IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

DAVID L. HUDSON, *Petitioner*, v. MATTHEW BENDER & COMPANY, INC. *and* THE TENNESSEE CODE COMMISSION, *Respondents*.	)))))))))))))	Supreme Court No. ______________ COA No. M2022-01260-COA-R3-CV Davidson County Chancery Court No. 22-1025-III

APPLICATION FOR PERMISSION TO APPEAL

January 5, 2024

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I. DATE ON WHICH THE JUDGMENT WAS ENTERED AND WHETHER A PETITION FOR REHEARING WAS FILED

The Court of Appeals entered judgment on November 9, 2023. App'x 1.[1] Petitioner David L. Hudson did not file a petition for rehearing.[2]

II. QUESTIONS PRESENTED FOR REVIEW

1. Publishing the law is a necessary and integral part of the government function of law making, and Tennessee government has a long history of publishing the law with the assistance of private individuals and entities. The Court of Appeals decided that the private entity that publishes the Tennessee Code Annotated, the definitive, authoritative, authorized, and official version of all Tennessee statutory law, is not the functional equivalent of government. Did the Court of Appeals err?

2. The Tennessee Public Records Act requires disclosure of public records unless it is clear that they are exempt from disclosure. The

[1] The judgment, opinions, and relevant orders of the Court of Appeals are included in the attached Appendix (App'x).

[2] Hudson and Public.Resource.org were the petitioners in the trial court and the appellants below. The Court of Appeals dismissed Public.Resource.org because it is an organization based outside of Tennessee and lacks standing to file a petition under the Tennessee Public Records Act. *See* App'x 17.

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Court of Appeals found that that there is no explicit exception to the access requirement of the Public Records Act for the Tennessee Code Annotated, but that there is an implicit exemption because the legislature intended to contract with a publisher to produce and sell the Code. Did the Court of Appeals err?

These issues present questions of law, including issues of statutory interpretation, which this Court reviews de novo. *See Tenn. Dep't of Corr. v. Pressley*, 528 S.W.3d 506, 512 (Tenn. 2017) ("Statutory interpretation and the application of a statute to the facts of a case involve questions of law and are reviewed under a de novo standard of review."); *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002) ("Our determination whether the Tennessee Public Records Act applies to the records in [respondent]'s possession is a question of law.").

III. FACTS RELEVANT TO THE QUESTIONS PRESENTED

A. Introductory Statement

Petitioner seeks to vindicate and protect the public's right of access to the complete and current electronic version of the Tennessee Code

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Annotated–the law of Tennessee–in the hands of the private company hired by the State to publish it.

The state government of Tennessee has contracted with Respondent Matthew Bender & Company, Inc., a division of LexisNexis Group (Lexis), a for-profit corporation, to compile, arrange, classify, annotate, edit, index, print, bind, publish, sell, and distribute the Tennessee Code Annotated (TCA). Petitioner seeks access to the complete and current electronic version of this public record. Remarkably, the State does not have this electronic public record in its possession. As the TCA's publisher, Lexis does have this public record. Lexis has denied Petitioner his right of access to the TCA as a public record under the Act. Petitioner sought redress for that denial in the proceedings below.

The Chancery Court of Davidson County, Tennessee, denied Petitioner access, finding that a provision in Title 1 of the Code governing legislative computer systems exempted the TCA from the access requirement of the Act. Despite this finding, and in order to avoid "a time-consuming and expensive remand" if its ruling were reversed, the Chancery Court also found that Lexis was the functional equivalent of state government under this Court's decision in *Memphis Publ'g Co. v.*

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Cherokee Children & Family Servs., Inc., 87 S.W.3d 67 (Tenn. 2002), for the purpose of preparing and publishing the TCA, and thus subject to the Act.

The Court of Appeals disagreed with the Chancery Court, finding that Lexis is not the functional equivalent of a governmental entity. "[I]n the event that [it is] wrong about that," the Court of Appeals also considered whether the TCA is exempt from disclosure under the Act. Like the Chancery Court, the Court of Appeals determined that it was, although not under the statute governing legislative computer systems. Indeed, the Court of Appeals found that "no single statute . . . contains an explicit exemption from disclosure for the TCA under the [Act]." The Court of Appeals nevertheless affirmed the Chancery Court's judgment after recognizing an implicit exemption for the TCA.

B. The Tennessee Code Annotated and the Tennessee Code Commission

The laws of the State of Tennessee are compiled in the Tennessee Code. R. 5.[3] The TCA includes, among other things, the text of the Tennessee Code and annotations to the Tennessee Code, including

[3] Citations are to the record on appeal (R.) except where noted.

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references to secondary sources that discuss the Code; references to cases in which courts have interpreted the Code (called "Notes of Decisions"); cross-references to other sections of the Code or to relevant regulations; and detailed historical notes. *Id.*

By Tennessee law and tradition, the TCA is the definitive, authoritative, authorized, and official version of all Tennessee statutory law. *Id.* This Court, other Tennessee courts, federal courts, lawyers, and members of the public routinely and uniformly cite to the TCA to refer to Tennessee statutory law. *Id.* They virtually never cite to any unannotated version of Tennessee statutory law. *Id.*

The TCA is produced and published by Respondent the Tennessee Code Commission (Commission), a State entity established by statute. *Id.*; Tenn. Code Ann. § 1-1-101. The members of the Commission include the Chief Justice of the State of Tennessee, the Attorney General and Reporter of the State of Tennessee, the Director of Legal Services of the General Assembly of Tennessee, all serving *ex officio*, plus two members appointed by the Chief Justice. R. 5; Tenn. Code Ann. § 1-1-101.[4] Thus,

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[4] Because the Commission intervened as a respondent in the Chancery Court and is a party to these proceedings, Petitioner will file a

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the current members of the Commission include two sitting members of this Court as well as the Attorney General, whose office has represented the Commission in this case in the courts below.[5] The Commission's Executive Secretary is the Revisor of Statutes, a member of the Office of Legal Services. R. 5; Tenn. Code Ann. § 1-1-102(b).

The Commission is

> 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. The Commission has

> full power and authority on behalf of the state of Tennessee to perform all acts and to negotiate and enter into all contracts necessary for and expedient to the successful production and publication of a revised compilation of the statutory laws of Tennessee, including the power and authority to enter into

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motion to recuse Commission members Chief Justice Holly Kirby and Justice Jeffrey S. Bivins.

[5] *See* Tennessee Code Commission (roster of Commission published by the Court on its website tncourts.gov), available at https://www.tncourts.gov/boards-commissions/boards-commissions/tennessee-code-commission (last accessed Jan. 4, 2024).

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> contracts with a law book publisher for the editing, compiling, annotating, indexing, printing, binding, publication, sale and distribution of the revised compilation and the performance and execution of all other publication plans formulated by the commission.

Tenn. Code Ann. § 1-1-106.

Section 107 further provides that

> [a]ny contract with a law book publisher for the purposes referred to in §§ 1-1-105 and 1-1-106 shall prescribe the specifications for the publication of the revised compilation, including the size of type to be used in the text of the statutes and the annotations, the grade and weight of the paper to be used, the size of the volumes, appropriate provisions for the insertion of pocket supplements and the publication of replacement volumes, the price at which Tennessee Code Annotated shall be sold in Tennessee when originally published, and such other provisions as are necessary for the full performance of the publication plans formulated by the commission.

Tenn. Code Ann. § 1-1-107.

If the Commission finds that the manuscript of the TCA "printed, edited, annotated, indexed and bound" by a law book publisher under a contract is acceptable, the Commission "shall prepare an appropriate written certificate of approval" and "acting through its executive secretary or other authorized officer, shall certify in writing" that the Commission has approved the manuscript. R. 7; Tenn. Code Ann. § 1-1-110.

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The official status of the TCA has been expressly established by the Tennessee General Assembly for almost seven decades. R. 7. Since 1953, Tennessee statutory law has provided that "[n]o compilation or codification of the statutes of Tennessee not bearing a copy of the certificate of approval of the code commission as provided in § 1-1-110 shall be recognized as an official compilation of the statutory law of Tennessee." R. 7; Tenn. Code Ann. § 1-1-112.[6] The Commission cannot subsidize the publication of the TCA out of public funds; rather, it "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." R. 7; Tenn. Code Ann. § 1-1-113.

C. The Commission's Exclusive Contract with Lexis

The TCA is produced by Lexis, under a 2019 Restated Agreement for Publication with the Commission (the Agreement). R. 7; R. 20–52. Under the Agreement, Lexis "shall perform and provide all editorial services necessary for the publication of T.C.A.," and "shall provide and be responsible for all ongoing publishing requirements associated with

[6] This is established by reference to the TCA annotation for Tenn. Code Ann. § 1-1-112 entitled, "History," which states "Acts 1953, ch. 80, § 5; T.C.A. (orig. ed.), § 1-112."

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the maintenance of T.C.A." R. 8; R. 20.

Notwithstanding Lexis's responsibilities under the Agreement, the Commission itself must approve virtually every aspect of the TCA, including the form of annotations; the addition of new annotations; the removal of archaic or obsolete references or annotations; any changes to the content or arrangement of replacement volumes; and the contents of each volume. R. 8; R. 20–52. Exhibit A to the Agreement provides an exhaustive list of technical specifications that "may be changed with the written approval of the Commission," including (among many others) the size of the pages; the type face and size; the margins; and the paper weight. R. 8; R. 43–52.

