

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

PUBLIC.RESOURCE.ORG, ET AL.,)	
)	
Appellants,)	
)	
v.)	No. M2022-01260-COA-R3-CV
)	
MATTHEW BENDER & COMPANY, ET AL.,)	
)	
Appellees.)	
)	

APPELLEE MATTHEW BENDER & COMPANY, INC.’S REPLY BRIEF

On Appeal from the Chancery Court for Davidson County, Tennessee
Public.Resource.org et al. v. Matthew Bender & Company, Inc., et al.
Case No. 22-1025-III

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**
Thomas H. Lee (BPR No. 17453)
150 Fourth Avenue North, Suite 1100
Nashville, TN 37219
Phone: (615) 864-5392
tom.lee@nelsonmullins.com

**TROUTMAN PEPPER HAMILTON
SANDERS LLP**
John M. Bowler (*Pro Hac Vice* pending)
600 Peachtree Street NE, Suite 3000
Atlanta, GA 30308
Phone: (404) 885-3000
john.bowler@troutman.com

TABLE OF CONTENTS

INTRODUCTORY STATEMENT 1

ARGUMENT 3

CONCLUSION..... 9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. Day</i> , 213 S.W.3d 244 (Tenn. Ct. App. 2006).....	4, 5, 6, 8
<i>City Press Communs., LLC v. Tenn. Secondary Sch. Ath. Ass'n</i> , 447 S.W.3d 230 (Tenn. Ct. App. 2014).....	4, 6, 8
<i>Friedmann v. Corr. Corp. of Am.</i> , 310 S.W.3d 366 (Tenn. Ct. App. 2009).....	4, 6, 8
<i>Memphis Publishing Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.</i> , 87 S.W.3d 67 (Tenn. 2002).....	<i>passim</i>
<i>Wood v. Jefferson Cnty. Econ. Dev. Oversight Comm., Inc.</i> , No E2016-01452-COA-R3-CV, 2017 WL 4277711 (Tenn. Ct. App. Sept. 26, 2017)	4, 6, 8

INTRODUCTORY STATEMENT

Appellants' Reply Brief merely rehashes Appellants' main arguments without replying in any meaningful fashion to the arguments of Appellee, Matthew Bender & Co., Inc. (hereinafter referred to as "Lexis"), Lexis's arguments for reversal of the Chancery Court's erroneous determination that Lexis operates as the functional equivalent of a government entity—thus subjecting Lexis to the requirements of the Tennessee Public Records Act ("TPRA").

All parties acknowledge the TPRA ensures government accountability and transparency by providing Tennessee citizens access to public records. Lexis Br. at 10. The "functional equivalent" doctrine protects the accountability function when the government outsources public responsibilities to private entities. Appellants' request for free access to the complete and current electronic version of the TCA, however, is not rooted in ensuring accountability and transparency in the performance of public functions by private actors.

Appellants' Reply Brief does not argue or demonstrate how requiring Lexis to produce a current electronic version of the TCA under the TPRA would enhance public oversight or accountability. Finding Lexis to be the functional equivalent of a government agency would not enhance public accountability. Appellants make no argument that the Code Commission or Lexis require oversight in Lexis' performance of its obligations under its contract with the Code Commission. Appellants merely want a free copy of that which Lexis has contracted to sell to the Code Commission—that is, a copy of the Tennessee Code Annotated. Conversely, public oversight over the Code Commission is not lessened if this Court determines that Lexis is not the

functional equivalent of a government entity. There is simply nothing that the Code Commission is “hiding” by outsourcing certain administrative services to Lexis.¹

As set forth in Lexis’s opening brief, none of the four *Cherokee* factors is dispositive of whether a private entity is operating as the functional equivalent of a private entity. Lexis Br. at 7, 11. The determination is not a black-and-white analysis, even though Appellants’ Reply Brief would appear to advocate such an approach. As the case law shows, the facts in each case vary and the weight to be given each relevant *Cherokee* factor may be different in light of the varying circumstances. It is the Court’s heuristic task to balance the non-exclusive *Cherokee* factors. This is not a scorecard. Whether Appellants, on the one hand, or Lexis on the other hand, “win” a majority of the *Cherokee* factors is not the point. The point is whether the test, as a whole, supports public accountability of privately performed governmental functions.

Nor is there any suggestion in *Cherokee* or its progeny that the *Cherokee* factors should be rigidly weighed or counted like marbles. The relative importance of each individual factor is case-specific. Even after challenged on all *Cherokee* factors by Lexis in its opening brief, Appellants’ Reply Brief focuses primarily on only one of the factors—the extent of government control over the private entity (factor 3)—while Appellants do nothing substantial to address the other factors. Here, considering all relevant evidence pertaining to all the *Cherokee* factors, none of the factors weighs in favor of functional equivalency here.

