Missing Footage: Reforming Tennessee's Law Enforcement Public Record Exception

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INTRODUCTION

According to the police reports, George Floyd died after a "medical incident."[1] Daniel Prude, died of a drug overdose while in Rochester police custody.[2] Chicago police shot teenager Laquan McDonald after he lunged at an officer while holding a knife.[3] Law enforcement presented these accounts as true and correct narratives describing the death of a Black man during a police encounter. They are, of course, entirely fabricated. Derek Chauvin murdered Floyd in cold blood. A Rochester police officer killed Prude by pressing his full body weight on to Prude's head as he lay prone and handcuffed.[4] Police footage of McDonald's death, released only after massive public protests, showed McDonald being shot sixteen times while running away from police.[5]

Government opacity kills any promise of meaningful political reform—democratic participation. Without access to records, voters

1. John Elder, *Investigative Update on Critical Incident*, MINNEAPOLIS POLICE DEP'T (May 26, 2020), https://archive.li/pwxX3.

2. Michael Wilson & Edgar Sandoval, *Documents Reveal How the Police Kept Daniel Prude's Death Quiet*, N.Y. TIMES (Oct. 8, 2020), https://www.nytimes.com/2020/09/15/nyregion/rochester-police-daniel-prude.html.

3. Ray Sanchez & Omar Jimenez, *16 Police Officers Participated in an Elaborate Cover-up After Laquan McDonald's Death*, CNN (Oct. 10, 2019), https://www.cnn.com/2019/10/10/us/chicago-inspector-general-laquan-mcdonald-shooting

4. Michael Wilson, *Did This Police Maneuver Lead to Daniel Prude's Death?*, N.Y. TIMES (Oct. 8, 2020), https://www.nytimes.com/2020/09/15/nyregion/daniel-prude-video-police-rochester.html.

5. Zach Stafford, *Tensions Rise in Chicago After Release of Video Showing Police Killing of Laquan McDonald*, THE GUARDIAN (Nov. 25, 2015), https://www.theguardian.com/us-news/2015/nov/24/laquan-mcdonald-police-killing-chicago-video-released.

and reformers lack a crucial tool for assessing local government officials' honesty, competence, and fidelity to the public good.[6]

Like every state, Tennessee law enforcement agencies have and continue to issue official police narratives obscuring or misstating the facts underlying a fatal police encounter.[7] In April of 2021, the Tennessee Bureau of Investigation initially claimed that 17-year-old Knoxville student Anthony Thompson, Jr., was shot to death after opening fire on three police officers in a school bathroom.[8] Officials told Thompson's family that they had no right to see the body camera footage until the end of the investigation. When released, the body camera footage showed Anthony Thompson, empty handed, attempting to peacefully surrender to police officers when a gun in his pocket accidentally fired, prompting the officers to shoot and kill him.[9]

Most recently, Memphis police officers reported encountering Tyre Nichols, a 29 year old Black man and father, during a traffic stop where he had "refus[ed] a lawful detention" and began to fight to officers. After his arrest, police claimed only that Tyre was only taken to the hospital because he "complained of shortness of breath." Body camera footage of Tyre's final moments, released weeks after his death,

6. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (stating that the basic purpose of open records laws generally "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed"); *see also* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1013–14 (2008) (describing Antonin Scalia's career-long critique of the federal FOIA as ineffective and superfluous given democratic checks and balances).

7. For more examples of official police coverups, see Sam Levin, *'They Kill the Person Twice': Police Spread Falsehoods After Using Deadly Force, Analysis Finds*, THE GUARDIAN (May 19, 2021) https://www.theguardian.com/us-news/2021/may/19/us-police-shootings-george-floyd-press-releases-reports (presenting a dozen examples of California police misrepresenting material facts related to inmate or suspect deaths).

8. Neil Vigdor, *Tennessee Student Killed by Police Did Not Fire Bullet That Hit Officer, Officials* Say, N.Y. TIMES (Apr. 14, 2021, 5:41 PM), https://www.nytimes.com/2021/04/14/us/knoxville-school-shooting-anthony-thompson.html; Sarah Riley & Brittany Crocker, *Latest Updates: The Police Shooting of Anthony J. Thompson Jr. in Knoxville*, KNOXVILLE NEWS SENTINEL (last updated Apr. 21, 2021, 8:56 AM), https://www.knoxnews.com/story/news/crime/2021/04/16/police-shooting-anthony-j-thompson-jr-knoxville-latest-updates/7227992002/.

9. Vigdor, *supra* note 8.

instead showed five officers beating him to death even as he attempted to comply with their orders.[10]

Tennessee law did not and could not force public disclosure of either video because Tennessee's public records laws, the Tennessee Public Records Act (TPRA), contains a daunting obstacle to police transparency: the Rule 16 law enforcement exception, an unusual judicially crafted doctrine barring all access to criminal records from the beginning of an investigation until the end of the very last collateral appeal. As a result, although police can waiver TPRA restrictions, no legal avenue exists for forcing disclosure of Tennessee law enforcement records during an ongoing investigation or prosecution. If police had not voluntarily surrendered footage of Tyre's death, the public would only have been guaranteed access at the conclusion of all suspects' federal post-conviction proceedings.

Lack of mandatory public access to police body camera footage is not an isolated transparency issue but only one example of the barriers preventing full public knowledge of state-sanctioned violence. A journalist's 2021 investigation revealed that Tennessee jails had underreported hundreds of in-custody deaths to state officials in spite of a state statute mandating annual reports documenting all law enforcement related deaths.[11]

Mapping and reforming Tennessee's statutory transparency framework might be an important and necessary step towards law enforcement reform and accountability. If effective law enforcement reforms can be tailored, such an effort requires effective levels of law enforcement transparency. However, transparency is not and should never be presented as a panacea, especially for pernicious social problems like racialized police violence. Greater access to law enforcement records will not undo the centuries of systemic racism engrained into

10. Jessica Jaglois, Nicholas Bogel-Burroughs & Mitch Smith, *Initial Police Report on Tyre Nichols Arrest Is Contradicted by Videos*, N.Y. TIMES (Feb. 1, 2023), https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html.

11. Grace King, *10Investigates: Prisons, Jails Across Tennessee Failing to Properly Report Hundreds of Inmate Deaths*, 10NEWS (Nov. 19, 2021), https://www.wbir.com/article/news/investigations/prisons-jails-across-tennessee-failing-to-properly-report-inmate-deaths/51-09131fe5-56c7-4020-a9f9-e49770eec12a (finding over 600 inmate deaths instead of the 331 deaths reported to state officials for the same period); *see* TENN. CODE ANN. § 38-10-102.

America's criminal justice system,[12] and may have a negligible effect on public attitudes towards police violence.[13] At best, transparency serves only as a transitional tool for extracting necessary information required to comprehend or combat racialized state violence, whether by revealing records of an individual's death at the hands of police or identifying emerging systems of state surveillance.[14]

To that end, this Article has three goals. The first goal is to illuminate some of the TPRA's doctrines and practical mechanics to provide clarity for Tennessee citizens seeking public records. The second goal is to explore the Rule 16 law enforcement exception's evolution and its illegitimacy under the state constitution, statutes, and rules of procedure. Finally, examining the TRPA through a separation of powers lens clarifies the law's ambiguous procedural aspects exploited by government defendants to frustrate record litigation.

Section I of this Article provides a brief overview of the TPRA's substantive components and the special judicial hearing reviewing denial of record access.

Section II addresses critical TPRA elements commonly disputed in litigation or key to a successful request, including exceptions to disclosure, the form, timing, and specificity of requests and responses, relief and remedies, and attorney fees.

Section III describes Tennessee Rule of Criminal Procedure 16, an unusual and daunting barrier preventing ready access to law enforcement records. The TPRA lacks specific provisions carefully delineating access to law enforcement records. To fill this statutory void and address a pressing public issue, Tennessee's judiciary stretched Rule 16 into an all-encompassing law enforcement exception preventing third-party access to law enforcement records during the pendency of a criminal investigation and the subsequent prosecution, up to and

12. *See* Kate Levine, *Discipline and Policing*, 68 DUKE L. J. 839, 845 (2019) ("[T]here is no reason to believe that visibility alone will solve complex, institutional, and organizational problems that have plagued police departments for decades.").

13. Ben Brucato, *The New Transparency: Police Violence in the Context of Ubiquitous Surveillance*, 3 MEDIA & COMMC'N 39, 50–51 (2015) (describing the muted political impact engendered of increased law enforcement transparency).

14. *See, e.g.*, Hannah Bloch-Webha, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CAL. L. REV. 917, 949–61 (2021) (identifying emerging data driven policing techniques including gang databases, private sector partnerships, and secret electronic searches).

including post-conviction federal proceedings. In practice, because law enforcement decides when an investigation has ended, the exception grants law enforcement officials wide discretion over when or whether to release internal police records, such as investigations of officer misconduct[15] or camera footage of a police killing.[16] Section III also explains how using Rule 16 as an amorphous, procedurally-created law enforcement privilege violates Tennessee's separation of powers by judiciary of the legislative power to alter substantive rights. *Appman* and its progeny should be recognized as unconstitutional, thereby ending use of Tennessee Rule of Criminal Procedure 16 to bar record access outside of an active criminal prosecution. Rather than continue burdening the judiciary with the Sisyphean task of backfilling statutory gaps, the Tennessee legislature should follow the lead of other states and enact a comprehensive statutory law enforcement privilege protecting sensitive victim information while also allowing timely public access to law enforcement records.

Section IV also uses the separation of powers to analyze the viability of the TPRA's statutorily created procedural requirements, requirements that partially contradict the state's procedural rules, and the application of the Tennessee Rules of Civil Procedure to TPRA litigation. Because the legislature cannot dictate procedure to the judiciary, the TPRA's procedural elements do not displace civil procedural rules,

Section V identifies the need for a uniform model state open records act. The inherent complexity of creating and adjudicating public record laws presents a daunting challenge to state governments and also to the citizens navigating the often byzantine and confusing end

15. *See, e.g.*, Tyler Whetstone, *KPD Opens New Internal Investigation After Cop Says Commanders Lied About Racist Incident*, KNOXVILLE NEWS SENTINEL, (July 8, 2021, 11:50 AM) https://www.knoxnews.com/story/news/local/2021/07/08/knoxville-police-racism-investigation-cop-says-commanders-lied/7885858002/. Although the investigation underlying this article finished in September of 2020, police delayed its release to reporters until May of the following year, claiming an ongoing investigation. (on file with author).

16. For example, footage showing the August 26, 2019, shooting death of Channara Pheap was only released after the conclusion of an internal Knoxville Police Department investigation, many months after the killing. Travis Dorman, *Knoxville Police Officer Was Justified in Killing Channara 'Philly' Pheap, Prosecutors Say*, KNOX NEWS, (Nov. 8, 2019, 11:58 AM), https://www.knoxnews.com/story/news/crime/2019/11/07/knoxville-police-officer-justified-killing-philly-pheap-da-says/2518165001/.

product. A uniform set of public record laws and the development of a common body of case law would facilitate record access in the same manner as the Uniform Commercial Code did for business transactions. A uniform information code might also help resolve the data blind spots hampering national reaction to police violence and other pressing issues.

I. AN OVERVIEW OF THE TENNESSEE PUBLIC RECORDS ACT

Unlike contract law and other legal domains benefitting from uniform codes and model legislation, state open records laws are often homegrown products with each state's laws presenting a heterogenous patchwork of requirements and procedure. Many attempts have been made at the Herculean task of surveying, cataloging, and rigorously comparing every state's public record laws, but the sheer volume and complexity of the task has proven daunting.[17] Tennessee's public record act alone is gargantuan: its three core statutes alone total over 18,000 words, easily double the size of the federal Freedom Of Information Act (FOIA) and four times the length of the United States Constitution. If other state's core open record statutes are equally lengthy, then the total word count for all state public record laws ranges somewhere close to a million words, roughly equal to the length of *Infinite Jest*, twice over. But there is more: the entirety of Chapter 7, entitled "Public Records," of the Tennessee Code occupies nearly one hundred

17. For a description of the major open records law compilation projects, see Bill F. Chamberlin et al., *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. FLA. J.L. & PUB. POL'Y 415, 418 (2007). For a list of multi-state and comparative open records law studies, see Richard J. Peltz-Steele & Robert Steinbuch, *Transparency Blind Spot: A Response to Transparency Deserts*, 48 RUTGERS L. REC. 1, 17–28 (2021), and see also Daxton R. "Chip" Stewart, *Let the Sunshine In, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265 (2010) (surveying state public record law remedies and fee provisions). The Reporter's Committee for Freedom of the Press maintains a comprehensive collection of state public record laws in its *Open Government Guide*. *Open Government Guide*, REP.'S COMM. FOR FREEDOM PRESS, https://www.rcfp.org/open-government-guide/ (last visited Oct. 31, 2022). For an earlier attempt to catalog state public record laws, see HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 39 (1953).

physical pages.[18] And Chapter 7 is not the entirety of TPRA-relevant statutes as it does not contain the hundreds of exceptions scattered throughout the state's other statutes or procedural rules.[19]

Like a related group of languages, state open records laws share similar characteristics or features, but successfully navigating any given set of laws ultimately requires granular knowledge of that specific body of law.[20] Given its complications and nuances, scholarship analyzing the TPRA has historically been the exclusive domain of practicing attorneys. As is true of many—perhaps all—similar state statutes, successfully navigating Tennessee's complicated constellation of public records laws requires carefully examining its peculiar requirements and dilemmas and interpreting case law.[21]

A. TPRA Requests and Responses Under Tenn. Code Ann. § 10-7-503

At its core, the TPRA promises Tennessee citizens ready access to inspect or copy non-exempt county or state government records, defending that promise with an expedited hearing and the possibility of

18. TENN. CODE ANN. § 10-5-101. Fortunately, the bulk of Chapter 7 does not pertain to most TPRA requests.

19. Other, more limited transparency statutes and provisions also exist throughout the Tennessee Code. *See* M. Christina Rueff, *A Comparison of Tennessee's Open Records Law with Relevant Laws in Other English-Speaking Countries*, 37 BRANDEIS L. J. 453 (1998) (analyzing Tennessee's adoption-specific open record law).

20. John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1027 (1989) ("A very wise man once noted that '[l]ife is too short to learn German.' The same might be said of state laws governing public records.").

21. The TPRA is not *terra incognita* and has been carefully scrutinized in a number of thoughtful publications. *See, e.g.*, Daniel A. Horwitz, *Safeguarding Crime Victims' Private Records Following the* Tennessean v. Metro, 53 TENN. BAR J. 20 (2017); Craig E. Willis, *2008 Public Records Act Sunshine Law Update*, 45 TENN. BAR J. 20, 20 (2009); Craig E. Willis, *The Tennessee Public Records Act and Statutory Exceptions 'Otherwise Provided by State Law,'* 43 TENN. BAR J. 20, 20 (2007); Albert Louis Chollet III, *Enabling the Gaze: Public Access and the Withdrawal of Tennessee's Proposed Rule of Civil Procedure 1A*, 36 U. MEM. L. REV. 695 (2006). Writing on behalf of the Reporter's Committee for Freedom of the Press, Doug Pierce, a frequent and successful TPRA litigator, penned what is likely the most thorough general overview of the TPRA. *See generally* Douglas R. Pierce, *Tennessee Open Government Guide*, REP.'S COMM. FOR FREEDOM PRESS, https://www.rcfp.org/open-government-guide/tennessee/ (last visited Oct. 29, 2022).

attorney fees. The right to inspect public records independent of a statute was first initially recognized in 1903 as a privilege bestowed upon Tennessee citizens,[22] although it had also been described as a constitutional right of access.[23] Although convoluted and riddled with hundreds of exceptions,[24] the TPRA exists to promote citizen oversight of government action[25] and expressly demands to be "broadly construed so as to give the fullest possible public access to public records,"[26] a requirement courts have sometimes honored even when disclosure promised serious consequences.[27] The most critical statutes are section 10-7-503, defining public records and the request process, section 10-7-504, providing some of the TPRA's many exceptions, and section

22. The right to inspect public records was first initially recognized in 1903 as a privilege bestowed upon Tennessee citizens. *See* State ex rel. Wellford v. Williams, 75 S.W. 948, 959 (Tenn. 1903) (holding that Memphis residents concerned about the city's financial condition had the right to inspect the city's records). "In 1957, the General Assembly codified this right of public access by enacting the state's first public records statutes." Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 864 (Tenn. 2016).

