

**PUBLIC.RESOURCE.ORG and** )  
**DAVID L. HUDSON, JR.,** )  
) )  
Petitioners, )  
) )  
v. ) **Case No. 22-1025-III**  
) )  
**MATTHEW BENDER AND** )  
**COMPANY, INC., a division of** )  
**LexisNexis Group,** )  
) )  
Respondents. )

Petitioners, Public.Resource.Org and David Hudson, Jr. (“Petitioners”) ask this Court to order Respondent Matthew Bender & Co. (“Respondent” or “Bender”) to produce the entire digital version of the Tennessee Code Annotated (“TCA”) in response to Petitioner’s request for the same under the Tennessee Public Records Act (“TPRA”).

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## **FACTUAL BACKGROUND**

### **I. The TCA Contains Tennessee’s Official Code, and Annotations to That Code.**

The Tennessee Code Annotated consists of two discrete works. The first is the “Tennessee Code,” defined as the “compilation of the laws of the state.” *See* Tenn. Code Ann. § 1-2-101(a). The Tennessee Code contains the codified public acts of the General Assembly. Codification refers to “[t]he process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code.” CODIFICATION, BLACK’S LAW DICTIONARY (11th ed. 2019). The Tennessee Code is made available free to the public.

The Tennessee Code Annotated, on the other hand, is defined as the “annotated edition of the code provided for by chapter 1 of this title,” referring to Tenn. Code Ann. §§ 1-1-101, *et seq.* Tenn. Code Ann. § 1-2-101(a). These annotations consist of, *inter alia*, summaries of relevant judicial opinions, legislative history, cross-references to other statutes on the same or similar subject, citations to pertinent Attorney General Opinions, and references to various secondary sources, such as law review articles. When the official code and its annotations are combined, the resulting publication—the Tennessee Code Annotated—is deemed the “official compilation of the statutes, codes and session laws of the state of Tennessee.” Tenn. Code Ann. § 1-1-105(a). However, and even as Petitioners concede, the Tennessee Code is the official law of the state, while the annotations are not. (*See* Petition ¶ 16.)

## **II. The Tennessee Code Commission Oversees the Preparation of the TCA.**

The Code Commission is statutorily responsible for preparing and publishing TCA. Tenn. Code Ann. §§ 1-1-101, -105. The Commission is an *ad hoc*,<sup>1</sup> 5-member governmental body consisting of the Chief Justice of the Tennessee Supreme Court, the Tennessee Attorney General, and the General Assembly’s Director of the Office of Legal Services, who all serve as *ex officio* members. Tenn. Code Ann. § 1-1-101. The Chief Justice chairs the Commission and appoints the remaining at-large members. Tenn. Code Ann. §§ 1-1-101, 102. An Associate Justice of the Supreme Court and a private attorney currently hold these two seats.<sup>2</sup> The Legislature’s Office of Legal Services (OLS) provides staffing to the Code Commission. Tenn. Code Ann. § 1-1-103.

The Code Commission is not part of the Legislature. The Commission obtains its authority to act and restrictions thereon from Title 1 of the TCA. The Tennessee General Assembly’s powers, in contrast, are governed by Title 3. The Tennessee Supreme Court does not consider the Commission to be part of the Legislature. *See Washington v. Robertson County*, 29 S.W.3d 466, 473, n.6 (Tenn. 2000) (rejecting use of TCA cross-references to construe a statute, because “cross references are included by the Code Commission, not the legislature, and they do not reflect legislative intent in interpreting a statute.”). Nor does the Commission wield lawmaking authority. *See Jordan v. Knox County*, 213 S.W.3d 751, 756, n.2 (Tenn. 2007) (“In 2003, the General

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<sup>1</sup> For a historical survey of the Code Commission and Tennessee’s codification process, see generally, Eddie Weeks, A HISTORY OF TENNESSEE STATUTORY LAW: COMPILATIONS, CODIFICATIONS, AND COMPLICATIONS, (LEXIS) (2021) (hereinafter “Weeks”), available at <https://store.lexisnexis.com/products/a-history-of-tennessee-statutory-law-compilations-codifications-and-complications-skuSKU33395>, with copies of excerpted pages attached as Exhibit A to this Motion. Mr. Weeks is the Librarian for the Tennessee General Assembly.

