IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF TENNESSEE AMERICAN WATER COMPANY TO CHANGE AND INCREASE CERTAIN RATES AND CHARGES SO AS TO PERMIT IT TO EARN A FAIR AND ADEQUATE RATE OF RETURN ON ITS PROPERTY USED AND USEFUL IN FURNISHING WATER SERVICE TO ITS CUSTOMERS	)	**DOCKET NO. 06-00290**

CONSUMER ADVOCATE'S MOTION TO RECONSIDER SUPPLEMENTAL PROTECTIVE ORDER, OR IN THE ALTERNATIVE, FOR INTERLOCUTORY REVIEW BY THE TENNESSEE REGULATORY AUTHORITY

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of Attorney General ("Consumer Advocate"), respectfully submits this motion to reconsider the supplemental protective order entered on March 1, 2007, or in the alternative, for interlocutory review of the supplemental protective order by the Tennessee Regulatory Authority. The parties already have a protective order in place, and there is no need for a supplemental protective order for so-called "highly confidential" information. Also, there are specific problems with the supplemental protective order.

The supplemental protective order says that if the Tennessee Attorney General's Office receives a request or subpoena for "highly confidential" information, the Tennessee Attorney

General's Office "shall (i) oppose the production or disclosure of Highly Confidential Information and; and [sic] (ii) shall not disclose or produce such information unless and until subsequently ordered to do so by a court of competent jurisdiction." (Supplemental protective order, ¶11; see also ¶ 8-e). Furthermore, disputes about what is "highly confidential" information will be resolved by the hearing officer. (Supplemental protective order , ¶ 2). These two provisions taken together give the hearing officer the power to dictate to the Tennessee Attorney General the position of the Tennessee Attorney General's Office regarding whether any document or information is subject to disclosure or production pursuant to any request or subpoena.

The Tennessee Attorney General directs the state's civil litigation in the trial courts, appellate courts, and supreme court. Tenn. Code Ann. § 8-6-109(b). If the Tennessee Attorney General determines that the facts and the law justify production or disclosure of documents or information pursuant to a request or subpoena, the ability of the Tennessee Attorney General's Office to take a position consistent with the opinion of the Tennessee Attorney General should not be impeded by an order of the TRA or its hearing officer. Although Tennessee American Water Company (the Company) has argued that a protective order settles any potential issue regarding the obligation of the Tennessee Attorney General's Office to disclose or produce documents or information, it is impossible to reach that conclusion without knowing any facts about the documents or information, without knowing any facts about the request or subpoena, without knowing the legal basis for the request or subpoena, without knowing the specific legal basis for the claim of confidentiality, and without knowing what developments might occur in the law between now and the time of the request or subpoena.

The Company relies on *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996), which

says, "[D]ocuments sealed by the protective order are not subject to inspection under the Tennessee Public Records Act." However, this case does not address the situation in which documents are incorrectly designated as confidential or are under seal erroneously. Also, this case does not address all potential sources of a request or subpoena. Given that the Tennessee Attorney General has virtually no control over what documents the Company designates as "highly confidential" or what documents the hearing officer will agree are "highly confidential," it is inappropriate for the hearing officer or the TRA to order the Tennessee Attorney General to take a particular position regarding the validity of a future request or subpoena.

Another case on which the Company relies, *Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 1999), establishes that the actual facts underlying the claim of confidentiality do matter to Tennessee courts. According to the Court of Appeals, "We emphasize, however, that any attempt to discover material in the possession of a governmental attorney *that actually constitutes work product* will be unsuccessful for the above-mentioned reasons." *Id.* at 786 (emphasis added). Tennessee courts will look behind the claim of confidentiality to determine if it is valid. The mere claim that a document is attorney work product does not protect it from the Public Records Act. The document must *actually constitute* attorney work product in order to be protected from the Public Records Act. Therefore, it is *not* indisputably established that any and all documents under seal pursuant to a protective order are protected from the Tennessee Public Records Act. If a document is designated "highly confidential" incorrectly by the Company, or if the hearing officer erroneously permits the Company to maintain the incorrect designation, it is possible that the supplemental protective order would not shield the document from the Tennessee Public Records Act.

If the Company incorrectly designates a document as "highly confidential," the Tennessee Attorney General's Office could petition the hearing officer to remove the designation. (Supplemental protective order, ¶ 1). However, if the hearing officer disagrees with the Tennessee Attorney General's Office about the designation of the document, the supplemental protective order requires the Tennessee Attorney General's Office to "oppose the production or disclosure" in the event of a subpoena or request for the document. (Supplemental protective order, ¶ 11). In this situation the supplemental protective order would order the Tennessee Attorney General's Office to take a position with regard to the confidentiality of a document that contradicts the position that the Office took in its petition to remove the designation.

In the context of a Public Records Act request, "a public official can justify refusing a Tennessee citizen access to a governmental record only by proving by a preponderance of the evidence that the record in controversy comes within a statutory exemption." *Memphis Publishing Company v. Holt*, 710 S.W.2d 513, 517-18 (Tenn. 1986). "The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence." Tenn. Code Ann. § 10-7-505(c). Considering these clearly established obligations on a public official analyzing a public records request, the Tennessee Attorney General's Office should not be ordered to delegate the analysis to the Company, the hearing officer, or the TRA. A public official responding to a public records request must analyze the facts and the law very carefully.

No entity other than the legislature can create exceptions to the Public Records Act. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville*, 274 F.3d 377, 394 (6th Cir.

2001). The Tennessee Supreme Court has made this point clear with the following language:

> Our review is governed solely by the language in the Public Records Act and the clear mandate in favor of disclosure. We do not question the sincerity or intention of NES in making a policy that is, on the surface, in the interests of its customers' privacy or safety. Yet these and any other matters of public policy that may affect the rights of access under the Public Records Act may not be adopted ad hoc by a government agency without action by the legislature.

The Tennessean v. Electric Power Board of Nashville, 979 S.W.2d 297, 305 (Tenn. 1998).

Tennessee courts consistently have looked behind the claims of confidentiality when analyzing whether a governmental agency has acted appropriately in responding to a public records request. According to the Tennessee Court of Appeals in *Cleveland Newspapers, Inc. v. Bradley County Memorial Hospital*, 621 S.W.2d 763 (Tenn. Ct. App. 1981), "only the legislature can declare certain records to be confidential. ... [T]he board of directors ... cannot avoid the provisions of the Code by so designating their personnel records." *Id.* at 765. Looking behind the claim of confidentiality, the Court of Appeals in *Coats v. Smyrna/Rutherford County Airport Authority*, 2001 WL 1589117 (Tenn.Ct.App.), decided, "Under our exercise of review, the correspondence that is the subject of this litigation does not contain any information of a confidential or secret nature." *Id.* at *7 (copy attached).

Again looking behind the claim of confidentiality, the Court of Appeals in *The Tennessean v. City of Lebanon*, 2004 WL 290705 (Tenn.Ct.App.), said the following:

> The City correctly asserts that records relating to a pending criminal action are not subject to disclosure under the Public Records Act because they are protected by other state law, specifically Tenn. R. Crim. P. 16(a)(2). [Citations omitted.] However, the mediation and settlement agreements between the City and Ms. Adams are not criminal investigative records. The fact that the City may have

> included those documents in the same files as police and TBI investigative reports does not make them confidential by association.

Id. at *7 (copy attached). Tennessee courts clearly are willing to look behind the claims of confidentiality to determine whether a governmental agency responded appropriately to a public records request. Therefore, the Tennessee Attorney General's Office should have the ability to consider the possibility that Tennessee courts would be willing to look behind the supplemental protective order to determine whether a document designated as "highly confidential" has been designated appropriately.

