

I. Under Tennessee law, a private entity is only subject to the TPRA when the private entity is the functional equivalent of a governmental agency.

“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)). In *Memphis Publishing Co.*, the Tennessee Supreme Court established a framework for evaluating whether a private entity is subject to the disclosure requirements of the TPRA. While the court held the right of access under the TPRA should “include those records in the hands of any private entity which operates as the functional equivalent of a governmental agency,” *Id.* at 79, in limiting the applicability of the TPRA the court cautioned that:

our holding clearly is not intended to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies. ***A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government.***

Id. (emphasis added).

To determine whether a private entity is the functional equivalent of a governmental agency, a court should primarily examine to what extent the private entity performs a traditionally governmental function. *Id.* (“The cornerstone of this analysis, of course, is whether and to what extent the entity performs a governmental or public function.”). In making this determination a court should consider:

(1) the level of government funding of the entity; (2) the extent of government involvement with regulation of, or control over the entity; and (3) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.

Id. “In making this determination, [the Courts] look to the totality of the circumstances in each given case, and no single factor will be dispositive.” *Id.*

In addition to the four non-exclusive factors outlined in *Memphis*, Tennessee courts have examined whether the entity in question exercises discretion normally reserved for the government. *Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526, 531 (Tenn. 2011). Even where an entity performs a traditional governmental or public function to a certain extent, those public functions “must outweigh its private identity for the purposes of the [TPRA].” *Friedmann v. Corrections Corp. of Am.*, 310 S.W.3d 366, 373 (Tenn. Ct. App. 2009).

II. Respondent is Not the Functional Equivalent of a Governmental Agency.

Applying this precedent, Respondent is not the functional equivalent of a governmental agency. LexisNexis Group (“LexisNexis”) oversees Respondent, who specializes in publishing analytic legal research information. Matthew Bender has been in the publishing business for over 100 years and today operates as a division of LexisNexis. LexisNexis is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting, and academic markets. LexisNexis originally pioneered online information with its Lexis[®] and Nexis[®] services. LexisNexis also provides and publishes analytic legal research materials. *See* Affidavit of Anders Ganten (attached as *Response Exhibit 1*; hereinafter, “*Ganten Aff.*”), ¶3. LexisNexis is part of RELX PLC (“RELX”), a global provider of information-based analytics and decision tools for professional and business customers. RELX serves customers in more than 180 countries, has offices in approximately 40 countries and employs more than 33,000 people. The shares of RELX are traded on the London, Amsterdam and New York Stock Exchanges. *Id.* ¶3 (Hereinafter, LexisNexis and RELX sometimes collectively are referred to as “Affiliates” of Respondent).

Respondent is a party to a Restated Agreement for Publication (the “Contract”) with the Tennessee Code Commission (the “Commission”). The Contract is a subject of the Petition pending in this court. *Id.* ¶2. Respondent and the Commission executed the Contract under which Respondent is responsible for researching, managing, creating, publishing, and distributing an annotated version of Tennessee state laws as the TCA under the authority of Tennessee Code Annotated Sections 1-1-106 and 1-1-107. Attached as **Exhibit 1** to the Ganten Affidavit and incorporated herein by reference is a true and correct copy of the most recent version of the fully executed Contract effective January 1, 2020. *Id.* ¶8. The Contract was awarded to Respondent in 1996 under an open bid process, whereby Respondent and third parties presented bids to administer the Commission’s project to publish and distribute the laws of the state of Tennessee in both hard bound book and by providing electronic on-line access. Respondent has negotiated Contract extensions with the Commission ever since. *Id.* ¶16. Respondent, under its Contract with the State, is not performing a function traditionally performed by the government. Rather, Matthew Bender is performing “specific, contracted-for services” – the publication of the T.C.A. – which the Tennessee Supreme Court excluded from the functional equivalency test in *Memphis*. 87 S.W.3d at 79. The factors identified in *Memphis* and subsequent decisions all weigh against Petitioners’ claims here.

A. The State of Tennessee Has Not Delegated a Governmental Function to Lexis (Factor 1)

The Court of Appeals noted in *Allen*, that “[g]overnment function’ is not statutorily defined and Tennessee case provides little guidance. However, in adopting the functional equivalence test, the Tennessee Supreme Court [in *Cherokee*] relied heavily upon Connecticut law.” 213 S.W.3d at 253 (citing *Cherokee*, 87 S.W.3d at 77 and quoting Conn. Gen. Stat. Ann. § 1-200(11)).