Under the Agreement, Lexis "shall maintain the present style and format of the Code, and adhere to the Style Guidelines adopted by the Commission," and the Commission's "Style Guidelines for Codification of Public Chapters" includes provisions governing alphabetization, dates, numbers, punctuation, and miscellaneous words and phrases. R. 9; R. 44–50. Under the Agreement, Lexis will also "implement style changes requested by the Commission." R. 9; R. 50.

Section 7 ("Supervision") of the Agreement provides that Lexis

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> agrees that all compilations, codifications, annotations, and other matters to be included in T.C.A. shall be submitted to the Executive Secretary in advance of publication, in order that such items may be checked, proofread, verified and certified by the Executive Secretary prior to publication as provided by the minimum requirements.

R. 31. The Agreement further provides: "In the event of disagreement as to material to be included in such T.C.A., or as to any codification, annotation or other matter of editorial content, [Lexis] shall abide by and follow the decision of the Commission as communicated by the Executive Secretary," and "[i]n the event of any other dispute between [Lexis] and the Commission concerning publication of the T.C.A. or performance under th[e] Agreement, the decision of the Commission shall prevail." R. 9–10; R. 31. The Agreement also requires that Lexis provide the Commission, after each legislative session, the complete and current electronic version of the TCA. R. 10; R. 27–28. And the Commission may terminate the Agreement for cause or for convenience without cause "if for any reason the Commission determines, in its sole discretion, that such termination is in the best interest of the State." R. 10; R. 32–33.

D. Petitioner's Public Records Requests

On October 8, 2021, Vanderbilt Law School Professor Gautam Hans, working with Public.Resource.org, submitted a public records

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request to the Revisor of Statutes of Tennessee requesting "[a] copy of each electronic version of the most current Tennessee Code Annotated, reproduced in its entirety." R. 11; R. 54. Responding for the Revisor of Statutes, the Office of the Attorney General and Reporter of Tennessee denied Professor Hans's public records request on October 19, 2021, advising him "that the Revisor of Statutes does not [have] an electronic version of the most current Tennessee Code Annotated *in its entirety*." R. 11; R. 56–57 (emphasis in original).

Professor Hans replied on January 24, 2022, seeking several clarifications concerning the Attorney General's response, including its use of the phrase "*in its entirety*," and confirmation "whether the State has any electronic documents or files responsive to [Professor Hans's] request." R. 11; R. 59–61. Professor Hans's January 2022 letter also cited Section 2.9 of the Agreement, which provides that Lexis "shall prepare and provide to the Commission at no cost to the State of Tennessee a mutually agreeable electronic format containing an accurate representation of the material contained in the bound volumes of T.C.A. and its cumulative supplements." R. 11; R. 27–28.

The Attorney General responded on February 2, 2022, repeating

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that neither the Revisor of Statutes and Executive Secretary of the Commission nor the OLS had any documents or records responsive to Professor Hans's records request. R. 11; R. 63–64. The Attorney General also advised that the Executive Secretary "has never requested that an 'electronic format' of the Tennessee Code Annotated be delivered" to the Commission under Section 2.9 of the Agreement. *Id.*[7]

Based on these statements in formal response to a request for public records under the Act, Petitioner understood that the State of Tennessee does not have in its possession the complete and current electronic version of the TCA. R. 12. Given that understanding, and Lexis's exclusive contract with the State to prepare and publish the TCA, Petitioner wrote Lexis requesting access under the Act to "[e]ach electronic version of the most current Tennessee Code Annotated, reproduced in its entirety" on May 16, 2022. R. 12; R. 66–68.

On May 20, 2022, Lexis denied Petitioner's public records request, arguing that the Act does not apply to Lexis because Lexis "is not the

[7] The Agreement clearly provides the Commission, at the very least, the right to receive the complete and current electronic version of the TCA. R. 27–28. Thus, the fact that the only custodian of this public record is Lexis is the result of a conscious and intentional decision of the State and, specifically, the Commission.

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functional equivalent of a government entity." R. 12; R. 70.

E. Chancery Court Proceedings

On August 11, 2022, Petitioner filed a Petition for Access to Public Records and to Obtain Judicial Review of Denial of Access under the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503 and 10-7-505 (the Act), in the Chancery Court for Davidson County, Tennessee. R. 1–70. Petitioner sought access to and a copy of the complete and current electronic version of the TCA and to obtain judicial review of the actions of Lexis, who had denied Petitioner access to that public record.

The Chancery Court dismissed the Petition on August 30, 2022. R. 357–70. The Chancery Court reasoned that the TCA was exempt from disclosure under Section 10-7-503(a)(2)(A) of the Act because the sale, publication, and reproduction of the TCA is governed by title 1, chapter 1 of the Tennessee Code, as provided in Tenn. Code Ann. § 3-10-108(d).[8]

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[8] Section 3-10-108(d) applies to the "Legislative computer system" and not to any records in the possession of Lexis:

> (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

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R. 359–65.

Nevertheless, "in the interest of avoiding a time-consuming and expensive remand even if there is a reversal of [that] decision," the Chancery Court continued with its analysis under the Act and found that Lexis was the functional equivalent of the State because it "is performing

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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.

(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.

(Emphasis added.) *See also* 1987 Tenn. Pub. Acts, ch. 163, § 8 (R. 284–88).

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a governmental function by producing and publishing" the TCA. R. 366.[9]

F. Court of Appeals Proceedings

The Court of Appeals disagreed with the Chancery Court's finding that Lexis was the functional equivalent of government entity. The Court of Appeals observed that, "[w]hile the state certainly has always been in the law-making business, it has not traditionally been in the self-publishing business," and ultimately concluded that "under the main *Cherokee* factor"—that is, whether and to what extent the entity performs a governmental or public function—"Lexis does not perform a governmental function." App'x 10. As to the second *Cherokee* factor, the extent of government control, the Court of Appeals observed that "[t]he control exercised by the Commission is over the product, not Lexis itself," which is "simply performing a carefully regulated service for the state." *Id.*

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[9] Upon the request of Petitioner under Tenn. Code Ann. § 10-7-505(b) ("The court may direct that the records being sought be submitted under seal for review by the court and no other party."), the Chancery Court ordered Lexis to file in the court's registry "the current version of the Tennessee Code Annotated reproduced in its entirety"—that is, the public record sought by Petitioner in this case. R. 369. That document or documents were subsequently filed under seal and are now held in the registry of the Chancery Court. R. 371–73; R. 379–82.

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The Court of Appeals went on to consider whether the TCA was itself exempt from disclosure under the Act.[10] Although the Court of Appeals agreed with Petitioner "that no single statute cited by Lexis or the Commission contains an explicit exemption from disclosure for the TCA," it nevertheless observed that "the law recognizes implicit exemptions, as well." App'x 13 (citing *Patterson v. Convention Ctr. Auth. of Metro. Gov't of Nashville & Davidson Cnty.*, 421 S.W.3d 597, 606 (Tenn. Ct. App. 2013)). "The only reasonable conclusion," the Court of Appeals opined, "is that the General Assembly intended to contract with a publisher to produce and publish the TCA and then allow it to be sold by the publisher—not given away for free upon request." *Id.* ("Given that there is a statutory framework in place for the production and distribution of the TCA, requiring unfettered free access under the [Act] would negate this statutory approach."). According to the Court of Appeals, providing free access by means of a request for public records "would circumvent the statutory scheme in place for producing and publishing the TCA" and "undermine the state's practice of contracting

[10] Judge McBrayer wrote separately to say that he would affirm the Chancery Court's dismissal of the petition only on this "threshold issue." App'x 15–16.

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with publishers like Lexis." *Id.* "If one could obtain the TCA for free by making a public records request," the Court of Appeals concluded, "few if any publishers would contract with the state to publish the TCA" and "[f]ewer consumers still would want to pay for [it]." *Id.*

IV. THE REASONS SUPPORTING REVIEW

Tennessee Rule of Appellate Procedure 11(a) provides that

> [i]n determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

A. There is a need to secure uniformity of decision because the Court of Appeals' decision is inconsistent with this Court's decision in *Cherokee* and its progeny.

The General Assembly has mandated that the accountability created by the Act be extended in favor of "'the fullest possible public access to public records.'" *Cherokee*, 87 S.W.3d at 74 (quoting Tenn. Code Ann. § 10-7-505(d)). Thus, although the Act expressly governs "state, county and municipal records," Tenn. Code Ann. § 10-7-503(a)(2)(A), Tennessee courts interpret records "made or received . . . in connection with the transaction of official business by any governmental entity," *id.*

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§ 10-7-503(a)(1)(A), "to include those records in the hands of any private entity which operates as the functional equivalent" of a governmental entity, *Cherokee*, 87 S.W.3d at 79.

