

IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

PUBLIC.RESOURCE.ORG)	
and DAVID L. HUDSON, JR.,)	
)	
Petitioners,)	
)	
v.)	No. 22-1025-III
)	
MATTHEW BENDER &)	
COMPANY, INC.,)	
<i>a division of the LexisNexis Group,</i>)	
)	
Respondent.)	

**PETITIONERS' MEMORANDUM IN SUPPORT OF
PETITION FOR ACCESS TO PUBLIC RECORDS AND
TO OBTAIN JUDICIAL REVIEW OF DENIAL OF ACCESS**

Petitioners Public.Resource.org and David L. Hudson, Jr. (Petitioners), submit the following Memorandum in support of their Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access:

INTRODUCTION

In this action, under the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503 and 10-7-505 (the Act), Petitioners seek access to and a copy of a public record—specifically, the complete and current electronic version of the Tennessee Code Annotated (TCA)—and to obtain judicial review of the actions of Respondent Matthew Bender & Company, Inc., a division of the LexisNexis Group (Lexis), who has denied Petitioners access to those records. The document sought is undoubtedly a public record—it is hard to imagine a document more clearly a public record than the official version of the law itself.

Moreover, under settled law, announced two decades ago by the Tennessee Supreme Court in *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67 (Tenn. 2002), Tennesseans have a right of access to public records in the hands of non-governmental entities that are the functional equivalent of government.

Under contract with the State of Tennessee, Lexis publishes the TCA—the definitive law of Tennessee—under the strict and close supervision of the Tennessee Code Commission (Commission). The Commission is a statutorily created government entity that, by law, must and does specify to Lexis precisely and in exacting detail how, in what form, and with what content, Lexis must publish the TCA.

For these reasons, Lexis is the functional equivalent of state government for purposes of its work producing the TCA, and Petitioners are entitled access to and a copy of the TCA.

FACTS

The Tennessee Code Annotated and the Tennessee Code Commission

The laws of the State of Tennessee are compiled in the Tennessee Code. Pet. ¶ 15. The Tennessee Code Annotated (TCA) includes, among other things, the text of the Tennessee Code and annotations, including references to secondary sources that discuss the Code; references to cases in which courts have interpreted the Code (called Notes of Decisions); cross-references to other sections of the Code or to relevant regulations; and detailed historical notes. *Id.* ¶ 16.

By Tennessee law and tradition, the TCA is the definitive, authoritative, authorized, and official version of all Tennessee statutory law. *Id.* ¶ 17. The Tennessee Supreme Court, other Tennessee courts, and federal courts routinely and virtually uniformly cite to the TCA to make any reference to Tennessee statutory law. *Id.* ¶ 18. They virtually never cite to any unannotated version of Tennessee statutory law. *Id.*

The TCA is produced and published by the Tennessee Code Commission, a State entity established by statute. Pet. ¶ 19; Tenn. Code Ann. § 1-1-101. The members of the Commission include the Chief Justice of the State of Tennessee, the Attorney General and Reporter of the State of Tennessee, the Director of Legal Services of the General Assembly of Tennessee, all serving *ex officio*, plus two members appointed by the Chief Justice. Pet. ¶ 20; Tenn. Code Ann. § 1-1-101. The Commission's Executive Secretary is the Revisor of Statutes, a member of the Office of Legal Services. Pet. ¶ 21; Tenn. Code Ann. § 1-1-102(b).

The Commission is

authorized and directed to formulate and supervise the execution of plans for the compilation, arrangement, classification, annotation, editing, indexing, printing, binding, publication, sale, distribution and the performance of all other acts necessary for the publication of an official compilation of the statutes, codes and session laws of the state of Tennessee of a public and general nature, now existing and to be enacted in the future, including an electronically searchable database of such code, which official compilation shall be known as "Tennessee Code Annotated."

Tenn. Code Ann. § 1-1-105. The Commission has

full power and authority on behalf of the state of Tennessee to perform all acts and to negotiate and enter into all contracts necessary for and expedient to the successful production and publication of a revised compilation of the statutory laws of Tennessee, including the power and authority to enter into contracts with a law book publisher for the editing, compiling, annotating, indexing, printing, binding, publication, sale and distribution of the revised compilation and the performance and execution of all other publication plans formulated by the commission.

