice mail message. The Defendant did not present any evidence that it denied Plaintiff's voicemail message pursuant to a good faith belief in the law; in fact, the Defendant has not ever presented the belief it held with respect to the Plaintiff's voicemail request.

E. THE DEFENDANT FAILED TO PROVIDE ANY SUBSTANTIVE PROOF OF THE LEGAL REASONING UPON WHICH IT RELIED AND, THEREFORE, THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE DEFENDANT DID NOT ACT WILLFULLY.

At trial, the Defendant did not provide any authority upon which it relied when it denied Plaintiff's email and voicemail records requests. Certainly, after spending nearly a two years in litigation and filing every conceivable motion and making all plausible arguments (and some implausible), the Defendant would be able to present some semblance of a legal foundation for its position. But it has not. The Defendant has only referred to "administrative discretion", which is not founded in the law, and argues that even though the TPRA states that a request for inspection cannot be denied, just because the TPRA does not say a governmental entity has to accept an email, it is not required to do so. As demonstrated above, such arguments should be unavailing. Thus, how can the Defendant state with any credibility that its denial of Plaintiff's records request is not willful if even now after over two years of litigation it cannot present any legal authority to deny his request? If the Defendant cannot present such authority before this Court, certainly the Defendant did not have a reasonable grounds to deny the Plaintiff's requests in 2014 and, thus, by definition, such denial was not in good faith

The Defendant did present at trial the testimony of Jim Fuqua, however, Mr. Fuqua did not present any legal authority for his position. In fact, he stated other than maybe reading parts of the TPRA, he did not do any independent legal research on this issue and simply contacted the Open Records Attorney, Elisha Hodge. Despite Ms. Hodge being on the Defendant's witness list, the Defendant curiously chose not to call her and, thus, there exists no admissible evidence as to what legal advice Ms. Hodge provided to Mr. Fuqua regarding the legality of the its decision not to accept Plaintiff's records request by email and/or voicemail. Mr. Fuqua did testify that he had a 45 minute conversation with Ms. Hodge but could only testify that in general she stated that the Defendant did not have to accept a records request. However, Plaintiff objected to these statements as hearsay. The Court found that such were not hearsay because they were intended to

demonstrate Mr. Fuqua's mindset; however, the Court ruled it would not allow such into evidence for the truth of the matter asserted. T.C.A. 10-7-505(g), does allow a court to consider the advice provided by the Office of Open Records Counsel in determining whether the Court should award attorney's fees; however, no such evidence is before this Court as the Defendant did not present any substantive evidence of what the opinion of the OORC was. Thus, unless the Defendant could have presented at trial the actual advice provided by the Office of Open Records Counsel, meaning proof submitted for the truth of the matter asserted, the Defendant cannot use such evidence to prove Plaintiff is not entitled to attorney's fees. Therefore, as the Defendant failed to provide the advice provided by the Office of Open Records Counsel, such cannot be considered in determining whether or not Defendant acted willfully.

Further, Mr. Fuqua did not provide any rationale for the decision to deny Plaintiff's request. Mr. Fuqua testified that he talked to Ms. Hodge, but the Defendant did not provide any rationale as to why the Defendant could reject a records request by email. In fact, Mr. Fuqua testified that he did not do any independent research on his own and, thus, the record continues to be void on any rationale as to why the records request by Mr. Jakes could be ignored. As there is no admissible evidence as to why Mr. Fuqua advised his client to deny the request, the record does not support a finding that the Defendant acted in good faith.

F. THE PROPONDERANCE OF THE EVIDENCE AT TRIAL ESTABLISHED THAT IN RESPONSE TO LEARNING CITIZENS WOULD BE MAKING RECORDS REQUEST THE DEFENDANT CHANGED ITS POLICY SO THE RECORDS REQUEST PROCESS WOULD BE TECHNICAL AND SLOW

In determining willfulness, the Court should consider the motivation by Defendant in altering its policy to require a request be on a form and, thereby, be in violation of the TPRA.

The TPRA requires that the law be given a liberal construction to allow the broadest access possible and the Defendant has attempted to defeat this fundamental purpose of the TPRA by making the process as difficult as possible for Citizens. Thus, the determination of willfulness should be seen through prism of the Defendant's general attitude toward citizens and the records request process. The facts present at trial established strong circumstantial evidence that the Defendant has adopted the policy that a citizen has to make a records request either in person or by U.S. Mail in an effort to either frustrate citizens and/or in retaliation for citizens inspecting financial records. Such evidence consisted of 1) the timing of the adoption of the policy; 2) the efforts made by Defendant to counteract any efforts by citizens to disclose their findings pursuant to a records request; 3) and the complete lack of common sense in the reasons the Defendant will not accept requests by email.