For example, George Roulstone, the public printer, first organized Tennessee’s laws in a collection published in 1803, not long after statehood in 1796. Weeks, *supra*, at 1. The state published its first official code in 1858, reprinted as amended in 1929 and 1932. The first version of the TCA was not published, however, until 1955. *Id.* at 10-23, 47, 56, 103, 105–109.

<sup>2</sup> See <https://www.tncourts.gov/boards-commissions/boards-commissions/tennessee-code-commission>.

Assembly directed the Code Commission to change all references from ‘county executive’ to county mayor.’”) (citing 2003 Tenn. Pub. Acts, ch. 160–61); *Shelby County. v. King*, 620 S.W.2d 493, 495–96 (Tenn. 1981) (Code Commission has the authority to “rearrange, regroup and renumber the titles, chapters, sections, and parts of sections but does not have authority to change the sense, meaning or effect of any act.”) (quoting Tenn. Code Ann. § 1-1-108); *Harper v. Bradley County*, 464 S.W.3d 615, 618, n.1 (Tenn. Ct. App. 2014) (noting that through 2011 Tenn. Pub. Acts, ch. 510, § 9, the General Assembly requested the Code Commission “delete the terms ‘malpractice’, ‘medical malpractice’, ‘malpractice action’, and ‘medical malpractice action’ wherever they appear in the Tennessee Code Annotated and substitute instead the term ‘health care liability’ or ‘health care liability action’ as applicable.”); *Moore v. Old Republic Ins. Co.*, 512 S.W.2d 564, 567 (Tenn. 1974) (reference to U.S. Code in notes to TCA statute “was added by the compiler [Code Commission]. Since the reference to the United States Code was not in the Act passed by the Legislature and signed by the Governor, we hold it to be mere surplusage and as such it can not alter the sense or meaning of the Act in question.”) (superseded by statute on other grounds) (citing predecessor statute to Tenn. Code Ann. § 1-1-108).

Though the Chief Justice chairs the Commission, the Commission itself is not considered a judicial body in that it does not hold the power to interpret state law. *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995) (judicial branch “has the authority to interpret and apply the law.”); *Chumbley v. People’s Bank & Tr. Co.*, 57 S.W.2d 787, 788 (1933) (Supreme Court justices were not disqualified from considering constitutional challenge to law published in Code of 1932 on grounds that they appointed the members of the Code Commission. Simply being a “member of a civic body” is not sufficient basis to disqualify the justices.).

### **III. The Commission Contracts with a Private Publisher to Annotate the Code and Publish the TCA.**

The Code Commission contracts with Bender, an affiliate of LexisNexis, to compile and publish the TCA.<sup>3</sup> The most recent contract is the “Restated Agreement for Publication.” *See* Exh. 1 to Affidavit of Paige A. Seals attached hereto as Exhibit B and incorporated herein by this reference. The Agreement is a work-for-hire arrangement that took effect January 1, 2020, and lasts for 10 years. Pursuant to the Agreement, Bender provides all editorial and publishing services necessary for the publication of the TCA. (Agreement, § 1.1.) To facilitate Bender’s work, the Commission furnishes Bender with copies of the General Assembly’s legislative acts for compilation. (*Id.*, § 2.1.)

Section 1.6 of the Agreement addresses the TCA annotations. It requires Bender, as part of its responsibilities under the work-for-hire arrangement, “compile a complete annotation to each statute appearing in the TCA, from all cases which are available up to the time work is completed.” (*Id.*, § 1.6.) The case annotations “shall include all published opinions” of the courts of Tennessee and all federal courts “construing Tennessee statutes arising out of Tennessee.” (*Id.*) Bender shall also provide references to law reviews, opinions of the Tennessee Attorney General, and any new annotations “as determined by Publisher’s editorial staff and approved by the Executive Secretary or as recommended by the [Code] Commission or Executive Secretary.” (*Id.*, § 1.7 (“References”).)<sup>4</sup> In other words, Bender compiles and writes all aspects of the annotations under the Agreement.

