PUBLISHED AND UNPUBLISHED OPINIONS BY THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE RELATING TO 911 ISSUES

Published Opinions

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85-205	District authority to hire and manage employees necessary to staff PSAP and may enter into interlocal agreements with other agencies to perform PSAP functions
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Unofficial Opinions

Tenn. Op. Atty. Gen. No.	Subject
U85-039	Whether Shelby County Commission must approve ECD contracts in excess of $50,000
U89-16	Whether a district may use revenues collected pursuant to Tenn. Code Ann. § 7-86-108 to fund a PSAP and radio dispatching equipment; what governmental entity has the power to authorize radio dispatching; may a county or municipality supplement funding for radio dispatching; duties in establishing county-wide emergency dispatching
U90-49	Propriety of district contracting with private organization for answering and dispatching emergency calls to agencies
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U91-31	Payment of compensation to district board members for services performed at the direction of the district board
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U93-21	Conflict of interest in appointing ECD board members
U93-30	Propriety of the board of directors of district determining the location of the dispatcher for the district
U95-013	Whether an E-911 district may impose its service charge on an agency of the federal government

Office of the Attorney General
State of Tennessee

***1** Opinion No. **85-114**
April 12, 1985

COUNTIES:

Commission/Commissioners/Legislative Bodies: Exemption of federal, state, and local government entities from the emergency communications district service charge. T.C.A. §§ 7-86-101 et seq., -108.

EMERGENCY:

Exemption of federal, state, and local government entities from the emergency communications district service charge. T.C.A. §§ 7-86-101 et seq. -108.

MUNICIPAL CORPORATIONS:

Fiscal Affairs: Municipal Powers: Exemption of federal, state, and local government entities from the emergency communications district service charge. T.C.A. §§ 7-86-101 et seq., -108.

TAXATION:

Use and Sales Tax: Applicability of the amusement tax to tanning beds and tanning salons; applicability of taxes other than the amusement tax to tanning beds and tanning salons. T.C.A. §§ 67-1-102, 67-6-212, 67-6-402; P.A. 1984, Ch. 13; Dept. Rev. Rules and Reg. 1320-5-1-1.16, 1320-5-1-1.23.

TELEPHONE:

Exemption of federal, state, and local government entities from the emergency communications district service charge. T.C.A. §§ 7-86-101 et seq., -108.

The Honorable Ray Albright
Senator
Room 317, War Memorial Building
Nashville, Tennessee 37219

Dear Senator Albright:

You have requested an opinion on the following question:

QUESTION

Should the Hamilton County Board of Commissions exempt federal, state, and local governmental entities from the service charge it has imposed pursuant to T.C.A. §§ 7-86-101 et. seq. to fund an emergency services number?

OPINION

Federal, state and county governmental entities are exempt from the Emergency Communications District service charge.

ANALYSIS

T.C.A. § 7-86-101 et. seq. is the Emergency Communications District Law. It was enacted to provide a single, three-digit number (911) to provide a simplified means of securing emergency services. The act permits the creations of a municipal corporation or district which would collect the necessary funds and contract with a service supplier who would furnish such an emergency communications service.

The board of directors of the district is authorized by T.C.A. § 7-86- 108(a) to assess a 'service charge' to fund the emergency telephone service. Such service charge 'shall have uniform application and shall be imposed throughout the entire district to the greatest extent possible in conformity with the availability of such service within the district.' T.C.A. § 7-86- 108(a). T.C.A. § 7-86-108(b) provides: 'Every billed user shall be liable for any service charge imposed under this chapter until it has been paid to the service supplier.' T.C.A. § 7-86-112 provides: 'If the proceeds generated by the emergency telephone service charge exceed the amount of moneys necessary to fund the service, the board of directors of the district shall reduce the service charge rate or suspend the service charge.'

***2** The statute provides that this service charge 'shall not be construed as taxes.' T.C.A. § 7-86-106. This is in accord with the established rule that a 'tax' is imposed for a general or public purpose and for carrying on general government functions. Obion County v. Massengill, 177 Tenn. 477, 151 S.W.2d 156 (1941). In contrast, this service charge will be used only to pay for providing the 911 emergency service number.

A special assessment is not a tax but is assessed or levied for a special purpose on lands benefited. Id; West Tenn. Flood Control and Soil Conservation District v. Wyatt, 193 Tenn. 566, 247 S.W.2d 56 (1952). Federal agencies or instrumentalities are immune from special assessments by state and local governments. United States v. Adair, 539 F.2d 1185 (8th Cir. ___). The authority

of a city or municipal corporation to make a special assessment on state or county property must be specially conferred by statute. State v. Hamblen County, 161 Tenn. 575, 33 S.W.2d 73 (1930); City of Morristown v. Hamblen County, 136 Tenn. 242, 188 S.W. 796 (1916).

This service charge is distinguishable from a special assessment since the service charge allowed under T.C.A. § 7-86-108 is levied upon telephone users while special assessments can be levied only upon land or real property. Weakley County v. Odle, 654 S.W.2d 402 (Tenn. App. 1983); West Tennessee Flood Control, supra. In addition, special assessments are generally used for improvements on the real property of the municipality which raise the value of the property specially assessed. Obion County, supra; 63 C.J.S. Municipal Corporation § 1035. Therefore, this 'service charge' is not a special assessment.

The charge in question here is simply a charge for the use of a service and is imposed only on those who will have access to the service. Clearly the Emergency Communications District Law empowers the municipal district to exercise its police power to establish a means of securing emergency services. The legislative purpose appears to be to protect public safety and health through the provision of such a service. The charge is only incidental to the provision of the service and is used only to pay the cost of the service. Craig v. City of Macon, 543 S.W. 2d 772 (Mo. 1976).

No matter what the nature of the fee involved, however, it is well settled in Tennessee that the state and its political subdivisions are not subject to a statute unless specifically mentioned therein or unless application thereto is necessarily implied. Keeble v. City of Alcoa, 204 Tenn. 286, 319 S.W.2d 249 (1959) ; Davidson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956); Harrison Construction Co. v. Gibson County Board of Education, 642 S.W. 2d 148 (Tenn. App. 1982). This Emergency Communications District Law is silent as to the sovereign and therefore the state and its subdivisions, including the county, are not subject to the law or to the fee involved. Similarly where the United States Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function is immune from state regulation. Hancock v. Train, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed. 2d 555 (1976); Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed.2d 1504 (1943).

***3** Federal, state, and county governmental entities should therefore be exempt from the Emergency Communications District service charge since there is no legislation specifically making them subject to the provisions of this law.

If you have any further comments or questions about this matter, do not hesitate to contact us.

Sincerely,

W. J. Michael Cody

Attorney General and Reporter

John Knox Walkup

Chief Deputy Attorney General

Christine Modisher

Assistant Attorney General

Tenn. Op. Atty. Gen. No. 85-114, 1985 WL 193663 (Tenn.A.G.)

END OF DOCUMENT

TN ST § 7-86-106
T. C. A. § 7-86-106

C
WEST'S TENNESSEE CODE ANNOTATED
TITLE 7. CONSOLIDATED GOVERNMENTS--GOVERNMENTAL AND PROPRIETARY FUNCTIONS
SPECIAL DISTRICTS
CHAPTER 86. EMERGENCY COMMUNICATIONS
PART 1--EMERGENCY COMMUNICATIONS DISTRICTS
§ 7-86-106. Status; powers; service charges

The emergency communications district so created shall be a "municipality" or public corporation in perpetuity under its corporate name, and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein shall not be construed as taxes and shall be payable as bona fide service charges by all service users, whether private or public, profit making, or not-for-profit, including governmental entities. The powers of each district shall be vested in and exercised by a majority of the members of the board of directors of the district.

1984 Pub.Acts, c. 867, § 6; 1987 Pub.Acts, c. 94, § 1.

<General Materials (GM) - References, Annotations, or Tables>

T. C. A. § 7-86-106, TN ST § 7-86-106

Current through End of 2003 First Reg. Sess.

END OF DOCUMENT

***1** Office of the Attorney General
State of Tennessee

Opinion No. **85-205**
June 27, 1985

CONTRACTS: Freedom to Contract: Municipal Corporations:

Authority of an Emergency Communications District Board to hire and manage employees to operate an independent answering point; obligation of the Board to pay personnel costs of a public safety agency if the Board chooses an existing agency as an answering point. T.C.A. §§ 7-86-101 et seq., - 107, 12-9-101 et seq., -108; Op.Atty.Gen. 81-532 (September 24, 1981).

COUNTIES: Interlocal Cooperation: Services:

Authority of an Emergency Communications District Board to hire and manage employees to operate an independent answering point; obligation of the Board to pay personnel costs of a public safety agency if the Board chooses an existing agency as an answering point. T.C.A. §§ 7-86-101 et seq., - 107, 12-9-101 et seq., -108; Op.Atty.Gen. 81-532 (September 24, 1981).

INTERLOCAL COOPERATION ACT:

Authority of an Emergency Communications District Board to hire and manage employees to operate an independent answering point; obligation of the Board to pay personnel costs of a public safety agency if the Board chooses an existing agency as an answering point. T.C.A. §§ 7-86-101 et seq., - 107, 12-9-101 et seq., -108; Op.Atty.Gen. 81-532 (September 24, 1981).

Mr. Brian L. Kuhn
County Attorney
Shelby County Government
Suite 801
160 N. Mid-America Mall
Memphis, Tennessee 38103

Dear Mr. Kuhn:

You have requested an opinion on the following questions:

QUESTIONS

1. If an Emergency Communications District Board establishes an independent answering point, does the Board have authority under the Emergency Communications District Law (T.C.A. § 7-86-101 et seq.) to hire and manage employees to operate the independent answering point?

2. If an Emergency Communications District Board chooses an existing public safety agency to be the public service answering point for providing 911 service, is the Board under any legal obligation to pay any of the personnel cost of the public safety agency involved in staffing the public service answering point? If so, how should the portion to be paid by the District Board be determined?

OPINIONS

1. The Board has authority pursuant to T.C.A. § 7-86-105(g) to hire and manage any employees necessary to operate an independent answering point.

2. The District Board is authorized by the Interlocal Cooperation Act, T.C.A. § 12-9-101 et seq. to enter into a joint venture or contract with another public agency to perform public service answering point functions. The terms of such an agreement would be negotiated by the parties.

DISCUSSION

1. T.C.A. § 7-86-105(g) provides:
The board shall have the authority to employ such employees, experts, and consultants as it may deem necessary to assist the board in the discharge of its responsibilities to the extent that funds are made available.
***2** Therefore the Board may at its discretion, hire and manage employees to operate an independent answering point.

2. The Emergency Communications District Law, T.C.A. § 7-86-101 et seq., does not address arrangements the District Board may make with another agency in fulfilling the Board's duties under the law (except that "the involved agencies may maintain a secondary backup number and shall maintain a separate number for nonemergency telephone calls." T.C.A. § 7-86-107).

The Interlocal Cooperation Act, T.C.A. § 12-9-101 et seq. enables local governmental units to cooperate with other governmental units. If the District Board were to enter into joint or cooperative action with another public agency, such agreement would be governed by the provisions of T.C.A. § 12-9- 104. T.C.A. § 12-9-104 controls if a separate legal or administrative entity is created or if an administrative or joint board is responsible for administering the contract. A contract under this section would be negotiated by the parties and specify the items listed in § 12-9-104(c).

An "interlocal contract for performance of services" is authorized by T.C.A. § 12-9-108 which provides:
Any one or more public agencies may contract with any one or more public

agencies to perform any governmental service, activity or undertaking which each public agency entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties. Contracts entered into pursuant to this section need not conform to the requirements set forth in this chapter for contracts for joint undertakings.

"Public agency" is defined by § 12-9-103(1) to mean "any political subdivision of this state, ... any agency of the state government or of the United States ..." This would encompass the Emergency Communications District. (See Op.Atty.Gen. 81-532 (Sept. 24, 1981)). Under this provision, the District Board could negotiate a contract with any other "public agency" as defined above to perform the public service answering point functions. Absent indications of a joint venture discussed above, § 108 rather than § 104 would control.

Nothing in either the Emergency Communications District Law or the Interlocal Cooperation Act controls the specific content of such a contract, such as obligation to pay the personnel cost involved or how much should be paid. As with any contract, the parties are free to negotiate a contract that best suits their needs.

If you have any further questions, do not hesitate to contact us.

Sincerely,

W.J. Michael Cody

Attorney General and Reporter

John Knox Walkup

Chief Deputy Attorney General

Christine Modisher

Assistant Attorney General

Tenn. Op. Atty. Gen. No. 85-205, 1985 WL 193754 (Tenn.A.G.)

END OF DOCUMENT

*1 Office of the Attorney General
State of Tennessee

Opinion No. 86-026
February 5, 1986

COUNTIES: Commission/Commissioners/Legislative Bodies: Compensation: Executives: Interlocal Cooperation

Eligibility of members of the Shelby County area "9-1-1" **Emergency Communications** District Board to participate in an existing local retirement system; Authority of the Shelby County area "9-1-1" **Emergency Communications** District Board to establish its own retirement system; Authority of the Shelby County Board to enter into agreements with local governments to allow for convenience transfers. T.C.A. §§ 7-86-101 et seq., 8-35-201, 68-25- 102; Pr.A. 1945, Ch. 72; Memphis Charter § 53.1; Ops.Tenn.Atty.Gen. 82-390 (August 2, 1982), 85-205 (June 27, 1985).

COURTS: County:

Eligibility of members of the Shelby County area "9-1-1" **Emergency Communications** District Board to participate in an existing local retirement system; Authority of the Shelby County area "9-1-1" **Emergency Communications** District Board to establish its own retirement system; Authority of the Shelby County Board to enter into agreements with local governments to allow for convenience transfers. T.C.A. §§ 7-86-101 et seq., 8-35-201, 68-25- 102; Pr.A. 1945, Ch. 72; Memphis Charter § 53.1; Ops.Tenn.Atty.Gen. 82-390 (August 2, 1982), 85-205 (June 27, 1985).

MUNICIPAL CORPORATIONS: Charter: Municipal Powers:

Eligibility of members of the Shelby County area "9-1-1" **Emergency Communications** District Board to participate in an existing local retirement system; Authority of the Shelby County area "9-1-1" **Emergency Communications** District Board to establish its own retirement system; Authority of the Shelby County Board to enter into agreements with local governments to allow for convenience transfers. T.C.A. §§ 7-86-101 et seq., 8-35-201, 68-25- 102; Pr.A. 1945, Ch. 72; Memphis Charter § 53.1; Ops.Tenn.Atty.Gen. 82-390 (August 2, 1982), 85-205 (June 27, 1985).

RETIREMENT: Tennessee Consolidated Retirement System (T.C.R.S.):

Eligibility of members of the Shelby County area "9-1-1" **Emergency Communications** District Board to participate in an existing local retirement system; Authority

of the Shelby County area "9-1-1" **Emergency Communications** District Board to establish its own retirement system; Authority of the Shelby County Board to enter into agreements with local governments to allow for convenience transfers. T.C.A. §§ 7-86-101 et seq., 8-35-201, 68-25- 102; Pr.A. 1945, Ch. 72; Memphis Charter § 53.1; Ops.Tenn.Atty.Gen. 82-390 (August 2, 1982), 85-205 (June 27, 1985).

Mr. Brian L. Kuhn
County Attorney
Shelby County Government Suite 801
160 N. Mid America Mall
Memphis, Tennessee 38103

Dear Mr. Kuhn:

This letter responds to your request for an opinion concerning the following topics:

QUESTIONS

1) Can employees of the Shelby County area "9-1-1" **Emergency Communications** District Board participate in an existing local retirement system?

***2** 2) Can the Shelby County area "9-1-1" **Emergency Communications** District Board establish its own retirement system?

3) If the Shelby County area "9-1-1" **Emergency Communications** District Board can establish its own retirement system, can the Board also work out an agreement between other local governments to allow for convenience transfers such as the one that now exists between the City of Memphis and Shelby County?

OPINIONS

1) Neither the Private Acts of 1945, Chapter 72, governing the Shelby County pension system, nor Section 53.1 of the Charter of the City of Memphis, which governs the City retirement system, provide authority for participation in those pension systems by employees of the Shelby County area "9-1-1" **Emergency Communications** District Board.

2) There is presently no statutory authority authorizing the Shelby County area "9-1-1" **Emergency Communications** District Board to establish its own retirement system. However the **Emergency Communications** District Board, as a political subdivision, may participate in the Tennessee Consolidated Retirement System, as set forth in T.C.A. § 8-35-201.

3) Because it was opined in Section 2, supra, that the Shelby County area "9-1-1" **Emergency Communications** District Board is not authorized to establish its own retirement system, this question is moot.

ANALYSIS

I.

In order for the employees of the Shelby County area "9-1-1" **Emergency Communications** District Board to participate in either the Shelby County pension system or the City of Memphis retirement system, the employees of the District Board must fall within the ambit of eligible participants for each respective local retirement system. This issue was well-researched in an opinion by Thomas R. Russell of your office, referred to in your opinion request, a copy of which was received from you in our office on January 28, 1986. As was noted, the Private Acts of 1945, Chapter 72, Section 2 defines the authority for Shelby County to establish a pension system for county employees as follows:

> ... the Quarterly County Courts in counties of a population as above set out, are hereby authorized in their discretion and by proper resolution to establish a retirement or pension system or system for the officials and employees of the counties and may likewise so provide for the disability and retirement or pension system or systems to cover permanent, partial or temporary disabilities incurred by employees of such counties. If and when this retirement or pension system or systems shall be established, all public employees of such counties, who may be designated by the said Quarterly County Courts, shall be eligible to its benefits,.... (emphasis added).

Consequently, the Shelby County Board of County Commissioners (which was formerly the Quarterly County Court) was given the authority to establish a retirement system. However the specific language of Section 2, emphasized above, clearly indicates that only the officials and public employees of the county are eligible to participate in the benefits afforded under the Shelby County retirement system.

***3** T.C.A. §§ 7-86-101, et seq., authorizes the creation, structure, operation and funding of **"Emergency Communications** Districts" such as the Shelby County area "9-1-1" **Emergency Communications** District, and its Board. T.C.A. § 7-86-104(a) provides that the legislative body of any municipality or county may, by ordinance or resolution, create an **Emergency Communications** District within all or part of the boundaries of such municipality or county, after an election authorizing such a decision is held in conformity with subsection (b). The legislative body may then appoint a board of directors, pursuant to T.C.A. § 7-86-105(b). T.C.A. § 7-86-105(g) gives the board the authority to employ such employees, experts and consultants as it may deem necessary to assist the board in the discharge of its responsibilities to the extent that funds are made available.

The specific status of the **Emergency Communications** District as created pursuant to the aforementioned provisions is set forth in T.C.A. § 7-86-107 as follows:

> The **emergency communications** district so created shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.

Funding for the operation of the **Emergency Communications** Districts so created is obtained from three statutorily authorized sources: (1) the emergency telephone service charge set forth in T.C.A. § 7-86-108; (2) funds from federal, state and local government sources, which the district may receive as well as funds from private sources, as set forth in T.C.A. § 7-86-109, and (3) funds from the issuance of bonds as set forth in T.C.A. § 7-86-114, and as referred to in T.C.A. § 7-86-109.

As a "municipal corporation" with its own source of funding, it seems clear that an **Emergency Communications** District is a separate entity, distinct and autonomous from the county in which it is located. The **Emergency Communications** District law nowhere dictates that the districts created thereunder are to be controlled by or are a part of the county in which they may be located. To the contrary, this office has previously recognized the complete functional autonomy of the districts in opining that contracts awarded by the Shelby County **Emergency Communications** District in excess of $50,000 do not require the approval of the Shelby County Commission as a prerequisite to their award. See, Op.Tenn.Atty.Gen. U85-039 (August 8, 1985). Consequently, employees hired by the **Emergency Communications** District Board pursuant to the provisions of T.C.A. § 7-86-105(g) are not officials or public employees of Shelby County, as would be required for eligibility to participate in the Shelby County Retirement System.

In a similar manner, Section 53.1 of the Charter of the City of Memphis sets forth the authority for the establishment of a retirement system as follows:

> ***4** The board of commissioners of said City of Memphis shall have power by ordinance to establish a retirement or pension system or systems for all elected officials, including the mayor and the board of commissioners of the City of Memphis and all other officers and employees of said City of Memphis. (Priv. Acts 1951, Ch. 377, § 1). (emphasis added).

Applying the same analysis as is relative to participation in the Shelby County Retirement System, it seems clear that any employees of the **Emergency Communications** District are not "city" employees, and are therefore precluded from participation in the City of Memphis Retirement System which is expressly limited to city employees.

II.

The statutory scheme authorizing the creation and operation of the **Emergency Communications** Districts (T.C.A. §§ 7-8-101, et seq.) is completely devoid of any provisions establishing or authorizing the district boards to establish a retirement system for any employees hired pursuant to T.C.A. § 7-86- 105(g). As noted in 60 Am.Jur.2d, Pensions and Retirement Funds, § 41, p. 910:

> The rule prevailing in most jurisdictions is that the legislature has power to require municipalities to pension their employees and to raise the funds for that purpose.... In some jurisdictions, statutes have been enacted which expressly authorize municipal corporations, or specified classes thereof, to provide pensions for municipal employees generally, while in other jurisdictions the same result is reached by necessary implication, as under constitutional and statutory provisions setting up a home-rule form of government for municipalities.

Under the above analysis, there appear to be two methods to reach a determination

that a municipal corporation has the authority to establish a pension system. First, and the most prevalent method, is that the legislature may enact law expressly requiring the municipal corporation to pension its employees. As previously noted, no such legislation was included in the **Emergency Communications** District law. Second, the authority to establish a pension for municipal employees may be implied as a constitutional or statutory intendment of a "home-rule" form of government for the municipality in question. The legislature has nowhere implied a broad "home-rule" system for the exercise of powers by an **Emergency Communications** District. Rather, the power to be exercised is vested completely in a majority of the members of the board of directors of each district pursuant to T.C.A. § 7-86-106, and the statutory scheme envisions a carefully tailored legislative objective with board authority limited to the achievement of that objective. Thus a "home- rule" situation is nowhere indicated by the specific legislation involved herein.

Although the legislature has not authorized the establishment of a retirement system by an **Emergency Communications** District Board for the benefit of any employees hired by the board, there remains an alternative set forth in T.C.A. § 8-35-201 for such employees to participate in the Tennessee Consolidated Retirement System. T.C.A. § 8-35-201(a) sets forth that:

***5** The chief legislative body of any political subdivision of the state, not participating under §§ 8-35-212--8-35-214 may, by resolution legally adopted and approved by said chief legislative body, authorize all its employees in all of its departments or instrumentalities to become eligible to participate in the retirement system....

In our response to a previous opinion request which you directed to our office, an **Emergency Communications** District was opined as being encompassed within the definition of a "political subdivision". See, Op.Tenn.Atty.Gen. 85-205 (June 27, 1985). Additionally, a "political subdivision" has been opined as referring to geographical governmental units smaller than the state, rather than a functional division of state government. See, Op. Tenn.Atty.Gen. 82- 390 (August 2, 1982). This construction of the phrase "political subdivision" is consistent with the statutory definition set forth in T.C.A. § 68-25- 102(8) as "any municipality, city, incorporated town, county, district or authority, or any portion or combination of two (2) or more thereof." An **Emergency Communications** District is both a "municipality" (as noted in T.C.A. § 7-86-106) as well as a "district", within the above definitive examples of a "political subdivision." Consequently, by complying with the prerequisites set forth in T.C.A. § 8-35-201, the Board of the **Emergency Communications** District may, by resolution, authorize its employees to participate in the Tennessee Consolidated Retirement System, subject to the approval of the board of trustees of the T.C.R.S.

III.

Because the analysis set forth in Section 2 opines that the Shelby County area "9-1-1" **Emergency Communications** District Board is not authorized to establish its own retirement system, your question concerning "convenience transfers" is rendered moot.

If you have further questions or comments about this matter, please feel free to

contact us.

