

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 13, 2005 Session

ED BRENNAN v. GILES COUNTY BOARD OF EDUCATION

**A Direct Appeal from the Chancery Court for Giles County
No. 2799 The Honorable Stella Hargrove, Judge**

No. M2004-00998-COA-R3-CV - Filed August 18, 2005

Appellant requested certain records under the Public Records Act. After an *in camera* review, the trial court determined that these records were not accessible under that Act as they fell outside the definition of public or state records found at T.C.A. §10-7-301(6). On appeal, Appellant contends that, by virtue of the fact that the requested documents were made during business hours and were made or stored on computers owned by the school system, these facts, per se, make them “public records”. Finding that the trial court did not err in performing an *in camera* review to determine whether any of the requested documents fell within the purview of the statutory definition, we affirm.

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

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, M., J., joined.

Matt Q. Bastian of Columbia, Tennessee For Appellant, Ed Brennan

Joe W. Henry, Jr., of Pulaski, Tennessee For Appellee, Giles County School Board

OPINION

On January 9, 2004, Edward Brennan (“Appellant”) filed a written request with the Giles County Board of Education (“Board,” or “Appellee”) to view and inspect “digital records of Internet activity, including e-mails sent and received, web sites visited and transmissions sent and received and the identity of any and all Internet Service Providers.” By letter of January 12, 2004, the Board denied Mr. Brennan’s request. On January 21, 2004, Mr. Brennan filed a “Petition to Access Public Records” in the Chancery Court of Giles County.¹

¹ On January 21, 2004, Mr. Brennan also filed a “Show Cause Motion for Immediate Hearing *Pendente Lite*,” which was granted by an “Order to Show Cause for Immediate Hearing” entered on the same day. According

Following a hearing on January 21, 2004, the trial court reviewed the requested documents *in camera*. On March 19, 2004, the trial court issued an Order denying Mr. Brennan's Petition. The Order reads, in pertinent part, as follows:

This cause came on to be heard on the 21st day of January, 2004...upon the Petition filed on behalf of Mr. Edward Brennan asking for various relief including the right to view, inspect and/or make copies of certain records, the response of the Defendant thereto, the argument of counsel for both parties in open Court, the *in camera* review of the requested records submitted by the Defendant, and upon the entire record from all of which the Court finds as follows:

1. That the Court has reviewed the materials forwarded for an *in camera* inspection, as well as the public records statutes and all case law provided by attorneys for both parties.
2. The Court finds that the records requested by the petitioner are not public records under the definition of Tennessee Code Annotated Section 10-7-301.
3. The test in determining whether material is a public record is whether the materials are made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.
4. Application of the test requires an examination of the totality of the circumstances.
5. The Court finds that none of the material provided are public records under this test. Mr. Brennan appeals from this Order and raises one issue for review as stated in his brief:
Whether digital records of computer activity maintained by the school systems' internet service provider and on two school owned computers or computers privately owned that were connected to the school owned internet system are "public records" within the meaning of T.C.A. 10-7-101 et seq. and thus available to a resident of the State of Tennessee for viewing and inspection?

We first note that the issue before this Court is quite narrow. The parties hereto raise no issue concerning the outcome of the trial court's *in camera* review of the requested documents (i.e. whether specific documents were accessible under the Public Records Act). Rather, the Appellant contends that, by virtue of the fact that the requested documents were created during

to Appellant's brief, this Order initiated the pleadings in the lower court and the parties' respective attorneys agreed that the original pleadings could be filed with the lower court simultaneous with the agreed upon hearing date of January 21, 2004.

school hours and/or by virtue of the fact that the requested documents were created and/or stored on school owned computer equipment, these facts, per se, make them public records under the Act. Consequently, according to Appellant, there was no need for the trial court to review the documents *in camera* since same were arguably “public records” by virtue of the nature of their creation and storage regardless of their specific content.

The trial court’s determination that an *in camera* review of the requested documents was necessary to determine whether same fell within the purview of the Public Records Act is a question of law. As such, our review of the trial court’s Order is *de novo* upon the record with no presumption of correctness accompanying the trial court’s conclusions of law. *See* Tenn. R. App. P. 13(d); *Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998); *Sims v. Stewart*, 973 S.W.2d 597, 599-600 (Tenn. Ct. App. 1998).