Another major problem with the supplemental protective order is that it requires everyone with access to "highly confidential" information (other than employees of the Authority) to execute an affidavit in which the person swears under oath to be bound by the supplemental protective order. The affidavit requirement is problematic for several reasons.

One of the problems with the affidavit requirement is connected directly to the supplemental protective order's requirement that the Tennessee Attorney General's Office must oppose disclosure of documents designated as "highly confidential." By signing the affidavit, the employees of the Tennessee Attorney General's Office might be construed as agreeing to be bound by the provision that dictates the Tennessee Attorney General's position regarding disclosure of documents. Also, by signing the affidavit, the employees of the Tennessee Attorney General's Office might be construed as attempting to enter into a confidentiality agreement contrary to the Public Records Act. "A governmental entity cannot enter into confidentiality agreements with regard to public records. The idea of entering into confidentiality agreements with respect to public records is repugnant to and would thwart the purpose and policy of the

Act." *Tennessean v. City of Lebanon*, 2004 WL 290705 (Tenn.Ct.App.), p. *5.

Another problem with the affidavit requirement is that it might be construed as contractual in nature, which could implicate the state's sovereign immunity. The state has consented to waive its sovereign immunity in the context of "[a]ctions for breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract[.]" Tenn. Code Ann. § 9-8-307(a)(1)(L). If the affidavits are construed as contractual in nature, they could be interpreted as waiving the state's sovereign immunity.

Also, the affidavits might be interpreted as a voluntary waiver of rights or defenses by the signatories. "State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain." Tenn. Code Ann. § 9-8-307(h). Signing the affidavits might be construed as waiving this statutory defense. "The defense of qualified immunity is available to public officials whose conduct conforms to a standard of objective legal reasonableness." *Cantrell v. DeKalb County*, 78 S.W.3d 902, 907 (Tenn. Ct. App. 2001). Signing the affidavits might be construed as waiving this qualified immunity defense. Furthermore, signing the affidavits might be construed as creating contractual rights for the Company against the signatories.

Another major problem with the supplemental protective order is that it says, "the TRA or the Hearing Officer shall clear the hearing room of all persons who are not subject to this Protective Order during any period of time when the Highly Confidential Information may be discussed during or used in a hearing." (Supplemental protective order, ¶ 6). If the Tennessee

Attorney General's Office determines that it should not consent to the supplemental protective order, the employees of the Tennessee Attorney General's Office would be excluded from portions of the hearing on the merits of the rate case. This result has not been justified by any source of law. The Company has not cited a specific regulation of the Securities and Exchange Commission or any other source of law that would require the Authority to exclude the employees of the Tennessee Attorney General's Office from the hearing room while so-called "highly confidential" information is merely discussed. Such action would potentially deprive Tennessee consumers of full representation at the hearing.

Another problem with the supplemental protective order is that it draws an arbitrary distinction between the employees of the Tennessee Regulatory Authority and the Tennessee Attorney General's Office. The supplemental protective order effectively exempts the employees of the Tennessee Regulatory Authority from its requirements. (See, for example, supplemental protective order, ¶ 8-b). "An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, [citation omitted], or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Jackson Mobilphone Company v. Tennessee Public Service Commission*, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993).

Without conceding that there is any need for a separate class of confidential information designated "highly confidential" information, any potential justification for the designation would be related to the nature of the information rather than the identity of the recipient of the information. Therefore, whatever exemptions from the supplemental protective order are appropriate for the employees of the Tennessee Regulatory Authority also should be extended to

the employees of the Tennessee Attorney General's Office. In this context the distinction between the two groups of state employees is arbitrary.

The Consumer Advocate respectfully requests that the hearing officer vacate the supplemental protective order. In the alternative, the Consumer Advocate respectfully requests interlocutory review of the supplemental protective order by the Authority.

RESPECTFULLY SUBMITTED,

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Dated: March 9, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or facsimile to the parties of record on March 9, 2007.

Stephen R. Butler
Assistant Attorney General

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Coats v. Smyrna/Rutherford County Airport AuthorityTenn.Ct.App.,2001.Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Allison COATS,

v.

SMYRNA/RUTHERFORD COUNTY AIRPORT AUTHORITY.

No. M2000-00234-COA-R3-CV.

Dec. 13, 2001.

Appeal from the Chancery Court for Rutherford County, No. 99MI-1476; Robert E. Corlew, III, Chancellor.

Josh A. McCreary, Murfreesboro, Tennessee, for the appellant, Smyrna/Rutherford County Airport Authority.

Allison Coats, Smyrna, Tennessee, pro se.

OPINION

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S. and PATRICIA J. COTTRELL, J., joined.

WILLIAM B. CAIN, J.

***1** This action was brought by the plaintiff against the defendant following two requests by the plaintiff pursuant to the Tennessee Public Records Act for certain documents relating to the Smyrna Airport negotiations with Wiggins Group, PLC./Plane Station, Inc. The plaintiff alleged a statutory right to inspect certain documents. Ultimately, the trial court ordered all of the documents released to the plaintiff, but ordered correspondence addressed to or signed by the SRCAA attorney placed under seal pending appeal. The principal issue on this appeal is whether the appellee is entitled to the documents under seal pursuant to Tennessee Code Annotated section 10-7-503.

***1** The appellant in this case is a municipal airport authority located at the Smyrna Airport known as the Smryna/Rutherford County Airport Authority (" SRCAA"). The appellee is a resident of Smyrna and, by the date of the appellate court hearing, became a licensed attorney. The appellee appeared in the trial court proceedings *pro se.* The appellee is one of five organizers and directors of a community group known as Concerned Area Residents Get Organized ("CARGO"). The present case arose out of proposed developments and negotiations between the Smyrna Airport and the Wiggins Group, PLC/Plane Station, Inc. ("Wiggins"). The SRCAA was represented by a private attorney in the negotiations. A letter of intent was entered between Wiggins and the SRCAA that contained a confidentiality provision stating:

***1** CONFIDENTIAL INFORMATION. Lessor and Lessee acknowledge that in connection with this letter and the Lease, each will need to provide the other with the confidential information. Each agrees that it will take all reasonable steps to insure that each of its officers, employees, agents and advisors will:

***1** (a) Keep and safeguard as confidential all such confidential information.

***1** (b) Use such confidential information solely for the purposes of evaluation regarding and complying with the provisions of the Lease and for purposes of exercising the rights and privileges afforded under the Lease.

***1** (c) Not to disclose such confidential information except for the purposes described above, or except and in compliance with the requirements set forth above or except as required by law (or any regulations or guidelines having the force of law) or subpoena or by legal process or by any governmental or regulatory agency authority or body or as required by any stock exchange in which shares of Lessee or any affiliate of Lessee are traded or are to be traded. No information shall be deemed confidential information if at the time it was

provided by Lessor or Lessee, as applicable, it was in the public domain or if it thereafter enters the public domain other than through the breach of these confidentiality provisions.

***1** On April 6, 1999, the plaintiff and Mr. King, the director of CARGO, entered the SRCAA office and requested certain documents concerning correspondence relating to a lien on the airport property held by Metro/Nashville Airport Authority. All further requests were referred to SRCAA's private attorney. The plaintiff was granted two of the three requested documents. On September 17, 1999, the plaintiff went to the SRCAA office requesting additional documents. She left a written request, address, and phone number at the office. No further contact was made with the plaintiff until she filed a petition.

