IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

ALEX FRIEDMANN, individually and as an Associate Editor of PRISON LEGAL NEWS,	)	
Petitioner/Appellee,	)	No. M2008-01988-COA-R3-CV
vs.	)	
CORRECTIONS CORPORATION OF AMERICA,	)	On Appeal From the Chancery Court of Davidson County, No. 08-1105-I
Respondent/Appellant.	)	

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, THE ASSOCIATED PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, and THE ASSOCIATION OF CAPITOL REPORTERS AND EDITORS

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I. INTEREST OF AMICI CURIAE

This brief is being conditionally filed with the Court together with a motion for leave to be granted status as amici curiae, pursuant to T.R.A.P. 31(a).

Proposed amicus the American Civil Liberties Union of Tennessee, Inc. ("ACLU"), is a nonpartisan domestic nonprofit organization with its principal office in Nashville, Davidson County, Tennessee. ACLU has individual members throughout Tennessee. ACLU's mission is to promote and protect constitutional rights in Tennessee, and it has a demonstrated interest in public and open government, in the integrity and proper administration of Tennessee's correctional system, and, as a frequent public interest litigant, in the proper award of attorneys' fees and costs to successful petitioners under Tennessee's Public Records Act, T.C.A. § 10-7-101 *et seq.* (the "Act").

Proposed amicus the Associated Press ("AP") is mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP gathers news worldwide through its global network of 243 bureaus and offices, including four in Tennessee. AP has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

Proposed amicus the Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information

vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press, including in the State of Tennessee.

Proposed amicus the Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media, including in the State of Tennessee. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information act issues since 1970.

Proposed amicus the American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 600 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people, including in the State of Tennessee.

Proposed amicus the Association of Capitol Reporters and Editors is the only national journalism organization for those who write about state government and politics, including in the State of Tennessee. It was founded in 1999 and currently has approximately 200 members.

This brief raises issues not raised by the parties or other amici, particularly with respect to the standard of review that should apply to the Chancery Court's

Order denying an award of attorneys' fees to Appellee Alex Friedmann/Prison Legal News. It argues, first, that this Honorable Court should uphold the Chancery Court's Order requiring Appellant Corrections Corporation of America ("CCA") to respond to Mr. Friedmann's request for documents under the Public Records Act, due to the core governmental function served by CCA. Second, these amici submit that the Court should reverse the Chancery Court's Order denying an award of attorneys' fees and costs to Mr. Friedmann, since the court below misconstrued the applicable statute, T.C.A. § 10-7-505(g).

II. ARGUMENT

A. Standard of Review

CCA is correct that it is a question of law whether the Public Records Act applies to the documents that Mr. Friedmann has requested from CCA. *Memphis Publ'g Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 74 (Tenn. 2002). However, that question of law must be evaluated in light of the General Assembly's declaration that the Act "shall be broadly construed so as to give the fullest possible public access to public records." T.C.A. § 10-7-505(d); *Cherokee*, 87 S.W.3d at 74.

In addition, whether the Chancellor erred in failing to award attorneys' fees and costs to Mr. Friedmann is, properly understood, also a question of law subject to *de novo* review by this Court. In its Order of July 30, 2008 resolving Mr. Friedmann's attorney fee application under T.C.A. § 10-7-505(g) (R. at 849), the Chancery Court held that it was reasonable for CCA to refuse access to its

records since (1) "CCA is a private entity," and (2) prior to the Chancery Court's hearing on July 29, 2008, there had been no ruling under the Act against CCA to place CCA on notice "that it must comply with the Tennessee Public Records Act as though it were a government agency." (*Id.* [emphasis added].)

The trial court misapplied T.C.A. § 10-7-505(g) when it implicitly concluded that a private contractor with the State need not even make a good faith inquiry as to its potential duties to disclose records, if there has been no prior court ruling under the Act against that contractor. This is, of course, an issue of law and *de novo* review is necessary. *Cherokee*, 87 S.W.3d at 74 (a question of statutory construction is a question of law).

B. CCA Performs a Core Public Function, Which Is the Cornerstone of Functional Equivalency Analysis

Definitions of "public records" in state freedom of information acts generally fall within four categories, two that allow liberal disclosure and two that are more restrictive. *What Are "Records" of Agency Which Must Be Made Available Under State Freedom of Information Act*, 27 A.L.R.4th 680 § 2[a]. Tennessee's Act falls under the second category of liberal definitions of "public records," those providing that any record made or received in connection with or relating to a law, duty of the agency, or the transaction of public business, or any record containing information regarding those matters is a public record. *See id.*

According to Tennessee law, public records for purposes of citizen inspections under T.C.A. § 10-7-503 include

> ... all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency ....