23. Ballard v. Herzke, 924 S.W.2d 652, 661 (Tenn. 1996). While some states like Florida, Montana, and North Dakota provide a constitutional right to access public records, recent Tennessee appellate decisions have rejected guaranteed public record access as a constitutional right. Chad G. Marzen, *Public Record Denials*, 11 N.Y.U. J. L. & LIBERTY 966, 967–68 (2018). *See* Moncier v. Harris, No. E2016-00209-COA-R3-CV, 2018 WL 1640072, at *5–6 (2018) (directly rejecting claimed constitutional right to government records under Section 19 of the Tennessee constitution).

24. *See* Statutory Exceptions to the Tennessee Public Records Act, Tenn. Comptroller Treasury (Jan. 2018) https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/2018-01-19_ExceptionstotheTennesseePublicRecordsActFinal.pdf (listing hundreds of known TPRA exceptions).

25. *Tennessean*, 485 S.W.3d at 864 ("The Public Records Act has a noble and worthwhile purpose by providing a tool to hold government officials and agencies accountable to the citizens of Tennessee through oversight in government activities.").

26. TENN. CODE ANN. § 10-7-505(d).

27. *See* Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc., 87 S.W.3d 67, 74 (Tenn. 2009); Memphis Publ'g Co. v. City of Memphis, 871 S.W.2d 681, 687–88 (Tenn. 1994); Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346, 360 (Tenn. 2008) ("Providing access to public records promotes governmental accountability by enabling citizens to keep track of what the government is up to."). "[U]nless an exception [to the TPRA] is established, we must require disclosure 'even in the face of serious countervailing considerations.'" Schneider v. City of Jackson, 226 S.W.3d 332, 340 (Tenn. 2007) (quoting *City of Memphis*, 871 S.W.2d at 684).

10-7-505, describing the special show cause hearing available for reviewing denied record requests.

TPRA's initial application and scope are relatively straightforward. Under it, all public records, meaning any communication made during the course of government business, regardless of the records format,[28] are presumed to be open for public inspection or copying,[29] even including confidential mediation and litigation settlements,[30] unless otherwise provided by state law.[31]

Tennessee citizens are entitled to inspect non-exempt public records in person or request that a governmental entity provide them copies.[32] An inspection request may be made in almost any form, whether remotely, in writing, by telephone, or verbally and in-person.[33] A governmental entity can require that a request for copies be in writing or submitted on a particular form.[34] Other significant limitations on requests include that they may not require a governmental entity to compile information or create new records that did not previously exist, and that the request must be sufficiently detailed so as to permit the government entity to identify specific records.[35] Whether or not a request

28. TENN. CODE ANN. § 10-7-503(a)(1)(A)(i).

29. Schneider v. City of Jackson, 226 S.W.3d 332, 340 (Tenn. 2007).

30. Allen v. Day, 213 S.W.3d 244, 261 (Tenn. Ct. App. 2006) (finding no TPRA exception under for Rule 31 mediation settlements); *see also* Friedmann v. Corr. Corp. of Am., No. M2012-00212-COA-R3CV, 2013 WL 784584, at *5 (Tenn. Ct. App. Feb. 28, 2013) ("Settlement agreements have consistently been held to be public records by our courts."); Tennessean v. City of Lebanon, No. M2002–02078–COA–R3–CV, 2004 WL 290705 (Tenn. Ct. App. Feb. 13, 2004) Contemporary Media, Inc. v. City of Memphis, No. 02A01–9807–CH00211, 1999 WL 292264 (Tenn. Ct. App. May 11, 1999).

31. TENN. CODE ANN. § 10-7-503(a)(2)(A).

32. TENN. CODE ANN. § 10-7-506(a).

33. TENN. CODE ANN. § 10-7-503(a)(7)(A)(i); Jakes v. Sumner County, No. M2015-02471-COA-R3-CV, 2017 Tenn. App. LEXIS 515, at *20 (Tenn. Ct. App. July 28, 2017) ("[T]he General Assembly placed no restriction on the form or format of a request for inspection of public records . . . ."). Although a written request facilitates easier judicial review of a denial, videos of in-person record requests also creates a sufficiently definite—if perhaps awkward—record fit for review. *See* Taylor v. Town of Lynnville, No. M2016-01393-COA-R3-CV, 2017 Tenn. App. LEXIS 469, at *4 (Tenn. Ct. App. July 13, 2017).

34. *See* TENN. CODE ANN. § 10-7-503 (a)(7)(A)(ii)–(iv).

35. *See* TENN. CODE ANN. § 10-7-503(a)(4); Waller v. Bryan, 16 S.W.3d 770, 774 (Tenn. Ct. App. 1999) ("If a citizen can sufficiently identify the documents which

is sufficiently specific is a question of fact, not law.[36] A record custodian may seek an injunction against requesters it views as attempting to "disrupt government operations," barring any further TPRA requests for up to a year.[37]

Somewhat remarkably, the statute does not contemplate any substantial temporal gap between an inspection request and the inspection itself. By default, all public records must be accessible "at all times during business hours . . . for personal inspection by any citizen of this state" and, a government entity must "promptly make available for inspection [or copying] any public record not specifically exempt from disclosure."[38] While only governmental records can be requested, obeying the legislative directive favoring disclosure, courts have expansively interpreted the definition of "governmental entity" to even include private government contractors equivalent in function to a public body.[39]

Only if "it is not practicable for the record to be made promptly available," can a record custodian delay promptly fulfilling a request and instead must, within up to seven business days, either: (1) provide the requested records; (2) provide a written denial including the legal justification for the denial; or (3) give a "complet[ed] records response form . . . [stating] the time reasonably necessary to produce the record or information."[40] Individual government entities each possess their own public record request policies, but those policies cannot impose restrictions more cumbersome than those imposed by statute.[41] While

he wishes to obtain copies of so as to enable the custodian of the records to know which documents are to be copied, the citizen's personal presence before the record custodian is not required."). For the a thorough exploration of these issues, see RCFP, Conley v. Spangler, Freedom of Info., Sept. 8, 2021, https://www.rcfp.org/briefs-comments/conley-v-spangler/ (Reporter's Committee for Freedom of the Press Amicus Brief in Conley v. Spangler).

36. Hickman v. Tenn. Bd. of Paroles, 78 S.W.3d 285, 289 (Tenn. Ct. App. 2001).

37. TENN. CODE ANN. § 10-7-503(a)(7)(C)(i).

38. TENN. CODE ANN. §10-7-503(a)(2)(B).

39. Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs. Inc., 87 S.W.3d 67, 79 (Tenn. 2002) (listing non exhaustive factors for functional equivalency test analyzing to what "extent the entity performs a governmental or public function"); *see also* Allen v. Day, 213 S.W.3d 244 (2006).

40. TENN. CODE ANN. § 10-7-503(a)(2)(B).

41. TENN. CODE ANN. § 10-7-503(g)(1).

a fee can be charged for costs associated with providing copies—such as paying for the time spent finding the requested records or making redactions[42]—no fee can be charged for the inspection of records.[43] Officials enjoy a statutory shield from liability for the required disclosure of records, although this shield does not extend to accidental or intentional disclosures of confidential information.[44]

B. The Tenn. Code. Ann. § 10-7-505 TPRA Hearing

Should a government entity deny a citizen's request, by failing to make records promptly available, failing to make one of the two permitted responses for records not promptly available, or attempting to levy an unnecessary fee,[45] that citizen is entitled to a section 10-7-505 show-cause hearing. Once a TPRA petition has been filed, the show-cause hearing is mandatory: a court cannot preemptively reject petitions it finds unconvincing.[46]

Section 10-7-505 contemplates that a named TPRA defendant be either a government official in their official capacity, their designee, or the government entity itself.[47] Naming an official can foist responsibility on them personally to satisfy a court order or under threat of criminal contempt.[48]

42. TENN. CODE ANN. § 10-7-503(a)(5). Pursuant to section 8-4-604, the Office of Open Records Counsel maintains a schedule of charges to guide government entities in assessing the reasonable cost of record production.

43. TENN. CODE ANN. § 10-7-503(a)(7)(A)(i).

44. TENN. CODE ANN. § 10-7-505(f) ("Any public official required to produce records pursuant to this part shall not be found criminally or civilly liable for the release of such records . . . .").

45. Tenn. Att'y Gen. Op., Providing Access to Public Records, (No. 01-021 Feb. 8, 2001), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2001/op01-021.pdf.

46. *See* Wells v. Wharton, No. W2005-00695-COA-R3CV, 2005 WL 3309651, at *11 (Tenn. Ct. App. Dec. 7, 2005) (internal citation and quotation marks omitted) ("It is clear from the statute that there must be an evidentiary hearing if there are disputes concerning the nondisclosure of the records.").

47. *See* TENN. CODE ANN. § 10-7-505; Kersey v. Jones, No. M2006-01321-COA-R3CV, 2007 WL 2198329, at *6 (Tenn. Ct. App. July 23, 2007) ("We find support for this proposition in the number of cases filed under the Public Records Act against individuals in their official capacities, rather than against a governmental entity.").

48. *See* Moody v. Hutchison, 159 S.W.3d 15, 26 (Tenn. Ct. App. 2004).

Section 10-7-505 promises citizens swift judicial review of a denied request by filing a petition with the proper circuit or chancery court,[49] at specially designed hearing made with five major procedural modifications. The first is the suspension of the usual procedural timelines: upon the filing of a petition, the reviewing court "issue[s] an order requiring the defendant . . . to immediately appear and show cause, if they have any, why the petition should not be granted."[50] Many courts hold hearings within a matter of days after a petition's filing.[51] Second, the statute alters the typical procedure for answering: "[a] formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings."[52] The third is that the plaintiff may request that the court examine the requested records *in camera* to evaluate the legitimacy of a denied request.[53] Fourth, the government entity bears the burden of justifying the denial by a preponderance of the evidence.[54] Because of this shifted burden, it is the government entity that controls the course of proceedings and whether it will attempt to quickly meet its burden through introducing affidavits or instead via live testimony.[55] Lastly, a prevailing petitioner can be entitled to extensive relief, including broad injunctions and even reasonable

49. *See* TENN. CODE ANN. § 10-7-505(b).

50. TENN. CODE ANN. § 10-7-505(b). Courts accept that a TPRA petition always merits a show-cause hearing. Jackson v. Hackett, No. 37, 1990 WL 143238, at *3 (Tenn. Ct. App. Oct. 3, 1990) ("It is clear from the statute that there must be an evidentiary hearing if there are disputes concerning the nondisclosure of the records.").

51. *See* Schneider v. City of Jackson, 226 S.W.3d 332, 335–36 (Tenn. 2007) (trial court ordered a February 7 hearing for a January 26 petition). By requiring immediate appearance, Tennessee has likely waived any government entity due process rights that might require a certain amount of notice before a hearing. *See generally* City of Trenton v. New Jersey, 262 U.S. 182 (1923) (holding that local government entities only have the rights granted by their state).

52. TENN. CODE ANN. § 10-7-505(b).

53. *Id.*

54. TENN. CODE ANN. § 10-7-505(c).

55. Moncier v. Harris, No. E2016-00209-COA-R3-CV, 2018 WL 1640072, at *11 (Tenn. Ct. App. Apr. 5, 2018) ("[I]t is the defendant who bears the burden of justifying nondisclosure of the records sought; therefore, it is for the defendant to decide, not the plaintiff, how it will meet that burden.").

costs and attorney fees should the denial of the request be deemed willful.[56]

Courts and petitioners alike have struggled to harmonize some of these statutory procedural modifications with the actual rules of civil procedure. Some judges have even decided that the usual procedural rules simply do not apply to TPRA hearings.[57] As discussed in Section IV, Tennessee's separation of powers doctrine requires that TPRA hearings follow the civil rules of procedure, with procedural rules overriding conflicting TPRA's procedural modifications.

II. DISCRETE ELEMENTS OF TPRA LITIGATION AND STATUTORY INTERPRETATION

A. Mootness and TPRA Claims

The filing of a TPRA petition will sometimes prompt reluctant record custodians to disclose responsive records in advance of the TPRA hearing, raising the possibility that the controversy has been mooted by resolving the initial conflict.[58] Allowing record custodians to escape liability through this clever use of justiciability doctrines would defang the TPRA almost entirely. By resisting disclosure until a suit was filed, record custodian would impose an additional burden on record requesters but by then handing over the records, requesters would be deprived of the opportunity to seek compensation for the costs of the initial suit.

While courts have agreed that disclosure of records does indeed moot the underlying controversy, they have reached the merits of the dispute under the public interest exception to the mootness doctrine.[59]

56. TENN. CODE ANN. § 10-7-505.

57. *See Moncier*, 2018 WL 1640072, at *11.

58. *See, e.g.*, Chattanooga Pub. Co. v. Hamilton Cty. Election Comm'n, No. E2003-00076-COA-R3-CV, 2003 WL 22469808, at *3 (Tenn. Ct. App. Oct. 31, 2003).

59. The public interest exception allows a court to address a mooted controversy involving claims (1) that affect more than private rights or personal interests; (2) are "issues of great importance to the public and the administration of justice"; (3) likely to arise in the future; and (4) possessing an adequate record allowing the issue to be fully addressed. *See* Scripps Media, Inc. v. Tennessee Dep't of Mental Health & Substance Abuse Servs., 614 S.W.3d 700, 706 (Tenn. Ct. App. 2019) (quoting

As an alternative, the issue of costs and attorney fees under subsection (g) can also be used as a means of addressing mooted controversies because evaluating the willfulness of a denial typically requires evaluating the same factors as a merits ruling.[60]

B. The Myriad TPRA Exceptions to Record Access

The most common cited reason for a record request denial is that a record falls under one of the TPRA's many exceptions. Upon its passage in 1957, the PRA exempted only select medical and military records from public access.[61] That number has drastically increased; by 2018, the Office of Open Records Counsel catalogued 538 express PRA exceptions, some found in section 10-7-504, but many more scattered through other statutes.[62]

Some exceptions are direct and straightforward, but others are heavily detailed, exempting records based on format, content, subject matter, and even the location where the information was recorded. For example, at the time of this Article's writing, section 10-7-504(u) expressly exempts from disclosure police body camera footage showing: (1) minors, but only when they are at a primary or secondary school; (2) "the interior of a facility licensed under Title 33 [Mental Health and Substance Abuse and Intellectual and Developmental Disabilities] or Title 68 [Health, Safety and Environmental Protection];" or (3) the "interior of a private residence that is not being investigated as a crime scene." It further specifies that it does not prevent using body camera footage in a criminal proceeding or use of the footage by government

Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty., 301 S.W.3d 196, 210 (Tenn. 2009)).

60. *Cf.* Greer v. City of Memphis, 356 S.W.3d 917, 920 n.2 (Tenn. Ct. App. 2010).

61. Act of Mar. 18, 1957, ch. 285, 1957 Tenn. Pub. Acts 932; Horwitz, *supra* note 21.

62. *See* Exceptions to the Tenn. Pub. Rec. Act, Tenn. Comptroller of the Treasury, Open Rec. Couns. (2018), https://comptroller.tn.gov/office-functions/open-records-counsel/open-meetings/exceptions-to-the-tennessee-public-records-act.html. The Office of Open Records Counsel maintains a database of PRA exceptions. *See also* Public Records Exceptions, Tenn. Comptroller of the Treasury, Open Rec. Couns., https://apps.cot.tn.gov/PublicRecordsExceptions. https://apps.cot.tn.gov/PublicRecordsExceptions.

agencies performing official functions. The subsection gives its own expiration date, stating that it will be deleted effective July 1, 2022.[63]

Though somewhat tedious to navigate, these kinds of granular exceptions guide citizens, record custodians, and judges by providing clear and determinate record exceptions, reducing the possibility of litigation or accidental disclosure of sensitive information. Yet the sheer volume and specificity of exceptions, as well as the Legislature's willingness to rapidly amend (section 10-7-504 was amended seven times in 2021 alone with the shortest-lived version lasting only five days), can frustrate record custodians and citizens alike, nor are related exceptions intuitively organized or grouped together. For example, section 10-7-504(u) makes no reference to section 38-8-311, which requires that for an "officer-involved shooting death" (but not deaths caused by other means), all investigative records become public after an investigation by the TBI and "the completion of the prosecutorial function by the district attorney general," ignoring section 10-7-504 entirely. Despite passage in 2017, no other sections of the TCA cites section 38-8-311, allowing it to be easily overlooked.

