IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

JOSE MARCUS PERRUSQUIA,	)	
	)	
Petitioner-Appellant,	)	
	)	**DAVIDSON COUNTY**
v.	)	**No. W2023-00293-COA-R3-CV**
	)	
FLOYD BONNER, JR. and	)	
STEVE MULROY,	)	
	)	
Respondent-Appellee.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE DAVIDSON COUNTY CHANCERY COURT

BRIEF OF RESPONDENT-APPELLEE STEVE MULROY

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II

Whether, in any event, the chancery court properly concluded that the sheriff's office record was not subject to disclosure under the Public Records Act, when the record was a surveillance video directly related to the security of a government building and therefore confidential under Tenn. Code Ann. § 10-7-504(m)(1). (Petitioner's Issue 4.)

III

Whether Petitioner's request for an award of attorney's fees under Tenn. Code Ann. § 10-7-505(g) should be rejected, when Petitioner was properly denied access to the sheriff's office record. (Petitioner's Issue 5.)

STATEMENT OF THE CASE AND RELEVANT FACTS

This is a public-records case arising out of a request made by Petitioner, Jose Marcus Perrusquia, to inspect a surveillance video in the custody of the Shelby County Sheriff's office. The video depicted an altercation between an officer of the Memphis Police Department officer and an individual arrested on an outstanding warrant. The altercation took place at a detention facility controlled and operated by the Sheriff's Office and was recorded by a surveillance camera within the facility. (TR Vol 1, 6-7.) The Sheriff's Office conducted an investigation into the altercation, and as part of that investigation, generated a case file, No. 18050011S1SH, which included a copy of the surveillance video. (*Id.*) The individual involved in the altercation pled guilty to assault, and the officer involved in the altercation was suspended without pay for violations of departmental regulations. (*Id.* at 5.)

At the conclusion of the Sheriff's Office's investigation, the case file was delivered to the Office of the District Attorney General for the 30th Judicial District ("DA's Office") for possible criminal prosecution of the police officer. (TR Vol. 2, 189.) After reviewing the file, the DA's Office declined to pursue criminal prosecution and returned the entire case file, including the surveillance video, to the Sheriff's Office. (*Id.*)

Approximately two and a half years later, Petitioner began making a series of public-records requests to the DA's Office and to the Sheriff's Office requesting documents and materials related to the investigation into the altercation. (TR Vol. 2, 183, 192.) Perrusquia twice requested that the DA's Office provide copies of all records connected to the Memphis Police Department's internal-investigation case file regarding

the altercation, including a copy of the surveillance video. (*Id.*) The DA's Office responded by providing the only record in its possession responsive to Petitioner's request: a copy of the DA's letter to the Sheriff's Office explaining that no criminal prosecution would be pursued. (TR Vol. 2, 183.) The DA's Office informed Petitioner that it did not possess the surveillance video, which had been returned with the investigative file to the Sheriff's Office. (TR Vol. 2, 192.)

Petitioner then made multiple public-records requests to the Sheriff's Office and asked to inspect its investigative case file, including the surveillance video. (TR Vol. 2, 157-58.) The Sheriff's Office responded by providing a redacted copy of its case file, but it did not provide a copy of the surveillance video on the grounds that it is not subject to disclosure under Tenn. Code Ann. § 10-7-504(m). (*Id.*)

Petitioner argued to the Sheriff's Office that the exception in § 10-7-504(m) does not apply because the video reflects possible criminal activity. (TR Vol. 2, 179.) After review, the Sheriff's Office maintained that the surveillance video was not subject to disclosure under § 10-7-504(m). (*Id.*)

Petitioner then suggested to the DA's Office that it should "get these records back from the Sheriff and release them . . . in accordance with the Tennessee Public Records Act." (TR Vol. 2, 198.) When the DA's Office declined, Petitioner filed a petition for access to the surveillance video under the Tennessee Public Records Act (TPRA) against both the Sheriff's Office and the DA's Office. (TR Vol 1, 1-19.) Petitioner not only sought an order requiring the Sheriff's Office to provide him with a copy of the video, but he also sought orders requiring, *inter alia*, that the

Sheriff's Office provide the DA's Office with a copy of the video and its investigative file; that the DA's Office provide him with a copy of the video; and that the DA's retain the video and investigative file. (*Id*. at 18-19.)