When deciding whether a private entity is the functional equivalent of a governmental agency, Tennessee courts look to the totality of the circumstances. *Cherokee*, 87 S.W.3d at 79. Although not dispositive, the cornerstone of the functional-equivalent analysis is whether and to what extent the entity performs a governmental or public function; this is of the utmost importance because "a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity." *Id. See also* Tenn. Code Ann. § 10-7-503(a)(6) ("A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity."). Other factors that may be relevant to the analysis include the extent of government involvement with, regulation of, or control over the entity; whether the entity was created by an act of the legislature or previously determined by law to be open to public access; and the level of

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government funding of the entity. *Cherokee*, 87 S.W.3d at 79.[11]

In *Cherokee*, a non-profit public benefit corporation, Cherokee Children & Family Services, Inc., entered into a contract with Tennessee to provide childcare services for indigent families and supervise child care placements under Tennessee Department of Human Services guidelines. 87 S.W.3d at 70–71, 79. This Court observed that the arrangement between the corporation and the State involved "'[t]he most common form of privatization, called "contracting out," [in which] the government contracts with a private entity to provide a service previously performed by the government, or to provide a service for or on behalf of a government entity.'" *Id.* at 76 (quoting Craig D. Feiser, *Protecting the Public's Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 Fla. St. U.L. Rev. 825, 825–27 (2000)). Before the Department of Human Services contracted with Cherokee Children & Family Services to perform these services, the Department provided the services itself. *Id.* at 79. After the contract ended, the Department again provided the

[11] Neither this Court nor the Court of Appeals has added other factors to this non-exclusive list in the 20 years since *Cherokee* was decided.

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services itself. The services provided by Cherokee Children & Family Services were undoubtedly government services that carried out a government function.

To determine whether Cherokee Children & Family Services was subject to the public-access requirements of the Act, this Court first considered whether it performed a governmental or public function and concluded that childcare services "were undeniably public in nature." *Id.* at 79. This was true, in part, because the State "directly performed these services prior to entering into the contracts" with the corporation, the corporation's "involvement in providing these services was extensive," and its business activities were "dedicated exclusively to the servicing of the [ ] contracts." *Id.* Thus, all of the Cherokee Children & Family Services' records "necessarily relate to its state business" and were therefore subject to public access under the Act. *Id.*; *see also id.* at 74, 80.

The Court of Appeals erred when it decided that Lexis is not the functional equivalent of the government, and it did so by not following this Court's decision in *Cherokee* or its own decisions applying the functional-equivalence test over the last two decades. In addition to providing a rationale for reversal, the Court of Appeals' error also

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demonstrates a need to secure uniformity in the decisions applying *Cherokee*.

1. Compiling, arranging, classifying, annotating, editing, indexing, printing, binding, publishing, and selling the law of the State of Tennessee is a traditionally and quintessentially governmental function because law making is a traditionally and quintessentially governmental function.

There is no law without government,[12] and the law must be published in order for it to be the law. "The law must be accessible . . . the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations." Thomas Henry Bingham, *The Rule of Law* 37–38 (Penguin Press 2011). "Every citizen is presumed to know the law," and "it needs no argument to show . . . that all should have free access" to its contents. *Nash v. Lathrop*, 142 Mass. 29, 35, 6 N.E. 559, 560 (1886) (cited by *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888)). *See also* Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 34 (Cambridge Univ. Press 2004) ("Citizens are subject only to the law, not to the

[12] *See* Bertrand Russell, *Ideas That Have Helped Mankind*, in Unpopular Essays (1950) ("Government can easily exist without law, but law cannot exist without government.").

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arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance.”). The law cannot be the law without being published, and thus publication of the law is a necessary and integral part of the government function of law making.

Given these self-evident truths, the reasoning in *Cherokee* applies with equal (if not greater) force here, yet the Court of Appeals chose to ignore that. Put more bluntly, the Court of Appeals held that, while providing child care services to indigent children and supervising child care placements is a government function, publishing the law of Tennessee—the last necessary and crucial step in law making—is not a governmental function. This holding is wrong; more importantly, it is inconsistent with and at odds with this Court’s decision in *Cherokee*.

There is no dispute that the TCA is the definitive, authoritative, authorized, and official version of all Tennessee statutory law. And the Commission is “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

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publication of an official compilation of the statutes, codes and session laws of the state of Tennessee." Tenn. Code Ann. § 1-1-105. The Commission also has "full power and authority on behalf of the state of Tennessee to perform all acts and to negotiate and enter into all contracts necessary for and expedient to the successful production and publication of a revised compilation of the statutory laws of Tennessee." Tenn. Code Ann. § 1-1-106.

As authorized by statute, the Commission has contracted out "the successful production and publication" of the TCA to Lexis, and these services are "undeniably public in nature." *Cherokee*, 87 S.W.3d at 79. *See also Wood v. Jefferson Cnty. Econ. Dev. Oversight Comm., Inc.*, No. E2016-01452-COA-R3-CV, 2017 WL 4277711, at *4 (Tenn. Ct. App. Sept. 26, 2017) (finding that the defendant performed a governmental function because it was tasked with the "primary governmental purpose" of promoting economic development); *City Press Commc'ns, LLC v. Tenn. Secondary Sch. Athletic Ass'n*, 447 S.W.3d 230, 238 (Tenn. Ct. App. 2014) (finding functional equivalence because "it is undeniable that education is a government function" and "the Tennessee State Board of Education viewed the supervision and regulation of athletic activities in public

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junior and senior high schools of Tennessee as one of its governmental functions" when it designated the TSSAA as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis) (quotation and citation omitted); *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009) (concluding that the Corrections Corporation of America is the functional equivalent of a state agency because it provided prison services that the State is required to provide under the Tennessee Constitution); *Allen v. Day*, 213 S.W.3d 244, 254 (Tenn. Ct. App. 2006) (holding that a private entity was the functional equivalent of the Sports Authority of the Metropolitan Government of Nashville because the entity provided statutorily authorized management services to run the day-to-day operations of the Gaylord Entertainment Center).[13]

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[13] *But see Gautreaux v. Internal Med. Educ. Foundation, Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) (holding that a non-profit corporation was not the functional equivalent of a governmental agency because its duties were "merely ministerial" and it "merely acted as a bookkeeper" for a state university); *Memphis Publ'g Co. v. City of Memphis*, No. W2016–01680–COA–R3–CV, 2017 WL 3175652, at *7 (July 26, 2017) (finding no functional equivalence because "the services [the International Association of Chiefs of Police, Inc.] performed were incidental to the selection of the director—a task wholly assumed by the City."). Unlike

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Because Lexis performs the quintessentially governmental function of producing and publishing the law of Tennessee–the TCA–this factor weighs heavily in favor of a finding that the Chancery Court correctly concluded that Lexis is the functional equivalent of the Commission.

The Court of Appeals attempted to escape this inescapable conclusion by treating the facts of this case as "distinct" from those that "implicate areas of traditional government intervention," like education and prisons. App'x 10. But Tennessee courts have repeatedly found that other roles performed for the government by private entities that are decidedly less integral to government than establishing and maintaining the rule of law are nevertheless "government functions" under the Act. *See Cherokee*, 87 S.W.3d 67, 71 (brokering childcare services for indigent

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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]." 336 S.W.3d at 529; 2017 WL 3175652, at *7. Subject to the Commission's ultimate approval, Lexis—not the Commission—selects cases for inclusion in the TCA and creates the content of the annotations. R. 200; R. 205–06 ("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.").

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families and supervising child care placements);[14] *Wood*, 2017 WL 4277711, at *4 (promoting economic development in Jefferson County); *City Press*, 447 S.W.3d at 238 (supervising and regulating Tennessee public junior- and senior-high schools interscholastic athletic activities); *Allen*, 213 S.W.3d at 251 (providing statutorily authorized management services to run the day-to-day operations of the Gaylord Entertainment Center (now the Bridgestone Arena), a sports and entertainment venue).

The Court of Appeals also asserted that, "[w]hile the state certainly has always been in the law-making business, it has not traditionally been in the self-publishing business." App'x 10.[15] But Tennessee has a long history of collecting, organizing, and publishing the law as a function of government, with the assistance of private individuals and entities—like Lexis. For example, in 1803, Tennessee's "Territorial Government

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[14] In *Cherokee*, this Court noted that Cherokee Children & Family Services did not "care for" or "keep" children "in the strictest sense;" rather, "it served as a 'brokering agency' that screened applicants and assisted eligible applicants in locating approved child care providers." 87 S.W.3d at 72. Here, there is no broker or middleman, as Lexis publishes the TCA directly under the extremely close supervision of the Commission.

[15] As noted above, of course, Petitioner submits that the Court of Appeals is wrong: the law-making business has always included, and must include, the publishing of the law.

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appropriated $600 to George Roulstone as public printer, and he was to publish all the acts and proclamations of that government." Eddie Weeks, *A History of Tennessee Statutory Law: Compilations, Codifications, and Complications* 1 (Lexis 2021) ("It was a private effort of Mr. Roulstone . . ."). Thus, from the very earliest days of Tennessee statehood—long before any Tennessee government contemplated providing childcare or sports arenas or high school athletics—state leaders recognized that publishing the law of Tennessee was necessary to the function of government and the rule of law in Tennessee. Tennessee leaders were right then to see publishing the law of Tennessee as an essential government function, and the same has been true in the 220 years since then.