State v Cawood, 134 S.W.3d 159, 164-65 (Tenn. 2004) (citing at n.7 *Cherokee*, 87 S.W.3d at 75; *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) [relying on T.C.A. § 10-7-301(6) for a definition of "public record" in T.C.A. § 10-7-503]).

Moreover, the Act explicitly applies to records in the control of any state department, agency, or "instrumentality." T.C.A. § 10-7-505(b).

As the parties recognize, the Tennessee Supreme Court, in *Cherokee*, adopted the "functional equivalency" approach to the records of state contractors first pioneered by the Connecticut Supreme Court. The Court found that functional equivalency analysis served both the statutory definition of "public records" in T.C.A. § 10-7-301(6) as well as "the policies furthered by the Act." *Cherokee*, 87 S.W.3d at 79 n.14. Therefore, the Court held that "records 'made or received ... in connection with the transaction of official business by any governmental agency' include those records in the hands of any private entity which operates as the functional equivalent of a governmental agency." 87 S.W.3d at 79.

CCA asserts, citing *Cherokee*, that this Court should apply a purported four-factor test to determine whether it is the "functional equivalent of a government agency": (1) whether and to what extent the entity performs a

governmental or public function; (2) the level of government funding of the entity; (3) the extent of government involvement with, regulation of, or control over the entity; and (4) whether the entity was created by an act of the legislature or previously determined by law to be open to public access. (CCA Br. at 9.)

CCA focuses much of its argument on factors (2), (3), and (4) as laid out by CCA.[1] The *Cherokee* Court, however, explicitly stated that those three factors are "additional," whereas the "cornerstone" of the functional equivalency analysis is question (1):

> ... whether and to what extent the entity performs a governmental or public function, for we intend by our holding to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity.

87 S.W.3d at 79 (emphasis added); *see also, Allen v. Day*, 213 S.W.3d 244, 263 (2006), *perm. app. denied* (2006) (J. Cottrell, concurring) ("The key to determining when a private entity, through a relationship with a government, subjects its records to public inspection lies, in the first instance, in the analysis of whether the entity is performing a governmental function.").

Following *Cherokee* and *Allen*, the Chancery Court correctly emphasized the core governmental function element of equivalency analysis. As a constitutional matter, there is no more fundamental state function than incarceration. *See, e.g.*, Tenn. Const. art. I § 32; *Allen*, 213 S.W.3d at 263 (J.

[1] CCA's argument on the three "additional" factors is ably rebutted by Mr. Friedmann's brief, and as to those factors we will not reiterate the points and authorities that have already been laid out for the Court by Mr. Friedmann.

Cottrell, concurring) ("Prime examples of [traditional state] activities are law enforcement (such as policing, incarcerating, adjudicating, etc.) and education.").

Given this core governmental function performed by CCA on behalf of the State of Tennessee, the concern raised by Amicus Tennessee Secondary School Athletic Association ("TSSAA") that the Chancery Court's ruling in this case would necessarily subject "every trash collector, road builder, or other contractor with the government" to the Act's requirements is inapposite. (TSSAA Br. at 11.) Such cases are not before the Court – only the case of a private instrumentality performing the core government function of administering prisons.

C. The Court Below Erred in Failing to Award Fees and Costs

1. *The Court Applied the Wrong Legal Standard*

In its Order of July 30, 2008 resolving Mr. Friedmann's attorneys' fees application under T.C.A § 10-7-505(g) (R. at 849), the Chancery Court held that it was reasonable for CCA to refuse access to its records since (1) "CCA is a private entity," and (2) prior to the Chancery Court's hearing on July 29, 2008, there had been no ruling under the Act against CCA to place CCA on notice "that it must comply with the Tennessee Public Records Act as though it were a government agency." (*Id.* [emphasis added].)

Nevertheless, more than ample statutory and reported case law existed to place CCA on notice that a state contractor in its situation had to disclose the records requested by Mr. Friedmann. The trial court's standard would utterly absolve private contractors with state government of their duty, under Section

505(g), to examine the Act in light of *Cherokee* and make a good faith determination as to its applicability to their records.

The Tennessee Supreme Court has taken a very different tack from the court below in analyzing fee requests under the Act. Rather than requiring a prior court ruling against that particular record-holder before it will consider an award of fees and costs under Section 505(g), the Tennessee Supreme Court has instead awarded fees where an instrumentality of government denies a records request under the Act on the basis of sweeping privilege claims not previously approved by Tennessee courts of record. *See Schneider v. City of Jackson*, 226 S.W.3d 332, 346-48 (Tenn. 2007).

