

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

PUBLIC.RESOURCE.ORG)
and DAVID L. HUDSON, JR.,)
)
 Petitioners,) No.: 22-1025-III
)
vs.)
)
 MATTHEW BENDER &)
 COMPANY, INC.,)
 a division of LexisNexis Group,)
)
 Respondent,)
)
 AND)
)
 TENNESSEE CODE COMMISSION,)
)
 Intervening Respondent.)

**MEMORANDUM AND FINAL ORDER: (1) DISMISSING TENN. CODE
ANN. § 10-7-505 PUBLIC RECORDS ACT PETITION AND
(2) PROVIDING FOR UNDER SEAL FILING**

This lawsuit was filed by two Petitioners. One is Public.Resource.org (“Public Resource”), a nonprofit organization whose work includes making the code of laws of all fifty states available in a common and usable form to enable the public to have meaningful access to their laws. The other Petitioner, David L. Hudson, Jr., is a resident of Nashville, Tennessee, a Justice Robert Jackson Fellow with the Foundation for Individual Rights in Education, and First Amendment Fellow with the Freedom Forum. The Petitioners have filed this lawsuit pursuant to the Public Records Act, Tenn. Code Ann. § 10-7-505, to

obtain a court ruling and order that the publication, Tennessee Code Annotated, is a public record which should be freely accessible to the public.

Context for the lawsuit is that the publication in issue, Tennessee Code Annotated, was initiated and has been commissioned by the Legislature. The publication consists of a compilation of the statutes, codes and sessions laws of the State of Tennessee accompanied by annotations. TENN. CODE ANN. § 1-1-105. The annotations commissioned by the Legislature have come to include judicial opinions, legislative history, cross-references to other statutes on the same or similar subject, and citations to Attorney General Opinions and secondary sources.

The controversy which generated the lawsuit is that the Respondent publisher of Tennessee Code Annotated, Matthew Bender & Company, Inc., a division of LexisNexis Group, denied a public records request served by the Petitioners on May 16, 2022, under the Public Records Act, Tennessee Code Annotated section 10-7-503. In their request the Petitioners sought public access to the most recent version of Tennessee Code Annotated. The Respondent denied the Petitioners' May 16, 2022 Public Records Request claiming that the Respondent is "an independent, private company that is not the functional equivalent of a government agency." *Corrected Response in Opposition to Petition for Public Access to Public Records and to Obtain Judicial Review of Denial of Access*, August 15, 2022, at 1.

Additional context for the lawsuit is that the Tennessee Code Commission is also a party to the lawsuit. It sought and was granted intervention on the side of the Respondent. The origin and function of the Commission are that it was created by the Legislature 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,’ [emphasis added].” TENN. CODE ANN. § 1-1-105(a).

The Commission’s position is that public access to Tennessee Code Annotated is not required because the publication is exempt from the Public Records Act. In support of this defense the Commission argues that the Legislature has made a distinction between the Tennessee Code and the publication in issue, Tennessee Code Annotated, with the former, Tennessee Code, being freely accessible, such as under the Public Records Act, but the latter, Tennessee Code Annotated, not being freely accessible. The Tennessee Code is the compilation of solely the laws, whereas Tennessee Code Annotated contains both the laws and the annotations.

As support for this distinction between the Tennessee Code and Tennessee Code Annotated, the Commission cites to Tenn. Code Ann. § 1-2-101, entitled “Designation of code.” It provides in subpart (a), “This compilation of the laws of this state is to be designated as the ‘Tennessee Code’ and the annotated edition of the code provided for by Chapter 1 of this title shall be designated as ‘Tennessee Code Annotated.’” This distinction is reiterated in Tenn. Code Ann. § 1-1-111(b). It provides that the 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] [emphasis added].” An additional statutory reference to the distinction asserted by the Commission is that the Tennessee Code is accessible free, without charge, through the Tennessee Secretary of State, as provided in Tenn. Code Ann. §§ 12-6-102, 103 and 116; whereas Tennessee Code Annotated is not free. By statute it must be sold. The Legislature has provided in Tenn. Code Ann. §§ 1-1-101 *et seq.* for the Commission to contract with a publisher for the editing, compiling, annotating, indexing, printing, binding, publication, sale and distribution of Tennessee Code Annotated. Section 1-1-113 provides that the Commission is not authorized to subsidize the publication of Tennessee Code Annotated out of public funds “but shall require that the cost of publication be borne by the publisher” and that “the publisher shall be required to depend for compensation upon the proceeds of the sale of the publication.”