Applying the factors that the Court in *Cherokee* found relevant and as readily confirmed by the history of Tennessee statutory law and the compilations and codifications thereof through the enactment of the Tennessee Code Annotated in 1955¹, the editorial and publishing “function” currently performed by Respondent under the Contract (and previously performed by other private publishing companies) is not, and has never been, a governmental function, but rather is a role performed by the private sector. The earliest collections of statutes of the State of Tennessee were prepared by private individuals, including attorneys, and were not printed by or under the authority of the State of Tennessee. The State government has never actually published the TCA. Eventually the State gave the Commission the authority to negotiate a contract with a private party to publish the TCA. But it has never been an internal governmental function.

Under the Contract with the Commission, Respondent provides two functions: (1) publicly and freely distributing the unannotated statutory texts of Tennessee, and (2) researching, creating, managing, publishing, and distributing annotations to the TCA as a work for hire. *Ganten Aff.* ¶17. Addressing the first of its responsibilities, Respondent and its Affiliates are not formally or informally controlled by the State of Tennessee or the Commission. Any “control” by the Commission is not over the businesses of Respondent and its Affiliates, but instead solely over the agreed-on services provided by Respondent and creation and delivery of the TCA as outlined in the Contract including the General Requirements for the Publication of the Code and Code CD-ROM set forth in **Exhibit A** to the Contract (e.g., pertaining to type page size, type face, type size, etc.). *Id.* ¶10. In this capacity, the Respondent is not functioning as a government entity, but rather

¹ The TCA of 1955 replaced the Code Supplement of 1950, which updated the Code of 1932, which replaced the Code of 1858. “In between and before those official codifications were numerous unofficial codifications and compilations of law, written by different individuals but never enacted or adopted by the legislature as an official code of laws.” See “A History of Tennessee Statutory Law: Compilations, Codifications, and Complications” (2021), Eddie Weeks, the legislative librarian to the Tennessee General Assembly since 1996; See *id.* at “Introduction,” p. v.

as a custom publisher operating under a vendor contract. It has no role whatsoever in the creation of the unannotated Tennessee Code, which is approved and enacted by the legislature of the State of Tennessee. The detailed specifications for the TCA in the Contract regarding deliverables of the product are exactly the control over only “ministerial tasks” the court in *Gautreaux* found unsupportive of a claim the entity was the functional equivalent of a government entity. *Gautreaux*, 336 S.W.3d at 530-31

In the same way a publisher will print a third-party owned novel or a college textbook, Matthew Bender proofs and prints the 46 volumes that comprise the annotated TCA as a services vendor according to the specifications in the Contract. Matthew Bender supplies free hardbound copies of the TCA to public libraries in the State of Tennessee and also under Section 1.16 of the Contract (titled “Internet”), via a link to the State of Tennessee website located at www.tncourts.gov, Respondent provides free public access version of the unannotated version of the Tennessee Code on the Internet. *Id.* ¶¶18-19. While as with any vendor services contract, the Contract contains significant specifications on ministerial issues such a paper, font and print size, to characterize what is essentially a print and on-line publishing vendor contract as a government function, it would violate the express caution provided by the Tennessee Supreme Court in *Memphis* – “A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government.” *Memphis*, 87 S.W.3d at 79.

As to the second services function performed by Respondent under the Contract, the preparation of the Annotations, Respondent exercises significant independence and control, albeit under the terms of its vendor Contract with the Commission. *Ganten Declaration* ¶22. This labor-intensive creative process includes:

reading case law opinions to identify discussion points and interpretation issues regarding the Tennessee code, court rules, and constitutional provisions at issue;

subjectively analyzing the materials for noteworthiness, along with a determination of whether the court or other authority's discussion is relevant to an understanding of the provision;

after cases are culled and selected for inclusion, the editors then verify each potential source to ensure validity and to gain an understanding of how the statutory provision relates to the issue being discussed;

upon verification, the editors draft the Annotation focusing on succinctness, accuracy, and guidance for future readers;

certain cases are selected for an in-depth review and analysis by a quality review team and further editing;

once the Annotation is checked for accuracy, style, and jurisdictional requirements, the most on-point and specific classification, as selected by the editors, is assigned to the Annotation from the Respondent taxonomy scheme for indexing; and

upon completion, the Annotation is included for online and print product publication.