Tenn. Code Ann. § 1-1-106.

Section 107 further provides that

[a]ny contract with a law book publisher for the purposes referred to in §§ 1-1-105 and 1-1-106 shall prescribe the specifications for the publication of the revised compilation, including the size of type to be used in the text of the statutes and the annotations, the grade and weight of the paper to be used, the size of the volumes, appropriate provisions for the insertion of pocket supplements and the publication of replacement volumes, the price at which Tennessee Code Annotated shall be sold in Tennessee when originally published, and such other provisions as are

necessary for the full performance of the publication plans formulated by the commission.

Tenn. Code Ann. § 1-1-107.

If the Commission finds that the manuscript of the TCA “printed, edited, annotated, indexed and bound” by a law book publisher under a contract is acceptable, the Commission “shall prepare an appropriate written certificate of approval” and “acting through its executive secretary or other authorized officer, shall certify in writing” that the Commission has approved the manuscript. Pet. ¶ 26; Tenn. Code Ann. § 1-1-110.

The official status of the TCA has been expressly established by the Tennessee General Assembly for almost seven decades. Pet. ¶ 27. Since 1953, Tennessee statutory law has provided that “[n]o compilation or codification of the statutes of Tennessee not bearing a copy of the certificate of approval of the code commission as provided in § 1-1-110 shall be recognized as an official compilation of the statutory law of Tennessee.” Pet. ¶ 27; Tenn. Code Ann. § 1-1-112.¹ The Commission cannot subsidize the publication of the TCA out of public funds; rather, it “shall require that the cost of publication be borne by the publisher, and the publisher shall be required to depend for compensation upon the proceeds of the sale of the publication.” Pet. ¶ 28; Tenn. Code Ann. § 1-1-113.

The Commission’s Exclusive Contract with Lexis

The TCA is produced by Lexis under a 2019 Restated Agreement for Publication with the Commission (the Agreement). Pet. ¶ 30; Ex. 1. Under the Agreement, Lexis “shall perform and provide all editorial services necessary for the publication of T.C.A.,” and “shall provide and be responsible for all ongoing publishing requirements associated with the maintenance of T.C.A.”

¹ This is established by reference to the TCA annotation for Tenn. Code Ann. § 1-1-112 entitled, “History,” which states “Acts 1953, ch. 80, § 5; T.C.A. (orig. ed.), § 1-112.”

Pet. ¶ 32; Ex. 1 at Section 1.1. Notwithstanding Lexis’s responsibilities under the Agreement, the Commission must approve numerous aspects of the TCA, including the form of annotations; the addition of new annotations; the removal of archaic or obsolete references or annotations; any changes to the content or arrangement of replacement volumes; and the contents of each volume. Pet. ¶ 33; Ex. 1. Exhibit A to the Agreement provides an exhaustive list of technical specifications that “may be changed with the written approval of the Commission,” including (among many others) the size of the pages; the type face and size; the margins; and the paper weight. Pet. ¶ 34; Ex. 1 at Ex. A (“General Requirements for the Publication of the Code and Code CD-ROM”).

Under the Agreement, Lexis “shall maintain the present style and format of the Code, and adhere to the Style Guidelines adopted by the Commission,” and the Commission’s “Style Guidelines for Codification of Public Chapters” includes provisions governing alphabetization, dates, numbers, punctuation, and miscellaneous words and phrases. Pet. ¶ 35; Ex. 1 at Ex. A. Under the Agreement, Lexis will also “implement style changes requested by the Commission.” Pet. ¶ 36; Ex. 1 at Ex. A.

Section 7 (“Supervision”) of the Agreement provides that Lexis

agrees that all compilations, codifications, annotations, and other matters to be included in T.C.A. shall be submitted to the Executive Secretary in advance of publication, in order that such items may be checked, proofread, verified and certified by the Executive Secretary prior to publication as provided by the minimum requirements.