¹ Lexis’s opening brief at pages 2 to 3 observed that finding Lexis to be the functional equivalent of a government agency would potentially allow public access to internal records of Lexis that the Code Commission itself cannot demand that Lexis produce under their contract. In their Reply Brief, Appellants have not argued to the contrary. Such a finding would create a situation where the Code Commission itself could not request an internal document from Lexis, but a citizen of Tennessee could do so through a TPRA request.

ARGUMENT

I. Lexis does not perform a governmental function under the first *Cherokee* factor

In its opening brief, Lexis established that it does not perform a governmental or public function and therefore does not meet *Cherokee's* first factor. Appellants' Reply Brief is largely silent on this first factor other than to conclusorily state that the production and publication of the definitive, authoritative, authorized, and official version of all Tennessee statutory law are "undeniably" of a "public nature." Appellants' Reply Br. at 2-3. But all government contracts are undeniably of a public nature. No matter how "public" an electronic version of the TCA may be, that does not make Lexis the "gatekeeper" or the functional equivalent of a government agency just by the virtue of Lexis producing and possessing the electronic record.² That is not how the *Cherokee* test as applied by the Tennessee courts functions.

Lexis's Matthew Bender division has performed the same services—including copy editing, compiling, publishing, etc.—(albeit in different contexts) for its private clients for over a 100 years. The services that Lexis provides to the Code Commission are not a "public" function but rather services that anyone—including non-governmental entities—could hire Lexis or a

² In assessing whether functional equivalency exists, the question is not whether the end result is public, but rather, whether the private entity's function is itself public. Lexis respectfully submits that it does not matter how "public" the end product is (here the TCA and publication thereof). That is not a question for this Court to resolve. An analogy can be made to a word processor. This is essentially the service that Lexis provides to the State of Tennessee (but on a larger scale). State entities presumably use Microsoft Word to produce documents that are public in nature. That does not mean, however, that Microsoft is performing a public function for the State. Lexis's role while more nuanced is closer to Microsoft in the analogy than it is to the role of the Code Commission itself. Lexis merely provides a service that the Code Commission uses to achieve the Commission's function; the service of Lexis, however, is not itself a public function.

similar company to perform. Lexis's publishing services for the Code Commission are very different from the Tennessee court decisions where a private entity was deemed to be performing a governmental function. In the prior Tennessee court decisions, the government is the *only* one capable of *asking* a contractor to perform those functions and the services performed by the private entity could only be performed for a governmental client therein indicating a public function.³ Here, an entire marketplace exists for Lexis's services where the government is but one participant in that market and thus not outsourcing a government function.

In their Reply Brief, Appellants argue that Lexis's function is the same or similar to the arena manager in *Allen* or the prison operator in *Friedman*. See Appellants' Reply Br. at 5-6. However, in those cases, private contractors provided services that the Tennessee courts determined constituted a governmental or public function. As set forth in Lexis's opening brief, the line of demarcation between a private service and performing a governmental or public function depends on whether the private entity is performing a "gatekeeping" function or exercising discretion that affects how the public access a public benefit or service. In *Allen*, the

³ See, e.g., *Memphis Publishing Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002) (Tennessee Department of Human Services asked Cherokee to provide essential child care services for indigent families and to supervise child care placements under TDHS guidelines which TDHS had previously performed); *Allen v. Day*, 213 S.W.3d. 244, 246 (Tenn. Ct. App. 2006) (Sports Authority of the Metropolitan Government of Nashville asked Powers Management, LLC to manage a public arena); *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 369 (Tenn. Ct. App. 2009) (Tennessee contracting with Corrections Corporation of America to build and operate prisons); *City Press Communs., LLC v. Tenn. Secondary Sch. Ath. Ass'n*, 447 S.W.3d 230, 240 (Tenn. Ct. App. 2014) (Tennessee Board of Education asking Tennessee Secondary School Athletic Association to direct and manage the extracurricular sporting activities at high schools); *Wood v. Jefferson Cnty. Econ. Dev. Oversight Comm., Inc.*, No E2016-01452-COA-R3-CV, 2017 WL 4277711 *2 (Tenn. Ct. App. Sept. 26, 2017) (Jefferson County asking the EDOC's to centralize the economic development activities of the County in the most efficient matter so that public funds are efficiently utilized).

private entity retained discretion to change arena hosting fees or ticket prices. 213 S.W.3d at 256-57. In *Friedman*, a captive prisoner population relied on a private contractor for basic necessities. In the instant case, there is no “gatekeeping” function. 310 S.W.3d 366, 369. Lexis does not exercise any discretion that has a public effect without direct Code Commission approval and knowledge *before* there is a public effect. Even if purchasers including Tennessee residents must purchase the electronic version of the TCA through Lexis, that does not make Lexis the “gatekeeper” here. Lexis has no authority to set the terms or conditions for access to the TCA. On the contrary, Lexis must sell the TCA at the price the Code Commission sets. Thus, the public is not relying on Lexis to be “reasonable” like the arena goers in *Allen* relied on the arena manager or the prisoners in *Friedman* relied on the private contractor.

