IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

PUBLIC.RESOURCE.ORG ET AL.,	)	
Petitioners-Appellants,	)	
v.	)	No. M2022-01260-COA-R3-CV
MATTHEW BENDER & COMPANY, INC., ET AL.,	)	
Respondents-Appellees.	)	

APPELLANTS' REPLY BRIEF

On Appeal from the Chancery Court for Davidson County, Tennessee
Public.Resource.org et al. v. Matthew Bender & Company, Inc., et al.
Case No. 22-1025-III

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INTRODUCTORY STATEMENT

The State of Tennessee has contracted with Lexis, a private entity, to compile, arrange, classify, annotate, edit, index, print, bind, publish, sell, and distribute the Tennessee Code Annotated (TCA)—the definitive, authoritative, authorized, and official version of all Tennessee statutory law. When Appellants sought access to the complete and current electronic version of the TCA under the Tennessee Public Records Act (Act), the State told them that it didn't have it. So Appellants requested a copy from Lexis, which has a copy but refuses to provide it because, it argues, it isn't the State.

Now it appears that the State *may* have an electronic version of the TCA. But Appellees' shell game nevertheless continues as they attempt to defeat the public's right of access under various statutory provisions, none of which exempts the TCA from disclosure under the Act. Jealously guarding Lexis's monopoly over the production and publication of the TCA, Appellees also aggressively discount the extent of the State's admitted control over Lexis's contracted-for services, which are undeniably governmental in nature, given that Tennesseans would not have any access to the law that governs them but for those services.

This case involves nothing less (or more) than privatization, the very phenomenon that inspired the creation of the Tennessee Supreme Court's functional-equivalence test in *Cherokee*. Because Lexis's relationship with the

State meets that test, the Chancery Court's decision should be affirmed in part. And because neither state nor federal law provides any reason to subvert the public's fundamental right to access the law of Tennessee, this case should be remanded with instructions to order Lexis to produce a copy of the complete and current electronic version of the TCA to Appellants.

ARGUMENT

I. The Commission exercises near-total control over Lexis's publication of the law of Tennessee.

Notwithstanding the obviously functional nature of the functional-equivalent analysis set out in *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67 (Tenn. 2002), and its progeny, both Respondent-Appellee Matthew Bender & Company, Inc., a division of LexisNexis Group (Lexis) and Intervening Respondent-Appellee the Tennessee Code Commission (Commission) double down on the same arguments that the Chancery Court correctly rejected when it found that Lexis was the functional-equivalent of the State of Tennessee under the Act.

Lexis argues that it "does not perform an inherently governmental function by providing specific, contracted-for services" to the Commission. Lexis Br. at 11; *see also id.* at 16–19. But this argument ignores the undeniably public nature of the "specific, contracted-for services" that Lexis provides: production and publication of the definitive, authoritative, authorized, and

official version of all Tennessee statutory law. *See* Tenn. Code Ann. §§ 1-1-105(a) (deeming the TCA the "official compilation of the statutes, codes and session laws of the state of Tennessee"), 1-1-111(b) (providing that the certified TCA "shall constitute prima facie evidence of the statutory law of this state" and shall be used "as the official compilation of the statutory law.").

Like the contractors found to be the functional equivalents of the State in *Cherokee* and other cases, Lexis acts as a "gatekeeper" between the public and the law of Tennessee. "[B]ut for the existence of [Lexis], the general public would interact directly with the government to access the public services provided by [Lexis]," and the public has "no choice but to interact with the private contractor" that produces and publishes the TCA. Lexis. Lexis Br. at 12–14.

On the other hand, and unlike the private entities in *Gautreaux* and *Memphis Publishing*, Lexis does not "merely act[ ] as a bookkeeper" for the State, nor are its services "incidental" to "a task wholly assumed by the [Commission]." *Gautreaux v. Internal Med. Educ. Foundation, Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011); *Memphis Publ'g Co. v. City of Memphis*, No. W2016-01680-COA-R3-CV, 2017 WL 3175652, at *7 (Tenn. Ct. App. July 26, 2017). According to the Commission, "[t]he editing and publishing services provided by [Lexis] . . . are not performed—and have never been performed—by the Code Commission." Comm'n Br. at 28. Further, both Lexis and the Commission

claim that the work done by Lexis under the Commission's supervision is sufficiently creative to qualify for copyright protection. *See* R. 216 ("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.").[1] For example, it is Lexis—not the Commission—that selects cases for inclusion in the TCA and creates the content of the annotations. R. 200, 205–06.[2]

Appellees' attempts to downplay the extent of the State's control over Lexis are also unavailing. Lexis argues that its contract with the Commission "does not rise to the level of pervasive government involvement." Lexis Br. at 22. The Commission argues that there is no functional equivalency here because it does not control Lexis's "day-to-day operations." Comm'n Br. at 31. But while pervasive, day-to-day control may be sufficient to establish functional equivalence, it is not necessary, and the rule has never been so

[1] In the Chancery Court, Lexis admitted that the preparation of the TCA is a "labor-intensive creative process" that includes reading, reviewing, and analyzing opinions and other materials, verifying sources, and drafting annotations—a process that Lexis also admitted is at all times subject to "the terms of [Lexis's] vendor Contract with the Commission." R. 199–200.

