IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

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

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# BRIEF OF AMICUS CURIAE, TENNESSEE MUNICIPAL LEAGUE RISK MANAGEMENT POOL, INC.

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Tennessee Municipal League Risk Management Pool, Inc. (the "Pool") hereby respectfully submits this amicus curiae brief to the Tennessee Court of Appeals in this matter.[1]

The Pool is an entity created by Tennessee municipal governments pursuant to Tenn. Code Ann. § 29-20-401, *et seq.* for the purpose of providing "risk management, insurance, reinsurance . . . , self-insurance, or a combination thereof for any and all of the areas of liability or insurability, or both, for such governmental entities." Tenn. Code Ann. § 29-20-401(b). The Pool currently provides such services to more than four hundred and ninety five local governmental entities.

As governmental entities, The Pool's members are required to respond to requests for public records made pursuant to the TPRA. The Court's decision in this appeal regarding the application of Tenn. Code Ann. § 10-7-503 will significantly impact the manner in which The Pool's members operate on a daily basis. The Pool also is responsible for paying legal defense costs incurred by municipal governmental entities across the State of Tennessee for alleged violations of the TPRA. The Pool has a significant financial interest in the outcome of this litigation because the Court's decision could expand the potential liability of governmental entities for claims arising under the TPRA, should public records policies such as the one adopted by SCBOE be found in violation of the Act. The Pool and its members are greatly concerned about whether a governmental entity has the discretion under the TPRA to choose the manner in which it accepts requests for public information.

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[1] The Pool simultaneously has filed a motion pursuant to Rule 31 Tenn. R. App. P. seeking permission to file this Amicus Brief on behalf of the Tennessee Municipal League Risk Management Pool.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Pool adopts the Statement of Issues Presented for Review as previously submitted and set forth in the brief of Defendant-Appellant, Sumner County Board of Education:

(1) Whether the Sumner County Board of Education's public records policy violates the TPRA because it does not permit electronic requests to inspect public records.

(2) Whether [Plaintiff's] request to inspect the Board's public records policy is moot because the requested policy has been publicly available online since 2011 and the Board provided a hardcopy of the policy to Jakes early in this litigation.

In this amicus brief, it is the intention of The Pool to address issue #1 presented by Sumner County Board of Education (hereafter referred to as "SCBOE").

## STATEMENT OF THE CASE

The Pool adopts the statement of the case presented by SCBOE in the Brief of Appellant.

## STATEMENT OF FACTS

The Pool adopts the statement of facts presented by SCBOE in the Brief of Appellant.

## SUMMARY OF THE ARGUMENT

The general purpose of the Tennessee Public Records Act is to allow broad access to public records. The TPRA prohibits records custodians from requiring written requests to inspect documents or assessing a charge to view a public record. The TPRA also requires that the request for inspection of public records be sufficiently detailed so that the custodian can identify the documents to be inspected. Otherwise, the TPRA does not require governmental entities to accept requests to inspect public records in any particular format.

SCBOE's public records policy requires citizens to submit requests to inspect records in person or via U.S. Mail. The trial court erred in this case by finding this policy was in violation of the TPRA and requiring the SCBOE to revise its policy. The TPRA does not require governmental entities to accept public records requests via electronic mail, voicemail, facsimile transmission, or in any other particular format and, therefore, the trial court's mandate to SCBOE requiring revision of its public records policy should be reversed.

Governmental entities and their legislative bodies are in the best position to determine the manner in which they will accept citizens' requests to inspect public records under the TPRA. What will work best for one governmental entity may not work for another, and a blanket rule requiring entities subject to the TPRA to accept certain methods of records requests could cripple a great deal of governmental entities. Entities subject to the TPRA should be allowed the discretion to establish their own policies as to how public records requests are received, so long as the methods are in compliance with the requirements of the TPRA.

## ARGUMENT

### I. THE TENNESSEE PUBLIC RECORDS ACT DOES NOT REQUIRE GOVERNMENTAL ENTITIES TO ACCEPT ELECTRONIC REQUESTS TO INSPECT PUBLIC RECORDS.

SCBOE's public records policy requires citizens to submit requests to inspect records in person or via U.S. Mail. The trial court erred in holding that the SCBOE's public records request policy was in violation of the TPRA because there is no provision in the Act which prescribes the format in which entities must accept requests to inspect records. The trial court's ruling goes beyond the express language of the TPRA and should be reversed.

The TPRA does not require that governmental entities accept requests to inspect records in any particular manner; the only specific mandates with regard to requests to inspect public records under the TPRA can be found at Tenn. Code Ann. § 10-7-503(a):

> (4) This section shall not be construed as requiring a governmental entity to sort through files to compile information or to create or recreate a record that does not exist. **Any request for inspection or copying of a public record shall be sufficiently detailed to enable the governmental entity to identify the specific records for inspection and copying.**
>
> (7)(A) **A records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law**; however, a records custodian may require a request for copies of public records to be in writing or that the request be made on a form developed by the office of open records counsel. **The records custodian may also require any citizen making a request to view a public record or to make a copy of a public record to present a photo identification, if the person possesses a photo identification, issued by a governmental entity, that includes the person's address. If a person does not possess a photo identification, the records custodian may require other forms of identification acceptable to the records custodian.**

(Emphasis added).

These express restrictions demonstrate the intent on the part of the Tennessee Legislature to include some limitations it chooses to place on governmental entities regarding their open records policies, but leave other matters to the entities themselves.

Questions of statutory construction are questions of law which are reviewed *de novo* with no presumption of correctness. Jones v. Professional Motorcycle Escort Serv., L.L.C., 193 S.W.3d 564, 567 (Tenn. 2006) (citing Ki v. State, 78 S.W.3d 876, 879 (Tenn. 2002). On the issue of statutory interpretation, the Tennessee Supreme Court has held:

> When construing or interpreting statutes, the essential duty of this Court is to ascertain and carry out the legislature's intent without unduly restricting or expanding a statute's coverage beyond its intended scope. In so doing, we are to examine the natural and ordinary meaning of the language used, without a forced or subtle construction that would limit or extend the meaning of the language. Where the language of the statute is clear and unambiguous, then this Court will give effect to the statute according to the plain meaning of its terms.

Lavin v. Jordon, 16 S.W.3d 362, 365 (Tenn. 2000)(internal citations and quotations omitted).

Additionally, when "ascertaining the intent of the legislature, this Court may look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment." State v. Edmondson, 231 S.W.3d 925, 927 (Tenn. 2007)(relying on State v. Collins, 166 S.W.3d 721, 726 (Tenn. 2005)). Further, courts are directed not to "apply a particular interpretation to a statute if that interpretation would yield an absurd result." State v. Sims, 45 S.W.3d 1, 11 (Tenn. 2001). "[C]ourts must also construe [statutory] words in the context in which they appear in the statute and in light of the statute's general purpose." Lee Medical, Inc. v. Beecher, 312 S.W.3d

515, 526 (Tenn. 2010). A helpful way to discover a "statute's general purpose" is to view the statute against "the tapestry of the law generally." Town of Mount Carmel v. City of Kingsport, 217 Tenn. 298, 302, 397 S.W.2d 379, 381 (1965).

> Courts are not authorized to alter or amend a statute. The reasonableness of a statute may not be questioned by a court, and a court may not substitute its own policy judgments for those of the legislature. Courts must presume that the legislature says in a statute what it means and means in a statute what it says there.

Mooney v. Sneed, 30 S.W.3d 304, 306–07 (Tenn. 2000)(internal citations and quotations omitted). Where language is not included in a statutory scheme, the Court should apply the plain language of the statute and "decline to 'read in'" language that is not included in the statute "to extend the coverage of the statute." Howell v. State, 151 S.W.3d 450, 458 (Tenn. 2004). The absence of language requiring governmental entities to accept requests to inspect records in any specific format is significant and this language should not be "read in" to require the SCBOE to revise its current policy.

According to the plain language of the TPRA, the general purpose of the Act is to allow Tennessee citizens access to state and local government public records, subject to certain limitations. SCBOE's policy requiring that a citizen make a request to inspect public records either in person or via the U.S. Mail does not circumvent this purpose. The trial court's finding that SCBOE's public records request policy violates the TPRA should be reversed.

## II. THE SUMNER COUNTY BOARD OF EDUCATION'S PUBLIC RECORDS POLICY COMPLIES WITH ESTABLISHED CASE LAW ON THE SUBJECT.

The Tennessee Office of Open Records Counsel has shared its position regarding whether entities must accept public records electronically and provides guidance on the issue. On its "Frequently Asked Questions" webpage, the Office of Open Records Counsel poses the following question and answer:

> Is a governmental entity required to accept a public records request for copies via email or fax?
>
> The case law in Tennessee only addresses the fact that a governmental entity is required to accept requests for copies in person or through the mail. However, if the governmental entity decides to accept requests for copies via email or text, the law does not prohibit the entity from doing so. If a governmental entity is going to limit the methods in which it accepts requests for copies, that information should be reflected in the entity's rule or policy.[2]

The trial court cited to Waller v. Bryan, 16 S.W.3d 770 (Tenn. Ct. App. 1999) to support its finding that the SCBOE's policy giving citizens the option to request to inspect records in person violates the TPRA. [Trial Court Findings of Fact and Conclusions of Law p. 16)]. The trial court found that requiring a personal appearance violates the intent of the TPRA "to give the fullest possible access to public records" and to "promptly make available for inspection any public record." [Id.]. It then cited to Waller to support its finding that a requirement for one to appear in person to request a copy of documents "would place form over substance and not be consistent with the clear intent of the Legislature." [Id.].

The Pool submits that the trial court's reliance on Waller is in error because the facts in Waller are distinguishable from this case. In Waller, the issue was "whether or not the Appellant's inability to show up in person at the Chattanooga Police Department

[2] https://www.comptroller.tn.gov/openrecords/faq.asp

'for inspection' of the records prohibits him from obtaining copies of identified records." Waller, 16 S.W.3d at 771. The plaintiff in Waller made a request for copies of photographs taken in the investigation of his murder/robbery case. Id. at 772. The Court of Appeals held that, so long as the citizen's request is sufficiently detailed to allow the custodian of records to identify the documents to be copied, the citizen is not required to appear in person. Id. at 774.

