

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2007 Session

**NASHVILLE POST COMPANY D/B/A NASHVILLE POST.COM ET AL. v.
TENNESSEE EDUCATION LOTTERY CORPORATION ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 06-60-II Carol McCoy, Chancellor**

No. M2006-01863-COA-R3-CV - Filed October 22, 2007

The Nashville Post appeals the trial court's refusal to award it attorneys' fees and costs under the Public Records Act against the Tennessee Education Lottery Corporation for failure to produce a letter terminating an employee's employment. Finding the trial court did not abuse its discretion, we affirm.

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

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Gerald E. Martin, Nashville, Tennessee, for the appellants, Nashville Post Company d/b/a NashvillePost.Com, and Kenneth S. Whitehouse.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Janet M. Kleinfelter, Senior Counsel; and William N. Helou, Assistant Attorney General, for the appellees, Tennessee Education Lottery Corporation and Rebecca G. Paul.

OPINION

The Nashville Post Company ("Nashville Post") and its reporter sought attorneys' fees and costs under the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-101 *et seq.* ("Act") based upon failure of the Tennessee Education Lottery Corporation ("Lottery") to produce a letter the Lottery sent one of its employees, Steve Adams, terminating his employment ("Termination Letter"). While the trial court ordered the Lottery to allow the Nashville Post to inspect the Termination Letter, the court declined Nashville Post's request for attorneys' fees and costs incurred to obtain the letter. This appeal pertains solely to whether Nashville Post is

entitled to attorneys' fees and costs arising from the Lottery's refusal to produce for inspection the unredacted Termination Letter.¹

The material facts of this matter are not in dispute. On January 5, 2006, the Nashville Post published a story about the departure of Mr. Adams from the Lottery. The Lottery confirmed Mr. Adams' departure. Although no request had yet been made, the Lottery also issued a statement informing the Nashville Post and others that any records and documents relating to the investigation of allegations of workplace harassment by Mr. Adams were covered by attorney-client privilege and were not available to the public.

On Sunday, January 8, 2006, reporters from the Nashville Post requested by telephone and e-mail that the Lottery provide documents about Mr. Adams' employment and termination. The Lottery responded several hours later on Sunday agreeing to provide some documents, requesting time to seek advice regarding some, and stating it would not produce any records relating to the investigation leading to Mr. Adams' departure.

The next day, on Monday morning, January 9, 2006, the Nashville Post filed a petition under the Act seeking "records relating to the investigation that led to the resignation or termination of Mr. Adams" and "any records relating to his termination." Shortly thereafter, the Lottery provided the Nashville Post with a redacted version of the Termination Letter. The portions redacted apparently concerned the investigation. In its response to the petition, the Lottery asserted that any records of the investigation into allegations of workplace harassment by Mr. Adams were protected by the attorney-client privilege and the attorney work product doctrine.

After hearing oral argument on Nashville Post's request, the trial court entered its order on February 8, 2006, determining that the requested documents, including the unredacted Termination Letter, were not protected by attorney client privilege or attorney work product. During the oral argument, when being questioned by the court, counsel for the Lottery acknowledged that since Mr. Adams, a third party, had seen the Termination Letter any privilege that may have existed was lost.

After a later hearing on the Lottery's motion to alter or amend unrelated to the Termination Letter, the trial court found in its April 17, 2006 order that attorneys' fees and costs would not be awarded the Nashville Post under the Act since the Lottery had not acted in "bad faith."

I. ANALYSIS

As has been often stated, the Act establishes the broad right of the people to have access to governmental records. Tenn. Code Ann. § 10-7-503; *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007); *Memphis Publishing Company v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994). The Act places the burden of proof for justification of nondisclosure of records on the official seeking to protect the records. Tenn. Code Ann. § 10-7-505(c);

¹ In its brief on appeal, the Nashville Post expressly waived "any claims for attorneys' fees and costs for obtaining other documents from the Lottery."

Schneider, 226 S.W.3d at 340. The Act also allows a court to award a petitioner under the Act attorneys' fees arising from efforts to obtain disclosure. Specifically, Tenn. Code Ann. § 10-7-505(g) provides as follows:

If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.