[2] "Pursuant to the terms of a vendor Contract, [Lexis] simply publishes hardcopy and on-line copies of the Tennessee Code the same as any other custom publisher of books and textbooks, and researches and drafts Annotations for the TCA in the same manner as a freelance writer hired to create content." R. 200, 205–06.

narrow. *See Allen v. Day,* 213 S.W.3d 244, 253–54 (Tenn. Ct. App. 2006) ("'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 . . . 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 . . .*'") (quoting Conn. Gen. Stat. Ann. § 1-200(11) (emphasis added)).

In *Cherokee*, the State did not exercise "complete control or supervision" over the private contractor. Yet our Supreme Court nevertheless found that the State's audits, monitoring visits, and regular reviews of the contractor's files evidenced "a significant level of governmental control and oversight" that weighed in favor of finding functional equivalence. 87 S.W.3d at 71. Similarly, this Court found functional equivalence where the State merely "monitored" a private contractor "to ensure that its contractual obligations are fulfilled." *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009).

There is no dispute that Lexis has numerous and minutely detailed contractual obligations to the Commission, or that the Commission monitors Lexis's fulfillment of those obligations very closely indeed. By statute, Lexis's agreement with the Commission must "prescribe the specifications for the publication" of the TCA, including "such other provisions as are necessary for

the full performance of the publication plans formulated by the commission." Tenn. Code Ann. § 1-1-107. And under Appellees' agreement—as Lexis acknowledges—the Commission "has final authority over the contents and formatting of the TCA, including over items such as page size, typeface, paperweight, organization, and specific language," and Lexis "must" implement style changes requested by the Commission and "abide by all decisions of the Code Commission" as to both the form and content of the TCA. Lexis Br. at 5 (citations omitted). Like the functionally equivalent non-governmental entity charged with managing the Arena in *Allen*, Lexis "not only agreed to comply with the [Commission]'s overarching directives regarding the [production and publication of the TCA] but it acquiesced to the [Commission]'s control over more minute managerial decisions." 213 S.W.3d at 259.

There is also no dispute that Lexis does not receive funding directly from the State and is not a creature of the General Assembly. But the latter was also true in *Cherokee*, *Allen*, *Friedmann*, *City Press*, and *Wood*, where each of the private entities at issue was nevertheless found to be the functional equivalent of the State. *See Cherokee*, 87 S.W.3d at 80; *Allen*, 213 S.W.3d at 260; *Friedmann*, 310 S.W.3d at 375–76 (Tenn. Ct. App. 2009); *City Press Commc'ns, LLC v. Tenn. Secondary Sch. Athletic Ass'n*, 447 S.W.3d 230, 237 (Tenn. Ct. App. 2014); *Wood v. Jefferson Cnty. Econ. Dev. Oversight Comm.,*

Inc., No. E2016-01452-COA-R3-CV, 2017 WL 4277711, at *7 (Tenn. Ct. App. Sept. 26, 2017). This factor was not dispositive in those decisions and should not be dispositive here.

II. State law does not exempt the TCA from disclosure under the Act.

Lexis and the Commission argue that the TCA is exempt from the Act because the public's access to it is "otherwise provided by state law." They point (as did the Chancery Court) to section 3-10-108(d) of the Tennessee Code, which governs access to the "Legislative computer system," as well as various provisions of Title 1, Chapter 1 (which governs the Commission) and Title 12, Chapter 6 (which governs the "Distribution of Publications"). Lexis Br. at 28–34; Comm'n Br. at 20–25.

Appellants have explained that the Chancery Court erred when it concluded that the TCA is exempt from disclosure under the Act because section 3-10-108(d) applies to the "Legislative computer system" only and not to any records in the possession of Lexis, including the complete and current electronic version of the TCA. Appellants' Br. at 16–18. In response, the Commission argues that Appellants are wrong because "[t]he 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.'" Comm'n Br. at 24 (quoting Tenn. Code Ann. § 3-16-101(4)). Candidly, this is the first time in this litigation that the Commission or the State has made this assertion.