Each Annotation is an original and creative work of authorship that is protected by copyrights owned by the State of Tennessee under the Contract and as a work for hire. The Annotation often includes a written analysis of the court's application of the law to the particular

facts of the case law opinion or describing the court’s interpretation or construction of the provision. *Id.* ¶¶23-30. The expert research, drafting and editing services provided by Matthew Bender, and the significant discretion permitted to it under the Contract in providing those services, all of which result in documents protected under the federal Copyright Act, are not hallmarks of the functions of a government agency. Indeed, it is expressly because of its 100-year history as a private company with this expertise that the Commission entered into the Contract with the Respondent to provide these vendor services, which the Tennessee government is not capable of providing and which it has never historically provided. *See* Footnote 1, *supra*. Contrary to Petitioners’ assertion that this make Matthew Bender the “agent” of the Commission, Petition ¶ 6, instead, the Contract makes clear that the Respondent is performing a specific service – researching, drafting, editing, printing and publishing – for its customer, the Commission, and the performance of these contracted-for services does not mean Matthew Bender has “open[ed] its records to public scrutiny.” *Memphis*, 87 S.W.3d at 79. This factor weighs in favor of the Respondent.

B. Lexis is Not Funded by the State of Tennessee (Factor 2)

In addition to the “cornerstone” analysis discussed above, *Memphis* also requires courts to examine “the level of government funding” a private entity receives. *Id.* In *Memphis*, the court noted that “Cherokee’s operation was financed with public funds” and that “over ninety-nine percent came from governmental sources.” *Id.*

By sharp and marked contrast, Matthew Bender and its Affiliates are collectively a large, private, multinational corporation that makes the vast majority of its revenue from private subscriptions and sales of proprietary materials. *Ganten Aff.* ¶¶1-4. However, they receive not one penny from the Commission or the State of Tennessee for its services under the Contract. Pursuant

to Tennessee statute and Section 1.1 (“General”) of Contract (“Publisher shall bear all editorial and publication costs associated with the production and maintenance of T.C.A., without contribution, subsidy or expense by the State of Tennessee....”), Respondent does not charge the Commission, and neither the Commission nor any Tennessee governmental entity pay Respondent any fee to create the TCA. Instead in recognition of the significant time, expertise and creativity required to generate the TCA, the Contract authorizes Respondent to charge a fee to customers accessing online copies of and to sell hardcopy books and electronic access to the work. *Id.* ¶41.² The publication of the T.C.A. – while an important function – is not a primary revenue generator for the Respondent and its Affiliates which have customers in more than 180 countries, offices in approximately 40 countries and more than 33,000 employees and whose stock shares are traded on the London, Amsterdam and New York Stock Exchanges. *Id.* ¶ 4. As the Respondent and its Affiliates receive no funding from the Commission or the State of Tennessee, this factor weighs heavily against finding that Matthew Bender is the functional equivalent of a government entity.

C. Respondent is Not Regulated by or Controlled by the Commission (Factor 3)

The court in *Memphis* also examined “the extent of government involvement with regulation of, or control over the entity” in deciding functional equivalency. In the instant case, the Commission is not involved with, oversight, regulation of, or control over private Respondent’s or its Affiliates’ businesses. More specifically, with respect to the businesses of Respondent and

² The Petitioners’ argument based on the “indirect funding” in the *City Press* case is misplaced here. Pet. Mem. at 16. In the cited *City Press* case, 98% of TSSAA’s entire budget came from this funding, making the organization essentially publicly funded. *City Press*, 447 S.W.3d at 236. By contrast, any revenue Respondent receives from the sale of TCA is a tiny fraction of a 33,000-employee company. *Ganten Aff.* ¶41. Further, the *City Press* court highlighted that “[i]f the TSSAA did not collect revenue from these tournament games, ‘the local schools would be collecting the money and spending the money.’” In the instant case, the State of Tennessee and the Commission have *never* collected money from the sale of the TCA. Private lawyers and later vendor publishers under contract have always collected the funds from the sale of the TCA. See Footnote 1, *supra*.

its Affiliates, the Commission does not:

- (a) have any involvement in their corporate operations;
 - (b) have any management authority over them or control over their managerial decisions;
 - (c) exercise oversight of or control over their businesses or employees;
 - (d) control whom they employ, including who Respondent employs to work on the Annotations or the TCA;
 - (e) require their employees to meet any state certification requirements with respect to the Contract;
 - (f) have authority over or control or involvement in their ongoing day-to-day activities;
- or
- (g) have rights to review, approve, veto, or audit their businesses or general budgets or statements of overall business operating revenue, expense, and expenditures.

See Ganten Aff. ¶ 11.