C. Determining When a Record Has Been Made "Promptly Available"

In construing the meaning of whether a record is "promptly make available" for inspection or copying, courts have honored the legislative directive to interpret the TPRA in favor of disclosure. For example, in *Noe v. Solid Waste Board of Hamblen County/Morristown*, a record requester had personally visited a government entity's record custodian in person on three consecutive days yet was not allowed to inspect records related to an upcoming board meeting.[64] The record custodian testified that at the time of the requester's visit, he had been busy with other clerical tasks and that his office manager, having just returned from vacation that day, was also occupied with other administrative chores.[65]

63. TENN. CODE ANN. § 10-7-504(u)(5) (2022). It is unclear whether this subsection or the TPRA's Rule 16 law enforcement exception would prevail in the event of a direct conflict.

64. Noe v. Solid Waste Bd. of Hamblen Cnty./Morristown, No. E201700255COAR3CV, 2018 WL 4057251, at *1 (Tenn. Ct. App. Aug. 27, 2018).

65. *Id.* at *4.

On review, the court of appeals noted that the TPRA does "not require that a records custodian make a record available immediately," or demand "dropping what the custodian is doing at the time of the request to find a document." However, the critical TPRA inquiry is the factual question of whether "prompt access to the records was or was not practicable."[66] Citing the trial record, the court found that the requested records not made promptly available because they were in the custodian's office and "easily accessible" at the time of the petitioner's visit.[67]

D. Distinguishing Records and Information

A record is any discrete communication or unit of data made or received by a governmental entity during the transaction of government business,[68] while information refers to the contents of a record.[69] Information contained in a record may be exempt from disclosure even if the record itself is open to public inspection or copying. For example, upon seizing property for civil forfeiture, an officer must deliver a notice of seizure, containing personally identifying information, to the person found in possession of the seized property.[70] While state law specifically requires that notices of seizure be kept as public records,[71] but this requirement does not bar redacting TPRA-exempt information from the notices.[72]

66. *Id.* at *3.

67. *Id.* at *4 n.4.

68. TENN. CODE ANN. § 10-7-503 (a)(1)(A)(i); Tennessean v. Elec. Power Bd. of Nashville, 979 S.W.2d 297, 302 (Tenn. 1998).

69. Wells v. Wharton, No. W2005-00695-COA-R3CV, 2005 WL 3309651, at *6–9 (Tenn. Ct. App. Dec. 7, 2005) (discussing the distinction between records and information under the TPRA).

70. TENN. CODE ANN. § 40-33-203.

71. TENN. CODE ANN. § 40-33-204(g).

72. Moncier v. Harris, No. E2016-00209-COA-R3-CV, 2018 WL 1640072, at *8 (Tenn. Ct. App. Apr. 5, 2018) ("Contrary to Attorney's argument, however, simply because the Legislature has declared that the 'notices and receipts' are public records does not mean that information in those records that is confidential cannot be redacted from the records before producing them in response to a public records request.").

Record requests commonly seek information that is scattered amongst separate records in a government entity's possession.[73] Whether and how a record requester is entitled to copies of this information can hinge on the information's storage format. Courts require electronically or digitally stored information to be divulged to requesters regardless of the record format in which it is kept, even if harvesting this information requires an extensive electronic search or the creation of a novel computer program designed only to collate the requested information. In *Tennessean v. Elec. Power Bd. of Nashville*, a power company denied a newspaper's request for its customers' names, addresses, and telephone numbers on the grounds that the information sought was not contained in one individual record but was scattered throughout different electronic records.[74] The power company offered to provide the records if the newspaper paid both for the cost of writing a computer program that would collate the requested information and also paid an additional $86,400 for the cost of notifying customers that their personal data had been given to the newspaper.[75] The trial court ruled that the newspaper was entitled to the records but only if it paid $91,619, the cost of writing the computer program and copying the data as well as the cost of notifying customers. The court of appeals reversed, deciding that "record" meant "information gathered or organized on a particular subject and in a particular format." Because the power company did not possess the requested information in the requested format and could not be compelled to create a new record, the newspaper's claim failed.[76] The supreme court disagreed, deciding that the electronic storage of information erased any meaningful difference between a record's format and the information it contains.[77] Citing the

73. Jetmore v. Metro. Gov't of Nashville & Davidson Cty., No. M201601792COAR3CV, 2017 WL 4570413, at *8 (Tenn. Ct. App. Oct. 12, 2017) ("When a petitioner is interested in a category of public records encompassed by the TPRA, he or she may not know the details of a particular document.").

74. Tennessean v. Elec. Power Bd. of Nashville, 979 S.W.2d 297, 299 (Tenn. 1998).

75. *Id.* at 299.

76. *Id.* at 300.

77. *Id.* at 304 ("[O]nce information is entered into a computer, a distinction between information and record becomes to a large degree impractical. In our view, it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record.").

TPRA's public policy goals, the court affirmed the propriety of the newspaper's request, which only required collecting and organizing existing information and not the compilation of statistics, an explanation, or an analysis of the collected data.[78] The supreme court granted the newspaper access to the records contingent on paying the actual costs of collecting the data but did not require paying the cost of customer notifications.[79]

Unlike electronic records, a government entity is not required to collect information from physical records in order to create a new record or document. *Hickman v. Board of Parole* illustrates the disparate treatment of physical and electronic records. An inmate had requested from the Board of Parole copies of fourteen categories of inmate information, such as the names of all felons certified as parole eligible and the percentage of their sentence completed at the time of release.[80] The board stored some of the requested information digitally in individual inmate files and stored the remainder of the information in physical files. The board denied the request, claiming that compiling the digitally stored information would require a specially written computer program, while the physical records would need to be individually reviewed for the responsive information. Adhering to *Electric Power Board*, the appellate court decided that because the board possessed the information in electronic format, the inmate was entitled to copies of the requested digitally stored information even if retrieval required writing a special computer program. However, the inmate was not entitled to the physically stored information because the TPRA does not require government entities to "manually compile[] information from thousands of separate records into a new record."[81] Instead, a requester should personally inspect the physical records and extract the information sought.

E. Level of Specificity Required for TPRA Denials

The TPRA requires a record custodian's written denial to lay out "the basis for the denial," but does not provide any hint as to the

78. *Id.* at 304.

79. *Id.* at 305.

80. Hickman v. Tenn. Bd. of Prob. and Parole, No. M2001-02346-COA-R3-CV, 2003 Tenn. App. LEXIS 187, at *6 (Tenn. Ct. App. Mar. 4, 2003).

81. *Id.* at *32.

level of specificity required.[82] The level of required detail has profound repercussions for TPRA requests and any subsequent litigation. As a practical matter, requiring a specific denial citing a supporting statute or case promotes judicial efficiency by allowing a potential plaintiff to either cure the defect in their request or assess the validity of an asserted justification in advance of litigation. Contrarily, permitting a governmental entity to provide only a very general denial, such as citing section 10-7-504 without indicating a subsection, promotes potentially unnecessary litigation by obscuring the strength (or existence) of a valid reason supporting denial.

However, a 2021 Office of Open Records Counsel (OORC) opinion letter interpreted the provision as only requiring that governmental entities provide a general basis for the denial, speculating that requiring a specific basis might force revelation of confidential information.[83]

Given the statutory directive favoring disclosure, the OORC's position rests on shaky foundations. The nonbinding OORC letter also failed to account for the Tennessee Court of Appeals case *Friedmann v. Marshall County*, which held that *ex post facto* justifications for a denial cannot be used to undermine a finding of willfulness.[84] In *Friedmann*, the Marshall County Sheriff received a request asking for the jail's written medical policies and related contracts.[85] The Sheriff's written response required that the requester appear in person before they could receive responsive records.[86] The requester's reply pointed out that the OORC had already issued guidance stating that a governmental entity cannot require a personal appearance as a condition for receiving records.[87] After further correspondence with the Sheriff, the

82. Tenn. Pub. Rec. Act § 10-7-503(a)(2)(B)(ii).

83. Letter from Lee Pope, Open Records Couns., Tennessee Comptroller of the Treasury, to Paul McAdoo, Loc. Legal Initiative Staff Att'y, Reps Comm. for Freedom of the Press (Jan. 29, 2021), https://comptroller.tn.gov/content/dam/cot/orc/documents/21-01BasisforDenialAmendedwithfootnote.pdf.

84. Friedmann v. Marshall Cnty., 471 S.W.3d 427, 439 (Tenn. Ct. App. 2015).

85. *Id.* at 429.

86. *Id.*

87. Record custodians rarely suffer any penalty for denying a request on specious grounds and thus it is not uncommon to a request arbitrarily denied for unjustifiable reasons. *See also* Conley v. Knox Cnty. Sheriff, No. E2020-01713-COA-R3-CV, 2022 WL 289275, at *24–25 (Tenn. Ct. App. Feb. 1, 2022), *appeal denied*, (Aug.

requester filed a petition for a show cause hearing.[88] At the hearing, the sheriff claimed for the first time that he had denied the request out of concern that the requester might not actually be a Tennessee citizen, a justification omitted from his written communications with the requester.[89] The trial court ultimately ordered production of the records but cited the Sheriff's citizenship concerns as justification for denying attorney fees.[90] The Court of Appeals reversed and awarded attorney fees, deciding that the trial court had erred by considering an *ex post factor* justification not provided to the requester until after his petition was filed.[91]

Similarly, in *Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, Judge Susano rejected a defendant's attempts to raise additional defenses not originally asserted in its written denials. Citing the defendant's burden to "show cause, if they have any" and justify their denial, Judge Susano reasoned that "it would not promote public access for us to hold that an opponent to production may piecemeal its defenses."[92]

F. The TPRA's Use as an Alternative or Supplement to Civil Discovery Against Government Defendants

Although the practice has been the occasional target of disparaging dicta,[93] litigants facing government entities frequently employ the TPRA as a supplemental means of acquiring information prior or during litigation. TPRA requests can provide a significant tactical advantage by allowing a petitioner to explore the records of a

3, 2022) (condemning sheriff's total lack of legal justification for denying all arrest record inspection requests).

88. *Friedmann*, 471 S.W.3d at 431.

89. *Id.*

90. *Id.* at 432.

91. *Id.* at 441.

92. Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth., 358 S.W.3d 213, 223 (Tenn. Ct. App. 2010).

93. *See* Swift v. Campbell, 159 S.W.3d 565, 576 (Tenn. Ct. App. 2004) ("Circumventing existing discovery rules was not what the General Assembly had in mind when it enacted the public records statutes in 1957.").

governmental entity[94] in advance of formal litigation without triggering any reciprocal discovery obligations.

As illustrated by *Konvalinka,* the TPRA and civil discovery remain two entirely separate and distinct processes even though they may seek and uncover the same information.[95] *Konvalinka* began as part of a separate civil action wherein a physician sued a hospital to prevent the suspension of his clinical privileges.[96] An interlocutory appeal was filed to resolve a discovery dispute but the appellate court also stayed any further discovery until after the appeal's resolution.[97] During the pendency of the appeal, the physician's attorney filed a TPRA request seeking, in part, the same records at issue in the appeal. The appellate court held the attorney in contempt of its stay order.

The Tennessee Supreme Court reversed, with Justice Koch reasoning that while the legislature may not have intended for the TPRA to act as an alternative to discovery, when construed in favor of disclosure, the TPRA contains no express limitation on persons "in litigation with a government entity or who are considering litigation with a government entity from . . . seeking access to public records relevant to the litigation."[98]

This same kind of "prediscovery" via TPRA requests is not limited to state cases and routinely appears in federal civil actions against Tennessee government entities. In line with *Konvalinka*, Tennessee district courts have rebuffed defendant attempts to bundle plaintiffs' related TPRA requests as part of a pending federal case, citing section

94. The TPRA cannot, of course, be used to uncover records from a totally private person or entity not engaged in governmental functions. *See id*. at 572 ("[T]he public records statutes cannot be used as a discovery device in litigation between private parties").

95. Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth., 249 S.W.3d 346, 350 (Tenn. 2008).

96. Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth., No. E2006-00064-COA-R3-CV, 2006 WL 2596781, at *3 (Tenn. Ct. App. Sept. 11, 2006), *rev'd*, 249 S.W.3d 346 (Tenn. 2008).

97. *Konvalinka*, 249 S.W.3d at 350.

98. *Id.* at 360–61 (internal citation omitted) ("A growing number of courts, construing public records statutes similar to ours, have decided that persons should not be denied access to public records solely because they are involved, or may be involved, in litigation with a governmental entity.").

10-7-505's limitation that TPRA claims may only be brought in chancery or circuit court.[99]

G. TPRA Relief and Injunctions

The extent of available injunctive relief is one area in which courts lives up to the statutory mandate of broad interpretation favoring disclosure. In order to achieve the legislative purpose of maximizing public record access, courts can and do draw upon the statutory power to grant "full injunctive remedies and relief to secure the purposes and intentions of this section,"[100] including creative remedies designed to address TPRA-violating policies and prevent similar cases from arising in the future. A court has wide latitude in fashioning these remedies. In *Schneider v. City of Jackson*, a trial court issued a permanent injunction requiring the defendant government entity to respond in writing to all future record requests from the plaintiff newspaper and state when a request would be produced or the basis for its nondisclosure.[101] Although these requirements have since been incorporated in to section 10-7-503, they were not required by the TPRA at that time. The supreme court had no hesitation in affirming the propriety of such specific and long-lasting relief, citing section 10-7-505(d).[102]

Similarly, in *Jetmore v. Metro. Gov't of Nashville & Davidson Cty.*, the petitioner sought to have restored his routine access to local police's traffic reports, reports he had been accessing regularly for a number of years.[103] Seemingly intent on frustrating this access, the police began changing their policy, first denying ready access to

99. *See* Bunt v. Clarksville Montgomery Cty. Sch. Sys., No. 3:19-CV-01013, 2021 WL 1264431, at *14 (M.D. Tenn. Apr. 6, 2021) (TPRA "does not authorize federal district courts to consider such petitions" which must be litigated, if at all, in county circuit or chancery court); United States v. Barnes, No. 3:13-cr-117-TAV-HBG-1, 2016 WL 5108227, at *2 (E.D. Tenn. Aug. 22, 2016) (declaring lack of jurisdiction to analyze TPRA request and that party "must appeal to the chancery court or circuit court with the appropriate jurisdiction for the relief he seeks"), *report and recommendation adopted*, No. 3:13-cr-117-TAV-HBG-1, 2016 WL 5108087 at *1 (E.D. Tenn. Sept. 20, 2016).

100. TENN. CODE ANN. § 10-7-505(d).

101. Schneider v. City of Jackson, 226 S.W.3d 332, 348 (Tenn. 2007).

102. *Id.*

103. Jetmore v. Metro. Gov't of Nashville & Davidson Cnty., No. M201601792COAR3CV, 2017 WL 4570413, at *1 (Tenn. Ct. App. Oct. 12, 2017).

inspections and then ignoring or delaying his requests for copies.[104] Police eventually resumed their policy of allowing inspection but now only granted access to older reports while also limiting the number of copies that could be requested each day.[105] Rather than seeking specific records only, petitioner also sought injunctive relief requiring the police to institute their prior records inspection policies.[106] The trial court imposed an injunction specially designed remedy tailored to address the police's action, including a requirement that all inspection requests to be answered within seventy-two hours.[107] The government defendant appealed but, given the injunction's rock solid statutory basis, did not question the propriety of the trial court's remedy.

H. Willfulness of a Wrongful Record Denial

The TPRA's attorney fee provision, section 10-7-505(g) permits the discretionary award of "all reasonable costs involved in obtaining the record," including reasonable attorney fees, "[i]f the court finds that the governmental entity . . . knew that such record was public and willfully refused to disclose it."[108] In assessing willfulness, 10-7-505(g) allows a court to consider any of the nonbinding guidance issued by the Office of Open Records Counsel.[109] While the award of fees is discretionary even if there is a finding of willfulness,[110] very few cases have found willfulness yet denied an award.