The chancery court held a show-cause hearing and subsequently issued a memorandum and final order denying the petition. (TR Vol. 4, 462-69.) The court ruled that under Tenn. Code Ann. § 10-7-504(m)(1), the surveillance video was not subject to disclosure because it is a "record directly related to the security of a government building," namely, the Shelby County detention facility. (TR Vol. 3, 319.) The court further ruled that the Sheriff's Office, "and not the DA," was the records custodian of the video under Tenn. Code Ann. § 10-7-503(a)(1)(C), and it "decline[d] to obligate the DA to become a records custodian" of a record of the Sheriff's Office. (*Id*. at 320.)

Petitioner now appeals to this Court.

STANDARD OF REVIEW

This Court reviews the chancery court's findings of fact de novo with a presumption of correctness unless the record preponderates otherwise. *See Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); Tenn. R. App. P. 13(d). The chancery court's conclusions of law are reviewed de novo, with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *see Reguli v. Vick*, No. M2012-02709-COA-R3-CV, 2013 WL 5970480 at *2 (Tenn. Ct. App. Sept. 10, 2013), *perm. app. denied* (Tenn. April 8, 2014).

ARGUMENT

I. The District Attorney's Office Had No Obligation under the TPRA with Respect to a Record of the Sheriff's Office.

The TPRA requires the custodian of a public record to make available for inspection any public record that is not exempt from disclosure. Tenn. Code Ann. § 10-7-503(a)(2)(A) and (B). Such obligation, however, necessarily assumes that the custodian has possession, i.e., *custody*, of the record. And here, as the chancery court found and as Petitioner does not contest, the DA's Office did not have possession of the surveillance video when Petitioner made his public-records request, because it had already returned the video to the Sheriff's Office. (Memorandum and Order, TR Vol. 3, 319-20.)

Petitioner's argument is that because the DA's Office had previously received and reviewed the surveillance video, the chancery court erred in concluding that the DA's Office was not the "records custodian" of the video. Petitioner contends that the chancery court should have required the DA's Office to "re-obtain and retain" the video. (Br. Petitioner-Appellant, 19.) But the TPRA does not require a DA's office to retain another governmental entity's records, or copies thereof, just because those records were, at one time, shared with DA's Office. The chancery court therefore rightly declined to impose such an obligation. (TR Vol. 3, 320.)

The TPRA defines a "records custodian" as "any office, official, or employee of any governmental entity lawfully responsible for the *direct custody and care* of a public record." Tenn. Code Ann. § 10-7-503(a)(1)(C) (emphasis added). As the chancery court concluded, the Sheriff's Office—

"not the DA"—was the governmental entity lawfully responsible "for the direct custody and care of the surveillance video." (TR Vol. 3, 320.) The video was captured by a surveillance camera inside a detention facility operated by the Sheriff's Office, and it was made part of an official investigative file of the Sheriff's Office. (TR Vol 1, 6-7.) While the Sheriff's Office had sent the video to the DA's Office, the DA's Office returned the video to the custody of the Sheriff's Office after completing its review. (TR Vol. 2, 189.)

Petitioner argues that this Court should "look to the definition of 'public record'" in the TPRA and that, based on that definition, the video "is both a public record in the hands of the Sheriff, who 'made' the document . . . , and in the hands of the DA, who 'received' it." (Br. Petitioner-Appellant, 21, 22.) But Petitioner's argument ignores the fact that the DA had *returned* the video to the Sheriff. While the TPRA's definition of "public record" includes records that are "made or received" in connection with the transaction of official business by any governmental entity, Tenn. Code Ann. § 10-7-503(a)(1)(A)(i), it does not require governmental entities that receive the records of other governmental entities to *retain* those records. Nor does any other provision of the TPRA.

Petitioner also points to "cases interpreting" the definition of "public record" in § 10-7-503(a), namely, *Griffin v. City of Knoxville*, 821 S.W.2d 921 (Tenn. 1991), and *Bd. of Educ. of Memphis City Schs. v. Memphis Publ'g Co.*, 585 S.W.2d 629 (Tenn. Ct. App. 1979). (Br. Petitioner-Appellant, 21, 22-23.) But these decisions serve only to highlight the flaw in Petitioner's argument.