More importantly, until the Court of Appeals decision in this case, not one of the decisions interpreting the Act has ever suggested that the function in question must be "traditionally" performed by government in order for a private entity to be considered the functional equivalent of a governmental entity. Imposing such a litmus test, nowhere supported in the statute or Tennessee case law, with no standards for the correct and appropriate interpretation of how "traditionally" might be proven or discerned, runs contrary to the plain language of the Act, the Act's

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mandate for an interpretation favoring access, and this Court's precedent in *Cherokee* and other cases. It is enough, under the Act as interpreted by this Court in *Cherokee* and applied by the Court of Appeals in *Wood*, *City Press*, *Allen*, and other decisions, that the function in question be a government function, regardless of whether that government function dates to 1803 or more recent times, when government functions have included providing child care services to indigent children and supervising child care placements, according to this Court.

Indeed, the recent history of privatization—or "contracting out" services traditionally by the government—is the reason this Court created the functional-equivalence test. "Since the 1980s, governmental entities in various parts of the nation have looked increasingly to privatization as a possible solution to perceived problems of inefficiency or expense in the provision of public services," and "private entities that perform public services on behalf of a government often do so as independent contractors." *Cherokee*, 87 S.W.3d at 76, 78. "Nonetheless, the public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been

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delegated to an independent contractor." *Id.* at 78. And "a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity." *Id.* at 79. This last principle is expressly codified in the Act. *See* Tenn. Code Ann. § 10-7-503(a)(6) ("A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity."). As *Cherokee* and its progeny make clear, private entities performing government functions—whether "traditional" or not—are subject to the disclosure requirements of the Act.

2. The Commission controls the publication of the TCA and need not control Lexis itself for Lexis to be the functional equivalent of government for purposes of publishing the TCA.

Throughout this litigation, Respondents have essentially argued that, to obtain a ruling that Lexis is the functional equivalent of government under *Cherokee*, Petitioner must demonstrate that ***all*** of Lexis, presumably including all aspects of the entire, worldwide operations of Matthew Bender & Company, Inc., must be shown to be the functional equivalent of government—essentially, the handmaiden or

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agent of government. Petitioner has never argued this, nor does Tennessee law require any such proof or argument.

In truth, as Petitioner argued to the trial court, Tennessee law under *Cherokee* has always focused on the ***function*** in question—in *Cherokee*, providing child care services to indigent children and supervising child care placements; in this case, preparing and publishing the TCA.[16]

Under the contract in *Cherokee*, the State (through the Department of Human Services) reimbursed Cherokee Children & Family Services for approved costs, and was allowed to audit the corporation's records relating to work performed or money received under the contract. 87 S.W.3d at 71. Cherokee Children & Family Services was also required to submit an annual independent audit to the State after each reporting period, and the State conducted routine monitoring visits and regular reviews of the corporation's client files. *Id.* Although the State did not

[16] To be clear, Petitioner in this case seeks one public record, the TCA. For the avoidance of doubt, Petitioner acknowledges that, should he prevail in this case, a finding that Lexis is the functional equivalent of government under *Cherokee* for the purpose of preparing and publishing the TCA would not entitle the public to access records in Lexis's possession that are unrelated to this function.

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exercise "complete control or supervision" over Cherokee Children & Family Services, this Court nevertheless found that these provisions evidenced "a significant level of governmental control and oversight" that weighed in favor of finding that the corporation was the functional equivalent of the State. *Id.* at 79–80.

In the opinion below, the Court of Appeals emphasized that "[t]he control exercised by the Commission is over the product, not Lexis itself," and that "Lexis itself is not under state control"; rather, "[i]t is simply performing a carefully regulated service for the state." App'x 10. The lower court likened this to "the state demanding certain exacting specifications in road construction or any other project." *Id.* ("Lexis is not a stand-in for the government; it is just performing a contracted-for job within tightly specified parameters. . . . it simply adheres to stringent specifications in performing a contracted-for service to the state.").

Under *Cherokee*, this is a distinction without a difference. Control over the provision of services in a vendor contract was at the very heart of this Court's analysis and fundamental to its holding:

> [A]lthough [the Tennessee Department of Human Services] did not exercise complete control or supervision over Cherokee, a significant level of governmental control and oversight is evidenced by the provisions in the 1992 and 1999

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> contracts requiring advance State approval of "allowable costs" under the contracts and the provisions in all three contracts authorizing State audits of Cherokee's activities.

87 S.W.3d 67, 79–80. So, too, with Lexis.

The case for functional equivalence here is much more compelling than in *Cherokee* because, under the Agreement and by statute, the Commission exercises complete control and supervision over Lexis's function of preparing and publishing the TCA. By statute, the Agreement must "prescribe the specifications for the publication" of the TCA,

> including the size of type to be used in the text of the statutes and the annotations, the grade and weight of the paper to be used, the size of the volumes, appropriate provisions for the insertion of pocket supplements and the publication of replacement volumes, the price at which Tennessee Code Annotated shall be sold in Tennessee when originally published, and such other provisions as are necessary for the full performance of the publication plans formulated by the commission.

Tenn. Code Ann. § 1-1-107. By entering into the Agreement with Lexis, the Commission did just as the statute commands by providing an exhaustive list of minute technical specifications that may be changed only "with the written approval of the Commission." R. 43–44 ("General Requirements for the Publication of the Code and Code CD-ROM"); *see also* R. 44–50 ("Style Guidelines for Codification of Public Chapters"). The

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Commission must also approve numerous aspects of the TCA, and Lexis must submit the proposed-to-be-published TCA to the Revisor of Statutes in advance of publication to be "checked, proofread, verified and certified." R. 31. Any disagreements or disputes about "matter[s] of editorial content" are resolved in favor of the Commission, which ultimately must approve and certify the manuscript. *Id.* Like the contractually mandated submission of an independent audit after each reporting period in *Cherokee*, Lexis must also provide the Commission with the complete and electronic version of the TCA after each legislative session. R. 27–28.

In the Chancery Court, Lexis candidly conceded the Commission's extensive involvement in the preparation and publication of the TCA:

> Any "control" by the Commission is not over the businesses of Respondent and its Affiliates, but instead solely over the agreed-on services provided by Respondent and creation and delivery of the TCA as outlined in the Contract including the General Requirements for the Publication of the Code and Code CD-ROM set forth in **Exhibit A** to the Contract (e.g., pertaining to type page size, type face, type size, etc.).

R. 198. These services are not "merely ministerial"; rather, according to Lexis, the preparation of the TCA is a "labor-intensive creative process" that includes reading, reviewing, and analyzing opinions and other

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materials, verifying sources, and drafting annotations—a process that Lexis admits is at all times subject to "the terms of [Lexis's] vendor Contract with the Commission." R. 199–200.

In reviewing Lexis's trial court concession quoted above, note, too, that Lexis concedes that the government does, in fact, have "control" over *every aspect* of Lexis's performance of the function in question—control down to that last punctuation mark. This level of control is greater even than the State had over the wholly private, nonprofit corporation in the *Cherokee* decision, Cherokee Children & Family Services.

In *Allen*, the Court of Appeals considered a similarly significant level of government involvement in the day-to-day operations of a private contractor. There, the operating agreement between the Sports Authority of the Metropolitan Government of Nashville and Powers, the non-governmental entity charged with managing the Gaylord Entertainment Center (the Arena), was "replete with evidence of the Sports Authority's substantial oversight," and the Court found that the Sports Authority's "substantial interest" in the operation and maintenance of the Arena was "illustrated by the pervasive influence and control the Sports Authority exerts over [its] management":

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> Under the operating agreement, Powers is required to consult with the Sports Authority with respect to the service of alcohol, the designation of smoking areas in the Arena, the rates and charges for events and parking, community events held at the Arena, any material alterations, additions, changes, or improvements to the Arena, the selection of a general manager, the settlement of any claim, the entering into of any contract which creates $100,000 or more operating expenses during a term and the provisions in such contracts, the bank where the operating revenue is maintained, and the use of design rights.

Allen, 213 S.W.3d at 254–55, 258.

Like Lexis, "Powers not only agreed to comply with the Sports Authority's overarching directives regarding the management of the Arena but it acquiesced to the Sports Authority's control over more minute managerial decisions." *Id.* at 259. For example, just as Powers could not make "any material alterations, additions, changes, or improvements to the Arena" without consulting the Sports Authority, Lexis cannot so much as change the TCA's typeface or the weight of the paper it is printed on without express Commission approval. R. 43–51. *See also Wood*, 2017 WL 4277711, at *5 (finding functional equivalence where "no check written by or on behalf of [the private entity] is valid unless it bears two signatures, one of which is that of the county finance director" and the entity complied with the county commission's directive

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to change its organizational structure or organizational flow chart).

The Court of Appeals attempted to distinguish *Allen*, the only functional-equivalence decision discussed in any detail in the majority or concurring opinions. "[I]n that case," the Court of Appeals observed, "the private entity 'participate[d] in making binding governmental decisions regarding the management of the Arena[.]'" App'x 10 (quoting *Allen*, 213 S.W.3d at 256). And although the Court of Appeals acknowledged that "the Commission has the final say on the TCA's contents," it also asserted that "Lexis just helps implement the process." *Id.*

Setting aside any difference that may exist between Powers's "participation" in *Allen* and Lexis's "implementation" here, Lexis—not the Commission—selects cases for inclusion in the TCA and creates the content of the annotations, which are then subject to the Commission's ultimate approval. R. 200; R. 205–06. More importantly, the Court of Appeals' cursory analysis ignores other factors that the *Allen* court found equally persuasive that are also present in this case.