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<sup>3</sup> By statute, the TCC has the power to contract with a private publisher as well as any other action necessary to publish the Tennessee’s official code of law. Tenn. Code Ann. § 1-1-106.

<sup>4</sup> Bender’s editorial duties further include preparation of a User’s Guide (Agreement, § 1.3), References (§ 1.7), Legislative History (§ 1.10), and tables and indices for searching the TCA (§§ 1.8, 1.11).

**IV. The Commission Meets Annually to Review and Approve Proposed Modifications to the Tennessee Code.**

Bender must submit proposed changes to the Code Commission by October 31 every year. (Agreement, § 2.2.) The Code Commission reviews and deliberates on proposed edits to the Tennessee Code during a public meeting held annually in November. At the 2020 meeting, for example, Bender proposed replacing Volume 2A (State Government), Volume 4 (Courts and Procedure), and splitting Volume 6 (Probate, Mental Health, Guardianship, Fiduciaries, Trusts and Estates) into three separate volumes from its previous two volumes. *See* Exh. 2 to Seals Affidavit (Tr. of Nov. 10, 2020, Comm’n Mtg at 7–10, hereinafter “Commission Transcript”). The Code Commission approved these changes. (Commission Transcript at 13.)<sup>5</sup>

**V. The Code Commission Certifies the Official Code—but Not the Annotations—as “Prima Facie” Evidence of the Laws of Tennessee.**

After the Commission approves the changes to the Tennessee Code, Bender submits that year’s proposed Tennessee Code publication to the Code Commission’s Executive Secretary for proofreading, verification, and certification. (Agreement, § 7.) The Code Commission may make ministerial edits such as rearranging titles or chapters sections. However, the Commission “shall not alter the sense, meaning or effect of any act of the general assembly, **but shall copy the exact language of the text of the statutes.**” Tenn. Code Ann. § 1-1-108(a) (emphasis added).

The Code Commission reviews the final draft of the Tennessee Code to certify that the text of each section of law appearing therein has been compared within the original section published in the public acts of the General Assembly and is correctly and accurately copied. Tenn. Code

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<sup>5</sup> Supplements to the TCA must be published within 80 days of Bender’s receipt of all enactments from the previous regular or extraordinary session of the Tennessee General Assembly. (Agreement, § 2.4.)

Ann. § 1-1-110. The Code Commission fixes a certificate of authenticity to each volume of the TCA attesting to the Tennessee Code’s accuracy in relation to the legislative enactments. *Id.*

Upon certification, “[t]he text of the statutes, codes and code supplements (**but not the annotations, footnotes and other editorial matter**) appearing in the printed copies of the compilation, containing a copy of the commission’s certificate of approval, shall constitute prima facie evidence of the statutory law of [Tennessee].” Tenn. Code Ann. § 1-1-111(b) (emphasis added). No compilation or codification “not bearing a copy of the certificate of approval of the code commission . . . shall be recognized as an official compilation of the statutory law of Tennessee.” Tenn. Code Ann. § 1-1-112.

Once published, Bender holds the exclusive right to sell the TCA.<sup>6</sup> (Agreement, § 8.) Bender provides a “free public access version of the unannotated version of the Tennessee Code on the Internet.” (*Id.*, § 1.16.) As Petitioners recognize, and pursuant to the work-for-hire Agreement, the state of Tennessee holds the copyright in the TCA as a compilation of laws and annotations. (Agreement, § 6; Petition ¶ 29.)