Ex. 1. The Agreement further provides: “In the event of disagreement as to material to be included in such T.C.A., or as to any codification, annotation or other matter of editorial content, [Lexis] shall abide by and follow the decision of the Commission as communicated by the Executive Secretary,” and “[i]n the event of any other dispute between [Lexis] and the

Commission concerning publication of the T.C.A. or performance under th[e] Agreement, the decision of the Commission shall prevail.” Pet. ¶ 38; Ex. 1 at Section 7. The Agreement also requires that Lexis provide the Commission, after each legislative session, the complete and current electronic version of the TCA. Pet. ¶ 39; Ex. 1 at Section 2.9. And the Commission may terminate the Agreement for cause or for convenience without cause “if for any reason the Commission determines, in its sole discretion, that such termination is in the best interest of the State.” Pet. ¶ 40; Ex. 1 at Section 9.

Petitioners’ Public Records Requests

On October 8, 2021, Vanderbilt Law School Professor Gautam Hans, working with Petitioner Public Resource, submitted a public records request to the Revisor of Statutes of Tennessee requesting “[a] copy of each electronic version of the most current Tennessee Code Annotated, reproduced in its entirety.” Pet. ¶ 42; Ex. 2. Responding for the Revisor of Statutes, the Office of the Attorney General and Reporter of Tennessee denied Professor Hans’s public records request on October 19, 2021, advising him “that the Revisor of Statutes does not [have] an electronic version of the most current Tennessee Code Annotated *in its entirety*.” Pet. ¶ 43; Ex. 3 (emphasis in original).

Professor Hans replied on January 24, 2022, seeking several clarifications concerning the Attorney General’s response, including its use of the phrase “*in its entirety*,” and confirmation “whether the State has any electronic documents or files responsive to [Professor Hans’s] request.” Pet. ¶ 44; Ex. 4. Professor Hans’s January 2022 letter also cited Section 2.9 of the Agreement, which provides that Lexis “shall prepare and provide to the Commission at no cost to the State of Tennessee a mutually agreeable electronic format containing an accurate representation of the material contained in the bound volumes of T.C.A. and its cumulative

supplements.” Pet. ¶ 45; Ex. 1 at Section 2.9. The Attorney General responded on February 2, 2022, repeating that neither the Revisor of Statutes and Executive Secretary of the Commission nor the OLS had any documents or records responsive to Professor Hans’s records request. Pet. ¶ 46; Ex. 5. The Attorney General also advised that the Executive Secretary “has never requested that an ‘electronic format’ of the Tennessee Code Annotated be delivered” to the Commission under Section 2.9 of the Agreement. *Id.*

Based on these statements in formal response to a request for public records under the Act, Petitioners understand and believe that the State of Tennessee does not have in its possession the complete and current electronic version of the TCA. Pet. ¶ 47.

Given the State’s responses to Professor Hans’s public records request, and Lexis’s exclusive contract with the State to compile, arrange, classify, annotate, edit, index, print, bind, publish, sell, and distribute the TCA, Petitioners wrote Lexis requesting access under the Act to “[e]ach electronic version of the most current Tennessee Code Annotated, reproduced in its entirety” on May 16, 2022. Pet. ¶ 48; Ex. 6 (the Request). On May 20, 2022, Lexis denied the Request, arguing that the Act does not apply to Lexis because Lexis “is not the functional equivalent of a government entity.” Pet. ¶ 49; Ex. 7.

LAW

Tennessee courts have long recognized the public’s right to examine governmental records. *See, e.g., State ex rel. Wellford v. Williams*, 110 Tenn. 549, 75 S.W. 948 (1903). In 1957, the General Assembly codified this public access doctrine by enacting the Public Records Act. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). The Public Records Act now “governs the right of access to records of government agencies in this state.” *Cole v. Campbell*, 968 S.W.2d 274, 275 (Tenn. 1998). Facilitating access to governmental records promotes public

awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee. *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74–75 (Tenn. 2002).