***2** The plaintiff filed a petition on October 7, 1999 seeking to inspect certain documents pursuant to Tennessee Code Annotated section 10-7-101, et seq. ("Act"). The plaintiff's September 17, 1999 request included seven records or categories of records including: (1) A business plan of Wiggins relative to the development of the Smyrna airport, (2) the source of information of the "Airport Facts" which was released to explain Wiggins' plans, (3) the source of information upon which the Memorandum of Understanding between the Airport Authority and Wiggins Group was based, (4) invoices for Air Cargo Feasibility Study and Strategic Plan prepared by Keiser & Associates and the noise study by PBS & J, (5) proposed lease agreements by Wiggins, (6) counter-proposed lease agreements from SRCAA to Wiggins, and (7) all correspondence between SRCAA and Wiggins

***2** The SRCAA released the majority of the documents, however, the proposed lease agreements and all of the correspondence between SRCAA and Wiggins were not disclosed.

***2** The Chancery Court for Rutherford County ordered the proposed lease agreements disclosed:
***2** [T]he court finds that the Open Records Act applies to the Defendant, and that the Defendant must immediately provide to the Plaintiff access to the following documents: Lease Agreements proposed by Wiggins Group, PLC/Plane Station, Inc.; Lease Agreements proposed by the Defendant to Wiggins Group, PLC/Plane Station, Inc. .... The Court further finds that no documents have been identified which constitutes the source of information for a publication introduced known as " Airport Facts" or for a document entitled " Memorandum of Understanding" between the Defendant and Wiggins Group. The Court finds that the business plan of Wiggins Group, PLC/Plane Station, Inc. relative to development at the Smyrna Airport and an invoice for an Air Cargo Feasibility Study and Strategic Plan have been previously introduced.

2** The trial court denied the appellant's request for stay pending appeal and the leases were released to the appellee. In a memorandum opinion letter submitted by the trial court, after concluding that the leases were public records and that the plaintiff was entitled to them, the court stated:2** The correspondence perhaps should be considered differently. If the Defendant claims that the correspondence between Wiggins and the Defendant is protected by the attorney-client privilege, it appears that these documents (or copies thereof) should be filed under seal and examined by the Court in camera, before being further considered. Initially, it would seem that the majority of these documents similarly have been communicated to third parties, and thus are not legitimately subject to the attorney-client privilege. Nonetheless, there may be an element of expectation of privacy in a letter not present in the draft of a contract. Although the letters which are directly between counsel and the agency probably are protected by the attorney-client privilege, communications between the agency and a third party are probably such to release under the Open Records Act.

***3** In a later letter, the court stated:
***3** I have concluded my review of the correspondence submitted to me by Mr. Cope under seal.... While I frankly believe that correspondence should fall within a different category under the open records law from legal documents, proposed or completed, I find no legal authority setting forth

such a distinction. Upon review of the correspondence, I find nothing which would justify an order preventing their disclosure, although again I will acknowledge that even clothed with the authority of the Court, and with the ability, at least upon initial review, to keep secret all that I see, I continue to have the feeling that a sense of privacy is being invaded when the correspondence is made public. In fairness, it does not appear to the Court that any great amounts of information will be learned by the Plaintiff herein, or any other members of the public from the examination of the correspondence. The correspondence, of course, contains nothing of a particularly sensitive nature, yet it appears to have been written with the expectation of privacy.
***3** Nonetheless, the law provides that such information is open to the public.

***3** The trial court ordered all correspondence between the SRCAA and Wiggins released pursuant to the Act, but granted a stay of the order relating to correspondence addressed to or signed by the SRCAA attorney.

***3** The appellant maintains that the documents at issue in this appeal include the proposed lease agreements by Wiggins, the counter-proposed lease agreements from SRCAA to Wiggins, and all correspondence between SRCAA and Wiggins. "To avoid being dismissed as moot, ... issues must ... remain justiciable throughout the entire course of the litigation, including the appeal ." *County of Shelby v. McWherter,* 936 S.W.2d 923, 931 (Tenn.Ct.App.1996) (citing *McIntyre v. Traughber,* 884 S.W.2d 134, 137 (Tenn.1994)). We find that the issues relating to the draft leases and the correspondence that were previously provided to the appellee are moot. Therefore, we take no position as to the previously released documents. At issue on appeal are the documents under seal including correspondence addressed to or signed by the SRCAA attorney ("correspondence").

***3** Our review is governed by the provision of Tenn. R.App. P. 13(d) that "review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." However, with regard to issues of law, the standard of review is *de novo* without a presumption of correctness. *Ganzevoort v. Russell,* 949 S.W.2d 293, 296 (Tenn.1997); *Ridings v. Ralph M. Parsons Co.,* 914 S.W.2d 79, 80 (Tenn.1996).

***3** In the present case, we are confronted with the application of the Act to correspondence signed by or addressed to an attorney in the possession of the attorney. Public policy favors the right of citizens to inspect public records. *See City of Jackson v. Jackson Sun, Inc.,* 1988 WL 11515, at *5 (Tenn.Ct.App.1988). The public's right to access records of governmental entities is very broad, creating a presumption of openness. *See Memphis Publ'g Co. v. City of Memphis,* 871 S.W.2d 681, 684 (Tenn.1994); *see also Contemporary Media, Inc. v. City of Memphis,* No. 02A01-9807-CH00211, 1999 WL 292264, at *3 (Tenn.Ct.App.1999); *see also Arnold v. City of Chattanooga,* 19 S.W.3d 779, 785 (Tenn.Ct.App.1999); *see also* Tenn.Code Ann. § 10-7-503. The Legislature has declared that the Act "shall be broadly construed so as to give the fullest possible public access to public records." Tenn.Code Ann. § 10-7-505(d) (1999); *See also Griffin v. City of Knoxville,* 821 S.W.2d 921, 924 (Tenn.Ct.App.1991). However, not all public records are open to inspection. *Id.* "The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence." Tenn.Code Ann. § 10-7-505(c) (1999).

***4** The appellee maintains that the correspondence sought is within the purview of the Act and the appellant maintains that the correspondence at issue signed by or received by an attorney is not subject to the Act. First, the appellant argues on appeal that the correspondence does not fall within the definition of public "records."

***4** The first issue we address is whether or not the documents in the correspondence are public records within the meaning of the Act. Public records are

defined as "all documents, papers, letters, ... or other material ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn.Code Ann. § 10-7-301(6) (1999). Tennessee Code Annotated § 10-7-503 provides "all state, county and municipal records ... except any public documents authorized to be destroyed ... shall at all times, during business hours, be open for personal inspection ... and those in charge of such records shall not refuse such right of inspection ... *unless otherwise provided by state law.*" (Emphasis added).

***4** The final clause of Tennessee Code Annotated section 10-7-503(a) stating that documents are available 'unless otherwise provided by state law' qualifies the presumption of openness by creating a general exception for other state laws protecting documents. *Arnold v. City of Chattanooga,* 19 S.W.3d 779, 785 (Tenn.Ct.App.1999) (citing *Ballard v. Herzke,* 924 S.W.2d 652, 662 (Tenn.1996); *Appman v. Worthington,* 746 S.W.2d 165, 167 (Tenn.1987)).

***4** "The proper test in determining whether material is a public record remains whether it was 'made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency,' " and "[a]pplication of this test requires an examination of the totality of the circumstances." *Id* at 924 (citing Tenn.Code Ann. § 10-7-301). The correspondence was 'made' in the course of the entity's official business in connection with official business. In an effort to comport with the Legislature's mandate that the Act be construed broadly as possible, we take the position that the correspondence meets the expansive definition of public record.

***4** Aside from the general exception, T.C.A. 10-7-504, and numerous other statutes cross-referenced create classes of confidential records not subject to inspection. *See Griffin,* 821 S.W.2d 921, 923. Among the exceptions is one for the work product of the Attorney General and Reporter or any attorney thereunder. *Arnold,* 19 S.W.3d 779, 785. Correspondence addressed to or signed by an attorney retained by a public entity is not specifically excluded by the statutes.