Sincerely,

W.J. Michael Cody

Attorney General

John Knox Walkup

Chief Deputy Attorney General

C. Blair Scoville

Assistant Attorney General

Tenn. Op. Atty. Gen. No. 86-026, 1986 WL 222662 (Tenn.A.G.)

END OF DOCUMENT

***1** Office of the Attorney General
State of Tennessee

Opinion No. **92-69**
December 28, 1992

Amendment of Service Charge Rate in E-911 Districts

Senator Jerry W. Cooper
Room 309 War Memorial Building
Nashville, Tennessee 37243-0214

QUESTION

If an E-911 Service District is established by referendum, as provided by state statute, and the parameters of such District are defined in the local referendum and local resolution, can these parameters (i.e. rate set to fund the E-911 service) be changed by subsequent amendments to the state statute without being placed before the people in another local referendum?

OPINION

The rate set to fund the E-911 service can be changed by a subsequent amendment to the state statute without being placed before the people in another local referendum.

ANALYSIS

Tenn.Code Ann. § 7-86-101, et seq. is the Emergency Communications District Act. It was enacted to provide a single, three-digit number (911) to provide a simplified means of securing emergency services. The Act permits the creation of a municipal corporation or district which would collect the necessary funds and contract with a service supplier who would furnish an emergency communications service.

Tenn.Code Ann. § 7-86-104 authorizes the legislative body of any municipality or county to create by ordinance or resolution an emergency communications district within all or part of the boundaries of such municipality or county. The question of creating such a district is to be submitted to the voters within the boundaries of the proposed district for a referendum election.

Tenn.Code Ann. 7-86-105 provides that upon approval by a majority of the eligible voters, the legislative body may create an emergency communications district and appoint a Board of Directors for the district. The Board of Directors

is then authorized by Tenn.Code Ann. § 7-86-108(a) to assess a "service charge" to fund the emergency telephone service. The Board may levy such service charge in an amount not to exceed sixty-five cents (65 cents) per month for residence-classification service users, and not to exceed two dollars ($2.00) per month for business-classification service users. Id.

In addition, the Board is directed by Tenn.Code Ann. § 7-86-112 to reduce the service charge rate or suspend the service charge, if the proceeds generated by such charge exceed the amount necessary to fund the service. Alternatively, if the amount of moneys generated is not adequate to fund the service, the Board may, by resolution, reestablish the service charge rate or lift the suspension.

With the enactment of the Emergency Communications District Act, the legislature has provided for the establishment of a district and given it limited powers in order to carry out a particular public purpose. Such a district is known as a quasi-municipal corporation. Professional Home Health v. County General, 759 S.W.2d 416, 419 (Tenn.Ct.App.1988) (citing 56 Am.Jur.2d Municipal Corporations § 13). "Although a quasi-municipal corporation is not in a strict sense a 'municipal corporation,' that term is often used in a generic sense to encompass a quasi-municipal corporation that was organized for an essential public purpose." Professional Home Health v. County General, 759 S.W. at 419 (citing 62 C.J.S. Municipal Corporations § 5).

***2** A municipal or quasi-municipal corporation exists solely and alone by virtue of its act of incorporation, and it can exercise no powers but such as are expressly granted to it, and such as are the result of necessary and proper implication. Smiddy v. City of Memphis, 140 Tenn. 97, 203 S.W.2d 512 (1918). By its express provisions, Tenn.Code Ann. § 7-86-104 allows for legislatively established emergency communication districts upon the approval of the affected people. A referendatory vote is only required for the establishment of the district, not for acts amending or repealing such creation or establishment. In the absence of express language to the contrary, therefore, it is the opinion of this Office that a referendum is not required to amend the rate set to fund an E-911 district. Further, we are not aware of any constitutional prohibition that would be applicable. Consequently, the legislature can amend Tenn.Code Ann. § 7-86-108 which sets the amount of rate which can be charged by an E-911 district to fund such district. See Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga, 580 S.W.2d 322, 327 (Tenn.1979).

It should be noted, however, that Tenn.Code Ann. § 7-86-112 expressly directs the Board of Directors of an E-911 District to reduce or suspend the service charge rate if the proceeds from such charge exceed the amount necessary to fund the service. Accordingly, while the legislature may amend the Act to increase the amount of the rate which can be charged, the Board of Directors of a District may not increase the service charge rate of that district if the proceeds from the current rate are adequate to fund the service.

Charles W. Burson

Attorney General & Reporter

John Knox Walkup

Solicitor General

Janet M. Kleinfelter

Assistant Attorney General

Tenn. Op. Atty. Gen. No. 92-69, 1992 WL 545046 (Tenn.A.G.)

END OF DOCUMENT

***1** Office of the Attorney General
State of Tennessee

Opinion No. **93-65**
November 29, 1993

Status of "911 tapes" under Public Records Act

The Honorable Keith Westmoreland
State Representative
Room 214, War Memorial Building
Nashville, TN 37243-0102

QUESTION

Whether "911 tapes," which are not part of an ongoing police investigation, are open to the public.

OPINION

It is the opinion of this Office that, generally, a 911 tape made or received by a state or local governmental agency in connection with the transaction of its official business would be a public record open for inspection in accordance with T.C.A. § 10-7-503. We have found no state law providing otherwise for "911 tapes" per se. Because the contents of a 911 tape may vary, however, along with the facts and circumstances surrounding a particular tape, each request to inspect a 911 tape should be examined on a case-by-case basis.

ANALYSIS

Section 10-7-503 of Tennessee Code Annotated provides that "[a]ll state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee ... unless otherwise provided by state law." T.C.A. § 10-7-503(a) (Supp.1993). The proper test in determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. Griffin v. City of Knoxville, 821 S.W.2d 921, 924 (Tenn.1991) . Application of this test requires an examination of the totality of the circumstances. Id.

The Emergency Communications District Law is found at T.C.A. §§ 7-86-101, et seq. The General Assembly has declared the number 911 as the primary emergency telephone number in Tennessee. T.C.A. § 7-86-102(a) (Supp.1993). A county or municipal legislative body may create an emergency communications district by

resolution or by ordinance, and establishment of the district is subject to a vote "for" or "against" by voters within the boundaries of the proposed district. T.C.A. § 7-86-104 (1992). A district created under the law is deemed to be a municipality. T.C.A § 7-86-106 (1992). The powers of an emergency communications district are vested in its Board of Directors. Id. The Board is responsible for creating an emergency communications service that has the capability of utilizing at least one of four methods in response to emergency calls. T.C.A. § 7-86-107 (1992). These methods and their statutory definitions are as follows:

'Direct dispatch method' means a 911 service in which a public service answering point, upon receipt of a telephone request for emergency services, provides for the dispatch of appropriate emergency service units and a decision as to the proper action to be taken;
T.C.A. § 7-86-103(2) (Supp.1993); T.C.A. § 7-86-107(a)(1).

'Referral method' means a 911 service in which a public safety answering point, upon the receipt of a telephone request for emergency services, provides the requesting party with a telephone number of appropriate public safety agencies or other providers of emergency services;
***2** T.C.A. § 7-86-103(5); T.C.A. § 7-86-107(a)(2).

'Relay method' means a 911 service in which a public safety answering point, upon receipt of a telephone request for emergency services, notes the pertinent information from the caller and relays such information to the appropriate public safety agency or other agencies or other providers of emergency service for dispatch of an emergency unit;
T.C.A. § 7-86-103(6); T.C.A. § 7-86-107(a)(3).

'Transfer method' means a 911 service in which a public safety answering point, upon receipt of a telephone request for emergency services, directly transfers such request to an appropriate public safety agency or other provider of emergency services;
T.C.A. § 7-86-103(10); T.C.A. § 7-86-107(a)(4).

The Emergency Communications District Law does not use the term "911 tape" that is used in the opinion request. From the statutes above, we assume that a "911 tape" is an audio tape recording of a telephone request for emergency services. We further assume for purposes of this opinion that the tape recording is lawfully made by a state or local governmental agency in connection with the transaction of its official business. It would appear from the statutes, for example, that the governmental agency making the recording might be serving as a "public service answering point," "public safety agency," or "provider of emergency services" as those terms are used in T.C.A. § 7- 86-103. See generally, Op.Tenn.Atty.Gen. U91-154 (December 4, 1991) (opining on the legality of a district's recording 911 telephone calls). In our opinion, a 911 tape made in accordance with those assumptions would be a public record open for inspection pursuant to T.C.A. § 10-7-503 and copying pursuant to T.C.A. § 10-7-506, unless otherwise provided by state law. The definition of a "public record" expressly includes sound recordings. T.C.A. § 10-7- 301(6) (1992).

The General Assembly has provided exceptions to section -503's rule of openness in T.C.A. § 10-7-504 (1992). No exception for "911 tapes" per se appears in this statute. The exceptions set forth in § 10-7-504 are not exclusive, and statutes dealing with the subject matter in question also must be examined when analyzing a question under the Public Records Act. Thus, we also have examined the Emergency Communications District Law, and no confidentiality is provided by these statutes

for a telephone request to number 911 for emergency services.

As your opinion request contemplates, the answer to whether a 911 tape is open for public inspection could vary, however, depending upon the facts and circumstances of the particular tape in question. In Appman v. Worthington, 746 S.W.2d 165 (Tenn.1987), the Court held that records of a certain investigation were not available for inspection under the Public Records Act because the records were relevant to a pending criminal prosecution. Also, for example, the General Assembly has provided that "all records concerning reports of child sexual abuse" shall be confidential in order to protect the child and persons responsible for the child's welfare, and such records may only be disclosed as authorized by statute. T.C.A. § 37-1-612 (1991). It is conceivable that a request for emergency services to number 911 could also constitute a record concerning a report of child sexual abuse, depending upon the contents of the call. Similarly, some other provision of state law might provide otherwise than for public inspection of a particular 911 tape, depending upon the contents of the call, and the facts and circumstances surrounding a particular tape that has been requested.

***3** In summary, it appears generally that a 911 tape made or received by a state or local governmental agency in connection with the transaction of its official business would be a public record open for inspection in accordance with T.C.A. § 10-7-503. We have found no state law providing otherwise for "911 tapes" per se. Because the contents of a 911 tape may vary, however, along with the facts and circumstances surrounding a particular tape, each request to inspect a 911 tape should be examined on a case-by-case basis.

Sincerely,

Charles W. Burson

Attorney General and Reporter

Andy D. Bennett

Associate Chief Deputy Attorney General

Gina J. Barham

Deputy Attorney General

Tenn. Op. Atty. Gen. No. 93-65, 1993 WL 496552 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **93-72**
December 28, 1993

Creation of Municipal Emergency Communications District

Rep. Clint Callicott
Room 214, War Memorial Building
Nashville, TN 37243-0161

QUESTION

1. Is a municipality authorized under T.C.A. §§ 7-86-101, et seq. to create a municipal emergency communications district without the approval of a county-wide emergency communications district in which the municipality is located.

2. If the answer to question 1 is yes, should the authorizing referendum be held within the municipality or must it be held throughout the county-wide district?

3. If the answer to question 1 is yes, will the new district be entitled to user fees generated within its boundaries to the exclusion of the existing county-wide district, and does the existing county-wide district retain any obligations within the boundaries of the new municipal district?

OPINION

1. It is the opinion of this Office that T.C.A. §§ 7-86-101, et seq. authorize a municipality to create a municipal emergency communications district without the approval of a county-wide emergency communications district in which the municipality is located.

2. It is the opinion of this Office that the authorizing referendum should be held within the municipality.

3. It is the opinion of this Office that a municipal emergency communications district, once created, will be excluded from the service area of the county- wide district. Thus, the municipal district will be entitled to user fees generated within its boundaries to the exclusion of the existing county-wide district, and the county-wide district will retain no obligations within the boundaries of the new municipal district, beyond the obligation of both districts to coordinate their efforts to ensure prompt, efficient service to all the residents in the area.

ANALYSIS

1. Creation of New District

This opinion involves an interpretation of the Emergency Communications District Law, T.C.A. §§ 7-86-101, et seq. (the "Act"). The primary purpose of statutory construction is to ascertain and give effect, if possible, to the intention or purpose of the legislature as expressed in the statute. Westinghouse Electric Corporation v. King, 678 S.W.2d 19 (Tenn.1984), appeal dismissed, 470 U.S. 1075 (1985). Subsection (a) of T.C.A. § 7-86-102 provides:

> The general assembly finds and declares that the establishment of a uniform emergency number to shorten the time required for a citizen to request and receive emergency aid is a matter of public concern and interest. The general assembly finds and declares that the establishment of the number 911 as the primary emergency telephone number will provide a single, primary, three- digit emergency telephone number through which emergency service can be quickly and efficiently obtained and will make a significant contribution to law enforcement and other public service efforts requiring quick notification of public service personnel. It is the intent to provide a simplified means of securing emergency services which will result in saving of life, a reduction in the destruction of property, quicker apprehension of criminals and ultimately the saving of money.

***2** T.C.A. § 7-86-102(a) (Supp.1993). Under the Act, the legislative body of any municipality or county may by ordinance or resolution create an emergency communications district within all or part of the boundaries of such municipality or county. T.C.A. § 7-86-104(a) (1992). Before such a district may be established, the legislative body of the municipality or county must request the county election commission to submit to the voters within the boundaries of a proposed emergency communications district the question of creating such a district in an election. T.C.A. § 7-86-104(b) (1992). Upon approval by a majority of the eligible voters within the area of the proposed district voting at such referendum, the legislative body may create an emergency communications district. T.C.A. § 7-86-105(a) (Supp.1993). The board of directors of such district is authorized to levy an emergency telephone service fee to users within the district.

In your request, you ask whether a city which is already within the boundaries of a county-wide emergency communications district may create its own emergency communications district separate from the county district. We note that we have previously concluded that the area encompassed by an emergency communications district is an exclusive service area. Op.Tenn.Atty.Gen. U90-104 (June 26, 1990). That opinion request involved a county which wished to create a district encompassing the entire county. A municipality located within county boundaries had already created a municipal communications district. That opinion, in effect, concluded that the proposed county district could not include territory within the municipal district. However, we noted that two districts may enter into a mutual agreement regarding these services pursuant to the Interlocal Cooperation Act, T.C.A. §§ 12-9-101, et seq.

In the above-referenced opinion, this Office noted that the Act does not address any process for merger or consolidation of districts. With regard to the issue addressed here, the Act contains no procedure for splitting or carving off a newly created municipal communications district from an already existing county communications district. An existing county-wide district would include the municipal territory. Presumably its budget and service contracts would include

user fees from municipal residents and service extended to municipal territory. Allowing a municipality to create its own district may therefore cause some disruption in the county district's services. It could be argued that the citizens of the municipality which wishes to create the new district have already had the opportunity of participating in the county-wide election which authorized the creation of the county-wide emergency communications district, and that the city should therefore be precluded from establishing a municipal district.

Based on our review of the Act, however, it appears that a county-wide district can be established without the approval or participation of a municipal legislative body. Further, we would note that both county and municipal legislative bodies are expressly accorded the authority to create an emergency communications district. In construing a statute, it is the duty of the court to give every word and phrase meaning. Loftin v. Langsdon, 813 S.W.2d 475 (Tenn.App.1991), appeal denied. Nothing in the Act suggests that a city or town within a county-wide district is precluded from exercising its power and discretion to create its own district after a county-wide district has been formed. We therefore conclude that a municipal legislative body may create a municipal emergency communications district even when the municipality is already located within a county-wide district.

***3** This conclusion is consistent with the plain language of T.C.A. § 7- 86-104(a) , which allows the legislative body of "any" municipality or county to create an emergency communications district after approval by referendum. Moreover, this conclusion is also consistent with the power granted in many private act municipal charters and by state law, according municipalities the right to grant exclusive franchises to provide utilities within their borders. See, e.g., T.C.A. § 6-2-201(13) (1992). Nothing in the Act suggests that a municipality grants a county-wide district an exclusive franchise by failing to exercise its right to create its own district before the county-wide district is created. We would also note that under state annexation law a municipality acquires the exclusive right to perform or provide municipal and utility functions and services in any territory which it annexes. T.C.A. § 6-51- 111(a) (Supp.1993).

2. Location of Referendum

T.C.A. § 7-86-104(b) provides in relevant part:

> The legislative body of any municipality or county shall by resolution request the county election commission to submit to the voters within the boundaries of a proposed emergency communications district the question of creating such district in an election to be held pursuant to § 2-3-204.

T.C.A. § 7-86-104(b) (1992) (emphasis added). As a result, it would appear that the referendum on the creation of a municipal emergency communications district should be submitted to the voters within the municipality.

3. Right to User Fees and Service Obligations

As noted above, this Office has concluded that each emergency communications

district is an exclusive service area. It would therefore appear that the territory within the newly created municipal emergency communications district would be excluded from the exclusive service area of the county district. Pursuant to T.C.A. § 7-86-108, the board of directors of an emergency communications district is authorized to levy an emergency telephone service charge to users. The statute states: "Any such service charge shall have uniform application and shall be imposed throughout the entire district to the greatest extent possible in conformity with the availability of such service within the district." T.C.A. § 7-86-108(a)(1) (Supp.1993) (emphasis added). It therefore appears that, upon its creation, the municipal district would have the sole right to levy user fees within its boundary. Further, it would appear that, upon its creation, the municipal district would be the sole provider of emergency communication services within the municipal boundaries. Thus, the county district would retain no obligation to provide services within the municipality's boundaries, beyond the continuing obligation of both districts to coordinate their efforts to ensure prompt, efficient service to area residents. Again, the municipal and the county districts could still contract together for the provision of services under the Interlocal Cooperation Act, T.C.A. §§ 12-9-101, et seq.

***4** Charles W. Burson

Attorney General and Reporter

Michael E. Moore

Solicitor General

Ann Vix

Assistant Attorney General

Tenn. Op. Atty. Gen. No. 93-72, 1993 WL 561231 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **94-007**
January 13, 1994

911 board's appropriation of funds for aid to local governments

Honorable Anna Belle O'Brien
State Senator
Suite 10, Legislative Plaza
Nashville, TN 37243-0212

QUESTION

May a 911 board appropriate and spend funds for aid to local governments impacted by the implementation of a 911 system? For example, a local highway department expense to acquire road signs for roads heretofore unsigned.

OPINION

This Office reaffirms Op.Tenn.Atty.Gen. U93-19, which opined that the board of directors of an emergency communications district does not have the authority to spend district funds for the acquisition and installation of road signs. Other examples of possible expenditures must be examined on a case by case basis.

ANALYSIS

The General Assembly has enacted the Emergency Communications District Law, which is codified at T.C.A. §§ 7-86-101, et seq. In order to create an emergency communications district, the legislative body of a municipality or county must first create the district by ordinance or resolution, and the question "for" or "against" is submitted to the voters within the district's proposed boundaries. T.C.A. § 7-86-104. After its creation, an emergency communications district is deemed to be a municipality, and its powers are vested in a board of directors. T.C.A. § 7-86-106. This board is commonly called a 911 board because the Emergency Communications District Law is the means through which the Legislature has acted to establish the number 911 as the primary emergency telephone number in Tennessee. See generally, T.C.A. § 7-86-102 (statement of legislative intent).

This Office issued an opinion February 26, 1993, opining that the board of directors of an emergency communications district does not have the authority to expend district revenues for the acquisition and installation of highway, road, and street signs. Op.Tenn.Atty.Gen. U93-19 (Feb. 26, 1993) (copy attached). After

this opinion, the Emergency Communications District Law was amended by Chapter 479 of the Public Acts of 1993, which became effective July 1, 1993. Section 1 of Chapter 479 added the language now found at T.C.A. § 7-86-102(c):

It is the intent that all funds received by the district are public funds and are limited to purposes for the furtherance of this part. The funds received by the districts are to be used to obtain emergency services for law enforcement and other public service efforts requiring emergency notification of public service personnel and the funds received from all sources shall be used exclusively in the operation of the emergency communications district.

Under this language, we reaffirm our opinion as expressed in Op.Tenn.Atty.Gen. U93-19 that the Emergency Communications District Law does not authorize a 911 board to spend district funds for the acquisition and installation of road signs. This conclusion is supported by the legislative history of Public Chapter 479. When the House of Representatives first passed the legislation (HB 1362), it would have allowed 911 boards to spend funds for the purchase and installation of highway, road, and street signs. When the bill passed the Senate on May 17, 1993, however, it was amended to delete those provisions. The House concurred in the Senate amendment on May 18, 1993. (Tape H-107 and Senate Message Calendar for House consideration on May 18, 1993, on file at the State Library and Archives). Whether a 911 board is authorized to make other possible expenditures must be examined on a case by case basis.

***2** Charles W. Burson

Attorney General and Reporter

Andy D. Bennett

Associate Chief Deputy Attorney General

Gina J. Barham

Deputy Attorney General

Note

TO RETRIEVE THE FULL TEXT OF THE ATTACHED OPINION(S) SET FORTH AT THIS POINT, ENTER THE FOLLOWING FIELD SEARCH:

CI(U93-19)

Tenn. Op. Atty. Gen. No. 94-007, 1994 WL 88761 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. 94-013
February 3, 1994

Conflict of Interest; 1993 Amendment to T.C.A. § 7-86-105(b)(1); Legality of Appointment by County Executive of County Commissioner to E911 Communications District Board of Directors

H. Greeley Wells, Jr.
District Attorney General
Second Judicial District
P.O. Box 526
Blountville, Tennessee 37617

QUESTION

What effect, if any, does the 1993 amendment to T.C.A. § 7-86-105(b)(1) have on Op.Tenn.Atty.Gen. U93-21 (February 26, 1993)?

OPINION

The 1993 amendment to T.C.A. § 7-86-105(b)(1), providing that whenever that section requires a county legislative body to appoint directors for the board of an **emergency communications** district, the method of appointment shall be by the confirmation process as established pursuant to T.C.A. § 5-6- 106(c), changes Op.Tenn.Atty.Gen. U93-21 (February 26, 1993) (copy attached). A county legislative body's power to confirm candidates appointed by the county executive, the procedure established by T.C.A. § 5-6-106(c), does not amount to a power of appointment in the county legislative body for purposes of common law conflict of interest principles. Therefore, a county legislative body may confirm the appointment made by the county executive of one of its own members to the **emergency communications** district board of directors, but the county legislative body member should abstain from voting on the confirmation of his or her own appointment.

ANALYSIS

The 1993 amendment to T.C.A. § 7-86-105(b)(1) added one sentence with relation to the appointment of a board of directors for an **emergency communications** district by a county legislative body, stating: "Whenever this section requires the county legislative body to appoint directors, the method of appointment shall be by the confirmation process as established pursuant to § 5-6-106(c)." T.C.A. § 5-6-106(c) reads as follows:

Except as otherwise provided by general law, or special or private act, the county executive shall appoint members of county boards and commissions and county department heads. Such appointees shall be subject to confirmation by the county legislative body, and in so doing, the legislative body may express its views fully and freely and shall vote for or against confirmation. The legislative body shall not seek or interview such prospective employees prior to their appointment by the county executive. Such appointment and confirmation is not applicable to employees appointed by other elected county officials.

Taken together, these statutory provisions provide that where T.C.A. § 7- 86-105 requires the county legislative body to appoint members of the **emergency communications** district board of directors, the county executive shall name the appointees to the **emergency communications** district board of directors in the first instance. Those appointees shall be subject to confirmation in the same method as that applicable to members of county boards and commissions and county department heads through T.C.A. § 5-6-106(c), whereby the county legislative body shall vote for or against confirmation of the appointees named by the county executive.

***2** Op.Tenn.Atty.Gen. U93-21 opined that it was a conflict of interest for a member of the Monroe County Board of County Commissioners to serve as a member of the 911 **Emergency Communications** District Board of Directors because then-T.C.A. § 7-86-105(b)(1) gave the Monroe County Commissioners power to appoint the board of directors directly, and public policy would prohibit them from appointing one or more of their members to the board. The amendment to T.C.A. § 7-86-105(b)(1) changes the manner of appointment which supported the prior Opinion, and hence we now reach a different conclusion under current law.