The immense value and necessity to have access to the annotated version of a state’s code of laws as opposed to just the code itself was recently expressed by Chief Justice Roberts in a case finding that the state of Georgia’s official annotated code was ineligible for copyright protection under the public edits doctrine.¹ In *Georgia v.*

¹ “Under the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of the works they create in the course of their official duties.” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1501 (2020).

Public.Resource.Org, 140 S. Ct. 1498, 1512 (2020), writing for the majority, Chief Justice Roberts explains that without the annotations to a state’s code of laws the reader/user has incomplete and inadequate notice of the law presently in effect.

Georgia minimizes the OCGA annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. See OCGA §§ 21-2-131, 16-6-2, 16-6-18, 16-15-9 (available at www.legis.ga.gov). Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal. See §§ 21-2-131, 16-6-2, 16-6-18, 16-15-9 (available at <https://store.lexisnexis.com/products/official-code-of-georgia-annotated-skuSKU6647> for \$412.00).

Id.

While the foregoing policy argument may animate and inform the Petitioners’ claim, they come before this Court supporting their claim with statutory construction and case law, understanding that trial courts do not make policy but rule upon the law. The Petitioners’ argument is that it “is hard to imagine a document [Tennessee Code Annotated] more clearly a public record than the official version of the law itself.” *Petitioners’ Memorandum in Support of Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access (“Petitioners’ Memorandum”)*, August 11, 2022 at 1. The Petitioners assert that the Respondent must provide access under the Petitioners’ Public

Records Request because the Respondent fits within the capacity of the functional equivalent of government, recognized by case law as being subject to the Public Records Act, Tenn. Code Ann. § 10-7-503, quoting the Petitioners' briefing as follows.

[U]nder 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.

Petitioners' Memorandum at 2.

After studying the case law and statutes and considering argument of Counsel, the Court respectfully differs from the Petitioners' analysis on the threshold issue of whether Tennessee Code Annotated constitutes a document required for public access under the Public Records Act. The Court concludes that Tennessee Code Annotated fits within an exception to the Public Records Act. That exception is found in section 10-7-503(a)(2)(A) of the Act. It provides that state records shall be open for inspection by citizens of the state "unless otherwise provided by state law."

The Court is persuaded by the Commission’s statutory construction, at pages 11-15 of its *Memorandum of Law in Support of the Tennessee Code Commission’s Motion to Intervene*, August 12, 2022, as well as factoring in the text of Tenn. Code Ann. §§ 12-6-102 and 12-6-116, that the combination and totality of Tenn. Code Ann. §§ 1-1-105(a), 1-1-106(s), 1-1-113(a)–(b), 3-10-108(d), 12-6-102 and 12-6-116 constitute state law that “otherwise” provides that Tennessee Code Annotated is exempt from access under the Public Records Act. This combination of statutes, the Court concludes, is indicative of legislative intent that the helpful publication of Tennessee Code Annotated for citizens of the State of Tennessee to be on notice of and understand the State laws, shall not be freely accessible, and shall be available only through sale or purchase.

The analysis is that sections 1-1-105(a), 1-1-106(a), 1-1-113(a)-(b), 12-6-102, and 12-6-116 are clear that the Tennessee Code is distinct from Tennessee Code Annotated and that the only free access to citizens to the laws of Tennessee is to the Tennessee Code. Then section 3-10-108² adds to this statutory construction the explicit wording that not

² This statute reads as follows:

§ 3-10-108. Legislative computer system; access

(a) The joint legislative services committee shall consider each application for direct access to the legislative computer system in which confidential information is stored or processed, or that is connected to another computer in which confidential information is stored or processed, and solely shall determine whether or not to permit direct access by the applicant.