***4** An entity cannot protect public records under the Act by shielding them behind a private attorney or otherwise by placing them in the possession of a private entity. If something is a public record, it remains a public record regardless of its physical location. *See Creative Restaurants v. City of Memphis,* 795 S.W.2d 672, 679 (Tenn.Ct.App.1990) .

***5** The appellant argues that the Act is inconsistent with Canon 4. The appellant is not asking this Court to declare the Act unconstitutional. Rather, the appellant argues that the correspondence falls within the broad exception of "otherwise provided by state law" contained in the Act. *See* Tenn.Code Ann. § 10-7-503(a). "It is certainly true that the Legislature is forbidden from destroying an attorney's ability to fulfill his ethical duties to a client." *Memphis Publ'g Co.,* 871 S.W.2d 681, 688. We recognize the competing interests at stake in this lawsuit between the attorney's duty and the right of the public to access public records.

***5** The competing interests have been addressed previously concerning the Open Meetings Act:
***5** In *Smith County Educ. Ass'n v. Anderson,* 676 S.W.2d 328 (Tenn.1984), we held that a provision of the Tennessee Open Meetings Act which prohibited a public body from holding private meetings could not be construed to prevent a public body from meeting in private with its attorney to discuss pending litigation. If the statute were so construed, we stated, the attorney's ability to fulfill his duty not to reveal its client's secrets would be destroyed.
***5** ....
***5** We emphasize, however, that any attempt to discover material in the possession of a governmental attorney that actually constitutes work product will be unsuccessful for the above-mentioned reasons. Therefore, we expressly invite the Legislature to remedy the underinclusiveness of § 10-7-504 by excepting the work product of county and municipal attorneys from public view.

***5** *Id.* at 688-89.

***5** The specific issue in the present case concerns

Canon 4 and the general exception contained in the Act. Canon 4 provides "[a] lawyer should preserve the confidences and secrets of a client." Sup.Ct. R. 8, Canon 4.
*5 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
*5 (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
*5 (1) Reveal a confidence or secret of a client.
*5 ....
*5 (C) A lawyer may reveal:
*5 ....
*5 (2) Confidences or secrets when permitted under Disciplinary Rules or *required by law* or court order.

*5 *Id.* DR 4-101 (Emphasis added).

*5 The preliminary statement to Supreme Court Rule 8 states:
*5 The Canons are statement of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession....
*5 The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive....
*5 The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

*6 Sup.Ct. R. 8 Code of Professional Responsibility, Preliminary Statement.

*6 In *Arnold,* the Eastern Section of this Court concluded that work products of an attorney for a governmental entity were not subject to disclosure under the Public Records Act, if the privilege were not waived. The Court stated:
*6 The Public Records Act is to be broadly construed so as to give the fullest possible public access to public records. T.C.A. § 10-7-505(d). Yet, that Act creates exception for documents made privileged or protected from disclosure by other state law. Just as important as public access to government records, is the right of a client to effective assistance of counsel. Canon 4 of the Code of Professional Responsibility, mandates that an attorney not betray the confidences of his client. The primary purpose of the work product privilege is to assure that an attorney is not inhibited in his representation of his client by the fear his files will be open to scrutiny upon demand. Moreover, if the client were aware that its secrets, embodied in the attorney's internal memorandum or other document, would all be subject to public scrutiny, it would limit the client's willingness to speak openly with his or her attorney and would consequently affect the attorney's ability to represent his or her client.

*6 *Arnold,* 19 S.W.3d 779, 787.

*6 In the present case, we are not dealing with the work product doctrine. The work product doctrine protects documents of an attorney prepared by the attorney, or another in his behalf, in preparation for trial or anticipation of litigation. *Id.* at 783. Further, the appellant is not arguing attorney-client privilege, having abandoned it in argument. The fact that records are merely signed by or written to an attorney is not sufficient reason to block public access. Even though the public's right of inspection is broad, it is not absolute and important countervailing interests can sometimes outweigh the right and defeat the presumption of openness if provided by law.

*6 The Supreme Court Rules are the law of this State and, therefore, are included in the phrase ' unless otherwise provided by State law.' Tenn.Code Ann. § 10-7-503(a). The mandatory disciplinary rules state that "[a] lawyer may reveal confidences and secrets when required by law or court order. DR 4-101(C)(2)." "It is certainly true that the Legislature is forbidden from destroying an attorney's ability to fulfill his ethical duties to a client." *Memphis Publ'g Co.,* 871 S.W.2d at 688. Thus, an ethical duty of an attorney in The Code of Professional Responsibility may create an exception to the Act. Accordingly, Canon 4 may exempt certain confidences and secrets from inspection

under the Act. In *Combined Communications, Inc. v. Solid Waste Region Board,* No. 01-A-01-9310-CN00441, 1994 WL 123831, at *2 (Tenn. Ct.App. April 13, 1994), this Court stated:
***6** The courts of this state have held that under some circumstances, communications from an attorney to his client that meet the definition of a public record may be exempt from the provisions of Tenn.Code Ann. § 10-7-503. However, "the privilege does not extend to communications from an attorney to a client when they contain advice solely based upon public information rather than confidential information."

*7 *Combined Communications, Inc. v. Solid Waste Region Board,* No. 01-A-01-9310-CN00441, 1994 WL 123831, at *2 (Tenn. Ct.App. April 13, 1994) (citing *Bryan v. State of Tennessee,* 848 S.W.2d 72 (Tenn.Crim.App.1992)).

*7 Under our exercise of review, the correspondence that is the subject of this litigation does not contain any information of a confidential or secret nature. It cannot be said that as a general rule, Rule 4 applies to all documents written to an attorney or signed by an attorney. The Rule cannot have such a blanket application.

*7 After examining the totality of the circumstances, we affirm the trial court and find that the correspondence addressed to or signed by the SRCAA attorney should be provided to the appellee.

*7 With regard to the documents under seal, we order that the documents remain under seal for the well-stated reasoning by the Western Section of this Court:
*7 Recognizing that the appellate process does not end with this Court, in order to prevent the issue from becoming moot until the judicial process is completed, the original documents initially filed in a sealed envelope with the chancery court and subsequently transmitted to the clerk of this Court in the same manner shall remain sealed and closed under the jurisdiction of the Clerk of this Court until the time for filing an Application for Permission to Appeal to the supreme Court has expired and the mandate of this Court has issued or, in the event Application for Permission to Appeal is made to the Supreme Court, until that Application is acted upon by that Court and a final judgment entered by the Supreme Court.

*7 *City of Jackson v. Jackson Sun, Inc.,* 1988 WL 11515, at *6 (Tenn.Ct.App.1988).

*7 The judgment of the trial court is affirmed with costs assessed to Appellant.

Tenn.Ct.App.,2001.
Coats v. Smyrna/Rutherford County Airport Authority
Not Reported in S.W.3d, 2001 WL 1589117 (Tenn.Ct.App.)

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The Tennessean v. City of LebanonTenn.Ct.App.,2004.
SEE COURT OF APPEALS RULES 11 AND 12
Court of Appeals of Tennessee.
THE TENNESSEAN, et al.
v.
The CITY OF LEBANON, Tennessee.
No. M2002-02078-COA-R3-CV.

May 7, 2003 Session.
Feb. 13, 2004.

Appeal from the Chancery Court for Wilson County, No. 01014; Charles K. Smith, Chancellor.

Charles W. Cook, III, Nashville, Tennessee; Peggy F. Williams, Lebanon, Tennessee, for the appellant, the City of Lebanon, Tennessee.
Alfred H. Knight, Alan D. Johnson, Nashville, Tennessee, for the appellees/cross-appellants, The Tennessean and Warren Duzak.

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL , P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

OPINION

PATRICIA J. COTTRELL, J.