The willfulness standard had previously been construed by some courts as requiring a showing of bad faith on the part of a record custodian,[111] a relatively difficult standard demanding some proof of

104. *Id.* at *1.

105. *Id.*

106. *Id.* at *6.

107. *Id.*

108. TENN. CODE ANN. § 10-7-505(g) (2008).

109. *Id.*

110. Taylor v. Town of Lynnville, No. M201601393COAR3CV, 2017 WL 2984194, at *8 (Tenn. Ct. App. July 13, 2017) ("The General Assembly has provided that attorney's fees may be awarded once a finding of willfulness has been established.").

111. Tennessean v. City of Lebanon, No. M2002-02078-COA-R3-CV, 2004 WL 290705, at *9 n.9 (Tenn. Ct. App. Feb. 13, 2004) (recounting how willfulness had come to be mistakenly construed as equivalent to bad faith and the meaning of bad faith); Schneider v. City of Jackson, 226 S.W.3d 332, 346 (Tenn. 2007) (citing Arnold

malice, ill-intent, or lack of good-faith.[112] The Court of Appeals has conclusively rejected this higher standard, instead determining that a government entity's record denial is willful for "invoking a legal position that is not supported by existing law or by a good faith argument for the modification of existing law."[113] Even reliance upon attorney advice cannot defeat a finding of willfulness as a government entity cannot "remain unknowledgeable of the [TPRA] and authority interpreting it and thereby immunize itself from liability for attorney fees. A request for access to a public record imposes a duty on the entity to inform itself of its legal obligations."[114]

I. Attorney Fees and Costs

An open records law's fee provision can determine the effectiveness of an entire statutory scheme because the prospect of incurring further costs is one of the few limits on government stonewalling. Most (perhaps all) open record statutes place the burden of proof on the government, allowing it greater control over the general duration of the proceedings. A miserly attorney fee provision encourages a government defendant to punitively lengthen litigation and thereby exhaust the funds of private plaintiffs and the available time of *pro bono* attorneys. Alternatively, an overly generous fee provision can encourage

v. City of Chattanooga, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999)) ("[E]lement of 'willfully' required by this statute has been described as synonymous to a bad faith requirement.").

112. Contemp. Media, Inc. v. City of Memphis, No. 02A01-9807-CH00211, 1999 WL 292264, at *4 (Tenn. Ct. App. May 11, 1999) (quoting Black's Law Dictionary (5th ed. 1979)) (defining bad faith).

113. Clarke v. City of Memphis, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015); *see also* Jetmore v. Metro. Gov't of Nashville & Davidson Cty., No. M2016-01792-COA-R3-CV, 2017 WL 4570413, at *9 (Tenn. Ct. App. Oct. 12, 2017) (adopting willfulness standard from *Taylor* and *Clarke*); Friedmann v. Marshall Cty., 471 S.W.3d 427, 436–40 (Tenn. Ct. App. 2015). A justification lacks legal merit if it is "not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Id.* at 444 (Gibson, J., concurring) (quoting *Tennessean*, 2004 WL 290705, at *9 n.9).

114. *Jetmore*, 2017 WL 4570413, at *9 (quoting *Taylor*, 2017 WL 2984194 at *6.); *see also* Greer v. City of Memphis, 356 S.W.3d 917, 920 (Tenn. Ct. App. 2010) (affirming attorney fee award despite defendant claims that denials were "undisputedly inadvertent").

plaintiffs' attorneys to clog court dockets with unnecessary cases contesting petty violations.[115]

The TPRA's fee provision gives a trial court the discretion to "assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees."[116]

As a threshold matter, courts bar *pro se* attorneys from recovering fees for time spent working on their own case.[117] In calculating attorney fees, precedent requires Tennessee trial courts to consider the factors contained in Tennessee Supreme Court R. 8, RPC 1.5,[118] and TPRA decisions have dutifully awarded fees based on consideration of that rule.[119] Some other statutory fee provisions apply RPC 1.5 to the entire case as a whole, recompensating for time spent on both successful and unsuccessful claims within the same suit. However, court have strictly construed § 10-7-505(g) such that costs unrelated to recovering the willfully denied records cannot be recovered even if they are part of the same case.[120]

As is the case for many Tennessee attorney fee statutes, TPRA appellate fees are more ambiguous. Following the general rule for appellate fees set out in *Killingsworth v. Ted Russell Ford, Inc.*, a TPRA petitioner must present appellate fees as an issue on appeal or else the

115. *See* Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 426 (2015).

116. TENN. CODE ANN. § 10-7-505(g).

117. *See* Clarke v. City of Memphis, 473 S.W.3d 285, 294 (Tenn. Ct. App. 2015) ("[Attorney] not entitled to recover attorneys' fees he billed while working on his own case.").

118. Ellis v. Ellis, 621 S.W.3d 700, 708 (Tenn. Ct. App. 2019) (citing Wright ex rel. Wright v. Wright, 337 S.W.3d 166, 185 (Tenn. 2011)) ("Moreover, a trial court evaluating the reasonableness of an award of attorney fees must consider the factors provided in Tennessee Supreme Court Rule 8, RPC 1.5.").

119. *See, e.g.*, Little v. City Of Chattanooga, No. E2013-00838-COA-R3-CV, 2014 WL 605430, at *5–8 (Tenn. Ct. App. Feb. 14, 2014); Contemp. Media, Inc. v. Memphis, No. 02A01-9807-CH00211, 1999 WL 292264, at *7 (Tenn. Ct. App. May 11, 1999).

120. Conley v. Knox Cnty. Sheriff, No. E2020-01713-COA-R3-CV, 2022 WL 289275, at *34 (Tenn. Ct. App. Feb. 1, 2022), *appeal denied*, No. E2020-01713-SC-R11-CV, 2022 Tenn. Lexis 340 (Tenn. Aug. 3, 2022).

appellate fees are forfeited.[121] Less clear is whether an appellate court can uphold a fee award while denying appellate fees. *Killingsworth* reasoned that presenting the issue of fees only to a trial court and the court of appeals failed to satisfy Tennessee's appellate procedure requirements yet did not address whether appellate court could second guess the trial court by denying appellate fees, implying that the issue turned on whether the underlying statute directly provided fee authority to the trial court.[122] Later appellate decisions have held both that appellate courts have the sole discretion to award attorney fees and also that appellate attorney fees must be awarded under a valid trial court attorney fee award.[123] Relatedly, a party does not typically need to have prevailed on all appellate issues but can receive appellate fees based on even a partial victory.[124]

TPRA decisions have generally agreed that appellate courts retain discretion to grant appellate fees but diverge over the scope of that discretion. In *Taylor v. Town of Lynnville*, the Court of Appeals claimed the discretion to grant TPRA appellate fees and did so, reasoning that they were part of the trial court's original award: "absent the willful denial of access, [petitioner] would not have incurred any

121. 205 S.W.3d 406, 410 (Tenn. 2006); Jetmore v. City of Memphis, No. W201801567COAR3CV, 2019 WL 4724839, at *15 (Tenn. Ct. App. Sept. 26, 2019) (denying TPRA appellate fees where successful plaintiff failed to designate appellate fees as an appellate issues). Forfeiture of appellate fees not directly raised as an issue might no longer be automatic. First Cmty. Mortg. v. Appraisal Servs. Grp., No. W2020-01246-COA-R3-CV, 14 (Tenn. Ct. App. Nov. 29, 2021) (claiming the authority to address appellate fees sua sponte).

122. Killingsworth v. Ted Russell Ford, Inc., 205 S.W.3d 406, 411 (Tenn. 2006) (citing Chaille v. Warren, 689 S.W.2d 173 (Tenn. Ct. App. 1985)).

123. *Compare* Trezevant v. Trezevant, 568 S.W.3d 595, 641 (Tenn. Ct. App. 2018) (citing Moses v. Moses, E2008-00257-COA-R3-CV, 2009 WL 838105, at *27 (Tenn. Ct. App. Mar. 31, 2009) (no perm. app. filed)) ("The determination of whether to award attorney fees on appeal is within the sole discretion of the appellate court."), *with* Beacon4, LLC v. I & L Invs., LLC, 514 S.W.3d 153, 212 (Tenn. Ct. App. 2016) (citing *Killingsworth*, 205 S.W.3d at 411) ("We therefore hold that the provision of the PPA allowing an award of reasonable attorney's fees upon a finding of bad faith also provides for an award of reasonable attorney's fees on appeal, provided that the appellant has requested such fees in appellate pleadings.").

124. Forbes v. Wilson Cty. Emergency Dist. 911 Bd., 966 S.W.2d 417, 422 (Tenn. 1998) (finding that Tennessee Human Rights Act attorney fee provision "does not require that the plaintiff prevail on all appellate issues before attorney fees may be awarded").

attorney fees, appellate or otherwise. Thus, in our view, her appellate costs and attorney fees are 'costs involved in obtaining the record'" under section 10-7-505(g).[125] *Taylor*'s approach grants greater deference section 10-7-505's plain language and accords with the common federal practice of viewing appellate fees as part of the trial court's statutory attorney fee award.[126] However, in *Conley v. Knox County Sheriff*, the court claimed the discretion to deny appellate fees in TPRA cases should the government defendant appellant prevail on any issue, even if the citizen appellee successfully defends the trial court's original fee award.[127]

Section 10-7-505 seems to place all fee discretion in the hands of the specified trial courts capable of hearing a TPRA petition.[128] No court has addressed how this fee discretion could be appropriated by an appellate court consistent with the separation of powers.

III. THE CATCH-ALL EXCEPTION AND THE TPRA RULE 16 EXCEPTION

While the sheer breadth and variety of TPRA exceptions poses an obvious challenge, the most difficult interpretative dilemma is posed by the catch-all exception, section 10-7-503(a)(2)(A), which prohibits public disclosure of any records exempted by "state law."[129] Courts

125. Taylor v. Town of Lynnville, No. M2016-01393-COA-R3-CV, 2017 WL 2984194, at *8 (Tenn. Ct. App. July 13, 2017) (citing TENN. CODE ANN. § 10–7–505(g)) ("[E]xercis[ing] our discretion to grant [petitioner's appellate fee] request" but also noting that "this appeal was part and parcel of his efforts to vindicate his right of access" and "his appellate costs and attorney fees are 'costs involved in obtaining the record.'").

126. *See* Voice v. Stormans Inc., 757 F.3d 1015, 1016 (9th Cir. 2014); Warnock v. Archer, 397 F.3d 1024, 1026 (8th Cir. 2005) (citing Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)).

127. Conley v. Knox Cnty. Sheriff, No. E202001713COAR3CV, 2022 WL 289275, at *11 (Tenn. Ct. App. Feb. 1, 2022), *appeal denied*, (Aug. 3, 2022) (because record requester had "not prevailed on the issue of her trial attorney's fees, we decline to exercise our discretion to award her attorney's fees on appeal").

128. *See* TENN. CODE ANN. § 10-7-505 (b), (g) (stating that a TPRA "petition shall be filed in the chancery court or circuit court . . . . [S]uch court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees.").

129. TENN. CODE ANN. § 10-7-503(2)(A) (2016); *see* Gautreaux v. Chattanooga Hamilton Cnty. Hosp. Auth., No. E200900367COAR3CV, 2010 WL 2593613, at *3 (Tenn. Ct. App. June 29, 2010) ("The last clause of Tenn. Code Ann. § 10-7-

have expansively construed "state law" to include not only the disclosure exceptions found within the TPRA itself but to also entail express or implied exceptions in the state constitution, procedural rules, other statutes, and even administrative rules.[130]

The catch-all exception defies easy application and injects a level of uncertainty into any TPRA request or hearing by potentially barring access to records despite no express exception. For example, even if requested body camera footage escaped the narrowly tailored statutory exceptions described above, it could still be kept from public view by application of a supposed exception containing no mention of body camera footage, the TPRA, or TPRA exception: Tennessee Rule of Criminal Procedure Rule 16.

A. Tennessee Rule of Criminal Procedure 16: The Law Enforcement Exception that Does Not Exist

The current interpretation of Tennessee Rule of Criminal Procedure 16 creates a law enforcement exception barring TPRA access to almost all records made or received by law enforcement during a criminal investigation or the pendency of a criminal proceeding. Rule 16 itself provides no obvious indication that it would come to serve as the most formidable barrier to public disclosure of Tennessee law enforcement records. Titled "Discovery and Inspection," Rule 16 governs evidentiary disclosures in a criminal prosecution. The two key sections, Rule 16(a) and (b), respectively describe the state and the defendant's obligations to disclose evidence in a criminal proceeding. As would one day become of the greatest importance to the TPRA, Rule 16(a)(2) provides that, with limited exceptions, nothing in Rule 16 *itself* authorizes "discovery or inspection" of documents made by prosecutors or the police in investigating or prosecuting the case at hand:

> Except as provided in . . . subdivision (a)(1), *this rule* does not authorize the discovery or inspection of reports, memoranda, or other internal state documents *made by* the district attorney general or other state

503(2)(A), 'unless otherwise provided by law' provides a catchall exception to the Public Records Act. This provision exempts documents that are made privileged or protected from disclosure by Tennessee laws other than the Act itself.").

130. *See* Horwitz, *supra* note 21, at 131–32.

> agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.[131]

As written, Rule 16 is ultimately a rather modest limitation: in terms of scope, it applies only to those records traditionally protected under the work product doctrine[132] and does not encompass records created by third parties or interfere with other means of obtaining information.

However, the TPRA does not contain an all-purpose exception to disclosure for law enforcement records. Over the course of decades, this statutory oversight would lead Rule 16 to be warped into its current incarnation as an all-purpose law enforcement exception all while courts insisted that no such doctrine limits the TPRA.

1. *Memphis Publishing Co. v. Holt*

Rule 16 was initially interpreted as being a discovery rule inapplicable outside of a criminal proceeding, and unable to bar third party TPRA access to law enforcement records.[133] In *Memphis Publishing Co. v. Holt*,[134] the Tennessee Supreme Court decided that Rule 16 did not prevent TPRA disclosure of investigative files after resolution of all criminal investigations. A newspaper had sought the Memphis Police Department's investigation records of a gruesome incident dubbed the Shannon Street massacre.[135] In January of 1983, an anonymous call lured two Memphis police officers to a Shannon Street home occupied by an alleged doomsday cult leader and his small group of followers.[136]

131. TENN. R. CRIM. P. 16(a)(2) (emphasis added). Rule 16 limits required discovery but nothing in its plain language prevents prosecutors from voluntarily disclosing records outside the scope of discovery.

132. Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 859 (Tenn. 2016).

133. Memphis Pub. Co. v. Holt, 710 S.W.2d 513, 517 (Tenn. 1986).

134. *Id.* at 517–18.

135. United Press Int'l, *Officer Killed, Memphis Police Slay 7 Cultists*, N.Y. TIMES (Jan. 14, 1983), https://www.nytimes.com/1983/01/14/us/officer-killed-memphis-police-slay-7-cultists.html.

136. *Id.*

The group ambushed the two officers, capturing one.[137] Police surrounded the home, but officers were told to standby even as the kidnapped officer cried for help, his screams audible from half a block away.[138] After thirty hours of failed hostage negotiations, a police SWAT unit entered the home and shot all of the captors, but the officer had already been tortured to death.[139] The incident created extraordinary community tensions. Patrol officers criticized police leadership for delaying the rescue while the families of the slain group leader claimed that the police had falsely portrayed him as a mentally ill cult leader in order to justify killing seven African-American men.[140] The NAACP even called for a Justice Department investigation.

The following November, long after completion of the Memphis Police Department's investigation of the incident, reporters sought and were denied access to the final investigative file.[141] At the hearing, the police department admitted that the investigative files were closed, and no related criminal proceedings were pending or contemplated.[142] The trial court ordered the records disclosed.[143] On appeal, the Tennessee Supreme Court agreed. The court rejected government arguments that releasing the records would be against public policy, reasoning that it was the legislature, not the court, who controlled public policy, and the legislature had deigned not to create a general TPRA law enforcement exception.[144] The Court also rejected the claim that Rule 16(a)(2) created a general exception to TPRA access, citing the rule's limited scope: "By definition [Rule 16(a)(2)] applies only to discovery in criminal cases. The investigative file sought to be examined in this case is

137. *Id.*

138. *Id.*

139. Frank Thorsberg, *A Medical Examiner Said Today the Policeman Slain By . . .*, UPI ARCHIVES, https://webcache.googleusercontent.com/search?q=cache:JTc_pmW3TtwJ:https://www.upi.com/Archives/1983/01/14/A-medical-examiner-said-today-the-policeman-slain-by/.