As discussed above, the Agreement between the Commission and Lexis is "replete with evidence of the [Commission]'s substantial oversight," and the Commission's "substantial interest" in the

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publication of the TCA is "illustrated by the pervasive influence and control" the Commission exerts over Lexis's activities in relation to the publication of the TCA. *Allen*, 213 S.W.3d at 258–60. Under the Agreement, Lexis 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—every jot and tittle of the TCA to be published by Lexis must meet the Commission's approval. Under *Cherokee* and *Allen,* that weighs heavily in favor of a finding that the Chancery Court correctly concluded that Lexis is the functional equivalent of the Commission.[17] The Court of Appeals, however, decided

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[17] Should this Court grant permission to appeal, Petitioner is fully prepared to address the remaining *Cherokee* factors: whether a private entity was created by an act of the legislature or previously determined by law to be open to public access, and the level of government funding of the entity. *See Cherokee*, 87 S.W.3d at 79.

The first of these factors is irrelevant here, as it was in *Cherokee, Wood, City Press, Friedmann,* and *Allen*. Not one of the private entities in those cases was created by an act of the legislature or previously determined by law to be open to public access, yet each was found to be the functional equivalent of the State. *See id.* at 80; *Wood*, 2017 WL 4277711, at *7; *City Press*, 447 S.W.3d at 237; *Allen*, 213 S.W.3d at 260.

As to the second, revenues from the sale of the TCA under Lexis's exclusive contract with the State are undoubtedly significant and "constitute indirect government funding." *City Press*, 447 S.W.3d at 236 (finding functional equivalence because "revenues from the various championship tournaments [that TSSAA governed and coordinated],

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against the weight of that authority, demonstrating a need to secure the uniformity of decisions applying this Court's functional-equivalence jurisprudence.

B. Whether the TCA is exempt for disclosure under the Act is a question of great public interest, and the conflicting decisions below demonstrate that it is also an important question of law that this Court should settle.

Since long before the enactment of the Act, Tennessee courts have recognized the public's right to examine governmental records. *See, e.g.*, *State ex rel. Wellford v. Williams*, 110 Tenn. 549, 75 S.W. 948 (1903). In 1957, the General Assembly codified this public access doctrine by enacting the Act. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996).

The Act now "governs the right of access to records of government agencies in this state." *Cole v. Campbell*, 968 S.W.2d 274, 275 (Tenn. 1998). Facilitating access to governmental records promotes public

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which generate millions, constitute indirect government funding"). *See also Friedmann*, 310 S.W.3d at 376 (finding functional equivalence even though the defendant's affidavit was "silent as to how much of [its] total revenue generated in Tennessee comes from its contracts with the State and local governments," and noting "[t]hat percentage likely is quite high"). In any event, the lack of direct government funding is not and never has been dispositive, and it cannot outweigh the other functional-equivalence factors discussed above.

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awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee. *Cherokee*, 87 S.W.3d at 74–75 ("Through its provisions, the [Act] serves a crucial role in promoting accountability in government through public oversight of governmental activities.").

Given that purpose, the Act is construed "liberally to enforce the public interest in open access to the records of state, county, and municipal governmental entities." *Id.* at 74; *see also Schneider v. City of Jackson*, 226 S.W.3d 332, 340 (Tenn. 2007) ("[T]he General Assembly has directed the courts to construe broadly the Public Records Act 'so as to give the fullest possible access to public records.'" (quoting Tenn. Code Ann. § 10-7-505(d)).

The Act broadly defines "[p]ublic record or records" or "state record or records" to include "all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-503(a)(1)(A). Given this definition, this

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Court has described the Act as an "'all[-]encompassing legislative attempt to cover all printed matter created or received by government in its official capacity.'" *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) (quoting *Bd. of Educ. of Memphis City Schools v. Memphis Publ'g Co.*, 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979)).

The Act mandates that "[a]ll state, county and municipal records shall . . . 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). "These statutes create a presumption of openness and express a clear legislative mandate favoring disclosure of governmental records." *Schneider*, 226 S.W.3d at 340 (citing *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004); *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999)). Unless an exception is established, Tennessee courts must be "vigilant" and require disclosure "even in the face of serious countervailing considerations." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).

"Disclosure of public records is required unless it is clear that a

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record is excepted either explicitly by the Act or implicitly by application of another state law." *Patterson v. Convention Ctr. Auth. of Metro. Gov't of Nashville & Davidson Cnty.*, 421 S.W.3d 597, 611 (Tenn. Ct. App. 2013) (citations omitted). Implicit exceptions to the Act are those that are found in "other state law." Tenn. Code Ann. § 10–7–503(a); *Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2005).

Remarkably, the Chancery Court and the Court of Appeals were at odds on this particular point. The Chancery Court agreed with Lexis and the Commission and found an explicit statutory exception; the Court of Appeals agreed with Petitioner "that no single statute cited by Lexis or the Commission contains an explicit exemption from disclosure for the TCA under the [Act]." App'x 13. That such competent, reasonable, and experienced judges could disagree on such a fundamental question only highlights its importance and the need for this Court to settle it.

The Court of Appeals found an "implicit exemption" because it determined that "the General Assembly intended to contract with a publisher to produce and publish the TCA and then allow it to be sold by the publisher—not given away for free upon request." *Id.* This conclusion flies in the face of the purposes of the Act, the statutory presumption of

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openness, and the General Assembly's preference for disclosure of government records, which, if anything, must include the very laws enacted by the government.

The implicit exception identified by the Court of Appeals also threatens to swallow the rule favoring disclosure, much like "contracting out" public services to private entities threatened the public's right to access public records before this Court's decision in *Cherokee*. Under that decision and the Act, the government cannot avoid its disclosure obligations by contractually delegating its responsibility to a private entity. *Cherokee*, 87 S.W.3d at 79; Tenn. Code Ann. § 10-7-503(a)(6). But under the Court of Appeals' decision in this case, the government may avoid its disclosure obligations if some other state law provides for some other means of disclosure—even if those other means do *not* "give the fullest possible public access to public records," Tenn. Code Ann. § 10-7-505(d), and no exception to the access requirement of the Act has been enacted by the General Assembly.

For these reasons, whether the TCA is exempt from disclosure under the Court of Appeals' interpretation of the TCA is both an important question of law and a question of great public interest that this

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Court should settle.

CONCLUSION

The foregoing demonstrates that the Court should grant this application so that it can secure uniformity in Tennessee law and settle important questions of law and great public interest.

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CERTIFICATE OF COMPLIANCE

This brief contains 9,016 works and thus complies with the applicable word limitation in Tennessee Rule of Appellate Procedure 30(e).

This 5th day of January, 2024.

/s/ Joshua Counts Cumby
Joshua Counts Cumby
Counsel for Petitioner

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CERTIFICATE OF SERVICE

I certify that I have delivered this application by email and first-class mail to counsel for respondents at the following addresses:

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This 5th day of January, 2024.

/s/ Joshua Counts Cumby
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APPENDIX

Public.Resource.org, et al. v. Matthew Bender & Company, Inc., et al., No. M2022-01260-COA-R3-CV (Tenn. Ct. App. Nov. 9, 2023) – Judgment .... App. 1

Public.Resource.org, et al. v. Matthew Bender & Company, Inc., et al., No. M2022-01260-COA-R3-CV (Tenn. Ct. App. Nov. 9, 2023) – Majority Opinion .... App. 2

Public.Resource.org, et al. v. Matthew Bender & Company, Inc., et al., No. M2022-01260-COA-R3-CV (Tenn. Ct. App. Nov. 9, 2023) – Concurring Opinion .... App. 15

Public.Resource.org, et al. v. Matthew Bender & Company, Inc., et al., No. M2022-01260-COA-R3-CV (Tenn. Ct. App. Oct. 17, 2023) – Order Dismissing Public.Resource.org .... App. 17

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11/09/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 3, 2023

PUBLIC.RESOURCE.ORG, ET AL. v. MATTHEW BENDER & COMPANY, INC., ET AL.

Appeal from the Chancery Court for Davidson County
No. 22-1025-III Ellen Hobbs Lyle, Chancellor

No. M2022-01260-COA-R3-CV

JUDGMENT

This appeal came on to be heard upon the record of the Chancery Court for Davidson County and briefs filed on behalf of the respective parties. The Court is of the opinion that the Trial Court's judgment should be affirmed as modified.

It is therefore ORDERED and ADJUDGED by this Court that the judgment of the Chancery Court for Davidson County is affirmed as modified, and this matter is remanded to the Chancery Court for Davidson County for collection of costs below. The costs on appeal are taxed against the Appellant, David L. Hudson, Jr., and his surety, if any.

PER CURIAM

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IN THE COURT OF APPEALS OF TENNESSEE
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PUBLIC.RESOURCE.ORG, ET AL. v. MATTHEW BENDER & COMPANY, INC., ET AL.