***1** The City of Lebanon appeals the trial court's award of partial attorney fees to *The Tennessean* newspaper under the provisions of the Public Records Act, Tenn.Code Ann. § 10-7-501 et seq. The City argues that the trial court erred in ordering it to pay any attorney fees at all, because its refusal to make a public record available to *The Tennessean* was justified by a good faith belief that it was not required to. The newspaper argues that the trial court should have awarded it all the fees it incurred in the effort to compel the City of Lebanon to comply with the Public Records Act, instead of just a portion of those fees. We agree with *The Tennessean,* and we accordingly affirm the award of attorney fees, but modify it to include those fees that had been excluded by the trial court.

***1** The sole issues in this appeal involve questions relating to the trial court's award of attorney fees. Since those fees arose from underlying litigation under the Public Records Act, and those records were created as the result of a private citizen's claims against the City of Lebanon, we must begin this opinion with a brief history.

I. A Request Under the Public Records Act

***1** In the year 2000, the Lebanon Police Department's Drug Task Force staged a raid on a private residence within the City of Lebanon. They went to the wrong house because of a faulty search warrant, entered the house without properly identifying themselves, and wound up shooting and killing John Adams, a private citizen who was wholly unconnected with the target of the warrant.

***1** The City of Lebanon admitted liability. Mr. Adams' widow, Lorrine Adams, did not file a complaint, and she did not initiate a lawsuit against the City of Lebanon at any time. Instead, she entered into negotiations with the City's insurance carrier, Corregis Insurance. On December 16, 2000, the parties reached a settlement agreement. One provision of the agreement was that the details of the settlement would remain confidential.

***1** On December 19, Warren Duzak, a reporter for *The Nashville Tennessean* asked for a copy of the settlement agreement and other documents relating to it, pursuant to the Public Records Act, Tenn.Code Ann. § 10-7-501 et seq. The City Attorney denied the request.

II. Court Proceedings

***1** The day after the City's refusal, the City Attorney filed a Motion in the Wilson County Circuit Court seeking a protective order to maintain the confidentiality of the settlement agreement, even though there was no litigation pending in that court between Ms. Adams and the City. The City styled its Motion "In re the Matter of John Adams, deceased and *Lorrine Adams v. City of Lebanon,* Tennessee." The motion specifically asked for a protective order to keep the "terms of the settlement agreement" confidential and stated, in pertinent part:
***1** The confidentiality provision was included in the Agreement to prevent any influence it may or may not have on the state's pending suit in criminal court against a former police officer involved in the wrongly executed search warrant; and, for the protection of the privacy of Mrs. Adams and the estate of John Adams. The Nashville Tennessean, a Nashville daily newspaper, now demands that the city provide a copy of the settlement agreement under the Public Records Act and the Freedom of Information Act. The City avers that revelation of the terms of the Agreement will have an adverse effect on the mediation process, which will outweigh the public's right to know, and will jeopardize the city's future use of the mediation process in settlement of civil claims against it. The city further avers that revelation of the terms of the Agreement, if made public, could influence a jury, either way, in the criminal trial now pending.

***2** A hearing on the City's motion was conducted ex parte, without notice to *The Tennessean.* Notwithstanding the jurisdictional requirements of the Public Records Act, the Circuit Court granted the protective order on December 21. The order reiterated that it had been sought "to keep confidential the terms of a settlement agreement ..." and specifically found that "the terms of the settlement agreement are entitled to a Protective Order." Despite the court's statement regarding the purpose of the motion, the court also found that any and all records of the investigation into the death of Mr. Adams were not subject to inspection under the Public Records Act. In support of the protection of the settlement agreement, the court found that Rule 31 of the Tennessee Supreme Court required that agreements resulting from mediation remain confidential.

***2** Upon learning of the protective order, *The Tennessean* filed a Motion to Intervene and a Motion to have the Protective Order set aside on the ground of lack of jurisdiction.[FN1] The Circuit Court granted the Motion to Intervene, but denied the Motion to Set Aside. The primary basis for the court's denial was that Rule 31 authorized the confidentiality of the settlement. *The Tennessean* then appealed.

> FN1. Prior to its court filings, *The Tennessean,* through its counsel, sent a letter to the City attorney formally requesting access to the settlement agreement and correspondence relating to Ms. Adams' claim against the City.

***2** *The Tennessean* also filed a Petition for Access to Public Records in the Chancery Court of Wilson County pursuant to Tenn.Code Ann. § 10-7-505. The Chancery Court conducted a hearing on the newspaper's Petition on March 8, 2001, but declined to rule, because the appeal of the Circuit Court's decision was pending, and the Chancery Court decided to withhold its decision until the Court of Appeals acted.

***2** This court rendered its opinion on February 7, 2002. *See In re: John Adams,* No. M2001-00662-COA-R3-CV, 2002 WL 192575 (Tenn.Ct .App. Feb. 7, 2002) (No Tenn. R.App. P. 11 application filed). We held that the Circuit Court's ruling was void and of no effect because that court did not have jurisdiction to enter a protective order in this case for two reasons.

***2** First, no Complaint had been filed, and therefore no action had been commenced to give the trial court jurisdiction to issue the protective order. Second, subject matter jurisdiction over demands for public documents is vested in the Chancery Court under Tenn.Code Ann. § 10-7-505. We further held that the confidentiality provisions of Rule 31 did not apply in this case because the parties were never before the court and the settlement negotiations were not initiated pursuant to Rule 31.

***2** After this Court issued its opinion, *The Tennessean* set a show cause hearing in the Chancery Court on its Petition for Access. The City's concerns about the disclosure of the records had been allayed by this time, and it tendered the requested records before the hearing. The show cause hearing was then converted into a hearing on the newspaper's request for attorney fees, which are authorized under Tenn.Code Ann. § 10-7-505(g) for a governmental entity's willful refusal to disclose a public record.

***3** On July 17, 2002, the Chancellor ruled from the bench, without an evidentiary hearing. The court found that the newspaper was entitled to the attorney fees and costs it incurred because of the filings and proceedings in Circuit Court, including its appeal of the Circuit Court's ruling. It also ruled that *The Tennessean* should be reimbursed for the costs it incurred in applying for attorney fees, other than the cost of attending the July 17 hearing. The total award amounted to $20,038.52. But the court excluded from reimbursement those costs directly arising from or generated by the newspaper's Petition for Access in the Chancery Court, which we calculate from the attorney's affidavit to amount to about $4,000. The City of Lebanon appealed the trial court's award of fees. *The Tennessean* also appealed the trial court's denial of the remainder of its requested fees.

III. Attorneys fees and public records

***3** The Public Records Act makes it possible for a petitioner to recover the attorney fees and costs it incurs in the process of judicially compelling a governmental entity to comply with the provisions of the Act. Tenn.Code Ann. § 10-7-505(g) reads:
***3** If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.

***3** The reason for this legislative exception to the general "American" rule that each party pays its own attorney fees is to discourage wrongful refusals to disclose public documents. *Contemporary Media Inc. v. City of Memphis,* No. 02A01-9807-CH00211, 1999 WL 292264, at *3 (Tenn.Ct.App. May 11, 1999) (No Tenn R.App. P. 11 application filed). It also recompenses a party who has been required to expend time and money to enforce the public's right to access to public documents. *Id.* Consequently, it furthers the purpose of the Act, which is "to give the fullest possible public access to public records." Tenn.Code Ann. § 10-7-505(d).

***3** The statute is a limited award provision. *Memphis Publishing Co. v. City of Memphis,* 871 S.W.2d 681, 689 (Tenn.1994). The decision whether to award attorneys' fees under Tenn.Code Ann. § 10-7-505(g) is left to the discretion of the trial court, and appellate courts will not disturb that decision absent an abuse of that discretion. *Memphis Publishing Company v. Cherokee Children & Family Services, Inc.,* 87 S.W.3d 67, 80 n. 15 (Tenn.2002).
***3** Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

***4** *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn.2001) (citations omitted).

***4** The statute allows the court to award fees upon a finding that the governmental entity knew the record was public and willfully refused to disclose it. These two requirements have sometimes been stated as one combined standard, willfulness. Because the knowledge component of the standard implicates the issue of the clarity of the law regarding the settlement agreement's status as a public record, we begin with some basic principles.