The Public Records Act broadly defines “[p]ublic record or records” or “state record or records” 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. § 10-7-503(a)(1)(A). Given this definition, the Public Records Act has been described as an “all[-]encompassing legislative attempt to cover all printed matter created or received by government in its official capacity.” *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) (quoting *Bd. of Educ. of Memphis City Schools v. Memphis Publ'g Co.*, 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979)).

The Public Records Act mandates that “[a]ll state, county and municipal records shall . . . be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.” Tenn. Code Ann. § 10-7-503(a)(2)(A). “These statutes create a presumption of openness and express a clear legislative mandate favoring disclosure of governmental records.” *Schneider v. City of Jackson*, 226 S.W.3d 332, 340 (Tenn. 2007) (citing *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004); *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999)). Unless an exception is established, Tennessee courts must be “vigilant” and require disclosure “even in the face of

serious countervailing considerations.” *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).

The accountability created by the Public Records Act is to be extended in favor of ““the fullest possible public access to public records.”” *Cherokee*, 87 S.W.3d at 74 (quoting Tenn. Code Ann. § 10-7-505(d)). Thus, although the Public Records Act expressly pertains to “state, county and municipal records,” Tenn. Code Ann. § 10-7-503(a)(2)(A), Tennessee courts interpret records “made or received . . . in connection with the transaction of official business by any governmental entity,” *id.* § 10-7-503(a)(1)(A), “to include those records in the hands of any private entity which operates as the functional equivalent” of a governmental entity, *Cherokee*, 87 S.W.3d at 79.

Tennessee citizens denied access to governmental records have the right to file a petition in court and “to obtain judicial review of the actions taken to deny the access.” Tenn. Code Ann. § 10-7-505(a). “In a case in which the court is called upon to apply the functional equivalency test, the initial burden is on the petitioner to show that the private entity operates as the functional equivalent of a governmental entity.” *Memphis Publ’g Co. v. City of Memphis*, No. W2016-01680-COA-R3-CV, 2017 WL 3175652, at *5 (Tenn. Ct. App. July 26, 2017) (citing *Allen v. Day*, 213 S.W.3d 244, 251 (Tenn. Ct. App. 2006)). Once that showing is made, however, the private entity bears the burden of proof, and must justify nondisclosure of the records by a preponderance of the evidence. Tenn. Code Ann. § 10-7-505(c); *see also The Tennessean v. City of Lebanon*, No. M2002-02078-COA-R3-CV, 2004 WL 290705, at *9 (Tenn. Ct. App. Feb. 13, 2004); *Allen*, 213 S.W.3d at 250–51.²

² “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

ARGUMENT

When deciding whether a private entity is the functional equivalent of a governmental agency, Tennessee courts look to the totality of the circumstances. *Cherokee*, 87 S.W.3d at 79. Although not dispositive, the cornerstone of the functional-equivalent analysis is whether and to what extent the entity performs a governmental or public function; this is of the utmost importance because “a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity.” *Id.* See also Tenn. Code Ann. § 10-7-503(a)(6) (“A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.”). Other factors that may be relevant to the analysis include, but are not limited to, the extent of government involvement with, regulation of, or control over the entity; the level of government funding of the entity; and whether the entity was created by an act of the legislature or previously determined by law to be open to public access. *Cherokee*, 87 S.W.3d at 79.³

I. Compiling, arranging, classifying, annotating, editing, indexing, printing, binding, publishing, and selling the law of the State of Tennessee is a public function.

In *Cherokee*, a non-profit public benefit corporation, Cherokee Children & Family Services, Inc., entered into a contract with Tennessee to provide childcare services for indigent families and supervise child care placements under Tennessee Department of Human Services guidelines. 87 S.W.3d at 70–71, 79. The Tennessee Supreme Court observed that the arrangement between the corporation and the State involved “[t]he most common form of privatization, called “contracting out,” [in which] the government contracts with a private entity

its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys’ fees, against the nondisclosing governmental entity.” Tenn. Code Ann. § 10-7-505(g).