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No. 22-1025-III Ellen Hobbs Lyle, Chancellor

No. M2022-01260-COA-R3-CV

This appeal concerns a petition to access public records filed against a private entity. David L. Hudson, Jr. ("Hudson") and Public.Resource.Org filed a petition against Matthew Bender & Company, Inc., a division of LexisNexis Group ("Lexis"), in the Chancery Court for Davidson County ("the Trial Court") pursuant to the Tennessee Public Records Act ("the TPRA") seeking access to and a copy of the complete and current electronic version of the Tennessee Code Annotated ("the TCA.").[1] The Tennessee Code Commission ("the Commission") intervened on Lexis's side in part to protect the state's alleged copyright interest in the TCA. The Trial Court held that the TCA is exempt from disclosure because Tennessee law provides a separate avenue for publication of the TCA. In addition to its dispositive ruling, the Trial Court held that Lexis operates as the functional equivalent of a governmental entity, and that the TCA is disqualified from copyright protection. Hudson appeals. Lexis and the Commission raise issues as well. We hold, *inter alia*, that Lexis is a private company performing specific services for the state on a contractual basis. It has not assumed responsibility for public functions to such an extent as to become the functional equivalent of a governmental entity. We modify the Trial Court's judgment in that respect. Otherwise, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which CARMA DENNIS MCGEE, J., joined. W. NEAL MCBRAYER, J., filed a separate concurring opinion.

[1] The record reflects that Public.Resource.Org is an organization based outside of Tennessee and thus lacks standing to file a petition under the TPRA. *See Scripps Media, Inc. v. Tenn. Dep't of Mental Health & Substance Abuse Servs.*, 614 S.W.3d 700, 704 (Tenn. Ct. App. 2019); Tenn. Code Ann. § 10-7-503(a)(2)(A); Tenn. Code Ann. § 10-7-505(a). We entered an order directing Public.Resource.Org to show cause as to why it should not be dismissed for lack of standing. It filed a response acknowledging that it is not in a position to show cause. Therefore, we entered an order dismissing Public.Resource.Org.

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Lucian T. Pera, Memphis, Tennessee, and Joshua Counts Cumby, Nashville, Tennessee, for the appellant, David L. Hudson, Jr.

Thomas H. Lee, Nashville, Tennessee, and John M. Bowler, Atlanta, Georgia, for the appellee, Matthew Bender & Company, Inc., a division of LexisNexis Group.

Jonathan Skrmetti, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; James P. Urban, Deputy Attorney General; and Kevin M. Kreutz, Deputy Attorney General, for the appellee, the Tennessee Code Commission.

OPINION

Background

Hudson filed a petition against Lexis in the Trial Court pursuant to the TPRA, Tenn. Code Ann. §§ 10-7-503 and 10-7-505, seeking access to and a copy of the complete and current electronic version of the TCA and to obtain judicial review of the actions of Lexis in denying Hudson's request for the material. It was and remains Hudson's contention that the TCA is a public record that must be disclosed under the TPRA. The Commission moved to intervene on Lexis's side in part to protect the state's alleged copyright interest in the TCA. In its memorandum of law in support of its motion to intervene, the Commission asserted that "the State is the owner of the copyright rights in the annotations to the TCA. As such, the TCA is exempt from disclosure under the TPRA." The Commission was allowed to intervene.

The Tennessee Code is a compilation of the statutory laws of Tennessee. The TCA includes the Tennessee Code but also, among other things, annotations and references to caselaw interpreting the code. The TCA is the "official compilation of the statutes, codes and session laws of the state of Tennessee of a public and general nature. . . ." Tenn. Code Ann. § 1-1-105(a). Furthermore, "[t]he text of the statutes, codes and code supplements (but not the annotations, footnotes and other editorial matter) appearing in the printed copies of the compilation, containing a copy of the commission's certificate of approval, shall constitute prima facie evidence of the statutory law of this state. . . ." Tenn. Code Ann. § 1-1-111(b) (West eff. July 10, 2014).

The Commission, which was created by the General Assembly in 1953, produces and publishes the TCA. The Commission has as its members the Chief Justice of the Tennessee Supreme Court, the Tennessee Attorney General and Reporter, a Director of the Office of Legal Services for the General Assembly, and two other members appointed by

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the Chief Justice. Tenn. Code Ann. § 1-1-101 (West eff. March 17, 2016). The Commission is authorized to do as follows:

> (a) 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."
>
> (b) "Publication," as used in this chapter, includes the necessary actions by whatever means and in whatever form for development of a Tennessee Code database.

Tenn. Code Ann. § 1-1-105. In addition:

> (a) The Tennessee code commission has full power and authority on behalf of the state of Tennessee to perform all acts and to negotiate and enter into all contracts necessary for and expedient to the successful production and publication of a revised compilation of the statutory laws of Tennessee, including the power and authority to enter into contracts with a law book publisher for the editing, compiling, annotating, indexing, printing, binding, publication, sale and distribution of the revised compilation and the performance and execution of all other publication plans formulated by the commission.
>
> (b) Nothing in this chapter shall be construed to render invalid or impair the obligations of any contract previously entered into by the commission for the purposes set forth in this section or with a suitable contractor for an electronically searchable database of such code.

Tenn. Code Ann. § 1-1-106. Further still:

> (a) Any contract with a law book publisher for the purposes referred to in §§ 1-1-105 and 1-1-106 shall prescribe the specifications for the publication of the revised compilation, including the size of type to be used in the text of the statutes and the annotations, the grade and weight of the paper to be used, the size of the volumes, appropriate provisions for the insertion of pocket

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supplements and the publication of replacement volumes, the price at which Tennessee Code Annotated shall be sold in Tennessee when originally published, and such other provisions as are necessary for the full performance of the publication plans formulated by the commission.

(b) The price at which pocket supplements and replacement volumes are to be sold from time to time in Tennessee shall be controlled by the commission in such contracts as it may, from time to time, in its discretion execute.

Tenn. Code Ann. § 1-1-107.

The Commission contracts with Lexis to edit the TCA and support the distribution process. Under the contract, the Commission has the final say over the content of the TCA. The specifications are precise. The Commission also sets the price at which Lexis sells the TCA, and the Commission compensates Lexis by allowing it to keep the proceeds from its sale of the TCA.

In August 2022, the Trial Court entered an order dismissing Hudson's petition. The Trial Court held, among other things, that "[Lexis] 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 Trial Court reasoned that other provisions of Tennessee law govern access to the TCA, and thus the TCA is exempt from disclosure. This ruling was dispositive. However, the Trial Court also ruled for the sake of completeness that Lexis is the functional equivalent of a governmental entity, and that the TCA is disqualified from copyright protection. Hudson timely appealed to this Court.

Discussion

The parties address albeit to different ends the same three issues, which we restate slightly as follows: 1) whether the Trial Court erred in concluding that the TCA is disqualified from copyright protection; 2) whether the Trial Court erred in concluding that Lexis is the functional equivalent of a governmental entity; and 3) whether the Trial Court erred in concluding that the TCA is exempt from disclosure under the TPRA.

We first address whether the Trial Court erred in concluding that the TCA is disqualified from copyright protection. Lexis and the Commission contend that the Trial Court erred by addressing the question at all. They state that determinations of copyright status are reserved for the federal courts. This implicates the Trial Court's subject matter jurisdiction. Whether subject matter jurisdiction exists is a question of law reviewed de novo without a presumption of correctness. *Northland Ins. Co. v. State*, 33 S.W.3d 727,

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729 (Tenn. 2000) (citation omitted). The Commission cites a case from this Court which states:

> 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 and converts all state common or statutory law "within the general scope of copyright" into federal law to be uniformly applied throughout the nation.

Wells v. Chattanooga Bakery, Inc., 448 S.W.3d 381, 387 (Tenn. Ct. App. 2014) (quoting *Ritchie v. Williams*, 395 F.3d 283, 286 (6th Cir. 2005)). However, the Commission also acknowledges an opinion by this Court in which we stated that just because an action is predicated on rights derived from the Copyright Act, that action is not necessarily one for copyright infringement or one that arises under the Copyright Act. *See Minor Miracle Prods., LLC v. Starkey*, No. M2011-00072-COA-R3-CV, 2012 WL 112593, at *5 (Tenn. Ct. App. Jan. 12, 2012), *no appl. perm. appeal filed* (citing *Peay v. Morton*, 571 F.Supp. 108, 112-13 (M.D. Tenn. 1983)). While state courts may not rule definitively on copyright status, a state court does not have to utterly avoid any questions touching upon copyright. We note that the Commission intervened in this case in part to protect the state's alleged copyright interest in the TCA. It would be a curious thing if neither the Trial Court nor this Court could address the state's purported copyright interest when that purported interest was asserted in opposition to the TPRA petition.[2] Insofar as the Trial Court addressed the TCA's copyright eligibility for purposes of ruling on the TPRA petition, the Trial Court did not exceed its authority.