The implication of the timing of Defendant's adoption of the policy simply cannot be denied. The facts at trial established that the from 1991 through March 20th, 2014, the Defendant had a records request policy that did not mention the method of requesting a public record and certainly did not state that such could only be made by U.S. Mail or in person. The policy stated, "Any citizen of Tennessee . . . shall be permitted, upon written request, at a reasonable time, to inspect all records maintained by the school system unless otherwise prohibited by law, regulation or board policy." (*See* Exhibit 1). However, the testimony established at trial that on March 6th, 2014, Mr. Neil Siders a local journalist, contacted Mr. Jeremy Johnson and advised that he would be speaking at a SURG meeting, a local political group, to discuss citizens rights related to records request and the method of making such request. Mr. Johnson advised Mr. Siders that he was not aware of any forms and told Mr. Siders that he merely needed to send Mr. Siders an email if he needed any information or documents. It was after this conversation with

Mr. Siders that Mr. Johnson met with Mr. Phillips to amend the current policy. Mr. Johnson could not provide a cogent explanation as why the policy suddenly needed to be altered, other than it needed "clarity", however, suffice it say the timing strongly suggest it was in direct response to the possibility members of SURG would be making records requests. Thus, the Defendant intended to make the process as inconvenient as possible. Such a finding is a reasonable conclusion because prior to the first request by Mr. Kurt Riley, on March 10th, 2014, Mr. Johnson had not responded to records request by certified mail. (TP Vol. X, p. 131). Why would certified mail suddenly be required? The obvious answer is the longer and more protracted the process the more likely citizens would be frustrated and not make requests Further, previous to Mr. Riley's first request, Mr. Johnson had accepted records request by email; after learning that SURG member may be making records requests, suddenly the most convenient and efficient manner to communicate, email, was no longer an acceptable method of making a request. And the strongest indication that the Defendant intended to make the process as technical as possible is the fact that prior to Mr. Riley's request, the Defendant did not have any forms related to records request and, thus, obviously, forms were not needed to make records request. Mr. Siders testified that Mr. Johnson said he did not have any forms, but only generally referred Mr. Siders to the OORC website. Obviously, after meeting with Mr. Phillips, they decided a form needed to be filled out and submitted. Again, the timing is undeniable and speaks volumes about the true motivation behind the sudden change in policy.

The second indication of the purpose of the alteration of the process is seen in the Defendant's defensive response to Mr. Kurt Riley's records requests. The evidence at trial established Mr. Riley presented at the Director's office on March 10th, 2014 and completed the form as follows: "Please provide for my review and inspection any and all credit card

statements for all employees, elected officials and other personnel from July 2013 to current." On March 12, 2014, Mr. Johnson sent a letter to Mr. Riley via certified mail advising him the records could be review on or after March 14, 2014. On March 20th, Mr. Riley presented to review the documents and because Mr. Johnson did not provide all the records requested, Mr. Riley had to make a second request. (*See* TE No. 18) Upon Mr. Riley reviewing credit card statements, Mr. Phillips and Mr. Johnson took the time on Defendant's website to provide a detailed explanation of the records Mr. Riley requested. The statement was entitled "Financial Transparency" and begins by stating "On March 10, 2014, Kurt Riley representing Sumner United for Responsible Government (SURG) filed an Open Records Request with our office . . .". (TE No. 14). What is most telling about this explanation is that the Defendant takes the time to reveal the name of the individual making the request and asserts that he is a member of a local political group. Why is this relevant?[1] However, most telling about Defendant new found refusal to use modern technology to receive records requests is the fact the Defendant uses the internet to provide its response. Thus, to sum up Defendant's position: if a citizen wants to make a records request, the citizen cannot use the internet to make the request via email, but must use the slowest or most inconvenient methods of communicating, to wit: U.S. mail or face to face communication; but if the Defendant desires that the public know about its opinion related to a response to a records requested by a citizen than it will use the most convenient and efficient method of communicating with the public, to wit: the internet.[2] The only reasonable conclusion

[1] Defendant also indicated in its brief that SURG was part of "the tea party" without indicating the relevance of such fact or the basis of its truth.

