

Background

Under Rule 26 of the Tennessee Rules of Civil Procedure, a party to litigation is permitted to obtain information such as depositions, questionnaires, documents, books and other relevant materials in the possession of an opposing party. Commonly referred to as discovery, this process is subject to judicial discretion and is intended to provide both parties a fair and equitable opportunity to obtain everything they are entitled to under the law and to ensure that neither party is able to keep *relevant*, non-privileged information from the other. Application of the discovery rules is fact-specific and thus can vary from case to case. However, the process allows each party, as well as the court, to be fully aware of information that has been obtained for use at trial.

Under the Tennessee Public Records Act, T.C.A. §§ 10-7-501, *et seq.*, any citizen is entitled, upon request, to inspect public records of state and local governmental entities. Although the law does provide for some exceptions, most of the records of state and local governmental entities are required to be made available for public inspection.

Problem

There is an inconsistency between the intent of the discovery rules and the execution of the public records laws.

This inconsistency exists because while the Rules of Civil Procedure provide that a party to a lawsuit is not entitled to access the records of an opposing private party during the course of litigation if such records are outside the scope of discovery, the application of the public records law means that the same is not true where the opposing party is a governmental entity.

This inconsistency was highlighted in a recent case in which the Tennessee Supreme Court said in *dicta*:

It may very well be that the General Assembly neither intend nor anticipated that the public records statutes they enacted would be used by persons litigating with government entities to obtain records that might not be as readily available through the rules of discovery. However, at present, neither the discovery rules nor the public records statutes expressly limit or prevent

Amend TCA, § 10-7-503 to allow a governmental entity covered under the public records law to motion a court to preclude the use of the Tennessee Public Records Act in obtaining any material discoverable under the Tennessee Rules of Civil Procedure or otherwise related to the subject of the litigation.

Where a court rules favorably upon such a motion, the Tennessee Rules of Civil Procedure governing discovery shall control all subsequent requests that the litigant, the litigant's attorneys, agents, or other persons acting on behalf of the litigant may make concerning the governmental entity's records.

Benefits

Ensure the fair and equitable treatment of all parties by eliminating the inconsistency, acknowledged by the Tennessee Supreme Court, between the intent of discovery and the execution of the public records law when one party to a lawsuit is a governmental entity. All parties to litigation, when seeking information from other parties and when responding to such requests, would be operating under the same levels of court supervision and the same expectations for timeliness of responses.

In addition, this legislation addresses the Court's concerns by relieving judges of the burden of having to consider the two unwieldy sets of laws and regulations pertaining to records when governments are a party to a suit.



persons who are in litigation with a government entity or who are considering litigation with a government entity from filing petitions under Tenn. Code Ann. § 10-7-505(a).

Konvalinka v. Chattanooga-Hamilton County Hospital Authority, 249 S.W.3d 346 (Tenn. Feb. 13, 2008).

When a party to litigation with an entity covered under the public records laws seeks to exploit this inconsistency to gain an advantage, it creates an inequity for state and local governmental entities and, ultimately, the taxpayers represented by such entities.

Take for example an attorney representing a client suing a municipality who elects to circumvent the discovery process by obtaining records from that municipality via a public records request. Unlike the discovery process, the information was obtained outside of, and possibly contrary to, the court's direction and; therefore, there is no determination made with respect to its relevancy to the dispute or to its legal admissibility. Moreover, as it was obtained outside the discovery process it is likely that the municipality does not know that the opposing party has obtained this information. Unaware that the opposing party possesses this information and that it might be used in the dispute, the municipality would not necessarily know to address this information in preparation for the trial, thus placing it at a clear disadvantage.

On the other hand, as the opposing party is a private citizen and not subject to the public record laws, the municipality would have no alternative to the discovery process when it needs information. As such, the opposing party would have direct knowledge of all the information that the municipality possessed and would be afforded time to address this information in preparation for the trial.

This is but one example of how a private party to a lawsuit with an entity covered under the public records law could exploit this inconsistency to gain an unfair advantage – the very thing the Rules of Civil Procedure were established to prevent – and illustrates the inequity that exists as a result of this inconsistency.