³ Neither the Tennessee Supreme Court nor the Court of Appeals have added other factors to this non-exclusive list in the 20 years since *Cherokee* was decided.

to provide a service previously performed by the government, or to provide a service for or on behalf of a government entity.” *Id.* at 76 (quoting Craig D. Feiser, *Protecting the Public’s Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 Fla. St. U.L. Rev. 825, 825–27 (2000)). Before the Department of Human Services contracted with Cherokee Children & Family Services to perform these services, the Department provided the services itself. *Id.* at 79. After the contract ended, the Department again provided the services itself. The services provided by Cherokee Children & Family Services were undoubtedly government services that carried out a government function.

To determine whether Cherokee Children & Family Services was subject to the public-access requirements of the Public Records Act, the Supreme Court first considered whether it performed a governmental or public function and concluded that childcare services “were undeniably public in nature.” *Id.* at 79. This was true, in part, because the State “directly performed these services prior to entering into the contracts” with the corporation, the corporation’s “involvement in providing these services was extensive,” and its business activities were “dedicated exclusively to the servicing of the [] contracts.” *Id.* Thus, all of the Cherokee Children & Family Services’s records “necessarily relate to its state business” and are therefore subject to public access under the Tennessee Public Records Act. *Id.*; *see also id.* at 74, 80.

The reasoning in *Cherokee* applies with equal (if not greater) force here.⁴ British philosopher Bertrand Russell once wrote: “Government can easily exist without law, but law cannot exist without government.” *Ideas That Have Helped Mankind*, in UNPOPULAR ESSAYS

⁴ In *Cherokee*, the Supreme Court noted that Cherokee Children & Family Services did not “care for” or “keep” children “in the strictest sense;” rather, “it served as a ‘brokering agency’ that screened applicants and assisted eligible applicants in locating approved child care providers.” 87 S.W.3d at 72. Here there is no broker or middleman, as Lexis publishes the TCA directly under the watchful eye of the Commission.

(1950). However controversial the first point, the second is unassailable. There is no dispute that the TCA is the definitive, authoritative, authorized, and official version of all Tennessee statutory law. And the Commission is “authorized and directed to formulate and supervise the execution of plans for the compilation, arrangement, classification, annotation, editing, indexing, printing, binding, publication, sale, distribution and the performance of all other acts necessary for the publication of an official compilation of the statutes, codes and session laws of the state of Tennessee.” Tenn. Code Ann. § 1-1-105. The Commission also has “full power and authority on behalf of the state of Tennessee to perform all acts and to negotiate and enter into all contracts necessary for and expedient to the successful production and publication of a revised compilation of the statutory laws of Tennessee.” Tenn. Code Ann. § 1-1-106.

As authorized by statute, the Commission has contracted out “the successful production and publication” of the TCA to Lexis, and these services are “undeniably public in nature.” *Cherokee*, 87 S.W.3d at 79. *See also Wood v. Jefferson Cnty. Econ. Dev. Oversight Comm., Inc.*, No. E2016-01452-COA-R3-CV, 2017 WL 4277711, at *4 (Tenn. Ct. App. Sept. 26, 2017) (finding that the defendant performed a governmental function because it was tasked with the “primary governmental purpose” of promoting economic development); *City Press Commc’ns, LLC v. Tenn. Secondary Sch. Athletic Ass’n*, 447 S.W.3d 230, 238 (Tenn. Ct. App. 2014) (finding functional equivalence because “it is undeniable that education is a government function” and “the Tennessee State Board of Education viewed the supervision and regulation of athletic activities in public junior and senior high schools of Tennessee as one of its governmental functions” when it designated the TSSAA as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis) (quotation and citation omitted); *Friedmann v. Corr.*

Corp. of Am., 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009) (concluding that the Corrections Corporation of America is the functional equivalent of a state agency because it provided prison services that the State is required to provide under the Tennessee Constitution); *Allen*, 213 S.W.3d at 254 (holding that a private entity was the functional equivalent of the Sports Authority of the Metropolitan Government of Nashville because the entity provided statutorily authorized management services to run the day-to-day operations of the Gaylord Entertainment Center).⁵

Because Lexis performs the quintessentially governmental function of producing and publishing the law of Tennessee—the TCA—this factor weighs heavily in favor of a finding that it is subject to the Public Records Act as the functional equivalent of the Commission.