2. ***A Good Faith Review of the Law by CCA Would Have Shown Its Duty to Disclose Records Under the Act***

The Chancellor relied on two decisions of the Tennessee Supreme Court, *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 689 (Tenn. 1994) and *Schneider*, 226 S.W.3d 332, for the proposition that "Tennessee courts must not impute to a governmental entity the 'duty to foretell an uncertain juridical future." *Memphis Publ'g*, 871 S.W.2d at 689. Both *Memphis Publishing* and *Schneider*, however, were cases of first impression.[2] This is not a case of first impression.

First, since Section 1 of the Act Relative to Private Prison Contractors and Public Records took effect on May 11, 1998, "[t]he records and other documents

[2] *Memphis Publishing* found that civil deposition transcripts were public records under the Act and *Schneider* dealt with a claim of law enforcement privilege.

concerning any inmate who is sentenced to the custody of the department of correction and is being housed in a prison or facility operated by a private prison contractor shall be [*i.e.*, have been since 1998] public records to the same extent such records are public if an inmate is being housed in a department of correction facility." T.C.A. § 41-24-117. All or substantially all of Mr. Friedmann's records requests relate to litigation documents concerning inmates "housed in a prison or facility operated by [CCA]."

Second, since *Cherokee* was decided by the Tennessee Supreme Court in September 2002, it has been the settled law of this state that the Public Records Act encompasses "records in the hands of any private entity which operates as the functional equivalent of a governmental agency." 87 S.W.3d at 79. The Chancery Court record shows that CCA was well aware of *Cherokee*, yet it nonetheless refused to turn over any records to Mr. Friedmann. (See, *e.g.*, Pet. Ex. B.)

Third – although CCA and Amicus TSSAA raise the decision of the Ohio Supreme Court in *State ex rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193, 198 (Ohio 2006), which arguably took a narrow view of *Cherokee* and the functional equivalency test – this Court, after *Oriana* and prior to the Chancery Court hearing in this case, took a broad view of *Cherokee* in *Allen v. Day* in applying functional equivalency to the privately-held manager of a public sports arena. 213 S.W.3d 244, 256, 262 (finding private manager was functional equivalent of government despite contract disavowing agency relationship and

manager's inability to govern or regulate, because "[t]he significant scope of the opinion of the Supreme Court in *Cherokee* is determinative . . .").

3. ***Policy Considerations Support a Fee Award***

Strong policy considerations support a requirement that potential subjects of the Public Records Act must perform a good faith review of the law and its applicability to their activities and records before making a sweeping denial of requests under the Act, or risk an award of fees and costs under T.C.A. § 10-7-505(g).

The first such consideration was articulated by the *Cherokee* Court itself: "the public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor." 87 S.W.3d at 78.

Second, the rule embraced by the Chancery Court in this case would create perverse incentives for private government contractors to refuse legitimate records requests knowing they will have at least one "free shot" without any risk of having to pay fees or costs under Section 505(g).

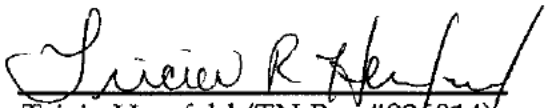
Third, if potential "functionally equivalent" instrumentalities are not required to perform a good faith review of the law and its applicability to their activities and records before denying requests under the Act, and if fee awards are not made to investigative and advocacy groups such as Prison Legal News after they are denied access to public records in violation of the doctrine of

functional equivalency, "the accountability created by public oversight [that] should be preserved," *Cherokee*, 87 S.W.3d at 79, will not be preserved. Without fee awards in cases such as this one, public interest organizations will face significant hurdles in obtaining legal counsel and fulfilling their missions to ensure public accountability.

III. CONCLUSION

For the foregoing reasons, proposed Amici the American Civil Liberties Union of Tennessee, the Associated Press, the Society of Professional Journalists, the Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors, and the Association of Capitol Reporters and Editors respectfully submit that this Honorable Court should uphold the Chancery Court's Order requiring CCA to respond to Mr. Friedmann's request for documents under the Public Records Act. These amici further submit that the Court should reverse the Chancery Court's Order denying attorneys' fees and costs under T.C.A. § 10-7-505(g) and either (1) award such fees and costs or (2) remand for consideration of whether CCA made a valid review of the law of functional equivalency and the Act Relative to Private Prison Contractors and Public Records before denying Mr. Friedmann's request.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of March, 2009, a true and exact copy of the foregoing has been served by first class U.S. mail upon the following:

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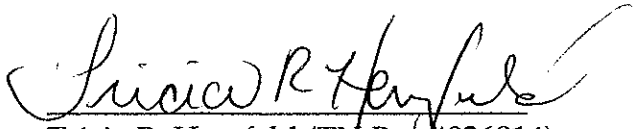

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