[2] It should be further noted that Defendant spent several pages in its appellate brief asserting its legal right to respond to records request via the internet.

for this blatant inconsistency is the Defendant desired to frustrate citizens who intended to make request.

Finally, the Defendant has failed to provide any plausible explanation as to why the Defendant cannot accept an email. As set forth herein the Defendant has stretch the boundaries of credulity in asserting that email is dangerous, not reliable and costly. Indeed, the Court found that the Defendant's primary witness simply was not credible. Further, the reasons just does not make sense: if email was so dangerous and unreliable, it would not be such a prevalent form of communication and certainly would not be used in our legal system.

G. CONCLUSION

Given the above law and argument, the preponderance of the evidence at trial established that upon learning that citizens intended to make records requests, Mr. Johnson and Mr. Phillips met to change the enforcement of the policy which had been in place for over twenty years and sought to make the process as slow and technical as possible and in violation of the TPRA by compelling citizens to make request for inspection in writing and on a form Prior to the citizens' requests in March, Mr. Johnson accepted email, did not respond by certified mail and did not even have a form at the Board for citizens to complete. Once the Defendant received the request from citizens it anticipated, it implement its new policy to frustrate the citizens and when legally challenged on its position; Mr. Johnson and Mr. Fuqua decided, contrary to their years of experience with the TPRA, that it would deny the Plaintiff's request. Why else would Defendant decide to immediately refer it to an outside attorney for the purposes of litigation? This is the essence of bad faith and Plaintiff would respectfully submit that the Court should find the Trial Court abused its discretion and award the attorney's fees set forth in Plaintiff's Motion to Alter

or Amend (*See* TR Vol, VII, p. 961-972) or remand this matter to the Trial Court for the Trial Court to determine the amount of reasonable attorney's fees.

IV. IF THE COURT FINDS THAT DEFENDANT'S ACTIONS WERE NOT WILLFUL, IN THE ALTERNATIVE, PLAINTIFF RESPECTFULLY SUBMITS THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING PLAINTIFF TO CONDUCT FURTHER DISCOVERY AND THIS MATTER SHOULD BE REMANDED FOR ADDITIONAL DISCOVERY WITH RESPECT TO THE ISSUE OF WILLFULNESS.

Pursuant to a Motion for Protective Order, the Trial Court did not allow the Plaintiff to conduct adequate discovery and Plaintiff was subjected to a trial by surprise. Shortly, after the inception of this matter, Plaintiff issued a short set of discovery. The Defendant responded and failed to provide sufficient answers and almost simultaneously filed a Motion for Summary Judgment using the very information Plaintiff requested, but which the Defendant refused to provide. (*See* TR Vol. I, p. 23). Plaintiff issued Notices of Deposition for two key witnesses in this matter: Jeremy Johnson and Del Phillips on August 22, 2014. (*See* TR Vol. II, p. 175-178). Defendant filed a Motion for Protective Order and Plaintiff filed a Motion to Compel. (See TR Vol. II, p. 179 & 254). However, primarily due to the original Chancellor being recused and the matter being referred to the Honorable David "Dee" Gay, these Motion were not heard until January 9th, 2015. At that time the Trial Court denied Plaintiff's Motion to Compel and granted Defendant's Motion for Protective Order stating, "[T]he Plaintiff's Motion to Compel is denied and the Defendant's Motion for a Protective Order is granted, therefore, no additional discovery, to include depositions, shall occur in this matter. The Court has reviewed the record and has reviewed the written discovery and the responses submitted by the parties and the Court finds no additional discovery is needed. The case *sub judice* involves a very limited legal issue and

additional discovery is not required to adjudicate such issue." (TR Vol. V, p. 627-628). While the legal issues are very limited in this matter, the factual issues are complex, when including the factual issue of whether or not the Defendant's actions were willful and the factual issue of whether or not email/voicemails are a burdensome form of communication. Therefore, the Plaintiff respectfully submits that the Trial Court abused its discretion in preventing Plaintiff from performing additional discovery in this matter.