The Pool asserts that the Court's holding in Waller applies only to requests to make copies and does not apply to the facts in this case because the Plaintiff's request was only to inspect, and not for copies. The very definition of "inspect" requires one to look at or to examine an item. The TPRA itself provides that a "records custodian may not require a written request or assess a charge to view a public record unless otherwise required by law." Tenn. Code Ann. § 10-7-503(a)(7)(A) (emphasis added). Thus, if a citizen merely wants to inspect records, as opposed to requesting copies, it would be necessary for the requestor to appear in person to view such records. In other words, to make an inspection of records, one must physically be present to do so, otherwise the request would turn into a request for the governmental entity to provide the requestor with copies of the records. Once the request to inspect has been converted to a request to make copies, then the governmental entity may require that the request be in writing and may charge for copies under the TPRA. The TPRA does not prohibit inspection requests from being made in person, as this is the type of request an inspection of records contemplates. This is one of the options for which SCBOE's open records policy allows, and it does not violate the TPRA.

The Court of Appeals' analysis of the TPRA in Hickman v. Tennessee Bd. of Probation and Parole, No. M2001-02346-COA-R3-CV, 2003 WL 724474 (Tenn. Ct. App. March 4, 2003), supports this argument. In Hickman, the Court held:

> 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 documents without requiring an extensive search.

Id. at *3. This is precisely the type of policy that SCBOE has adopted and it is compliant with the TPRA.

The Court's holding in Wells v. Wharton, No. W2005-00695-COA-R3-CV, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2005), also is instructive. In Wells, the requestor used a computer system he had created himself to download public records in bulk from the Shelby County Portal website. Id. at *1. The Shelby County Government subsequently shut down the website because the computer system was overloaded. Id. The requestor then went to the offices to download the information; however, he was still unable to download the records in bulk because either the office computers could not handle the requests, or the office did not provide public access to computers. Id. The requestor thereafter filed suit, claiming that he had been denied access to public records. Id. The Court noted that the requestor, at all times, could have accessed the public records he was seeking by requesting paper copies from the records custodian. Id.

The issue on appeal in Wells was "whether a citizen requesting public records may dictate the manner he or she receives it . . . ." Id. at *7. The Court of Appeals determined that no Tennessee court had addressed the issue, and it looked to other

jurisdictions for guidance. Id. While noting that none of the cases cited from other jurisdictions were binding, the Court stated:

> [t]hese cases illustrate that the issue in the present case depends on whether the purpose of the Tennessee Public Records Act is one of access to the information contained within the public records or one of access to the public records in their normally kept form.

The Court noted further:

> In Tennessee, the purpose of the Public Records Act is to allow maximum access to the information contained within public records [and] in light of the purpose of the Tennessee Public Records Act, we conclude that the Tennessee Public Records Act does not require a custodian of records to provide public records in the manner a citizen requests.

Id. at *9. The Court held that "[a]llowing a custodian of records to choose the manner in which he or she presents public records to citizens is not unreasonable so long as that manner does not distort the record or inhibit access to the record." Id.

While the decision in Wells relates to the format of the production of requested records, the decision is instructive because it supports the argument that, so long as the purpose of the TPRA is being met, the governmental entity should be permitted to designate the format in which it accepts public records requests. As the Court pointed out in Wells, the plaintiff always could have requested copies of the records in paper form; thus, the Shelby County Government was not denying access to those records, but was just not providing them in the format which the plaintiff was requesting. The Pool submits that, with regard to SCBOE's public records policy, the purpose of open access to records under the TPRA is still being met, as citizens are permitted two very clear and simple methods by which they can request to inspect public records.

## III. GOVERNMENTAL ENTITIES ARE IN THE BEST POSITION TO DETERMINE THE MANNER IN WHICH THEY RECEIVE REQUESTS TO INSPECT PUBLIC RECORDS WITHIN THE PARAMETERS SET BY THE TENNESSEE PUBLIC RECORDS ACT.

A decision by this Court affirming the trial court's ruling that the SCBOE's open records policy violates the TPRA would have considerable adverse effects on local governmental entities. While the TPRA creates a private cause of action for judicial review of alleged denials of public records requests, the trial court overreached in this case because it sought to establish or influence how SCBOE may accept records requests.

Courts should not delve into policy matters that are in the purview of a local legislative body, such a school board or a City council. Local governmental entities should be allowed to legislate and adopt their own open records policies as they see fit, so long as the policies do not violate the express provisions of the TPRA. In fact, the Legislature recently amended Section 10-7-503 of the TPRA to reserve the power to create written public records policies with the governmental entities themselves. Tennessee Code Annotated § 10-7-503(g) provides the following:

> No later than July 1, 2017, every governmental entity subject to this section shall establish a written public records policy properly adopted by the appropriate governing authority. The public records policy shall not impose requirements on those requesting records that are more burdensome than state law and shall include:
>
> (1) The process for making requests to inspect public records or receive copies of public records and a copy of any required request form;
>
> (2) The process for responding to requests, including redaction practices;
>
> (3) A statement of any fees charged for copies of public records and the procedures for billing and payment; and
>
> (4) The name or title and the contact information of the individual or individuals within such governmental entity designated as the public records request coordinator.

The Pool submits that Tenn. Code Ann. § 10-7-503(g) reflects the intent of the Legislature to afford governmental entities the discretion to develop their own public records policy in accordance with the TPRA.

Tennessee law has long recognized the authority of local governmental entities to exercise discretion in making policy. This understanding is reflected in the immunity provisions of the Tennessee Governmental Tort Liability Act ("GTLA"), Tenn. Code Ann. § 29-20-201, *et seq*. With regard to tort claims brought against governmental entities, the GTLA expressly preserves an entity's immunity from suit when the claim is based on the entity's exercise, performance, or failure to exercise a discretionary function. Tenn. Code Ann. § 29-20-205(1). In Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 85 (Tenn. 2001), the Tennessee Supreme Court analyzed discretionary function immunity, holding:

> Essentially, the discretionary function exception prevents the use of tort actions to second-guess what are essentially legislative or administrative decisions involving social, political, economic, scientific, or professional policies or some mixture of these policies. Doe v. Coffee County Bd. of Educ., 852 S.W.2d 899, 907 (Tenn. Ct. App.1992) (citing United States v. Gaubert, 499 U.S. 315, 323, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991))[3]. The rationale for preserving immunity for certain acts performed by governmental entities is that **the government should be permitted to operate without undue interference by the courts, as courts are often "ill-equipped to investigate and balance the numerous factors that go into an executive or legislative decision."** Bowers

[3] In Gaubert, the U.S. Supreme Court considered the discretionary function exception to the Federal Tort Claims Act, noting that

> [t]he purpose of the exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy . . . . Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs.

Id., 499 U.S. 315, 322–23, 111 S. Ct. 1267, 1273–74 (1991)(internal citations and quotations omitted).

> v. City of Chattanooga, 826 S.W.2d 427, 431 (Tenn. 1992) (quoting Wainscott v. State, 642 P.2d 1355, 1356 (Alaska 1982)); *see also* Carlson v. State, 598 P.2d 969, 972 (Alaska 1979).

Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 85 (Tenn. 2001)(emphasis added).

Although a citizen's right to file a petition for judicial review of an alleged denial to inspect or copy public records is created by the express provisions of Tenn. Code Ann. § 10-7-505, The Pool submits that the courts should not interfere with a governmental entity's discretion to establish public records policies which are compliant with the express provisions of the TPRA.

Further, requiring an entity to accept records requests via e-mail or electronically is considerably difficult given the TPRA's provision for verification of Tennessee citizenship by the records custodian. In 2008, the Legislature amended the TPRA to add the following language:

> The records custodian may also require any citizen making a request to view a public record or to make a copy of a public record to present a photo identification, if the person possesses a photo identification, issued by a governmental entity, that includes the person's address. If a person does not possess a photo identification, the records custodian may require other forms of identification acceptable to the records custodian.

Tenn. Code Ann. § 10-7-503(7)(A).

This language was added to the TPRA to give record custodians the authority to verify, through government-issued photo identification that includes an address, that the person making the public records request is a Tennessee citizen. The Attorney General for the State of Tennessee has issued the opinion that individuals who are not citizens of the State of Tennessee may rightly be denied access to public records under the TPRA. Tenn. Op. Att'y Gen. No. 01-132 (Aug. 22, 2001). Thus, it appears that

verification of Tennessee citizenship is an important factor in determining an individual's right to inspect public records under the TPRA.

Requiring entities to accept public records requests via e-mail poses significant difficulties for records custodians when considering the issue of verification of citizenship, and raises the question: How does a records custodian verify a requestor's Tennessee citizenship without being able to verify that information in person? If the trial court's ruling is affirmed and entities are required to accept requests to inspect records in formats such as via e-mail, telephone, facsimile transmission, or voicemail, such a ruling could undermine the governmental entity's interest in verifying the citizenship of the requestor.[4]

There are a number of other reasons why accepting public records requests electronically may not be a good idea for entities subject to disclosure under the TPRA. First, e-mails are a method of electronic communication which permits and/or supports the anonymity of the sender, and there is no guarantee that an e-mail requestor of public records is a citizen of the State of Tennessee. Further, with e-mail records requests, there can be no guarantee that the request is sent by an actual person. E-mails can be generated by other potentially harmful and system-crippling computer programs such as spambots.[5] Likewise, should the records request require a response from the entity's records custodian, there are no guarantees that the response would be received by an actual person.

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[4] Arguably, verification of Tennessee citizenship is less of an issue when a requestor makes a request via U.S. Mail. By sending a request via U.S. Mail, the records custodian would at least have the requestor's return address and a postmark to assist in verification of citizenship.

[5] *See,* https://en.wikipedia.org/wiki/Spambot ("E-mail spambots harvest e-mail addresses from material found on the Internet in order to build mailing lists for sending unsolicited e-mail, also known as spam. Such spambots are web crawlers that can gather e-mail addresses from websites, newsgroups, special-interest group (SIG) postings, and chat-room conversations. Because e-mail addresses have a distinctive format, such spambots are easy to code.")

