NO. M2022-01260-COA-R3-CV
COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

PUBLIC.RESOURCE.ORG, ET AL.,

Plaintiffs-Appellants,

v.

MATTHEW BENDER & CO., INC.,

Respondent-Appellee,

and

TENNESSEE CODE COMMISSION,

Intervening Respondent-Appellee.

ON APPEAL FROM THE JUDGMENT OF THE DAVIDSON COUNTY CHANCERY COURT

BRIEF OF INTERVENING RESPONDENT-APPELLEE

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly ruled that "Tennessee Code Annotated" is exempt from disclosure under the Tennessee Public Records Act because it fits within the "state law" exception in Tenn. Code Ann. § 10-7-503(a)(2)(A).

2. Alternatively, whether Petitioners were properly denied access to Tennessee Code Annotated under the Public Records Act because its publisher, Matthew Bender & Company, Inc., is not a governmental entity.

3. Alternatively, whether Petitioner was properly denied access to Tennessee Code Annotated under the Public Records Act because Tennessee Code Annotated is copyright-protected.

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves a request made under the Tennessee Public Records Act for free access to Tennessee Code Annotated, which is published by Respondent, Matthew Bender & Co., Inc. ("Matthew Bender").

Factual and Legal Background

Tennessee Code Annotated Contains the Official Tennessee Code, As Well As Annotations to the Code.

Tennessee Code Annotated ("TCA") consists of two discrete works. The first is the Tennessee Code itself, 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. *See Chumbley v. People's Bank & Trust Co.*, 60 S.W.2d 164, 166 (Tenn. 1933) (holding that the Tennessee Code is "the collection and compilation in logical and concise form of all the general statutes of the state.") The enrolled draft of the "official Tennessee Code" and any supplemental reenactments are required to be deposited with the Tennessee Secretary of State and "carefully preserved by that officer as the official code of this state, adopted and declared to be such." *See* Tenn. Code Ann. § 1-2-102 and § 1-2-114(b)(5). The Tennessee Code is accessible to the public, free of charge, through the Tennessee Secretary of State.[1] *See* Tenn. Code Ann. §§ 12-6-102, -103, and -116.

The TCA, on the other hand, is defined as the "annotated edition of the code provided for by chapter 1 of this title." Tenn. Code Ann. § 1-2-

[1] Additionally, Matthew Bender is required to provide a free public-access version of the Tennessee Code on the Internet. *See* R. Vol. I at 25, § 1.16.

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. (R. Vol. II at 222-225.) When the official Tennessee Code and the annotations are combined, the resulting publication—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). The text of the statutes, codes, and code supplements appearing in this compilation—*but not the annotations, footnotes, and other editorial material*—"shall constitute prima facie evidence of the statutory law of this state" and "may be cited as Tennessee Code Annotated or by the abbreviation 'T.C.A.'" Tenn. Code Ann. § 1-1-111(b).

The Tennessee Code Commission Oversees the Preparation of the TCA.

The Tennessee Code Commission is statutorily responsible for the preparation and production of the TCA:

> The Tennessee code commission is hereby 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(a). The Commission is a five-member body created by the General Assembly in 1953. *See* 1953 Tenn. Pub. Acts, ch. 80, § 1.

The General Assembly originally created a three-member commission in 1951 with authority to negotiate with publishers "with reference to the preparation and codification of the statutes of the State" and to make recommendations to the General Assembly regarding the adoption of a Code. 1951 Tenn. Pub. Acts, ch. 175. The 1951 commission subsequently recommended the

> publication of the 1931 Code, the 1950 Code Supplement, the Public Acts of 1951, the Public Acts of the Seventy-Eighth General Assembly, and the Public Acts of succeeding Sessions of the General Assembly into an official annotated compilation to be known as 'Tennessee Code Annotated', said code to be compiled and published by a private publisher under the supervision and direction of a permanent Tennessee Code Commission.

1953 Tenn. Pub. Acts, ch. 80. The 1951 commission further recommended the establishment of a long-range plan to ensure that "Tennessee Code Annotated" would be kept up-to-date and current as an official annotated code compilation. *Id.*

In response to this recommendation, the General Assembly established the Code Commission. 1953 Tenn. Pub. Acts, ch. 175, § 1. The Commission currently consists of the Chief Justice of the Tennessee Supreme Court, the Tennessee Attorney General, and the Director of the Office of Legislative Legal Services, who all serve as *ex officio* members. Tenn. Code Ann. § 1-1-101. The Chief Justice appoints the two remaining

at-large members, one of whom is currently an attorney in private practice. *Id.*

The Code Commission Has Authority to Contract with a Private Publisher to Annotate the Code and Publish the TCA.