To the extent that the Commission is now suggesting that it or the State of Tennessee is in possession of an electronic version of the TCA, this is an astonishing reversal of the formal responses Appellants received to their public-records requests to the State. The Attorney General flatly denied that the Commission, a Commission member (the Director of Legal Services of the General Assembly), the Commission's Executive Secretary (the Revisor of Statutes, a member of the Legislature's Office of Legal Services), or the Legislature's Office of Legal Services had access to an electronic version of the TCA.[3] The Attorney General also advised Appellants that the Commission's Executive Secretary "has never requested that an 'electronic format' of the Tennessee Code Annotated be delivered" to the Commission under Section 2.9

[3] This assertion was made repeatedly. *See* R. 57 ("Please be advised that the Revisor of Statutes does not [have] an electronic version of the most current Tennessee Code Annotated *in its entirety*."); R. 64 ("To the extent you are now making a request for copies of these documents to the Office of Legislative Legal Services, including its Director, please be advised that neither the Office, nor its Director, has any documents responsive to this request."); *id.* ("[Y]our client requested a 'copy of each electronic version of the most current Tennessee Code Annotated, reproduced in its entirety.' . . . Ms. Seals, both in her capacity as the Revisor of Statutes and as Executive Secretary for the Tennessee Code Commission, does not have any records responsive to this request.").

of the Commission's agreement with Lexis, which provides the Commission with the right to receive the complete and current electronic version of the TCA. R. 27–28, 63–64.

Because the Attorney General told Appellants that the State of Tennessee did not have the complete and current electronic version of the TCA in its possession, Appellants then wrote to Lexis requesting access to "[e]ach electronic version of the most current Tennessee Code Annotated, reproduced in its entirety." R. 12, 66–68. Denied access by Lexis, Appellants then sought judicial review of Lexis's denial in the Chancery Court—not the denial of the Commission or the State of Tennessee. *See* Lexis Br. at 37 ("This Appeal concerns ***only*** Lexis's denial of the TPRA request directed to it.").

Regardless of the State's inconsistency or inability to determine whether it does or does not possess an electronic copy of the TCA, neither the Commission nor Lexis explain how section 3-10-108, which governs access to legislative computer systems, precludes or prohibits Tennessee citizens' access to the electronic copy of the TCA *in Lexis's computer system*. Indeed, Lexis argues that it does not matter who possesses a copy of the TCA or where it is "housed": "Whether the specific copy of the TCA that Appellants seek are [sic] housed on the legislative computer system or not, title 1, chapter 1 provides for the exclusive means of access to the TCA." Lexis Br. at 32; *see also id.* ("[T]he exception rooted in title 1, chapter 1 applies regardless of where the specific

copy of the TCA that is sought is housed."). This argument ignores the plain language of the statute.

Like section 3-10-108, neither title 1, chapter 1, nor title 12, chapter 6 say *anything* about the public's right of access to the complete and current electronic version of the TCA–the law of Tennessee–*in the hands of Lexis*, the private company hired by the State to publish it. Section 1-1-105(a) merely provides the Commission with authority "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 . . . including an electronically searchable database of such code." Sections 1-1-106(a) and 1-1-113 merely provide the Commission with the authority to contract out that work and the parameters for payment. And section 12-6-116 applies only to the Secretary of State's authority to distribute "the public acts of the general assembly which are prepared at intervals during and after each legislative session and made available online pending publication of the bound volumes of the public acts of Tennessee"—not the TCA.[4]

[4] Section 12-6-102, also relied upon by Appellees, "shall not apply to the [TCA], any supplement thereto or replacement volume thereof, or any act enacting that code."

Without citing any authority, the Commission argues that "[w]hen the provisions of these statutes are construed together, it is clear . . . that the General Assembly intended for these provisions to replace the provisions of the Public Records Act with respect to access to the TCA." Comm'n Br. at 23. But this baseless, bold assertion not only seeks to have this Court insert into the statute language the legislature did not enact, it also contradicts the Act's "presumption of openness" and the "clear legislative mandate favoring disclosure of governmental records." *Schneider v. City of Jackson*, 226 S.W.3d 332, 340 (Tenn. 2007).

Further, as the Commission concedes, establishing that another statute (or statutes) creates an exception to the Act's presumption and the General Assembly's mandate requires "'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 Act. Comm'n Br. at 22 (quoting *State ex rel. Guzman v. Darnell,* No. 01-A-6406-CH00294, 1994 WL 585684, at *3 (Tenn. Ct. App. Oct. 26, 1994)). A grab bag of statutory provisions that merely reference the Commission or the TCA is hardly persuasive, however, and neither the Commission nor Lexis should be allowed to create an ad hoc exception to the Act's default rule of disclosure out of whole cloth.