On the substance of the copyright issue, the Commission argues that the state has a valid copyright interest in the TCA. Hudson and the Commission discuss *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. ——, 140 S.Ct. 1498, 206 L.Ed.2d 732 (2020), a case by the Supreme Court of the United States addressing whether Georgia's code annotations are eligible for copyright protection. In *Georgia*, Public.Resource.Org posted the Official Code of Georgia Annotated online where it could be downloaded without charge. *Id*. at 1505. Georgia's Code Revision Commission sued Public.Resource.Org for copyright infringement. *Id*. In the majority opinion authored by Chief Justice John G. Roberts, Jr., the Court ruled against copyright eligibility for the Georgia annotations. *Id*. at 1506. The Court, relying upon the government edicts doctrine, stated:

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[2] We decline, however, to take judicial notice of certain correspondence which Hudson has attached to his reply brief purporting to show that the United States Copyright Office rejected Lexis's application to register the TCA for copyright protection.

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> We hold that the annotations in Georgia's Official Code are ineligible for copyright protection. . . . A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered the "authors" of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.

Georgia, 140 S.Ct. at 1506.

The Commission raises several points to distinguish the facts of *Georgia* from those of the instant case, to wit: that the annotations in *Georgia* were authored by the Georgia legislature acting in its legislative capacity whereas no Tennessee legislator or jurist authored the TCA while carrying out a legislative or judicial function; that the Tennessee General Assembly does not control the Commission; that in contrast to Georgia, the Tennessee General Assembly does not vote to "merge" annotations with the Tennessee Code; that no court has construed the Commission as acting in a legislative capacity; and that the Commission lacks lawmaking authority. The Commission acknowledges that it was created by the General Assembly and that the General Assembly funds and staffs it. Notwithstanding that, according to the Commission, the Trial Court incorrectly relied on an overly simplistic finding that the Commission functions as an "arm" of the legislature. The Commission says that instead it is "a civic or governmental body vested with governmental authority to act on behalf of the State," not a legislative body.

While the procedures used by Georgia vis-à-vis its code annotations and those used by Tennessee are not identical, the distinctions are immaterial as to the issue before us. The U.S. Supreme Court in *Georgia* was sweeping in its analysis of the government edicts doctrine. That analysis yields the same result in the appeal at bar. The Commission is, indeed, an "arm" of the legislature. It could hardly be other. If it is a "civic" or "governmental body," it is one created by the legislature for producing the TCA, a distinctly legislative goal. The Commission's proffered distinctions between the facts of this case and those of *Georgia* are overwhelmed by the breadth of the Supreme Court's holding. As applied here, the Commission, which is an arm of the General Assembly, produces the TCA (with the contracted-for assistance of Lexis) in the course of its official duties.

The *Georgia* Court noted that, while "Georgia minimizes the OCGA annotations as non-binding and non-authoritative", "that description undersells their practical significance." 140 S.Ct. at 1512. The Court contrasted "economy-class" readers and "first-

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class" readers—i.e., the former having access to only the bare code, and the latter with the benefit of crucial added context. *Id.* That applies just as well to the TCA. The TCA is the definitive version of Tennessee statutory law, which courts almost always cite to. The facts of *Georgia* are analogous to the case at bar in every meaningful respect. We do not presume to bind federal courts as to the TCA's eligibility for copyright protection, but we hold for purposes of Hudson's TPRA petition that the TCA is ineligible for copyright protection. We affirm the Trial Court on this issue.

Our determination that the TCA is ineligible for copyright protection is not dispositive. This remains a public records case. More precisely, it is an effort by Hudson to access records held by a private entity, Lexis, by means of the TPRA. In order to achieve that, he must vindicate his theory that Lexis, in helping the Commission produce the TCA, operates as the functional equivalent of a governmental entity. Otherwise, as a private entity, Lexis is not subject to the TPRA. We therefore address whether the Trial Court erred in concluding that Lexis is the functional equivalent of a governmental entity. This Court has discussed the TPRA thusly:

> The Tennessee Supreme Court has characterized the TPRA as "an all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity." *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) (citing *Bd. of Ed. v. Memphis Publ'g Co.*, 585 S.W.2d 629, 631 (Tenn. App. 1979)). It has opined that the TPRA's broad legislative mandate "require[s] disclosure of government records even when there are significant countervailing considerations." *Gautreaux v. Internal Medicine Educ. Found.*, 336 S.W.3d 526, 529 [(Tenn. 2011)] (citing *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994)). The TPRA requires the courts to construe the statute broadly "so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d). Accordingly, there is a "presumption of openness" under the TPRA, "favoring disclosure of governmental records." *Schneider v. City of Jackson*, 226 S.W.3d 332, 340 (Tenn. 2007) (citing *see State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004); *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999)).
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> Notwithstanding the presumption of openness, in the interest of public policy the General Assembly has provided specific explicit exemptions from disclosure contained in the TPRA itself. It has also "acknowledged and validated both explicit and implicit exceptions from disclosure found elsewhere in state law." *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004). In an action filed for review of the denial of access to a record

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> by a governmental entity, the governmental entity carries the burden of proof to justify nondisclosure by a preponderance of the evidence. *Schneider*, 226 S.W.3d at 339 (citing Tenn. Code Ann. § 10-7-505(c)).

Patterson v. Convention Ctr. Auth., 421 S.W.3d 597, 606-07 (Tenn. Ct. App. 2013).

With regard to when a private entity acts as the functional equivalent of a governmental entity, the Tennessee Supreme Court has interpreted records made or received in connection with the transaction of official business as inclusive of "those records in the hands of any private entity which operates as the functional equivalent of a governmental agency." *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002) (footnote omitted). In articulating the test for functional equivalence, our Supreme Court explained:

> In making this determination, we look to the totality of the circumstances in each given case, and no single factor will be dispositive. 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 responsibilities 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.
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> We caution that our holding clearly is not intended to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies. A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government. But when an entity assumes responsibility for providing public functions to such an extent that it becomes the functional equivalent of a governmental agency, the Tennessee Public Records Act guarantees that the entity is held accountable to the public for its performance of those functions.

Cherokee, 87 S.W.3d at 79.

The 'cornerstone' question of this analysis is whether and to what extent Lexis performs a governmental or public function. Hudson argues that Lexis does perform such

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a role. He cites the fact that every citizen is presumed to know the law. He continues: "The law cannot be the law without being published, and thus publication of the law is a necessary and integral part of the government function of law-making." Hudson submits that the Commission has "complete control and supervision over Lexis. . . ." However, we disagree with Hudson as to the nature and implications of this control. The control exercised by the Commission is over the product, not Lexis itself. It is akin to the state demanding certain exacting specifications in road construction or any other project. If the state were dissatisfied, it could contract with another vendor. In any event, Lexis itself is not under state control. It is simply performing a carefully regulated service for the state. That the product at issue happens to be a compilation of the official statutory law of the state makes no difference to the fact that Lexis is still providing a specific service and not acting as a governmental entity. The Commission has the ultimate say over the TCA's content. Lexis is not a stand-in for government; it is just performing a contracted-for job within tightly specified parameters.

Hudson cites several cases, including *Allen v. Day*, 213 S.W.3d 244 (Tenn. Ct. App. 2006), in support of his argument that Lexis is the functional equivalent of a governmental entity. In *Allen*, this Court held that a private entity managing day-to-day operations at a public arena was the functional equivalent of a governmental entity. *Id*. at 246, 261. Importantly, in that case, the private entity "participate[d] in making binding governmental decisions regarding the management of the Arena[.]" *Id*. at 256. Here, the Commission has the final say on the TCA's contents. Lexis just helps implement the process. Other examples of functional equivalence cited by Hudson relating to education and prisons, for instance, implicate areas of traditional government intervention. The present matter is distinct. While the state certainly has always been in the law-making business, it has not traditionally been in the self-publishing business. Thus, we conclude that under the main *Cherokee* factor, Lexis does not perform a governmental function. Additionally, the Tennessee Supreme Court in *Cherokee* clarified that the rationale underpinning the functional equivalence doctrine is to ensure that the state does not avoid disclosure by delegating to a private entity. 87 S.W.3d at 79. Here, the state is not avoiding disclosure of the TCA through its contractual relationship with Lexis. On the contrary, the state contracts with Lexis to produce and publish the TCA, not to hide it.

The remaining *Cherokee* factors likewise do not support a finding of functional equivalence. Lexis is not controlled by the state. As discussed above, it simply adheres to stringent specifications in performing a contracted-for service to the state. Lexis also is not funded by the state. Finally, Lexis was not created by the General Assembly. The *Cherokee* factors weigh strongly against a finding of functional equivalence as to Lexis. We hold that, under the totality of the circumstances, Lexis does not operate as the functional equivalent of a governmental entity simply by virtue of its specific, contracted-

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for services for the state in connection with publishing the TCA. We modify the Trial Court's judgment to that extent.

Our conclusion that Lexis is not the functional equivalent of a governmental entity means that it is not subject to the TPRA. However, in the event that we are wrong about that, we proceed to consider whether the Trial Court erred in concluding that the TCA is exempt from disclosure under the TPRA. The TPRA states, as relevant:

> (a)(1) As used in this part and title 8, chapter 4, part 6:
> (A) "Public record or records" or "state record or records":
> (i) Means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity; and
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> (2)(A) All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.
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> (7)(A)(i) A governmental entity shall not require a written request or assess a charge to view a public record unless otherwise required by law. Requests to view public records may be submitted in person or by telephone, fax, mail, or email if the governmental entity uses such means of communication to transact official business, or via internet portal if the governmental entity maintains an internet portal that is used for accepting public records requests.