(b) Direct access to such a computer may not be permitted unless protection of any confidential information is ensured.

(c) The provisions of § 10-7-503 shall not apply to records or information otherwise available in printed form or to information or records otherwise exempt from the provisions of § 10-7-503.

(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.

only the sale and publication of Tennessee Code Annotated are governed by sections 1-1-101 *et seq.* but also its “reproduction”—further evidence Tennessee Code Annotated is exempt from the Public Records Act.

In considering section 3-10-108 as one of the several statutes that together indicate the Legislature has exempted Tennessee Code Annotated from the Public Records Act, the Court has not adopted the Petitioners’ position that the section is irrelevant. The Petitioners’ position focuses on the title of section 3-10-108(d), “Access to legislative computer system—Reproduction of Tennessee Code Annotated,” and reasons that the statute is irrelevant because the Commission and its Counsel, the Attorney General, have admitted that the document the Petitioners are seeking to access under the Public Records Act—the most recent version of Tennessee Code Annotated—is not in the possession of the Legislature or the Claims Commission, and therefore Tennessee Code Annotated is not located on the legislative computer system. The Petitioners reason that because the legislative computer system is the subject section 3-10-108 covers, the section is irrelevant.

To the contrary the Court concludes that section 3-10-108 is relevant and should be included with the other components of the statutory construction. The Court is persuaded by the Commission’s argument that the Public Records Act does not apply to Tennessee Code Annotated because its reproduction is regulated and exempted in Tenn. Code Ann. §§ 1-1-101 *et seq.*, quoting the Commission’s argument as follows.

(e) The committee shall designate the terminals, if any, at which public access is given to public information. The data processing equipment located in the offices of members of the general assembly and legislative staff need not provide such access if not so designated by the committee. TENN. CODE ANN. § 3-10-108 [emphasis added].

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.⁸

⁸ “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).

Memorandum of Law in Support of the Tennessee Code Commission’s Motion to Intervene,
August 12, 2022 at 15.

Thus, putting aside, as it must, whether the Legislature’s policy of not providing citizens free access to Tennessee Code Annotated is or is not sound, the Court concludes that based upon the foregoing statutory construction, Tennessee Code Annotated constitutes, under the Public Records Act, section 10-7-503(a)(2)(A), a document exempt from disclosure by state laws and is not required to be accessible under the Public Records Act. It follows, then, that the Respondent is not required to provide access to the Petitioners of Tennessee Code Annotated because the publication fits within an exception under the Public Records Act, and the Petition in this case must be dismissed.

The foregoing ruling is dispositive, making it unnecessary to decide the other two defenses asserted by the Respondent, and supported by the Commission: (1) that the Respondent is not required to provide Petitioners access because the Respondent is not the functional equivalent of a governmental entity, and (2) that access is foreclosed by the copyright law. Nevertheless, in the interest of avoiding a time-consuming and expensive remand even if there is a reversal of the above statutory construction, for completeness the Court shall rule upon these two defenses.

With respect to the application of the functional equivalent doctrine in this case, the Court concludes that if Tennessee Code Annotated does not fit the general exception to the Public Records Act, as exempt from access based upon state law, then the Respondent is performing a governmental function by producing and publishing Tennessee Code Annotated. In so concluding and based upon the evidence of record, consisting of the Verified Petitions and the Affidavits and Declarations of: Carl Malamud, president of Petitioner Public.Resource.Org, and Anders Ganten, a Senior Director of the Respondent, the Court adopts the reasoning and authorities of the Petitioners at pages 10-17 of the *Petitioners' Memorandum* and pages 3-9 of the *Petitioners' Reply in Support of Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access*, August 19, 2022, which are incorporated herein.

With respect to the defense that Tennessee Code Annotated is eligible for copyright protection, the Court concludes that defense fails based upon the recent United States

Supreme Court case of *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1408 (2020). It held that annotations to the laws of Georgia included in the Official Code of Georgia Annotated (“OCGA”), as authorized by an arm of the Georgia legislature (Georgia’s Code Revision Commission) in the course of its official duties, are ineligible for copyright protection under the government edicts doctrine. In concluding that the annotations were authored by the Georgia legislature in the course of its official duties through the Commission, the majority of the U.S. Supreme Court cited to facts not present in this case.