In *Griffin*, the Knoxville Police Department took into evidence three handwritten notes that had been discovered during its investigation of a shooting death. The police department ultimately concluded that the death was a suicide and closed its investigation. 821 S.W.2d at 922. The media subsequently submitted a public-records request to the police department for the notes and its investigative file, which was denied. On appeal, noting that the handwritten notes had been "taken into custody by the Knoxville Police Department in the course of investigating [the] shooting death," the Supreme Court held that the "notes were received by the Knoxville Police Department in connection with the transaction of official business and, therefore, are a public record." *Id*. at 921. Unlike the situation here, however, the notes at issue in *Griffin* were *in the possession* of the Knoxville Police Department when the public-records request was made to the Knoxville Police Department. *See id.* at 922-23. Furthermore, the handwritten notes were not records of another governmental entity. *Id.* at 922. In *Memphis Publ'g Co.*, the documents at issue were likewise in the possession of a committee of the Memphis Board of Education when the public-records request was made. *See* 585 S.W.2d at 631 (noting that "the records in question were in the hands of a public body").

Petitioner also misplaces his reliance on an out-of-state case to support his assertion that the DA's Office was required by the TPRA to retain copies of the Sheriff's Office records. (Br. Petitioner-Appellant, 24.) Indeed, that decision, *Chandler v. City of Sanford*, 121 So. 3d 657 (Fla. Dist. Ct. App. 2013), actually supports the position of the DA's Office here.

In *Chandler*, the plaintiff had requested an original copy of an email sent by a City employee to a neighborhood-watch volunteer who was then a defendant in a highly publicized murder trial. 121 So. At 658. The City produced several redacted emails in response, explaining that it was under a directive of the State Attorney, which was prosecuting the murder case, not to release any original records. *Id*. at 659. The original copies of the emails had been turned over to the State Attorney, who reviewed and redacted the records and then returned the redacted records to the City. *Id*.

The appellate court concluded that the City could not avoid the request for the unredacted, original records "by transferring custody of its records to another agency." *Id.* at 660. "[D]espite th[e] instruction from the State Attorney," the court stated, "the City remained the governmental entity responsible for the public records." *Id.*

The City in *Chandler* can be compared to the Sheriff's Office here—not to the DA's Office—because the Sherriff's Office is "the governmental entity responsible for the public records." *Id.* Accordingly, *Chandler* supports only the proposition that the Sheriff's Office could not be relieved of its responsibility for the surveillance video by transferring it to the DA's Office. *Chandler* does *not* support Petitioner's contention that the DA's Office had some responsibility to retain the surveillance video (or a copy of the surveillance video). The DA's Office did not "*transfer* custody of *its* records" to the Sheriff's Office, *id.* (emphasis added)—the DA's Office *returned* custody of *the Sheriff's Office* records to the Sheriff's Office.

Petitioner also suggests that the DA's Record Retention Policy and Records Disposition Authorization "support reversal"; Petitioner suggests that the DA's Office did not "dispose" of the surveillance video (and Sheriff's investigative file) pursuant to the approved RDA, and he says that the Retention Policy supports the conclusion that the DA's Office was "a records custodian" for these records. (Br. Petitioner-Appellant, 27-28 (citing Tenn. Code Ann. § 10-7-509(a)). Neither point has merit.

First, the DA's Office did not "dispose" of the surveillance video or the Sheriff's investigative file. Again, the DA's Office merely returned these records to their original source. And the return of records to the entity lawfully responsible for their direct custody and care cannot be regarded as the "disposition" of such records.[1]

Second, nothing in DA's Records Retention policy required it to retain a copy of such records. The DA's Office routinely reviews cases with local law-enforcement agencies, typically pre-arrest and pre-indictment. During any such review, the Office may access and review records of the law-enforcement agency, but it does not retain a copy since retention is unnecessary in making pre-arrest or pre-indictment charging determinations. (Beacham Affidavit, TR Vol. 2, 249-51.). In fact,

[1] While § 10-7-509(a) provides that "disposition of all state records shall occur only through the process of an approved records disposition authorization," "disposition" is not defined for purposes of Part 5 of Chapter 7 of Title 10. For purposes of Part 3, however, it means "preservation of the original records in whole or in part, preservation by photographic or other reproduction processes, or outright destruction of the records." Tenn. Code Ann. § 10-7-301(3).

Petitioner's reliance on the DA Office's records retention policy in this instance is clearly fallacious as the policy only applies to 1) criminal case files, i.e. misdemeanors, felonies, non-capital first degree murder cases, and capital cases; 2) records created by the office in the course of its official business; or 3) records maintained in the course of its official business. (TR Vol. 2, 205.) Here, the records shared by the Sherriff's Office did not lead to any charges and, therefore, cannot be considered criminal case files under any reasonable interpretation. Nor were any records created by the DA's Office during the course of its charging determination, other than the letter from the DA explaining that charges would not be forthcoming, which was disclosed to Petitioner following his initial public records request. And, finally, no records were maintained by the DA's Office since all records, including the requested video, were returned to the Sheriff's Office following its charging decision.