The power to confirm appointments is different from the power to appoint for purposes of analyzing potential conflicts of interest under the common law rule enunciated in State ex rel. v. Thompson, 193 Tenn. 395, 246 S.W.2d 59 (1952), that it violates public policy for an appointing body to confer office upon one of its own members. This Office has opined that the county legislative body's power to confirm candidates appointed by the county executive does not amount to a power of appointment for purposes of the principles applied in Thompson and State ex rel. Bugbee v. Duke (Tenn., filed at Nashville, August 29, 1988), an unpublished opinion of the Tennessee Supreme Court. See Op.Tenn.Atty.Gen. U92-129 (December 14, 1992) (copy attached). Consistent with that Opinion and the analysis therein, a county legislative body member should abstain from voting on the confirmation of his or her own appointment.

Therefore, it is not a conflict of interest for the County Board of County Commissioners to confirm the appointment of one of its members to serve as a member of the 911 **Emergency Communications** District Board of Directors. The appointee County Commissioner should abstain from voting on the confirmation of his or her appointment to the **Emergency Communications** District Board of Directors.

Charles W. Burson

Attorney General and Reporter

Michael E. Moore

Solicitor General

Sarah A. Hiestand

Assistant Attorney General

Tenn. Op. Atty. Gen. No. 94-013, 1994 WL 32681 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **94-024**
March 9, 1994

1993 Amendment to T.C.A. § 7-86-105(b)(1); Manner of Appointing E911 Communications District Board of Directors in a County Meeting the Requirements of T.C.A. § 7-86-105(b)(3).

Senator Bud Gilbert
Suite 311, War Memorial Building
Nashville, Tennessee 37243-0207

QUESTION

Does the 1993 amendment to T.C.A. § 7-86-105(b)(1) require members of an emergency communications district board of directors in a county meeting the requirements of T.C.A. § 7-86-105(b)(3) to be appointed by the county executive in accordance with T.C.A. § 5-6-106(c) or by the county legislative body as would be required under T.C.A. § 7-86-105(b)(3) taken in isolation.

OPINION

The 1993 amendment to T.C.A. § 7-86-105(b)(1), which provides that whenever that section requires a county legislative body to appoint directors for the board of an emergency communications district, the method of appointment shall be by the confirmation process as established pursuant to T.C.A. § 5-6-106(c), applies to a county meeting the requirements of § 7- 86-105(b)(3). Therefore, the county executive of a county meeting the requirements of T.C.A. § 7-86-105(b)(3) would appoint the directors which are to be appointed by the legislative body of the county pursuant to T.C.A. § 7-86-105(b)(3), and the appointments would be subject to confirmation by the county legislative body.

ANALYSIS

T.C.A. § 7-86-104 permits the legislative body of any municipality or county by ordinance or resolution, respectively, to create an emergency communications district within all or part of the boundaries of such municipality or county under the terms of a referendum stated therein. T.C.A. § 7-86-105(a) provides that upon approval by a majority of the eligible voters within the area of the proposed district voting at such referendum, the legislative body may create an emergency communications district. T.C.A. § 7-86-105(b)(1) states that:

The legislative body may appoint a board of directors composed of not less than seven (7) nor more than nine (9) members to govern the affairs of the district.

Therefore, the "legislative body" contemplated by that section may be either the legislative body of a county, or of a municipality. T.C.A. § 7-86- 105(b)(1) continues by permitting certain small municipalities meeting certain criteria to have the legislative body of such municipality be the board of directors.

If the legislative body of a county, rather than a municipality, is the body creating the emergency communications district, the final sentence of T.C.A. § 7-86-105(b)(1) directs how that county legislative body is to go about appointing those members of the board of directors it is directed to appoint anywhere within T.C.A. § 7-86-105. The 1993 amendment to T.C.A. § 7-86-105(b)(1) added one sentence with relation to the appointment of a board of directors for an emergency communications district by a county legislative body, stating: "Whenever this section requires the county legislative body to appoint directors, the method of appointment shall be by the confirmation process as established pursuant to § 5-6-106(c)." The words "this section," as used in the foregoing, refer to the entire section, including all of T.C.A. § 7-86-105, and all instances within that section that a county legislative body is directed to appoint a board of directors. T.C.A. § 5-6- 106(c) reads as follows:

***2** Except as otherwise provided by general law, or special or private act, the county executive shall appoint members of county boards and commissions and county department heads. Such appointees shall be subject to confirmation by the county legislative body, and in so doing, the legislative body may express its views fully and freely and shall vote for or against confirmation. The legislative body shall not seek or interview such prospective employees prior to their appointment by the county executive. Such appointment and confirmation is not applicable to employees appointed by other elected county officials.

Taken together, these statutory provisions provide that where T.C.A. § 7- 86-105 requires the county legislative body to appoint members of the emergency communications district board of directors, the county executive shall name the appointees to the emergency communications district board of directors in the first instance. Those appointees shall be subject to confirmation in the same method as that applicable to members of county boards and commissions and county department heads through T.C.A. § 5-6-106(c), whereby the county legislative body shall vote for or against confirmation of the appointees named by the county executive.

T.C.A. § 7-86-105(b)(3) is one such portion of T.C.A. § 7-86-105 which requires a county legislative body to appoint certain members of the board of directors of the emergency communications district. T.C.A. § 7-86-105(b)(3) states in pertinent part:

(3) In emergency communication districts established by counties with a population greater than three hundred thousand (300,000) and less than seven hundred fifty thousand (750,000) according to the 1980 federal census or any subsequent federal census, except in counties with a metropolitan form of government, the mayor and the chief of police and the fire chief of the municipality, or their representatives, with the largest population in the district, the county sheriff in the district, and the county executive in the district, shall be members of the board of directors of the district.... In

districts covered by this subsection, the legislative body may appoint up to eleven (11) members to govern the affairs of the district to allow for the appointment of two (2) additional directors, one (1) of whom shall be a woman and one (1) of whom shall be a representative of the nongovernmental emergency agencies servicing such district....
(Emphasis added). T.C.A. § 7-86-105(b)(3) directs that in counties to which it applies (Knox County) the county legislative body may appoint those members of the emergency communications district board of directors which are not statutorily required to be on the board by that paragraph. Due to the last sentence of T.C.A. § 7-86-105(b)(1), any such appointments shall be made according to the procedure set forth in T.C.A. § 5-6-106(c), whereby the county executive makes the appointments and they are subject to confirmation by the county legislative body.

***3** Charles W. Burson

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Tenn. Op. Atty. Gen. No. 94-024, 1994 WL 81297 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. 95-032
April 6, 1995

Emergency Communications District; Installation, Maintenance of Road Signs; County Legislative Body Liability

Senator Jerry W. Cooper
Room 309 War Memorial Building
Nashville, Tennessee 37243-0214

QUESTION

Would a county be liable for failure to put up new road name signs if a person suffers injury because an ambulance could not find the person's residence due to the lack of a road name sign, where neither the E911 program nor the county road superintendent has put up new road name signs.

OPINION

A county could be found liable under the Governmental Tort Liability Act for the failure of the county road superintendent to put up new road name signs in the circumstances described, if the installation of such signs is required by law or policy adopted by the county.

ANALYSIS

The opinion request indicates that the existence and operation of an E911 district in a county is creating a dispute over whether the E911 district, or the county road superintendent, is responsible for erecting new signs which might prevent harm caused by an ambulance's inability to locate an injured person, and whether the county could be found liable for the combined inaction of the E911 district and the road superintendent. Based on the Tennessee Governmental Tort Liability Act, which permits certain tort actions to be maintained against local governmental entities, a court would look to whether the county had a duty to erect the missing sign on a particular road.

Such a matter would involve a factual and legal conclusion under the Governmental Tort Liability Act and probably highly disputed issues of causation. This opinion will assume for the sake of analysis a fact situation where injury or death was proximately caused by the lack of a new sign. This opinion also will

assume that the road in question is one which the county owns and controls, or that even if the county does not own and control the road, that a sign on that road which needs to be changed is owned and controlled by the county. The opinion will then consider whether the operation of the E911 district alters or decreases any preexisting county duty to erect or change the pertinent sign.

A. County Liability for Highway Signs Generally:

When immunity from suit is removed by the Tennessee Governmental Tort Liability Act (GTLA), liability of the governmental entity shall be determined as if the entity were a private person. T.C.A. § 29-20-206. One provision removing immunity, T.C.A. § 29-20-203, specifically relates to road conditions, stating:

(a) Immunity from suit of a governmental entity is removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. "Street" or "highway" includes traffic control devices.

Cases interpreting this section have held that "the statutory exception to governmental immunity provided in this section embraces street signs and traffic control devices within its terms, as well as the actual surface conditions of streets and sidewalks." Fretwell v. Chaffin, 652 S.W.2d 755 (Tenn.1983). Although a road name sign is a type of traffic control device, and the Fretwell court considered street signs generally within this section, it is unclear whether either 1) the non-existence of a road name sign to identify a road, or 2) the existence of a road name sign which identifies the wrong name of a road, can be construed as a "defective, unsafe or dangerous condition" of such sign, or of the road it relates to, within the meaning of T.C.A. § 29- 20-203. We are unaware of any case so holding, and it seems this section is directed mainly to suits about driving conditions on the road, and the adequacy of signs to alert drivers to pertinent driving conditions and limitations, not the identity of the road itself.

***2** T.C.A. § 29-20-205, the section of the GTLA most relevant to the liability question in this opinion request, removes immunity from suit of all governmental entities for injury proximately caused by a negligent act or omission of any employee within the scope of his or her employment except, among other possible exceptions, if the injury arises out of the exercise or performance or the failure to exercise or perform a discretionary function. T.C.A. § 29-20-108 specifically declares that E911 boards and board members (but not employees) are immune from any claim relating to or arising from the conduct of the affairs of the board, except in cases of gross negligence.

A "planning-operational" test has been adopted to determine which governmental acts are entitled to immunity. Bowers ex rel. Bowers v. City of Chattanooga, 826 S.W.2d 427 (Tenn.1992), after remand, 855 S.W.2d 583 (Tenn.App.1992). Planning or policy-making decisions are considered discretionary and do not give rise to tort liability, while decisions that are merely operational are not considered discretionary, and thus, do not give rise to immunity. Id. In our opinion, the development of a policy to erect or not to erect certain signs would be planning, and hence immune. Conduct, however, that fails to comply with legal requirements, including policies adopted, may give rise to liability if the failure to follow the requirements is the proximate cause of injury. Doe v. Coffee County Bd. of

Educ., 852 S.W.2d 899 (Tenn.App.1992). Thus, if a policy has been duly adopted to require the erection of new signs in a particular manner, or if other state or local law requires the erection of a road sign, but the governmental entity given responsibility by the law has failed to implement it as required, that failure, we think, would be operational, and thus, could be a cause for liability. The policy or standards adopted by a county could include policies emanating from sources such as an E911 board.

In the case of county-owned and -controlled roads, the county legislative body has a duty of general supervision of those roads. T.C.A. § 5-5-119 states that "[t]he establishment and general supervision of roads and ferries, watercourses and local improvements, are entrusted to the county legislative body, as provided in title 54, chapters 7 and 9-14." County legislative bodies are given exclusive control of the establishment and supervision of roads and ferries. Ledbetter v. Turnpike Co., 110 Tenn. 92, 73 S.W.2d 117 (1902), overruled on other grounds, Knierim v. Leatherwood, 542 S.W.2d 806 (Tenn.1976).

Assuming the county has general supervision of the road in this opinion request, the county road superintendent probably has the responsibility to carry out the county's supervisory function. County road commissioners, though authorized to supervise the roads in their districts, are merely the agents of the county to construct and repair. The general supervision of the roads remains in the county legislative body. 23 Tenn.Juris. Streets and Highways, § 42., citing Harmon v. Taylor, 83 Tenn. (15 Lea) 535 (1885). Suit may be maintained against a county for any just claim (T.C.A. § 5-1-105), and a county may be sued in the name of the members of the county legislative body, especially if no objection is made. Wilson v. Davidson County, 3 Cooper's Tenn.Ch. 536 (1877).

***3** The Tennessee County Uniform Highway Law, T.C.A. §§ 54-7-101, et seq., would make the county road superintendents of applicable counties responsible for signage on county roads. The chief administrative officer (defined as a county road superintendent under T.C.A. § 54-7-103), except in those counties with elected road commissioners or county councils wherein the general control and authority over the county road systems shall remain as is provided by private or general act, shall be the head of the county highway department and shall have general control over the location, relocation, construction, reconstruction, repair and maintenance of the county road systems of the county. T.C.A. § 54-7-109(a). Thus, the failure of a road superintendent to act for the county could form a basis for county liability in a proper case. A court would look to the acts establishing the county road superintendent in question to determine that official's specific powers and duties.

The duty of a county to erect a road sign on a particular highway might be found under regulations of the Department of Transportation. T.C.A. § 54-5- 108(b) states that:

The department [of transportation] has full power, and it is made its duty, acting through its commissioner, to formulate and adopt a manual for the design and location of signs, signals, markings, and for posting of traffic regulations on or along all streets and highways in Tennessee, and no signs, signals, markings or postings of traffic regulations shall be located on any street or highway in Tennessee regardless of type or class of the governmental agency having jurisdiction thereof except in conformity with the provisions contained in such

manual.
(Emphasis added). The Manual on Uniform Traffic Control Devices is found in Rules of the Department of Transportation, Tenn.Comp.R. & Regs. Title XIV, Chapter 1680-3-44, Part X--Tennessee Supplement, and is promulgated under authority of T.C.A. § 54-5-108. The purpose of Chapter 1680-3-44 is to supplement the Manual on Uniform Traffic Control Devices (the "Manual") promulgated by the Federal Highway Administration which has been previously adopted by rulemaking procedures, at Chapter 1680-3-1. (Rule 1680-3-44-.01). A county or municipality should consult the Manual for any specific requirements. The Manual may be consulted by the courts in evaluating duty to put up signs. See O'Guin v. Corbin, 777 S.W.2d 697 (Tenn.App.1989). The Manual presents traffic control device standards for all streets and highways open to public travel regardless of type or class or the governmental agency having jurisdiction. Manual, 1A-1. In the language of the Manual, the word "should" is not mandatory, but is a recommended or advisory condition. The word "shall" indicates mandatory usage. Manual, 1A-5. The Manual says traffic control devices "shall" be placed only by the authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic. All regulatory devices, if they are to be enforced, need to be backed by applicable laws, ordinances, or regulations. Manual, 1A-3.

***4** We would note that the conventional highway rules set forth in Chapter 1680-3-44 are not always worded in mandatory form with respect to local government. In particular, the rule most pertinent to conventional county road name signs is Rule 1680-3-44-.15, entitled "Street Name Signs," which says, in pertinent part:

(1) Local governmental agencies are encouraged to erect street name signs in urban areas at all street intersections regardless of other route marking that may be present and in rural areas to identify important roads not otherwise marked. (Emphasis added). This rule, and its advisory language substantially reflects the Manual, which says street name signs "should" be erected in urban areas at all street intersections regardless of other route marking that may be present and "should" be erected in rural districts to identify important roads not otherwise marked. Manual, Section 2D-39 (D3). Generally, the requirements for signs on controlled access and high-speed roads are more stringent.

The foregoing rules do not appear to impose a specific mandatory duty on the county to erect road name signs, but rather, encourage compliance. In rural areas, the rule does not even encourage that every road be marked, but that a decision be made to determine what are "important" roads. Other rules or laws could, by contrast, be mandatory. Depending on the class of road involved, the type of intersection, and the laws, rules and standards which are applicable to the locality, a sign may be required, or left to the discretion of the county official involved. There is no way to generalize whether a county road superintendent should erect a road sign. Also, as the Governmental Tort Liability Act decisions indicate, a policy adopted by the county requiring the county to employ standards consistent with the regulations, which was not implemented, could impose liability in the case of neglect or failure to implement the policy.

B. County Liability Where an E911 District Operates:

1. County Liability Is Not Reduced by E911 Operations Since E911 Districts May Not Erect Road Signs:

E911 districts are created by ordinance or resolution, respectively, of a municipality or county, upon approval by a majority of eligible voters within the proposed district boundaries. T.C.A. §§ 7-86-104 and -105. Regardless of the county's responsibility for roads under its ownership and control, or to change signs which it owns and controls, there appears to be no explicit statutory basis for assigning or delegating any responsibility for the erection of street and road signs to the E911 district serving that territory. This is the case even though the legislature has expressed an intent that E911 districts be involved in the process of formulating whether a road needs a new name or a changed name, and to develop policies to promote efficient delivery of emergency services through this addressing function.

Prior to the enactment of T.C.A. § 7-86-127, this Office opined that an emergency communications district did not have any authority to expend district revenues for the acquisition and installation of highway, road, and street signs. See Op.Tenn.Atty.Gen. U93-19 (February 26, 1993); Op.Tenn.AttyGen. **94- 007 (** January 13, 1994) (copies attached). Op.Tenn.Atty.Gen. **94-007** reviewed the legislative history behind Public Chapter 479 of 1993, which is codified at T.C.A. § 7-86-102(c), regarding the intended use of the funds received by the district, noting that the statute specifically deleted provisions which would have allowed E911 boards to spend funds for the purchase and installation of highway, road, and street signs. Hence, previously there would have been no possibility of any obligation by the E911 district to put up street signs of any sort. The 1994 enactment of T.C.A. § 7-86-127 did not restore or reword the provision which had been deleted from the proposed 1993 enactment, and thus the opinion of this Office remains that an E911 district has no duty or authority to erect highway, road and street signs. Thus, a county cannot look to an E911 district to put up road signs to go along with the road names it recommends.

***5** A county might have questions relating to E911 involvement in new road signs because of T.C.A. § 7-86-127. That section provides:

(a) Unless expressly provided otherwise by law, the authority to name roads and streets, and to assign property numbers relating thereto, is exclusively vested in the legislative bodies of counties for unincorporated areas, and municipalities within their incorporated boundaries; provided, that the exercise of this authority must be in a manner acceptable to the United States postal service.

(b) The legislative bodies of any county or municipality may delegate the authority provided hereunder to the emergency communications district, if there be one; provided, that the legislative body shall approve road or street name changes made by the district under such terms as the legislative body may determine.

(c) Any county or city, including districts with delegated authority, may establish and impose reasonable fees and enforce policies relating to the changing of names of roads and streets.

(d) This section may not be construed to require a local government to maintain any portion of a road which the local government has not accepted. T.C.A. § 7-86-127 (1994 Tenn.Pub.Acts Ch. 807, § 2.) (Emphasis added.)

The preamble to the 1994 enactment of T.C.A. § 7-86-127 specifically found that to more fully accomplish the purposes of the Emergency Communications District Law,

> ... it is essential that each county have a uniform system of addressing which is consistent with regulations of the United States postal service in order to achieve maximum effect with minimum inconvenience to the public. The general assembly further finds that the involvement of emergency communications districts in the addressing activity is necessary and complementary to the responsibility of local governments, which requires explicit definition.

(1994 Tenn.Pub.Acts Ch. 807, § 1, emphasis added). By enacting T.C.A. § 7- 86-127, the legislature was explicitly defining the complementary involvement of E911 districts with local governments in the "addressing activity." Still, funds received by E911 districts are limited to the purposes for the furtherance of the part establishing E911 districts. T.C.A. § 7-86-102(c). Even in light of the preamble, the wording of T.C.A. § 7-86-127 does not seem to impose any duty on E911 districts, or the ability to expend any of their resources to erect the signs which might be associated with addressing activity.

The legislative history of Chapter 807 did not elaborate on whether the E911 districts have any power or specific duties to purchase or erect road signs. Subsections (a) and (b) of § 7-86-127 were meant to clarify that the local city or county legislative body retained power to approve all street and road names, even where the E911 district was delegated some role to aid in the assignment of the names, so that it was clear the E911 district had no independent, conflicting power to finally adopt names within the local jurisdiction. Also, the General Assembly wanted to make sure that strict compliance with U.S. postal regulations was recommended but not mandated because the postal rules were not ideally suited to the delivery of emergency services. The General Assembly affirmed that the E911 board should be involved, subject to the directive of the local legislative body, in the process of making sure that street and road names adopted be consistent with the purpose of efficient location of persons or property in emergencies. Subsection (c) was adopted specifically to clarify that the authority to impose reasonable fees set forth therein relates only to the changing of names, generally at the petition of local residents, but not to the initial naming of streets. (Legislative History, 3-10-94, House Session, Representative Duer, sponsor, HB 2728, and 3-22-94, Senate State and Local Government Committee, Comments of Sen. O'Brien, sponsor, SB 2730). Subsection (d) of § 7-86-127 was written to assure that where the local government, such as the county, had not accepted a road for maintenance, this statute would not impose a new duty to maintain that road strictly arising out of road name changes or assignments made to meet the uniform addressing purpose of the E911 act. (Leg. History, 3-22-94, Senate State and Local Government Committee).

***6** Under T.C.A. § 7-86-127, the only statutory role of an E911 district in street or road name changes or assignments might occur if a delegation under subsection (b) has occurred. If a delegation has taken place from the county to the E911 district of power to name roads and assign property numbers, then, subject to the terms of the delegation, such an E911 district may, under T.C.A. § 7-86-127(b), assign road names to previously unnamed roads and propose road name changes which shall be approved by the county legislative body, or, under T.C.A. § 7-86-127(c), establish and impose "fees and policies relating to the changing of names of roads...." We do not think that the power to impose such fees and

policies as an E911 district might adopt necessarily implies the power or duty of the E911 to erect signs for newly named roads or to reflect any road name changes. Because the E911 cannot use its resources to erect road signs, the county cannot rely on the E911 to share or take over any responsibility or liability the county might already have for a sign or road in question.

2. County Duty Potentially Might Be Extended by E911 Operations Due to County Resolutions Implementing Road Names Adopted or Proposed by the E911 District:

Certain actions of the E911 board, pursuant to the terms of the particular road-naming delegation from the county under which the E911 acts, might impose on the county a greater responsibility for erecting particular signs for roads named by the E911, or for which the E911 proposed a changed name that was then formally approved by the county legislative body. As noted under the Governmental Tort Liability Act, liability can be imposed if a governmental entity fails to implement a policy which it adopted and mandated itself to implement. If the county delegates its authority relating to naming roads to the E911 board, and, for instance, proposes terms in the delegation or other county resolution dictating that the road names adopted by the E911 board be reflected in road signs to be erected by the county within a certain period of time, then the county might be found liable for failure to follow its own duly adopted policy.

An example of this is found in Watts v. Robertson County, 849 S.W.2d 798 (Tenn.App.1992), where Robertson County delegated the responsibility of the county road supervisor to make bridge inspections to the State. The State advised the county through its inspection report that approach guard rails should be installed, which the road supervisor did not implement. The private act empowering the supervisor indicated that he should inspect to see that the bridges be in good repair and safe, establish an inspection system, and keep the bridges in good repair. The duty to keep the bridges in good repair was not carried out. The county was denied summary judgment because once the bridge was inspected and determined to be in need of guard rails, the Court found that the county, by its own private act, was required to install them. Id., at 800- 801. Similarly, a county could impose increased duties on itself because of the way it chooses to interact with the E911 board and to carry out its road-naming decisions. The county legislative body maintains ultimate control over this relationship and the terms of any delegation. If the county found that the manner in which it had resolved to implement E911 district proposals or decisions was too burdensome, then the county legislative body could presumably revoke or amend the terms of the delegation, and adjust its obligations.

***7** Arguably, the terms of the delegation to the E911, or any other enactment of the county legislative body or private act, could impose duties on the county road supervisor to erect certain signs for the health, safety and welfare of its citizens even on roads which the county did not otherwise maintain. In the Harris v. Williamson County case, supra, 838 S.W.2d 588 (Tenn.App.1992), it was undisputed that the county had authority to erect traffic control devices and create a special speed zone pursuant to statute at the location in question, even though the county did not otherwise maintain, own or control the road. In Harris, a statute, T.C.A. § 55-8-152(e), provided explicit authority for the county to

establish special speed limits upon any highway or public road of the state within its jurisdiction. This is more explicit regulatory authority for affecting roads not otherwise maintained by the county than the E911 context, where T.C.A. § 7-86-127(d) makes clear that the county has no heightened responsibility for maintaining roads just because the road-naming authority set forth in that statute has been exercised. The E911 act therefore does not address the extent of either the E911's or a county's police power over signs on private roads.