E-mails also are a well-known culprit in the exposure of computer systems to harmful programs such as viruses, malware, key loggers, ransom ware, etc. Requiring entities to accept public records requests via e-mails puts their computer systems at considerable risk. A rule of thumb in many offices is, "If you do not recognize the sender, do not open the e-mail."[6] If this rule were applied to public records requests made by e-mail, then a considerable amount of valid public records requests would go unopened. Or, if this rule were disregarded, and e-mails from unknown senders were opened, then governmental entities would be putting their information systems at risk. Even if entities have information systems with built-in e-mail security technology, it is possible that valid public records requests still would be sent to a "spam" folder automatically, putting the governmental entity in a position of technically having received a request to inspect records but, because of unknown identity of e-mail sender or some other unknown security or technical issue existing with the e-mail itself, the records custodian is unable to respond (or is unable to respond in a timely manner under the TPRA). This type of situation implicates one of the public policy concerns advanced by SCBOE in its appellate brief: that records requests made via e-mail easily could become lost or misplaced.

Moreover, requiring entities to accept e-mail records requests would place a sizeable financial burden upon most entities. Secure e-mail systems and the technological infrastructure required to protect the entity may severely affect the budgets of many entities and affect the ability of entities to provide the services for which they are organized. In addition, not only would many smaller entities lack the

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6 This rule of thumb is the first tip offered by McAfee Security as one of several "common-sense precautions to reduce [] exposure and protect your system." *See*, http://www.mcafee.com/us/threat-center/resources/security-tips-13-ways-to-protect-system.aspx

resources to obtain sophisticated technology, but many also would lack readily-available technological consultants or personnel to address the burdens of e-mail records requests.

Accepting public records requests via e-mail and without requiring production of photo-identification also puts governmental entities at the risk of failing to catalog and coordinate inquiries, particularly in situations where a requesting party may send duplicate requests in several different e-mails and to different recipients. Further, accepting e-mail requests to inspect public records may deprive the entity from the ability to log and keep track of requests by citizens, and may create difficulties in recording and maintaining compliance records.

In addition, under Tenn. Code Ann. § 10-7-504, the Tennessee Legislature has determined that certain records, even though public, shall be considered confidential and the confidentiality of those records shall be redacted. Tenn. Code Ann. § 10-7-504(a)(20)(C) provides the following:

> Information made confidential by this subsection (a) shall be redacted wherever possible and nothing in this subsection (a) shall be used to limit or deny access to otherwise public information because a file, document, or data file contains confidential information. For purposes of this section only, it shall be presumed that redaction of such information is possible. The entity requesting the records shall pay all reasonable costs associated with redaction of materials.

Where records first must be redacted before the requestor can view them, human capital must be expended. As an example, of the 446 member entities that are covered by The Pool for purposes of workers' compensation insurance, 105 of these entities (approximately 24%) have fewer than ten full-time employees. For governmental entities stretched to meet the demands of operations with few employees, the risk of

expending human capital to respond to potentially hundreds of bogus or invalid e-mail public records requests would undermine the entity's ability to operate efficiently.

In the instant case, the trial court found that the SCBOE presented no evidence that personal appearances at the Sumner County Board of Education "prevent wasted governmental time and money caused by the endless search of voluminous records for a document insufficiently identified." [Trial Court Findings of Fact and Conclusions of Law p. 16-17]. It found that "no pressing justification for a personal appearance has been presented by the [SCBOE] for [Plaintiff's] request that was sufficiently identified." [Id. at p. 17]. In his brief, Plaintiff asserts that the SCBOE's argument that "legitimate policy interest and concerns supports the [SCBOE]'s conclusion that electronic requests should not be utilized in requested access to the [SCBOE]'s public records" is unreasonable because the SCBOE testified at the trial of this matter that it only receives 12-15 records requests a year. [Brief of Appellee, pp. 30-31].

Remarkably, the trial court noted on pages 24 and 25 of its Findings of Fact and Conclusions of Law

> [t]hat non-exempt records should be "open" and not "closed" so that anyone requiring public records would not be thwarted by policies that are only (emphasis added) convenient for the government entity – but with policies that are consistent with openness, efficiency, and promptness that effectively balance the needs of each citizen by giving the "fullest possible access to public records", T.C.A. § 10-7-505(d), without compromising the need of the government to operate.[6]

In footnote #6, the trial court remarked:

> [6] Each government entity operates differently and utilizes their personnel to meet the demands upon the entity. The Sumner County Board of Education operates uniquely and differently from all other government entities to meet the specific needs and demands of the public school system in Sumner County. This Court will not legislate or dictate what methods/formats should be adopted to process public records requests for inspection; however, the Court only recommends that any policy be

> expanded to accommodate the methods of modern communication – beyond a writing or an appearance in person, and the Court only suggests the consideration of the two methods specifically sanctioned by the BPG and the Comptroller's office; website and telephone.

The Pool submits that the trial court's ruling that SCBOE's public records policy violates the TPRA and its remarks in footnote #6 of the order are inconsistent. The trial court recognized that governmental entities operate differently from each other subject to their limitations of personnel to meet the demands of the entity, but yet it held that the SCBOE's public records policy violates the TPRA because it permits inspection requests only in person and via U.S. Mail. Despite its remarks in footnote #6, by finding the SCBOE's policy in violation of the TPRA (when it is not) and requiring it to draft a new policy, the trial court has substituted its judgment for that of SCBOE. No single blanket rule for requests to inspect public records should apply to all governmental entities as it likely would have a detrimental effect on smaller entities throughout Tennessee. The trial court may have determined that, in this instance, the SCBOE did not have to waste governmental time and money in compiling the documents that Plaintiff requested, but this may not be the case with every governmental entity faced with records requests, particularly if the entity is forced to address the risks and costs inherent in addressing records requests via e-mail.

## CONCLUSION

The Tennessee Public Records Act does not require governmental entities to accept requests to inspect public records electronically or in any particular format. The trial court substituted its judgment for that of the Sumner County Board of Education in determining that its public records policy was non-compliant with the TPRA. The

Sumner County Board of Education's public records policy is compliant with the TPRA and case law interpreting the TPRA, and the trial court's ruling should be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 26, 2016, a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, to the following:

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Byron C. WELLS
v.
A.C. WHARTON, Jr., et al.

No. W2005-00695-COA-R3-CV.
|
Assigned on Briefs June 1, 2005.
|
Dec. 7, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
Aug. 21, 2006.

Direct Appeal from the Chancery Court for Shelby County, No. CH04-1826-3; D.J. Alissandratos, Chancellor.

**Attorneys and Law Firms**

Byron C. Wells, Memphis, TN, pro se.

Brian L. Kuhn, Shelby County Attorney, Craig E. Willis, Assistant County Attorney, Memphis, TN, for Appellees.

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

## OPINION

ALAN E. HIGHERS, J.

***1** In this appeal, we are asked to determine multiple issues including whether the chancery court erred when it granted the defendants' motion to dismiss for failure to state a claim upon which relief may be granted. The plaintiff contends that there were numerous claims made in his complaint sufficient to survive defendants' motion to dismiss. The plaintiff, acting pro se, filed an appeal to this Court. We affirm in part and reverse in part and remand.

## I. FACTS & PROCEDURAL HISTORY

Byron Wells ("Mr. Wells" or "Appellant") is a resident of Shelby County who previously accessed public documents via the Shelby County Portal website. Using a computer program that he specially created, Mr. Wells would download public documents in bulk format. After access through the website overloaded its computer system, the Shelby County Government ("Shelby County") closed the website for several weeks. Shelby County eventually reopened access to the website but placed limitations on the amount of data that could be downloaded and the length of connection time. As a result, Mr. Wells could no longer download the documents he desires in bulk format via his specially created program. Mr. Wells attempted to go to the Shelby County offices where the documents are kept to utilize that office's computers to download public records in bulk format. Mr. Wells could not download public records in the same manner, however, because (1) the computers provided for public use to access public records by the office cannot handle such request or (2) the office does not provide a computer for public use to access public records. At all times pertinent to this litigation, Mr. Wells could submit a written request to each office he desired public records from and receive those records in a paper copy.

On September 10, 2004, Mr. Wells filed suit against A.C. Wharton Jr., William R. Key, Chris A. Turner, Joseph A. Jackson, Shelby County, James Huntziker, and Kevin A. Gallagher (collectively "Defendants" or "Appellees"). Thereafter, Mr. Wells amended his complaint to allege that the limited access provided by Shelby County via the Internet violated the Tennessee Public Records Act; that the Shelby County Mayor's Office denied him copies of payment records between the Memphis Daily News and Shelby County; that officials denied him copies of public records in a format requested by Mr. Wells; and that Defendants' requirement that Mr. Wells must first present a written request before being allowed public access constituted a denial of access to public records. [1]

On October 6, 2004, the chancery court conducted a hearing on Defendants' motion to dismiss and motion to strike. At that time, the chancery court continued the hearing to allow both parties to discuss with each other the feasibility of creating a new system that would allow Mr. Wells the access he desired.

After the parties could not reach an amicable compromise, the chancery court conducted a hearing on Defendants' motion to dismiss, motion to strike, and motion for a protective order and/or to stay discovery as well as Mr. Wells's motion to disqualify Defendants' attorney and motion to strike exhibit obtained by misinformation. On March 2, 2005, the chancery court denied Appellant's motions; granted Defendants' motion to strike and motion to dismiss; and ruled that Defendants' motion for protective order and/or to stay discovery was moot. On March 3, 2005, Mr. Wells filed a motion for relief from judgment and/or motion to reconsider. On March 9, 2005, Mr. Wells filed a memorandum in support of his motion for relief from judgment and/or motion to reconsider. After a hearing on the motion, the chancery court denied Mr. Wells's motion for relief from judgment and/or motion to reconsider.