In addition to being directed to "formulate and supervise the execution" of the long-range plans regarding the TCA, the Code Commission is given authority "on behalf of the state of Tennessee" 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(a). This includes 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." *Id.*

Any such contract with a law-book publisher shall contain, among other things, specifications for the size of type to be used in the text of the statutes and the annotations, the grade and weight of paper, the size of the volumes, provisions for pocket supplements and publication of replacement volumes, as well as the price at which the TCA and any pocket supplements and replacement volumes shall be sold in Tennessee. Tenn. Code Ann. § 1-1-107. In preparing the manuscript of the revised compilation, including pocket supplements and replacement volumes, the Commission is required to "copy the exact language of the text of the statutes, codes and session laws of a public and general nature of the state of Tennessee." Tenn. Code Ann. § 1-1-108(a). However, the

Commission is permitted to make certain non-substantive stylistic changes. *Id*.

The Code Commission is required to review any manuscript of the revised compilation, pocket supplement, or replacement volume and determine whether it conforms to the "[C]ommission's publication plans and meets and satisfies the requirements of this chapter," as well as the requirements of any publication contract. Tenn. Code Ann. § 1-110(a). Once the Commission determines that a manuscript meets all these requirements, it prepares a written certificate of approval for each volume and pocket supplement and certifies in writing that the Commission has approved the manuscript of the compilation (and pocket supplements). A copy of each volume and pocket supplement, along with the original certificate of approval, is then filed with the Secretary of State, and all other printed copies of each volume and pocket supplement contains a printed copy of the Commission's certificate of approval. Tenn. Code Ann. § 1-1-110.

Finally, while the General Assembly has authorized the Commission to spend appropriated funds as necessary, it has specifically prohibited the Commission from subsidizing the cost of publication of the TCA out of public funds. Tenn. Code Ann. § 1-1-113(a)-(b). Instead, the Commission "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." *Id.* § 1-1-113(b).

The Code Commission Has Contracted with Matthew Bender to Publish the TCA.

Pursuant to its authority under Tenn. Code Ann. § 1-1-106(a), in 1996 the Commission contracted with Matthew Bender[2] to compile and publish the TCA. The most recent contract took effect January 1, 2020, and is for a period of ten years. (R. Vol. I at 20-52.) The terms of this contract reflect the details of the publication plan formulated by the Commission for the editing, compiling, annotating, indexing, printing, binding, publication, sale, and distribution of the TCA.

As part of that publication plan, the contract requires Matthew Bender not only to compile the statutes, codes and session law, and annotations in the TCA, but also to provide a User's Guide, a comprehensive General Index, an appropriate table of contents, and various reference tables as part of the TCA. (R. Vol. I at 21-24, §§ 1.3, 1.8, 1.11.) Additionally, Matthew Bender is required to include the federal and state constitutions and the Tennessee Court Rules Annotated as part of the TCA. (*Id*. at 23-24, §§ 1.12, 1.14)

While the contract requires Matthew Bender to provide all editorial services necessary for the publication of the TCA, it prohibits Matthew Bender from altering the "sense, meaning or effect of any [statute]." (*Id*. at 22-23, § 1.9.) Matthew Bender is permitted to make the stylistic, non-substantive changes authorized by Tenn. Code Ann. § 1-1-108 but is

[2] Matthew Bender operates as a division of LexisNexis Group, which in turn is part of RELX PLC. (R. Vol. II at 210-211.) References to Matthew Bender in the Code Commission's brief are intended to include LexisNexis Group and RELX PLC.

required to provide a listing of all such editorial changes made to the Commission's Executive Secretary. (*Id.*)

Matthew Bender is also required to compile a complete annotation to each statute appearing in the TCA, which shall include all published opinions of the Supreme Court, the Court of Appeals and the Court of Criminal Appeals, and of all federal courts construing Tennessee statutes. (*Id*. at 21, § 1.6.) Additionally, Matthew Bender is required to provide collateral references to law reviews and annotations to Attorney General opinions, as well as the source and history of each section, including the number of that section as it appeared in any previous official code. (*Id*. at 22-23, §§ 1.7, 1.10.)

Matthew Bender must submit proposed changes to the Commission by October 31 each year. (*Id*. at 24-25, § 2.2.) The Commission reviews and deliberates on proposed edits to the TCA during a public meeting held annually in November. For example, at the November 2020 meeting, Matthew Bender proposed replacing Volumes 2A and 4 and splitting Volume 6 into three separate volumes, and the Commission approved these proposed changes. (R. Vol. II at 158, 161-74.) Matthew Bender then must provide page proofs to the Commission staff for proofreading; the final decision as to the contents of each volume rests with the Commission. (*Id*. at 27-28, §§ 2.6, 3.)

Procedural Background

Petitioners, Public.Resource.org and David L. Hudson, Jr.,[3] sent a letter on May 16, 2022, to LexisNexis requesting copies of the following records pursuant to Tennessee's Public Records Act, Tenn. Code Ann. § 10-7-503(a):

> Each electronic version of the most current Tennessee Code Annotated, reproduced in its entirety. Examples of such relevant version include, but are not limited to, files in the following formats: Microsoft Word, XML, PDF, and any other editable document or database.
>
> Copies of any final, executed versions of any contracts or agreements between your company and the Tennessee Code Commission (or the State of Tennessee or any officer, official, employee, or agent of the Tennessee Code Commission or the State) concerning the [to] editing, annotating, or publishing of the Tennessee Code Annotated that date from 1995 to the present.