- The Commission consists largely of legislators.
- The annotations are approved by the legislature.
- The State of Georgia has one official code—the “Official Code of Georgia Annotated” which, by vote of the Legislature, merges the statutory portion with the annotations to publish the final merged product as the Official Code of Georgia Annotated.

These factual distinctions, however, are not material, this Court concludes. That conclusion is based upon the text in the U.S. Supreme Court decision that a bright line test applies, “[W]e ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.” *Id.* at 1513. In deciding that the Commission qualified as a legislator, the Court explained,

The Commission is not identical to the Georgia Legislature, but functions as an arm of it for the purpose of producing the annotations. The Commission is created by the legislature, for the legislature, and consists largely of legislators. The Commission receives funding and staff designated by law for the legislative branch. Significantly, the annotations the Commission creates are approved by the legislature before being “merged” with the statutory text

and published in the official code alongside that text at the legislature's direction. OCGA § 1-1-1; see 906 F.3d at 1245, 1255; Tr. of Oral Arg. 8.

Id. at 1508.

Although some of these facts (as listed above) are not present in this case, nevertheless the Court concludes that the Tennessee Code Commission functions as an arm of the Legislature related to Tennessee Code Annotated because the Commission is created by the Tennessee Legislature. Tennessee Code Annotated section 1-1-105 designates Tennessee Code Annotated as an official compilation of the laws enacted by the Legislature. The Court therefore concludes that even with the factual distinctions between this case and *Georgia v. Public.Resource.Org*, nevertheless the bright line test stated by the U.S. Supreme Court disqualifies Tennessee Code Annotated as protected by copyright law.

It is therefore ORDERED that the following Prayer for Relief of the *Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access*, July 27, 2022:

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that this Court:

(1) Immediately issue an order requiring Lexis to appear before this Court within ten days and Show cause, if any they have, why this petition should not be granted, as provided by Tenn. Code Ann. § 10-7-505(b);

(2) Grant Petitioners a declaratory judgment that the document sought by their request—the complete and current electronic version of the TCA—is a public record under Tennessee law and that Lexis’s failure to grant the public access to and a copy of this public record constitutes a violation of the Act;

(3) Grant Petitioners a declaratory judgment that Lexis willfully refused to grant access to and a copy of the complete and current electronic version of the TCA as a public record;

(4) Order Lexis to immediately make a copy of the complete and current electronic version of the TCA available to Petitioners;

(5) Grant Petitioners their reasonable costs and attorney fees pursuant to Tenn. Code Ann. § 10-7-505(g);

(6) Grant Petitioners discretionary costs under Tenn. R. Civ. P. 54;

(7) Grant Petitioners such equitable relief as may be necessary to secure the purposes and intentions of the Act and specifically Tenn. Code Ann. § 10-7-505, including, if necessary, the exercise of the full injunctive remedies and relief available to the Court; and

(8) Grant Petitioners all such further relief to which they may be entitled

is dismissed with prejudice. Court costs are taxed to the Petitioners.

It is further ORDERED, for the record on appeal, that by Wednesday, September 7, 2022, at noon, the Respondent shall file the current version of the Tennessee Code Annotated reproduced in its entirety in a .nfo file format on a CD-ROM. It is ORDERED that the Clerk and Master shall place this filing of the Respondent under seal with only Respondent's Counsel, the trial court, and the appellate court(s) to have access to the under-seal filing. Neither the Petitioner nor the Intervenor shall have access to the under seal filing without an order being entered granting such access. The purpose of these measures is to preserve the Respondent's copyright protections throughout the proceedings until there is a final (including appellate) decision on that issue but to also have in the record the document that is in issue in this Public Records Request lawsuit.

Finally, Chancellor Lyle's term ends August 31, 2022, when she is retiring. Any further matters in the trial court in this case shall be presided over by Chancellor I'Ashea Myles. Her docket clerk is Jessica Taylor.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, fax, or efile as applicable to:

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Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson
Deputy Clerk
Chancery Court

August 30, 2022