The Public Records Act, at T.C.A. §10-7-503 (Supp. 2004) reads, in pertinent part, as follows:

...all state, county and municipal records...shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

In construing the Public Records Act, we are guided by the General Assembly's directive that the public records statutes are to be "broadly construed so as to give the fullest possible public access to public records." T.C.A. § 10-7-505(d); *see also Chattanooga Publishing Co. v. Hamilton Co. Election Comm'n*, No. E2003-00076-COA-R3-CV, 2003 WL 22469808, at * 4 (Tenn. Ct. App. Oct. 31, 2003) and cases cited therein. In deciding whether the records are subject to public disclosure, we must be guided by the clear legislative policy favoring disclosure. Thus, unless it is clear that disclosure of a record or class of records is excepted from disclosure, we must require disclosure even in the face of "serious countervailing considerations." *Memphis Publishing Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994); *Swift v. Campbell*, No. M2003-02607-COA-R3-CV, 2004 WL 1920783, at * 4 (Tenn. Ct. App. Aug. 25, 2004), perm. appeal denied January 31, 2005.

That being said, the Appellant herein interprets the Public Records Act very broadly and champions a reading whereby any citizen of Tennessee may gain access to any and all records created during work hours on computers owned and operated by governmental entities. However, when read in light of the applicable statutory definitions, it is clear that the legislature did not intend for all records to be available for public perusal. T.C.A. §10-7-301(6) (Supp. 2004) limits access to those materials that meet the definition of public or state records, to wit:

“Public record or records” or “state record or records” means all documents, papers, letters, maps, books, photographs, microfilm, 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.

(Emphasis added).

It is well settled that the interpretation of statutory law is a judicial function. *See, e.g., State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 754 (Tenn. Ct. App.2001) (citations omitted). When interpreting a statute, the role of the Court is to “ascertain and give effect to the legislative intent.” *Sharp v. Richardson*, 937 S.W.2d 846, 850 (Tenn. 1996). In the absence of ambiguity, legislative intent is derived from the face of the statute, and the Court may not depart from the “natural and ordinary” meaning of the statute’s language. *Davis v. Reagan*, 951 S.W.2d 766, 768 (Tenn. 1997); *Westland West Community Assoc. v. Knox County*, 948 S.W.2d 281, 283 (Tenn. 1997).

The language of T.C.A. §10-7-301(6) unambiguously states that, in order to be a public or state record and thereby subject to access under T.C.A. §10-7-503, the document must be “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” As in this case, when a question arises as to whether certain documents fall within the purview of the statutory definition, it is the role of the trial court, as the gatekeeper of the law, to make that determination.

When T.C.A. §10-7-503 is read in conjunction with the relevant definition at T.C.A. §10-7-301(6), it is clear that the legislature placed some limitation on those documents that may be accessed under the Public Records Act. By the plain language of the definition, this limitation involves the purpose behind the creation of the document (i.e. whether it was “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency”). However, the limitation does not, as the Appellant argues, rest upon an inquiry into the time (i.e. whether during business hours) or upon the place where the document was produced and/or stored (i.e. on school owned computers). It was, therefore, necessary for the trial court to perform its judicial function by viewing the requested documents *in camera* to determine whether these documents were “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” For the trial court to allow the documents to be accessed under the Public Records Act just by the mere fact that they were made during business hours and/or on computers that were school-owned would be a violation of the clear intent of the legislature and, consequently, a dereliction of the most basic judicial duty.

While we have found no Tennessee cases directly on point with the one at bar, we have looked to other jurisdictions that have public record acts similar in language to our own. Fla. Stat. Ann. §119.011(11) (West 2004) provides, in relevant part, as follows:

"Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, ***made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.***

(Emphasis added).