(R. Vol. 1 at 66-68.) The letter asserted that LexisNexis and its company, Matthew Bender, "is, for purposes of its contracted work on the Tennessee Code Annotated, the 'functional equivalent' of government" and therefore "all of its records concerning this work are public records subject to the access requirement of the Act." (*Id.* at 67.) LexisNexis responded on May 20, 2022, stating its position that Tennessee's Public Records Act did not apply to it and declining to provide copies of the requested records. (R. Vol. I at 70.)

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[3] The letter was from counsel who indicated that he represented Mr. Hudson and "Carl Malamud, President and Founder of Public.Resource.Org." (R. Vol. I at 66.) Mr. Malamud was not specifically named as one of the Petitioners, but Public.Resource.Org—a separate corporate entity—was so named.

Petitioners filed a petition in Davidson County Chancery Court against Matthew Bender on July 27, 2022, seeking access to "the complete and current electronic version of the Tennessee Code Annotated and to obtain judicial review of the actions" of Matthew Bender in denying Petitioners access to these records. (R. Vol. I at 1-18.) The Code Commission sought and obtained permission to intervene for the purpose of defending its interest in the TCA and asserting its objections to production of the TCA under the Public Records Act. (R. Vol. I at 109 – Vol. II, 78.)

A show-cause hearing was held on August 23, 2022. (R. Vol. 5, Transcript). The trial court issued its Memorandum and Order on August 30, 2022, dismissing with prejudice Petitioners' prayer for relief. (R. Vol. III at 357.) The court determined that the Tennessee Code Annotated fits within the "otherwise provided by state law" exception to the Public Records Act in Tenn. Code Ann. § 10-7-503(a)(2)(A). (R. Vol. III at 362.) Specifically, the trial court found 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." (*Id*. at 363.) The trial court further found that when these sections are construed in conjunction with the provisions of § 3-10-108, "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." (*Id*. at 364-65.)

Petitioners timely filed a notice of appeal on September 12, 2022. (R. Vol. III at 376.)

STANDARD OF REVIEW

This is an appeal from a decision of the trial court after a final hearing on the merits. This Court's review of the judgment of a trial court sitting without a jury is *de novo* upon the record. *See Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). There is a presumption of correctness as to the trial court's findings of fact unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). The trial court's conclusions on matters of law are reviewed *de novo*, with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

ARGUMENT

I. Tennessee Code Annotated Is Exempt from Disclosure under Tennessee's Public Records Act.

The trial court properly determined that the TCA is exempt from disclosure under the Public Records Act because it fits within the Act's "state law" exception. Petitioners' sole argument for why the trial court erred is that Tenn. Code Ann. § 3-10-108(d) is limited to legislative computer systems and thus does not apply to the TCA. (Br. Appellants 16-20.) But the trial court did not base its ruling solely on the provisions of § 3-10-108(d). The trial court found that § 3-10-108, *along with* §§ 1-1-105(a), 1-1-106(a), 1-1-113(a)-(b), 12-6-102, and 12-6-116, were state laws that, when construed together, "otherwise provided" against public disclosure of the TCA under Tenn. Code Ann. § 10-7-503(a)(2)(A). (R. Vol. III at 364-65.)

A. Public records are subject to disclosure unless State law provides otherwise.

The Tennessee Public Records Act provides in pertinent part:

> All state, county and municipal records shall, at all times during business hours, . . . 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 provides that it is to be broadly construed in favor of public access, and Tennessee courts have consistently adhered to this policy. *See* Tenn. Code Ann. § 10-7-505(d).

While the Public Records Act expresses the State's policy of openness as to governmental records, the General Assembly nevertheless "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)). The Public Records Acts "is not absolute, as there are numerous statutory exceptions to disclosure." *Tennessean v. Metropolitan Government of Nashville*, 485 S.W.3d 857, 865 (Tenn. 2016). 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 particular record or class of records would outweigh the policy favoring public disclosure." *Allen*, 213 S.W.3d at 261. Thus, 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, this Court 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-6406-CH00294, 1994 WL 585684, at *3 (Tenn. Ct. App. Oct. 26, 1994). Instead, this 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).

B. State law "otherwise provide[s]" that the TCA is exempt from public disclosure.

Here, as the trial court found, the General Assembly has enacted a statutory scheme that "otherwise provide[s]" against free public access to the TCA by instead providing for the publication *and sale* of the TCA. That statutory scheme is simply incompatible with providing free public access to the TCA.