## **VI. Petitioner Public.Resource.Org and a Law Professor Submit Public Records Act Requests Regarding the TCA.**

As these Petitioners note, in August 2021 an individual who is not among the current petitioners submitted a TPRA request for “each electronic version of the most current Tennessee Code Annotated, reproduced in its entirety.” (Ex. 2 to Petition.) The Revisor of Statutes—to whom the request was directed—advised that she did not have an electronic copy of the TCA, and that even though the Agreement calls for Bender to make the electronic copy available to the Commission, such production comes only upon request by the Commission’s Executive Secretary,

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<sup>6</sup> The Code Commission sets the sale price of the TCA. Tenn. Code Ann. § 1-1-107.

and no such request has been made. (Ex. 5 to Petition (citing Agreement, § 2.9).) One of the Petitioners, David Hudson—who had not previously submitted a written public records request to any State entity on this topic—submitted a TPRA request to LexisNexis’s legal department similar to the August 2021 request to the Revisor of Statutes.<sup>7</sup> (Petition, Exs. 6, 7.) Upon receiving Bender’s written response advising Mr. Hudson that Bender is not a governmental entity and therefore not subject to the TPRA, Mr. Hudson initiated this lawsuit. (Petition, Ex. 7.)

### **ARGUMENT**

The Code Commission should be granted the right to intervene or be permitted to intervene so that it may object to the Petition on grounds that the State owns the TCA as a work of copyright and that under the TPRA and Supremacy Clause of the U.S. Constitution, copyrighted works are exempt from disclosure under Tennessee’s public records laws.

#### **I. The Code Commission Should Be Permitted to Intervene in this Matter.**

The Code Commission should be granted intervention as a matter of right, pursuant to Tenn. R. Civ. P. 24.01, because it is the author of the TCA and Petitioners seek reproduction and use of the TCA outside of the confines of the Copyright Act (17 U.S.C. §§ 101, *et seq.*). Forcing Bender to reproduce and distribute a digital version of the TCA to one or more of the Petitioners would infringe upon the State’s copyright interest in the TCA and therefore provides a valid basis for mandatory intervention pursuant to subsection (2) of Rule 24.01. Alternatively, the Code Commission should be granted intervention by permission, pursuant to Tenn. R. Civ. P. 24.02, subsection (2), because its assertion of its copyright interest in the TCA as a defense against

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<sup>7</sup> Counsel for Mr. Hudson indicated in the May 16, 2022, request to LexisNexis that he represented Mr. Hudson *and* “Carl Malamud, President and Founder of Public.Resource.Org.” Mr. Malamud—a California resident not entitled to make public records requests in Tennessee—is not one of the petitioners, but Public.Resource.Org is named as if it is. Based on the Petition, Public.Resource.Org did not make a public records request to LexisNexis, nor could it under the TPRA.



Petitioner's action presents a common question of law as the instant action, i.e., whether the TCA is subject to disclosure under the TPRA.

**A. The Code Commission Has the Right to Intervene to Protect its Property Interest in the TCA.**

The Court should grant the Code Commission's Motion to Intervene pursuant to Tenn. R. Civ. P. 24.01, as the Commission has the right to intervene to protect its property interest in the TCA. Rule 24.01 provides that upon timely motion, any person shall be permitted to intervene where the intervenor "claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties." Tenn. R. Civ. P. 24.01(2).

A party seeking to intervene as of right must demonstrate that "(1) the application for intervention was timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the pending litigation; (3) the proposed intervenor's ability to protect that interest is impaired; and (4) the parties to the underlying suit cannot adequately represent the intervenor's interests." *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 190–91 (Tenn. 2000).

The "rules governing intervention are construed broadly in favor of the applicants." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007). As with other Tennessee rules, "[f]ederal case law interpreting rules similar to those adopted in this state are persuasive authority for purposes of construing the Tennessee rule." *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 755 (Tenn. 2006).