140. April Thompson, *Shannon Street Documentary Shows How Tragedy Changed Memphis Police*, NEWS 3 CHANNEL, (Apr. 29, 2016, 7:55 PM), https://wreg.com/news/shannon-street-documentary-shows-how-tragedy-changed-memphis-police/; *see also* Shannon Street: Echoes Under a Blood Red Moon (MVP3 Entertainment Group 2016).

141. Memphis Pub. Co. v. Holt, 710 S.W.2d 513, 515 (Tenn. 1986).

142. *Id.*

143. *Id.*

144. *Id.* at 517.

a closed file . . . not relevant to any pending or contemplated criminal action. Rule 16, therefore, does not come into play in this case."[145]

2. *Appman* and Creation of the Rule 16 Exception

Holt drew two decisive lines—preventing Rule 16 from reaching out beyond the confines of the criminal courtroom and rejecting a judicial ability to create TRPA exceptions. But only a year later, the court would signal a partial retreat by extending Rule 16 to prevent non-litigant TPRA requests from uncovering law enforcement records during an ongoing criminal proceeding.[146]

In *Appman v. Worthington*, three inmates had been indicted for killing another inmate.[147] One of the defendant inmate's attorneys, John Appman, filed a TPRA request under his own name seeking records of the correctional facility's investigation of the inmate's death. The reviewing chancery court ruled that Rule 16 protected the investigative records from the request. In line with *Holt*, the Court of Appeals reversed, finding that "Rule 16 relates only to the rights and duties of parties to a criminal case as to discovery from each other, and not the rights of citizens," like attorney Appman, "to access to public records."[148]

The Tennessee Supreme Court reversed. First, the court decided that Rule 16, passed "upon the governor's approval of a joint resolution of the legislature adopting the rules," had sufficient force of law to create an exception to the TPRA.[149] Because the inmates had already been indicted, Rule 16 applied and barred the documents from TPRA disclosure to a third party. Distinguishing *Holt*, the court clarified that while Rule 16 does not apply "where the files have been closed and are not relevant to any pending or contemplated criminal action," it does apply "where the files are open and are relevant to pending or contemplated criminal action."[150]

Although very clearly reversing its position on Rule 16's scope, the *Appman* court neglected to elucidate a compelling rationale for

145. *Id.*

146. Memphis Pub. Co. v. Holt, 710 S.W.2d 513 (Tenn. 1986).

147. Appman v. Worthington, 746 S.W.2d 165, 165 (Tenn. 1987).

148. *Id.* at 166.

149. *Id.* at 165.

150. *Id.* at 166.

engaging in the creation of public policy TPRA exceptions. As explained below in Section IV, the legislature's role in passing the rule would likely not remedy the separation of powers issue identified in *Holt* because, unlike the federal Rules Enabling Act, the state legislature plays no role in shaping the content of Tennessee's procedural rules

Rule 1 of the Tennessee Rules of Criminal Procedure limits application of those rules to criminal proceedings and hence, even after *Appman*, Rule 16 was not initially applied to bar record access during the pendency of a postconviction proceeding. In *Freeman v. Jeffcoat*, a defense attorney sought police files under the TPRA for use at her client's state post-conviction proceeding alleging ineffective assistance of counsel.[151] Citing Rule 1, the court of appeals agreed that a post-conviction proceeding was not a criminal proceeding and thus the closure of the initial criminal prosecution listed the *Appman* Rule 16 barrier and allowed the defense attorney to examine the police files via the TPRA.[152] Under the same reasoning, the court in *Cap. Case Res. Ctr. of Tennessee, Inc. v. Woodall* permitted TPRA access to police and prosecution records during a prisoner's federal post-conviction proceedings; once the criminal proceedings ended, Rule 16 no longer applied.[153]

The Tennessee Legislature would later pass the Tennessee Post-Conviction Procedure Act, including a statute limiting state post-conviction discovery to that allowed by Rule 16.[154] The Tennessee Supreme Court subsequently adopted Supreme Court Rule 28, (6)(7)(C) laying out the scope of discovery required in post-conviction proceedings. Notably, Rule 28 does not actually adopt Rule 16 but instead imposes that rule's same requirements on the state: "the state shall provide to petitioner discovery of all those items deemed discoverable under Rule 16, Tennessee Rules of Criminal Procedure, if relevant to the issues raised in the post-conviction petition, and shall provide any

151. Freeman v. Jeffcoat, No. 01-A-01-9103-CV-00086, 1991 WL 165802 (Tenn. Ct. App. Aug. 30, 1991), perm. app. denied (Tenn. May 18, 1992).

152. *Id.* at *4, *6.

153. Cap. Case Res. Ctr. of Tennessee, Inc. v. Woodall, No. 01-A-01-9104-CH-00150, 1992 Tenn. App. LEXIS 94, at *5–6 (Tenn. Ct. App. Jan. 29, 1992).

154. TENN. CODE ANN. § 40-30-109(b) ("Discovery is not available in a proceeding under this section except as provided under Rule 16 of the Tennessee Rules of Criminal Procedure.").

other disclosure required by the state or federal constitution." The decision to omit the petitioner from Rule 28 indicates permission to continue the practice of post-conviction TPRA requests. However, *Waller v. Bryan* decided that both the Legislature and the Supreme Court had mandated Rule 16 discovery limitations on state post-conviction proceedings, barring any further TPRA requests.[155]

3. *Swift v. Campbell*

Swift v. Campbell extended the duration of the Rule 16 TPRA exception in one very critical dimension: by applying it to bar access to prosecutorial or police records during the pendency of federal post-conviction proceedings. Previously, after exhausting state proceedings, death row inmates could employ the TPRA to examine a greater range of records than they were allowed by the rules of discovery. Records uncovered by TPRA access could and did serve as the basis for further post-conviction proceedings by allowing inmates to identify potential *Brady* violations and other prosecutorial missteps.[156]

In 1982, a jury sentenced Phillip Workman to death for shooting a Memphis police officer while robbing a Wendy's restaurant. Yet after Workman's conviction, additional evidence began to cast serious doubt on his conviction. A Memphis police officer signed an affidavit claiming that Memphis police were covering up key additional evidence.[157] The prosecution's chief witness backpedaled his testimony of having seen Workman shoot the officer. Two forensic pathologists opined that the slain officer's bullet wound was consistent with friendly fire from other responding officers.[158] Even two members of the

155. Waller v. Bryan, 16 S.W.3d 770, 776 (Tenn. Ct. App. 1999).

156. *See, e.g.*, Sample v. State, No. W2008-02466-CCA-R3-P, 2010 WL 2384833, at *3 (Tenn. Crim. App. June 15, 2010) ("In September 1993, the Petitioner received a copy of the file, and, based on the documents contained therein, he filed another petition for post-conviction relief in 1995, which is the subject of this appeal.").

157. Ashley Fantz, *Tennessee Case Twists and Turns Toward Death*, CNN (May 4, 2007, 11:51 AM), http://www.cnn.com/2007/US/05/02/workman.sidebar/.

158. Kevin Sack, *Question Over Fatal Shot Stirs a Death Row Debate*, N.Y. TIMES (Mar. 29, 2000), https://www.nytimes.com/2000/03/29/us/question-over-fatal-shot-stirs-a-death-row-debate.html.

Tennessee Supreme Court recommended a grant of clemency from the governor.[159]

Workman filed a habeas petition alleging numerous counts of prosecutorial misconduct and the fabrication of evidence.[160] He lost.

On May 4, 2007, the Sixth Circuit rejected Workman's final attempt to avert his execution, deciding that Workman had failed to present any evidence suggesting that, at the time of his habeas proceedings, the State Attorney General had committed fraud by failing to inform the court of perjurious testimony or other exculpatory evidence.[161]

But Workman *had* in fact tried to uncover the State Attorney General's records only to be barred by the Tennessee Court of Appeals in *Swift v. Campbell*. In 2003, after the close of all state proceedings, Workman's federal public defender filed a TPRA request for the records from the prosecuting assistant district attorney general.

The Tennessee Court of Appeals acknowledged previous precedent holding that a pending federal habeas corpus proceeding did not "automatically render [the] file relevant to a 'pending or contemplated criminal action'" so as to bar TPRA access.[162] Yet the court also recognized *Waller*'s application of Rule 16 to bar TPRA requests during state post-conviction proceedings.[163] Finding "no logical reason to differentiate between pending state post-conviction proceedings and federal habeas corpus proceedings," the Court of Appeals affirmed the denial of the TPRA request under Rule 16. However, it rejected the state's additional proposed rationales for denying record access,

159. Swift v. Campbell, 159 S.W.3d 565, 578 (Tenn. Ct. App. 2004); *see* Workman v. State, 22 S.W.3d 807, 817 (Tenn. 2000) (Drowota, J., concurring) ("I do hereby certify to . . . [the] Governor of the State of Tennessee, that there were extenuating circumstances attending this case and that [Workman's] punishment of death ought to be commuted.").

160. Workman v. Bell, 178 F.3d 759, 766 (6th Cir. 1998) (Workman alleged "that the prosecution presented false testimony, withheld documents, did not disclose statements by witnesses, and fabricated evidence in an effort to keep the jury from discovering that . . . someone else, . . . shot Lt. Oliver").

161. *Id.* at 840.

162. Swift v. Campbell, 159 S.W.3d 565, 574 (Tenn. Ct. App. 2004) (quoting Capital Case Res. Ctr. of Tenn., Inc. v. Woodall, 1992 WL 12217, at *5 (Tenn. Ct. App. Jan. 29, 1992)).

163. *Id.* at 575.

refusing to recognize the existence of a general law enforcement privilege.[164]

Workman was executed by lethal injection four days after the Sixth Circuit's decision, the first Tennessee execution in forty years. As a last requested, he asked that his final meal, a vegetarian pizza, be donated to a homeless person. State officials denied this request.[165]

4. "You can see those records after your execution": The Evolving Disparity Between TPRA Requests in Criminal and Civil Cases

It is impossible to know if prevailing in *Swift* would have changed Mr. Workman's ultimate fate, but it is worth pausing to reflect on the tortuous evolution of TPRA precedent between *Holt* and *Swift*. Interpreting this constantly revised statute strongly favoring disclosure and containing hundreds of specific exceptions, the judiciary repeatedly disclaimed the power to create new exceptions and denied the existence of a law enforcement privilege all while steadily expanding the scope of criminal records exempt from TPRA access. Unclear was whether or how a law enforcement privilege differed from the courts' application of Rule 16; with *Swift*, Rule 16 had now been stretched so far as to extend into federal proceedings entirely outside the control of the Tennessee courts or legislature. Tennessee's civil and criminal procedural rules both contain specific rules governing discovery. Neither set of rules expressly bar a litigant or third party from uncovering relevant records. Yet Workman was not allowed to access records relevant to the federal proceedings that could have saved his life. In contrast, despite a stay on discovery issued by a Tennessee appellate court, the doctor in *Konvalinka* was entitled to keep filing TPRA requests regarding the suspension of his staff privileges.[166] Never denying Mr. Workman's right to access the prosecution's records, the *Swift* court merely required that he wait until after conclusion of the federal proceedings deciding whether to delay his execution before he could access the records required to show that his execution should be delayed.

164. *Id.* at 576, 578.

165. Ashley Fantz, *Executed Man's Last Request Honored—Pizza for Homeless*, CNN (May 10, 2007) ,http://www.cnn.com/2007/US/05/09/execution.pizza/.

166. Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346, 350 (Tenn. 2008).

5. *Schneider v. City of Jackson*

Decided in 2007, three years after *Swift*, in *Schneider*, the Tennessee Supreme Court unequivocally rejected the existence of a common law "law enforcement privilege" broadly preventing "disclosure [of] information that would be contrary to the public interest in the effective functioning of law enforcement."[167] Local reporters had requested records from the city of Jackson, including police field interview cards stored separately from investigatory files.[168] Jackson police used these cards to record the contact information and descriptions of persons they interviewed, periodically consulting the cards to help identify suspects or witnesses.[169] The police refused to turn over the cards, claiming them exempt from disclosure under a law enforcement privilege shielding investigatory information.[170] The law enforcement privilege as asserted in *Schneider* would have broadly protected from disclosure any police investigatory information,[171] regardless of whether it concerned an ongoing or closed investigation. Citing federal and state cases from other jurisdictions, the Court of Appeals recognized this law enforcement privilege on public policy grounds.[172] The Tennessee Supreme Court reversed on the grounds that such a privilege simply did not exist in Tennessee's common law.[173] And while the Court acknowledged that a law enforcement privilege might further public policy, the Court declined to create such an exception, citing

167. Schneider v. City of Jackson, 226 S.W.3d 332, 344 (Tenn. 2007).

168. *Id.* at 135.

169. *Id.* at 337–38, 345; Schneider v. City of Jackson, No. W2005-01234-COA-R3CV, 2006 WL 1644369, at *13 (Tenn. Ct. App. June 14, 2006), *rev'd*, 226 S.W.3d 332 (Tenn. 2007).

170. *See Schneider*, 226 S.W.3d at 338 ("Even the fact . . . that an officer stopped and talked to a particular individual at a particular place is privileged . . . .").

171. *Id.* at 343–44 (citing United States v. Myerson, 856 F.2d 481, 484 (2d Cir. 1988) (stating that the law enforcement privilege is intended "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation").

172. *Id.* at 343.

173. *Id.* at 344–45.

numerous TPRA decisions refusing to dictate public policy by creating exceptions without the legislature's permission.[174]

6. *Tennessean v. Metro. Gov't of Nashville*

Tennessean v. Metro. Government of Nashville firmly established that Rule 16 does indeed block TPRA access to most law enforcement records of ongoing criminal investigations or criminal prosecutions.[175] The decision announces no new rules and instead simply applies the legal doctrines created in *Appman* while also specifying that the source of the records—whether they were created by government employees or whether they came from third parties—does not materially alter the *Appman* analysis. However, *Tennessean* marks the first time a dissenting justice identified the Rule 16 TPRA exception as being a judicially created law enforcement privilege.

In *Tennessean*, four Vanderbilt football players had pled not guilty to charges of aggravated sexual battery and aggravated rape committed against a victim on the Vanderbilt campus.[176] The newspaper *The Tennessean* requested to inspect records of the assault held by the Nashville police; officers had created some of the requested records while other records had been collected from third parties.[177] The police denied the request, claiming that the records were "part of an open criminal investigation or pending prosecution" and thus shielded by Rule 16.[178] The newspaper filed a TPRA petition and the victim successfully intervened in that proceeding, arguing that releasing the records would violate her rights under article I, section 35 of the Tennessee Constitution and the Victims' Bill of Rights.[179] After an *in camera* review of the records, the Chancery Court decided that the petitioners

174. *Id.* at 344 (citing State v. Cawood, 134 S.W.3d 159, 166 (Tenn. 2004)).

175. Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 859 (Tenn. 2016); *see also* Daniel A. Horwitz, *Closing the Crime Victims Coverage Gap: Protecting Victims' Private Records from Public Disclosure Following* Tennessean v. Metro, 11 TENN. J. L. & POL'Y 129, 140 (2016).

176. Matt Stevens, *Third Former Vanderbilt Football Player Convicted of Rape*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/us/vanderbilt-rape-brandon-banks.html.

177. *Id.*

178. *Tennessean*, 485 S.W.3d at 860.