In 1994, the Tennessee Supreme Court noted that the Act's attorney fee provision is "by its terms a limited award provision." *Memphis Publishing*, 871 S.W.2d at 689. While the Court did not elaborate on what it meant by using the descriptive term "limited," an examination of the statute makes its limitations clear. First, an award of fees under the Act must meet the threshold requirement that the trial court find that the governmental entity or official "knew" the record was public and "willfully" failed to disclose it. In other words,

. . . the Public Records Act does not authorize a recovery of attorneys' fees if the withholding governmental entity acts with a good faith belief that the records are excepted from the disclosure. Moreover, in assessing willfulness, Tennessee courts must not impute to a governmental entity the "duty to foretell an uncertain juridical future."

Schneider, 226 S.W.3d at 346 (quoting *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d at 689).

The "willful" element has been described as "synonymous to a bad faith requirement,"² *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999), and the standard for determining whether the refusal was willful and knowing has been expressed in varying ways. Nonetheless, in actuality our courts have consistently applied the same analysis. That analysis emphasizes the component of the statutory standard that the entity or its officials know that the record sought is public and subject to disclosure. It evaluates the validity of the refusing entity's legal position supporting its refusal. *See, e.g., Schneider*, 226 S.W.3d at 346-47. Critical to that determination is an evaluation of the clarity, or lack thereof, of the law on the issue involved. As reiterated by our Supreme Court in *Schneider*, as quoted above, courts will not impute to a governmental entity "a duty to foretell an uncertain judicial future." Accordingly, requests for fees have been denied where the question of whether the record sought was public was "not straightforward or simple," *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d at 689, or involved "complex interpretation of controlling case law," *Memphis Publishing Co. v. Cherokee Children & Family Services*, 87 S.W.3d at 80.

² In *Arnold v. City of Chattanooga*, the court quoted Black's Law Dictionary to conclude that "willful," being synonymous with "bad faith," is not simply bad judgment or negligence but "implies the conscious doing of a moral wrong because of dishonest purpose or moral obliquity." 19 S.W.3d at 789. *Accord Henderson v. City of Chattanooga*, 133 S.W.3d 192, 215-16 (Tenn. Ct. App. 2000).

Most of the cases on attorneys' fees under the Act have involved appellate review of an award of fees, and the emphasis has been on the good faith involved in the assertion that the records at issue were exempt from disclosure. Herein, the Lottery based its position of refusing disclosure on the attorney-client privilege and the attorney work product doctrine. In another case involving an attorney-directed investigation of allegations of harassment by a governmental employee, we have held that the attorney-client privilege and/or the work product doctrine apply, in appropriate circumstances, to create an exception to disclosure under the Act. *Tennessean v. Tenn. Dept. of Personnel*, No. M2005-02578-COA-R3-CV, 2007 WL 1241337 (Tenn. Ct. App. Aug. 18, 2006) (no Tenn R. App. P. 11 application filed). Whether all or part of a particular document may be covered by that exception is a fact-specific inquiry, generally requiring the input of a lawyer.

As the language of the attorneys' fee provision makes clear, there is another step in the fee award analysis. Even if the trial court makes a finding of knowledge and willfulness, the statute does not require the trial court to award attorneys' fees. If the trial court makes such a finding, Tenn. Code Ann. § 10-7-505(g) provides the trial court "may, in its discretion" assess costs and fees. The decision whether or not to assess fees, after the threshold requirement is met, is still within the trial court's discretion and is therefore subject to an abuse of discretion standard of review on appeal. *Memphis Publishing Co. v. Cherokee Children & Family*, 87 S.W.3d 67, 80 n.15 (Tenn. 2002).

A trial court abuses its discretion when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Williams v. Baptist Memorial Hospital*, 193 S.W.3d 545, 551 (Tenn. 2006); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). So long as reasonable minds can disagree as to the propriety of a decision, a trial court's discretionary decision will be upheld. *Eldridge*, 42 S.W.3d at 85. The abuse of discretion standard does not allow the appellate court to substitute its judgment for that of the trial court. *Williams*, 193 S.W.3d at 551.

Nashville Post argues on appeal that the trial court erred in finding that the Lottery was not proceeding in "bad faith." According to Nashville Post, the Lottery knew the unredacted letter was public and willfully refused to produce it. Therefore, according to Nashville Post, the trial court erred and should have awarded it attorneys' fees. However, even if we agreed that the trial court's good faith determination was in error, which we do not, that conclusion would not automatically lead to a reversal of the trial court's refusal to award fees. As discussed above, that decision is within the discretion of the trial court in light of the circumstances.