The State can meet its burden of proof to intervene as a matter of right. The intervention motion is timely; it has been filed before the OSC hearing set for August 15, 2022. Any response

to the Code Commission’s motion can be addressed prior to or at the hearing. The Commission also has a significant interest in the litigation. Petitioner seeks to use the TPRA to obtain a copy of a copyrighted work, outside the permissible scope of the use of copyrighted works under federal law. *See* 17 U.S.C. §§ 102(a), 106 (granting copyright owners the exclusive right to, among other things, reproduce, distribute, sell, perform, or display their protected works). This interest is thus far greater than “a mere contingent, remote, or conjectural possibility of being affected as a result of the suit.” *Brown & Williamson Tobacco Corp., supra*, 18 S.W.3d at 192 (Tenn. 2000). The Commission’s copyright interest will potentially be impaired if it does not intervene; as a work made for hire, the State (through the Commission) is the author of the work and in the best position to defend its interest.

A proposed intervenor is “required only to show that the representation might be inadequate” to meet the final factor of mandatory intervention. *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999). The standard for showing inadequacy is low; “[t]he proposed intervenors need show only that there is a potential for inadequate representation.” *Id.* Even though the Commission’s interests are generally aligned with its contractual partner, Respondent Bender, “the tactical similarity of the present legal contentions of the parties does not assure adequacy of representation or necessarily preclude the intervenor from the opportunity to appear in its own behalf.” *Fund for Animals, Inc., v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003). For all these reasons, the Commission requests it be granted the right to intervene.

**B. The Code Commission Should Be Entitled to Permissive Intervention.**

In the alternative, the Code Commission seeks permission to intervene because of the common question of law—whether the TCA is subject to disclosure under the TPRA—that is implicated by Petitioner’s action and the Commission’s defense. Tenn. R. Civ. P. 24.02 provides

that a person may be permitted to intervene “when a movant’s claim or defense and the main action have a question of law or fact in common.” Tenn. R. Civ. P. 24.02(2). Trial courts have broad discretion to grant permissive intervention upon a showing of a common question of law or fact. *White v. Johnson*, 522 S.W.3d 417, 422 (Tenn. Ct. App. 2016); *Chaille v. Warren*, 635 S.W.2d 700, 703 (Tenn. Ct. App. 1982)(permissive intervention reviewed under abuse of discretion standard). Here, the Commission seeks to intervene to argue that federal copyright law supersedes the TRPA and exempts the TCA from production as a public record. Because the objection the Commission seeks to raise is legally similar to the arguments asserted by Bender in its letter declining production, the Commission should be granted permission to intervene. (*See* Ex. 7 to Petition); *see also Tennessee v. Metropolitan Government of Nashville*, 485 S.W.3d 857, 860 (Tenn. 2016)(lower court granted state the right to intervene to assert objection in TPRA matter, even where municipal entity had been named as respondent and asserted similar objections). For all these reasons, the Commission requests it be given permission to intervene in this matter.

## **II. The TCA is Exempt from Disclosure Under the TPRA.**

### **A. Tennessee Law Does Not Make the TCA Available for Inspection and Copying Pursuant to the TPRA.**

The Tennessee Public Records Act provides in pertinent part:

All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, 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) (emphasis added).

The Act defines the term “public record” 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 in connection with the transaction of official business by any governmental agency.” Tenn. Code Ann. § 10-7-503(a)(1). In determining what a public record is, the Tennessee Supreme Court has stated that a court should look to the totality of the circumstances. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991).

The Act further provides that it is to be broadly construed in favor of public access, and Tennessee courts have consistently adhered to this policy. Tenn. Code Ann. § 10-7-505(d). The purpose of the Act is to promote public awareness of the government’s actions and to ensure the accountability of government officials and agencies by facilitating the public’s access to governmental records. *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002).

While the Public Records Act expresses the State’s policy of openness to governmental records, the General Assembly nonetheless “recognized from the outset that circumstances could arise where the reasons not to disclose a particular record or class of records would outweigh the policy favoring public disclosure.” *Allen v. Day*, 213 S.W.3d 244, 261 (Tenn. Ct. App. 2006) (quoting *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004)). Thus, the Public Records Act “is not absolute, as there are numerous statutory exceptions to disclosure.” *Tennessean*, 485 S.W.3d at 865. Additionally, the General Assembly “provided for a *general exception* to the Public Records Act, based on *state law*,” which includes “statutes, the Tennessee Constitution, the common law, rules of court and administrative rules and regulations.” *Id.* at 865-66 (citing *Swift*, 159 S.W.3d at 571-72) (emphasis added).