179. TENN. CODE ANN. §§ 40-38-101–117 (2014).

were entitled to all records "not developed internally and not constituting statements or other documents reflecting the reconstructive and investigative efforts" of the police, and permitted inspection of some text messages sent by third parties to the police.[180] The court denied access to all other records on the grounds that Rule 16 prevented their disclosure.[181] The Tennessee Court of Appeals reversed, holding that all of the requested records fell within Rule 16's protections.[182]

On appeal to the Tennessee Supreme Court, the newspaper argued that Rule 16 only protected records made by law enforcement in connection with an investigation or prosecution and statements from state witnesses or prospective state witnesses.[183] The police asserted that Rule 16 barred disclosure of all public records connected with a pending or ongoing criminal prosecution, regardless of who created those records, and that Rule 16 barred third party acquisition of information during on-going criminal discovery.[184]

The Court stated the issues for resolution as requiring it to decide whether the TPRA allows access to public records that: (1) "arise out of and are part of a criminal investigation resulting in a pending prosecution;" (2) "are not the work product of law enforcement under Rule 16(a)(2);" (3) "were gathered by law enforcement from other sources in their investigation of the case," and (4) "are requested by entities that are not parties to the pending criminal case."[185]

The Court first turned to its prior decisions interpreting the scope of Rule 16 TPRA protections. In *Appman*, the Court denied an attorney's TPRA request for law enforcement records related to his client's ongoing criminal proceedings, reasoning that Rule 16 provided an exception to the TPRA.[186] In *Swift*, the Tennessee Court of Appeals decided that Rule 16 protects documents related to a criminal conviction under collateral attack in federal court.[187] Relying on these

180. *Tennessean*, 485 S.W.3d at 862.

181. *Id.*

182. Tennessean v. Metro. Gov't of Nashville & Davidson Cnty., No. M2014–00524–COA–R3–CV, 2014 WL 4923162, at *4 (Tenn. Ct. App. Sept. 30, 2014); *Tennessean*, 485 S.W.3d at 862.

183. *Tennessean*, 485 S.W.3d at 866.

184. *Id.*

185. *Id.* at 870.

186. *Id.* at 869.

187. *Id.* at 869–70.

decisions and sensitive to the policy implications of allowing public access to victim information, the Court agreed with the police that Rule 16 barred access to the requested records.[188] Critically, the Court articulated that the TPRA could not allow the inspection of law enforcement records because Rule 16 controls discovery and provides no means for the acquisition of information by nonlitigants: "during the pendency of the criminal case and any collateral challenges to any conviction, Rule 16 governs the disclosure of information and only the defendant has the right to receive certain information."[189]

Responding to the dissent's charge that it had created the common-law law enforcement privilege repeatedly rejected in past decisions,[190] the majority expressly rooted its conclusion in the catchall TPRA exception, section 10-7-503(a)(2)(A), deciding that its prior decisions clearly viewed procedural rules as "state law" for the purposes of the TPRA.[191]

Turning to policy, the majority noted that it would be "absurd" to permit a defendant to use the TPRA to receive an even broader range of records than they would receive under the typical rules of criminal discovery.[192] The Court also voiced its concern that without expansive Rule 16 protections, the TPRA could disrupt ongoing investigations, harm victim privacy, and prevent a defendant's fair trial by news media prematurely exposing potential jurors to the State's evidence.[193] The Court eschewed directly addressing the victim's claims and instead concluded that its decision adequately protected her privacy concerns.[194]

Agreeing with the trial court's decision, dissenting Justice Wade concluded that Rule 16's plain language limits its protection to law enforcement work product and witness statements.[195] While acknowledging the majority's public policy concerns, the dissent viewed the

188. *Id.* at 870–71.

189. "Rule 16 provides for the release of certain information to the defendant in a criminal case, but does not authorize the release of any information to a nonparty to the case." *Id.* at 859.

190. Schneider v. City of Jackson, 226 S.W.3d 332, 334 (Tenn. 2007).

191. *Tennessean*, 485 S.W.3d at 870–71, 873.

192. *Id.* at 871.

193. *Id.*

194. *Id.* at 873–74.

195. *Id.* at 877, 880.

majority's holding as creating a law enforcement privilege and usurping the legislature's authority to set public policy.[196] Justice Wade also believed that the victim's claims deserved to be remanded for adjudication.[197]

B. The Limits of Law Enforcement Exceptions: FOIA's (b)(7) and the TPRA's Rule 16

Tennessean ultimately added little to the Rule 16 TPRA exception that had not already been clarified by *Appman* and *Swift*, its only truly novel contribution being that the exception prevents access to third party records in police possession. However, it did describe and solidify the Rule 16 TRPA exception's expansive scope and boundaries. Rather than applying only to on-going judicial proceedings, the exception—still based on a criminal procedural rule—begins far outside courtroom walls, stretching to encompass law enforcement records relevant to an ongoing or pending criminal investigation even before initiation of a prosecution. Protection ends should an investigation result in no criminal proceedings. Should criminal proceedings occur, Rule 16 bars TPRA inspection—or any other release of information to a non-party until the end of all direct and collateral proceedings,[198] including those outside the reach of Tennessee's procedural rules, such as postconviction federal appeals.[199] Such an extensive duration virtually eradicates the possibility of timely press or citizen access to capital punishment records as those proceedings span decades and only end with an inmate's death. Rule 16's reach is more definite as it has been expressly interpreted as barring any TPRA requests, whether from litigants, litigant's counsel, or nonlitigants.[200] However, Rule 16's nebulous boundaries discourage plaintiffs from bringing potentially clarifying litigation: *Tennessean*'s wide breadth provides law enforcement with colorable grounds for almost any TPRA denial, ensuring no award of attorney fees.

196. *Id.* at 881.

197. *Id.* at 877, 882.

198. *Id.* at 859; *see also* Waller v. Bryan, 16 S.W.3d 770, 773, 777 (applying Rule 16 to bar prisoner access to law enforcement files during the pendency of his state post-conviction proceeding).

199. Swift v. Campbell, 159 S.W.3d 565, 576 (Tenn. Ct. App. 2004).

200. Friedmann v. Marshall Cnty., 471 S.W.3d 427 (Tenn. Ct. App. 2015).

Contrasting the Rule 16 exception with other law enforcement exceptions reveals the former's rigidity. For example, the federal Freedom of Information Act's law enforcement exception, 5 U.S.C. § 552 (b)(7), expressly exempts from disclosure "records or information compiled for law enforcement purposes" but only information disclosure interferes with law enforcement proceedings or a fair trial, reveals private information, law enforcement techniques, or informant identities, or otherwise as could "reasonably be expected to endanger the life or physical safety of any individual."[201] By providing equitable exceptions allowing judicial *in camera* review, FOIA permits public release of all law enforcement records not undermining important policy concerns. By contrast, Tennessee's Rule 16 law enforcement exception imposes a blanket ban on all law enforcement information without the possibility for meaningful judicial review or, because it is not a codified privilege, legislative finetuning.

1. *Scripps Media, Inc. v. Tennessee Dep't of Mental Health & Substance Abuse Servs.*

Decided in 2018, *Scripps* provided some clarification as for *Tennessean*, holding that Rule 16 does not protect non-investigatory records created in the ordinary course of government business even if they later become relevant to a criminal investigation.[202]

In *Scripps*, a TBI official's spouse sent emails to the governor describing the TBI official's affair with an employee of the Tennessee Department of Mental Health and Substance Abuse Services (TDMHSAS) and how the pair had improperly spent state funds for personal trips.[203] At the governor's request, Tennessee Department of Safety and Homeland Security launched an investigation into the TBI

201. 5 U.S.C. § 552 (b)(7). FOIA exemption 7 would eventually be transformed into an independent evidentiary privilege, although the two doctrines are distinct. *See* Stephen Wm. Smith, *Policing Hoover's Ghost: The Privilege for Law Enforcement Techniques*, 54 AM. CRIM. L. REV. 233, 253 (2017) (recounting the evolution of the federal law enforcement evidentiary privilege from FOIA exemption 7); *see also* Black v. Sheraton Corp. of Am., 564 F.2d 531, 541 (D.C. Cir. 1977).

202. Scripps Media v. Tenn. Dep't of Mental Health & Substance Abuse Servs., 614 S.W.3d 700, 702 (Tenn. Ct. App. 2019).

203. *Id.*

official and the TDMHSAS employee.[204] An investigative reporter filed TPRA requests with the TBI and TDMHSAS for communications between the TBI official and TDMHSAS employee as well as any travel reimbursement requests, phone logs, and credit card summaries.[205] Citing the ongoing investigation, the Attorney General's Office denied the request but offered to make the files available if the investigation ended with no ensuing prosecution.[206]

The Court of Appeals ruled in favor of the reporter, rejecting the State's argument that Rule 16 protects otherwise nonexempt public records from TPRA disclosure the moment those records become relevant to a criminal investigation.[207] The court instead decided that Rule 16 only applied to the contents of investigatory files. It did not shield otherwise accessible records made in the ordinary course of government business, even if those records later became relevant to an ongoing criminal investigation.[208]

However, *Scripps* alleviates some of *Tennessean*'s ambiguity by deciding the clearest starting point for Rule 16 protections, distinguishing relevant non-exempt records existing prior to an investigation from exempt records collected or created by law enforcement as a part of an ongoing criminal investigation.[209]

Against the expansive Rule 16 protections, *Scripps* fact-intensive inquiry into a record's creation might prove a pivotal step towards ensuring public access to vital law enforcement records. For example, rather than immediately rejecting requests for police body camera footage, courts must now address whether a particular video represents the product of an active investigation or only the passive collection of visual data possibly germane to a contingent prosecution.

204. *Id.*

205. *Id.*

206. *Id.*

207. Scripps Media, Inc. v. Tennessee Dep't of Mental Health & Substance Abuse Servs., 614 S.W.3d 700, 710 (Tenn. Ct. App. 2019).

208. *Id.* at 709.

209. *Id.*

C. Deconstructing the TPRA Rule 16 Exception

While the TPRA Rule 16 exception temporarily remedies select statutory omissions, the doctrine is unlikely to survive any dedicated challenge attacking its procedural, statutory, or constitutional basis.

1. Procedural Justifications for Overturning the TPRA's Rule 16 Law Enforcement Exception

Both the *Tennessean* majority and the dissent reached correct and reasonable conclusions: extensive and well-established case law supported the majority's conclusion.[210] But, as the dissent pointedly noted, the plain language of Rule 16 makes no mention of exempting records or limiting TPRA access. Indeed, Rule 16(a)(2) contains no prohibition on TPRA requests, whether by litigants or by nonlitigants, instead stating that "this rule does not authorize the discovery or inspection of" investigatory or litigation records except as provided under subdivision (a)(1).[211] Nor does Rule 16(a)(2) apply to all investigatory records, but instead shields the narrow category of records "made by" the district attorney, state agents, or law enforcement, and only when they were created "in connection with investigating or prosecuting the case" at hand.[212]

Rule 16 is, of course, a procedural rule. Tennessee Rule of Criminal Procedure 1 limits the scope of all criminal procedural rules to in court proceedings only: "[t]hese rules govern the procedure in all criminal proceedings conducted in all Tennessee courts of record." Citing Rule 1, *Holt* recognized that "[b]y definition [Rule 16's] limitation on access to records applies only to discovery in criminal cases . . . the investigative file sought . . . is not relevant to any pending or contemplated criminal action. Rule 16, therefore, does not come into play in this case."[213] It was *Appman*, not *Tennessean*, that first rejected the plain language of Rule 16 and Rule 1's limitations in order to prevent attorneys from gaining access to the state's records during a prosecution. No case squarely addresses how or why Rule 16 applies to stop

210. Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 868–870 (Tenn. 2016) (surveying Rule 16 decisions).

211. *See* TENN. R. CRIM. P. 16(a)(2).

212. *Id.*

213. Memphis Pub. Co. v. Holt, 710 S.W.2d 513, 517 (Tenn. 1986).

TPRA disclosure of investigatory files before the initiation of criminal proceedings or to nonlitigants.[214] Applied as written, Rule 1 would limit Rule 16 to applying only after the initiation of a criminal proceeding up until termination of state proceedings. Because federal postconviction proceedings exist beyond the scope of the Tennessee Rules of Criminal Procedure, Rule 16's TPRA exception should end with all state court proceedings.

i. The TPRA Rule 16 Exception Bars Record Access Even Before Rule 16 Applies

Casting further doubt on its justification, the Rule 16 TPRA exception bars record access even when Rule 16 has yet to apply, both before and after the trial court level prosecution, Rule 16 does not apply within key stages of a criminal prosecutions. In *State v. Willoughby*, before her preliminary hearing in General Sessions Court, a defendant, accused of murdering her husband, filed a motion under Rule 16 requesting discovery and inspection of evidence, including potentially exculpatory evidence.[215] The court denied the motion on the grounds that Rule 16 does not apply to preliminary hearings.[216] The Tennessee Supreme Court affirmed, reasoning that Rule 1 limits application of the Rules of Criminal Procedure to "courts of record," a category not encompassing general sessions court.[217] While Rule 1 lists several instances in which the procedural rules govern general sessions proceedings, the Court read into those exceptions the limitation that the procedural rules applied "only those proceedings peculiar to the practice in the General Sessions Court" and did not apply to preliminary hearings.[218]

Rule 16 thus exists in a state of paradoxical asymmetry. Under *Willoughby*, Rule 16 cannot be invoked for the purpose of actual discover either before or during a preliminary hearing, yet under *Appman* and its descendants. Rule 16 bars use of the TRPA to uncover law

214. *See* TENN. R. OF CRIM. P. 1.

215. State v. Willoughby, 594 S.W.2d 388, 389 (Tenn. 1980).

216. *See also* State v. Harrison, 270 S.W.3d 21, 34 (Tenn. 2008) ("[T]he Tennessee Rules of Criminal Procedure d[o] not explicitly apply to pretrial competency hearings.").

217. *Willoughby*, 594 S.W.2d 388.

218. *Id.* at 391.

enforcement records. No court has yet addressed why or how TPRA record access can be denied under Rule 16 when Rule 16 is not yet in force. Given the high percentage of cases resolved by plea bargain, this temporal gap in information access might unfairly blind defendants at a crucial procedural stage.

2. The Statutory Justifications for Overturning the Law Enforcement Exception

Under procedural rules, Rule 16's TPRA exception should be limited to, at most, applying only to the parties to a state criminal proceeding and only during the pendency of those proceedings. But even this limited scope runs afoul of another source of law: state statutes. By allowing a procedural rule to impede the substantive TPRA right to access records, *Appman* and its progeny run afoul of the statutory and constitutional framework by which Tennessee's Supreme Court creates rules of procedure. As discussed below, because the Tennessee Supreme Court claims the inherent constitutional authority to dictate judicial procedure, the interaction of Tennessee procedural rules and statutes presents a constitutional dilemma with no federal parallel. Although federal courts possess some inherent authority to govern their own proceedings,[219] the United States Supreme Court makes no claims to having independent constitutional authority to enact procedural rules but instead adopts and alters those rules via the Rules Enabling Act.[220] The Rules Enabling Act grants the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence" for federal courts, with the caveat that those rules may not alter or abridge any substantive rights.[221] While any new rules must be presented to Congress, no congressional approval is required except for rules "creating, abolishing, or modifying an evidentiary privilege" which "shall have no force or effect unless approved by Act of Congress."[222]

Under Section 17 of the Tennessee constitution, legislation must originate in the General Assembly and is only amendable by that

219. *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965).

220. *Id.* at 471; *see also* 28 U.S.C. § 2072.

221. 28 U.S.C. § 2072(a)–(b).

222. 28 U.S.C. § 2074.

body.[223] Like the federal Rules Enabling Act, the Tennessee legislature has passed statutes purportedly governing the introduction and limitations of procedural rules.[224] Although the power to create procedural rules exists separate from state statute, the Tennessee Supreme Court voluntarily follows this statutory framework for creating and enacting rules found in section 16-3-300.[225]

Under those statutes, the Tennessee Supreme Court drafts proposed procedural rules, which take effect after receiving approval by resolution from both legislative chambers.[226] No formal mechanism exists permitting legislative amendment or creation of proposed rules.[227]

State statute also grants properly adopted procedural rules special importance: should any statute conflict with a procedural rule, then that statute is rendered null once the rule comes into effect.[228] However, under section 16-3-403, any judicially prescribed rules "shall not abridge, enlarge or modify any substantive right," and must "be consistent with the constitutions of the United States and Tennessee."[229]

The TPRA creates statutory rights for Tennessee citizens to access public records. The Rule 16 exception—a judicially created exception springing from a judicially created procedural rule—limits those rights. Under the section 16-3-403, Rule 16 simply cannot be used in this manner.