First, the General Assembly has distinguished between the "Tennessee Code" and "Tennessee Code Annotated," defining Tennessee Code Annotated as the "annotated edition of the code provided for by chapter 1" of Title 1. Tenn. Code Ann. § 1-2-101(a). Second, the General

Assembly created the Tennessee Code Commission and authorized it to contract with a publisher for the "editing, compiling, annotating, indexing, printing, binding, publication, *sale and distribution*" of the TCA; and it expressly prohibited the Commission from subsidizing the publication of the TCA with public funds. *See* Tenn. Code Ann. §§ 1-1-105(a), -106(a), and -113(b) (emphasis added). Instead, the publisher "shall be required to depend for compensation upon the proceeds of the sale of the publication." *Id.* § 1-1-113(b).

Third, the General Assembly has specifically exempted the TCA from the provisions of Tenn. Code Ann. §§ 12-6-101, -102, -103, and -116, which require the Secretary of State to distribute printed copies of the public acts each year and to publish the acts in electronic format on the Department of State's website. *See* Tenn. Code Ann. § 12-6-102(e) (providing that "[t]his section and §§ 12-6-101 and 12-6-103 shall not apply to the Tennessee Code Annotated, any supplement thereto or replacement volume thereof"). Finally, the General Assembly provided in Tenn. Code Ann. § 3-10-108(d) 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."

When the provisions of these statutes are construed together, it is clear, as the trial court found, that the General Assembly intended for these provisions to replace the provisions of the Public Records Act with respect to access to the TCA. *See* R. Vol. III at 362-365. "[T]he Tennessee Code is distinct from Tennessee Code Annotated," and "the only free access to citizens to the laws of Tennessee is to the Tennessee Code." (R. Vol. III at 363.)

Petitioners' argument is that the trial court incorrectly expanded the scope of § 3-10-108(d) because that statute applies to the legislative computer system and the TCA "is neither stored on a legislative computer system nor in the possession, custody, or control of the legislature." (Br. Appellants 20.) But this argument fails for two reasons: First, the trial court expressly stated that it considered § 3-10-108 only "as *one of the several* statutes that *together* indicate the Legislature has exempted Tennessee Code Annotated from the Public Records Act." (R. Vol. III at 364 (emphasis added).) And Petitioners have no argument for why the remaining several statutes do not show a legislative intent to exempt the TCA from public disclosure.

Second, Petitioners' argument is wrong anyway. The Office of Legislative Information Systems is required to maintain "on its electronic data processing equipment the complete text of Tennessee Code Annotated for the use of the general assembly and its staff and the Tennessee code commission and its staff." Tenn. Code Ann. § 3-16-101(4). And the legislative computer system and electronic data-processing equipment in the legislative branch are maintained through the Office of Legislative Information Systems. *See* Tenn. Code Ann. § 3-16-103.

Petitioners also assert that the trial court's construction of § 3-10-108(d) creates "an unnecessary conflict" between that provision and the Public Records Act. (Br. Appellants 20.) But any state law that "otherwise provide[s]" against public disclosure of government records obviously conflicts with the Public Records Act and its presumption in favor of disclosure of government records. And it well settled 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*, 312 S.W.3d 515, 527 (Tenn. 2010), and that 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).

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 30 years earlier. *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 in § 3-10-108(d) that *only* the publication and sale of the TCA is governed by the provisions of Title 1, Chapter 1. It did not. Instead, the Legislature 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" (emphasis added). It must therefore be presumed that the General Assembly intended for public access to the TCA, in any form, to be governed by the procedures set out in Title 1, Chapter 1—and *not* by the disclosure provisions of the Public Records Act. (R. Vol. III at 364-65.)

II. Alternatively, Access to the TCA Was Properly Denied Because Matthew Bender Is Not a Governmental Entity.

Even if this Court were to conclude that the "state law" exception in § 10-7-503(a)(2)(A) does not exempt the TCA from public disclosure, it

should affirm the trial court's denial of relief on the alternative ground that Matthew Bender is not a governmental entity and therefore not subject to the Public Records Act. *See* Tenn. Code Ann. § 10-7-503(a)(1)(A)(i). Although the trial court correctly concluded that its determination that the TCA fit within the "state law" exception to the Public Records Act was dispositive of this case, it nevertheless proceeded to opine on this alternative issue, finding that Matthew Bender was the functional equivalent of the Commission. (R. Vol. III at 366.)[4]. On this point, however, and contrary to Petitioners' assertion (Br. Appellants 21), the trial court erred.

In *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67 (Tenn. 2002), the Supreme Court held that when a "private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency," records in the hands of such private entity are public records subject to disclosure under the Public Records Act. 87 S.W.3d at 78-79. The Court then adopted the "functional equivalency" test articulated by the Connecticut Supreme Court to determine when a private entity's records should be open to public inspection. *Id.*; *see id.* at 77 (citing *Conn. Humane Soc'y v. Freedom of Info. Comm'n*, 591 A.2d 395, 397 (1991)).

