

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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April 14, 2003

Opinion No. 03-042

Public Records - Tennessee School Boards Association

QUESTION

Would the opinion of this Office stated in Op. Tenn. Atty. Gen. 01-069 (May 2, 2001) be any different in light of the Tennessee Supreme Court's decision in *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67 (Tenn. 2002)?

OPINION

No.

ANALYSIS

In Op. Tenn. Atty. Gen. 01-069 (May 2, 2001), this Office opined that, if the Tennessee School Boards Association ("TSBA") is a private non-profit association or corporation with more than two full-time staff members as described in Tenn. Code Ann. § 8-44-102(b)(1)(E)(i), and has complied with the audit requirements contained in Tenn. Code Ann. § 10-7-503(d)(1), then a court could find that all records of the TSBA, including applications, credentials, letters of recommendation, resumes and other similar material submitted to and held by the TSBA on behalf of a local board of education as part of its assistance to that board in hiring a director of schools, are not public records subject to inspection under Tenn. Code Ann. § 10-7-503(a). We further opined that additional legislation (HB 1437) would be necessary if the General Assembly intended that these records in the hands of the TSBA remain public and open to inspection. You have now asked that we reconsider this opinion in light of the Tennessee Supreme Court's decision in *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67 (Tenn. 2002).

That case actually involves two separate cases that were consolidated on appeal. In the first case, Memphis Publishing Company ("MPC") sought access to records belonging to Cherokee Children & Family Services, Inc., a non-profit corporation that contracted with the Tennessee Department of Human Services (TDHS) to help administer a state-subsidized day care program. MPC asserted that Cherokee's records were public records subject to inspection under the Public Records Act, Tenn. Code Ann. § 10-7-503(a), because the terms of the contract between Cherokee and TDHS rendered the records public

property. Alternatively, MPC argued that because of the services Cherokee performed, it should be deemed a state agency for purposes of the Public Records Act. 87 S.W.3d at 72.

In the second case, the Comptroller of the Treasury had notified Cherokee that his Office intended to conduct an audit of Cherokee's records to investigate Cherokee's use of state-provided transportation and registration funds and sought access to certain bank records of Cherokee. When Cherokee refused to provide access, the Comptroller filed suit seeking a mandatory injunction. The Comptroller asserted that he was entitled to the records in question on two separate grounds. First, relying upon the same contractual provisions as MPC, the Comptroller asserted that all of Cherokee's records were property of the State and, therefore, public records. Second, the Comptroller asserted that he was entitled to access under recently enacted legislation, 2000 Tenn. Pub. Acts ch. 960, which authorized the Comptroller to audit any entity which contracted with the state or local governments to provide government services and which received fifty percent or more of its gross revenues from governmental sources, retroactive to 1992. *Id.* at 72-73.

The case was ultimately appealed to the Tennessee Supreme Court, which held that all of Cherokee's records were subject to access by the public and the Comptroller under the terms of the Tennessee Public Records Act. Specifically, the Supreme Court held that under the Act, "public records" should be construed as including "those records in the hands of any private entity which operates as the functional equivalent of a governmental agency." *Id.* at 79. In determining whether a private entity operates as the functional equivalent of a governmental agency, the Court held that the totality of the circumstances should be examined in each given case and that the cornerstone of any analysis is "whether and to what extent the entity performs a governmental or public function." *Id.* Other factors that may be considered are (1) the level of government funding of the entity; (2) the extent of government involvement with, regulation of, or control over the entity; and (3) whether the entity was created by an act of the legislature or previously determined by law to be open to public access." *Id.*

Our prior opinion was premised on the assumption that the TSBA was a private non-profit association or corporation, as described in Tenn. Code Ann. § 8-44-102(b)(1)(E)(i), which had more than two full-time staff members. As we noted in our prior opinion, the Public Records Act specifically addresses the records of such an entity and provides that all records of such an association or nonprofit corporation are not public and, therefore, not open for inspection if the entity has complied with the audit requirements set forth in the statute. *See* Tenn. Code Ann. § 10-7-503(d)(1). The Tennessee Supreme Court did not address this provision in the *Memphis Publishing* case, as Cherokee was not an association or non-profit corporation as described in Tenn. Code Ann. § 8-44-102(b)(1)(E)(i). The Court cautioned, however, that its holding was "not intended to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies. A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government." 87 S.W.3d at 79. In light of these statements by the Tennessee Supreme Court and the specific provisions of Tenn. Code Ann. § 10-7-503(d)(1), it remains our opinion that a court would find that § 10-7-503(d)(1) is a state law that provides otherwise with respect to the openness of all

records of the TSBA, including applications, credentials, letters of recommendation, resumes and other similar material submitted to and held by the TSBA on behalf of a local board of education as part of a process of assisting that board in hiring a director of schools. Accordingly, it also remains our opinion that, if the General Assembly intends that these documents remain public records open for inspection in the hands of the TSBA, then additional legislation so providing would be necessary.

Finally, it should be reiterated that, both this opinion and our prior opinion are premised on the assumption that the TSBA is: (1) a private non-profit association or corporation, as described in Tenn. Code Ann. § 8-44-102(b)(1)(E)(i) with more than two full-time staff members, and (2) has complied with the audit requirements contained in Tenn. Code Ann. § 10-7-503(d)(1). As we stated in our previous opinion, if the TSBA is a private non-profit association as described in § 8-44-102(b)(1)(E)(i) with more than two full-time staff members, but has failed to fully comply with the audit requirements of Tenn. Code Ann. § 10-7-503(d)(1), then its records would be public records open for inspection under § 10-7-503(a).

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