## II. ISSUES PRESENTED

*2 Appellant, acting pro se, filed a timely notice of appeal to this Court and presented numerous issues for review, to include the following:

1. Whether allegations of actual fraud, misrepresentation and other misconduct which may be criminal in nature state a claim upon which relief may be granted;

2. Whether an allegation that Shelby County operates its computer program contrary to Attorney General's opinions state a claim upon which relief may be granted;

3. Whether the chancery court should have disqualified Appellees' attorney from representing Appellees when there is a conflict of interest among Appellees;

4. Whether the chancery court should have disqualified Appellees' attorney from representing all defendants when the attorney writes an opinion stating to his clients that their actions are illegal and then defend them claiming that their actions are not illegal;

5. Whether the chancery court should have disqualified Appellee's attorney because Appellees may have committed a felonious act;

6. Whether Appellees' denial of public records because Appellant filed a lawsuit against Appellees state a claim upon which relief may be granted;

7. Whether Appellees may require any request for public records to be in writing.

8. Whether Appellees' denial of providing a copy of public records in a particular manner state a claim upon which relief may be granted;

9. Whether a claim that Appellees' preferentially treated the Memphis Daily News state a claim upon which relief may be granted;

10. Whether a county official must maintain a computer for the public to access public records;

11. Whether the chancery court can require Appellant provide computer programming for total access to all records for the entire public;

12. Whether the chancery court can demand Appellant to pay for all costs of reviewing county operations to make all records accessible to all members of the public;

13. Whether newly discovered evidence of a substantial change in the operations of Appellees states a claim upon which relief may be granted;

14. Whether the chancery court must provide judicial review of Appellant's claims before granting a motion to dismiss;

15. Whether the chancery court may refuse to allow Appellant to correct the record to state that he would be required to make payments for new computer programs for access to public records which are not available;

16. Whether the chancery court converted Appellees' motion to dismiss to a motion for summary judgment when it considered the County's claims that remote public access to its records would damage the records and that the County has adopted reasonable rules;

17. Whether Appellees refusal to grant a request for access to public records unless Appellant made a written request states a claim upon which relief may be granted; and

  

18. Whether the chancery court erred when it concluded that it did not understand the complaint and that it would let the Court of Appeals tell him what to do.

*3 For the following reasons, we affirm in part and reverse in part and remand the decision of the chancery court.

## III. DISCUSSION

### *A. Issues Without Merit*

Appellant has presented numerous issues on appeal. The majority of these issues, however, are meritless. We address each issue in turn.

First, we address Appellant's assertion that his allegations of fraud, misrepresentation, and other conduct which may be criminal in nature orally presented at trial state a claim upon which relief may be granted. At trial, Appellant made several oral allegations that Appellees have committed a fraud upon the chancery court and made misrepresentations to the chancery court. These allegations may be a violation of the Tennessee Rules of Professional Conduct if proven true. *See* Tenn. Sup.Ct. R. 8, RPC 3.3 (2003). They do not, however, state a claim upon which relief may be granted. Appellant has not alleged that Appellees committed a fraud upon Appellant or made a misrepresentation to Appellant.

Even assuming that Appellees have committed a fraud or made a misrepresentation to Appellant, Appellant has not alleged fraud or misrepresentation within his complaint. When considering whether to grant a motion to dismiss for failure to state a claim upon which relief may be granted, a court may not hear "matters outside the pleadings." *Trau Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn.2002) (citing *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn.1999)). Thus, this issue is without merit.

Second, we address Appellant's claims that the chancery court should have disqualified Appellees' attorney for any one of three reasons. Appellant claims there is a conflict of interest between the parties and that an attorney may not represent all parties dually represent Appellees. Appellant also claims that the Appellee allowed a conspiracy by Appellees to perpetrate a fraud upon the chancery court and to maintain that fraud upon the chancery court.

Appellant, as the movant, had the burden to prove that the chancery court should disqualify the County Attorney from representing Appellees. During the hearing on this motion, Appellant presented no evidence other than his unfounded allegations as proof. Thus, the chancery court was not in error when it denied Appellant's motion to disqualify.

Appellant has also asserted that the chancery court should have disqualified Appellees' attorney because the attorney's written opinion was in opposite of Appellees stance at trial. Appellee did not raise this issue at trial. Thus, Appellant has waived this issue. *Barnhill v. Barnhill*, 826 S.W.2d 443, 458 (Tenn.Ct.App.1991) (citing *Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc.*, 677 S.W.2d 457 (Tenn.Ct.App.1984)) (holding that a party waives an issue when it raises it for the first time on appeal).

Third, we address Appellant's contentions that the chancery court cannot demand Appellant to pay for all costs of reviewing county operations to make all records accessible to all members of the public and that the chancery court cannot require Appellant provide computer programming for total access to all records for the entire public.

*4 At trial, the chancery court did not issue a final order requiring Appellant to pay for any costs related to these issues, nor did it issue a final order adjudging whether a county official must maintain a computer for public access. This Court "will not decide theoretical issues based on contingencies that may or may not arise." *City of Memphis v. Shelby County Election Comm'n*, 146 S.W.3d 531, 539 (Tenn.2004). To do so would "violate the established rule that appellate courts will not render advisory opinions." *Id.*

Fourth, we address Appellant's claims that Appellees' preferentially treated the Memphis Daily News state a claim upon which relief may be granted; that Shelby County operates its computer program contrary to Attorney General's opinions state a claim upon which relief may be granted; that newly discovered evidence of a substantial change in the operations of Appellees states

a claim upon which relief may be granted; and that the chancery court may refuse to allow Appellant to correct the record to state that he would be required to make payments for new computer programs for access to public records which are not available.

In Appellees' motion to strike, Appellees petitioned the chancery court to strike out all allegations of Appellant's complaint that did not relate to Appellant's right of personal inspection of public records under section 10-7-505 of the Tennessee Code. Each of these issues does not pertain to Appellant's right of personal inspection. Appellant has not challenged the chancery court's grant of Appellees motion to strike on appeal. Thus, these issues are pretermitted.

Fifth, we address Appellant's claim that a county official's failure to maintain a computer for the public to access public records states a claim upon which relief may be granted. Section 10-7-123(a) of the Tennessee Code provides that a "county official *may* provide computer access ... for inquiry only to information contained in the records of that office which are maintained on computer storage media in that office, during and after regular business hours." Tenn.Code Ann. § 10-7-123(a)(1) (emphasis added). Pursuant to this statute, a county official is not required to maintain a computer for the public to access public records. Thus, this issue is without merit.

Next, we address Appellant's claim that the chancery court converted Appellees' motion to dismiss to a motion for summary judgment when it considered the County's claims that remote public access to its records would damage the records and that the County has adopted reasonable rules.

If a trial judge receives matters outside the pleadings on a motion to dismiss for failure to state a claim upon which relief may be granted, "the motion shall be treated as a motion for summary judgment and disposed of as provided in [Tennessee] Rule [of Civil Procedure] 56." Tenn. R. Civ. P. 12.02; *see also Hixson v. Stickley,* 493 S.W.2d 471, 472-73 (Tenn.1973).

*5 Although Appellant claims that the chancery court heard matters outside the pleadings, the record does not reflect such an assertion. During its hearing on Appellees' motion to dismiss, the chancery court directed Appellees to "keep in mind that on a Motion to dismiss you have to stay within the confines of the four corners of the Complaint." Thus, we find this issue meritless.

Finally, we address Appellant's claim that the chancery court erred when it concluded that it did not understand the complaint and that it would let the Court of Appeals tell him what to do. First, this Court notes that Appellant has misstated what the chancery court stated at its hearing on Appellant's motion for relief from judgment and/or motion to reconsider. The chancery court specifically stated that "[p]erhaps the members of the Court of Appeals have a greater understanding of this than I do when they read your Complaint, but when I read your Complaint, I do not see a cause of action for which the Court can grant relief." Further, this is not an appealable issue.

### *B. Motion to Dismiss*

Appellant asserts that the chancery court erred when it granted Appellees' motion to dismiss for failure to state a claim upon which relief may be granted. Because Appellant has failed to appeal the chancery court's grant of Appellees' motion to strike, this Court is limited to determining whether Appellees' denial of inspection of payment records because Appellant is a party to a lawsuit against them; whether Appellees' denial of Appellant's requests to have certain public documents copied in a particular format; and/or whether Appellees' requirement that a citizen must first make a written request before a custodian of records grants him or her access to public records state a claim that may withstand a motion brought pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure.

When reviewing a 12.02(6) motion to dismiss, this Court will not consider any matter outside the pleadings. *Trau Med of America, Inc.,* 71 S.W.3d at 696 (citing *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.,* 986 S.W.2d 550, 554 (Tenn.1999)). This Court shall liberally construe the pleadings and "presume all factual allegations to be true and giv [e] the plaintiff the benefit of all reasonable inferences." *Id.* (citing *Pursell v. First Am. Nat'l Bank,* 937 S.W.2d 838, 840 (Tenn.1996)). A trial court's granting of a motion to dismiss must be upheld if "it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant

relief." *Id.* (citing *Doe v. Sundquist,* 2 S.W.3d 919, 922 (Tenn.1999); *Fuerst v. Methodist Hosp. S.,* 566 S.W.2d 847, 848 (Tenn.1978)). We review any conclusions of law by the trial court under a *de novo* standard with no presumption of correctness. *Union Carbide Co. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn.1993).

In counts four and five of his complaint, Appellant claims that he was denied copies of any payment records between Shelby County and the Memphis Daily News by Appellees. Appellant asserts that the Shelby County finance department denied his request sending him to the Shelby County mayor's office for the public records he sought and that the Shelby County mayor's office denied him access to public records because he was a party to a lawsuit.

*6 Section 10-7-503 of the Tennessee Code requires that a county official may not refuse inspection of any public record to *any* citizen of Tennessee "unless otherwise provided by state law." Tenn.Code Ann. § 10-7-503(a) (2005). If a citizen has been denied access to public records by a government official, that citizen "may petition for access to any such record and to obtain judicial review of the actions taken to deny the access." Tenn.Code Ann. § 10-7-505(a) (2005). This Court must "broadly construe [ ] [this section of the Tennessee Code] so as to give the fullest possible public access to public records." Tenn.Code Ann. § 10-7-505(d) (2005).

Our legislature has defined the term public document to include "all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or *in connection with the transaction of official business by any governmental agency.*" Tenn.Code Ann. § 10-7-301(6) (2005) (emphasis added).

Appellant, a resident of Shelby County, has requested payment records from transactions conducted between the Memphis Daily News and Shelby County. Clearly, these records fall within the definition of a public record. If we view his allegations as true, Appellant, a citizen of Tennessee, has been denied access to public records. Thus, Appellant has stated a claim upon which relief may be granted.

Additionally, in counts one through four of his complaint, Appellant has asserted that he has been denied copies of various public records in electronic format, basing his claim on our Supreme Court's decision in *Tennessean v. Electric Power Board of Nashville.*

Appellant interprets our Supreme Court's decision in *Tennessean v. Electric Power Board of Nashville,* 979 S.W.2d 297 (Tenn.1998), as to require a government official to provide public records in a computerized format. This interpretation, however, is in error. In *Tennessean v. Electric Power Board of Nashville,* the Tennessean Newspaper requested the names, addresses, and phone numbers of Nashville Electric Service's customers. *Id.* at 299. Nashville Electric Service denied this request asserting that it did not have a record that contained all of the requested information and that it would have to create a new record in order to meet this request. *Id.* The Supreme Court found that this denial was one of format and access and required the Nashville Electric Service to create a new record that contained all the information. *Id.* at 304. The Supreme Court, however, defined format of the record as the content included within the record not the manner in which Nashville Electric Service presented the information to the Tennessean. *Id.*

In this case, Appellant has not alleged that Appellees have denied him access to public records because Appellees would have to create a new record. Thus, *Tennessean v. Nashville Electric Service* is inapplicable in this case.