II. The Commission controls the publication of the TCA.

Under the contract in *Cherokee*, the State (through the Department of Human Services) reimbursed Cherokee Children & Family Services for approved costs, and was allowed to audit the corporation’s records relating to work performed or money received under the contract. 87 S.W.3d at 71. Cherokee Children & Family Services was also required to submit an annual independent audit to the State after each reporting period, and the State conducted routine monitoring visits and regular reviews of the corporation’s client files. *Id.* Although the State did not exercise “complete control or supervision” over Cherokee Children & Family Services, the Supreme Court nevertheless found that these provisions evidenced “a significant level of

⁵ *But see Gautreaux v. Internal Med. Educ. Foundation, Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) (holding that a non-profit corporation was not the functional equivalent of a governmental agency because its duties were “merely ministerial” and it “merely acted as a bookkeeper” for a state university); *Memphis Publ’g*, 2017 WL 3175652, at *7 (finding no functional equivalence because “the services [the International Association of Chiefs of Police, Inc.] performed were incidental to the selection of the director—a task wholly assumed by the City.”).

governmental control and oversight” that weighed in favor of finding that the corporation was the functional equivalent of the State. *Id.* at 79–80.

Here again, the case for functional equivalence is even more compelling than in *Cherokee* because the Commission exercises complete control and supervision over Lexis under their Agreement. By statute, the Agreement must “prescribe the specifications for the publication” of the TCA,

including the size of type to be used in the text of the statutes and the annotations, the grade and weight of the paper to be used, the size of the volumes, appropriate provisions for the insertion of pocket supplements and the publication of replacement volumes, the price at which Tennessee Code Annotated shall be sold in Tennessee when originally published, and such other provisions as are necessary for the full performance of the publication plans formulated by the commission.

Tenn. Code Ann. § 1-1-107. And by entering into the Agreement with Lexis, the Commission did just as the statute commands by providing an exhaustive list of minute technical specifications that may be changed only “with the written approval of the Commission.” Pet. ¶ 34; Ex. 1 at Ex. A (“General Requirements for the Publication of the Code and Code CD-ROM”); *see also* Pet. ¶ 35; Ex. 1 at Ex. A (“Style Guidelines for Codification of Public Chapters”). The Commission must also approve numerous aspects of the TCA, and Lexis must submit the proposed-to-be-published TCA to the Revisor of Statutes in advance of publication to be “checked, proofread, verified and certified.” Pet. ¶¶ 33, 37; Ex. 1 at Section 7. Any disagreements or disputes about “matter[s] of editorial content” are resolved in favor of the Commission, which ultimately must approve and certify the manuscript. Pet. ¶¶ 26, 38. Like the contractually mandated submission of an independent audit after each reporting period in *Cherokee*, Lexis must also provide the Commission with the complete and electronic version of the TCA after each legislative session. Pet. ¶ 39; Ex. 1 at Section 2.9.

In *Allen v. Day*, the Court of Appeals considered a similarly significant level of government involvement in the day-to-day operations of a private contractor. There, the operating agreement between the Sports Authority of the Metropolitan Government of Nashville and Powers, the non-governmental entity charged with managing the Gaylord Entertainment Center (the Arena), was “replete with evidence of the Sports Authority’s substantial oversight,” and the Court found that the Sports Authority’s “substantial interest” in the operation and maintenance of the Arena was “illustrated by the pervasive influence and control the Sports Authority exerts over [its] management”:

Under the operating agreement, Powers is required to consult with the Sports Authority with respect to the service of alcohol, the designation of smoking areas in the Arena, the rates and charges for events and parking, community events held at the Arena, any material alterations, additions, changes, or improvements to the Arena, the selection of a general manager, the settlement of any claim, the entering into of any contract which creates \$100,000 or more operating expenses during a term and the provisions in such contracts, the bank where the operating revenue is maintained, and the use of design rights.

Allen, 213 S.W.3d at 254–55, 258.