***4** Whether a document is a public record is, in the first instance, determined by whether it was made or

received by a governmental entity pursuant to law or ordinance or in connection with the transaction of official business. Tenn.Code Ann. § 10-7-301(b) ; *Griffin v. City of Knoxville,* 821 S.W.2d 921, 923 (Tenn.1991). The Act creates a presumption of openness as to government documents. *Arnold v. City of Chattanooga,* 19 S.W.3d 779, 785 (Tenn.Ct.App.2000). There are specific exceptions that make otherwise public records confidential and not subject to disclosure, *see* Tenn.Code Ann. §§ 10-7-503(b) through (e) & -504, none of which are relevant herein, as well as a general exception to the access requirement where "otherwise provided by state law," Tenn.Code Ann. § 10-7-503(a), which effectively exempts from disclosure documents that are made privileged or protected from disclosure by law other than the Act itself. *Arnold,* 19 S.W.3d at 786.

***4** The legislature has declared that when courts are called upon to decide petitions for access, the Public Records Act "shall be broadly construed so as to give the fullest possible public access to public records." Tenn.Code Ann. § 10-7-505(d). Tennessee courts have adhered to the policy of full public access and interpreted the Act liberally to further the public interest as defined by the legislature. *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.,* 87 S.W.3d at 74; *Tennessean v. Electric Power Bd. of Nashville,* 979 S.W.2d 297, 301 (Tenn.1998). When a request for access to a record is denied, the burden is placed on the governmental entity to justify nondisclosure. Tenn.Code Ann. § 10-7-505(c).

***4** There is no dispute or question that the settlement agreement was created or received by the City in the transaction of official business and was presumptively a public record subject to disclosure under the Act. The question, therefore, is whether there existed some exception to justify the refusal of access.

IV. A Duty to Disclose

***4** The question of whether a settlement agreement in litigation against a city is subject to disclosure under the Public Records Act was decided in *Contemporary Media, Inc. v. City of Memphis,* No. 02A01-9807-CH00211, 1999 WL 292264 (Tenn.Ct.App. May 11, 1999) (No Tenn. R.App. P. 11 application filed). In that case, the family of a man who died in police custody had filed a civil rights lawsuit in federal court against the city. The lawsuit was settled by an agreement that included a confidentiality provision, and the city procured a " confidentiality order" which was placed under seal in the federal court lawsuit. This order reiterated the confidentiality provision, but the settlement agreement's other terms were not included. After the media requested and was denied access to the agreement by the city, *Contemporary Media* filed a petition for access in the chancery court. The city agreed that the requested documents were public records, but asserted that their disclosure was prohibited by the federal court confidentiality order. Subsequently, the federal court entered an order finding that the confidentiality order did not prohibit the city from disclosing the terms of the settlement agreement. The city then released the documents.

***5** The issue then became *Contemporary Media's* entitlement to attorney's fees it incurred in gaining access to the settlement agreement. This court stated that the first inquiry was whether the city knew that the record was public, and that question involved a determination of whether the city could make an agreement to treat the record as confidential. We found that the city could not and held:

***5** A governmental entity cannot enter into confidentiality agreements with regard to public records. The idea of entering into confidentiality agreements with respect to public records is repugnant to and would thwart the purpose and policy of the Act. Thus, the City could not lawfully enter into the agreement which it entered into with the ... family to keep the terms of the public record confidential.

***5** *Contemporary Media, Inc.,* 1999 WL 292264, at *5.

***5** In reaching this conclusion, the court relied in part upon a 1996 Opinion of the Attorney General of Tennessee which opined that an agreement by a

governmental agency to restrict public access to public records that are not exempt under law violates public policy and is unenforceable. *Id.*, at *5, quoting Op Tenn. Atty. Gen. 96-144 (December 3, 1996).

***5** Thus, at the time *The Tennessean* made its request to the City of Lebanon, there existed an opinion of the Court of Appeals holding and an Opinion of the Attorney General indicating that the City could not agree to make the settlement document confidential and that such an agreement would not be effective to remove the settlement document from the disclosure requirements of the Public Records Act.

***5** The City does not address this authority or attempt to explain why it does not apply or why it did not put the City on notice that the settlement agreement was a public document whose disclosure was required. Instead, the City argues that its refusal to grant access to the settlement agreement was " warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."

***5** In specific, the City argues that after it refused to disclose the settlement agreement it "sought guidance" from the Circuit Court and was thereafter entitled to rely on the Circuit Court's decisions regarding the protective order and deny access. But the City did not simply "seek guidance;" it sought and obtained ex parte a protective order in a court without jurisdiction where no case was pending in order to prevent or delay access. In fact, the City's motion stated that a protective order was necessary because the newspaper has requested access to the settlement agreement. In our earlier opinion, this court described the City's actions in seeking the protective order in Circuit Court as "an attempt to thwart the Public Records Act" and a "pre-emptive strike" for which there was no authority. *In re: the Matter of John Adams, Deceased,* 2002 WL 192575, at *3.

***5** The question before us is not whether the City's continued refusal was justified by pending court proceedings. Instead, the relevant question is whether the City's refusal to produce the requested documents was willful and with the knowledge that the record was public.

V. The City's Rationale for Refusing to Disclose

***6** In this appeal, the City asserts three substantive bases for refusal of access: (1) that Tennessee Supreme Court Rule 31 required that the settlement agreement remain confidential, (2) that the then pending criminal investigation of the shooting precluded disclosure of investigative reports that were also part of the City's file, and (3) that Ms. Adams' desire for confidentiality based on privacy and security concerns justified the refusal of access.

***6** This court discussed the Rule 31 argument in its prior opinion in this matter, holding:
***6** Rule 31 applies to court ordered mediation, which may be ordered by the court on its own motion, or on motion of a party. *Harris v. Hall,* No. M2000-00784-COA-R3-CV, 2001 WL 21504893, at *4 (Tenn.Ct.App. Nov. 28, 2001). To be so ordered, there must therefore be an underlying matter before the court. The rule expressly does not govern private alternative dispute resolution. Sup.Ct. R. 31 § 1. Mrs. Adams never initiated a claim against the City of Lebanon. Accordingly, the settlement mediation between Mrs. Adams and the City did not take place in the context of a Rule 31 court order. Although the courts and legislature of this State recognize and commend arbitration as a means of dispute resolution, (citation omitted), Rule 31 governing court annexed arbitration cannot be invoked here to justify a preemptive protective order in a matter that was never before the court.

***6** *In re: John Adams,* 2002 WL 192575, at *7.

***6** As this quotation makes clear, there was no legal basis for the assertion that Rule 31 exempted the settlement agreement from disclosure, either at the time the City refused the newspaper's request for the document or later. Rule 31 itself provides in its Section 1 that the standards and procedures in Rule 31 "do not affect or address the general practice of alternative dispute resolution in the private sector outside the ambit of Rule 31," which can only be called into play when there is pending an "eligible

civil action," as defined in Tenn. R.S.Ct. 31 § 2(d).