*7 Section 10-7-505 of the Tennessee Code grants citizens of Tennessee the right to seek judicial review when an official denies his or her request to access public records. Tenn.Code Ann. § 10-7-505(a). Appellant has not alleged that he has been denied these records in any form. Appellant argues that Appellees have denied him copies of public records in electronic form.

While Tennessee courts have not addressed whether a citizen requesting public records may dictate the manner he or she receives it, several other jurisdictions have addressed this issue. For example, in *Farrell v. City of Detroit,* 209 Mich.App. 7, 530 N.W.2d 105 (Mich.Ct.App.1995), the Michigan Court of Appeals found that custodians of public records must provide public records in the format that the citizen requests. *Farrell,* 209 Mich.App. 7, 530 N.W.2d 105. In *Farrell,* a newspaper reporter requested a copy of a computer

tape that contained the "listing of all taxpayers who pay City of Detroit property taxes." *Id.* at 107. The City of Detroit responded to Mr. Farrell's request informing him that he could procure a printed copy of the public records he requested during normal business hours. *Id.* The district court granted summary judgment for the City of Detroit finding "that providing hard copies of the requested information was sufficient to comply with the FOIA." *Id.*

On appeal, Mr. Farrell argued that the trial court erred because it improperly emphasized "the information sought rather than the records requested." *Id.* at 107-08. Basing their decision on applicable Michigan law, the Court of Appeals of Michigan held that custodians of records must "provide the 'public record' ... [citizens] request, not just the information contained therein." *Id.* at 109. The Court also found that the magnetic tape requested was a public record and that the City of Detroit was required to give a copy of the magnetic tape, not just a printout of the information in the tape. *Id.*

Likewise, in *American Federation of State, County & Municipal Employees, AFL-CIO v. County of Cook,* 136 Ill.2d 334, 144 Ill.Dec. 242, 555 N.E.2d 361 (Ill.1990), the Illinois Supreme Court found that a custodian of records must provide the public record and not just the information contained within the public record. *Am. Fed'n of State, County & Mun. Employees, AFL-CIO,* 136 Ill.2d 334, 144 Ill.Dec. 242, 555 N.E.2d 361. In that case, representatives of the American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME") requested certain information. *Id.* at 362. Mr. Robert Lawson, another representative of the AFSCME, requested the same information on computer tape or diskette. *Id.* Mr. Thomas P. Beck, Cook County comptroller, denied Mr. Lawsons request stating that he had already provided the information to the AFSCME and that, in any event, he did not have to give a copy of the computer tape to Mr. Lawson. *Id.* After reviewing Illinois law, the Illinois Supreme Court found that computer tapes are public records and are subject to inspection and copying. *Id.* at 364-65.

*8 Other jurisdictions have found that a custodian of records may dictate the manner in which public records are disseminated to a member of the public. For example, the United States District Court for the District of Columbia found that the U.S. Freedom of Information Act did not allow a citizen to specify the format in which he or she receives a public record. In *Dismukes v. Department of the Interior,* 603 F.Supp. 760 (D.D.C.1984), the U.S. Department of the Interior (the "DOI") denied Mr. Philip Dismukes's request for "a copy of a computer tape listing by name and address the participants in the six 1982 Bureau of Land Management Simultaneous Oil and Gas Leasing bimonthly lotteries." *Dismukes,* 603 F.Supp. at 760-61. The DOI offered the information to Mr. Dismukes in microfiche form, advising Mr. Dismukes that this form was how the DOI routinely gave this information to the public. *Id.* at 761. The District Court focused on the informational content of the record rather than the record itself and found that "[t]he agency need only provide responsive, nonexempt information in a reasonably accessible form, and its offer to plaintiff satisfies that obligation." *Id.* at 763.

Similarly, in *Tax Data Corporation v. Hunt,* 826 P.2d 353 (Colo.Ct.App.1991), the Court of Appeals of Colorado, Division Two, found that custodians of public records may dictate the manner of access to public records. *Tax Data Corp.,* 826 P.2d 353. In *Tax Data Corporation,* a corporation requested tax information on real property from the Treasury Department of the City and County of Denver (the "Treasury Dept."). *Id.* at 354. Initially, employees of the Treasury Dept. permitted representatives of the corporation to access the Treasury Dept.'s computers, which were not designated for public use. *Id.* After discovering the corporation's activities, the treasurer of the City and County of Denver (the "Treasurer") informed the corporation that it could no longer use the Treasury Dept.'s computers to access the records, but if it would "leave a list of the properties of interest," the Treasury Dept. would send the corporation a computer printout containing the requested information. *Id.* Afterwards, the City of Denver Department of Revenue (the "Dept. of Revenue") "promulgated regulations governing public access to records open to inspection or copying under state and local laws." *Id.* at 355. The Court of Appeals declared that the "basic purpose of the Open Records Act is to insure the public's access to information which is a matter of public record, in a form which is reasonably accessible and which does not alter the contents of the information." *Id.* at 357. Reviewing the Dept. of Revenue's regulations in light of this purpose, it found that the issue presented was "one relating to the manner of access to public records which are electronically stored." *Id.* Finding that "the

regulations grant[ed] reasonable access to electronically stored information," the Court of Appeals held that "the regulations d[id] not deny access to electronically stored public records." *Id.*

*9 While these cases are not binding upon this Court, we find that these cases illustrate that the issue in the present case depends on whether the purpose of the Tennessee Public Records Act is one of access to the information contained within the public records or one of access to the public records in their normally kept form. In Tennessee, the purpose of the Public Records Act is to allow maximum access to the information contained within public records. *See Tennessean v. Nashville Elec. Serv.*, 979 S.W.2d 297 (Tenn.1998). Thus, the issue presented here is not one of denial but one of manner of access.

In light of the purpose of the Tennessee Public Records Act, we conclude that the Tennessee Public Records Act does not require a custodian of records to provide public records in the manner a citizen requests. Section 10-7-506 of the Tennessee Code allows for citizens "to take extracts or make copies of public records ... and to make photographs or photostats of the same" and allows the custodian of those records "to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats." Tenn.Code Ann. § 10-7-506(a). This statute, however, does not mention the manner in which the custodian of the record may present the record to the citizen. *See Id.* § 10-7-506 (2005). In addition, section 10-7-121 of the Tennessee Code sets forth the requirements a custodian of records must meet if he or she decides to maintain the public records by computer. *Id.* § 10-7-121. Under this section, in order for a custodian to maintain a public record on computer, the custodian must be able to provide "a paper copy of the information when needed or when requested by a member of the public." *Id.* § 10-7-121(a)(1)(D). Further, the section provides that "[n]othing in this section shall be construed to require the government official to sell or provide the media upon which such information is stored or maintained." *Id.* § 10-7-121(a)(2).

Allowing a custodian of records to choose the manner in which he or she presents public records to citizens is not unreasonable so long as that manner does not distort the record or inhibit access to that record. Further, the language of section 10-7-121 of the Tennessee Code appears to prohibit providing records in electronic form to the public. While this section does not specifically state that a computer printout is the only manner a citizen may view a public record that an official maintains on computer, it does state that the official must be able to provide a paper copy when requested by a member of the public and that maintaining a public record on a computer does not grant a citizen the right to inspect the media upon which the custodian stores public records. Accordingly, we find that Appellees' refusal to provide public records to Appellant in electronic form is not a claim upon which relief may be granted.

Finally, in count five of his complaint, Appellant asserted that Appellees initially required any request for public records be in writing before Appellees would grant Appellant access to certain public records states a claim upon which relief may be granted.

*10 Section 10-7-503 of the Tennessee Code states

> [A]ll state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Tenn.Code Ann. § 10-7-503(a).

It is clear from the language of this statute that an official may refuse inspection of public records by a citizen only when state law provides for such non-disclosure. Nowhere in the Tennessee Public Records Act allows for an official to deny access to public records if a citizen does not first request access in writing. "When the words of a statute are plain, clear, and unambiguous, we merely look to the statute's plain language to interpret its meaning ." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 24 (Tenn.2000) (citing *Schering-Plough v. State Bd. of Equal.*, 999 S.W.2d 773, 775-76 (Tenn.1999)). Therefore, Appellees' initial denial of Appellant's request for access

to public records because Appellant did not first request access in writing states a claim upon which relief may be granted.

Accordingly, we affirm in part and reverse in part the chancery court's grant of Appellees' motion to dismiss for failure to state a claim upon which relief may be granted.

### *C. Evidentiary Hearing*

Finally, Appellant asserts that the chancery court erred when it did not hold an evidentiary hearing on his claims before granting a motion to dismiss.

Section 10-7-505 of the Tennessee Code states:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.
>
> (b) Such petition shall be filed in the chancery court for the county in which the county or municipal records sought are situated, or in any other court of that county having equity jurisdiction. In the case of records in the custody and control of any state department, agency or instrumentality, such petition shall be filed in the chancery court of Davidson County; or in the chancery court for the county in which the state records are situated if different from Davidson County, or in any other court of that county having equity jurisdiction; or in the chancery court in the county of the petitioner's residence, or in any other court of that county having equity jurisdiction. Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party or parties to immediately appear and show cause, if they have any, why the petition should not be granted. A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings. The court may direct that the records being sought be submitted under seal for review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.
>
> *11 (c) The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence.
>
> (d) 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, and this section shall be broadly construed so as to give the fullest possible public access to public records.
>
> (e) Upon a judgment in favor of the petitioner, the court shall order that the records be made available to the petitioner unless:
>
> (1) There is a timely filing of a notice of appeal; and
>
> (2) The court certifies that there exists a substantial legal issue with respect to the disclosure of the documents which ought to be resolved by the appellate courts.
>
> (f) Any public official required to produce records pursuant to this part shall not be found criminally or civilly liable for the release of such records, nor shall a public official required to release records in such public official's custody or under such public official's control be found responsible for any damages caused, directly or indirectly, by the release of such information.
>
> (g) If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.