In making that determination, the Supreme Court stated that courts should look to the totality of the circumstances in each given case and that no single factor will be dispositive. *Id.*

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[4] The court addressed this issue, as well as the copyright issue discussed in Section III below, "for completeness" and "in the interest of avoiding a time-consuming and expensive remand." (*Id.*)

> The cornerstone of this analysis, of course, is whether and to what extent the entity performs a governmental or public function, for we intend by our holding to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibility to a private entity. Beyond this consideration, additional factors relevant to the analysis include, but are not limited to, (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. At the same time, however, the Supreme Court cautioned that its holding was not intended to allow public access to records of every private entity that provides any specific, contracted-for service to governmental agencies, noting that "[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*.

Application of *Cherokee*'s functional-equivalency test here leads to the conclusion that Matthew Bender is not a governmental entity.

A. Matthew Bender does not perform a governmental function.

Under the first prong of the test, the question is whether the private entity performs a governmental function. Petitioners argue that Matthew Bender "performs the quintessentially governmental function of producing and publishing the law of Tennessee—the TCA." (Br. Appellants 29.) Plaintiffs are incorrect.

This Court has defined a "traditional governmental function" as one that "is able to be adequately performed only by government, is

traditionally expected to be performed by government, or is required to be performed by the command of the Legislature or the constitution." *Crowe v. John W. Harton Mem'l Hosp.*, 579 S.W.2d 888, 892 (Tenn. Ct. App. 1979). And in the context of applying the functional-equivalency test, this Court relied on the definition of "governmental function" contained in Connecticut's Freedom of Information Act:

> (11) "Governmental function" means the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency. "Governmental function" shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.

Allen v. Day, 213 S.W.3d 244, 253-54 (Tenn. Ct. App. 2006) (quoting Conn. Gen. Stat. Ann. § 1-200(11)).

The editing and publishing services provided by Matthew Bender do not fit these definitions. They are not performed only by government nor are they traditionally expected to be performed by government. Indeed, these services are not performed—and have never been performed—by the Code Commission. In this respect, Matthew Bender's services stand in stark contrast to the services at issue in *Cherokee*—providing childcare for indigent families and supervising childcare

placements—which had previously been performed by the Tennessee Department of Human Services and were thus found to be "undeniably public in nature." 87 S.W.3d at 78-79.

The original configuration of the Commission was authorized only to negotiate with *private* publishers for the "preparation and codification of the statutes of the State." 1951 Tenn. Pub. Acts, ch. 175. And the "governmental function" of the current Commission is to "formulate and supervise the execution of *plans*" to provide for the publication of the TCA and to ensure that the TCA is kept up to date and current as the official annotated code. Tenn. Code Ann. § 1-1-105(a). In order to execute any such plans, the General Assembly has given the Commission authority to enter into contracts with publishers for the "editing, compiling, annotating, indexing, printing, binding, publication, sale and distribution" of the TCA, as well as the "performance and execution of all other publication plans formulated by the commission." Tenn. Code Ann. § 1-1-106(a).

By entering into a publication contract with Matthew Bender, the Commission has not delegated—nor has Matthew Bender assumed—a governmental function. The Commission maintains responsibility to formulate and supervise the execution of plans regarding the TCA and has simply exercised the authority conferred by the General Assembly in § 1-1-106(a). Moreover, the Commission's authority under § 1-1-106(a) to contract with publishers is entirely permissive. It does not obligate the Commission to enter into any such contract and thus does not transform "production and publication" of the TCA into an inherently governmental function. *See Fortgang v. Woodland Park Zoo*, 387 P.3d

690, 699 (Wash. 2017) (finding that statute authorizing cities to contract with nonprofits for the "overall management and operation of a zoo" did not transform zoo management into an inherently governmental function).

B. Matthew Bender receives no government funding.

The second prong of the test asks whether the private entity receives government funding, and Matthew Bender receives no funding from the Commission. The Commission is statutorily prohibited from using public funds to subsidize the publication of the TCA. *See* Tenn. Code Ann. § 1-1-113(b). Instead, pursuant to the statute and the terms of the contract, Matthew Bender is authorized to charge a fee to customers accessing online copies of the TCA and to sell hard copies of the TCA. *Id.*, *see also* R. Vol. II at 219.

Plaintiffs argue that this sales revenue constitutes "indirect government funding." (Br. Appellants 33.) It does not, since no monies flow, in any direction, from the State treasury. Furthermore, this sales revenue is an insignificant percentage of the total revenue of a publicly traded corporation with offices in 40 countries and over 33,000 employees. (R. Vol. II at 211.) And finally, to the extent courts have looked beyond percentage and considered the nature of a public-funding scheme, they have found that a "fee-for-services" model weighs against functional equivalency. *See Envirotest Sys. Corp. v. Freedom of Info. Comm'n*, 757 A.2d 1202 (Conn. App. 2000) (amount of government funding irrelevant where payment is fee-for-services pursuant to contract and thus funding factor weighs against a finding of functional equivalency); *Domestic Violence Servs. of Greater New Haven, Inc. v.*

Freedom of Info. Comm'n, 704 A.2d 827, 833-34 (Conn. App. 1998) (even though entity received "substantial funds" from local, state, and federal government, the funds were fees for services, in the form of grants, and therefore did not weigh in favor of functional equivalency).