***6** As its second ground for refusing access, the City asserts that *The Tennessean's* request for access was so broad as to include investigative files or other materials relating to a pending criminal investigation into the conduct of a police officer involved in the search warrant or its execution. [FN2] The City relies upon the Circuit Court's finding in its Protective Order that the City's files related to Ms. Adams' claim contained investigative reports prepared by law enforcement agencies and the Chancery Court's observation that the newspaper was also seeking investigative reports. The City argues that not only were the investigative reports protected from disclosure, but that the mediation agreement and settlement agreement were also properly withheld "until such time as the Circuit Court determined that the criminal investigation and/or trial has concluded so that any criminal trial will be fair, impartial and just." [FN3]

> FN2. In a letter written after the issuance of the protective order, the City attorney informed *The Tennessean's* attorney that she was declining the newspaper's request for access "to the settlement agreement ... and any other documents relating to her claim."
>
> FN3. The motion for protective order, quoted earlier, the letter from *The Tennessean's* attorney referenced in footnote 1, and the letter from the City's attorney referenced in footnote 2 all refer to a request for the settlement agreement and correspondence or documents relating to that settlement. Nowhere is there mention of the criminal investigative reports. From the motion the City filed, we interpret its position at that time as concern about the potential effect on the pending or prospective criminal trial of publicity about the settlement, not the release of any investigative reports. That interpretation is consistent with the City's argument in its brief that "if the jury pool found out that the City's insurance company had settled a wrongful death suit with Ms. Adams, it is very likely that such knowledge would cause the jury to believe that the police officer was guilty" and the continuation of that argument quoted above. This is a public policy argument related to disclosure of the settlement agreement itself.

***7** The City correctly asserts that records relating to a pending criminal action are not subject to disclosure under the Public Records Act because they are protected by other state law, specifically Tenn. R.Crim. P. 16(a)(2). *Appman v. Worthington,* 746 S.W.2d 165, 166 (Tenn.1987); *Knoxville News-Sentinel v. Husky,* 982 S.W.2d 359, 361 (Tenn.Ct.Crim.App.1998). However, the mediation and settlement agreements between the City and Ms. Adams are not criminal investigative records. The fact that the City may have included those documents in the same files as police and TBI investigative reports does not make them confidential by association.

***7** It is well-settled that a governmental entity must disclose records or portions of records that are public, even if it must delete confidential information contained in those records. *Tennessean v. Elec. Power Bd. of Nashville,* 979 S.W.2d at 303; *Hickman v. Tenn. Bd. of Paroles,* No. M2001-02346-COA-R3-CV, 2003 WL 724474, at *9-10 (Tenn.Ct.App. March 4, 2003) (No Rule 11 Perm.App. filed). Those cases placed on the governmental entity an obligation to create computer programs to produce new reports containing only public information, while eliminating confidential information. In the case before us, no such burden would be imposed on the City; all it had to do was pull the public records from its files.

***7** Consequently, whether or not *The Tennessean's* request included confidential investigative reports, which the newspaper disputes [FN4], it is abundantly clear that *The Tennessean* requested the settlement agreement and the City refused access to the settlement agreement. It is equally clear that the confidentiality of the investigative reports has no relevance to and no effect upon the public status of

the totally separate settlement agreement related to the City's potential civil liability. Thus, the City's argument as to this ground for refusing disclosure is without merit.[FN5]

> FN4. The Circuit Court, in its order refusing to set aside the protective order, specifically found that the Tennessean had requested investigative reports along with the settlement agreement and correspondence related to Ms. Adams' claim. The Petition for Access which initiated the proceeding herein states that the newspaper and its reporter had requested a copy "of this settlement agreement, along with correspondence and other documents that relate to it." There is no reference to criminal investigative reports, but it is not clear whether the chancellor interpreted the language used as broad enough to cover such reports. We simply note that the correspondence preceding this filing clearly referred to the settlement agreement, and the City never stated it considered the request as including investigative reports.
>
> FN5. Again, we are compelled to point out that the City's reliance on court action after its refusal to grant access is misplaced. The question is whether, at the time of the refusal, the City knew the record was public and willfully refused to disclose it.

***7** The third ground for refusing access asserted by the City is that Ms. Adams wanted the terms of the agreement to be kept confidential because of her concerns for her personal privacy and security. We can find no legal authority supporting an exclusion from the Public Records Act for an otherwise public record based on the wishes of the citizen involved. The City has provided us with no such authority, but argues that it would be appropriate to adopt a " rule of reason" denying *The Tennessean* access until such time as the citizen's privacy concern abated.

***7** Ms. Adams' sincere concerns for her privacy and security do not provide the City with a basis for refusing access to the settlement agreement. Citizens who apply for permits, apply for government jobs, buy electricity from a governmental utility, or otherwise do business with a governmental entity may share those concerns with regard to information about them contained in governmental records. Nonetheless, the General Assembly has made the policy decision that, as a general rule, the interest of the public as a whole in information about the operation of government outweighs individual privacy concerns. The General Assembly has also determined that countervailing interests outweigh full access in certain situations and has identified those situations in the Act and by providing that governmental records shall be open for inspection ... "unless otherwise provided by state law," in recognition of other legal authority making a record confidential or privileged.

***8** Our courts have found that records otherwise public are not subject to disclosure under the Public Records Act because of other law prohibiting their release. *See, e.g., Ballard v. Herzke,* 924 S.W.2d 652, 661-62 (Tenn.1996); *Memphis Publishing Co. v. City of Memphis,* 871 S.W.2d at 686 (Tenn.1994) ; *Arnold,* 19 S.W.3d at 785-86. However, our courts have not departed from the requirement that the record be protected from disclosure by existing law. To the contrary, the Tennessee Supreme Court has consistently refused to create any public policy exception to the Public Records Act. *Tennessean v. Electric Power Bd.,* 979 S.W.2d at 301. In *Memphis Publishing Co. v. Holt,* 710 S.W.2d 513 (Tenn.1986), the court held that closed police investigative reports were public records subject to disclosure because such records were not otherwise exempted by law [FN6] and rejected an argument it should imply an exception to the Act based on public policy. The court stated:

> FN6. The statute at that time read "unless otherwise provided by state statute." *Holt,* 710 S.W.2d at 515.

***8** It is the prerogative of the legislature to declare the policy of the state touching the general welfare. And where the legislature speaks upon a particular

subject, its utterance is the public policy of the state upon that subject....
***8** *Id.* 710 S.W.2d at 517. The Court has adhered to this position .[FN7] *See Doe v. Sundquist,* 2 S.W.3d 919, 926 (Tenn.1999) (holding that the confidentiality of records is a statutory matter left to the legislature, and absent a fundamental right or other compelling reason it would not extend constitutional protection to the non-disclosure of personal information.) Thus, neither this court nor either trial court was free to substitute its public policy judgment for that expressed by the legislature in the Act or to create an exemption not otherwise provided by law. Invocations of public policy or private detriment are not in themselves legally sufficient justifications for withholding public records from citizens of Tennessee.

FN7. The *Holt* court also referred to the then-existing provision allowing exceptions to public access only where " otherwise provided by state statute" and stated the legislature, by that language, had reserved to itself the public policy exceptions to the Act's requirement of disclosure. 710 S.W.2d at 517. Although that provision has been amended to create exceptions where "otherwise provided by law," the Court has not veered from its refusal to recognize judicial authority to create exceptions based on public policy.

***8** None of the arguments propounded by the City to justify its denial of access is well-founded. The City has failed to meet its burden of justifying nondisclosure of the records as required by Tenn.Code Ann. § 10-7-505(c).

VI. Willful Refusal

***8** The trial court considered the newspaper's request for fees in the context of the two separate lawsuits involved in its efforts to obtain access to the records. The court felt that the City's pre-emptive action in seeking a protective order from a court without jurisdiction was wrongful and resulted in additional fees, including the fees on appeal, that *The Tennessean* would not otherwise have incurred. The trial court reasoned that the City, after its refusal, should simply have waited for *The Tennessean* to file a petition for access under the Act and let the chancellor sort through the issues and determine what was protected.