As stated earlier, Appellant set forth in his complaint that he has been denied payment records between the Memphis Daily News and Shelby County and that the Shelby County mayor's office initially denied his request for access to these public records because he did not request in writing. "It is clear from the statute that there must be an evidentiary hearing if there are disputes concerning the nondisclosure of the records." *Jackson v. Hackett*, No.37,

1990 Tenn.App. LEXIS 684, at *6, 1990 WL 143238 (Tenn.Ct.App. October 3, 1990). Thus, it was error for the chancery court not to require Shelby County to appear and show cause as to these claims.

## IV. CONCLUSION

For the reasons set forth herein, we affirm in part and reverse in part the chancery court's decision. We remand for further proceedings consistent with this opinion. Costs of this appeal are taxed equally to Appellant, Mr. Byron Wells, and his surety, and to Appellees, for which execution may issue if necessary,.

### All Citations

Not Reported in S.W.3d, 2005 WL 3309651

### Footnotes

1 In his original complaint, Mr. Wells asserted federal civil rights violations under section 1983 of title 42 of the United States Code. Mr. Wells, however, did not include these allegations in his amended complaint.

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2003 WL 724474
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

J.D. HICKMAN,
v.
TENNESSEE BOARD OF
PROBATION AND PAROLE.

No. M2001-02346-COA-R3-CV.
|
March 4, 2003.

Appeal from the Chancery Court for Davidson County, No. 00-2350- II, Carol McCoy, Chancellor.

**Attorneys and Law Firms**

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PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

## OPINION

PATRICIA J. COTTRELL, J.

*1 Inmate filed a motion for declaratory relief regarding his rights to access certain materials held by the Board of Probation and Parole and sought an order from the trial court mandating the production of those materials at the expense of the Board. The trial court denied the motion for summary judgment filed by the inmate and dismissed the action in its entirety because the requirements for a mandatory injunction had not been met, but stated that the inmate was not prohibited from again seeking the materials by identifying the specific documents he wanted copied and paying in advance for the copies. We affirm the trial court's decision to deny the motion for summary judgment, but reverse the dismissal and remand.

In this appeal, a *pro se* inmate in the custody of the Tennessee Department of Correction seeks review of the trial court's decision to dismiss his motion for declaratory order in which he sought access to certain records of the Tennessee Board of Probation and Parole.

Mr. Hickman filed a motion for declaratory order in Davidson County Chancery Court seeking a "declaration of his rights under the Tennessee Constitution and the United States Constitution as they relate to the Freedom of Information Act." Mr. Hickman alleged that two months earlier he had sought information pursuant to the Public Records Act, Tenn.Code Ann. §§ 10-7-501 *et seq.*, which was in the custody and control of the Board and that the Board had not responded to his request after a reasonable amount of time had passed. According to Mr. Hickman, the Board's failure to respond amounted to a refusal of his access to such public records in violation of the Public Records Act. His motion sought an order instructing the Board to allow Mr. Hickman computer access to the information sought, or in the alternative, copies of all of the information sought at the expense of the Board. Mr. Hickman attached what was purported to be a copy of the request sent to the Board, requesting numerous pieces of information from inmate records from 1992 to the present date.

The Board filed a motion to dismiss pursuant to Tenn. R. Civ. P. 12 on the ground that the trial court lacked subject matter jurisdiction under the Uniform Administrative Procedures Act ("UAPA") as the UAPA does not apply to the actions of the Board. The trial court denied the motion to dismiss, stating that the Board's "contention would be correct if this action were being brought pursuant to the UAPA. However, Petitioner appears to be relying solely upon the Tennessee Public Records Act in making his claim for relief."

Mr. Hickman then filed a motion for summary judgment, arguing that there were no factual issues in dispute and that he was entitled to judgment as a matter of law. The Board opposed the motion for summary judgment by submitting the affidavit of Teresa Thomas, General Counsel for the Board, and arguing that the Board never received a request from Mr. Hickman, and even if it had received the request, it would not have complied for various stated reasons.

*2 The affidavit states that Ms. Thomas does not recall receiving a letter from Mr. Hickman which requested certain information and that after checking Mr. Hickman's parole file, she was unable to find a copy of the letter. Ms. Thomas indicated that she had received and responded to other letters from Mr. Hickman in the past. Ms. Thomas summarized the procedure by which the Board grants access to records in compliance with the Public Records Act as follows:

> ... If a citizen of Tennessee desires to inspect records of the Board of Probation and Parole, he or she must come to the place where the records are kept, during normal business hours, to inspect the records. For example, certain records, such as the main parole files, are kept at the Central Office, 404 James Robertson Parkway, Suite 1300, Nashville, Tennessee. Other records are maintained at the individual field offices across the state.
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> If a person desires copies of any of the records, the cost is $0 .20 per page, payable before the copies are made.
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> 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. The person should describe the records sought and payment of the $0.20 is required before the records are forwarded to the requesting person. There may also be a shipping charge if the records are voluminous.

Ms. Thomas further explained that the information requested by Mr. Hickman was not available in the manner he requested because the information is not maintained by the Board in the manner specified by Mr. Hickman. Ms. Thomas stated that the majority of the information sought by Mr. Hickman would have to be manually obtained and that some of the information was confidential.

Mr. Hickman responded to the Board's memorandum in opposition to summary judgment by submitting an unauthenticated inmate information request form which sought to verify that a letter was mailed to General Counsel for the Board on June 5, 2000.

The trial court issued an order denying the motion for summary judgment and dismissing Mr. Hickman's action by stating:

> Petitioner [Mr. Hickman] purportedly seeks a declaration of his rights under the Tennessee Public Records Act, T.C.A. § 10-7-501, et seq. Petitioner is actually seeking mandatory injunctive relief. He has requested an order compelling access to records of the Tennessee Board of Probation and Paroles. More specifically, he seeks information regarding all TDOC inmates convicted of class A, B, and C felonies who have been certified for parole since January 1992, and various compilations of data relating to such inmates' parole records....
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> ....
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> As the parties dispute whether or not a formal records request was sent to Respondent [the Board], this is not an appropriate matter for summary judgment. Accordingly, Petitioner's motion for summary judgment is denied. However, this matter should be dismissed for the following reasons.
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> *3 Petitioner's initial action was designated as a "Motion for Declaratory Order." As a former lawyer, Petitioner should be aware that all original actions in Chancery Court are commenced by the filing of a complaint, not a motion. Further, the remedy he seeks is not a declaration of his rights, but an order directing that the Respondents provide him with computer access to files, or alternatively, with copies of all the information he seeks, at Respondents' expense. As Petitioner seeks relief in the nature of a mandatory injunction, his request needs to address the requirements for such relief: irreparable harm should the relief not be granted, a likelihood of success on the merits, a balancing of the interests of each party, and the public interest. A review of his pleadings show that Petitioner has failed to demonstrate any irreparable harm. The caselaw clearly states that he is entitled to public records. *Cole v. Campbell,* 968 S.W.2d 274 (Tenn.1998). Accordingly, he may seek the documents, if they exist, by mail, provided that he clearly identifies each file and each document that he wants copied and provided that he advance the costs for such copies.

On appeal, Mr. Hickman argues that he was not seeking injunctive relief, but rather a declaration of his rights under the Tennessee Public Records Act. In particular, he avers that he sought a "declaration that [he] must be provided with any and all documents requested (allowable

by law, and with payment of the proper cost) by the Appellee; and that all costs be taxed to the Appellee."

I. Public Records Act

As the trial court correctly stated, this is an action to obtain access to governmental records, and such access is governed by the Tennessee Public Records Act. *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn.2002); *Cole v. Campbell*, 968 S.W.2d 274, 275 (Tenn.1998). Consequently, a court's review of a request for records is governed by the language of the Act. *Tennessean v. Electric Power Bd. of Nashville*, 979 S.W.2d 297, 305 (Tenn.1998). The Act, Tenn.Code Ann. §§ 10-7-501 *et seq.*, allows citizens to inspect certain public records and provides in part that:

> ... all state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by law.

Tenn.Code Ann. § 10-7-503.

In order to access public records, a citizen [1] 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 documents 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. *Waller v. Bryan*, 16 S.W.3d 770, 774 (Tenn.Ct.App.1999).

*4 If a person is denied access to public records, the Act itself provides the remedy. Tenn.Code Ann. § 10-7-505 provides:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal records as provided in § 10-7-503, and whose request has been in whole or in 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.

The Act directs an aggrieved citizen to file a petition in the chancery court in the county either where the records are located, or in the case of a state department, in the chancery court for Davidson County in order to seek judicial review of the denial of access to public records. Further,

> ... Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party or parties to immediately appear and **show cause, if they have any, why the petition should not be granted.** A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings. The court may direct that the records being sought be submitted under seal for review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.

Tenn.Code Ann. § 10-7-505(b) (emphasis added).

In accordance with the show cause language emphasized above, the Act specifically provides:

> The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence.

Tenn.Code Ann. § 10-7-505(c).

In addition, the legislature has also directed that the section of the Act dealing with judicial review of denials of access "be broadly construed so as to give the fullest

possible public access to public records." Tenn.Code Ann. § 10-7-505(d).

The Act, therefore, provides not only the means for achieving access to public records, but the remedy for the situation that arises when the governmental entity denies a request to produce the records for whatever reason: a method for judicial review that is explicitly set forth by statute. The Act also provides guidance to the courts in conducting such review.

II. Summary Judgment

Mr. Hickman filed a motion for summary judgment which the trial court denied based on the existence of a material factual dispute as to whether the Board actually received the request for public records by Mr. Hickman.

The standards for reviewing summary judgments on appeal are well settled. Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone. *Fruge v. Doe,* 952 S.W.2d 408, 410 (Tenn.1997); *Byrd v. Hall,* 847 S.W.2d 208, 210 (Tenn.1993); *Church v. Perales,* 39 S.W.3d 149, 156 (Tenn.Ct.App.2000). They are not, however, appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. Thus, a summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion-that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.,* 49 S.W.3d 265, 269 (Tenn.2001); *Brown v. Birman Managed Care, Inc.,* 42 S.W.3d 62, 66 (Tenn.2001); *Goodloe v. State,* 36 S.W.3d 62, 65 (Tenn.2001).