Respondent is ultimately operated by its Officers and the Board of Directors of RELX, none of whom is a public official of the State of Tennessee or a member of the Commission. Respondent and its Affiliates decision-making authority consists of no Tennessee public officials and no other public officials acting *ex officio*. None of Respondent's or its Affiliates' employees

are public officers or employees of the State of Tennessee³. Respondent and its Affiliates hire and establish the terms and conditions of employment of their employees, including those who perform services related to the TCA with no input from the State of Tennessee or the Commission. *Id.* ¶¶ 11-15.

Petitioners attempt to point to provisions in the Contract to argue that Respondent, is subject to government regulation or control – and thus the functional equivalent of a government agency. But this argument is misplaced, as the *Memphis* court examined the “extent of government involvement with, regulation of, or control over *the entity*.” 87 S.W.3d at 79 (emphasis added), not control over the provision of services in a vendor contract. No portion of the Contract grants the Commission any right to regulate or control Matthew Bender as an entity. Rather, the Contract lays out only the specifications for the *services* Matthew Bender is performing as a private entity. This is manifestly not an indication of a quasi-governmental function, otherwise every government vendor contract that specified services or product details or allows for an audit of the contract (but not the other party generally) would render the performer of that contract subject to TPRA disclosure. This factor weighs in favor of the Respondent.

D. Respondent was Not Created by an Act of the Legislature and has Not Previously Been Determined to be Open to Public Access (Factor 4)

Finally, the *Memphis* court also listed as a factor “whether the entity was created by an act of the legislature or previously determined by law to be open to public access.” *Id.* Matthew Bender and its Affiliates are collectively a private company with an over 100-year history that long precedes the origins of the Contract in 1996. *Ganten Aff.* ¶¶1, 8. Neither Respondent nor its

³ By contrast, in *City Press*, 447 S.W.3d at 236, offered by the Petitioners as instructive, 17 of the 18 members of the TSSAA governing bodies were public employees.

Affiliates were created by a Tennessee legislative act or for the sole purpose of serving any Tennessee or other government's functions. *Id.* ¶ 6. No law required the creation of the Respondent or its Affiliates or require that they continue in existence. *Id.* ¶ 7. Respondent and its Affiliates have never been subject to the Tennessee Public Records Act. *Id.* ¶ 8. Petitioners make no argument to the contrary and indeed concede that “Lexis was not created by the General Assembly” (Pet. Mem., p. 16), and so this factor weighs against Petitioners’ request.

III. Previous Decisions Weigh Against Petitioners’ Request.

Historically, when Tennessee courts have found a private entity to be the functional equivalent of a government agency, those private entities have been performing manifestly public functions. *See, e.g., Memphis*, 87 S.W.3d at 79 (“providing childcare services for indigent families and supervising childcare placements under [state] guidelines”); *Friedmann*, 310 S.W.3d at 375 (operating a state prison); *City Press Comm., LLC v. Tennessee Secondary School Athletic Ass’n.*, 447 S.W.3d 230 (Tenn. Ct. App. 2014) (overseeing Tennessee state high school athletics); *Wood v. Jefferson County Eco. Dev. Oversight Comm., Inc.*, No. E2016-01452-COA-R3-CV, 2017 WL 4277711 (Tenn. Ct. App. Apr. 18, 2017) (commission created by county resolution to boost economic development). In all these cases, the public function of the services performed is readily apparent. In contrast, Respondent’s vendor services of printing, note drafting and copy-editing stand markedly apart.

Instead, Respondent is far more similar to the respondent in *Gautreaux*. There, the Internal Medicine Education Foundation (“IMEF”) performed “administrative duties” to support the residency program at a teaching hospital in Chattanooga on behalf of the University of Tennessee College of Medicine (“UTCOCM”). 336 S.W.3d at 530-31. UTCOCM—not IMEF—selected professors and the content of the educational program; IMEF “merely acted as a bookkeeper”

paying faculty and managing reimbursements from insurers. *Id.* Thus, court held that “as we stated in *Cherokee*, merely providing services for, or doing business with, a government agency does not render a private entity the functional equivalent of a government agency.” *Id.* at 531. Here, Respondent performs a role more similar to the bookkeeping role of the foundation than the childcare placement in *Memphis* or the prison services in *Friedmann*. Pursuant to the terms of a vendor Contract, Respondent simply publishes hardcopy and on-line copies of the Tennessee Code the same as any other custom publisher of books and textbooks⁴, and researches and drafts Annotations for the TCA in the same manner as a freelance writer hired to create content. Contrary to Petitioners’ assertion that this is a “quintessentially governmental” function, Respondent’s role is like that of IMEF in *Gautreaux*—vendor services and support for a government agency, which does not render Respondent the functional equivalent of a government agency.