***8** The court indicated that the City would probably have lost in such an action, with the exception of any request for criminal investigative reports. Nonetheless, the court stated it felt that if the City had just said no, "that wouldn't have been any bad faith. I feel like *The Tennessean* would have been out that amount of attorney fees as well anyway." The court further stated:
***9** I feel like that based upon reviewing this and the record, that the Tennessean would have been out anyway regardless of what would have happened unless the City would have just revealed all the records. I really don't think they could have turned over all of the records at that time, because there was somewhat of a criminal investigation pending. I feel like they were justified. Also, because there was a contract saying that they could not do it, I think they would have been justified at that point, and then let the Tennessean file the action in Chancery Court.[FN8]

FN8. The court also observed that the City would probably have been justified in simply refusing the request "out of ignorance, if nothing else." We respectfully disagree. A governmental entity cannot remain unknowledgeable of the Public Records Act and authority interpreting it and thereby immunize itself from liability for attorneys fees. A request for access to a public record imposes a duty on the entity to inform itself of its legal obligations. The Public Records Act ensures citizens broad access to information about the operation of their governments, and a governmental entity cannot impede that access without at least attempting to ensure it is acting in compliance with that Act. The attorneys fee provision of the Act furthers the

> purpose of broad access. Consequently, the requirement of that provision that the entity or official "knew that such record was public" must be read to include what a reasonably prudent governmental official should have known, *i.e.,* at least the well-established law on the question.

***9** If a refusal of access was willful and knowing, then the party seeking access may be awarded "all reasonable costs involved in obtaining the record, including reasonable attorney's fees...." Tenn.Code Ann. § 10-7-505(g). Thus, while we agree with the trial court's view of the City's detour through the Circuit Court, the City's liability for fees incurred in that action rests on the same conduct as its liability in the Chancery Court action: the validity of its refusal of access. The fees incurred by *The Tennessean* in the Circuit Court action were necessitated by the City's actions and were involved in obtaining the settlement agreement. However, so were the fees incurred in the action in Chancery Court which was properly initiated by *The Tennessean* with a petition for access.

***9** In determining whether the refusal was justified, the court must decide whether the governmental entity knew the documents were public record and willfully refused to provide access. The Act places the burden on the refusing governmental official or entity to justify a refusal of access. Tenn.Code Ann. § 10-7-505(c). A public official can meet that burden and justify denial of access only by showing that the document at issue is not a public record or is exempt from disclosure by the exceptions enumerated in the Public Records Act or by an exception created in other law. *See Holt,* 710 S.W.2d 513.

***9** Regardless of the sometimes varying statements expressed by this court as to a standard for determining whether the refusal was willful and knowing,[FN9] in actuality our courts have consistently applied the same analysis. That analysis emphasizes the component of the statutory standard that the entity or its officials know that the record sought is public and subject to disclosure. It evaluates the validity of the refusing entity's legal position supporting its refusal; critical to that determination is an evaluation of the clarity, or lack thereof, of the law on the issue involved. As our Supreme Court has stated, courts will not impute to a governmental entity "a duty to foretell an uncertain judicial future." *Memphis Publishing Co. v. City of Memphis,* 871 S.W.2d at 689. Accordingly, requests for fees have been denied where the question of whether the record sought was public was "not straightforward or simple," *Id.,* 871 S.W.2d at 689, or involved "complex interpretation of controlling case law," *Memphis Publishing Co. v. Cherokee Children & Family Services,* 87 S.W.3d at 80.

> FN9. This court has, in some cases, defined the willful and knowing standard as synonymous with bad faith. *Arnold,* 19 S.W.3d at 789; *Contemporary Media,* 1999 WL 2922264, at *4-5; *Capital Case Resource Center of Tennessee, Inc. v. Woodall,* No. 01-A01-9104-CH-00150, 1992 WL 12217 (Tenn.Ct.App. Jan. 29, 1992) (no Tenn. R.App. P. 11 application filed). Despite the language used, however, the courts in each of these cases actually applied an analysis based on the state of existing law. The *Arnold* and *Contemporary Media* courts also adopted the Black's Law Dictionary definition of bad faith, which includes an element of fraud, sinister motive, dishonest purpose, ill will, or similar intent. *Arnold,* 19 S.W.3d at 789. We do not believe that inserting this element into the statutory standard is consistent with the Act or the purpose of the attorney fee provision. The equation of the knowing and willful statutory standard with bad faith was first made in the *Capital Case Resource Center* opinion, but that court did not adopt the definition used in the later opinions. In fact, the court analyzed the existence of bad faith by applying the Tenn. R. Civ. P. 11 standard of whether the argument for the refusal of access was warranted by existing law or a good faith argument for the existence, modification, or reversal of existing law. 1992 WL 12217, at *9. Thus,

> the *Capital Case Resource Center* court defined bad faith as the absence of Rule 11 good faith in the context of the legal arguments made. In *Combined Communications,* 1994 WL 123831 at *4, this court held that the Act's attorneys fee provision did not apply where a governmental entity's unsuccessful attempt to protect a public record from disclosure meets the Rule 11 standard. No reference was made to bad faith.

***10** In *Arnold,* the court concluded that the record did not support a finding that the City knew the documents were public records and willfully refused to disclose them, largely because the City's position that the documents were privileged was found to be correct, even though the court found the privilege had been waived. 19 S.W.3d at 789. In *Contemporary Media,* 1999 WL 2922264, at *6, the court held that because of the existence of prior legal authority contrary to the City's position, "the City must be deemed to have known that it cannot make public records confidential by agreement."

***10** Similarly, in *Capital Case Resource Center of Tennessee, Inc.,* this court held that its ultimate decision that the record at issue was public "did not equate with a finding that, at the time he refused the request, respondent *knew* he was obligated to grant it," 1992 WL 12217, at *8. This court noted that the respondent had refused the request only after being advised by the Attorney General that the file was not subject to public inspection. The court also found that at the time the request for access was denied, the state of the law was not clear as to the type of record involved, and, therefore, the court could not say that the respondent's arguments were not "warranted by existing law or a *good faith* argument for the extension, modification, or reversal of existing law." The court held, "given the lack of controlling precedent in this state at that time, we find that the evidence of record does not preponderate against a finding that he did not know the file was subject to public inspection." *Id.* at *9. In *Combined Communications,* 1994 WL 123831, this court also applied the Rule 11 standard for good faith legal arguments, concluded there was no basis for the City's claim the documents were privileged, and stated, "It is hard to imagine a situation better calculated to frustrate the public's right to be informed of the workings of government or to thwart the purpose of the Public Records Act." *Id.* at *8. Accordingly, the court found the City's action willful and awarded fees.

***10** This approach of examining the grounds asserted for denial of access in view of existing law is consistent with another provision of the Act which provides that when a trial court orders disclosure, the records are to be made available to the petitioner unless there is a timely appeal and the trial court certifies that "there exists a substantial legal issue with respect to the disclosure which ought to be resolved by the appellate courts." Tenn.Code Ann. § 10-7-505(e)(2).

***10** As explained earlier, we can find no basis in existing law for the City's refusal to provide the settlement agreement. To the contrary, existing authority, including the *Contemporary Media* holding, required disclosure, and we find no lack of clarity in that authority. Accordingly, we hold that the City's denial of access was not justified and the City is liable for all the reasonable fees the newspaper incurred in vindicating its right to access. That includes the fees incurred in the Chancery Court action as well as the Circuit Court action.

VII. Conclusion

***11** The trial court's order awarding attorney fees and costs to *The Tennessean* is affirmed, but is modified to include all reasonable fees and costs incurred by the newspaper in its quest for the disputed public records. This case is remanded to the Chancery Court of Wilson County for a determination of the amount to be awarded and for other proceedings consistent with this opinion. Tax the costs on appeal to the City of Lebanon.

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