This Court has held, "The Tennessee Rules of Civil Procedure embody a broad policy favoring discovery of any relevant, non-privilege evidence. . . .the rules leave it to the trial court's discretion to decide upon discovery restrictions that might be necessary." *Duncan v. Duncan*, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990). "However, a trial court's decisions are not immune from appellate review simply because they are discretionary. . .A party opposing discovery must demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* at 561. "A trial court should decline to limit discovery if the party seeking limitations cannot produce specific facts to support its request. . . If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case." *Id.* In the case at bar, the Defendant did file a Motion for Protective Order, but only sought to delay discovery until after the Trial Court ruled on Defendant's Motion for Summary Judgment. The Defendant's Motion for Protective Order stated in pertinent part, "Should the Court deny the Board's summary judgment motion and this case proceed to the show-cause hearing, then the Board will work with plaintiff to respond to discovery and to revisit a deposition schedule at that time." (TR Vol. II, p. 180). Therefore, the only reason the

discovery was limited was that the Court found that additional discovery was not required. However, such a finding ignores the broad policy favoring discovery found in the Tennessee Rules of Civil Procedure and the limitation was not reasonable.

One of the issues in this matter was willfulness. As a result of the Trial Court's ruling, Plaintiff was denied the opportunity to conduct oral discovery to fully explore this issue. Plaintiff was not allowed to depose Mr. Johnson and Mr. Phillips, both of which unilaterally changed the records request policy upon learning that citizens were intending to make requests. As demonstrated in the previous section, the timing alone raises serious questions about the true motivations behind the change in the policy and the Defendant's refusal to accept an email as a records request. As the Defendant did not present Mr. Phillips at trial, Mr. Phillips was not subject to cross examination and his testimony would be instrumental in proving the policy was changed with the specific intent to frustrate the citizens access to records.

Plaintiff was also denied the opportunity to explore the veracity of the Defendant's allegations regard emails. Through discovery, Plaintiff believes the misrepresentations about the emails would be easily exposed. By way of example, the Affidavit of Mr. Johnston, which was submitted to this Court in opposition to Defendant's unsuccessful Motion to Stay, proves that Mr. Brown was not being honest about the cost of a server he alleged would have to be purchased if the Defendant had to handle 12 to 15 more emails a year. How many other misrepresentations did Mr. Brown make? Surely, if the Plaintiff could prove the Defendant was not being forthright about the reasons it could not accept emails, it would be more difficult for the Court to find the Defendant's refusal to accept emails was not a willful violation of the law motivated by a specific intent to frustrate the records request process.

Plaintiff was denied the fundamental right to pursue discovery and to avoid a trial by surprise. Respectfully, as the Trial Court primarily deals with criminal matter, it is plausible that the Court overlooked the crucial role discovery plays in pursuing a civil matter as oral discovery does not exist in criminal proceedings. However, Defendant's witnesses made many, many fantastic assertions at trial and most notably, Mr. Phillips, a primary witness in this matter was never subject to cross examination. Therefore, the Trial Court abused its discretion by prohibiting Plaintiff from deposing the key witnesses in this case as Plaintiff was denied the opportunity to fully litigate this matter.

V. THE TRIAL COURT ERRED IN NOT ENTERING A PERMANT INJUNCTION ENJOINING DEFENDANT FROM REFUSING TO ACCEPT EMAILS, FACSIMILES AND OTHER ACCEPTABLE FORMS OF COMMUNICAITON TO MAKE RECORDS REQUESTS.

The Trial Court issued a permanent injunction which required the Defendant to bring its records request policy in compliance with the TPRA; however, the injunction fell short of prohibiting the Defendant from refusing to accept emails, facsimiles or telephone to accept records requests. For the reasons set forth in Section I, *infra.,* and as summarized and reiterated below, this Court should modify the Trial Court permanent injunction and pursuant to the plain language of the TRPA, prohibit Defendant from refusing any records requests which are received by custodian of records through normal avenues of communication.

The plain language of the TPRA states unambiguously that a governmental entity cannot refuse any 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(a)(2)(A). (emphasis added). The principle that a governmental entity does not have the right to refuse a records request it receives was confirmed in *Allen v. Day* when this Court held, "Powers does not argue that Ms. Burks request was insufficiently described nor does it argue that it lacked notice of Ms. Burks' request due to her failure to personally appear before Power's official records custodian. Power's simply contends that Ms. Burke did not comply with the literal language of the statute and therefore she should be precluded from contesting the denial of access to the settlement agreement. To strictly construe the subject matter jurisdiction requirements, as Powers suggests, would be to defeat the clear language of the act which states that the access is to be broadly construed so as to give the fullest possible access to public records." That is precisely what Defendant is attempting here: to defeat the clear language of the act so that it can limit the public access to the records. Defendant attempts to make the argument that its policy is not "tantamount to a denial of access to public records" and that Plaintiff "like many other citizens, can easily request to inspect a record under the Board's policy." Def's Brief, p.22. But Defendant did not adequately explain and has not explained: if the Board is not attempting to impede access, why will the Board not accept contemporary forms of communication? The Defendant rests primarily on "policy discretion", but yet provides no authority for such a position. The TPRA is unequivocal that the TPRA is to be "broadly construed so as to give the fullest possible public access to public records". T.C.A. 10-7-505(b). It is wholly intellectually dishonest to claim that the Board's policy has no effect on the citizens' access to records as the citizen is left with two slow, technical, burdensome choices under the Board's policy. The first clearly is inefficient, which would be to appear in person. Sumner County is over 500 square miles, which means the Board's central office can be as far as one hour for some Sumner County residents. (TP Vol. X, p. 161). For individuals like