Simply, Petitioner's argument that the DA's Office is now a records custodian of the Sheriff Office's video and/or investigative file under its records retention policy is wholly unavailing.

II. The Surveillance Video Was Not Subject to Disclosure under Tenn. Code Ann. § 10-7-504(m)(1).

Even if this Court were to conclude that the DA's Office had some obligation under the TPRA with respect to the surveillance video, the chancery court properly concluded that the video was not subject to disclosure under the TPRA; the video is directly related to the security of

a government building and therefore confidential, and not open to public inspection, under Tenn. Code Ann. § 10-7-504(m)(1). (TR Vol. 3, 319.)[2]

It is well settled that the TPRA allows public inspection of all state, county, and municipal records "unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A); *see Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 865 (Tenn. 2016); *Gautreaux v. Internal Med. Found.*, 336 S.W.3d 526, 529 (Tenn. 2011). The General Assembly "recognized from the outset that circumstances could arise where the reasons not to disclose a particular record or class of records would outweigh the policy favoring public disclosure." *Allen v. Day*, 213 S.W.3d 244, 261 (Tenn. Ct. App. 2006) (quoting *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004)). Thus, the TPRA "is not absolute, as there are numerous statutory exceptions to disclosure." *Tennessean*, 485 S.W.3d at 865; *see* Tenn. Code Ann. § 10-7-504. These statutory exceptions "are not subsumed by the admonition to interpret the Act broadly"; accordingly, "courts are not free to apply a 'broad' interpretation that disregards specific statutory language" setting forth such exceptions. *Allen*, 213 S.W.3d at 261. Additionally, the General Assembly "provided for a *general exception* to the Public Records Act, based on *state law*," which includes "statutes, the Tennessee Constitution, the common law, rules of court and administrative rules

[2] As the chancery court noted, the DA's Office, in responding to Petitioner's public-records request, indicated that even if it had possession of the surveillance video, it would not release it for this reason. (TR Vol. 3, 318; *see* Affidavit of Timothy Beacham, TR Vol. 2, 249-51.)

and regulations." *Id.* at 865-66 (citing *Swift,* 159 S.W.3d at 571-72) (emphasis added). *See* Tenn. Code Ann. § 10-7-503(a)(2)(A) (requiring inspection of public records "unless otherwise provided by state law")

Here, there is a statutory exception in the TPRA that exempts the disclosure of the surveillance video. Tennessee Code Annotated § 10-7-504(m)(1) provides in pertinent part as follows:

> Information and records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection. . . . . Such information and records include, but are not limited to:
> . . .
> (E) Surveillance recordings, whether recorded to audio or visual format, or both, *except segments of the recordings may be made public when they include an act or incident involving public safety or security or possible criminal activity*. . . . Release of any segment or segments of the recordings shall not be construed as waiving the confidentiality of the remaining segments of the audio or visual tape.

(emphasis added).

Petitioner takes no issue with the chancery court's determination that the surveillance video is directly related to the security of any government building and therefore falls within this exception. Instead, Petitioner seizes on the limited exception to this exception (italicized above), and argues that because the video involves "possible criminal activity," the exception does not apply. (Br. Petitioner-Appellant, 31.) Perrusquia is wrong.

As the chancery court recognized (TR Vol. 3, 318), Tenn. Code Ann. § 10-7-504(m)(1)(E) plainly states only that "segments of the [surveillance] recordings *may* be made public when they include . . .

possible criminal activity" (emphasis added)—not that they "shall" be or "must" be made public. Use of the word "may" "'ordinarily connotes discretion or permission; and it will not be treated as a word of command unless there is something in the context or subject matter or the act or statute under consideration to indicate that it was used in that sense.'" *In re Est. of Rogers*, 562 S.W.3d 409, 424 (Tenn. Ct. App. Feb. 14, 2018) (quoting *Colella v. Whitt*, 308 S.W.2d 369, 371 (Tenn. 1957)) (emphasis added).