C. Matthew Bender is not controlled by the Commission.

The third prong of the functional-equivalency test focuses on the extent of government involvement with, regulation of, or control over the private entity. Here, there is no evidence that the Commission (or any other governmental agency) has any significant involvement with the regulation of, or control over, Matthew Bender, and certainly not with respect to any of the day-to-day operations of Matthew Bender. (R. Vol. II at 212-214.)

Petitioners argue that Matthew Bender is controlled by the Commission because under the terms of the contract, Matthew Bender "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." (Br. Appellants 33.) But the Commission does not control Matthew Bender's day-to-day operations. As previously noted, the contractual terms to which Petitioners point simply reflect the details of the publication plan formulated by the Commission for the editing, compiling, annotating, indexing, printing, bindings, publication, sale and distribution of the TCA. And courts applying the functional-equivalency test have found that similar statutory monitoring requirements and contractual terms do not constitute day-to-day government supervision, but instead constitute "only the control necessary to ensure that government funds are properly used and to protect the government's

interest." *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 859 N.E.2d 936, 943 (Ohio 2006) (citing *Ry. Labor Executives' Assn. v. Consol. Rail Corp.*, 580 F. Supp. 777, 779 (D.C.D.C. 1984)); *see Domestic Violence Servs.* 704 A.2d at 834; *Fortgang*, 387 P.2d at 702.

The contractual terms between the Code Commission and Matthew Bender do not establish the kind of governmental control present in the two cases relied on by Petitioners—*Cherokee and Allen.* (Br. Appellants 29-33.) In *Cherokee,* the state agency would, pursuant to the contract, approve "allowable costs" prior to the commencement of any work by Cherokee and would routinely conduct regular monitoring visits and review of Cherokee's client files. 87 S.W.3d at 71. And in *Allen,* the governmental sports authority was allowed not only to review the private management firm's annual budget and statements of operating revenue, expenses, and expenditures, but also to approve or reject the yearly operating budget prior to the commencement of each operating year. 213 S.W.3d at 257. The agreement also required the management firm to consult with the governmental authority twice a year regarding the rates and charges for events and parking; to provide the authority with a proposed allocation of shared employee expenses; and to collect all operating revenue and deposit it in an account maintained at a bank selected by the authority and pay any year-end remainder to the authority. *Id.* at 265-57.

D. Matthew Bender was not created by any legislative act.

The final factor looks to whether the private entity was created by an act of the legislature or previously determined by law to be open to public access. Petitioners do not dispute that Matthew Bender was

neither created by an act of the legislature nor previously determined by law to be open to public access. (Br. Appellants 33-34.) Nor is there any evidence in the record that Matthew Bender was used by the Commission to avoid the requirements of the Public Records Act.

In sum, all four factors weigh against a finding that Matthew Bender is the functional equivalent of the Code Commission. More importantly, the contract between the Commission and Matthew Bender does not implicate the problem the functional-equivalency test was designed to protect against: governmental entities operating in secret through private-entity surrogates. *See Clarke v. Tri-Cities Animal Care & Control Shelter*, 181 P.3d 881, 885-86 (2008) ("were we to conclude that TCAC is not a functional equivalent of a public agency, we would be setting a precedent that would allow governmental agencies to contravene the intent of the . . . [PRA] by contracting with private entities to perform core government functions"). The purpose of the test "is to identify private entities that have effectively assumed the role of government—not to erode the privacy of any entity that contracts with government to further the public interest." *Fortgang,* 387 P.3d at 526. Matthew Bender has not assumed the role of the Commission; it has contracted to provide editorial and publication services to the Commission and nothing more. Because Matthew Bender is not the functional equivalent of a governmental agency, it is not subject to the Public Records Act.

III. Alternatively, Access to the TCA Was Properly Denied Because the TCA is Copyright-Protected.

If this Court were to conclude both that the "state law" exception in § 10-7-503(a)(2)(A) does not exempt the TCA from public disclosure and that Matthew Bender is a governmental entity, it should still affirm the denial of relief on the alternative ground that the TCA is exempt from disclosure under the Public Records Act because it is copyright-protected material.

A. A copyright interest is a recognized exception to the Public Records Act disclosure requirement.

The trial court erred in refusing to recognize the TCA's copyright protection without first considering whether state or federal law otherwise provides the TCA an exemption from disclosure under the Public Records Act. (R Vol. III at 366-67.) This Court has applied the Supremacy Clause of the United States Constitution to recognize a non-statutory exemption to disclosure under the Public Records Act where disclosure would violate federal law. *See Seaton v. Johnson*, 898 S.W.2d 232, 237 (Tenn. Ct. App. 1995) (holding that certain railroad-crossing records were confidential under Federal Railroad Safety Act and therefore "immune to examination" by the public); *see also* Tenn. Att'y Gen. Op. 18-23, 2018 WL 2995268, at *1 (May 30, 2018) ("To 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." (citing *Seaton*)).