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Note

TO RETRIEVE THE FULL TEXT OF THE ATTACHED OPINION(S) SET FORTH AT THIS POINT, ENTER THE FOLLOWING FIND:

FI 1994 WL 88761

FI 1993 WL 603238

Tenn. Op. Atty. Gen. No. 95-032, 1995 WL 174521 (Tenn.A.G.)

END OF DOCUMENT

Tenn. Op. Atty. Gen. No. 95-050

Office of the Attorney General
State of Tennessee

Opinion No. 95-050
May 15, 1995

E-911 Dispatcher serving as Judicial Commissioner

Thomas R. Frierson, II
Hamblen County Justice Center
510 Allison Street
Morristown, TN 37814

QUESTION

Whether E-911 dispatchers and other personnel may also serve as judicial commissioners under T.C.A. §§ 40-5-202, et seq.

OPINION

These two positions are incompatible if an emergency dispatcher or other employee may, in the exercise of his or her job responsibilities, become acquainted with a case in which he or she may subsequently be asked to perform duties as a judicial commissioner.

ANALYSIS

You ask whether it is legally permissible for E-911 dispatchers and personnel to serve as judicial commissioners for the purpose of issuing arrest warrants and setting bail amounts. We assume you are referring to judicial commissioners appointed and serving pursuant to T.C.A. § 40-1-111, and T.C.A. §§ 40-5-201, et seq. These statutes outline the method by which the position of judicial commissioner may be created and filled within counties falling within certain population brackets.

The duties of judicial commissioners vary, depending on the statute pursuant to which they are appointed, but include issuance of arrest warrants; setting of bonds and recognizances; and the issuance of mittimus. T.C.A. § 40-5- 201(b); T.C.A. § 40-1-111(a)(1)(A)(i), (ii) and (iii); T.C.A. §40-1- 111(d)(2)(A), (B) and (D). Commissioners appointed under T.C.A. § 40-1- 111(a) may also issue search warrants and appoint attorneys for indigent defendants in accordance with law and guidelines established by the presiding general sessions judge of the county. T.C.A. § 40-1-111(a)(1)(A)(i) and (iii). Commissioners appointed under § 40-1-111(d) may issue search warrants where authorized by the general sessions judge or a judge or a court of record. No employee, officer or official of a county metropolitan government under T.C.A. § 40-5-201 may serve as a judicial commissioner in such county. T.C.A. § 40-5-202 (1992).

By the term "E-911 dispatchers and personnel," we assume you are referring to individuals employed by an emergency communications district in the county created under T.C.A. §§ 7-86-101, et seq. Such districts are not a department of the local government which creates them, but are separate governmental entities. Therefore, an employee of such a district would not be an employee of a county metropolitan government barred from serving as judicial commissioner under § 40-5-202. There are no other statutory bars which would prevent E-911 dispatchers and personnel from serving as judicial commissioners.

Under the common law, an individual is prohibited from holding incompatible public offices. State ex rel. v. Thompson, 193 Tenn. 395, 399, 246 S.W.2d 59 (1952). This

prohibition arises when an individual occupying both offices would have some supervisory authority over himself. Under T.C.A. §§ 7-86- 101, et seq., an emergency communications district is created to provide and coordinate emergency dispatch service through use of a single 911 primary emergency number. The statute indicates that a dispatcher answering all calls may decide the proper action to be taken and provide for the dispatch of emergency service units to answer the call; provide a requesting party with a telephone number for appropriate public safety agencies or other providers of emergency services; or transfer the call or relay information to appropriate public safety or emergency agencies. T.C.A. § 7-86-103 (Supp. 1994). These responsibilities do not appear to conflict with the duties of a judicial commissioner.

*2 However, the Fourth Amendment to the United States Constitution requires that an impartial magistrate, rather than a prosecutor or police officer, make the determination, not only whether or not a search warrant shall issue, but also the specification of the articles to be seized and the place to be searched. Anthony v. Carter, 541 S.W.2d 157, 160 (Tenn. 1976); Sibron v. State of New York, 392 U.S. 40, 59 (1968). See also, Annot., 32 L.Ed.2d 970 (1968). It is possible that in some circumstances the same individual may be asked to perform duties as a judicial commissioner such as issuing an arrest warrant or a search warrant or setting bond in a case which he or she handled as an emergency dispatcher. Prior acquaintance with a case as an emergency dispatcher could prevent a judicial commissioner from executing his or her duties impartially. As a result, we think the duties of the two positions are incompatible if an emergency dispatcher or other employee may, in the exercise of his or her job responsibilities, become acquainted with a case in which he or she may subsequently be asked to perform duties as a judicial commissioner.

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Tenn. Op. Atty. Gen. No. 95-050, 1995 WL 309924 (Tenn.A.G.)
END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **95-064**
June 19, 1995

Emergency Communications Districts: Use of Telephone Service Charge Revenues

Representative Keith Westmoreland
Suite 214, War Memorial Building
Nashville, Tennessee 37243-0102

QUESTIONS

1. May an emergency communications (E911) district, which has adopted the "direct dispatch method" of response to emergency calls pursuant to T.C.A. § 7-86-107(a)(1), lawfully expend emergency telephone service charge revenues to provide for the dispatch of appropriate emergency service units to its service users within the district?

2. Are there any circumstances under which an E911 district, which has adopted the "direct dispatch method" of response to emergency calls pursuant to T.C.A. § 7-86-107(a)(1), may not lawfully expend emergency telephone service charge revenues to provide for the dispatch of appropriate emergency service units to its service users within the district?

3. If such an E911 district changes its response method from the "direct dispatch method" to the "relay method," "transfer method," or "referral method" of response to emergency calls pursuant to T.C.A. § 7-86-107(a)(3) or (4), what restriction, if any, is imposed upon its disposition of property acquired with emergency telephone service charge revenues which had formerly been used to provide for the dispatch of appropriate emergency service units to its service users within the district?

OPINIONS

1. Yes, such services are part of the operation of the service district.

2. We think this question really concerns the scope of services such a district is authorized to provide. A district using the direct dispatch method may use its telephone service revenues to purchase equipment and pay the salaries of personnel required to dispatch emergency service units to service users within the district who require such service. However, we think the term "dispatch" includes only services necessary to notify and have necessary emergency units sent to the service users requesting them; it does not include the actual provision of emergency services such as law enforcement, medical treatment, or fire control. Thus, such a district cannot expend its funds for such personnel or emergency

equipment.

3. Such a change in method would cause two major changes in the finances of an E911 district. First, the district would no longer be responsible for radio dispatching of emergency calls. Its costs would therefore drop. Second, the district might have equipment on hand no longer necessary to carry out its services. Although the statute does not expressly authorize a district to dispose of such equipment, we think such power may be necessarily implied, so long as such equipment is not subject to a lien in favor of bondholders or other creditors of the district. The statute clearly contemplates that an E911 district will reduce its charge in the event its revenues exceed its costs. As a result, we think the district may only dispose of surplus equipment by selling it for fair market value. Proceeds from such sale may only be used for district operations.

ANALYSIS

1. Expenditure of Telephone Service Charge Revenues

***2** Emergency communications (E911) districts are established and operate under the Emergency Communications District Law, T.C.A. §§ 7-86-101, et seq. ("the Act"). The Act authorizes the directors of the E911 district to levy an "emergency telephone service charge" on telephone service users "to be used to fund the 911 emergency telephone service." T.C.A. § 7-86- 108(a)(1). "911 service" is defined to include "regular 911 service enhanced universal emergency number service or enhanced 911 service which is a telephone exchange communications service whereby a public safety answering point may receive telephone calls dialed to the telephone number 911. 911 service includes lines and may include the equipment necessary for the answering, transferring and dispatching of public emergency telephone calls originated by persons within the serving area who dial 911...." T.C.A. § 7-86- 103(11)(emphasis added).

T.C.A. § 7-86-102(c) says:

It is the intent that all funds received by the district are public funds and are limited to purposes for the furtherance of this part. The funds received by the districts are to be used to obtain emergency services for law enforcement and other public service efforts requiring emergency notification of public service personnel and the funds received from all sources shall be used exclusively in the operation of the emergency communications district.

Pursuant to T.C.A. § 7-86-107(a), the board of directors of the district is required to create an emergency communications service capable of using at least one of four methods in response to emergency calls: the direct dispatch; referral; relay; or transfer method. The board of directors is required to elect the method which it determines to be the most feasible for the district.

The four methods of response to emergency calls which district directors may adopt are defined at T.C.A. § 7-86-103 as follows;

(2) "Direct dispatch method" means a 911 service in which a public service answering point, upon receipt of a telephone request for emergency services, provides for the dispatch of appropriate emergency service units and a decision as

to the proper action to be taken;

***

(5) "Referral method" means a 911 service in which a public safety answering point, upon the receipt of a telephone request for emergency services, provides the requesting party with a telephone number of appropriate public safety agencies or other providers of emergency services;

(6) "Relay method" means a 911 service in which a public safety answering point, upon receipt of a telephone request for emergency services, notes the pertinent information from the caller and relays such information to the appropriate public safety agency or other agencies or other providers of emergency service for dispatch of an emergency unit;

***

(10) "Transfer method" means a 911 service in which a public safety answering point, upon receipt of a telephone request for emergency services, directly transfers such request to an appropriate public safety agency or other provider of emergency services;...

***3** Under the referral, relay, and transfer methods of responding to emergency calls, the service provides information or relays phone calls to emergency services. By contrast, under the direct dispatch method of responding to emergency calls, the 911 service actually dispatches the appropriate emergency services. This Office has previously opined that if an E911 district uses the direct dispatch method, the district is responsible for dispatching emergency services and can use the service charges collected to pay for the costs of dispatching. See Op. Tenn. Atty. Gen. U89-16 (February 16, 1989). These costs include not only those for the public safety answering point, but also for radio dispatching of emergency calls, including salaries and all equipment necessary to do the radio dispatching.

Under any of the other three methods, the E911 district serves as the public service answering point and refers, relays, or transfers emergency calls to the appropriate public safety agency or other provider of emergency services. The actual radio dispatching responsibility rests with the public safety agency or provider of emergency service to which the emergency communication district referred, relayed, or transferred the emergency call. Thus, a district using any of these methods could not pay dispatch costs out of the service.

II. Range of Services

An E911 district which uses the direct dispatch method is authorized to expend its funds to pay for personnel and equipment necessary to provide this service. We think your second question really concerns the range of services included within the term "dispatch of appropriate emergency service units." As a general

matter, the primary purpose of statutory construction is to ascertain and give effect, if possible, to the intention or purpose of the legislature as expressed in the statute. Westinghouse Electric Corporation v. King, 678 S.W.2d 19, 23 (Tenn. 1984) appeal dismissed 105 S.Ct. 1830 (1984). The meaning of a statute is determined by viewing the statute as a whole and in light of its general purpose. City of Lenoir City v. State ex rel. City of Loudon, 571 S.W.2d 297, 299 (Tenn. 1978).

T.C.A. § 7-86-102(a) says, in part:

"The general assembly finds and declares that the establishment of a uniform emergency number to shorten the time required for a citizen to request and receive emergency aid is a matter of public concern and interest. The general assembly finds and declares that the establishment of the number 911 as the primary emergency telephone number will provide a single, primary, three-digit emergency telephone number through which emergency service can be quickly and efficiently obtained and will make a significant contribution to law enforcement and other public service efforts requiring quick notification of public service personnel." (Emphasis added).

From the above, it is apparent that 911 service is intended to be a telephone service to speed the notification of appropriate emergency personnel. Thus, we believe the service charge revenues must be limited to operations of the 911 service, and directed to provision of quick notification or dispatch of emergency service providers, rather than provision of the emergency services themselves. As a result, the actual provision of the emergency services being sought by the caller is outside the 911 service which the district is authorized to provide. Examples of unauthorized expenditures would therefore include payment of ambulance services, fire services, police or sheriff's salaries. Further, pursuant to T.C.A. § 7-86-120, it is unlawful for any district to expend any of its funds except in accordance with a budget adopted under that statute.

III. Disposition of District Equipment

***4** The third question concerns the powers of an E911 district. Under the Act, an emergency communications district is a municipality or public corporation. T.C.A. § 7-86-106. A municipal corporation has limited powers in order to carry out a particular purpose, and may only exercise the powers expressly granted to it by the legislative act that created it or those that arise by necessary implication in order that it may carry out the purpose for which it was created. Professional Home Health & Hospice, Inc. v. Jackson- Madison County Gen. Hospital Dist., 759 S.W.2d 416, 419 (Tenn.App. 1988) p.t.a. denied (1989); City of Chattanooga v. Tennessee Electric Power Co., 172 Tenn. 524, 112 S.W.2d 385, 388 (1938). The Act nowhere authorizes an E911 district to dispose of its property. Nevertheless, we think this power arises by necessary implication in order that such a district may carry out the purpose for which it was created.

The Act authorizes an E911 district to issue bonds and creates a lien on its facilities in favor of bondholders. T.C.A. § 7-86-114; T.C.A. § 7-86- 115. Where a district has issued bonds, its power to dispose of surplus equipment may be limited by the rights of bondholders. Applicable statutes and bond documents

should be consulted to determine whether such restrictions exist. Even if the district has not issued bonds, we infer certain restrictions on its power to dispose of its property and the use of proceeds from such disposition from the Act as a whole. T.C.A. § 7-86-112 provides:

> If the proceeds generated by an emergency telephone service charge exceed the amount of moneys necessary to fund the service, the board of directors of the district shall reduce the service charge rate or suspend the service charge. The board of directors may, by resolution, reestablish the service charge rate, or lift the suspension thereof, if the amount of moneys generated is not adequate to fund the service.

Thus, it appears that the General Assembly intended an E911 district to charge fees only sufficient to fund its services. A change in the method such a district uses from the "direct dispatch" to one of the three other methods would cause two major changes in the finances of the district. First, the district would no longer be responsible for radio dispatching of emergency calls. Its operating costs would therefore be reduced. Second, the district might have equipment on hand which is no longer necessary to carry out its services. This equipment may have been purchased out of revenues generated by the emergency telephone service charge. The statute clearly contemplates that an E911 district will reduce its charge in the event its revenues from the charge exceed its costs. As a result, we think the district may only dispose of surplus equipment by selling it for fair market value. Proceeds from such sale may only be used for district operations. In addition, if the district's operating costs are reduced by its change in method, the Act requires the district to reduce its emergency telephone service charge.

***5** Charles W. Burson

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Senior Counsel

Tenn. Op. Atty. Gen. No. 95-064, 1995 WL 370382 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **96-004**
January 16, 1996

Applying 911 Service Charge to Cellular Phones

Hon. Ward Crutchfield
State Senator
Suite 13 Legislative Plaza
Nashville, Tennessee 37243-0210

QUESTION

Tenn. Code Ann. § 7-86-108 authorizes an emergency communications district to impose a monthly fee on residential and business "service users" to fund 911 emergency telephone service. May the district levy this fee on cellular phone users?

OPINION

Under the current statute, the district may not levy this fee on cellular phone users.

ANALYSIS

Emergency communications (E-911) districts are established and operate under the Emergency Communications District Law, Tenn. Code Ann. §§ 7-86-101, et seq. ("the Act"). The Act authorizes the directors of the E-911 district to levy an "emergency telephone service charge" on telephone "service users". Tenn. Code Ann. § 7-86-108(a)(1)(Supp. 1995). The Act defines "service user" as "any person, corporation or entity who or which is provided 911 service." Tenn. Code Ann. § 7-86-103(8)(Supp. 1995). The Act defines "911 service" to include:

> regular 911 service enhanced universal emergency number service or enhanced 911 service which is a telephone exchange communications service whereby a public safety answering point may receive telephone calls dialed to the telephone number 911. "911 service" includes lines and may include the equipment necessary for the answering, transferring and dispatching of public emergency telephone calls originated by persons within the serving area who dial 911 ....

Tenn. Code Ann. § 7-86-103(11)(Supp. 1995). Under this definition, any user who can reach the answering point by dialing 911 is provided 911 service. Literally, a cellular phone customer who can reach the answering point by dialing 911 would be a "service user" under this definition. The Act as a whole, however, reflects no

method of billing this charge to cellular phone customers. The statute authorizing the district to levy the charge indicates that the charge will be billed by the "service supplier" to "service users." Tenn. Code Ann. § 7-86-108(d)(Supp. 1995). The Act defines the term "service supplier" to mean, "any person, corporation or entity providing exchange telephone service to any service user." Tenn. Code Ann. § 7-86-103(7)(Supp. 1995)(emphasis added). The Act provides no definition of "exchange telephone service." But the Act contains the following definition of "exchange access facilities":

> "Exchange access facilities" means all lines, provided by the service supplier for the provision of exchange telephone service, as defined in existing general subscriber services tariffs filed by the service supplier with the public service commission;

Tenn. Code Ann. § 7-86-103(4)(Supp.1995)(emphasis added). [FN1] Further, the Act provides that the "service supplier" is to bill the district for its service, "at the applicable rate as set forth in the service supplier's tariff on file with the public service commission for such service ...." [FN2] Tenn. Code Ann. § 7-86-111(Supp. 1995). Under state law, the Public Service Commission may only regulate the rates of certain cellular phone service providers. Tenn. Code Ann. § 65-4-101(a)(6)(Supp. 1995)(as further amended by 1995 Tenn. Code Ann. Ch. 305, § 20, effective July 1, 1996). In addition, there is a distinction in the statutes between "domestic public cellular radio telephone service" and "'[b]asic local exchange telephone services."' Compare Tenn. Code Ann. § 65-4-101(a)(6)(Supp. 1995) with Tenn. Code Ann. § 65-5-208(a)(1)(Supp. 1995). Read together, these statutes reflect an intent to limit the term "service supplier" in the Emergency Communications District Law to a phone company that is subject to regulation by the Public Service Commission and that supplies exchange telephone service through physical telephone lines. The Act authorizes only such a service supplier to bill the emergency telephone service charge to its customers. Thus, even if an emergency communications district were authorized to impose the charge on cellular phone users, the Act does not authorize the district to require a cellular phone company to bill the charge to its customers. Thus, the Act provides no billing mechanism for such charges.

***2** The primary rule in statutory construction is to give effect to the legislative intent. Mercy v. Olsen, 672 S.W.2d 196 (Tenn. 1984). The meaning of a statute is to be determined not from special words in a single sentence or section but from the statute taken as a whole and viewing the legislation in the light of its general purpose. State ex rel. Bastnagel v. City of Memphis, 224 Tenn. 514, 457 S.W.2d 532 (1970). "Statutes forming a single statutory scheme should be construed together to make the system consistent in all its parts and uniform in its operation." Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988) (citing Westinghouse Elec. Corp. v. King, 678 S.W.2d 19, 23 (Tenn. 1984). Reading the Act as a whole, this Office concludes that the General Assembly did not intend the emergency telephone service charge under Tenn. Code Ann. § 7-86-108 to extend to cellular telephone users.

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[FN1]. Effective July 1, 1996, this section has been amended to read: "'Exchange access facilities' means all lines, provided by the service supplier for the provision of exchange telephone service, as defined in existing general subscriber services tariffs filed by the service supplier with the Tennessee regulatory authority." 1995 Tenn.Pub.Acts Ch. 305, § 86.

[FN2]. Effective July 1, 1996, the term "Tennessee regulatory authority" is substituted for "public service commission." 1995 Tenn.Pub.Acts Ch. 305.

Tenn. Op. Atty. Gen. No. 96-004, 1996 WL 21047 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. 96-144
December 3, 1996

Agreement to keep unlisted telephone numbers confidential

Senator D.E. Crowe, II
Suite 6A, Legislative Plaza
Nashville, Tennessee 37243-0203

QUESTION

May an emergency communications district, organized under Tenn. Code Ann. §§ 7-86-101, et seq., furnish names and addresses of unlisted telephone number holders to the public, even where, in order to obtain the numbers, the district has signed a confidentiality agreement with a local telephone provider?

OPINION

Unlisted telephone numbers, in the custody of the district, are public records that the agency must make available for public inspection and copying during business hours unless otherwise provided by state law. No such exemption in state law, either by statute or under the Tennessee Constitution, exists. Similarly, release of this information would not violate any federal statute or any provision of the United States Constitution. An agreement by a governmental agency to restrict public access to public records that are not exempt under state law violates public policy and is unenforceable. Thus, the district must make these records available for personal inspection and copying by any citizen of the State.

ANALYSIS

Your question concerns the authority of an emergency communications district organized and operating under Tenn. Code Ann. §§ 7-86-101, et seq. This statutory scheme authorizes a city or county to create an emergency communications district to establish and operate an emergency communications service using the digits 911. Tenn. Code Ann. §§ 7-86-105 & -107. A district created under this statutory scheme is a "municipality" or public corporation and a "body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes." Tenn. Code Ann. 7-86-106.

To finance the service, the board of directors is authorized to levy an emergency telephone service charge on service users throughout the district. Tenn.

Code Ann. § 7-86-108. The service supplier--usually, the telephone company providing phone service within the district--bills and collects this service charge to service users--usually, telephone customers in the district. Tenn. Code Ann. § 7-86-108(d). The company must remit the service charge funds to the district. Tenn. Code Ann. § 7-86-110. Either the service supplier or the board of directors may demand payment from a service user who fails to pay a proper service charge and may terminate service to such user. Id. The service supplier bills the district for 911 service that the supplier may provide the district. The statute authorizes the board of a district to "subscribe to the appropriate telephone services from the service supplier." Tenn. Code Ann. § 7-86-107(c).

You ask whether a district may furnish the names and addresses of unlisted telephone number holders to the public, even where, in order to obtain the numbers, the district signed an agreement with a local telephone provider agreeing to keep the numbers confidential. Thus, presumably, disclosing the numbers would violate the district's contract with the telephone provider.

***2** State law provides:

(a) All state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Tenn. Code Ann. § 10-7-503(a) (emphasis added). Tenn. Code Ann. § 10-7- 506 provides that one who has a right to inspect public records has the right to take extracts or make copies of them, and to make photographs or photostats of them while they are in the possession of their lawful custodian, subject to "reasonable rules." This statutory scheme is often referred to as the Public Records Act. In this statute, "the Legislature unequivocally stated its intention to open governmental activity to public scrutiny ...." Memphis Publishing Co. v. City of Memphis, 871 S.W.2d 681, 685 (Tenn. 1994). Under the Act, if documents have been made or received in connection with the transaction of official business by any governmental agency, then a presumption of openness exists, and the governmental agency has the burden to justify non-disclosure. Id. at 684. The Memphis Publishing Co. case makes clear that a public record is presumed open in the absence of a specific exception.

The proper test in determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. Griffin v. City of Knoxville, 821 S.W.2d 921, 924 (Tenn. 1991). As noted above, an emergency communications district is a "municipality" and a public corporation. Such a district is therefore a governmental agency, and any record it made or received in connection with its official business would be a public record open to inspection unless otherwise provided by state law. Custody and release of E911 records are further discussed in Op. Tenn. Atty. Gen. **93-65** (November 29, 1993) and Op. Tenn. Atty. Gen. U95-088 (October 19, 1995).