Mr. Jakes who have interest in Sumner County but do not live in the County, their drive even longer. Plaintiff lives approximately forty-five minutes from the central office and, thus, Mr. Jakes has to drive an hour and half to make the request and then another hour and half to return to make the inspection. The other choice is to place the request in what has now being colloquially referred to as "snail mail" (this term of endearment is an acknowledgement of how slow the U.S. Mail is compared to electronic mail or facsimile). Therefore, instead of an instantaneous delivery of the request, the delivery can take up to three (3) days. And while a trip to the mailbox is not especially laborious, the Board's new policy is that the Board will only respond to request, regardless of whether or not such is made in person, by certified mail (See TP Vol. XI, p. 131) and, thus, when receiving the Board's response, one usually has to travel to the post office (unless the citizen happens to be at home during the day when the mail is delivered). Therefore, the Board's policy has transformed what should be a simple process into a technical and laborious process, which is best demonstrated by comparing how Plaintiff's first request should have been handled under the TPRA and how the request would be handled under the Defendant's random policies.

If the Board had followed the TPRA and not refused Plaintiff's right to inspect the Board's public records policy, upon receiving Mr. Jake's request, Mr. Johnson, under his obligation pursuant to the TPRA to respond promptly, would have responded via email and simply provided the link to the Board's policy. Therefore, the time frame of the completion of Plaintiff's request would have been less than 24 hours, with no money or resources spent, and the actual time both parties would have spent on the request would have been less than two (2) minutes, which would be more than enough time for Plaintiff to send the email and Mr. Johnson

to respond to the email. However, this is stark contrast to the time it would have taken under the Board's newly crafted policy.

Under the Board's new policy, Plaintiff would have had to either travel to the Board's central office, which would have taken an hour and half or he would have had to place the request in the mail, which, assuming he is one of the rare people that has stationary and stamps available at home, such would not have required a trip to the post office. Upon arriving at the Board's central office, Plaintiff would have to take the time to fill out the form provided by the OORC. Thus, the request alone, would have taken up to two hours. If the letter is sent through the mail, it will finally land on Mr. Johnson's desk 2 to 3 days later. Assuming Mr. Johnson waits the entire seven (7) day period from the time of receiving the request, thereafter, the taxpayers would pay $6.42 to have the response delivered via certified mail to Plaintiff. Because Plaintiff is employed, it is very unlikely he would be at home when the letter is deliver, thus, he would have to travel to the post office. When he opens the letter, he would find the letter states that he can use the modern form of communication, the telephone, to call Mr. Johnson and set up the time for the inspection. This begs the questions: if Mr. Johnson can communicate by telephone to set up the time for the inspection, why cannot Mr. Johnson avoid the process of responding by certified letter and simply call a citizen and advise the record is ready for inspection and set up a time for the inspection in one phone call? If the primary interest is to drag out the process, the Board's method makes sense.

Once the letter is received, a phone call has to be made to set up a specific time to inspect the record, which involves more time and effort. Plaintiff would then have to travel back to the central office, be taken upstairs to a conference room where he would sit with Mr. Johnson or another employee of the Board and review the record. Given the above, if the Plaintiff followed

the Board's process, the entire process would take at minimum twelve (12) days (one day to drive to make the request, seven days for the response, three days for the delivery of the certified mail, one day for the inspection) or at most fifteen days (add an additional 2 days for the delivery by mail of the request) and for Plaintiff it will take up to seven (7) hours to make the request and review the record if he chooses to drive to make the request.