*5 A party seeking summary judgment has the burden of demonstrating that its motion satisfies the requirements of Rule 56, including its entitlement to judgment as a matter of law. *Carvell v. Bottoms,* 900 S.W.2d 23, 25 (Tenn.1995); *Jones v. City of Johnson City,* 917 S.W.2d 687, 689 (Tenn.Ct.App.1995). When a party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts which must be resolved by the trier of fact. *Byrd,* 847 S.W.2d at 215. Summary judgment is not appropriate if the movant cannot demonstrate his entitlement thereto as a matter of law. *Penley v. Honda Motor Co.,* 31 S.W.3d 181, 183 (Tenn.2000).

Under the Public Records Act, judicial review is available to a party whose request to inspect public records has been denied. Tenn.Code Ann. § 10-7-505(a). The trial court found there was a factual dispute as to whether Mr. Hickman's request had been received by the Board and, consequently, whether the Board had denied the request.

Mr. Hickman alleged that he sought information from the Board and that the Board did not respond to his request after being given a reasonable time. In response, the Board submitted the affidavit of Teresa Thomas indicating that no one at the Board ever received a request for public records from Mr. Hickman. We agree with the trial court that there is a material dispute of fact as to whether Mr. Hickman was denied access to public records.

Nonetheless, the Board became aware of the request through this litigation and stated it would not have provided the requested material even if it had received the request. We consider that response a denial of access. The Board has put at issue the basis for its refusal to provide Mr. Hickman with the information he requested, and the Board has the burden of justifying nondisclosure. Tenn.Code. Ann. § 10-7-505(c).

III. Irreparable Harm

The trial court indicated that even if Mr. Hickman's request had been received and denied by the Board, he was still not entitled to relief because he sought "relief in the nature of a mandatory injunction" and he had not addressed or demonstrated the requirements for such an injunction, specifically irreparable harm. We respectfully disagree with the trial court because we conclude that a citizen seeking access to government records must only meet the requirements set out in the Public Records Act.

Under Tenn.Code Ann. § 10-7-505(a), a party whose request for access to public records has been denied may petition the court for such access and "obtain judicial review of the actions taken to deny the access." Further, "Upon a judgment in favor of the petitioner, the court shall order that the records be made available to the petitioner," absent certain circumstances not here present. Tenn.Code Ann. § 10-7-505(e).

Although the Act also gives the court the power to "exercise full injunctive remedies and relief to secure the purposes and intentions of this section," we find no requirement that a petitioner meet the requirements

for an injunction set out in Tenn. R. Civ. P. 65. If a citizen is denied access to a public record, no additional "irreparable harm" must be shown. The legislature has established as public policy the fullest possible access to public records and has determined that denial of access is sufficient herein to warrant court action requiring disclosure. The Act provides that if the court finds that access was improperly denied, (often a determination that the requested records are public records), the court shall order that the records be made available. Consequently, the fact that Mr. Hickman requested such an order does not impose an additional burden. Thus, the trial court applied an incorrect standard to Mr. Hickman's petition. We reverse the trial court's dismissal of Mr. Hickman's action that was based upon his failure to demonstrate irreparable harm.

*6 The trial court also stated, however, that Mr. Hickman was clearly entitled to any public records and that he could "seek the documents, if they exist, by mail, provided that he clearly identifies each file and each document that he wants copied and provided that he advance the costs for such copies." In essence, this statement was a declaration of Mr. Hickman's rights under the Act, as he had requested, but without a determination as to the Board's obligation to produce any specific record, and without an order to the Board to produce the records that met the court's criteria.

IV. Mr. Hickman's Request for Public Records

Mr. Hickman's request stated:

I. I would like to be provided the names and TDOC numbers of all of those concerned in section III; and be provided computer access for the information sought. In the alternative, if such access is denied, then it would become the BOP's burden of providing copies with all the information sought.

II. I would further ask that I be provided a *current* copy of the ATS (Average Time Served) chart as utilized by the Board of Paroles; and, a copy of the "Policy Guidelines" as provided to the citizenry upon request.

III. Information sought:

A. All class A, class B, and class C felonies where the inmate has been "certified eligible" for parole from 1-1-92 through the present time.

B. Risk factor (points) calculation for all inmates in "A" above.

C. The record of institutional conduct for all inmates in "A" above.

D. The type of crime (and any prior crimes) of the inmates in "A" above.

E. Whether the inmates in "A" above have been previously paroled, and if so, whether paroled on the same crime.

F. The number of inmates in "A" above that were denied parole as "High Risk."

G. The number of inmates in "A" above that were denied parole for "seriousness of the offense."

H. the number and type of "violent" crimes in "A" above.

I. The number and type of "non-violent" crimes in "A" above.

J. For those inmates in "A" above, the percent of the sentence complete at the time of release (violent and non-violent).

K. For those inmates in "A" above that were denied, the reason for denial, as stated on their "written decision."

L. The number of "first time offenders" for those inmates in "A" above.

M. The specific inmates that were "first time offenders" who were denied parole because they were a: judge, attorney, doctor, gay, black, female, or any other "social status" criteria.

N. Specifically the names and TDOC numbers of all persons convicted of theft over $10,000 and theft over $60,000 between 1-1-92 and the present, where:

1. They were first time offenders.

2. Their Risk points were 14 or less.

3. Where their institutional conduct consisted of two "A" offenses, two "B" offenses, or three "C" offenses or less, in the year immediately preceding their parole hearing.

*7 4. The specific crime, and the sentence imposed.

5. Their prior record, if any.

6. Their prior release(s) on parole, if any.

7. Their SED date, and date of parole.

8. If they were denied for parole, the reason for denial, how long they were "put off," and those required to "flatten" and any particular reason stated.

V. The Board's Justifications

As stated earlier, the Board has the burden of justifying a denial of access. In response to Mr. Hickman's motion for summary judgment, the Board argued: (1) some of its records were confidential; (2) some of the information sought was not kept in the format requested; and (3) it was not required to do a manual search of its records and compile data for Mr. Hickman. It also argued that complying with the request would be overly burdensome. [2]

With regard to the confidential records argument, the Board asserted in the trial court that some of the information sought by Mr. Hickman was confidential, citing to and attaching a copy of Tenn. Comp. R. & Regs. 1100-1-1-.14 entitled "Confidentiality of Parole and Clemency Records." Confidential records are not subject to disclosure under the Public Records Act, and a "confidential public record" is defined as "any public record which has been designated confidential by statute." Tenn.Code Ann. § 10-7-301(2). The legislature has authorized the Board to "make rules, as to the privacy of such records ... and their use by others than the board and its staff." Tenn.Code Ann. § 40-28-119(c). The reference "such records" is to those records described in subsection (a) of Tenn.Code Ann. § 40-28-119, to-wit:

> The board shall cause to be kept records which may include social, physical, mental, psychiatric and criminal information for every inmate considered for or released, under its supervision.... Such records shall contain reports of probation and parole officers with relation to such probationers and parolees.

The Board's rule identifies information considered confidential and not subject to release. [3] Tenn. Comp. R. & Regs. 1100-1-1-.14. In its filings in the trial court, the Board did not specifically identify those portions of Mr. Hickman's request which involve confidential records. On appeal, the Board has not reasserted its claim to confidentiality of records and, consequently, provides no assistance in identifying specifically what information Mr. Hickman has requested that is protected from release by the rule.

Obviously, the Board is not required to provide to Mr. Hickman any records that are made confidential by a rule promulgated pursuant to a specific grant of statutory authority. However, based upon the generality of the Board's response at trial, and the lack of any mention on appeal, we are unable to determine whether any of the information requested by Mr. Hickman is, in fact, confidential. Consequently, we cannot review the validity of the Board's justification based upon its rule regarding confidentiality.

*8 To the extent the Board is asserting that certain records contain confidential information, not that the entire record itself is confidential, the Tennessee Supreme Court has touched upon the obligation of a government agency to disclose the public portions of such record while deleting any confidential information. *See Tennessean,* 979 S.W.2d at 302. While not adopting it as the law in this state, the Court discussed and quoted a decision by the Kansas Supreme Court, *State ex rel. Stephan v. Harder,* 230 Kan. 573, 641 P.2d 366 (1982). Regarding that opinion, our Supreme Court stated:

> The plaintiffs sought non-exempt medical information from the Secretary of Social and Rehabilitative Services. The defendant asserted, and the testimony showed, that the information sought was contained in the agency's computer system, but was combined with other information that contained confidential information. The evidence also showed that a computer program could be designed to extract the non-exempt material from the confidential information. The trial court ruled that the agency had no duty to segregate the disclosable material, but the Kansas Supreme Court reversed:
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> > We hold that the [public records] act implies a duty upon the agency to delete confidential and

> nondisclosable information from that which may be disclosed, and thus to carry out the act's purpose of making available for public inspection all disclosable parts of the public record. Were this not so, any record which an agency is required by law to keep could be rendered inaccessible to public scrutiny by including confidential material therein.

*Tennessean,* 979 S.W.2d at 303 (quoting *State ex rel. Stephan,* 230 Kan. at 583, 641 P.2d at 374).

The dispute in the *Tennessean* case did not involve a claim that portions of the requested records were confidential, so our Supreme Court did not directly address an agency's obligation to delete confidential portions of an otherwise public record. However, we interpret the Court's opinion in the *Tennessean* case to imply that such an obligation may exist, at least where the information is kept in a computer system and, therefore, the deletion can be accomplished electronically.[4] Because we do not know what of the requested information the Board claims is confidential and whether that information is included in a computerized database or only available in hard copy records, we cannot resolve the issue, and cannot determine if an issue exists which requires resolution, based upon the record before us.

In addition to the confidentiality argument, the Board raised other reasons why it was not required to comply with Mr. Hickman's request. The factual basis for those reasons was set out in the affidavit of Teresa Thomas, as follows:

> ... I have concluded that the information requested is not available in the manner he requests. The Board maintains records of inmates by individual inmate number. In compiling information concerning all inmates convicted of Class A, B, or C felonies certified eligible for parole from January 1, 1992 through present, a special computer run would have to be performed.
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> *9 The other information requested would have to, in most instances, be manually obtained. For example, Mr. Hickman asks for the Risk Factor in points for all of those inmates certified as parole eligible from January 1, 1992 through present. This information is only maintained on the guidelines form in an inmate's individual file. It is not placed in a computer. In order to find this information, the file of each inmate would have to be pulled and the form would have to be reviewed to find the individual inmate's specific score.
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> Several of Mr. Hickman's requests would have to be found, if at all, through a manual search....