These exceptions to the Public Records Act recognized by state law reflect the General Assembly’s judgment that “the reasons not to disclose a record outweigh the policy favoring

disclosure.” *Allen*, 213 S.W.3d at 261. These exceptions “are not subsumed by the admonition to interpret the Act broadly;” accordingly, “courts are not free to apply a ‘broad’ interpretation that disregards specific statutory language” setting forth such exceptions. *Id.* Furthermore, the Tennessee Court of Appeals has recognized that a “specific reference to the Public Records Act is not required to establish that a statute creates an exception to its requirements.” *State ex rel. Guzman v. Darnell*, No. 01-A-01-9406-CH00294, 1994 WL 585684, at \*3 (Tenn. Ct. App. Oct. 26, 1994). Instead, that Court has held that “[w]hat is required is some persuasive evidence that the legislature *intended the procedures outlined in the statute to replace* rather than to supplement the normal practices established by the Public Records Act.” *Id.* (emphasis added).

Here, the General Assembly done just that—it has enacted a statutory scheme that clearly “provides otherwise” as to the openness of the TCA. Specifically, the General Assembly has declared that access to the Tennessee Code Annotated *in any form* is governed by the provisions of title 1, chapter 1 of the TCA. *See* Tenn. Code Ann. § 3-10-108(d) (“[T]he reproduction, publication, and sale of Tennessee Code Annotated in any form, in whole or in part, shall be pursuant to the provisions of title 1, chapter 1.”).

As discussed, *supra*, title 1, chapter 1 of the TCA establishes the Tennessee Code Commission and vests authority in the Commission

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(a) (emphasis added). The Commission is further vested with the

full power and authority . . . 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(a).

And while the Commission is “authorized to expend such funds as may be appropriated by the general assembly for the purpose of this chapter,” it is not “authorized to subsidize the publication of the code out of public funds, but 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.” Tenn. Code Ann. § 3-10-113(a)-(b).

Thus, when the provisions of Tenn. Code Ann. § 3-10-108(d) and title 1, chapter 1 of Tennessee Code Annotated—and in particular—the provisions of § 1-1-113(a)-(b) are construed together, it is clear that the General Assembly intends that the procedures outlined in these statutes replace the provisions of the TPRA with respect to access to the TCA.

Furthermore, it is a well-settled rule of statutory construction that the General Assembly is presumed to know the “state of the law on the subject under consideration at the time it enacts legislation. *Lee Medical, Inc. v. Beecher*, 3122 S.W.3d 515, 527 (Tenn. 2010) (citing *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683 (Tenn. 2005)). In addition, the General Assembly is presumed to have acted with full knowledge of the existing regulatory scheme. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008); *Brown-Forman Distillers Corp. v. Olsen*, 676 S.W.2d 567, 572 (Tenn. Ct. App. 1984).

The provisions of Tenn. Code Ann. § 3-10-108(d) were enacted by the General Assembly in 1987. *See* 1987 Tenn. Pub. Acts, ch. 163, § 8. Accordingly, at the time the General Assembly enacted these provisions, it is presumed to have had knowledge of the requirements of the Public Records Act, which was enacted thirty years prior in 1957. *See* 1957 Tenn. Pub. Acts, ch. 285, § 1. Had the Legislature intended that Tennessee citizens be allowed free, personal inspection and/or copies of the TCA—whether in paper or electronic form—it could have provided that *only* the publication and sale of the TCA is governed by the provisions of title 1, chapter 1. It did not but instead very specifically declared that “the *reproduction*, publication, and sale of Tennessee Code Annotated in any form, in whole or in part, *shall* be pursuant to the provisions of title 1, chapter 1”. Thus, it must be presumed that the General Assembly intended for access to the TCA, in any form, to be governed by the procedures set out in title 1, chapter 1, i.e., pursuant to the terms of any contract(s) entered into by the Commission for the “successful production and publication” of the TCA.<sup>8</sup>