Presumably, the district obtained the telephone numbers in implementing its statutory duty to create an emergency telephone service within the district. Unlisted telephone numbers in the custody of an emergency communications district are therefore public records subject to public inspection unless otherwise provided by state law. No state statute makes such records confidential. You

indicate that the district, in order to obtain the telephone numbers from the phone company, signed a contract agreeing not to disclose the unlisted numbers. The Tennessee Supreme Court, interpreting § 10-7-503, has stated that the General Assembly's enactments on public records express this State's public policy on this subject. See Memphis Publishing Co. v. Holt, 710 S.W.2d 513, 516 (Tenn. 1986). Thus, it is the public policy of this State for public records to be open for inspection unless otherwise provided by state law. By entering into an agreement to restrict access to public records for which no statutory exemption is available, the district would be attempting to create a new exemption from the Public Records Act. Such a contract is against public policy. Courts will decline to enforce a contract if the contract violates state law, provides for doing something that is contrary to statute, or harms the public good. Mattox v. Loretto Financial Services, No. 01-A-01- 9307-CV-00308 (Tenn. Ct. App. filed Dec. 14, 1994). Accordingly, a contract by an emergency communications district to refuse to disclose unlisted telephone numbers in its custody is unenforceable.

***3** If a state law conflicts with a federal law, either because compliance with both state and federal law is impossible, or because state law frustrates the purposes and objectives Congress expressed in the federal law, the state law is preempted under the Supremacy Clause of the United States Constitution. See, e.g., Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984). Federal law places some restrictions on release of unlisted telephone numbers by a telephone company. But it is not necessary to address whether these restrictions would preempt the Public Records Act because no federal restriction appears to apply directly to an emergency communications district. E.g., 47 C.F.R. § 51.27(c)(3)(iii) (FCC regulation applicable to "local exchange carrier" but not to an emergency communications district). Research has disclosed no other federal statute or regulation that would require the district to keep the numbers confidential.

This Office has concluded that the Public Records Act, as applied to a particular fact situation, may be unconstitutional. Op. Tenn. Atty. Gen. 87-4 (January 9, 1987). Thus, the Public Records Act would not require public access to a record if granting access would violate a right protected under the Tennessee or United States Constitution. See Op. Tenn. Atty. Gen. 96-027 (February 28, 1996) (constitutional right to a secret ballot is an exception to the Public Records Act). The question remains, then, whether the Tennessee or United States Constitution would prohibit a public agency from providing public access to unlisted telephone numbers in its custody because allowing access would violate a constitutionally protected right.

Courts in other states have differed on whether an individual has a "reasonable expectation of privacy" in an unlisted telephone number or other information under the Fourth Amendment to the United States Constitution sufficient to require law enforcement officials to procure a warrant to obtain it. Compare People v. Chapman, 679 P.2d 62 (Cal. 1984) (California constitution protected defendant's reasonable expectation of privacy in unlisted name, address, and telephone number, so that seizure by the police of the information without a warrant, consent, or exigent circumstances was unreasonable and violated the state constitution) & Saldana v. State, 846 P.2d 604 (Wyo. 1993), rehearing denied (1993) (obtaining an individual's name and telephone records through unlisted number was not a "search"

requiring a warrant because the defendant had no legitimate expectation of privacy in the information). In those cases, law enforcement officials obtained information from a private phone company. By contrast, this opinion addresses release of public records that are already in the custody of a governmental agency.

Both the Tennessee and the United States Constitution protect individual privacy rights. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993); Bellotti v. Baird, 443 U.S. 622 (1979). As applied, the right of privacy has been limited in its protection to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty, for example, activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. See, e.g., Roe v. Wade, 410 U.S. 113 (1973). The Sixth Circuit Court of Appeals has also held that the United States Constitution does not encompass a general right to privacy or reputation that would make the publication of private information a constitutional violation. J.P. v. Desanti, 653 F. 2d 1080, 1088-89 (6th Cir. 1981) (post-adjudication dissemination of social histories of juvenile offenders did not violate offenders' federal constitutional right to privacy). In Desanti, the Court stated that safeguards regarding non-disclosure of private information "must be left to the states or the legislative process." Id. at 1090-91; accord, Cline v. Rogers, 87 F.3d 176 (6th Cir. 1996) (no federal constitutional right to privacy in individual's criminal record; Tennessee law does not recognize a private cause of action for violations of the Tennessee Constitution). No other available Tennessee or federal case indicates that releasing an individual's unlisted telephone number under these circumstances would rise to the level of a constitutional violation. As a result, under the Public Records Act, unlisted telephone numbers and related names and addresses received by an emergency communications district in connection with the transaction of its official business must be open for personal inspection by any citizen of Tennessee during business hours. The agency also must make the records available for copying, "subject to reasonable rules."

***4** Charles W. Burson

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END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **97-091**
June 23, 1997

Use of E911 Tariff Monies for Emergency Vehicle Radio Receivers

Rep. Edith Langster
State Representative
741 Legislative Plaza
Nashville, Tennessee, TN 37243

QUESTIONS

1. Is an emergency communications district, operating under Tenn.Code Ann. §§ 7-86-101, et seq., authorized to use emergency telephone service tariffs levied under Tenn.Code Ann. § 7-86-108 to purchase the emergency vehicle radio receivers for use with a proposed replacement system further described below?

2. Is the answer to Question 1 different if, under the system, emergency calls are dispatched from the 911 emergency answering point to another computer dispatch console at a separate location, which then communicates with an emergency provider through the emergency vehicle radio receiver?

OPINIONS

1. The emergency vehicle radio receivers are "necessary equipment for the district" within the meaning of Tenn.Code Ann. § 7-86-108(e). Therefore an emergency communications district may use emergency telephone service tariffs levied under this statute to purchase the receivers.

2. If the separate console to which you refer would be located at a police station or other emergency service provider, and purchased and maintained by the police department, an argument could be made that the radio receivers are part of the police department's communication system, and therefore are not "necessary equipment" for the district. So long as the radio receivers are an integral part of the emergency communications system provided by the district, however, this Office concludes that their purchase falls within the term "purchases of necessary equipment" for the district under Tenn.Code Ann. § 7-86-108(e).

ANALYSIS

This request concerns the use of emergency telephone service charges levied

under the Emergency Communications District Law, Tenn.Code Ann. §§ 7-86-101, et seq. (the "Act"). The Metropolitan Government of Nashville and Davidson County ("Metro") provides 911 emergency service through an emergency communications district operating under the Act. Metro is planning to replace its existing method of providing 911 service with an 800 megahertz trunked- radio system. Dispatch infrastructure for the new system will include radio towers, lines, and computer dispatcher consoles. The proposed system requires special radio equipment to be located in the emergency vehicle, such as a police patrol car, in order for complete communication to take place between the 911 answering point and the emergency vehicle that will respond to the request for assistance. When this system is functioning, most communication will be by direct dispatch: that is, the 911 answering point will communicate directly with the emergency vehicle. Some calls may require communication from the computer at the answering point, to a computer at the dispatch console (possibly at a separate location) and then to the computer in the radio receiver in the emergency vehicle. The emergency vehicle radio receivers will be similar to a cellular telephone system.

***2** As a general matter, the primary purpose of statutory construction is to ascertain and give effect, if possible, to the intention or purpose of the legislature as expressed in the statute. Westinghouse Electric Corporation v. King, 678 S.W.2d 19, 23 (Tenn. 1984), appeal dismissed 105 S.Ct. 1830 (1984). The meaning of a statute is determined by viewing the statute as a whole and in light of its general purpose. City of Lenoir City v. State ex rel. City of Loudon, 571 S.W.2d 297, 299 (Tenn. 1978).

Tenn.Code Ann. § 7-86-102 sets forth the General Assembly's declaration and intent with regard to the Act. The statute provides in relevant part:

(a) The general assembly finds and declares that the establishment of a uniform emergency number to shorten the time required for a citizen to request and receive emergency aid is a matter of public concern and interest. The general assembly finds and declares that the establishment of the number 911 as the primary emergency number will provide a single, primary, three-digit emergency telephone number through which emergency service can be quickly and efficiently obtained and will make a significant contribution to law enforcement and other public service efforts requiring quick notification of public service personnel. It is the intent to provide a simplified means of securing emergency services which will result in saving of life, a reduction in the destruction of property, quicker apprehension of criminals and ultimately the saving of money.

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(c) It is the intent that all funds received by the district are public funds and are limited to purposes for the furtherance of this part. The funds received by the districts are to be used to obtain emergency services for law enforcement and other public service efforts requiring emergency notification of public service personnel and the funds received from all sources shall be used exclusively in the operation of the emergency communications district. Tenn.Code Ann. § 7-86-102(a) and (c)(Supp. 1996).

Under the Act, a local legislative body may create an emergency communications

district within all or part of its boundaries. Tenn.Code Ann. § 7-86-104; Tenn.Code Ann. § 7-86-105. Under Tenn.Code Ann. § 7-86- 107, the board of directors of an emergency communications district must create an emergency communications service designed to have the capability of using at least one of four specified methods in response to emergency calls. These methods are the direct dispatch method; the referral method; the relay method; and the transfer method, and they are further defined in Tenn.Code Ann. §7- 86-103. Under Tenn.Code Ann. § 7-86-108, the board of directors of the district is authorized to levy an emergency telephone service charge to fund the 911 emergency telephone service. Subsection (e) of this statute provides:

Revenues from the tariffs authorized in this section shall be used for the operation of the district and for the purchases of necessary equipment for the district.

***3** Tenn.Code Ann. § 7-86-108(e)(Supp. 1996)(emphasis added). The Act defines "911 Service" as follows:

"911 service" means regular 911 service enhanced universal emergency number service or enhanced 911 service which is a telephone exchange communications service whereby a public safety answering point may receive telephone calls dialed to the telephone number 911. "911 service" includes lines and may include the equipment necessary for the answering, transferring and dispatching of public emergency telephone calls originated by persons within the serving area who dial 911, but does not include dial tone first from pay telephones which may be made available by the service provider based on the ability to recover the costs associated with its implementation and consistent with tariffs filed with the Tennessee regulatory authority.

Tenn.Code Ann. § 7-86-103(11)(Supp. 1996)(emphasis added). Based on the facts provided in the request, it is the opinion of this Office that the emergency vehicle radio receivers you describe are "necessary equipment" for the district within the meaning of Tenn.Code Ann. § 7-86-108(e). As you describe the system, the special radio receivers are necessary components of an integrated system whose purpose is to provide a more efficient communications link between the answering point/dispatcher and the emergency service provider. These receivers are therefore equipment "necessary for the answering, transferring, and dispatching of public emergency telephone calls originated by persons within the serving area who dial 911" within the definition of 911 service quoted above.

This conclusion is not inconsistent with the opinions cited in the request. See Op.Tenn.Atty.Gen. 95-064 (June 19, 1995); and U89-16 (February 16, 1989). In those opinions, this Office concluded that an emergency communications district may use its service charge to include "salaries and all equipment necessary to do the radio dispatching" only if the board of directors determines to use the "direct dispatch method" defined in Tenn.Code Ann. § 7-86-103. If the board determines to use the "referral," "relay" or "transfer" methods defined in the Act, then the radio dispatching costs should be borne by the agency that receives the transferred, referred, or relayed request for emergency service. This conclusion appears to be based on the reasoning that, if the district uses the referral, relay, or transfer methods defined in the Act, it merely forwards a request for emergency services to an emergency service provider central answering point, which must then dispatch the appropriate service vehicle to the person making the 911 call. In that case, the emergency communications district would not be taking responsibility for actually dispatching police, ambulance, or other emergency service to the provider. This reasoning was based on the definitions of the

different types of service included in the Act. Under those systems, therefore, costs associated with dispatching emergency services would not be part of the service provided by the emergency communications district.

***4** By contrast, the proposed emergency communications system is a fully integrated system that will undertake to receive requests for emergency service, forward them as necessary, and communicate the request directly to the police, ambulance, or other emergency vehicle that will ultimately contact the individual requesting the service. All these functions fall within the purposes set forth in Tenn.Code Ann. § 7-86-102(c), cited above. As a result, this Office concludes that the purchase of the receivers is included within the term "purchases of necessary equipment" for the district under Tenn.Code Ann. § 7-86-108(e).

In your request, you indicate that some calls may be communicated to the radio receivers from an answering point to the computer at a dispatch console, possibly at a separate location, and then to the computer in the radio receiver in the emergency vehicle. You do not indicate where the dispatch console will be located or whether it will be purchased and maintained by the emergency communications district. It is possible the console to which you refer would be located at a police station or other emergency service provider, and purchased and maintained by the police department. An argument could be made that the radio receivers are therefore part of the police department's communication system, and thus are not "necessary equipment" for the district. Clearly, there is some overlap between providing an emergency communication service and the provision of law enforcement services. So long as the radio receivers are an integral part of the emergency communications system provided by the district, however, it is the opinion of this Office that their purchase falls within the term "purchases of necessary equipment" for the district under Tenn.Code Ann. § 7-86-108(e).

John Knox Walkup

Attorney General and Reporter

Michael E. Moore

Solicitor General

Ann Louise Vix

Senior Counsel

Tenn. Op. Atty. Gen. No. 97-091, 1997 WL 381164 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. 98-094
April 28, 1998

House Bill 3026 regarding 911 numbers and addresses

The Honorable Frank Buck
State Representative
Suite 32, Legislative Plaza
Nashville, TN 37243-0140

QUESTION

House Bill No. 3026 proposes to require addresses held with unpublished telephone numbers, or addresses otherwise collected or compiled and in the possession of **emergency communications** districts, to be made available upon written request to any county election commission for the purposes of compiling a voter mailing list for a respective county. If passed, would this legislation violate any state or federal statutes?

OPINION

It is the opinion of this Office that if House Bill No. 3026, as amended, is passed, it would not violate any state or federal statutes.

ANALYSIS

House Bill No. 3026, as amended, provides as follows:

Tennessee Code Annotated, Section 10-7-504(e), is amended by inserting the following language at the end of the subsection:

Provided, however, addresses held with such unpublished telephone numbers, or addresses otherwise collected or compiled, and in the possession of **emergency communications** districts created pursuant to title 7, chapter 86, shall be made available upon written request to any county election commission for the purpose of compiling a voter mailing list for a respective county. *

You have asked whether this proposed legislation would violate any state or federal statutes, and in particular 18 U.S.C. § 2703.

With regard to state statutes, the courts have recognized the legislature's prerogative to declare this State's policy with regard to public records. Memphis Publishing Co. v. Holt, 710 S.W.2d 513 (Tenn. 1986); Thompson v. Reynolds, 858 S.W.2d 328 (Tenn. Ct. App. 1993). Under the Public Records Act, all state, county,

The quoted proposed statutory language was enacted into law in substantially the same form

and municipal records are open for personal inspection by any citizen of Tennessee, unless otherwise provided by state law. Tenn. Code Ann. § 10-7-503 (Supp. 1997). An **emergency communications** district created pursuant to Tenn. Code Ann. §§ 7-86-101, et seq., is considered to be a municipality under Tenn. Code Ann. § 7-86-106. Thus, the records of such a district are open for personal inspection unless state law provides otherwise.

H.B. 3026, as amended, would require that addresses held with unpublished telephone numbers or otherwise collected or compiled and in the possession of **emergency communications** districts be made available upon request to county election commissions. As noted above, **emergency communications** district records are municipal records subject to public inspection unless otherwise provided by state law. If H.B. 3026 is enacted, it would not be inconsistent with or violate any state law.

Furthermore, requiring the release of these records upon request to a county election commission would not violate any federal statute or constitutional provision [FN1], including 18 U.S.C. § 2703. That statute is part of the federal Electronic Communications Privacy Act, 18 U.S.C.A. §§ 2701, et seq., which bars unlawful access to stored electronic communications. Section 2701 makes it a crime, punishable by a fine and/or imprisonment, to

***2** (1) intentionally access[es] without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceed[s] an authorization to access that facility and thereby obtain[s], alter[s] or prevent[s] authorized access to a wire or electronic communication while it is in electronic storage in such system . . ..

Section 2702 prohibits a person or entity providing an electronic communication service to the public from knowingly divulging to any person or entity the contents of a communication while in electronic storage by that service, except under certain enumerated circumstances. One such circumstance is found in § 2703, which sets forth the requirements for governmental access to the contents of an electronic communication that is in electronic storage in an electronic communications system.

Under the **Emergency Communications** District Law, Tenn. Code Ann. §§ 7-86- 101, et seq., an **emergency communications** district is a "municipality" or public corporation authorized to create an **emergency communications** service ("911 service") and to subscribe to the appropriate telephone services from a service supplier to establish 911 service. Tenn. Code Ann. §§ 7-86-106 & - 107. Thus, an **emergency communications** district is not an entity that provides an electronic communication service to the public and/or that electronically stores wire or electronic communications and, therefore, the above cited provisions of the Electronic Communications Privacy Act are not applicable to it.

Accordingly, it is the opinion of this Office that the proposed legislation, if passed would not violate any state or federal laws.

John Knox Walkup

Attorney General and Reporter

Michael E. Moore

Solicitor General

Janet M. Kleinfelter

Assistant Attorney General

[FN1]. In Kallstrom v. City of Columbus, 136 F.3d. 1055 (6th Cir. 1998), the United States Court of Appeals for the Sixth Circuit held that a city violated the due process rights of certain undercover police officers when it released addresses and other information from their personnel files to an attorney representing the defendants in a criminal case arising out of an undercover investigation in which the officers had participated. Although the information was not confidential under Ohio's public records law, the Court held that the city was required to give notice and an opportunity to be heard before disclosing the information in circumstances where they knew or should have known that releasing the information substantially increased the risk of the personal safety of the officers and their families. The facts of this case would distinguish it from a release of addresses by an **emergency communications** district to a county election commission, and thus, we do not think the E-911 district would need to give notice and opportunity for hearing before releasing addresses to a county election commission in order to avoid a federal constitutional violation.

Tenn. Op. Atty. Gen. No. 98-094, 1998 WL 227416 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **98-183**
September 9, 1998

Creation of New Emergency Communications District

Honorable Jack Sharp
State Representative
107 War Memorial Building
Nashville, TN 37243-0130

QUESTION

Does 1998 Tenn. Pub. Acts Ch. 1108, relative to emergency communications districts, prohibit the City of East Ridge from holding a referendum to allow the creation of a new emergency communications district without prior approval of the Emergency Communications Board created under that act?

OPINION

1998 Tenn. Pub. Acts Ch. 1108, Section 14, provides that no referendum to allow the creation of a new emergency communications district within the boundaries of an existing emergency communications district may take place without prior approval by the Emergency Communications Board. Thus, if the City of East Ridge is within the boundaries of an existing emergency communications district, it may not hold a referendum to create a new municipal communications district without the prior approval of this board. If it is not within the boundaries of an existing emergency communications district, it may hold such a referendum, but the newly created district must have its 911 system approved by the board prior to implementation.

ANALYSIS

This opinion concerns the impact of 1998 Tenn. Pub. Acts Ch. 1108 (the "Act") on the creation of new emergency communications districts. Under Tenn. Code Ann. § 7-86-104, the legislative body of a city or county may create an emergency communications district within all or part of the boundaries of the municipality or county. The statute provides for a referendum of voters within the boundaries of the proposed district to approve the new district. An emergency communications district created under this statute has the powers set forth in Tenn. Code Ann. § 7-86-105 through § 7-86-127. The request indicates that the City of East Ridge is considering creating a new emergency communications district within the boundaries

of the municipality.

The Act amends the statutory scheme governing emergency communications services at Tenn. Code Ann. §§ 7-86-101, et seq. Section 5 of the Act creates an Emergency Communications Board, referred to as "the board" throughout the rest of the statute, within the Department of Commerce and Insurance to assist emergency communications district boards of directors throughout the State. Various sections of the Act describe the powers and responsibilities of the Emergency Communications Board. Under Section 10 of the Act, for example, this board is authorized to establish operating standards for emergency communications districts and to establish operating standards concerning acceptable uses of revenue for emergency communications districts. Under Section 11 of the Act, the board is required to develop and implement a plan for providing 911 service and wireless enhanced 911 service to all citizens of Tennessee. Section 11(b) provides:

***2** The board shall encourage and promote the planning, development, and implementation of 911 service for each newly created emergency communications district. Any emergency communications district newly created after the effective date of this Act shall have its 911 system plan approved by the board prior to implementation. The plan for each such district shall include specific local requirements. Such plan shall include, but not be limited to, law enforcement, firefighting, and emergency medical services and may include, but not be limited to, other emergency services such as poison control, animal control, suicide prevention, and emergency management services.

Such plan shall also include funding requirements necessary to implement and operate the 911 system; provided, however, that if anticipated revenues are not adequate to achieve and maintain technical and operating standards as established by the board in this part, the board shall undertake a study to determine other options for the provision of 911 service to that area.

(Emphasis added). Therefore, any newly created emergency communications district must have a plan for its 911 system approved by the Emergency Communications Board prior to implementing that plan. Under Section 14 of the Act:

After the effective date of this act, no referendum to allow the creation of a new emergency communications district within the boundaries of an existing emergency communications district shall take place without prior approval by the board. In the event that the board determines that such a creation is in the best interest of the public, and after holding a public hearing within the service area of the existing emergency communications district, the board may order that a referendum be held; provided, however, that such action shall not threaten the financial integrity or stability or the level or quality of 911 service of the existing emergency communications district.

1998 Tenn. Pub. Acts Ch. 1108, § 14 (emphasis added). The Act became effective upon becoming law on May 20, 1998. 1998 Tenn. Pub. Acts Ch. 1108, § 32. Therefore, the Act prohibits a referendum to allow the creation of any new emergency communications district within the boundaries of an existing district without the prior approval of the Emergency Communications Board. If the City of East Ridge is within an existing emergency communications district, it may not hold a referendum to allow the creation of a new emergency communications district within the city boundaries without the prior approval of the Emergency Communications Board. If the City of East Ridge is not within an existing emergency communications district, it may create a new district, but implementation of any emergency communications plan developed by the new district may not be implemented without the prior approval of the Emergency Communications Board.

John Knox Walkup

Attorney General and Reporter

Michael E. Moore

***3** Solicitor General

Ann Louise Vix

Senior Counsel

Tenn. Op. Atty. Gen. No. 98-183, 1998 WL 661357 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. 99-022
February 9, 1999

Confidentiality of 911 Tapes Being Used in Pending Criminal Investigations.

Bill Clabough
State Senator, 8th District
309 War Memorial Building
Nashville, TN 37243-0208

QUESTION

Can 911 tape recordings of telephone communications and radio transmissions be withheld from public disclosure when a criminal investigation involving such recordings is being conducted? If so, does this include withholding the recordings from defense attorneys, media and persons directly involved in or the subject of the investigation.

OPINION

A 911 tape made or received by a state or local government agency in connection with the transaction of its official business would be a public record open for inspection pursuant to Tenn. Code Ann. § 10-7-503 and copying pursuant to Tenn. Code Ann. § 10-7-506, "unless otherwise provided by state law." Tennessee court rules of procedure, which have the force and effect of state law, as well as applicable statutes or common law, may provide an exception to the Public Records Act. The availability of the tape must, therefore, be determined on a case-by-case basis.

ANALYSIS

Section 10-7-503 of Tennessee Code Annotated provides that "[a]ll state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee ... unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a). The proper test in determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. Griffin v. City of Knoxville, 821 S.W.2d 921, 924 (Tenn. 1991)
.

This office has previously opined that, under Griffin, a 911 tape made or

received by a state or local government agency in connection with the transaction of its official business would be a public record open for inspection pursuant to Tenn. Code Ann. § 10-7-503 and copying pursuant to Tenn. Code Ann. § 10-7-506, unless otherwise provided by state law. [FN1] Op. Tenn. Atty. Gen. **93-65** (November 29, 1993)(copy attached); see also Memphis Publ. Co. v. City of Memphis, 871 S.W.2d 861 (Tenn. 1994)(enforcing a broad interpretation of the term "records").

In Tenn. Code Ann. § 10-7-504, the General Assembly has provided exceptions to the public availability of records. No exception for "911 tapes" per se appears in this statute. The exceptions set forth in Tenn. Code Ann. § 10-7-504 are not exclusive, however, and statutes, rules and the common law dealing with the subject matter in question also must be examined when determining whether a 911 tape is available as a public record.