There is nothing in the context or subject matter here, or in the TPRA, to indicate that the legislature intended the word "may" to mean anything other than its ordinary connotation. Indeed, when the legislature intended to use a word of command in the TPRA, it knew how to do so—the first paragraph of this same Subsection (m)(1) includes the word "shall." So the legislature's use of the word "may" in Subsection (m)(1)(E) must have been intended as a word of discretion, and *not* as a word of command.[3] *See Newsom v. Tennessee Republican Party*, 647 S.W.3d 382, 387 (Tenn. June 10, 2022) (citing *Hathaway v. First Fam. Fin. Servs., Inc.*, 1 S.W.3d 634, 640 (Tenn. 1999) ("The fact that the General Assembly did not use the same defined term

[3] The next (and last) sentence of Subsection (m)(1)(E) tends to confirm this conclusion. It provides that "[r]elease of any segment or segments of the recordings shall not be construed as *waiving* the confidentiality of the remaining segments of the audio or visual tape" (emphasis added). A "waiver" is generally regarded to be the result of a *voluntary* action. *See, e.g., Tenn. Farmers Mut. Ins. Co. v. Reed*, 419 S.W.3d 262, 266 (Tenn. Ct. App. 2013) ("[T]his Court has specifically stated that a waiver is a voluntary relinquishment by a party of a known right.") (internal quotation marks and citation omitted).

demonstrates that it did not intend for that definition to apply to establish the second variable."); *State v. Strode*, 232 S.W.3d 1, 11-12 (Tenn. 2007) ("This Court presumes that the General Assembly used each word in a statute deliberately, and that the use of each word conveys a specific purpose and meaning."). The chancery court was therefore quite right: disclosure of the surveillance video because it includes "possible criminal activity" is not *required*; rather, its release is "within the discretion of the records custodian of the video." (TR Vol. 3, 319.) (And here, the records custodian—the Sheriff's Office—chose not to release the surveillance video in response to Petitioner's request. (*Id*. at 318.))

Petitioner's insistence that this "carve-out" to the exception in Subsection (m)(1)(E) cannot be discretionary—because the TPRA is an act that serves "the public interest" (Br. Petitioner-Appellant, 31-34)—is simply unpersuasive. As discussed, if the General Assembly intended to foreclose discretionary decision-making under the TPRA's confidentiality provisions, it could have done so by using explicit language. It did not. Especially with the words "shall" and "may" appearing together in Subsection (m)(1), there is no cause to resort to overall "context" or "subject matter" to treat the legislature's use of the word "may" in § 10-7-504(m)(1)(E) as anything but a word of discretion or permission.

III. Petitioner Is Not Entitled to an Award of Attorney's Fees.

Petitioner maintains that he is entitled to an award of attorney's fees, both in the trial court and on appeal, under Tenn. Code Ann. § 10-7-505(g). (Br. Petitioner-Appellant, 35-37.) That statute provides that a court "may, in its discretion, assess all reasonable costs, . . . including reasonable attorneys' fees," if the court "finds that the governmental

entity . . . knew that [the requested records were] public and willfully refused to disclose [them]." Tenn. Code Ann. § 10-7-505(g). Petitioner is not entitled to *any* award of attorney's fees under this statute, let alone an award assessed against the DA's Office.

For all the reasons discussed above, the DA's Office had no obligation with respect to the Sheriff's Office records, including the surveillance video. The DA's Office was not the "records custodian" of the video under the TPRA, and it did not have the video in its possession when Petitioner made his records request. (TR Vol. 3, 319-20.) In any event, the trial court also properly determined that the video was excepted from disclosure under the TPRA by Tenn. Code Ann. § 10-7-504(m)(1). (TR Vol. 3, 319.) Since Petitioner did not, and does not, prevail on his petition for access, he is not entitled to an award of attorney's fees.

If, however, this Court were to reverse the judgment of the chancery court and hold that the DA's Office does have some responsibility for the surveillance video, it should remand for a determination whether Petitioner is entitled to an award of attorney's fees under § 10-7-505(g). The statute makes clear that a petitioner must do more than merely prevail on his petition for access to records; he must demonstrate that the denial of his records request was willful. *See Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) ("[T]he 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."). The chancery court would be in the best position to make such a determination. *See Jetmore v. City of Memphis,*

No. W2018-01567-COA-R3-CV, 2019 WL 4724839 (Tenn. Ct. App. Sept. 26, 2019) (remanding issue of reasonable attorney's fees to trial court for a determination regarding willfulness under § 10-7-505(g)).

CONCLUSION

For the reasons stated, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been sent by the Court's electronic filing system and/or electronic transmission, to:

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Certificate of Compliance

I hereby certify that this brief consists of 4,613 words, in compliance with Tenn. Sup. Ct. R. 46.

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