Like Lexis, “Powers not only agreed to comply with the Sports Authority’s overarching directives regarding the management of the Arena but it acquiesced to the Sports Authority’s control over more minute managerial decisions.” *Id.* at 259. For example, just as Powers could not make “any material alterations, additions, changes, or improvements to the Arena” without consulting the Sports Authority, Lexis cannot so much as change the TCA’s typeface or the weight of the paper it is printed on without express Commission approval. Pet. ¶ 34; Ex. 1 at Ex. A. *See also Wood*, 2017 WL 4277711, at *5 (finding functional equivalence where “no check written by or on behalf of [the private entity] is valid unless it bears two signatures, one of which is that of the county finance director” and the entity complied with the county commission’s directive to change its organizational structure or organizational flow chart).

Under the Agreement, Lexis publishes the TCA under the strict and close supervision of the Commission, a statutory entity that specifies what the TCA must include in exacting detail—every jot and tittle of the TCA to be published by Lexis must meet the Commission’s approval. That, too, weighs heavily in favor of a finding that Lexis is subject to the Public Records Act as the functional equivalent of the Commission.

III. The absence of direct government funding and the fact that Lexis was not created by the General Assembly are outweighed by the other *Cherokee* factors.

Although the Commission cannot subsidize the publication of the TCA out of public funds, Tenn. Code Ann. § 1-1-113, revenues from the sale of the TCA under Lexis’s exclusive contract with the State are undoubtedly significant and should “constitute indirect government funding.” *City Press*, 447 S.W.3d at 236 (finding functional equivalence because “revenues from the various championship tournaments [that TSSAA governed and coordinated], which generate millions, constitute indirect government funding”). *See also Friedmann*, 310 S.W.3d at 376 (finding functional equivalence even though the defendant’s affidavit was “silent as to how much of [its] total revenue generated in Tennessee comes from its contracts with the State and local governments,” and noting “[t]hat percentage likely is quite high”). In any event, the lack of direct government funding is not dispositive and cannot outweigh the two factors discussed above.

Similarly, the fact that Lexis was not created by the General Assembly is largely irrelevant here, as it was in *Cherokee*, *Allen*, *City Press*, and *Wood*. None of the private entities in those cases were created by an act of the legislature or previously determined by law to be open to public access, yet each was found to be the functional equivalent of the State. *See Cherokee*, 87 S.W.3d at 80 (“While it is true that: (1) Cherokee was privately incorporated rather than created by the legislature; (2) the contracts disavowed any agency relationship between Cherokee and the State; and (3) the parties asserted that the State incurred no tort liability for

Cherokee’s activities, these considerations are outweighed by the other factors listed above.”); *Allen*, 213 S.W.3d at 260 (“The Court would note however that the Tennessee Supreme Court in *Cherokee* held that a non-profit corporation may be the functional equivalent of a government agency even though the corporation is privately incorporated and the contract disavows the existence of an agency relationship.”); *City Press*, 447 S.W.3d at 237; *Wood*, 2017 WL 4277711, at *7. Indeed, Tennessee courts applying *Cherokee*’s functional-equivalence analysis sometimes omit this factor entirely. See *Friedmann*, 310 S.W.3d 366.⁶

CONCLUSION

Because the production and publication of the law of Tennessee is undeniably a governmental or public function, and the Commission exercises near-total control over Lexis’s exercise of that function, Lexis is the functional equivalent of the Commission and its records—including the complete and current electronic version of the TCA—are subject to the disclosure requirements of the Tennessee Public Records Act.

⁶ *Friedmann* also omitted an analysis of the extent of the State’s involvement with, regulation of, or control over the Corrections Corporation of America, but nevertheless found that it was the functional equivalent of the State.

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon counsel for Respondent by regular U.S. Mail, postage prepaid, and electronic mail at the following addresses:

Matthew Lung, Esq.
Deputy Head of Legal – North America LexisNexis
Legal and Professional
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A copy has also been served by hand on Respondent's Registered Agent, CT Corporation System, 300 Montvue Road, Knoxville TN 37919-5546.

August 11, 2022

/s/ Joshua Counts Cumby
Joshua Counts Cumby