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March 24, 2017

Via Email:
Mr. James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Comments of Tennessee Association of Broadcasters to Proposed Amendments to Tennessee Supreme Court Rule 34, No. ADM2017-00344

Dear Sir,

Pursuant to the Court's Order of February 22, 2017, soliciting public comments for proposed changes to Tennessee Supreme Court Rule 34, the Tennessee Association of Broadcasters ("TAB"), by and through counsel, submits the following comments:

TAB is a voluntary association of radio and television broadcast stations located in Tennessee, organized and existing as a not-for-profit Tennessee corporation. Its purpose includes promoting a high standard of public service among Tennessee broadcast stations, fostering cooperation with governmental agencies in all matters pertaining to national defense and public welfare, and encouraging customs and practices in the best interests of the broadcasting industry and the public it serves. Broadcasters, as federal licensees, are required to serve the public interest. 47 U.S.C. § 303(f); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d. 597, 599 (3rd Cir.), *cert. denied,* 327 U.S. 779 (1946) ("broadcasting station must operate in the public interest and must be deemed to be a 'trustee' for the public").

TAB appreciates the Court's recent consideration of Rule 34. We note that the Rule citation to Tennessee Code Annotated § 10-7-301(6) for a definition of "public records" should more properly be to § 10-7-502(a)(1)(A). Moreover, TAB believes this correction to citation is not merely a clerical matter, but rather indicative of the need for more significant revisions to Rule 34. The Tennessee Public Records Act, and interpretative case law, has changed significantly since Rule 34 was last revised. Accordingly, TAB urges this Court to consider a more thorough revision to Rule 34 than its recent proposal. TAB and other interested organizations and persons have participated in assisting the General Assembly in revising the Public Records Act, and we would be happy to serve in the capacity of an advisory committee for Rule 34 changes.

One particular aspect of the proposed changes that is especially troubling in the new Section (2)(B)(vii) (the "Proposed Section"). The Proposed Section would exempt the following from public access under the Tennessee Public Records Act, "Any other written or electronic record the disclosure of which would frustrate or interfere with the judicial function of the courts or potentially undermine the inherent constitutional power granted to the court and recognized in Tenn. Code Ann. § 16-3-503." The current version of this Section Rule 34 (2)(B)(vii) is broad, but the Proposed Section would broaden the scope of this exemption even further by adding the phrase "or potentially undermine the inherent constitutional powers granted to the court."

TAB opposes the addition to this phrase because it would be inconsistent with the Supreme Court's recognition of how the Tennessee Public Records Act is patterned, as noted in *Schneider v. City of Jackson*, 226 S.W.3d 332 (2007) . In addition to making the section too broad, the proposed addition makes the section too vague to inform anyone as to what is or is not exempt.

In the realm of state open records laws, and even the federal Freedom of Information Act, there are two basic patterns. The governmental entity can either have a few broadly worded exemptions that will require substantial court interpretation, or the governmental entity can have many narrow specific exemptions. The Supreme Court recognized these two distinct patterns when it reversed the Tennessee Court of Appeals recognition of a "law enforcement privilege" that had not been adopted by the General Assembly. *Schneider* 226 S.W.3d 332. Specifically the court stated:

> In adopting the law enforcement privilege, the Court of Appeals relied exclusively upon federal court decisions and decisions of other state courts. However, the Court of Appeals failed to account for the distinctions between the Public Records Act and the open records laws of these other jurisdictions. For example, the federal government's open records law, the Freedom of Information Act ("FOIA"), has nine broad and general exceptions to disclosure that necessarily require substantial judicial interpretation. See 5 U.S.C.A. § 552(b) (West 2007). The Illinois and Massachusetts courts decisions upon which the Court of Appeals relied were interpreting state statutes patterned upon FOIA. *See Roulette v. Dep't. of Cent. Mgmt. Servs.*, 141 Ill. App. 3d 394, 95 Ill. Dec. 587, 490 N.E.2d 60, 64 (1986); *Globe Newspaper Co. v. Boston Ret. Board*, 388 Mass. 427, 446 N.E.2d 1051, 1055 n. 11 (1983). One of the primary federal cases upon which the Court of Appeals relied observed that the law enforcement privilege is "largely incorporated" into FOIA. *United States v. Myerson*, 856 F. 2d 481, 483-84 (2d Cir. 1988).
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> In contrast, the Public Records Act is not patterned upon FOIA. It provides specific statutory exceptions to disclosure, with more than a dozen such exceptions for the records of law enforcement agencies. Significantly, none of these express exceptions incorporate the law enforcement privilege or otherwise bar disclosure of the field interview cards at issue in this appeal.

Id. at 342-43 (footnotes omitted).

In *Schneider*, the Court specifically noted that the Tennessee "Public Records Act [is] distinct from FOIA and the open records laws of other states." *Id.* at 343. Tennessee clearly follows the pattern of requiring specific, not broad, exemptions. In *Schneider*, the Court noted, "A comparison of open records and open meetings laws may be found at the Reporters Committee for Freedom of the Press, *Open Government Guide*, http://www.rcfp.org/ogg/index.php." Id. at 342, n. 13. This comparison of the various states open records laws includes an appendix for Tennessee, noting that Tennessee has well over 350 exemptions to the Public Records Act. Since the date of that Open Government Guide to which the Supreme Court referred, the Tennessee General Assembly has continued to enact several specific exemptions each year.

If the Court were to adopt the Proposed Section this would take the Public Records Act from a pattern that has many specific exemptions to one that has many specific exemptions plus this now, broad exemption. In so doing, Rule 34 would alter the general pattern of the Public Records Act and essentially give Tennessee citizens the "worst of both worlds," i.e., a plethora of specific exemptions to review, plus a broad exemption subject to uncertain future interpretations.

TAB is not aware of any event that has prompted this need for the Proposed Section. If there has been such an event that has led the Court to believe a rule change is needed, TAB urges the Court to adopt a narrowly tailored revision, and not such a broadly worded revision. If there has been no such event, then there would seem to be no need to expand Rule 34 to make it more broad and more vague.

TAB is concerned that the Proposed Section does not serve the public interest, which is paramount in the Public Records Act. The benefit of having specific exemptions is so that the average citizen will know what he or she may access under the Public Records Act. The broader an exemption is, the less notice provided to the public to inform them what may or may not be exempt. In the context of open courts the U.S. Supreme Court has observed, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980). Likewise, having specific, not so broad and vague exemptions, furthers public trust in government in general, and in our courts in particular.

Therefore, TAB respectfully urges the Court not to adopt the Proposed Section.

Sincerely,

Douglas R. Pierce