As set out above, the Tennessee Public Records Act's definition of public records is almost verbatim to the Florida statute, i.e. the documents accessible thereunder must be "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." In *Times Publishing Co. v. City of Clearwater*, 830 So. 2d 844 (Fla. App. 2002), the Florida Appellate Court addressed a case similar to the one at bar wherein newspaper employees petitioned for mandamus, declaratory judgment, and injunctive relief, seeking an order compelling the city to release all e-mail sent from or received by two city employees who used government-owned computers for communication. The crux of the argument in *Times Publishing*, like that of the case before us, was whether the fact that the documents requested were created and stored on government computers made them public records per se under the Florida Statute. The *Times Publishing* Court held, in pertinent part, as follows:

Information stored on a computer is as much a public record as written documents in official files. *See Seigle v. Barry*, 422 So.2d 63 (Fla. 4th DCA 1982). Moreover, because section 119.01, Florida Statutes (2000), established a state public policy of open records, the public records law must be construed liberally in favor of openness. *City of St. Petersburg v. Romine*, 719 So.2d 19 (Fla. 2d DCA 1998).

In this case, however, "private" or "personal" e-mail simply falls outside the current definition of public records. Such e-mail is not "made or received pursuant to law or ordinance." Likewise, such e-mail by definition is not created or received "in connection with the official business" of the City or "in connection with the transaction of official business" by the City. Although digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk.

Moreover, the supreme court has rejected a similar argument that the mere placement of a document in a public official's file makes the document a public record. In *Shevin v. Byron, Harless, Schaffer, Reid & Associates*, 379 So.2d 633 (Fla.1980), the supreme court rejected the decision of the district court of appeal that "in effect said that section 119.011(1) applies to almost everything generated or received by a public agency." *Id.* at 640. Instead, the supreme court held that only materials prepared "with the intent of perpetuating and formalizing knowledge" fit the definition of a public record. *Id.* The court specifically recognized:

It is impossible to lay down a definition of general application that identifies all items subject to

disclosure under the act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case-by-case basis.

Id. See also Lopez v. State, 696 So.2d 725 (Fla.1997) (holding handwritten notes of state attorney, although not exempt from disclosure, were not "public record" by definition); *Hill*, 701 So.2d 1218, 1220 (recognizing generally that private party's privileged documents do not become public record simply by virtue of fact they are in government's possession); *News & Sun-Sentinel, Co. v. Modesitt*, 466 So.2d 1164 (Fla. 1st DCA 1985) (holding that records held by commissioner of agriculture as custodian of funds for group of private citizens were not public records).

As discussed by Judge Rondolino in his order denying the Times' claim, the courts themselves have struggled with the rules that should govern public access to and retention of such e-mail. The supreme court has recognized that judicial e-mail "may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as public record." *In re Amendments to Rule of Judicial Administration 2.051--Public Access to Judicial Records*, 651 So.2d 1185, 1190 (Fla.1995). The Times' request would require a definition of public record that is broader than the definition provided by the supreme court for use by this court. *See* Report of the Supreme Court Workgroup on Public Records, 825 So.2d 889(Fla. 2002) (amending Florida Rule of Judicial Administration 2.051(b) to define records of judicial branch). Neither the statute nor the case law supports such a broad interpretation of the term "public record."

Id. at 847.

While the *Times Publishing* Court concedes that records stored or created on public computers **may** be public records **if** they meet the definition of "public records" under the Florida statute, the Court declines to make a bright-line rule wherein all records stored on governmental computers are public records. As in this case, the determination of whether the requested documents fall within the statutory definition requires a case-by-case, or record-by-record, review. *See also Media General Operation, Inc. v. Tom Feeney, Etc.*, 849 So. 2d 3 (Fla. App. 2003); *State of Florida v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). Although we are not bound to follow the Florida cases, the Court in *Times Publishing* held, in its well-reasoned opinion, what we perceive to be the correct ruling if made pursuant to the Tennessee statute. Applying the principles set forth above, we find that the trial court did not err in holding an *in camera* review of the documents requested by Mr. Brennan to determine whether any met the statutory requirements of the Tennessee Public Records Act.

We emphasize that the Appellant does not question the ruling of the trial court concerning whether the particular documents are within the definition of public records as set out in the statute.

Accordingly, we affirm the judgment of the trial court. Costs of this appeal are assessed against the Appellant, Edward Brennan, and his surety.

W. FRANK CRAWFORD, PRESIDING JUDGE,

W.S.