In Appman v. Worthington, 746 S.W.2d 165, 166 (Tenn. 1987), for example, the Tennessee Supreme Court held that the Tennessee Rules of Criminal Procedure have the force and effect of state law. See also Ballard v. Herzke, 924 S.W.2d 652, 662 (Tenn. 1996) (applying same holding to the rules of civil procedure). The Court in Appman held that documents in an active criminal case which would not be subject to discovery and inspection under Tennessee Rule of Criminal Procedure 16 are not subject to inspection under the public records act. 746 S.W.2d at 166. The Court reasoned that the protection in Rule 16 of certain material from discovery constituted an exception to the Public Records Act. Id. Thus, if the 911 tape is part of an active criminal prosecution, the Tennessee rules of discovery may impact whether it can be disclosed.

***2** In addition to Tennessee court rules, state statutes may also prevent disclosure under the public records act. For example, if the tape is part of an investigative record of the Tennessee Bureau of Investigation, Tenn. Code Ann. § 10-7-504(a)(2) requires that the "information in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record."

Finally, the common law may affect availability of a 911 tape. For example, the common law recognizes a privilege for investigative records relating to pending criminal prosecutions. See, e.g., Jennings v. Johnson, 480 F.Supp. 47 (E.D. Tenn. 1979) (common law prevents discovery of TBI records in an open criminal case).

Therefore, whether a defendant, the public or the media must be given access to a 911 tape which is part of a pending criminal investigation would hinge upon whether the record was excepted from public disclosure under rule, statute or common law. That question can only be answered on a case-by-case basis.

Paul G. Summers

Attorney General and Reporter

Michael E. Moore

Solicitor General

Peter M. Coughlan

Assistant Attorney General

[FN1]. The definition of a "public record" expressly includes sound recordings such as a 911 tape. Tenn. Code Ann. § 10-7-301(6).

Tenn. Op. Atty. Gen. No. 99-022, 1999 WL 98339 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **99-152**
August 16, 1999

County School Board - telephone meeting

Honorable Marsha Blackburn
State Senator
War Memorial Building, Suite 305
Nashville, Tennessee 37243-0223

QUESTION

Whether a member of the Williamson County School Board is permitted to vote by speaker phone at a scheduled meeting when all requirements of the Open Meetings Act have been met?

OPINION

No.

ANALYSIS

In 1990, the Tennessee General Assembly enacted Tenn. Code Ann. § 8-44- 108, which permits participation in meetings by electronic or other means. However, by its terms, Tenn. Code Ann. § 8-44-108 applies only to boards, agencies and commissions of state government. See Tenn. Code Ann. § 8-44- 108(a)(1). Additionally, the legislative history indicates that while the legislation initially applied to local governments, it was redrafted to make it applicable only to state boards, agencies and commissions. John Morgan, then- Executive Assistant to the Comptroller, explained the purpose of the bill to the Senate State and Local Government Committee as follows:

> We drafted the bill where it would be effective for local government. There was concern so we came back and made it applicable to state boards, commissions and agencies.... The bill is to make administratively sure that the spirit of the Sunshine Law is adhered to and that people use this means to conduct meetings. Also, that it give a more official sanction to use of electronic communication devices.

(Tape of Proceedings, Senate State and Local Government Committee, February 13, 1990) (remarks of Mr. Morgan).

Tenn. Code Ann. § 8-44-108 was amended during the 1999 legislative session, however, such amendment did not expand that statute to include local governments.

See 1999 Tenn. Pub. Acts Ch. 490. Thus, Tenn. Code Ann. § 8-44- 108 clearly does not authorize telephone participation in meetings by members of a county school board.

It is axiomatic that a county, including a county school board, may exercise no power unless conferred, expressly, or by clear implication, by the Legislature. Stone v. Town of Crossville, 187 Tenn. 19, 212 S.W.2d 678 (1948). Tenn. Code Ann. § 49-2-202 addresses members and meetings of county school boards, and § 49-2-203 sets forth their duties and powers. There is no provision within these statutes that authorizes a county school board member to participate in board meetings by telephone or other electronic means. Moreover, while the state legislature sometimes grants powers to specific counties through the passage of private acts, we have not found a private act that would authorize members of the Williamson County Board of Education to participate in board meetings by telephone or other electronic means.

Accordingly, it is our opinion that a member of the Williamson County School Board would not be permitted to vote by speaker phone at a scheduled meeting of the Board. [FN1]

***2** Paul G. Summers

Attorney General and Reporter

Michael E. Moore

Solicitor General

Janet M. Kleinfelter

Senior Counsel

[FN1]. To the extent that Op. Tenn. Atty. Gen. 82-033 (February 4, 1982) is inconsistent with this opinion, it is hereby withdrawn.

Tenn. Op. Atty. Gen. No. 99-152, 1999 WL 728597 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. 99-219
November 4, 1999

Emergency Dispatchers: Conflicts of Interest

The Honorable Ronnie Davis
State Representative
215 War Memorial Building
Nashville, TN 37243-0111

QUESTION

Is there a conflict of interest in violation of law for an emergency dispatcher who is an employee of an **emergency communications** district to also be an employee of a bonding company or of an attorney?

OPINION

No statute directly prohibits an individual who works as an emergency dispatcher for an **emergency communications** district from also working as the employee of a bonding company or of an attorney. Under Tenn. Code Ann. § 12- 4-101, the general state conflict of interest law, the employee could not be directly interested in any contract that the employee, in such capacity, had a duty to vote for, let out, overlook, or in any manner superintend. This statute would not apply where the employee has no such duty. Whether an emergency dispatcher who also works as an employee of a bonding company or of an attorney would be involved in an illegal conflict of interest depends on the capacity in which the employee works and the standards to which, in that capacity, the individual would be subject.

ANALYSIS

This request asks whether there is a conflict of interest in violation of law for an individual who works as an emergency dispatcher for an **emergency communications** board to work as an employee of a bonding company or an attorney at the same time. As a general matter, we have found no statute that would prohibit an individual from working as an emergency dispatcher and as an employee of a bonding company or as an employee of an attorney at the same time. Subsection (a) of the general conflict of interest provision, Tenn. Code Ann. § 12-4-101, prohibits any officer, committeeperson, director "... or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract" in which a political subdivision may be interested, to be directly

interested in any such contract. Directly interested means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. Under this provision, an employee of an **emergency communications** district could not be directly interested in any contract that the employee, in such capacity, had a duty to vote for, let out, overlook, or in any manner superintend. If the employee has no such duty, then this statute would not apply.

The question then becomes whether an emergency dispatcher for an **emergency communications** district would be involved in an illegal conflict of interest if he or she also works for a bonding company or an attorney. **Emergency communications** districts are created and operate under Tenn. Code Ann. § 7- 86-101, et seq. Tenn. Code Ann. § 7-86-201 sets forth the qualifications for a public safety dispatcher. This statute does not establish any specific standards regarding conflicts of interest. Tenn. Code Ann. § 7-86-201. It should be noted that state law has also created an **Emergency Communications** Board with the power to advise **emergency communications** districts. Tenn. Code Ann. §§ 7-86-301, et seq. Powers of the **Emergency Communications** Board include the power to provide technical assistance and to establish technical operating standards for **emergency communications** districts. Tenn. Code Ann. § 7-86-306. **Emergency communications** districts may therefore wish to consult with this board in dealing with the issue of outside employment by an emergency dispatcher. Our research has found no regulations promulgated by the Federal Communications Commission regarding emergency dispatchers. The **emergency communications** district may wish to consult with the Federal Communications Commission to determine whether it has promulgated regulations or standards applicable in this area.

***2** Statutes regulating bail bondsmen prohibit "any person while serving as a constitutionally elected peace officer, or as such officer's deputy, or any duly elected or appointed county official" to act directly or indirectly as a professional bondsman. 1999 Tenn. Pub. Acts ch. 13, § 2. This statute would not appear to prohibit an emergency dispatcher working for an **emergency communications** district from acting directly or indirectly as a professional bondsman. Finally, we are not aware of any statute that would generally prohibit an emergency dispatcher working for an **emergency communications** district from also working for an attorney. Whether any particular use of information obtained by an emergency dispatcher in that dispatcher's capacity as an employee for a bail bondsman or an attorney might violate a statute, ethical standard, or policy would depend on the particular facts and circumstances.

Paul G. Summers

Attorney General and Reporter

Michael E. Moore

Solicitor General

Ann Louise Vix

Senior Counsel

Tenn. Op. Atty. Gen. No. 99-219, 1999 WL 1013019 (Tenn.A.G.)

END OF DOCUMENT

Office of the Attorney General
State of Tennessee

***1** Opinion No. **01-005**
January 8, 2001

Duties of Emergency Medical Technicians and Emergency Medical "First Responders"

The Honorable Richard Montgomery
Tennessee State Representative
207 War Memorial Building
Nashville, Tennessee 37243-0112

QUESTIONS

1. Does Tennessee law impose upon Emergency Medical Technicians an obligation or duty to provide medical services at all times to the exclusion of any other duties or obligations?

2. Are emergency service personnel permitted under Tennessee law to work for a first responder that limits its responses to only those calls involving life threatening situations?

OPINION

1. No. An Emergency Medical Technician ("EMT") is required to provide care under the regulations promulgated by the Emergency Medical Services Board only after having assumed a duty to provide such care in a given situation.

2. Yes. An Emergency Medical "First Responder" Service is required, in order to participate in a community Emergency Medical Services ("EMS") system, to develop and maintain a memorandum of understanding which shall provide policies and procedures that specify the nature of calls for which first response services will be dispatched, thereby acknowledging that not all types of calls will require a response by a first response service.

ANALYSIS

I.

The opinion request asks whether a volunteer firefighter, who is also licensed as an EMT, is required to provide emergency medical services at any time, even to the exclusion of his or her duties as a volunteer firefighter. For example, must a

volunteer firefighter abandon his or her firefighting duties upon encountering anyone at, or on the way to, a fire scene who needs first aid?

The Emergency Medical Services Board ("Board") regulates emergency medical services in Tennessee, pursuant to Tenn. Code Ann. § 68-140-504. The Board has the power, responsibility and duty to promulgate regulations which may establish various categories and classifications of licenses, permits and certificates, under Tenn. Code Ann. § 68-140-504(2). Also included in this part are those acts which the Legislature has determined constitute prohibited conduct for EMS personnel, as codified at Tenn. Code Ann. § 68-140-511.

The fundamental rule of statutory construction and interpretation is to ascertain and give effect to the intention of the legislature. [FN1] The legislative intent is derived primarily from the natural and ordinary meaning of the language contained therein, when read in the context of the whole statute. [FN2] A court must give effect to every word, phrase, clause and sentence of an act in order to discern legislative intent properly. [FN3] A statute should be construed so that no section will invalidate another. [FN4]

***2** The plain language of Tenn. Code Ann. § 68-140-511(6) prohibits Emergency Medical Technicians ("EMTs") or Emergency Medical Technician - Paramedics ("EMT-Ps") from:

(a)bandoning or neglecting a patient requiring emergency care, following assumption of duty

(Emphasis added). Thus, the statute makes clear that an EMT or EMT-P cannot be said to have abandoned a patient unless he or she has already assumed the duty of caring for a given patient. This prohibition on abandoning or neglecting a patient requiring emergency care is also part of the regulations that govern proscribed acts of the EMT or EMT-P under Board regulations. Tenn. Comp. R. & Regs. Chap. 1200-12-1-.04(5)(f). However, again, the regulation specifies that a licensed individual can only be found to have abandoned or neglected a patient if such abandonment has occurred following an assumption of duty. Therefore, a licensed EMT or EMT-P would only have a duty to a patient after having assumed the responsibility of caring for that patient.

II.

The second question is whether a volunteer firefighter, who is also licensed as an EMT and works for an emergency medical first responder service, can respond only to calls that involve life-threatening situations to the exclusion of calls involving minor medical needs, or whether such an individual would be required to respond to all calls involving any sort of medical need.

The powers and duties of the Board are codified at Tenn. Code Ann. § 68- 140-504 . The Legislature has granted the Board the authority to establish standards governing the activities and operations of various categories of services which are licensed, permitted or certified by the Board. Tenn. Code Ann. § 68-140-504(3) . One of the services which is licensed, certified and permitted by the Board is the emergency medical first responder service ("first responder"). Tenn. Comp. R. & Regs. Chap. 1200-12-1-.16. The regulations provide that:

(a) licensed ambulance service classified as a primary provider shall coordinate first response services within its service area. First responder services shall meet the following standards for participation in the community EMS System.
Tenn. Comp. R. & Regs. Chap. 1200-12-1-.16(2). Among the standards required of a first responder is to develop a memorandum of understanding or agreement of coordination within the service area with the primary provider of emergency ambulance services. Tenn. Comp. R. & Regs. Chap. 1200-12-1-.16(2)(e). This required memorandum or agreement is to include policies and procedures as to the "(n)ature of calls for which first response services will be dispatched." Tenn. Comp. R. & Regs. Chap. 1200-12-1-.16(2)(e)(3). Therefore, the rules not only contemplate, but require, that a first responder service specify the types of calls to which it will respond. This indicates that certain other types of calls which are not specified would not be handled by the first responder service. Moreover, the regulations also specify that a first responder service only is permitted to make an official response as based on specific policy guidelines, and that unofficial responses by first responder services are not authorized. Tenn. Comp. R. & Regs. Chap. 1200-12-1-.16(7).

***3** As such, it is clear that the operative regulations allow a first responder service to limit its responses to only certain types of calls, as set forth in its memorandum of understanding or agreement of coordination, and prohibit a first responder service from making unofficial responses.

Paul G. Summers

Attorney General & Reporter

Michael E. Moore

Solicitor General

John W. Dalton

Assistant Attorney General

[FN1]. Mercy v. Olsen, 672 S.W.2d 196, 200 (Tenn. 1984).

[FN2]. James Cable Partners, L.P. v. City of Jamestown, 818 S.W.2d 338 (Tenn. App. 1991).

[FN3]. Dingman v. Harvell, 814 S.W.2d 362 (Tenn. App. 1991).

[FN4]. Id.

Tenn. Op. Atty. Gen. No. 01-005, 2001 WL 101808 (Tenn.A.G.)

END OF DOCUMENT

S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 11, 2001

Opinion No. 01-057

Requirement for Street Number Display

QUESTION

Tenn. Code Ann. § 7-86-127(c) authorizes any city or county, or emergency communications district with authority delegated by the city or county legislative body, to "establish and enforce policies for the assignment and posting requirements of property numbers." Does this statute authorize the local government to establish and enforce policies requiring homeowners and businesses to mark their establishments clearly with their street number?

OPINION

Yes, the term "posting" would include the manner in which street numbers are displayed.

ANALYSIS

This opinion concerns whether, under Tenn. Code Ann. § 7-86-127, a city, county, or emergency communications district may establish and enforce policies that would require homeowners or businesses to mark their establishments clearly with their street number. Under this statute, unless expressly provided otherwise by law, the authority to name roads and to assign property numbers is vested in the legislative bodies of counties for unincorporated areas, and cities within their incorporated boundaries. The exercise of this authority must be in a manner acceptable to the United States postal service. Under subsection (b) of this statute, the county commission or city council may delegate this authority to the emergency communications district. Subsection (c) provides:

> (c) Any county or city, including districts with delegated authority, may establish and impose reasonable fees and enforce policies relating to the changing of names of roads and streets, and may establish and enforce policies for the assignment and *posting requirements* of property numbers.

Tenn. Code Ann. § 7-86-127(c) (emphasis added). In this context, we think the term "posting" clearly includes the manner in which street numbers are displayed. For this reason, this statute

authorizes local governments to establish and enforce policies requiring homeowners and businesses to mark their establishments clearly with their street number.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Randy McNally
State Senator
302 War Memorial Building
Nashville, TN 37243-0205

S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
P.O. BOX 20207
Nashville, Tennessee 37202

July 15, 2003

Opinion No. 03-088

Private Roads

QUESTIONS

1. Whether any governmental entity has authority over private roads, such as those non-dedicated roads which exist in some subdivisions, and if so, to what extent.

2. Whether any governmental entity has authority to post speed limits and/or traffic control devices on such private roads.

3. Whether the owners of such non-dedicated roads have authority to post speed limits and/or traffic control devices on those roads.

4. Whether the posting of speed limits and/or traffic control devices by private owners of non-dedicated roads could trigger governmental tort liability for injuries or damage that occur on the private roads when those roads appear to be public.

5. When both the owner and one or more governmental entities have the authority to post speed limits and traffic control devices on such private roads, whose authority is superior?

6. Whether Title 55, Section 8 of the Tennessee Code Annotated applies to private roads.

7. Whether any governmental entity has the authority to enforce speed limits and traffic controls once posted on such private roads.

8. Whether the chief law enforcement officer of a county has authority to approve or reject proposed speed limits or traffic control devices on private roads.

9. What are the existing legal requirements and standards for equipment and training to operate equipment to measure the speed of moving vehicles?

10. Whether individuals licensed under Title 62 of the Tennessee Code Annotated as security officers have authority to enforce the motor vehicle restrictions under Tennessee Code Annotated, Title 55, Section 8 and others.

11. Whether House Bill 1594 would require owners of private roads to follow the steps specified in the bill exclusively before posting any traffic control signs on private property, or only if the owners desire to enforce traffic regulations under this section.

12. Whether a Title 62 security officer would be acting under color of state law for purposes of applicable civil rights laws if such an officer were authorized by legislation such as House Bill 1594 to enforce motor vehicle law and regulations.

OPINIONS

1. Generally, governmental entities within the state do not exercise ongoing control over private, non-dedicated roads and are prohibited from utilizing public funds and resources to build and maintain such roads. However, under certain circumstances, chancery or circuit courts, regional or municipal planning commissions and the legislative bodies of counties and municipalities may exercise some control over the establishment of private roads. In addition, under the Emergency Communications District Law, legislative bodies of counties for unincorporated areas and municipalities within their incorporated boundaries have exclusive control over the naming of both public and private streets and the assignment of property numbers in order to facilitate the quick and efficient operation of the E911 emergency system established in this state.

2. No. Governmental entities do not have authority to post speed limits and/or traffic control devices on private, non-dedicated roads.

3. Yes, private property owners may place speed limits and traffic control devices on their private properties as long as they are not in view of any highway. Private property owners are prohibited from placing any unauthorized sign, signal, marking or device which purports to be or is an imitation or resembles an official traffic control device or railroad sign or signal or attempts to direct the movement of traffic within view of any highway. However, private property owners may erect signs giving useful directional information and of a type that cannot be mistaken for official signs on private property adjacent to the highway.

4. No. The posting of speed limits and/or traffic control devices by private owners of non-dedicated roads would not trigger liability under the Governmental Tort Liability Act for injuries or damage that occur on said private roads unless the roads have become public roads by implied dedication for public use or where an adverse user has used the road as a public right-of-way for 20 years continuously thus creating a prescriptive easement.

5. Governmental entities do not have authority to post speed limits and traffic control devices on private roads. Therefore, there is no issue as to whose authority is superior.

6. No. Title 55, Section 8 does not apply to the operation of vehicles on private, non-dedicated roads.

7. No. Law enforcement officers do not have authority to enforce speed limits and traffic controls posted by private property owners on private, non-dedicated roads.

8. No. There is no statute specifically authorizing the chief of police or the sheriff to approve or reject proposed speed limits or traffic control devices to be posted on private, non-dedicated roads.

9. There are no statutorily mandated legal requirements and standards for equipment or the training required for the operation of equipment used to measure speed of moving vehicles by private individuals on private property.

10. No. Title 62 security officers do not have the authority to enforce the motor vehicle restrictions under Tennessee Code Annotated Title 55, Section 8 because the statutory rules of the road only apply to the operation of vehicles on public roads and security guards are only empowered to control, regulate or direct the flow or movements of traffic on private property.

11. No. House Bill 1594 would not require owners of private roads to follow the steps outlined in the bill exclusively before posting any traffic control signs on such private, non-dedicated roads.

12. Yes. Title 62 security officers would be acting under color of state law for purposes of applicable civil rights law if such officers were authorized by legislation such as proposed House Bill 1594 to enforce motor vehicle laws and regulations by issuing traffic citations.

ANALYSIS

1. Generally, governmental entities within this state do not exercise ongoing control over private, non-dedicated roads and are specifically prohibited from using public funds or resources for the building and maintenance of such roads. However, courts, regional or municipal planning commissions or the legislative bodies of counties and municipalities may exercise some control over the establishment and naming of private, non-dedicated roads.

The Tennessee Department of Transportation and the counties and municipalities of this state have jurisdiction over and are authorized to utilize public funds for the maintenance of public roads within the state. *See* Tenn. Code Ann. §§ 54-1-105(b)(1981); 54-1-126(a)(1991); 54-5-101(1981); 54-5-140(a)(1988); 54-5-201(a)(1987); 54-7-109(1981); 54-7-202(a)(1991); 6-2-201(15)-(17)(1998); 13-3-406(2002). This office has previously opined that public funds provided by taxation may only be used for public purposes and that public equipment and other property paid for, and public officers and employees compensated by, public funds cannot properly be donated or applied to a private use. Tenn. Op. Atty. Gen. No. 84-166 (May 17, 1984). Under the County Uniform Highway Act, the chief administrative officer of the county is specifically prohibited from authorizing or knowingly permitting the use of trucks, road equipment, rock, crushed stone or any other road material for private uses. Tenn. Code Ann. § 54-7-202(a)(1999). As discussed in Tenn.

Op. Atty. Gen. No. 84-166, there are also a number of statutory provisions in Title 6 (Cities and Towns) of the Tennessee Code Annotated bearing out the lack of authority of cities or their officials to use city equipment and build roads or bridges of otherwise work on private property. *See*, Tenn. Code Ann.§§ 6-19-101(1995); 6-20-220(1989) and 6-33-101(1989); Tenn. Op. Atty. Gen. No. 84-166 (May 17, 1984).

In Tennessee, circuit and chancery courts are authorized to create private roads, and later, to authorize the widening of those roads for the purpose of extending utility lines, in instances where an individual's land is surrounded or enclosed and the owners of the surrounding property refuse to allow the landlocked person to have a private road across their properties. Tenn. Code Ann. §§ 54-14-101-102 (2000). Under Tenn. Code Ann. § 54-14-101, the trial court may appoint a jury of view to lay off and mark a private road or an easement of necessity not exceeding twenty-five (25) feet wide across private property and assess damages to be paid to the owners of the property crossed by the private road. Tenn. Code Ann. § 54-14-101(2000). The court will then grant an order to the petitioner to open the road and keep it in repair. *Id.* Tenn. Code Ann. § 54-14-101(2) authorizes the court to grant the Petitioner an additional fifteen feet of land at a later date for the purpose of extending utility lines, including, but not limited to, electrical, natural gas, water, sewage, telephone or cable television. Tenn. Code Ann. § 54-14-101(2)(2000).

Regional or municipal planning commissions have the authority to adopt regulations governing the subdivision of land which could affect private roads within a proposed subdivision. Tenn. Code Ann. §§ 13-3-101-105 outline the authority for the creation of regional planning commissions, and Tenn. Code Ann. §§ 13-3-401-411 establish their statutory parameters. All subdivision plats must be approved by the regional planning commission once a regional plan, which includes at least a major road plan, has been adopted by the regional planning commission and has been filed in the county register's office. Tenn. Code Ann. § 13-3-402(1989). Subdivision is defined statutorily as the division of any tract or parcel of land into two (2) or more parcels. Tenn. Code Ann. § 13-3-401(A)(B)(1998).

Regional planning commissions are empowered to regulate subdivision development within its jurisdiction for several reasons: (1) to provide for the harmonious development of the region and its environs; (2) for the coordination of roads within the subdivided land with other existing or planned roads or with the state or regional plan or the plans of municipalities in or near the region; (3) for adequate open spaces for traffic, light, air and recreation; (4) for the conservation of or production of adequate transportation, water, drainage and sanitary facilities; (5) for the avoidance of population congestion; and (6) for the avoidance of such scattered or premature subdivision of land as would involve danger or injury to health, safety or prosperity by reason of the lack of water supply, drainage, transportation or other public services or would necessitate an excessive expenditure of public funds for the supply of such services. Tenn. Code Ann. § 13-3-403(a)(1998).