Tenn. Code Ann. § 10-7-503 (West July 1, 2022 to April 16, 2023) (emphasis added).

Lexis argues that the "otherwise" clauses apply here. To this end, it cites a number of statutes, including: Tenn. Code Ann. § 1-1-105(a); Tenn. Code Ann. § 1-1-106(a); and Tenn. Code Ann. § 1-1-113(b) ("The commission shall not be authorized to subsidize the publication of the code out of public funds, but shall require that the cost of publication be borne by the publisher, and the publisher shall be required to depend for compensation upon the proceeds of the sale of the publication."). Lexis also cites Tenn. Code Ann. § 3-

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10-108(d) ("If public information is stored in a computer-readable form, the committee has exclusive authority to determine the form in which the information will be reproduced for the requestor of the information; provided, that the reproduction, publication, and sale of Tennessee Code Annotated in any form, in whole or in part, shall be pursuant to the provisions of title 1, chapter 1. If access to such public information is also available in printed form, it need not be provided in an electronic readable form."). According to Lexis, Tennessee law provides an exclusive path to accessing the TCA, and the TPRA is not the means to do it. In response, Hudson says that Lexis and the Commission cannot establish an exemption from disclosure for the TCA by pointing to a "grab bag" of statutes that merely mention the Commission or the TCA.

This issue involves statutory interpretation. Our Supreme Court has given guidance with regard to interpreting statutes, stating:

> Statutory interpretation and the application of a statute to the facts of a case involve questions of law and are reviewed under a de novo standard of review with no presumption of correctness afforded to the trial court. *Tenn. Dep't of Corr. v. Pressley*, 528 S.W.3d 506, 512 (Tenn. 2017); *Arden v. Kozawa*, 466 S.W.3d 758, 764 (Tenn. 2015). We thus independently review the relevant provisions of the Charter without any deference to the interpretations of the Commission or the trial court. *See Pressley*, 528 S.W.3d at 512.
>
> The overriding purpose of a court in construing a statute is to ascertain and effectuate the legislative intent, without either expanding or contracting the statute's intended scope. *Ray v. Madison Cnty., Tenn.*, 536 S.W.3d 824, 831 (Tenn. 2017); *Pressley*, 528 S.W.3d at 512. Legislative intent is first and foremost reflected in the language of the statute. *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010). "We presume that the Legislature intended each word in a statute to have a specific purpose and meaning." *Arden*, 466 S.W.3d at 764. The words used in a statute are to be given their natural and ordinary meaning, and, because "words are known by the company they keep," we construe them in the context in which they appear and in light of the general purpose of the statute. *Lee Medical*, 312 S.W.3d at 526; *Ray*, 536 S.W.3d at 831. "We endeavor to construe statutes in a reasonable manner 'which avoids statutory conflict and provides for harmonious operation of the laws.' " *Ray*, 536 S.W.3d at 831 (citation omitted). When a statute's text is clear and unambiguous, we need look no further than the language of the statute itself. *Lee Medical*, 312 S.W.3d at 527. "We simply apply the plain meaning without complicating the task." *Pressley*, 528 S.W.3d at 513.

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> When, however, the language of a statute is ambiguous, we resort to rules of statutory construction and external sources in order to ascertain and give effect to the legislative intent. *Lee Medical*, 312 S.W.3d at 527; *Ray*, 536 S.W.3d at 832. These external sources may include the broader statutory scheme, the history and purpose of the legislation, public policy, historical facts preceding or contemporaneous with the enactment of the statute, and legislative history. *Lee Medical*, 312 S.W.3d at 527-28; *Ray*, 536 S.W.3d at 831-32. The language of a statute is ambiguous when it is subject to differing interpretations which yield contrary results. *In re Hogue*, 286 S.W.3d 890, 894 (Tenn. 2009). "This proposition does not mean that an ambiguity exists merely because the parties proffer different interpretations of the statute. A party cannot create an ambiguity by presenting a nonsensical or clearly erroneous interpretation of a statute." *Powers v. State*, 343 S.W.3d 36, 50 n.20 (Tenn. 2011).

Wallace v. Metro. Gov't of Nashville and Davidson Cnty., 546 S.W.3d 47, 52-53 (Tenn. 2018) (footnotes omitted).

We agree with Hudson that no single statute cited by Lexis or the Commission contains an explicit exemption from disclosure for the TCA under the TPRA. Nevertheless, the law recognizes implicit exemptions, as well. *Patterson*, 421 S.W.3d at 606 (citation omitted). We look to the overall statutory mechanism for the production and sale of the TCA to determine whether title 1, chapter 1 of the TCA and other law serve as an exception to the TPRA's general requirement of disclosure. The only reasonable conclusion is that the General Assembly intended to contract with a publisher to produce and publish the TCA and then allow it to be sold by the publisher—not given away for free upon request. Hudson seeks free access to the TCA by means of a request for public records. This would circumvent the statutory scheme in place for producing and publishing the TCA. Such a result would undermine the state's practice of contracting with publishers like Lexis. On this, we are guided by the General Assembly's clear intent, not the underlying wisdom of the policy, which we do not pass judgment on. If one could obtain the TCA for free by making a public records request, few if any publishers would contract with the state to publish the TCA. Fewer consumers still would want to pay for the TCA if it were required to be given away for free upon request. Given that there is a statutory framework in place for the production and distribution of the TCA, requiring unfettered free access under the TPRA would negate this statutory approach. We construe statutes to effectuate rather than nullify law. We also construe statutes to harmonize the law wherever possible. We, therefore, hold that Tennessee law 'otherwise provides' the exclusive avenue for obtaining the TCA. Thus, the TCA is exempt from disclosure under the TPRA. We affirm the Trial Court on this issue.

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In summary, we hold that for purposes of the TPRA, the TCA is ineligible for copyright protection under the U.S. Supreme Court decision in *Georgia v. Public.Resource.org, Inc*. We hold further that Lexis is not the functional equivalent of a governmental entity. Finally, we hold that if Lexis were the functional equivalent of a governmental entity, the TCA would be exempt from disclosure under the TPRA because Tennessee law otherwise provides a separate, exclusive avenue for obtaining the TCA. We affirm the Trial Court's judgment as modified.

Conclusion

The judgment of the Trial Court is affirmed as modified, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, David L. Hudson, Jr., and his surety, if any.

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D. MICHAEL SWINEY, CHIEF JUDGE

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11/09/2023
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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 3, 2023

PUBLIC.RESOURCE.ORG ET AL. v. MATTHEW BENDER & COMPANY, INC. ET AL.

Appeal from the Chancery Court for Davidson County
No. 22-1025-III Ellen Hobbs Lyle, Chancellor

No. M2022-01260-COA-R3-CV

W. NEAL MCBRAYER, J., concurring.

I would also affirm the dismissal of the petition for access to public records and to obtain judicial review of denial of access. But I would do so only "on the threshold issue" identified by the trial court. The trial court framed the issue as "whether Tennessee Code Annotated constitutes a document required for public access under the Public Records Act." On that threshold issue, I reach the same conclusion as the trial court and the majority. State law otherwise provides for access to Tennessee Code Annotated, so Tennessee Code Annotated is not a "state record" subject to disclosure under the Public Records Act. *See* Tenn. Code Ann. § 10-7-503(a)(2)(A) (Supp. 2023) (making all state records "open for personal inspection by any citizen of this state . . . unless otherwise provided by state law"); *see also Tennessean v. Metro. Gov't of Nashville & Davidson Cnty.*, 485 S.W.3d 857, 865 (Tenn. 2016) (recognizing Tennessee Code Annotated § 10-7-503(a)(2)(A) as "a general exception to the Public Records Act, based on state law"). The trial court recognized that resolving the threshold issue was "dispositive, making it unnecessary to decide the other two defenses asserted." Yet, "in the interest of avoiding a time-consuming and expensive remand" in the event of a reversal on the threshold issue, it also ruled on the other defenses.

There was no need to consider the other defenses. As the petitioner/appellant, David L. Hudson, Jr., and the respondent/appellee, Matthew Bender & Company, Inc., recognize, the issues on appeal all present questions of law. So the possibility of a time-consuming and expensive remand was remote. When a trial court reaches a correct result, here dismissal, but states an erroneous reason for the result, the result may be affirmed on the correct rationale if it is apparent from the record. *See Denny v. Wilson Cnty.*, 281 S.W.2d 671, 675 (Tenn. 1955). I would affirm dismissal of the petition solely because Tennessee

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Code Annotated is exempt from disclosure under the Public Records Act. It fits within the "state law" exception found in Tennessee Code Annotated § 10-7-503(a)(2)(A).

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE

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FILED
10/17/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

PUBLIC.RESOURCE.ORG, ET AL. v. MATTHEW BENDER & COMPANY, INC., ET AL.

Chancery Court for Davidson County
No. 22-1025-III

No. M2022-01260-COA-R3-CV

ORDER

On September 29, 2023, this Court entered an order directing one of the petitioner-appellants, Public.Resource.Org, to show cause as to why it should not be dismissed for lack of standing. Public.Resource.Org has filed a response acknowledging that it is not in a position to show cause. Therefore, Public.Resource.Org is dismissed from the appeal.

PER CURIAM

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