Our analysis of these justifications again begins with the Public Records Act. A "public record" is defined in the Act as "all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn.Code Ann. § 10-7-301.

Thus, the proper test for determining whether a document or other information is a public record is whether the record was made or received pursuant to law or ordinance in connection with the transaction of official business. *Griffin v. City of Knoxville,* 821 S.W.2d 921, 924 (Tenn.1991). Application of this test may require an inquiry into the totality of the circumstances surrounding the creation or receipt of the document or information. *Id.*

One issue raised herein by the Board's response is traceable to the requirement that the record be made or received. That is, the Board asserts that some of the information requested by Mr. Hickman is simply not available in a record that the Board has made or received; the Board does not maintain the requested information in a record as defined by the statute. In other words, the Board essentially asserts that Mr. Hickman's request is not for an existing record, but instead would require the Board to create anew record by compiling the information from thousands of existing records.

In *Tennessean,* our Supreme Court considered a "creation of a new record" argument. However, in that case, the Court determined that the requested information had been entered into a computer system and, consequently, "once information is entered into a computer, a distinction between information and record becomes to a large degree impractical." 979 S.W.2d at 304. The Court determined that because the records request did not require the governmental agency to "compile or collect statistics" or require an interpretation or analysis of data, the determinative question was not about creation of a new record, but was "one of format and access."[5] *Id.*

"Under the facts" of that case, the governmental agency, Nashville Electric Service ("NES"), was required to disclose the requested information. In our opinion, the facts leading to the Court's conclusion were: (1) although NES did not possess a single document containing the requested information (the names, addresses, and telephone numbers of its customers), it did maintain the separate pieces of information in its computer system, but not in the exact format requested; [6] and (2) the requested information could be produced by the governmental agency by having a computer program written to extract the requested information and produce it in the requested format. The agency maintained, and the requestor agreed, that it was entitled to require payment of the costs of the efforts required to produce the information in the format requested. The Supreme Court agreed, stating that the Public Records Act, at Tenn.Code Ann. § 10-7-506(a), specifically allowed an agency to enforce reasonable rules "governing the making of such extracts, copies, photographs or photostats." 979 S.W.2d at 305. The Court held that the Act authorized the agency to require payment for actual costs incurred in disclosing the requested records. *Id.*

*10 The Act envisions that the requestor will personally appear to make the request and will be given access to the public records requested. When personal appearance is not possible, a citizen may request that copies of records be sent to him or her. However,

> If a citizen can sufficiently identify the documents which he wishes to obtain copies of so as to enable the custodian of the records to know which documents are to be copied, the citizen's personal presence before the record custodian is not required. However, the records custodian is not required under the Public Records Act to make the inspection for the citizen requesting the documents. The citizen, to be able to obtain copies of those documents without making a personal inspection, must sufficiently identify those documents so that the records custodian can produce and copy those documents without the requirement of a search by the records custodian. The records custodian can require a charge or fee per copy that will cover both the costs of producing the copies and delivering the copies. It is the opinion of this Court that such was the intent of the Legislature.

*Waller,* 16 S.W.3d at 774.

Based upon the Supreme Court's opinion in *Tennessean,* we conclude that the Board can be required to produce nonconfidential information for Mr. Hickman that is contained in its computer system. The fact that a "special computer run would have to be performed" does not preclude such production; the Supreme Court has held the opposite. We are not certain what "a special computer run" entails, and there is no evidence in the record to more fully explain it. However, also under *Tennessean,* the Board can require that Mr. Hickman pay the costs of producing the information in the format he requested, including the cost of programming the computer to compile and produce the information. There is no information in the record before us regarding the potential cost.

In Ms. Thomas's affidavit, the Board asserted that responses to "several" of Mr. Hickman's requests "would have to be found, if at all, through a manual search." The affidavit provided one specific example: the request for the Risk Factor in points for all of those inmates certified as parole eligible from January 1, 1992, through present. The affidavit states, "This information is only maintained on the guidelines form in an inmate's individual file. It is not placed in a computer. In order to find this information, the file of each inmate would have to be pulled and the form would have to be reviewed to find the individual inmate's specific score."

Based upon *Waller,* we conclude that the Public Records Act does not require a governmental entity to manually sort through records and compile information gained from those records. 16 S.W.3d at 774. A Public Records Act request is not a discovery request pursuant to litigation. A citizen appearing in person could inspect the records and retrieve the information himself or herself. While the inability to appear in person does not relieve the agency from the obligation to provide requested records, there is nothing in the Act which would shift to the

agency the burden of manually compiling information from thousands of separate records into a new record. An agency has an obligation, upon payment of reasonable costs, to copy and provide to a nonappearing requestor, those documents or records that are sufficiently identified by the requestor, but has no obligation "to review and search their records pursuant to a Public Records Act request," *Waller,* 16 S.W.3d at 773, or to "compile or collect statistics." *Tennessean,* 979 S.W.2d at 304. We find no language in the Act that would require the Board to go through every parole eligible inmate's file and retrieve the Risk Factor for each so as to compile that information for Mr. Hickman.

*11 On the other hand, if Mr. Hickman had requested a copy of the "guidelines form" referenced in Ms. Thomas's affidavit for each inmate certified as parole eligible from January 1, 1992, the Board would be required to make those copies, if these documents are not confidential, and send them to Mr. Hickman upon payment of reasonable costs. Although each document would have to be manually retrieved for copying, a similar effort would be required if a citizen appeared in person and requested access to those documents.[7] Pulling files for review in person does not differ from pulling files to make copies.[8]

Finally, the Board argued that Mr. Hickman must comply with the reasonable procedures established by the Board for requesting documents:

> 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. The person should describe the records sought and payment of the $0.20 is required before the records are forwarded to the requesting person. There may also be a shipping charge if the records are voluminous.

The Board stated that Mr. Hickman will have to make a request that identifies the records sought with particularity, and which are not deemed confidential pursuant to Tenn.Code Ann. § 40-28-119 and Rule 1100-1-1-.14 of the Board of Probation and Parole, and prepay the costs of copying and shipping. The trial court made a similar statement regarding Mr. Hickman's right to make another request.

We do not disagree that a request should identify the records which the requestor wants copies of. We cannot determine, however, exactly what fatal lack of specificity exists in Mr. Hickman's request. The Board has not told us or the trial court that it is unable to identify the records requested. Mr. Hickman's request is generally phrased in terms of information he seeks rather than specific documents, and he asks for information regarding a described class of inmates rather than identifying each inmate. Based on the record before us, however, we are not convinced, that this generality provides a sufficient justification for denial of access. In the *Tennessean* case, for example, the request was simply for the names, addresses, and telephone numbers of all the customers of NES. The requestor did not identify or request a specific document containing that information or specify all the customers by name.

The Board has not asserted that it does not have records containing the requested information or that it cannot identify the records requested from the general nature of the request. The Board's obligation to show cause why it is denying access includes a requirement that the Board respond specifically to each request or, in other words, show cause why it is denying access to each requested item so that the court can adequately review its justification. For example, while we agree that the Board is not required to provide access to confidential records, it has not identified those portions of Mr. Hickman's request which would require disclosure of confidential records. Thus, neither the trial court nor this court can determine what requests may be justifiably denied on that basis.

*12 Finally, we also agree that the Board can require Mr. Hickman to pay in advance the reasonable costs of producing or delivering copies of the records, including "special computer run" costs, as discussed above.[9] However, according to the record before us, the Board has not calculated what those costs would be or demanded a specific payment from Mr. Hickman as a precondition to supplying the records.

## VI. Conclusion

The trial court's dismissal of this action is reversed because relief under the Public Records Act requires only a

showing of entitlement to the records and does not require a finding of irreparable harm. The case is remanded to the trial court for further proceedings that may be necessary to determine whether the Board has met its burden of justifying denial of access as to any part or all of Mr. Hickman's request. Such a determination will likely require that the Board provide more specific explanation of its justifications.

Costs of this appeal are taxed to the appellee, the Tennessee Board of Probation and Parole.

**All Citations**

Not Reported in S.W.3d, 2003 WL 724474

Footnotes

1 The right to access public records is granted to citizens, and although that term is not expressly defined in the Act, the Tennessee Supreme Court has held that a convicted felon has the same right of access to public records as any other citizen. *Cole,* 968 S.W.2d at 276-77.

2 The memorandum in opposition to summary judgment stated, "Such a request, as the petitioner states in the letter attached to the petition, of essentially all parole-eligible inmates in the Department of Correction, would be clearly onerous, overly burdensome, time-consuming and expensive."

3 In addition to other items, the Board considers confidential: "Parole Officers' opinions and statements recorded in the case file" and "statements in opposition of a parolee by victims, families of victims, families of inmates; private citizens who request confidentiality, and public officials who request confidentiality."

4 The computerized nature of the information is critical to the Court's decision in *Tennessean,* as is explained later in this opinion.

5 In distinguishing cases relied upon by Nashville Electric Service, the Court stated:

> The other case relied on by the defendant is *George v. Record Custodian,* 169 Wis.2d 573, 485 N.W.2d 460 (Wis.Ct.App.1992). There, an inmate asked for the number of claims received by the Department of Justice from 1988-1990, the number of cases settled without litigation, and the number of cases disallowed. The Wisconsin appellate court held that the records custodian was not required under the public records act to "collect or compile statistics or create a record for the benefit of a requester." 485 N.W.2d at 462.
>
> In contrast to *Seaton* and *George, The Tennessean's* request did not require NES to compile or collect statistics, nor did it require an explanation, interpretation, or analysis of information. NES did not claim that the requested information was exempt from disclosure, nor did it contend that it lacked the information.

*Tennessean,* 979 S.W.2d at 304.

6 The agency maintained a list of names and addresses. Telephone numbers, needed for service requests and emergency contacts, were not kept on the same list or database.

7 The Act provides no basis for denying access to records because granting such access would be "clearly onerous, overly burdensome, time-consuming and expensive."

8 Obviously, the time and effort involved in making copies is additional to that required to retrieve files. The copy cost charged to citizens making a request for access in person, as well as a citizen making a request by mail, presumably includes this additional cost.

9 We note that although Mr. Hickman originally sought an order in the trial court that the Board bear the cost of producing the information he sought, he does not specifically assert that argument on appeal and has essentially acknowledged that he would be responsible for paying for the reasonable costs of such copies.

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