III. Federal law does not exempt the TCA from disclosure under the Act.

Appellants do not dispute that states, including the State of Tennessee, may own copyrights, as the Commission incorrectly suggests. Comm'n Br. at 34, 37. Instead, Appellants dispute the blanket assertion that mere ownership by the State of a copyright under the federal Copyright Act exempts that copyrighted work from disclosure under the Tennessee Public Records Act. *Id.* at 34–35; Lexis Br. at 37. That assertion is baseless, and it should be rejected here as it was in the Chancery Court.

Even assuming that the TCA is protected by the Copyright Act, notwithstanding the U.S. Supreme Court's decision in *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498 (2020),[5] no Tennessee authority holds

[5] It is not, as explained by Appellants in their brief. *See* Appellants' Br. at 35–39. The United States Copyright Office agrees.

In a January 26, 2021 letter, the Copyright Office rejected Lexis's application to register the TCA on the bases of authorship (citing the government edicts doctrine and *Georgia*) and copyrightable material. *See* Jan. 26, 2021 United States Copyright Office Correspondence (included in the attached Appendix: United States Copyright Office Copy of Correspondence). Notwithstanding this rejection and Lexis's acknowledgement of this rejection ("I understand." *Id.*), neither Lexis nor the Commission disclosed this information during the proceedings in the Chancery Court, and Appellants only received it after the Chancery Court entered its final order. Appellants respectfully submit that this Court should take judicial notice of the Copyright Office's correspondence rejecting Lexis's copyright application. *See In re Bernard T*, 319 S.W.3d 586, 591 n.3 (Tenn. 2010) (stating that an appellate court "may take judicial notice of evidentiary issues in proper circumstances" and taking judicial notice of a juvenile court consent order concerning

that copyright ownership by the custodian of a public record constitutes an exception to the access requirements of the Act, or that providing access to the TCA under the Act would violate the Copyright Act.

The Commission's reliance on *Seaton v. Johnson*, 898 S.W.2d 232 (Tenn. Ct. App. 1995), is misplaced. That decision addressed the confidentiality of railroad-crossing records under the Federal Railroad Safety Act—not the accessibility of the TCA or any other public records under the Act. *See* Comm'n Br. at 34. The Commission's citations to the opinions of the Tennessee Attorney General and the Office of Open Records Counsel are similarly unpersuasive. *First*, those opinions are not the law in this State. *Second*, like *Seaton*, the cited Attorney General's opinion also does not address the intersection of the federal Copyright Act and the Tennessee Public Records Act. It merely refers to federal law as possibly trumping the Act. *See* Tenn. Att'y Gen. Op. 18-23, 2018 WL 2995268 (May 30, 2018) (acknowledging that "Tennessee courts have recognized that federal law can provide exceptions to Tennessee's Public

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parentage); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009) (stating that appellate courts may take judicial notice at any stage of the proceedings).

Notably, both Lexis and the Commission continue to claim copyright protection for the TCA where none exists. *See, e.g.*, Comm'n Br. at 37 ("The State holds a valid copyright in the TCA."). Asked by counsel for Appellants almost two months before they filed their briefs in this appeal to explain the import of this Copyright Office decision and how it may be reconciled with their positions in this matter, Lexis and the Commission have chosen to remain silent.

Records Act by virtue of the Supremacy Clause of the United States Constitution," citing *Seaton*, and opining that, "[t]o the extent any state or federal law provides otherwise with respect to the openness of a record, then the Public Records Act does not require the records custodian to make that record available for public inspection."). *Third*, the non-binding Office of Open Records Counsel opinion only addresses a situation where the copyright owner is a private entity—not the State.

States may own copyrights. But nothing in the Copyright Act prohibits the State, *as a copyright owner*, from making a copyrighted work public. More importantly for present purposes, there is no exception for copyrighted works under the Act that allows Lexis to hide behind its contractual obligation "to uphold the State's claimed copyright" and avoid its statutory obligation to provide the public access to the TCA.

CONCLUSION

For these reasons, the Chancery Court's decision exempting the TCA from disclosure under the Act should be reversed and this matter should be remanded to the Chancery Court with instructions to order Lexis to produce a copy of the complete and current electronic version of the TCA to Appellants.

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CERTIFICATE OF COMPLIANCE

This brief contains 3,417 words and thus complies with the applicable limitation in Tennessee Rule of Appellate Procedure 30(e).

This 5th day of May, 2023.

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