Because the analysis of each of the *Memphis* factors weighs in favor of the Respondent⁵, namely, (1) printing and publishing a Tennessee code was a private enterprise for nearly 100 years and is still not performed by the government, (2) the only control exercised by the Commission is over the deliverables created by the Respondent in the Contract, which is not equivalent to the control required over the Respondent itself, (3) Respondent receives not one penny of funding from the Commission or State of Tennessee under the Contract, and (4) Respondent is an 100 year old company incorporated before the Commission was even created, Respondent is not the functional equivalent of a governmental agency under *Memphis* and its progeny, and Respondent

⁴ See e.g., similar services offered by other private publishers - <https://greystonebooks.com/pages/custom-publishing>. “Greystone Books offers premium custom publishing services to companies and private individuals seeking to capture and share their story in a smart, beautifully designed book.”; <https://www.epigraphps.com/publishing/custom/> “Epigraph’s on-demand print/distribution offers a wide selection of formats and trim sizes, paper and cover stocks are standardized, and some common formats....”

⁵ Petitioners concede that they do not prevail on two of the four factors, trying to salvage their argument by focusing on the other two factors. See *Pet. Mem.*, p. 16. “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.”

is not subject to the disclosure requirements of the TPRA. Petitioners' request should therefore be denied on this basis alone. In the event this court rules otherwise on this threshold issue, the Respondent respectfully requests the entry of a stay to appeal this decision and further to brief and submits its arguments on the applicability of the TPRA to an electronic copy of the TCA⁶, which furthermore does not exist in the possession of the Respondent.⁷

[Signature on following page]

⁶ See e.g., T.C.A. §3-10-108(d). "If public information is stored in a computer-readable form, the committee has exclusive authority to determine the form in which the information will be reproduced for the requestor of the information; provided, 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. **If access to such public information is also available in printed form, it need not be provided in an electronic readable form.**" (emphasis supplied). The TCA in printed form is available in public libraries throughout the State of Tennessee. *Ganten Aff.* ¶ 37.

⁷ Respondent ceased producing and publishing a CD-ROM version of the TCA in 2021 because of an extremely low number of subscribers. Advance notice of this was provided to the Commission. *Ganten Aff.* ¶ 38. Respondent does not provide and has never provided the Commission or any other customer with and it does not possess an electronic copy of the TCA reproduced in its entirety in the following formats: Microsoft Word, XML, PDF, or any other editable document or database. *Id.* ¶ 39.

Respondent also disputes that Petitioners would be entitled to an award of attorney's fees if Petitioners are successful on any portion of their action. Even if Respondent is ultimately required to produce records, Respondent has not "willfully refused" to produce records. T.C.A. § 10-7-505(g); *Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) ("the Public Records Act does not authorize a recovery of attorney's fees" where there is "a good faith belief that the records are excepted from the disclosure"); *Friedmann*, 310 S.W.3d at 381 (private prison operator "was acting in good faith" when it denied request "given the complicated nature of [the] case"); *Cherokee*, 87 S.W.3d at 80 n. 15 (no award of attorney's fees because "decision involved a complex interpretation of controlling case law and contractual language).

Respectfully submitted,

/s/ Thomas H. Lee

Thomas H. Lee, BPR #17453
FROST BROWN TODD LLC
150 3rd Avenue South, Suite 1900
Nashville, TN 37201
615-251-5581 Telephone
615-251-5551 Facsimile
tlee@fbtlaw.com

Of counsel:

John M. Bowler
(Pro Hac Vice Application pending)
Georgia Bar # 071770
Troutman Pepper Hamilton Sanders LLP
600 Peachtree St. N.E., Suite 3000
Atlanta, GA 30308-2216
404-885-3000 Telephone
404-885-3900 Facsimile
john.bowler@troutman.com

*Attorneys for Respondent
Matthew Bender & Company, Inc., a
division of the LexisNexis Group*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following by electronic mail and/or first-class U.S. mail, postage prepaid on this the 15th day of August 2022:

Lucian T. Pera
ADAMS AND REESE LLP
6075 Poplar Avenue, Suite 700
Memphis TN 38119

Joshua Counts Cumby
ADAMS AND REESE LLP
1600 West End Avenue, Suite 1400
Nashville, TN 37203

Attorneys for Petitioner

/s/ Thomas H. Lee