II. Lexis is not controlled by the government under the third *Cherokee* factor.

Appellants devote most of their Reply to the third *Cherokee* factor—the degree of control exercised by the government over the private entity. To the extent the Lexis contract with the Code Commission shows any degree of “control,” however, it is not the sort of control that this *Cherokee* factor focuses on. Indeed, all of the terms of the Lexis contract with the Code Commission that Appellants point to as allegedly evidencing “control” are at most control over the “what,” rather than control over the “how.”⁴ Further, Appellants’ Reply Brief illustrates that any perceived “control” by the State over Lexis’s performance of its contracted-for services is confined temporally in so far as the Commission can only exercise it in the short window between

⁴ See Appellants’ Reply Br. at 5-6 (citing “prescrib[ing] the specifications for the publication” of the TCA; “final authority over the contents and of the TCA, including over items such as page size, typeface, paperweight, organization, and specific language”; and “abide by all decisions of the Code Commission” as to both the form and content of the TCA).

Lexis submitting the draft and the Commission approving it. That is, the Commission can only exercise any “control” *after* Lexis has completed its initial task. If, for example, the Code Commission were to approve of the form of the TCA as submitted by Lexis without requesting changes, then there is nothing else for the Commission to weigh in on. The interaction between Lexis and the Code Commission is more analogous to *Gautreaux* where the Supreme Court determined the nonprofit was not the functional equivalent of a government agency. There, the University of Tennessee College of Medicine-Chattanooga United’s (“UTCUM”) control of the private Internal Medicine Education Foundation, concerned only the contract governing the reimbursements for payments to UTCUM faculty. This is a very different type of “control” from the Tennessee court decisions that have applied this *Cherokee* factor and found the private entity was the functional equivalent of a governmental agency where the government had significant ongoing control over the entity.⁵

⁵ See, e.g., *Cherokee*, 87 S.W.3d at 71, 79 (TDHS exercised “significant level of government control and oversight” under contracts which authorized ongoing State audits of Cherokee’s activities and State routinely exercised its right by conducting regular monitoring visits and by reviewing Cherokee’s client files); *Allen*, 213 S.W.3d at 258 (Sports Authority had “substantial oversight of Powers’ management of the Arena” including “control over more minute managerial decisions such as “spending limits without prior approval”, and financial oversight such as submitting annual line item budgets for Sports Authority’s review and approval); *Friedmann*, 310 S.W.3d at 379 & n8 (CCA was subject to significant ongoing governmental control and oversight for prisoners being housed in accordance with Tennessee Correctional Incentives Act); *City Press*, 447 S.W.3d at 236 (“TSSAA’s decision-making authorities consisted of public officials, including public school principals and represents of public entities, creating substantial ongoing government involvement and control”); *Wood.*, No. E2016-01452-COA-R3-CV, 2017 Tenn. App. LEXIS 643, at *1-2, 5 (substantial amount of government involvement with the operations of committee; County Commission chairman, finance director, and two of city mayors served on EDOC’s Board; and EDOC sent representatives to the government work sessions and voting meetings to make presentations and had a representative at each monthly county meeting to field questions and make recommendations).

Furthermore, this Court does not have to find that there is “no control” by the Code Commission over Lexis’s performance of its services under the contract to conclude that Lexis is not the functional equivalent of a government agency. In balancing the nonexclusive factors, this Court can assess to what degree this type of “control” weighs or does not weigh in favor of functional equivalency. In their Reply Brief, Appellants themselves do not contend that the Code Commission exercises absolute control over Lexis or the TCA product. Appellants’ Reply Br. at 5.

A degree of control does not *ipso facto* indicate functional equivalency; because it is not just a question of the amount of control by the Code Commission over Lexis as it pertains to the TCA that informs the assessment of whether a private entity is the functional equivalent of a governmental agency. Rather, *Cherokee* and its progeny make clear that it is both the type and timing of the control that matters too. As set forth in Lexis’s opening brief, there is a significant distinction between specifications for the performance by a private entity of a contract with a governmental agency and oversight of the contracting private entity itself. Control must extend to the “how” for functional equivalency, which does not exist here. In the Tennessee court decisions that have found functional equivalency to exist, the government has retained the power to choose when and how to control the private entity— *e.g.*, conducting spot inspections, access to books and records, etc. That retention of power by the State does not exist here between the Code Commission and Lexis. Even if there is a degree of some “control” of Lexis’s performance of its contractual services it is minimal, not dispositive, and does not weigh in favor of Appellants’ position that Lexis is the functional equivalent of a governmental entity, particularly where, as here, all the *Cherokee* factors weigh decidedly in Lexis’s favor.