A brief history of the sequence of events is helpful. On Thursday, January 5, 2006, the Lottery terminated Mr. Adams' employment by giving him the Termination Letter in question. The next day, the Lottery issued a press release about the firing. On Sunday, January 8, 2006, the Nashville Post e-mailed the Lottery requesting Mr. Adams' personnel file, agreements regarding his compensation, e-mails among and mobile phone records of various Lottery officials for the 6 month period prior to the request, and all documents about the investigation leading to Mr. Adams' departure. While the Termination Letter was clearly within Nashville Post's request (as part of the personnel file or the investigation) it was not mentioned by name. This request involved a large number of files and documents.

The Lottery responded on the same day of this request, approximately two hours after the request was e-mailed. The Lottery spokesperson replied that she would release a redacted copy of the personnel file; would need to get advice on the compensation agreements and the mobile phone records and would respond the next day; needed clarification on the e-mail request; and that access to information regarding the investigation was being denied as exempt from disclosure because of attorney-client privilege and work product doctrine. As to Mr. Adams' personnel file, the Lottery responded that the personnel files would be produced with information made confidential by statute to be redacted.³ The Lottery's response, likewise, did not reference the Termination Letter. The Lottery's response also stated that the Lottery would contact the Nashville Post the next day, Monday, January 9 with more information.

On Monday morning at 8:37 a.m., Nashville Post filed this Public Records Act lawsuit. While the Lottery provided the Nashville Post with a copy of a redacted Termination Letter after the petition was filed, the Lottery's attorneys later acknowledged at the January 18 hearing that it was not privileged since it had been seen by a third party, Mr. Adams.

Given this sequence of events, we do not believe the trial court abused its discretion in refusing to award fees. The award of fees is appropriate when incurring those fees by bringing an action under the Act is necessary to gain access. By filing its petition at 8:30 Monday morning, Nashville Post did not allow time for any conversation or communication between the parties or their counsel. Nor did it allow any time for the Lottery to obtain further legal advice or clarification regarding the privileged nature of the Termination Letter. The Lottery acted promptly in responding to a request made on a Sunday and informed Nashville Post that it would provide more information on the next day. Nashville Post did not wait, but immediately filed its petition.

A petitioner is not required to communicate with a governmental entity to clarify positions or engage in discussions about possible fallacies in the entity's positions as to nondisclosure, but may file a petition upon the initial refusal to produce. The burden is then on the government to prove the documents are protected. However, failure to allow the governmental entity time to adequately assess what has been requested and failure to engage in any discourse with the governmental entity makes it difficult to argue that the governmental entity acted in bad faith when the first time the error of government's legal position is pointed out is after the petition has been filed. Here, the Lottery was given less than 24 hours, including a Sunday night, to respond to the request before Nashville Post filed suit.

After the suit was filed, the Lottery continued in its efforts, albeit erroneous, to comply with Nashville Post's request by providing a redacted version of the Termination Letter. Even when governmental officials are proceeding in the best of faith, it takes time to understand the nature of the request and the breadth of documents that may be included, research applicable law on exceptions to the Act, make judgments often on questionable legal issues and then articulate an accurate response to the request. With many requests, such as the one made by Nashville Post, the analysis must be done quickly for numerous documents. The Termination Letter was

³ The Lottery made specific reference to Tenn. Code Ann. § 4-51-124 which pertains to confidential Lottery information. The Lottery does not rely on this statute to protect the Termination Letter from disclosure.

not the only document requested but was one of many documents included in the request and turned over to the requestor.

Based on the foregoing, we cannot conclude that the trial court abused its discretion in declining to award costs and attorneys' fees under Tenn. Code Ann. § 10-7-505(g).⁴ Costs of this appeal are assessed against the Nashville Post Company for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE

⁴ Pursuant to Tenn. Code Ann. § 4-51-101, the Lottery is not "a state agency or department." Consequently, it is at least questionable whether the Lottery is subject to the attorneys' fee provision of the Act, since the Act by its terms applies to "all state, county, and municipal records." *But see, Memphis Publishing Co. v. Cherokee Children & Family*, 87 S.W.3d 67 (Tenn. 2002). The statutory scheme creating the Lottery, however, makes its records open for inspection to members of the public unless otherwise provided by "state law." Tenn. Code Ann. § 4-51-124. Certain exceptions to the disclosure requirement are listed in Tenn. Code Ann. § 4-51-124. The statute also specifically provides that the items designated as confidential in Tenn. Code Ann. § 4-51-124(c) are also exempt from disclosure under the Act. Tenn. Code Ann. § 4-51-124(a) and (b). In any event, we do not address the question of whether the Act's attorneys' fee provision is applicable to the Lottery since it was not raised at trial or on appeal.