Accordingly, based on the plain language of Tenn. Code Ann. § 3-10-108(d) and the provisions of title 1, chapter 1 of the TCA, these statutes are state laws that “provide otherwise” with respect to access to the TCA in any form and Petitioner is not entitled to an electronic copy of the TCA pursuant to the Tennessee Public Records Act.

**B. The Annotated Code is a Copyrighted Work and Therefore Exempt from Disclosure.**

Assuming, *arguendo*, that state law does not otherwise provide for exemption of the TCA, the work is nevertheless still exempt because the Code Commission holds a copyright in the TCA

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<sup>8</sup> “Publication” is defined as including the “necessary actions by whatever means and in whatever form for development of a Tennessee code database.” Tenn. Code Ann. § 1-1-105(b).

(as an annotated compilation of the Tennessee Code). Applying the Supremacy Clause of the U.S. Constitution, Tennessee courts recognize a non-statutory exemption where disclosure of public records would violate federal law. *See, e.g., Seaton v. Johnson*, 898 S.W.2d 232 (Tenn. Ct. App. 1995) (railroad-crossing records were confidential under Federal Railroad Safety Act); *accord Swift*, 159 S.W.3d at 577.<sup>9</sup>

Consistent with *Seaton*, the Tennessee Attorney General’s Office has opined that “[t]o the extent any state or federal law provides otherwise with respect to the openness of a record, then the Public Records Act does not require the records custodian to make that record available for public inspection.” Tenn. Att’y Gen. Op. 18-23 (May 30, 2018). The Office of Open Records Counsel has similarly opined on the limits the Copyright Act places upon the TPRA. *See* [Public Finance LETTERHEAD \(tn.gov\)](#).

Federal law—the U.S. Copyright Act—provides otherwise with respect to the openness of the annotated Code, and requires the Petition be denied. Under the Act, copyrights are secured automatically upon creation of an original work. *See* 17 U.S.C. § 302(a). And copyright protection applies to literary works such as the annotated Code. 17 U.S.C. § 102(a)(1). As the author of a copyrighted work,<sup>10</sup> the Code Commission possesses “the exclusive right to reproduce, distribute, sell, perform or display” the annotated Code. 17 U.S.C. §§ 102(a), 106. The Commission

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<sup>9</sup> *See also Patterson v. Convention Center Auth.*, 421 S.W.3d 597, 614 (Tenn. Ct. App. 2013) (“[o]ur holding in *Seaton* was based on federal preemption.”).

<sup>10</sup> Original, “as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). The validity of the Code Commission’s copyright in the annotated Code is not before this Court, nor could it be; federal district courts possess exclusive jurisdiction regarding disputes over the validity of an asserted copyright. *See* 28 U.S.C. § 1338(a); *Wells v. Chattanooga Bakery, Inc.*, 448 S.W.3d 381, 387 (Tenn. Ct. App. 2014) (addressing Copyright Act’s preemption of state claims); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 348-349 (2nd Cir. 2000) (a suit “arises under” the Copyright Act if it asserts a claim requiring “construction of the act”).



contracts with Respondent Bender for the annotated Code's distribution, sale, and reproduction.

Any copies of the annotated Code are only made available pursuant to the Agreement. Because the Copyright Act "provides otherwise" with respect to the distribution of the annotated Code, Petitioner's request must be denied.

### **CONCLUSION**

For the foregoing reasons, the Code Commission respectfully requests the Court (1) grant its motion to intervene and (2) deny Petitioner's request for production of the annotated Code under the TPRA.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Memorandum was served via U.S. Mail and/or electronic transmission upon:

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/s/ Janet M. Kleinfelter  
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