These two processes are in stark contrast and the unavoidable conclusion is that the Board's policy is designed to be as difficult and technical as possible as the Board has chosen the most laborious and lengthy methods of communicating. The only time the Board uses modern forms of communication is when the citizen is allowed to call and set up an appointment; otherwise, the Board utilizes the slowest, most time consuming methods of communication. And regardless of intent, a genuine argument cannot be made that it does not limit citizen's access to records. If it takes up to fifteen days to make a request and will result in numerous steps, many citizen simply will not have time to spend accessing public records. However, if the process is simplified, greater access is provided to the citizens.

If the TPRA is to be construed to allow the citizens the fullest access to records, the TPRA cannot be construed to allow a governmental entity to disallow the public to use contemporary forms of communication to make request. The case *sub judice* is the best example why this is so. It is clear the Defendant has every intention to make the process as slow and as technical as possible for the citizens. There is simply no other explanation for the Defendant's policy, especially given the timing of the change in the policy. The TPRA does not state the time in which the records must be provided and, thus, governmental entities, though they have to respond in seven (7) days, can take as long as they desire to respond. This lends itself to abuse and if the Court accepted Defendant's version of the law, such will allow the governmental

entities to try to thwart citizens from make requests by making the process technical and slow, which opens up further possibility for abuse. This certainly would frustrate citizen's efforts to access records. Undoubtedly, the General assembly seem to acknowledge this very fact by stating in plain language that no request for inspect may be refused. Therefore, Plaintiff would respectfully submit that this Court should modify the Trial Court's permanent injunction and prohibit the Defendant from refusing to accept public records request which are made by citizens through contemporary forms of communication.

VI. THE PLAINTIFF WOULD RESPECTFULLY SUBMIT THAT THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF'S MARCH 31ST, 2016 RECORD WAS NOT A VALID RECORDS REQUEST.

Plaintiff respectfully submits that the Trial Court erred in ruling that Plaintiff's second records request, made on March 31st, 2016 was not a valid records request. As such is a finding of fact, such should be upheld unless the Plaintiff can prove that the preponderance of the evidence establishes otherwise. *See* Rule 13 of the Tennessee Rules of Appellate Procedure. The Trial Court held, "The 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." (TR Vol. VII, p. 951). However, this Court found with respect to the first request: "Both the email and the phone message were sufficiently detailed to enable the custodian to identify the specific records requested' – a request for records policy for the records policy for the Board of Education. Under the TPRA, that is all that is required to make request to inspect public records." (TR Vol. VII, p. 944) The Court seem to focus on the tone of Plaintiff's emails,

however, a review of the request reveals that the Plaintiff did sufficient identify the records request and, thus, Defendant had an obligation to respond.

The email sent by Plaintiff to Mr. Johnson dated March 31, 2014 at 9:29 am, stated, "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 limited to the following: All emails sent and 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 [telephone numbers provided]." (TE No. 8). The Court found that the Defendant never sent a response to this request. (TR Vol. VII, p. 942). On its face, this request is very detailed and specific. A plain reading of the text of the request is that Plaintiff was seeking any documents or tangible items that reflected communication between Mr. Johnson and anyone else regarding Plaintiff's first request. Plaintiff was attempting to determine why a simple request *via* email for the Board's policy resulted in no response and Plaintiff requested records to gain insight in this regard. This is precisely the type of records that the public should access to determine the actions of their government. If the TPRA cannot be used to determine why a governmental entity is withholding records from the public, what other purpose would the TPRA have? Pursuant to the Court's own ruling, as long as a request sufficiently identifies the records sought, a governmental entity has a duty to respond. The plain language of Plaintiff's request requires a response and, therefore, the Plaintiff respectfully submits the Trial Court's ruling should be overturned in this regard.

CONCLUSION

Given the foregoing law and argument, the Plaintiff respectfully submits that this Court should find that the TPRA does not afford the right to the Defendant to deny public records requests which are received pursuant to conventional forms of communication, including email facsimile and telephone, and, therefore, the Court should modify the Trial Court's permanent injunction to prevent the Defendant from refusing records request received by conventional forms of communication. Additionally, the Court should find that the Trial Court erred in failing to award attorney's fees and award Plaintiff such fees or remand this matter to the Court to determine such fees and to determine discretionary costs. In the alternative, the Plaintiff respectfully submits the Court should remand this matter to the Trial Court to allow the Plaintiff to conduct discovery and to rehear the issue of willfulness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to J. Todd Presnell, 1600 Division Street, Suite 700, Nashville, Tennessee 37203, on this the 11 day of August, 2016.

KIRK L. CLEMENTS