In pursuit of these objectives, the regional planning commission may institute subdivision regulations which may specify the extent to which and the manner in which proposed roads should be graded and improved, and water, sewer or other utility mains, piping, connections or other

facilities shall be installed, as a condition precedent for approval of the plat. Tenn. Code Ann. § 13-3-403(b)(1998).

It is important to note that the approval of a plat by the regional planning commission does not constitute or effect an acceptance by any county or by the public of the dedication of any road or other ground shown upon the plat. Tenn. Code Ann. § 13-3-405. The Tennessee Supreme Court has held that this exception carved out of the act providing that plat approval is not acceptance of roads therein clearly shows the legislative intent of requiring specific and separate acceptance of roads, over and above the steps required to get plat approval. *Foley v. Hamilton,* 659 S.W.2d 356, 360 (1983). Accordingly, subdivision regulations adopted by the regional planning commission may affect the way proposed private, non-dedicated roads within the subdivision should be graded and improved.

Municipal planning commissions have powers similar to those of the regional planning commissions. Under Tenn. Code Ann. § 13-4-101(a), the chief legislative body of any municipality is empowered to create and establish a municipal planning commission. Tenn. Code Ann. § 13-4-101(a)(2002). Once the municipal planning commission has adopted a master plan which includes at least a major street plan, all subdivision plats dividing a tract into more than two lots must be approved by the municipal planning commission before a county register can file or record the plat. Tenn. Code Ann. §13-4-302(a), (c)(1)(2002). Municipal planning commissions are also authorized to adopt regulations governing the subdivision of land which may include requirements of the extent to which and the manner in which streets shall be graded and improved as a condition precedent to approval of the plat. Tenn. Code Ann. § 13-4-303(2002). The approval of a plat by the municipal planning commission shall not be deemed to constitute or effect an acceptance by the municipality, county or public of the dedication of any street or other ground shown upon the plat. Tenn. Code Ann. § 13-4-305(2002). As a result, subdivision regulations adopted by the municipal planning commission may apply to private, non-dedicated roads within the proposed subdivision.

County and municipal legislative bodies have the power to override decisions relating to the approval and acceptance of a road made by the regional or municipal planning commissions respectively. *See* Tenn. Code Ann. § 13-3-406(2002); Tenn. Code Ann. § 13-4-307(2002).

This opinion does not deal with any specific county or region. Tenn. Code Ann. § 13-3-409 provides that this section does not repeal or impair any provision of any private act relating to the approval or regulation by the municipal authorities of the cities specified of the subdivision of land or the filing of plans, plots or replots for land lying within the boundaries of any city's authority specified in any private act in place in 1935. Tenn. Code Ann. § 13-3-409(2002). Similarly, Tenn. Code Ann. § 13-4-105 provides that nothing in this chapter shall be deemed to modify or supplant any provision of any special or private statute providing for a municipal planning commission and all provisions of any such special or private statutes remain in full effect. Tenn. Code Ann. § 13-4-105(2002). Accordingly, provisions of special or private statutes or acts may apply depending on the location of the property.

Additionally, in an effort to facilitate the quick and efficient operation of the E911 emergency system, the General Assembly has enacted the Emergency Communication District Law, which gives legislative bodies of counties in unincorporated areas, and municipalities within their incorporated boundaries, exclusive authority to name public and private roads and streets, including roads and streets within residential developments, and to assign property numbers relating thereto unless expressly provided otherwise by law. Tenn. Code Ann. §§ 7-86-102(a)(1998); 7-86-127(a)(1997). If the legislative body has created an emergency communications district, the legislative body may delegate the authority to name public or private roads and streets to that district. Tenn. Code Ann. § 7-86-127(b)(1997).

2. The Department of Transportation and the counties and municipalities in Tennessee are only authorized to post speed limits and traffic control devices on public streets within their jurisdiction, not on private, non-dedicated roads. The Department of Transportation has the authority to set speed limits on access-controlled roadways designated as being on the state system of highways and on roadways designated as being on the state system of interstate highways and establish such special speed limits at school entrances and exits to and from controlled access highways on the system of state highways. Tenn. Code Ann. §§ 55-8-152(C); 55-8-152(h)(2002). Counties and municipalities of this state are only authorized to set speed limits on public roads within their jurisdiction that are not a part of the interstate or national defense highway system nor any controlled access highway. Tenn. Code Ann. § 55-8-152(f)(1)(C)(2002).

However, local governing bodies may establish traffic laws pertaining to privately owned streets that have been dedicated as rights-of-way for the public under very limited circumstances. Under Title 55, there is a clear distinction between private streets and private roads. Tenn. Code Ann. §§ 55-8-101(44) and (62)(2002). Streets are open to the public for purposes of vehicular travel while private roads are not. Tenn. Code Ann. § 55-8-101(44) defines a "private road or driveway" as every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons. Tenn. Code Ann. § 55-8-101(44)(2002). Whereas a "street" is defined as the entire width between boundary lines of every way when any part thereof is open to use of the public for purposes of vehicular traffic. Tenn. Code Ann. § 55-8-101(62)(2002).

Tenn. Code Ann. § 55-10-317 authorizes the local governing body to establish traffic laws for privately owned streets that are dedicated as rights-of-way for traffic and are located within a residential development having a combination of single family dwellings and multi-family dwellings only if a majority of the residents in that development have submitted a written petition to the appropriate local governing body requesting the enforcement of traffic laws on such private streets. Tenn. Code Ann. § 55-10-317(1995). If the local governing body approves the petition, then the governing body shall establish the traffic laws in such development in the same manner as it does for public streets within its jurisdiction. *Id.* There is no statute authorizing local governing bodies to establish traffic laws for private roads.

The Department of Transportation as well as the counties and municipalities of this state can

only erect official traffic control devices on public roads, over which they have jurisdiction. Pursuant to Tenn. Code Ann § 55-8-101(35) "official traffic control devices" are all signs, markings and devices placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning or guarding traffic. Tenn. Code Ann. § 55-8-101(35)(2002). The installation and maintenance of traffic control devices on private, non-dedicated roads would require the use of governmental employees, equipment and material for private purposes. As discussed under Number 1, governmental entities are prohibited from using public funds provided for taxation for private purposes. Consistent with this principle, it is the opinion of this office that the use of public funds or any other resources, including personnel and equipment, for the installation and maintenance of speed limit signs and other traffic control devices on private, non-dedicated roads would be a misapplication of public funds and resources.

3. Tennessee statutes do not specifically prohibit private property owners from posting speed limits and traffic control devices on their private property as long as those signs and devices cannot be viewed from any public right-of-way. Private property owners are prohibited from posting speed limits and traffic control devices on their private property in view of any highway. A highway is the entire width between the boundary lines of every way when any part thereto is open to the use of the public for purposes of vehicular travel. Tenn. Code Ann. § 55-8-101(22)(2002).

Tenn. Code Ann. § 55-8-113(f) makes it a Class C misdemeanor for anyone to:

> place, maintain or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be an imitation of or resembles an official traffic control device or railroad sign or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any official control device or any railroad sign or signal.

Tenn. Code Ann. § 55-8-113(a) & (f)(1989). Every prohibited sign, signal or marking is designated as a public nuisance and the authority having jurisdiction over the highway is empowered to remove the same or cause it to be removed without notice. Tenn. Code Ann. § 55-8-113(f)(1989).

Nevertheless, this statute permits private property owners to erect signs giving useful directional information and of a type that cannot be mistaken for official signs on private property adjacent to highways. Tenn. Code Ann. § 55-8-113(d).

4. Generally, the Governmental Tort Liability Act only applies to the actions and omissions of governmental entities, public officials or governmental employees, not private individuals. Accordingly, unless a private road has become a public road by implied dedication or adverse possession, the governmental tort liability act does not apply.

Under Tennessee law, private property owners maintain control over and are responsible for

the maintenance of private, non-dedicated roads. Pursuant to Tenn. Code Ann. 55-8-101(44), a private road is every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons. Tenn. Code Ann. § 55-8-101(44)(2002). A private road belongs to the owners of the lands benefitted by the road and the easement or right-of-way continues for as long as the road is used and maintained by the landowners. Tenn. Code Ann § 54-14-117(2002). Conversely, a public road has generally been defined to be a way open to all people, without distinction, for passage and repassage at their pleasure. *Cole v. Dych,* 535 S.W.2d 315, 318 (Tenn. 1976)(citing *Sumner County v. Interurban Transp. Co.*, 141 Tenn. 493, 213 S.W. 412 (Tenn. 1918)). As discussed above governmental entities are only authorized to lay out, maintain and repair public roads within their jurisdiction.

A public road may be created by: (1) an act of the public authority; (2) express dedication by the owner; (3) implied dedication by use of the public and acceptance by them with the intention of the owner that the use become public; or (4) adverse use for a period of 20 years continuously creating a prescriptive right. *Standard Life Ins. Co. v. Hughes,* 203 Tenn. 636, 315 S.W. 239, 242 (Tenn. 1958). For the Governmental Tort Liability Act to come into play on a private, non-dedicated road, there would have to be sufficient factual evidence to support a finding that the private road had been converted to a public road by implied dedication or by creation of a prescriptive right by an adverse user.

Dedication or the appropriation or gift by the owner of land, or an easement therein, for the use of the public, may be express, where the landowner formally declared dedication or by implication arising by the operation of law from the conduct of the owner and the facts and circumstances of the case. *McKinney v. Duncan,* 121 Tenn. 265, 118 S.W. 683, 684 (Tenn. 1908). To establish dedication by implication there must be proof of facts from which it positively and unequivocally appears that the owner intended to permanently part with his property and vest it in the public and that there can be no other reasonable explanation for his conduct. *Id.* The controlling criterion for determining whether private property has been impliedly dedicated is the intention of the landowner to dedicate. *Cole v. Dych*, 535 S.W.2d 315, 319 (Tenn. 1976).

Some of the factors Tennessee courts have taken into consideration in evaluating the landowner's intention are: (1) the landowner opens a road to public travel, *Johnson City v. Wolfe*, 103 Tenn. 277, 52 S.W. 991 (1899); (2) acquiescence in the use of the road as a public road, *Nicely v. Nicely,* 33 Tenn. App. 589, 232 S.W.2d 421(1949); (3) long, continued and adverse use by the public without objection from the owner, *McCord v. Hays,* 202 Tenn. 46, 302 S.W.2d 331,334-335 (1957); (4) the roadway is repaired and maintained by the public, *Burkitt v. Battle*, 59 S.W. 429 (Tenn. Ct. App. 1900). This office has previously opined that once the intention to dedicate has been proven there must also be acceptance of the road by the public. Tenn. Op. Atty. Gen. No. 80-4 (January 1980).

Under Tennessee law, the elements required to create a prescriptive easement are as follows: the use and enjoyment of the property must be adverse, under a claim of right, continuous, uninterrupted, open, visible, exclusive, with the knowledge and acquiescence of the owner of the

servient tenement and must continue for the full prescriptive period. *Sanders v. Mansfield*, No. 01-A-01-9705-CH00222, 1998 WL 57532 at *3 (Tenn. Ct. App. February 13, 1998)(citing *Peaver v. Hunt*, 924 S.W.2d 114, 116(Tenn. App. 1996). Twenty years of adverse use is the prescriptive period required to establish a right-of-way in either the public or in private persons. *Id.* (Citing *German v. Graham*, 497 S.W.2d 245 (Tenn. App. 1972); *Town of Benton v. People's Bank*, 904 S.W.2d 598 (Tenn. App. 1995).

Tenn. Code Ann. § 29-20-203 removes immunity from suit of a governmental entity for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. Tenn. Code Ann. § 29-20-203 (1973). Liability of a governmental entity under Tenn. Code Ann. § 29-20-203 may be predicated on street signs or traffic control devices that cause or contribute to the defective, unsafe or dangerous condition. *Burgess v. Harley*, 934 S.W. 2d 58, 63 (Tenn. Ct. App. 1996).

Under Tennessee's Governmental Tort Liability Act, a governmental entity is:

> Any political subdivision of the State of Tennessee including, but not limited to, any municipality, metropolitan government, county, utility district, school district, non-profit volunteer fire departments receiving funds appropriated by a county legislative body or a legislative body of a municipality, human resource agency, public building authority, and development district created and existing pursuant to the Constitution and laws of Tennessee or any instrumentality of government created by any one (1) or more of the herein named local governmental entities or by act of the General Assembly.

Tenn. Code Ann. § 29-20-102(3)(1998).

Suits brought pursuant to Tenn. Code Ann. § 29-20-203(a) must have three essential ingredients: (1) the local government must own and control the location or instrumentality alleged to have caused the injury; (2) the location or instrumentality must be defective, unsafe or dangerous; and (3) the local government must have constructive and/or actual notice of the defective, unsafe, or dangerous condition. *Burgess v. Harley*, 934 S.W.2d 58, 63 (Tenn. Ct. App. 1996). Accordingly, it is the opinion of this office that, unless a party can establish that a public road has been created by either implied dedication or establishment of a prescriptive right or easement or that a local government entity owned and controlled the location or instrumentality alleged to have caused the injury, the Governmental Tort Liability Act would not apply.

A private citizen or security guard/officer does not fall within the ambit of the Governmental Tort Liability Act. Tenn. Code Ann. § 29-20-205 removes immunity from suit of injury proximately caused by the negligent act or omission of any governmental employee within the scope of his employment except in certain enumerated circumstances. Tenn. Code Ann. § 29-20-205(1999).

Under the general provisions of the Governmental Tort Liability Act employee means and

includes:

> any official whether elected or appointed, officer, employee or servant or any member of any board, agency or commission (whether compensated or not), or any officer, employee or servant thereof, of a governmental entity, including the sheriff and the sheriff's employees and further including regular members of voluntary or auxiliary firefighting, police or emergency assistance organizations.

Tenn. Code Ann. § 29-20-102 (1998).

By definition, a security guard/officer is an individual employed by a contract security company or a proprietary security organization whose primary duty is to perform any function of a security or patrol service. Tenn. Code Ann. § 62-35-102(15)(1997). This office has previously opined that private security officers who are working for, under the supervision of and paid by a contract security company are independent contractors, not employees of the local, state or federal government, even when they are contracted by a governmental entity to provide security services. *See* Op. Tenn. Atty. Gen. 03-022 (February 25, 2003). Therefore, it is the opinion of this office that negligent actions or omissions by private security guards and other private citizens would not trigger liability under the Governmental Tort Liability Act.

5. As discussed under Number 2, governmental entities are only authorized to post speed limits and traffic control devices on roads that are within their jurisdiction. Therefore, there is no issue as to whose authority is superior when it comes to the posting of speed limits and traffic controls on private, non-dedicated roads that do not fall within the jurisdiction of a governmental entity.

6. Tennessee Code Annotated Title 55 § 8 does not apply to the operation of vehicles on private, non-dedicated roads. Tenn. Code Ann. § 55-8-102(a) provides that the provisions of Chapters 8, "Operation of Vehicles-Rules of the Road" refer to the operation of vehicles on highways, except where a different place is specifically referred to in a given section. Tenn. Code Ann. § 55-8-102 (a)(1988).

According to Tenn. Code Ann. § 55-8-101 (22), a highway is the entire width between the boundary lines of every way when any part thereto is open to the public for purposes of vehicular traffic. Tenn. Code Ann. § 55-8-101 (22) (2002). By contrast, a private road is defined as every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not other persons. Tenn. Code Ann. § 55-8-101(44)(2002).

7. Law enforcement personnel are not authorized to enforce traffic regulations and traffic control devices created and posted by private landowners on private, non-dedicated roads. However, law enforcement officers have limited powers to enforce traffic laws established by an appropriate local governing body on privately owned streets in residential areas that have been

dedicated as rights-of-way for traffic where a majority of the residents in the development submitted a written petition to the appropriate local governing body requesting the enforcement of traffic laws on the private street.

According to Tenn. Code Ann. § 55-5-101(49) right-of-way means the privilege of the immediate use of property. Tenn. Code Ann. § 55-8-101(49)(2002). As discussed under Number 2, private streets are open to the general public for vehicular traffic while private, non-dedicated roads are not. Tenn. Code Ann. §§ 55-8-101(44) & (62)(2002). Tenn. Code Ann. § 55-10-317 provides that:

> Notwithstanding any other provision of the law to the contrary an officer of any state, county, or municipal law enforcement agency that is charged with the responsibility of enforcing traffic laws may also enforce traffic laws, issue citations for violations thereof and impose fines in accordance with the provisions of state law or county or municipal ordinance, as appropriate, on privately owned streets *that are dedicated as rights-of-way for traffic* and are located within a residential development having a combination of single family and multi-family dwellings. Such enforcement of traffic laws within a private residential development shall be initiated only after the majority of residents in that development have submitted a written report to the appropriate local governing body requesting the enforcement of traffic laws on such private street. If such local governing body approves the petition, such governing body shall establish the traffic laws in such development in the same manner as it does for public streets within its jurisdiction.

Tenn. Code Ann. § 55-10-317(1995) (Emphasis added).

Accordingly, it is the opinion of this office that law enforcement officers are not authorized to enforce speed limits and traffic controls on private, non-dedicated roads.

8. There is no statute authorizing the chief law enforcement officer to approve or reject proposed speed limits or traffic control devices on private roads.

9. Private security officers are not specifically prohibited from using radar or other equipment to measure the speed of moving vehicles under Tenn. Code. Ann. § 62-35-134(1996), the statutory provision which outlines prohibited practices for private security guards. Tenn. Code Ann. § 62-35-134 (1996). There are no statutes specifically outlining legal requirements and standards for equipment and training required to operate equipment to measure speed of moving vehicles. However, the Tennessee Supreme Court has held that in prosecution for violating speed limits on the highway, the radar speedometer is an accurate device for checking speed when the same is calibrated or tested and checked for accuracy from time to time and when the operator is properly trained and knows how to use the equipment. *Hardaway v. State*, 202 Tenn. 94, 302 S.W.2d 351, 352-353 (Tenn. 1957). It stands to reason that if private citizens, including security guards, choose

to use radar or other equipment to measure speed on private roads they would need to test the equipment regularly for accuracy and that the operators would need to be properly trained in order to meet a common law reasonable standard of care.

Additionally, if private security guards utilize speed monitoring equipment, that equipment cannot appear to belong to public law enforcement entities. Tenn. Code Ann. § 62-35-127 specifically prohibits security guards or patrol service personnel from utilizing any vehicle or equipment which displays the word, police, law enforcement officer or the equivalent thereof or has any sign, shield, accessory or insignia that may indicate that such vehicle or equipment belongs to a public law enforcement agency. Tenn. Code Ann. § 62-35-127(1987).

10. Private security guards licensed under Title 62 of the Tennessee Code Annotated do not have authority to enforce the motor vehicle restrictions under Title 55, Section 8 because, as discussed under question 6, Title 55 § 8 only applies to the operation of vehicles on public roads and private security guards are only authorized to control, direct or regulate traffic on private roads. According to Tenn. Code Ann. § 62-35-102(15) a security guard or officer is an individual employed by a contract security company or a proprietary organization whose primary duty is to perform any function of a security guard and patrol service. Tenn. Code Ann. § 62-35-102(15) (1997).

Under Tenn. Code Ann. § 62-35-102(16) the terms "security guard and patrol service" are further defined as protection of persons and/or property from criminal activities including, but not limited to:

(A) Prevention and/or detection of intrusion, unauthorized entry, larceny, vandalism, abuse, fire or trespass on private property;
(B) Prevention, observation or detection of any unauthorized activity on private property;
(C) Enforce rules, regulations or state and local laws on private property;
(D) Control, regulation or direction of the flow or movements of the public, whether by vehicle or otherwise on private property;
(E) Street patrol service;

Tenn. Code Ann. § 62-35-102(16) (1997). In Tenn. Code Ann. § 65-35-102 (17), "street patrol service" is defined as the utilization of foot patrols or any other means of transportation in public areas or on public thoroughfares in order to service multiple customers or facilities. "Street patrol" does not apply to a security guard/officer traveling from one (1) facility to another to serve the same customer with multiple facilities. All these activities, except (E) take place on private property.

Accordingly, since private security guards may only direct traffic on private property, they are only empowered to enforce traffic laws and regulations that apply to the operation of motor vehicles on such private property.

11. No. House Bill 1594 would not require owners of private, non-dedicated roads to follow the steps specified in the bill exclusively before posting any speed limits or traffic control signs. The proposed bill specifies that its provisions would only apply to those property owners who

file a written consent indicating that the owner consents to application of the provisions of Title 55, Chapter 8. Further, the statute specifies that such consent would not constitute a dedication to the public of such roads nor permission by the owner for the public to use such roads.

A property owner's right to own, use and enjoy private property is fundamental. *Barnett v. Behringer,* 2003 WL 21212671, at *3 (Tenn. Ct. App. May 27, 2003)(citing *Nollan v. California Costal Comm'r.,* 483 U.S. 825, 831, 107 S.Ct. 3141, 3145 (1987). The Tennessee Supreme Court has held that:

> Every landowner, where not restrained by covenant or custom, has the entire dominion of the soil and the space above and below to any extent he may choose to occupy it, and in this occupation he may use his land according to his own judgment, without being answerable for the consequences to an adjoining owners, unless by such occupation he either intentionally or for want of reasonable care and diligence inflicts upon him injury.

Humes v. Mayor of Knoxville, 20 Tenn 403, 1839 WL 1313, at *3 (Tenn. 1839).

Accordingly, absent any restraints such as restrictive covenants, each owner of a private, non-dedicated road has the right to place speed limits and traffic control devises on his/her property as long as they cannot be seen from a public road, as discussed under Number 3, and do not violate any other laws or regulations. However, if these private, non-dedicated roads are located in a subdivision or in common areas shared by a number of individual owners who plan to hire private security guards to direct traffic and enforce traffic regulations on their properties it would stand to reason that a majority of the property owners would need to agree to and approve any proposed speed limits and traffic control devices for the sake of uniformity and to effectively advance their shared interests in safety on these private roads.

12. The Civil Rights Statute, 42 U.S.C. § 1983, provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia subjects or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. § 1983 (1996). Accordingly, a claim under 42 U.S.C. § 1983 contains two essential elements: (1) a violation of a right secured by the Constitution or laws of the United States; and (2) a defendant must have violated this right under color of state law. *Doe v. City of Chicago,* 39 F.Supp.2d 1106, 1110 (1999).

The statute does not designate what constitutes "under color of any statute, ordinance,

regulation, custom or usage, of any State" or what persons are susceptible to prosecution under the Civil Rights Act. Courts generally employ one of four tests in determining whether a private citizen acted under color of state law: (1) under the state compulsion test a private citizen may be liable under § 1983 when the state has so implicated itself in the defendant's action that the state has in effect compelled the action; (2) under the public function test the actions of a private individual may be attributed to the state when the private party is engaging in an activity that is traditionally the exclusive prerogative of the state; (3) under the joint action test a private defendant may be said to be acting under color of state law if that defendant and the state official had a meeting of the minds and thus reached an understanding that the plaintiff be denied a constitutional right; and (4) under the nexus test a private citizen may be found to be a state actor if the state has so far insinuated itself in the private party's actions as to create an interdependence between the state and the individual. *Doe v. City of Chicago*, 39 F.Supp.2d 1106, 1110 (N.D. Ill. 1999).

Applying the different tests is a "necessarily fact-bound inquiry." *Lugar v. Edmonson Oil Company, Inc.*, 457 U.S. 922, 938 (1982). Therefore, each case must depend on its background, facts and circumstances in applying the Act. *Decarlo v. Joseph Horne and Company*, 251 F. Supp. 935, 936 (1966). *See also, Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S. Ct. 860 (1961)(holding that only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance).