III. Appellants concede that the remaining *Cherokee* Factors Are Undisputed Because Lexis is not Funded or Created by The Code Commission

Appellants’ Reply Brief Concedes there is “no dispute that Lexis does not receiving funding from the State [*Cherokee* Factor 3] and is not a creature of the General Assembly [Factor 4].” Appellants’ Reply Br. at 6. In every Tennessee court decision where a private entity was found to be the functional equivalent of a governmental agency, the private entity—unlike Lexis here—received government funding (directly or indirectly). *See Cherokee*, 87 S.W.3d at 79 (Cherokee’s operation was financed with public funds; over 99% of its funding came from governmental sources); *Allen*, 213 S.W.3d at 254 (the “operating agreement clearly provides that the Sports Authority is solely responsible for providing the funds necessary to pay the costs and expenses incurred by Powers in the performance of its management responsibilities and obligations”); *Friedmann*, 310 S.W.3d at 371, 376 (contracts with Tennessee state and local government comprised 11.5% of CCA’s total revenue and that percentage “likely is quite high” as a percentage of CCA’s total revenue generated in Tennessee); *Wood.*, No. E2016-01452-COA-R3-CV, 2017 Tenn. App. LEXIS 643, at *2, 4 (the governments voted each year to provide funding to EDOC amounting to between 60.1% and 67.6% of its budget).⁶

⁶ In their Reply Brief, Appellants do not argue, nor could they reasonably argue, that there is indirect funding of Lexis by the State through Lexis’s exclusive right to sell the TCA. In *City Press*, 447 S.W.3d 230, the Board of Education gave the TSSAA the right to collect revenue that the schools – government entities – otherwise would have collected themselves. The court found that to be “indirect government funding.” *Id.* at 236. That is not the case here. Under the TCA statutory scheme that exists, the Code Commission could not itself collect fees from the public including Tennessee citizenry; because the Code Commission could not itself produce the TCA. The Code Commission is not making less money because Lexis is collecting the revenue from its publication services. Even assuming *arguendo* that indirect funding existed through the fees that Lexis charged the public for access to the TCA, it would still not weigh in favor of functional equivalency. Because the “funding” is proportional to the services provided by Lexis. If payment for these services were deemed “indirect” funding, it is merely paying for contracted services under

CONCLUSION

For these reasons, this Court should reverse the Chancery Court’s unnecessary and unfounded decision that Lexis, a private publisher, providing specific, contracted-for-services to the Code Commission, is the functional equivalent of a government agency subjecting it to the requirements of the TPRA.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

/s/
Thomas H. Lee (BPR No. 17453)
150 Fourth Avenue North, Suite 1100
Nashville, TN 37219
Phone: (615) 864-5392
tom.lee@nelsonmullins.com

**TROUTMAN PEPPER HAMILTON
SANDERS LLP**

John M. Bowler (*Pro Hac Vice* pending)
600 Peachtree Street NE, Suite 3000
Atlanta, GA 30308
Phone: (404) 885-3000
john.bowler@troutman.com

the contract. Such payment cannot weigh in favor of functional equivalency; otherwise, this factor would *always* weigh in favor of functional equivalency.

CERTIFICATE OF COMPLIANCE

This brief contains 2,362 words and thus complies with the applicable limitation in Tennessee Rule of Appellate Procedure 30(e).

This 5th day of June, 2023.

/s/ _____
Thomas H. Lee
*Counsel for Appellee Matthew Bender &
Company, Inc.*

CERTIFICATE OF SERVICE

I certify that this brief has been delivered by email and first-class mail to counsel of record in this matter at the following addresses:

Lucian T. Pera
ADAMS & REESE LLP
Crescent Center
6075 Poplar Avenue, Suite 700
Memphis, Tennessee 38119
lucan.pera@arlaw.com

Joshua Counts Crumby
1600 West End Avenue, Suite 1400
Nashville, Tennessee 37203
joshua.crumby@arlaw.com

Counsel for Appellants

James P. Urban
Kevin M. Kreutz
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
james.urban@ag.tn.gov
keven.kreutz@ag.tn.gov

*Counsel for Appellee the Tennessee
Code Commission*

/s/

Thomas H. Lee
*Counsel for Appellee Matthew Bender &
Company, Inc.*