Copyrights are protected under federal law (*see* 17 U.S.C. §§ 102(a), 106), and as discussed in Subsection C below, nothing in U.S. copyright law prohibits the states generally from owning copyrights. *See* Tenn. Att'y Gen. Op. 07-130, 2007 WL 2819343, at *2 (Aug. 27, 2007) (concluding that the Department of Tourist Development may own photographs created as works made for hire). The TCA is copyright-protected; it is an original work of original authorship owned by the State of Tennessee as a work made for hire created by Matthew Bender. (R. Vol. 2 at 232-33; *see id.*, Contract ("The work of Publisher shall be work made for hire. All the contents of the T.C.A. . . . containing T.C.A. copyrightable materials . . . shall be copyrighted in the name of the State, and all copyrights thereto shall be vested, held, and renewed in the name of the State of Tennessee."; *see also id.* at 216, Ganten Aff. ("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 Commission asserted copyright protection in the trial court (R. Vol. I at 127-28), and under *Seaton* this assertion of a copyright in the TCA exempts the record from disclosure under the Public Records Act.

B. The trial court erred in opining on the validity of the State's copyright.

Petitioners argue that the TCA is not eligible for copyright protection and that the trial court correctly so found. (Br. Appellants 35-39; *see* R. Vol. III at 366-68.) But the Code Commission had argued below only that federal copyright law provides an exception to the Public Records Act with respect to copyrighted works and that the TCA is

exempt from disclosure as a public record for that reason. (R. Vol. I at 128.) The Commission did not place the validity of the State's copyright at issue in this proceeding. Furthermore, and in any event, the trial court should not have opined on the validity of the State's copyright because it lacked jurisdiction to do so.

Under 28 U.S.C. § 1338, subsection (a), federal courts possess exclusive jurisdiction to resolve patent and copyright disputes. *See id.* ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to . . . copyrights."). "The Copyright Act is unusually broad in its assertion of federal authority. Rather than sharing jurisdiction with the state courts as is normally the case, the statute expressly withdraws from the state courts any jurisdiction to enforce the provisions of the Act." *Wells v. Chattanooga Bakery, Inc.*, 448 S.W.3d 381, 387 (Tenn. Ct. App. 2014).

The Commission does not suggest that state courts must avoid all issues that somehow involve copyrights or other intellectual property. "While it is generally true that cases alleging pure copyright infringements are reserved exclusively to federal courts, 'simply because an action is predicated on rights derived from the Copyright Act does not mean that the action is one for copyright infringement, or one 'arising under' the Copyright Act.'" *Minor Miracle Prods. LLC v. Starkey*, No. M2011-00072-COA-R3-CV, at *5 (Tenn. Ct. App. Jan. 12, 2012) (citing *Peay v. Morton*, 571 F. Supp. 108, 112-13 (M.D. Tenn. 1983)). But here the trial court purported to *invalidate* the State's longstanding copyright interest in the TCA—in a public-records lawsuit. The validity of a copyright—the very existence of the protected intellectual property—is

the most basic example of something that "arises under" United States copyright law. *See* 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship . . . .").

C. The State holds a valid copyright in the TCA.

Assuming, *arguendo*, that the lower court properly reached the merits of the Commission's copyright claim, the court erred in invalidating the State of Tennessee's asserted copyright interest in the Tennessee Code Annotated.

1. The Supreme Court broadly permits state and local governments to possess copyrights unless the work is a "government edict," carrying the force of law.

The Copyright Act protects "original works of authorship. 17 U.S.C. §§ 102(a), 106. The Act does not preclude state governments from owning copyrights. Indeed, the U.S. Supreme Court has explained that States are "free to assert copyright in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on." *Georgia v. Public.Resource.Org*, *Inc.,* 140 S. Ct. 1498, 1510 (2020).

Pursuant to the government edits doctrine[5], the High Court has held that "officials empowered to speak with the force of law cannot be

[5] The Court established the doctrine and applied it to Supreme Court opinions in *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055 (1834) and to state supreme court opinions in *Banks v. Manchester*, 128 U.S. 244 (1888). In that same year, the Court also found the government edicts doctrine did not apply to opinion-adjacent, explanatory materials (similar to annotations) in *Callaghan v. Myers*, 128 U.S. 617, 645 (1888).

the authors of—and therefore cannot copyright—the works they create in the course of their official duties." *Georgia*, 140 S. Ct. at 1504.

The Supreme Court in *Georgia* held that copyright does not vest in works that are "(1) created by judges and legislators (2) in the course of their judicial and legislative duties." *Georgia*, 140 S. Ct. at 1508. The Court invalidated the State of Georgia's copyright in its official annotations because they were authored by the Georgia Legislature acting in its legislative capacity. *Georgia*, 140 S. Ct. at 1507-09. The TCA is distinguishable from Georgia's annotations because no Tennessee legislator or jurist authored the TCA while carrying out a legislative or judicial function.