223. TENN. CONST. art. II, § 17.

224. *See* TENN. CODE ANN. § 16-3-401 ("The Supreme Court may make rules of practice for the better disposal of business before it."); TENN. CODE ANN. § 16-3-402 (2022) ("The Supreme Court has the power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of this state in all civil and criminal suits, actions and proceedings."); TENN. CODE ANN. § 16-3-307 (2022); *see also* Matthew R. Lyon, *Conformity and the Rules of Civil Procedure: Lessons from Tennessee*, 26 WIDENER L. J. 69, 82 (2017) (describing further Tennessee's rulemaking process).

225. *See* Donald F. Paine, *How Rules of Procedure Are Made*, 45 TENN. B.J. 38 (2009).

226. TENN. CODE ANN. § 16-3-404 (West 2022)

227. Paine, *supra* note 226, at 38 ("The General Assembly cannot draft rules of procedure.").

228. "After the rules have become effective, all laws in conflict with the rules shall be of no further force or effect." TENN. CODE ANN. § 16-3-406.

229. TENN. CODE ANN. § 16-3-403.

3. Constitutional Justifications for Overturning Tennessee's Law Enforcement Exception.

Responding to the dissent's charges of dictating public policy, a covert allegation of violating the separation of powers, *Tennessean*'s majority based its ruling on section 10-7-503's catch all exception and not on Rule 16 itself.[230] In effect, the catch-all exception was construed as a statutory transformer capable of imbuing other sources of "state law"—such as administrative regulations and procedural rules—with the legislature's authority.[231] Yet, the delegation of legislative authority to the judiciary is a constitutional impossibility. [232]

Article II, section 2 of the Tennessee constitution forbids any of the three branches of government from exercising a power belonging to another branch.[233] The constitution vests judicial power in the state supreme court[234] while the legislative authority vests in the General Assembly.[235]

Although not expressly stated by the constitution, the Tennessee Supreme Court reads in a distinction between procedural and substantive law, claiming ultimate authority over procedural law—to "hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved"[236]—granted to the Tennessee Supreme Court, while the legislature is tasked with enacting substantive law.[237] Critically, the Tennessee Supreme Court has repeatedly asserted its ability to create rules of procedure and practice as a power bestowed

230. Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 873 (Tenn. 2016).

231. *Id.*

232. Readers interested in a focused exploration of Tennessee's separation of powers and case law history concerning legislative infringement on judicial procedural authority should consult Judy M. Cornett & Matthew R. Lyon, *Contested Elections As Secret Weapon: Legislative Control over Judicial Decision-Making*, 75 ALB. L. REV. 2091, 2099–112 (2012).

233. *See* TENN. CONST. art. II, § 2 ("No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."); State v. Mallard, 40 S.W.3d 473, 481 (Tenn. 2001).

234. TENN. CONST. art. VI, § 1.

235. TENN. CONST. art. II, § 3.

236. State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001).

237. *Id.* at 480–81.

by the state constitution, one that can be neither abrogated or abolished by the legislature.[238] Yet just as the constitution forbids legislative interference in judicial procedure, so too does it prevent the legislature from delegating to the judiciary its authority and duty to create substantive law.[239]

i. Rule 16 Cannot Constitutionally Limit Substantive TPRA Rights

Whether, under Tennessee jurisprudence, Rule 16 can limit a third party's TPRA right to law enforcement records turns on: (1) whether the section 10-7-503's right to inspect records is substantive; and (2) whether the catch-all TPRA exception violates the separation of powers by delegating to the Tennessee Supreme Court the legislature's power to amend or abridge substantive rights.

The plain language of section 10-7-503 creates a "right of inspection" for Tennessee citizens to all non-exempt government records and lays out a government entity's duties in fulfilling those rights.[240] By creating and defining the rights of Tennessee citizens and the government's corresponding duties, the statute bears all of the hallmarks of a substantive law creating a substantive right.[241] As a product of the legislature's exclusive constitutional authority, only other legislative enactments should curtail the right to inspect records.

Appman and its progeny read the catch-all exception as giving the judiciary the ability to curb TPRA statutory rights by passing procedural rules. But this interpretation seems to rest on a clear separation of powers violation: because the TPRA creates substantive rights, the power to alter or amend the TPRA cannot be delegated to the judiciary. Allowing procedural rules to modify the scope of public record access does just that, allowing alteration of the TPRA's scope through

238. *See* State v. Lowe, 552 S.W.3d 842, 856–57 (Tenn. 2018) (citing a long line of cases maintaining Tennessee Supreme Court as ultimate procedural authority under the state constitution); Willeford v. Klepper, 597 S.W.3d 454, 465–66 (Tenn. 2020).

239. *See* TENN. CONST. art. II, § 2 ("No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."); *Mallard*, 40 S.W.3d at 481.

240. TENN. CODE ANN. § 10-7-503(a)(2)(A).

241. Willeford v. Klepper, 597 S.W.3d 454, 475 n.5 (Tenn. 2020) (citing 20 AM. JUR. 2d *Courts* § 47 (2018)); Black's Law Dictionary (11th ed. 2019); Broussard v. St. Edward Mercy Health Sys., 386 S.W.3d 387, 389 (Ark. 2012).

procedural rules unalterable by legislative enactments. At most, the Tennessee Supreme Court's inherent authority to regulate judicial proceedings might permit Rule 16 to bar TPRA access during Tennessee criminal proceedings, yet this authority ends at the courthouse door. Thus, the TPRA would allow full record access before initiation of a criminal proceeding and again after state proceedings terminated and would not apply to federal post-conviction proceedings. While there are sound reasons for allowing postconviction record access—given the stakes of a capital case, little reason exists for denying TPRA access—leaving investigatory records entirely open to the public until the initiation of criminal proceedings may not accord with the state's public policy goals. Viewed in this light, *Appman*'s creation of the Rule 16 TPRA exception—even if it was ultimately an unconstitutional usurpation of legislative authority—makes some practical sense.

D. Alternative Law Enforcement Exceptions

Some remedy must be crafted to protect the pressing public policy concerns identified by the *Tennessean* majority. The TPRA Rule 16 exception is both too broad in its scope—think of Phillip Workman—and too narrow, its protections expiring at the end of a criminal proceeding and leaving open for public inspection whatever victim or defendant records were created or collected by law enforcement.[242] The TPRA's statutory exceptions for victim information protect relatively little: section 10-7-504 offers limited protection to certain identifying records of victims who are minors[243] and similar records of sexual offense victims,[244] but provides scant else. While Tennessee courts possess the inherent authority to seal records,[245] and the TPRA cannot

242. State v. Cawood, 134 S.W.3d 159, 167 (Tenn. 2004) (citing TPRA as barring destruction of personally embarrassing exhibits filed in a criminal prosecution).

243. TENN. CODE ANN. § 10-7-504(t)(1).

244. TENN. CODE ANN. § 10-7-504(q); *see also* Horwitz, *supra* note 176, at 136–39 (identifying three broad categories of crime victims left unprotected after termination of Rule 16 protections).

245. Knoxville News-Sentinel v. Huskey, 982 S.W.2d 359, 362 n.1 (Tenn. Crim. App. 1998); *see, e.g.*, Tennessean v. Metro. Gov't of Nashville, 485 S.W.3d 857, 878 (Tenn. 2016) (Wade, J., dissenting) (describing the wide scope of protective orders put in place to protect victim's privacy).

be used to access sealed records,[246] a gap in protection would still remain after initiation of an investigation but before trial. Had the victim's claims in *Tennessean* gone forward, the court might have been able to fashion a more constitutionally compliant shield from Tennessee Code Annotated section 40-38-102's promise to have victims "[b]e treated with dignity and compassion,"[247] or the state constitutional right of victims to "be free from intimidation, harassment, and abuse throughout the criminal justice system."[248] Some existing statute or constitutional provision could very well prove a suitable foundation stone for another a judicially crafted law enforcement exception, this one now avoiding any constitutional difficulties. Yet the comparatively clumsy mechanisms of the judiciary seem poorly suited for the kind of nuanced, fact-specific rules required to effectively govern public record exceptions. Only the state legislature possesses the constitutional authority and legislative ability required to implement the kind of fact-intensive instructions required to create a balanced and effective framework for protecting law enforcement records. Recognizing this reality, many state public record statutes contain extensive and precise law enforcement record protection statutes. For example, Florida law dedicates over 4,000 words to describing the different categories of protected law enforcement records.[249] Great detail is provided: one subsection carefully dictates when body camera footage is exempt from disclosure, exceptions to these disclosure exemptions, how long footage must be stored and even creates a nine-factor balancing test for courts deciding whether to release police body camera footage.[250]

Given the existence of this and other detailed, court-tested state law enforcement exceptions, rather than craft a novel statute bereft of any interpreting case law, the Tennessee legislature could simply import an existing state law enforcement exception

246. Ballard v. Herzke, 924 S.W.2d 652, 662 (Tenn. 1996) ("Documents sealed by a court of this state are not subject to inspection under the Tennessee Public Records Act."); *see* Chollet III, *supra* note 21, at 740 (2006).

247. TENN. CODE ANN. § 40-38-102 (2022).

248. TENN. CONST. art. I, § 35; *see also* Horwitz, *supra* note 176, at 132–33.

249. *See* FLA. STAT. ANN. § 119.071(2)(a) (West 2022) (describing precise categories of investigatory records exempted from citizen inspection).

250. *See* FLA. STAT. ANN. § 119.071(2)(l) (West 2022).

IV. THE TPRA'S IMPERMISSIBLE PROCEDURAL ALTERATIONS

Just as *Appman*'s Rule 16 exception trespassed onto the legislature's constitutional purview, so too has the legislature strayed into protected judicial territory by attempting to statutorily amend the Tennessee Rules of Civil Procedure under section 10-7-505. Likely animated by the vital public policy goal of providing swift access to public records, the TPRA attempts to fundamentally transmute key aspects of the usual civil litigation procedural framework, such as by dictating an expedited hearing and dispensing with the need for a "formal written response." These procedural alterations have caused no small amount of confusion regarding the proper procedural mechanics of a TPRA hearing and application of procedural rules.

A plain reading of the Tennessee Rules of Civil Procedure indicates that a TPRA hearing would follow the same procedural rules as any other civil proceeding. Tennessee Rule of Civil Procedure 1 states that those rules "govern procedure in the circuit or chancery courts in all civil actions," making no distinction between statutory show cause hearings and other types of civil proceedings. Adhering to Rule 1's articulated scope, many courts have applied the Tennessee Rules of Civil Procedure to TPRA hearings, such as by allowing parties to engage in discovery[251] or invoke other procedural mechanisms outside those described by section 10-7-505.

Other courts have interpreted section 10-7-505 as superior to conflicting procedural rules, denying petitioners recourse to procedural mechanisms not expressly described by that statute. In *Moncier v. Harris*, an attorney had filed a TPRA petition seeking review of the Tennessee Department of Safety and Homeland Security's (TDOSHS) redaction of personal information from civil forfeiture documents.[252] The attorney had requested records from the city of Knoxville's civil forfeiture warrants intending to use the records to solicit clients, only to find that TDOSH had redacted all identifying personal

251. *See* Memphis Publishing Company v. City of Memphis, No. W2016–01680–COA–R3–CV at *2 (Tenn. Ct. App. 2017) (noting that newspaper petitioner and responding government entity engaged in "expedited discovery" before respondents filed their answers); Jakes v. Sumner Cty. Bd. of Educ., No. M2015-02471-COA-R3-CV, 017 Tenn. App. LEXIS 515, at *5–6 (Tenn. Ct. App. 2017).

252. Moncier v. Harris, No. E2016-00209-COA-R3-CV, 2018 Tenn. App. LEXIS 176, at *1–2 (Tenn. Ct. App. 2018).

information.[253] The attorney subpoenaed a TDOSH staff attorney, requiring their presence at a TPRA show cause hearing as well as the production of TDOSH documents.[254] The staff attorney filed a motion to quash on the grounds that discovery rules do not apply to section 10-7-505 hearings and that the statute's judicial review procedure did not permit plaintiffs to subpoena witnesses.[255] The trial court ruled in favor of TDOSHS on both issues.[256] The appellate court agreed, finding that the attorney had "ignored the statutory procedures" and "improperly attempted to expand the limited scope of that proceeding."[257] The court grounded its conclusion in the fact that "nowhere in section 10-7-505 is document discovery contemplated and the plain language of the statute precludes such a procedure."[258] The court reasoned that because the government bears the burden of proof and the legislature removed typical time constraints in the interest of swiftly resolving a TPRA petition, it would "make no sense" to permit plaintiff discovery or subpoenas.[259] By reading section 10-7-505 as encompassing all possible procedural mechanisms in a TPRA hearing, *Moncier* seems to carve out those hearings as total exception to Tennessee's civil procedural rules.

A. The Constitutional Division Between Statutes and Procedure

Resolving the tension between section 10-7-505's procedural provisions and civil rules requires yet another separation of powers analysis. The permissibility of section 10-7-505's procedural alterations falls into fairly well-settled analytic framework for reviewing separation of power challenges.

In mapping the constitutional boundaries between statutes and procedural rules, the Tennessee Supreme Court has recognized at least three main categories of statutes affecting procedure: (1) supplemental statutes to be read in tandem with procedural rules; (2) contradicting

253. *Id.*
254. *Id.* at *3.
255. *Id.*
256. *Id.* at *13.
257. *Id.* at *11.
258. *Id.*
259. *Id.*

statutes directly at odds with procedure; and (3) hybrid statutes composed of conflicting and supplemental parts.

As illustrated by *State v. Mallard,* a supplemental statute passes constitutional muster because its procedural directive works to complement existing judicially-created procedure.[260] A contradicting statute, exemplified in *State v. Lowe*, runs directly contrary to existing procedural requirements and judicial decisions, and would, if enforced, violate the separation of powers.[261] A hybrid statute contains some constitutionally permissible substantive rights while also partly violating the legislative ambit by attempting to dictate judicial procedure, a distinction explored in *Willeford v. Klepper*.[262]

1. *State v. Mallard*: Supplemental Procedural Statutes

A cornerstone Tennessee separation of powers decision, *State v. Mallard*, ruled constitutionally permissible any Tennessee statute supplementing procedural rules without providing any direct contradiction to procedural requirements. *Mallard* examined the constitutionality of Tennessee Code Annotated section 39-17-424, a statute that dictated the facts that must be considered when deciding whether a defendant had unlawfully possessed illegal drug paraphernalia.[263] Critically, the statute required consideration of "[p]rior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances or controlled substance analogues."[264] The defendant in *Mallard* had been convicted of possessing drug paraphernalia after the trial court had relied on section 39-17-424(2) to introduce into evidence his prior convictions for possession of crack cocaine and drug paraphernalia.[265] On appeal, the defendant argued that section 39-17-424(2) directly contradicted Tennessee Rule of Evidence 404(b)'s requirement that evidence of prior bad acts can only be admitted after a special hearing.[266] The appellate court ruled against the defendant, deciding that although the statute and rules

260. *See* State v. Mallard, 40 S.W.3d 473 (Tenn. 2001).
261. State v. Lowe, 552 S.W.3d 842 (Tenn. 2018).
262. Willeford v. Klepper, 587 S.W.3d 454, 468–69 (Tenn. 2020).
263. *Mallard*, 40 S.W.3d at 475.
264. TENN. CODE ANN. § 39-17-424(2).
265. *Mallard*, 40 S.W.3d at 475.
266. *Id.* at 477.

were in conflict, the statute prevailed because it was passed more recently than 404(b) and contained specific provisions aimed at governing prosecutions, thus prevailing over the more general terms of the evidentiary rules.[267]

The Tennessee Supreme Court reversed the court of appeals. Citing the Tennessee constitution's prohibition against usurping a power granted to another branch of state government, the court noted its inherent judicial constitutional authority to dictate judicial procedure, an authority existing "by virtue of the establishment of a Court and not by largess of the legislature."[268] Because of this inherent power, "the legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power."[269] However, the Court also acknowledged that, in the interest of promoting a functioning government, it would voluntarily permit procedural statutes when they "(1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court."[270] The Court ultimately decided to interpret section 39-17-424(2) as supplementing the Rules of Evidence, ruling that the evidence described by the statute could be considered, but only when admitted in accordance with the Rules of Evidence.[271]

2. *State v. Lowe*: Contradicting Procedural Statutes

Statutes directly trespassing on judicial territory forfeit have no effect. In *State v. Lowe*, the Court found the Exclusionary Rule Reform Act (ERRA)[272] unconstitutional for directly contradicting the exclusionary rule and Tennessee Rule of Criminal Procedure 41(g).[273] The ERRA forbade excluding evidence seized under a defective search warrant when the warrant's defects stemmed from a "good faith mistake or

267. *Id.* at 481 (quoting Haynes v. McKenzie Mem'l Hosp., 667 S.W.2d 497, 498 (Tenn. Ct. App. 1984)).