2. The TCA is not a government edict because the commission is not a judicial or legislative body.

The TCA annotations are not a government edict because their author is not a judge or legislator. The *Georgia* Court framed the inquiry as whether the annotations' "purported author qualifies as a legislator" and found the commission in Georgia met this test because it functioned as an arm of the legislature. *Georgia*, 140 S. Ct. at 1508. It reached this conclusion because (1) the legislature created the commission, (2) a majority of lawmakers controls the commission, (3) the commission receives funding and staffing from the legislature, and (4) the legislature approves the annotations the commission prepares before they are "merged" with Georgia's statutory text during legislative session. *Id.* at 1508 (citing *Code Rev'n Comm'm v. Public.Resource.Org, Inc.*, 906 F.3d. 1229, 1245 (11th Cir. 2018)("The [Georgia] General Assembly actually votes (and must vote) to make the OCGA the official codification of

Georgia's laws and, in doing so, also votes to incorporate the annotations as part of the OCGA.")).

The Tennessee legislature (1) created the Code Commission and (3) funds and staffs it. However, the legislature does not (2) control the Commission and, critically, (4) the Tennessee General Assembly does not vote to "merge" the annotations with the Tennessee Code. In fact, no branch of Tennessee government controls the Tennessee Code Commission. Tenn. Code Ann. § 1-1-101. A non-legislative official represents the legislative branch; the remaining two members of the Code Commission can be anyone, and a private party currently holds one of those two spots. *Id.*

Reinforcing the conclusion that the Code Commission is not legislative, the Tennessee Supreme Court does not consider the Code Commission to be part of the Tennessee General Assembly. *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."). For all these reasons, the Commission is a civic or governmental body vested with governmental authority to act on behalf of the State, but it is not a legislative body. The trial court therefore erred in finding otherwise.

3. The commission did not carry out a legislative function in authoring the TCA.

Even assuming, *arguendo*, that the Tennessee Code Commission is a legislative body, the act of preparing the annotations is not a discharge

of legislative duties. On this factor, the Supreme Court in *Georgia* relied upon the Georgia Supreme Court's determination that the act of preparing the annotations was an act of "legislative authority." *Georgia*, 140 S. Ct. at 1509. The Court also held that the annotations "provide commentary and resources that the legislature has deemed relevant to understanding its laws" because the Georgia legislature **merged** the annotations with the official code of the state and voted them into law. *Id.* (emphasis added).

Here, the trial court erred in not addressing the legislative-function inquiry, having relied solely on an oversimplistic finding that the Commission "functions as an arm of the Legislature . . . because the Commission is created by the Tennessee Legislature." (R. Vol. III at 367-68.) By this reasoning, any government body a legislature creates is prohibited from asserting a copyright in its works. This cannot be and is not true because State agencies that are not lawmaking bodies, according to the Court in *Georgia*, can assert copyrights. 140 S. Ct. at 1510.

Regardless, the Tennessee Code Commission bears little resemblance to the Georgia Commission. No legislator or legislative representative sits on the commission who could exercise a legislative function. No court has considered the Tennessee Commission or construed it as acting in a legislative capacity (making, altering, or repealing laws; *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995)) when carrying out its statutory duties with respect to the Tennessee Code Annotated. There is also no basis to argue that the annotations represent "commentary and resources" that the ***Tennessee Legislature*** has deemed "relevant to understanding its laws" because

the Tennessee Legislature did not vote to enact the annotations or take any similar action signaling the official imprimatur of the annotations. *See Georgia*, 140 S. Ct. at 1508-09; *cf. Tenn.* Code Ann. § 1-2-114(b)(1)(C) (legislature reenacts the code but not the annotations).

Tennessee courts have correctly considered the Code Commission and the General Assembly to be distinct actors that wield different powers and authority. *See Jordan v. Knox Cnty.*, 213 S.W.3d 751, 756 n.2 (Tenn. 2007) ("In 2003, the General Assembly directed the Code Commission to change all references from 'county executive' to 'county mayor.'"); *Shelby Cnty. 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)); *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 on other grounds) (citing Tenn. Code Ann. § 1-1-108). A contrary holding would vest the Code Commission with lawmaking authority the legislature clearly did not intend. For all of these reasons, the Commission's preparation of the TCA annotation is not a legislative function, and the lower court erred in making this determination.

CONCLUSION

For the reasons stated, the judgment of the chancery court dismissing with prejudice Petitioners' prayer for relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46, Rule 3.02, the total number of words in this brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, and this Certificate of Compliance, is 8,138. The word count is based upon the word processing system used to prepare this brief.

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I hereby certify that on, a copy of the foregoing was filed electronically. Notice of this filing will be sent through the Court's electronic filing system and by e-mail to the parties listed below.

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