268. *Id.* at 481.

269. *Id.* at 483.

270. *Id.* at 481 (citing Newton v. Cox, 878 S.W.2d 105, 112 (Tenn. 1994)).

271. *Id.* at 484.

272. TENN. CODE ANN. § 40-6-108 (2022).

273. State v. Lowe, 552 S.W.3d 842, 856–58 (Tenn. 2018).

technical violation."[274] Rule 41(g) lays out the procedure for suppressing unlawfully obtained evidence and the factors to be considered by a court ruling on such a motion.[275] At the time, Rule 41(g) required the suppression of evidence seized without a warrant or under a defective warrant, including warrants lacking the correct time of issuance.[276]

The defendant in *Lowe* had secretly given birth to twin boys in her family home before smothering both infants and leaving their bodies in a laundry basket.[277] The defendant's parents discovered one of the infant's bodies and called the police.[278] The police obtained a search warrant for the house, but instead of issuing three identical search warrants as required by Rule 41(d), the magistrate mistakenly marked one warrant's issuance time as "PM" instead of "AM."[279] The defendant argued that the evidence gathered from her parent's house should be suppressed for having been discovered by a faulty warrant; the state countered that the ERRA prevented exclusion of the evidence because the magistrate committed only a good faith clerical error.[280]

Contrasting the ERRA with the statute at issue in *Mallard*, the Court found that the ERRA did not supplement but instead "directly contradict[ed] existing procedural rules and then-existing Court precedent related to any good-faith exception."[281] The Court noted that the good-faith exception is a judicially created remedy made through its constitutional power to dictate judicial procedure. By "directly contradicting existing procedural rules and then-existing Court precedent related to any good-faith exception through the enactment of the ERRA, the General Assembly overstepped its constitutional boundaries."[282]

274. *Id.* at 850.

275. TENN. R. CRIM. P. 41(g).

276. TENN. R. CRIM. P. 41(g). Rule 41 was amended in 2018, the same year as Lowe, to make suppression optional instead of mandatory.

277. *Lowe*, 552 S.W.3d at 847–48.

278. *Id.* at 848.

279. *Id.* at 858.

280. *Id.* at 851, 857.

281. *Id.* at 856–57.

282. *Id.* at 857.

3. *Willeford v. Klepper*: Hybrid Procedural Statutes

Willeford v. Klepper articulated the standard for analyzing hybrid procedural statutes, those laws attempting to impermissibly dictate procedure but also containing sections addressing purely substantive legal issues.

In *Willeford,* the Court partially voided Tennessee Code Annotated section 29-26-121(f)(1), a two-part law allowing medical malpractice defendants to seek a protective order to "obtain protected health information" through *ex parte* interviews with non-party healthcare providers during discovery.[283] The second part of (f)(1) also dictated the circumstances under which a trial court must grant the defendant's petition.[284] At trial and on appeal, the plaintiff objected that the statute violated state separation of powers by impermissibly attempting to dictate judicial procedure.[285]

The Tennessee Supreme Court adopted the substance versus procedure framework commonly employed in other states to resolve separation of power: the legislature controls substantive law, which is the body of law that "creates, defines, and regulates primary rights," while the judiciary oversees and issues procedural laws, those that "pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated."[286] The Court also recognized the propriety of eliding a statute's unconstitutional procedural facets while leaving intact any provisions declaring individual substantive rights.[287]

Directly addressing section 29-26-121, the Court deemed the law not purely procedural as it created the substantive right of *ex parte*

283. Willeford v. Klepper, 597 S.W.3d 454, 462 (Tenn. 2020).

284. *See* TENN. CODE ANN. § 29-26-121(f)(1)(A)–(C).

285. *Willeford*, 597 S.W.3d at 458.

286. *See id.* at 466–67 (internal citations and quotation marks omitted). Why Willeford addressed the demarcation between judicial and legislative functions as a novel question, *see id.* at 465 ("This Court . . . has not spelled out clearly an analysis for considering a separation-of-powers issue . . . when a statute effectively abrogates *case law*.") (emphasis in original), remains unclear given the existing body of relevant precedent. *See, e.g.*, Richardson v. Young, 125 S.W. 664, 668 (1910) ("[T]he legislative power is the authority to make, order, and repeal; the executive, that to administer and enforce; and the judicial, that to interpret and apply, laws.").

287. *See Willeford*, 597 S.W.3d at 470–71; *see also id.* at 474 (Kirby, J., concurring in part and dissenting in part).

communication between a plaintiff's healthcare provider and medical malpractice defendants,[288] and that the "overriding *purpose* of the statute at issue is within the authority of the legislature, or at least something to which the judiciary should yield if reasonably possible."

However, the Court struck down that portion of the statute dictating when a court must grant a petition, reasoning that the legislature's attempt to remove trial discretion impermissibly dictated procedural matters to the judiciary.[289] The Court explained that the remaining portions of the statute "allows defendants in healthcare liability actions to petition trial courts for qualified protective orders for *ex parte* interviews with non-party treating healthcare providers, but it leaves the manner of disposition of such petitions to the sound discretion of trial courts."[290]

While approving of the decision's substantive versus procedural distinction, Justice Kirby's partial concurrence questioned whether *Willeford*'s opacity and consideration of novel factors, including public policy implications, clouds the separation of powers analysis.[291] The majority does seem to apply an amorphous public policy exception permitting some level of legislative interference with the judiciary's constitutional powers when a social issue exceeds an undefined threshold of social importance. It remains to be seen whether and to what extent this public policy exception will guide future decisions. However, it may represent an avenue for providing judicial approval for statutes that might have previously been deemed violative of the separation of powers.

B. The Tennessee Rules of Civil Procedure Fully Apply to TPRA Hearings

Using the procedural versus substantive analysis described above, the Tennessee Rules of Civil Procedure apply in full force to TPRA hearings and cannot be displaced by the legislature. *Lowe* clarified that any portion of a statute directly contradicting procedural rules cannot be given effect without violating the separation of powers, while *Mallard* permits that any portion of the statute not in direct conflict can

288. Willeford v. Klepper, 597 S.W.3d 454, 468 (Tenn. 2020).

289. *Id.* at 470.

290. *Id.* at 472–73 (emphasis added).

291. *See id.* at 473 (Kirby, J., concurring in part and dissenting in part).

be read as supplementing procedural rules. Thus, any of the TPRA's procedural aspects directly contradicting civil procedural rules would be void.

For example, whatever was intended by the TPRA's waiver of the need for "[a] formal written response,"[292] because the procedural rules trump conflicting statutes, a government respondent would still need to file an answer consistent with Tennessee Rule of Civil Procedure 7 or else risk waiving any defenses and admitting the petition's factual contents.[293] Those procedural aspects not in direct contradiction would require further harmonizing with procedural rules. Although these legal analyses could be accomplished piecemeal by appellate courts across the course of years, a more expedient solution would be amending the civil procedural rules to create a TPRA hearing aligning with the statute's policy goals.

1. The Protean Denial: Exploiting Procedural Ambiguities and TPRA Mechanics to Frustrate Record Access

By failing to clearly account for civil procedural rules, the TPRA creates a zone of procedural ambiguity permitting reluctant government entities to further delay and harass record requesters using a series of impenetrable, protean denials.

A record custodian flatly denying access to nonexempt records risks judicial sanctions. Instead, to effectively block access while frustrating judicial review, the record custodian can repeatedly deny requests citing multiple different statutory justifications, such as a lack of specificity, or that completing a request for multiple records would require compiling information.[294] Should the requester seek judicial review, because the government entity bears the burden of proof and

292. TENN. CODE ANN. § 10-7-505(b).

293. TENN. R. CIV. P. 8.02, 8.04.

294. For an example of the protean denial, see the Knox County Sheriff's Office's TPRA denial letter citing without explanation the compilation and specificity exceptions, denying the existence of any file containing responsive records, and also denying the ability to search the body of emails for responsive records. Letter from Michael S. Ruble, Knox Cnty. Sheriff's Office, Chief Counsel, to Christopher Schiano, MuckRock News, Reporter (Mar. 5, 2018) https://www.muckrock.com/foi/knox-county-30215/knox-county-sheriff-emails-mentioning-traditionalist-worker-party-11418-present-48158/#file-186447.

can dictate the course of proceedings, the government entity can demand that every single justification for every denial be tried in the most time intensive manner possible. Because *Moncier v. Harris* bars TPRA discovery, the plaintiff is powerless to hasten proceedings. And because Tennessee Code Annotated section 10-7-505(g) only allows awarding costs and fees for willfully denied records, no fees can be recovered if any of the competing justifications has a plausible legal basis.

Conley v. Knox County Sheriff, a Knox County Chancery Court case, provides the best illustration of the protean denial's application.[295] In that case, a sheriff denied the majority of a professor's interrelated requests for immigration detention records, with each denial citing multiple overlapping justifications: one claimed both that a request was not specific enough to identify the requested records while also affirming that the unidentifiable records did not exist. The professor sought judicial review of the denials and the sheriff opted to present his entire case through live witness testimony, including forcing the professor to testify. The sheriff raised a host of additional defenses including a previously unraised redaction defense, incorrectly insisting that all sheriff emails were deleted after thirty days, and also that existing email records could not be searched. Citing the TPRA's lack of a need for a formal written response, the sheriff refused to file an answer for sixth months after the initial petition, resuming the case only under threat of motions for default judgment and partial summary judgment. The court repeatedly reopened the record to admit records that the sheriff's witnesses had denied existed. In total, the entire proceeding took over a week of evidentiary hearings spread across two years. The sheriff's strategy of protean denials had, until *Conley*, proven extremely effective: the sheriff's record custodian testified to not having seen a single record inspection in over a decade of working for the sheriff's office.

Yet while the *Conley* trial court found at least eight TPRA violations, it could deem only two denials willful.[296] For the other denied requests, if even one of the multiple justifications for denial proved

295. The case was originally filed as Conley v. Tom Spangler, Knox County Chancery Court, Docket No. 197897-1, on April 18, 2019.

296. *See* Appellee's Brief p. 23, Conley, No. E2020-01713-COA-R3-CV, 2022.

legally plausible, the TPRA barred awarding fees and costs.[297] The attorney fee hearing took a further two days and required plaintiff to hire yet another attorney to represent her trial attorney.

Conley may mark the emergence of a novel government defendant strategy, or it could exemplify the routine record custodian practice of employing the TPRA's procedural ambiguities to frustrate record access. Either way, the case illustrates the kinds of unanticipated consequences fostered by the law's procedural ambiguities, permitting government delay while robbing diligent judges of the tools necessary to facilitate swift judicial review. Partly solving this dilemma requires appellate courts to emphasize the Tennessee Rules of Civil Procedure's applicability to TPRA proceedings and the careful reconciliation of section 10-7-505 with civil procedural rules.

V. THE NEED FOR A UNIFORM INFORMATION CODE

Public records document and embodied the painful, deeply personal intersections of human lives with the legal system: a rape victim's police records; a death row inmate's last attempt at staying his execution; investigative records of a police shootout and an officer's grisly death; videos proving the innocence of a Black man and child both killed by the police. Given their potentially life-altering importance, legislatures must strive to provide clear and definite public records laws setting public expectations for personal privacy while also fostering the possibility of government accountability. As a judicially created rule beyond the legislature's reach, Tennessee's inflexible TPRA Rule 16 law enforcement exception fails on all fronts, foreclosing the possibility of judicial review for law enforcement record requests. By existing outside of Tennessee Code, ironically, this most important limitation on public record access remains hidden from public view, its very existence denied. Similarly, while the TPRA's procedural aspects may facilitate quicker judicial review, they also create interpretative dilemmas and the possibility of sustained government stonewalling. Yet these issues are ultimately not a unique failing of Tennessee's state government but a problem endemic to all state public

297. Conley v. Tom Spangler, Knox County Chancery Court, Docket No. 197897-1, April 9, 2020 Memorandum Opinion, page. 32; *see also* Conley, No. E2020-01713-COA-R3-CV, 2022 Tenn. App. LEXIS 41, at *32–35 (Tenn. Ct. App. 2022).

record laws. Drafting, implementing, and constantly revising a comprehensive and cohesive set of state public is a daunting challenge. Given the task's complexity, closely examining similar laws from other states would likely reveal similar deficiencies.

There are forty-nine other state public records systems, each containing its own complexities and nuances and each set against the backdrop of a different state constitution.[298] Regionalized scholars have gone to great lengths to accurately map some areas of this legal landscape, creating state-specific guides for public use or litigation.[299] Yet significant gaps still exist: despite its decades of existence and vital importance to government affairs, the TPRA remains chiefly the domain of journalists and non-profits, having generated no sustained scholarly discussion. Like transactional law before the UCC, the patchwork of disparate state open records laws frustrates record access by demanding specific knowledge of local laws and procedures, a particular hardship for national news media attempting to investigate local governments. Similarly, state specific laws balkanize policy discussions and development because the subtleties and idiosyncrasies of each body of law frustrate meaningful comparisons or analysis.

State record laws already need reform. Citizens regularly pay hundreds of dollars for records that are almost entirely redacted, wait months for even the most basic records, or spend years litigating blatant statutory violations against unrepentant officials.[300]

More critically, the balkanization of state public record laws frustrates the accurate collection of basic data vital to pressing social issues, even by federal authorities. A *Washington Post* investigation revealed that that FBI undercounted by two-thirds the number of police shooting deaths between 2015 and 2021,[301] and also failed to accurately

298. The District of Columbia also has its own public record act., *see* D.C. CODE §§ 2-531–540., as do some major municipal entities.

299. Richard J. Peltz-Steele & Robert Steinbuch, *Transparency Blind Spot: A Response to Transparency Deserts*, 48 RUTGERS L. REC. 1, 17–26 (2021) (listing state specific open records scholarship).

300. *See* Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1506–27 (2020) (documenting some of the many barriers inhibiting state record access, including high fees, lack of resources, and hostile government officials).

301. Andrew Ba Tran, Marisa Iati & Claire Healy, *As Fatal Police Shooting Increase, More Go Unreported*, WASH. POST (Dec. 6, 2022), https://www.washingtonpost.com/investigations/interactive/2022/fatal-police-shootings-unreported/.

count the number of non-fatal police shootings.[302] But even this investigation was incomplete, the newspaper only relied on records from 154 police departments. Transparency alone does not create government accountability, but it does create that possibility. Without basic information detailing pressing social issues, accountability will never materialize.

The most effective step towards real transparency requires the same solution already applied to other substantive areas of state law: model legislation. The creation and adoption of the Uniform Commercial Code streamlined intrastate and interstate commerce by providing a unitary set of legal standards governing all aspects of commercial interactions. A uniform information code would afford government transparency and state record access this same level of modern optimization and predictability.

CONCLUSION

Only the creation and mass adoption of an optimized open records law can hope to provide the kind of transformative access to information required to fuel major law enforcement reforms and political change. Until the time, shifting Tennessee towards government accountability while honoring the constitutional separation of powers requires two careful, considered TPRA reforms. The legislature must replace Rule 16's law enforcement exception with legislation recognizing the vital role played by citizen oversight of law enforcement. A judicially-written procedural rule, at best capable of providing only a stopgap remedy, cannot continue to stymie public record access. Rather than abandoning the judiciary to cobble together piecemeal solutions, the legislature should embrace its constitutional duty to craft appropriate legislation. Similarly, the legislature's attempt to dictate TPRA procedure creates unnecessary confusion and procedural ambiguities. Remedying this oversight while adhering to constitutional restrictions likely requires a coordinated effort by both the legislature and the judiciary. Executing these two necessary reforms will help the TPRA fulfill its role as a tool for government accountability and reform.

302. Brian Howey, Wesley Lowery & Steven Rich, *The Unseen Toll of Nonfatal Police Shootings*, WASH. POST (Oct. 21, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-shootings-non-fatal/.