At issue is whether House Bill 1594 would empower private security officers in Tennessee to engage in an activity that is traditionally the exclusive prerogative of the state by granting them the authority and power to issue traffic citations to any person violating or charged with violating the speeding statutes on private roads. While the United States Supreme Court has never determined whether a private security guard who is cloaked with the authority of a police officer is a state actor performing a public function that is traditionally reserved to the state, a number of federal courts have held that a private security guard is a state actor when he or she is vested with the authority of a police officer. *Romanski v. Detroit Entertainment, L.L.C.*, 2003 WL 21296293, at *6 (E.D. Michigan May 28, 2003). A private individual who is vested with the powers of a police officer, which are powers that are only vested in the State, and those private individuals to whom the State has given such powers are state actors, acting under color of state law for purposes of § 1983. *Id.* at 7. Conversely, a private security guard who is merely exercising common law rights that may resemble police authority, such as detaining an individual who is suspected of theft, is not a state actor. *Id.* at 7, 8. *See, e.g., Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 82 F.Supp.2d 901 (N.D. Ill. 2000) (holding that private security personnel could be held as state actors under § 1983 because of their status as special Chicago police officers pursuant to a Chicago ordinance under which no legal difference existed between privately employed special officers and a regular Chicago Police Officer); *Wade v. Byles*, 83 F.3d 902 (Ill. 1996), *cert. denied* 519 U.S. 935 (holding that private security guard at city housing authority building was not performing exclusive state function when he shot plaintiff; therefore, plaintiff could not maintain § 1983 action against guard and private security company; guard's function as a lobby security guard with limited powers was not traditionally exclusive function of state and contracted security guards were not part of statutorily authorized police force); *Allen v. Columbia Mall, Inc.*, 47 F. Supp.2d 605 (D. Maryland 1999)

(holding that shopping mall's private security guards were not acting under color of state law as required to support a § 1983 claim because they only had "citizen arrest" powers); *El Fundi v. Deroche*, C.A.8 (Minn.) 1980, 625 F.2d 195 (8th Cir. 1980) (holding that state action is present when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments, particularly when a state statute authorizes merchants to detain suspected shoplifters); *Brooks v. Santiago*, No. 93 Civ.206(HB), 1998 WL 107110, at *3-4 (S.D.N.Y. March 10, 1998) (holding that private security guards acted under color of state law and were found to have acted in concert with local police because the police searched and arrested suspected shoplifter solely based on the security guard's allegations without conducting an investigation to generate probable cause); *McFadden v. Grand Union*, 154 F.R.D. 61 (S.D.N.Y. 1994) (holding no state action would exist based on private security guard's arrest of retail customer for misconduct at store, absent police personnel or department involvement; however, state action potentially established because the same security guard later processed customer's arrest at the police department minutes later).

The Tennessee Supreme Court has held that "under color of law" within the meaning of 42 U.S.C. § 1983 refers to a misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *Home Insurance Co. v. Leinart*, 698 S.W.2d 335, 336 (Tenn. 1985) (citing *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961)). Conversely, acts of a private or proprietary nature, of officials of state, county or municipal governments, as opposed to acts of a governmental nature, have been held, in the absence of specific legislation, to not be subject to 42 U.S.C. § 1983. *Id.* Under 42 U.S.C. § 1983, "conduct is engaged in under color of state law if the actor was clothed with the authority of the state and was purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed even if it was proscribed by state law." *Id.* (citing *Cohen v. Norris*, 300 F.2 24 (9th Cir. 1962)).

Under Tennessee law, only peace officers are authorized to issue citations. Tenn. Code Ann. § 40-7-118(a)(1) provides that a citation means a written order issued by a peace officer requiring a person accused of violating the law to appear in a designated court or government office at a specified date and time. Tenn. Code Ann. § 40-7-118(a)(1)(2002). A peace officer means an officer, employee or agent of government who has a duty imposed by law to: (i) maintain public order; (ii) make arrests for offenses; (iii) investigate the commission or suspected commission of offenses. Tenn. Code Ann. § 40-7-118(a)(3)(A)(2002). Tenn. Code Ann. § 55-8-104(a) mandates obedience to police officers invested with the power to direct and control traffic on public streets. Tenn. Code Ann. § 55-8-104(a)(1989). Tenn Code Ann. § 55-10-207 authorizes law enforcement officers to issue citations in lieu of arrest for violations of the rules of the road punishable as misdemeanors. Tenn. Code Ann. § 55-10-207(a)(1)(2002). Additionally, Tenn. Code Ann. § 7-63-101 provides that:

> When any person violates any traffic, or other ordinance, law or regulation of any municipal, metropolitan or city government in the presence of a:
>
> (1) Law enforcement officer of such government;

> (2) Member of the fire department or building department who is designated as a special officer of the municipality; or
>
> (3) Transit inspector employed by a public transportation system or transit authority organized pursuant to chapter 56, part 1 of this title;
>
> such officer or inspector may issue, in lieu of arresting the offender and having a warrant issued for the offence, a citation or complaint for such offense.

Tenn. Code Ann. § 7-63-101 (1993).

Under Tennessee law, private security guards are not law enforcement officers or peace officers. The General Assembly makes a clear distinction between security officers and law enforcement officers and prohibits private security officers from even giving the impression that they are sworn peace officers or governmental officials. Tenn. Code Ann. § 62-35-134(c)(5) makes it unlawful for a private security officer to make any statement which would reasonably cause another person to believe that such security officer functions as a sworn peace officer or other governmental official. Tenn. Code Ann. § 62-35-134(c)(5)(1996).

Further, it is unlawful for any person performing any function of a security guard and patrol service to:

> (1) Wear or display any badge, insignia, shield, patch or pattern which:
>
> (A) Indicates or tends to indicate that such person is a sworn peace officer;
>
> (B) Contains or includes the word "police" or the equivalent thereof; or
>
> (C) Is similar in wording to any law enforcement agency in this state; or
>
> (2) Have or utilize any vehicle or equipment which:
>
> (A) Displays the words "police," "law enforcement officer," or the equivalent thereof; or
>
> (B) Has any sign, shield, accessory or insignia that may indicate that such vehicle or equipment belongs to a public law enforcement agency.

Tenn. Code Ann. § 62-35-127 (1987).

In addition, Tenn. Code Ann. § 62-35-128 prohibits security guards/officers from wearing any military or police-style uniform, except for rainwear or other foul weather clothing, unless such

uniform has:

(1) Affixed over the left breast pocket on the outermost garment and on any cap a badge or insignia distinct in design from that utilized by any law enforcement agency in this state, unless the licensed security officer is in plain clothes;

(2) Affixed over the right breast pocket on the outermost garment a name plate or tape with the name of the security guard/officer on it, unless the licensed security officer is in plain clothes.

Tenn. Code Ann. § 62-35-128 (1996).

Under the laws of this state, private citizens such as a private security guards employed by a private security company, may arrest another for public offenses committed in their presence or when a felony has been committed and the arresting person has reasonable cause to believe that the person arrested committed it. Tenn. Code Ann. § 40-7-109(a)(2002). However, there is no statute authorizing private citizens to issue citations for traffic violations. Only law enforcement officers are empowered to issue traffic citations in lieu of arrest. House Bill 1594 would empower private security guards to issue traffic citations, a police function vested in the state alone that could not otherwise be exercised by a private citizen, thus cloaking them with the authority of the state. Therefore, any abuse of that power would constitute an action under color of state law.

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July 28, 2003

Opinion No. 03-093

Tort Liability of Emergency Medical Technicians and Paramedics

QUESTION

To what extent are emergency medical technicians (EMTs) and paramedics personally immune from tort suits?

OPINION

EMTs and paramedics are immune from liability, except for negligence, for following the orders of a physician or nurse in rendering emergency care. They are not subject to liability for honoring Do Not Resuscitate orders pursuant to Title 68, Chapter 40, Part 6. Further, EMTs and paramedics are immune from liability, except for negligence, for withdrawing blood at the written request of a law enforcement officer for the purpose of testing the alcoholic or drug content to determine if the person was operating a vehicle or vessel under the influence of an intoxicant.

EMTs and paramedics voluntarily and in good faith providing emergency care at the scene of an accident, medical emergency and/or disaster, while en route from such scene to a medical facility, or while assisting medical personnel at the receiving medical facility are not liable for damages except for acts of gross negligence. In addition, they are not liable for damages except for acts of gross negligence for rendering emergency care at gatherings open to the general public.

As of July 1, 2001, EMTs and paramedics employed by local governmental entities as defined by the Governmental Tort Liability Act are immune from any claim for damages, including medical malpractice, for which the immunity of the governmental entity is removed by the act. EMTs and paramedics employed by the State are immune for acts or omissions within the scope of their office or employment except for willful, malicious, or criminal acts or omissions, or for acts or omissions done for personal gain.

ANALYSIS

EMTs and paramedics are immune from civil and criminal liability, except for negligence, for following the orders of a physician or nurse in rendering emergency care. Tenn. Code Ann. §68-140-512(a). In addition, they are not liable for trespass when rendering services in good faith in compliance with the Emergency Medical Services Act of 1983. Tenn. Code Ann. §68-140-512(b).

Emergency medical services personnel are not subject to criminal prosecution or civil liability as a result of honoring Do Not Resuscitate orders pursuant to Title 68, Chapter 140, Part 6. Tenn. Code Ann. §68-140-604. Licensed paramedics, and licensed EMTs approved to establish intravenous catheters, acting at the written request of a law enforcement officer, who withdraw blood from a person for the purpose of testing the alcoholic or drug content to determine if the person was driving a motor vehicle or vessel under the influence of an intoxicant or drug, do not incur any civil or criminal liability as a result of the act of withdrawing blood except for damages resulting from any negligence. Tenn. Code Ann. §§55-10-406(a)(1); 69-10-217(d)(3).

Pursuant to the Good Samaritan Law, EMTs and paramedics providing voluntary emergency care in good faith at the scene of an accident, medical emergency and/or disaster, while en route from such scene to a medical facility, or while assisting medical personnel at the receiving medical facility are not liable for damages for the care provided or for any act or failure to act to provide additional care except for acts or omissions constituting gross negligence. Tenn. Code Ann. §63-6-218(b). In addition, EMTs and paramedics rendering emergency care to persons attending or participating in performances, sporting events, or other gatherings open to the general public, with or without an admission charge, whether or not the emergency care is made available as a service, or planned in advance, are not liable for damages for the care rendered or for any act or failure to act to arrange for further medical care except for acts or omissions constituting gross negligence. *Id.*

As of July 1, 2001, EMTs and paramedics employed by local governmental entities as defined by the Governmental Tort Liability Act, Tenn. Code Ann. §§29-20-101, *et. seq*., are immune from any claim for damages, including medical malpractice, for which the immunity of the governmental entity is removed by the act. Tenn. Code Ann. §29-20-310; *Hill v. City of Germantown*, 31 S.W.3d 234, 237-38 (Tenn. 2000). EMTs and paramedics employed by the State are immune for acts or omissions within the scope of their office or employment except for willful, malicious, or criminal acts or omissions, or for acts or omissions done for personal gain. Tenn. Code Ann. §9-8-307(h).

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September 26, 2003

Opinion No. 03-124

Sheriff's Accessing E-911 Database to Aid in Serving Warrants

QUESTION

Under the current statute governing the establishment and use of the statewide E-911 database, may a local county sheriff use the database in order to look up addresses to assist in serving warrants?

OPINION

According to information received by our Office, there is currently no statewide database. Information is provided to locally governed emergency communications districts through different means. In most cases, databases are maintained by a phone company, and access by the communications district staff comes only when they receive an emergency phone call. Depending on the facts and circumstances, access to these databases depends on the terms of the contract between the phone company and the communications district, and whether the phone company is contractually required to provide or will consent to the access. A sheriff may be allowed to access a database maintained by and readily accessible to an emergency communications district. District funds, however, may not be used to provide access if it is not for an emergency purpose.

ANALYSIS

This opinion concerns access to E-911 databases by sheriffs. The request refers to access to a "statewide" database. According to information received by our Office, there is currently no *statewide* E-911 database. E-911 service is provided through local emergency communications districts, established under Tenn. Code Ann. §§ 7-86-101, *et seq.* Tenn. Code Ann. § 7-86-102 provides in relevant part:

> (a) The general assembly finds and declares that the establishment of a uniform emergency number to shorten the time required for a citizen to request and receive emergency aid is a matter of public concern and interest. The general assembly finds and declares that the establishment of the number 911 as the primary emergency telephone number will provide a single, primary, three-digit emergency telephone number through which emergency service can be quickly

> and efficiently obtained, *and will make a significant contribution to law enforcement and other public service efforts requiring quick notification of public service personnel*. It is the intent to provide a simplified means of securing emergency services which will result in saving of life, a reduction in the destruction of property, *quicker apprehension of criminals* and ultimately the saving of money.
>
> * * * *
>
> (d) It is the intent that all funds received by the district are public funds and are limited to purposes for the furtherance of this part. The funds received by the district are to be *used to obtain emergency services for law enforcement* and other public service efforts requiring emergency notification of public service personnel, and the funds received from all sources shall be used exclusively in the operation of the emergency communications district.

(Emphasis added).

The question is whether sheriffs "may" use an E-911 database to look up addresses to assist in serving warrants. In researching the opinion, we have consulted officials of the Tennessee Emergency Communications Board ("TECB") for information about these databases. TECB is created and operates under Tenn. Code Ann. §§ 7-86-301, *et seq.* It is our understanding that, depending on how a particular database is maintained, it may be difficult to access in any other way than through receipt of an emergency phone call. The E-911 databases of the vast majority of emergency communications districts are controlled and maintained under contract between the district and a phone company. Databases for these districts are kept on the property of the phone company. Dispatchers cannot initiate access to information on these databases; access, instead, is directly linked to an emergency call. Some districts do maintain their own database, under the supervision of the TECB. Dispatchers for these districts may enter a telephone number and receive a corresponding name and address.

Where a database is under the custody and control of the emergency communications district, we think the district may lawfully grant a sheriff access to the database to look up addresses to assist in issuing and serving an arrest warrant. This conclusion is based, first, on Tenn. Code Ann. § 7-86-102, cited above. That statute reflects the intent of the General Assembly that provision of E-911 service, among other purposes, provide for the quicker apprehension of criminals. The district has developed and maintains the database as a means of providing that service. We think the General Assembly intended that resources developed to provide this service also be used to further the purposes listed in the statute. In addition, this Office has concluded that telephone numbers in the custody of an emergency communications district are public records subject to inspection and review by the public under the state public records act, Tenn. Code Ann. §§ 10-7-501, *et seq.* Op. Tenn. Atty. Gen. 96-144 (December 3, 1996). Since that opinion was written, the General Assembly passed the following statute limiting public access to unlisted numbers:

> (e) Unpublished telephone numbers in the possession of emergency communications districts created pursuant to title 7, chapter 86, shall be treated as confidential and shall not be open for inspection by *members of the public* until such time as any provision of the service contract between the telephone service provider and the consumer providing otherwise is effectuated; provided, that addresses held with such unpublished telephone numbers, or addresses otherwise collected or compiled, and in the possession of emergency communications districts created pursuant to title 7, chapter 86, shall be made available upon written request to any county election commission for the purpose of compiling a voter mailing list for a respective county.

Tenn. Code Ann. § 10-7-504(e) (emphasis added).

All of the database information in the possession of an emergency communications district, with the exception of unlisted numbers, therefore, is a public record. We do not think the exception for unlisted numbers was intended to prevent law enforcement officials from having unrestricted access to a database maintained by an emergency communications district, including access to unlisted numbers and addresses. The statute creating these districts expresses legislative intent that provision of the service will aid law enforcement officials in the apprehension of criminals. For this reason, we do not think the General Assembly intended law enforcement officials, including sheriffs, to be "members of the public" with restricted access to unlisted numbers under Tenn. Code Ann. § 10-7-504(e).

Although we conclude that a sheriff must be allowed access to databases maintained by an emergency communications district, district funds may not be used to provide the access. Tenn. Code Ann. § 7-86-102(d) mandates that all funds received by an emergency communications district are to be used exclusively for emergency-related purposes: "[A]ll funds received by the district are public funds and . . . are to be used to obtain emergency services for law enforcement and other public service efforts requiring emergency notification of public service personnel, and the funds . . . shall be used exclusively in the operation of the . . . district". *See* Op. Tenn. Atty. Gen. 95-064 (June 19, 1995) (district funds may not be spent for ambulance services, fire services, police or sheriffs' salaries); Op. Tenn. Atty. Gen. 94-007 (January 13, 1994) (district funds may not be used to buy and install road signs).

With regard to a database maintained by a private telephone company to which only limited access by the emergency communications district is available, however, we think the result is different. Under the provisions of Tenn. Code Ann. § 10-7-503, "all state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee . . . unless otherwise provided by state law." The statute, therefore, ordinarily refers to records maintained by a governmental entity. The test for determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with

the transaction of official business by any governmental agency. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991). This Office has also concluded that documents reviewed by a public agency in connection with its official business are also public records open for inspection. Op. Tenn. Atty. Gen. 96-011 (February 6, 1996). Whether a database prepared and controlled by a private company for the use of an emergency communications district is a public record open to inspection by the public in the first instance would, therefore, depend on the terms of the contract governing its preparation and use. Where a district's access to the database is severely circumscribed, we think a court would conclude that the database is not a public record open to public inspection. Further, federal law restricts the right of telephone companies to disclose unlisted numbers and related information. *See, e.g.*, 47 C.F.R. § 51.217(c)(3)(iv) (local exchange carriers). Access to this information, therefore, would depend on the terms of the contract between the telephone company and the emergency communications district, and whether the phone company is contractually required to provide or will consent to the access.

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April 15, 2004

Opinion No. 04-065

Joint Agreement for Emergency Communication Services

QUESTION

Is a 911 emergency communications district, created under Tenn. Code Ann. §§ 7-86-101, *et seq.*, authorized to enter into an agreement with the Sequatchie County government for the purpose of creating a committee that will oversee the operation of a dispatching/communications center?

OPINION

The proposed Agreement is directly governed by Tenn. Code Ann. § 7-86-105(b)(6). Under that statute, joint emergency communications operations must be run by a joint emergency communications district, the directors of which are appointed to four-year terms. Membership on the committee contemplated by the Agreement does not meet this requirement. In addition, the Agreement provides that the Tennessee Emergency Communications Board may arbitrate among the parties regarding the distribution of assets if the Agreement is terminated. This agency does not appear to have the authority to carry out this provision. Finally, the Agreement provides that the City and the County will indemnify other parties and their employees, agents, or consultants from liability, and it authorizes the City and the County to extend insurance to these entities. No statute authorizes these provisions.

ANALYSIS

This opinion concerns the authority of a 911 emergency communications district to enter into an agreement with a county government to create a committee to oversee the operation of a dispatching/communications center. The request includes a copy of an agreement that is currently being considered by the board of directors of an emergency communications district and the Sequatchie County Commission (the "Agreement"). The Agreement also provides for the City of Dunlap to elect to enter into it. The purpose of the Agreement is to protect the citizens of the county by implementing a system of enhanced 9-1-1 communications and to provide for radio communication between and among emergency service agencies serving the county by operating a communications center that will assist fire and police departments, the Sheriff, EMS, and rescue agencies to respond to calls for emergency assistance more rapidly. The Agreement establishes a Central Communications Committee (the "Committee"), made up of certain county officials who serve *ex officio* and two members of the emergency communications district board, to be elected by

the Board. If the City joins the Agreement, then the Committee includes the City police chief and the City fire chief.

Under the proposed Agreement, the Committee is invested with all authority necessary to operate a 9-1-1 communications center. The Agreement does not further describe the function of the communication center, but its purpose appears to be as a single communications center operated for the benefit of the County, the City, and the emergency communications district. The County must approve the Committee's budget. The County, the district, and the City each contribute toward the cost of the center. The district is required to pay all required costs under revenue standards established by the Tennessee Emergency Communications Board (the "State Board"), and, subject to the availability of funds, may contribute additional amounts. The County and the City pay a portion of the net amount of the total approved budget after deducting the district's contribution. The Agreement has a four-year initial term, with automatic renewal terms of four years thereafter.

Section 12 of the Agreement contains termination provisions. Under this section, if the County withdraws from the agreement, the parties agree to meet with the State Board within thirty days of the notice and develop plans for continuing 9-1-1 service and the equitable distribution of assets. The parties may ask the State Board to undertake binding arbitration to resolve any disagreements. If the State Board refuses to arbitrate, or the other parties do not wish to have the matter arbitrated, then the County or City may seek equitable relief in chancery court.

Under Section 13 of the Agreement, the County and City agree to defend, hold harmless, and indemnify the Committee, the district, and members of the governing bodies thereof, as well as all "employees, agents and consultants", from liability and to indemnify them from judgment, loss, or claims arising from operations under the Agreement. The Committee may maintain liability insurance in amounts and coverage greater than the limits of the Tennessee Governmental Tort Liability Act. In lieu of this insurance, the City or County may extend equivalent insurance coverage to employees, agents, and consultants.

Emergency communications districts are formed by a city or county legislative body after a local referendum in accordance with Tenn. Code Ann. §§ 7-86-104 and -105. Tenn. Code Ann. § 7-86-105(b)(6) authorizes local governments to consolidate emergency communications operations. The statute provides:

> It is the public policy of this state to encourage the consolidation of emergency communications operations in order to provide the best possible technology and service to all areas of the state in the most economical and efficient manner possible. Pursuant to this policy, if two (2) or more counties, cities, or existing emergency communications districts, or any combination thereof, desire to consolidate their emergency communications operations, *a joint emergency communications district* may be established by the parties using an interlocal agreement as authorized by title 5, ch. 1, part 1, and title 12, ch. 9, part 1; provided, that notwithstanding the language of this subdivision or any other law to the contrary, no such consolidation of

> emergency communications operations shall result in the creation of a separate emergency communications district within the boundaries of an existing emergency communications district. Under such an agreement, the funding percentages for each party, and the size *and appointment of the board of directors* of such combined emergency communications district shall be determined by negotiation of the parties, notwithstanding the provisions of this subsection to the contrary; provided, that the board of directors of such combined district shall be composed of not less than seven (7) members to govern the affairs of the district. *The terms, remuneration, and duties stated in subsections (c)-(i) shall apply to any board of directors of any combined emergency communications district.*

(Emphasis added). Tenn. Code Ann. §§ 5-1-113 and 5-1-114 authorize interlocal cooperation between contiguous counties and between counties and cities. Tenn. Code Ann. §§ 12-9-101, *et seq.*, authorize local governments to exercise their powers jointly under an interlocal agreement. The agreement may establish a separate legal entity or entities to conduct the joint or cooperative undertaking. Tenn. Code Ann. § 12-9-104(c)(2).

The Agreement creates the Committee to operate a combined communications center. Under Tenn. Code Ann. § 7-86-105(b)(6), quoted above, a county, a city, and an emergency communications district are expressly authorized to combine emergency communications operations. But the joint operation must be conducted by a joint emergency communications district. In the context of the statute, we think this term means that the operating entity must have all the characteristics of an emergency communications district. The statute provides that the participating local governments are to negotiate the size and *appointment* of the board of directors of the combined emergency communications district. The statute also expressly provides that directors of a joint emergency communications district are subject to the terms specified in Tenn. Code Ann. § 7-86-105(c). That statute provides that directors serve four-year terms, except for initial staggered terms. Under the Agreement, however, the county commission chairman, county emergency services committee chairman, county sheriff, county emergency management agency director, and county emergency medical service director, as well as the city police chief and fire chief, are eligible to service "so long as that person holds the office specified." Agreement, § 3.A. These provisions are inconsistent with the terms specified in Tenn. Code Ann. § 7-86-105(c). Moreover, under Section 4, *ex officio* members may designate any person to serve on the Committee in that member's absence. Directors serving under Tenn. Code Ann. § 7-86-105 have no such right. For these reasons, we think a court would conclude that the Committee does not meet the requirements of Tenn. Code Ann. § 7-86-105(b)(6).

The Agreement presents several other legal problems. Under Section 12, for example, the Agreement provides that the State Board may arbitrate the distribution of assets if the Agreement is terminated. This agency is created under Tenn. Code Ann. §§ 7-86-301, *et seq.* The State Board is generally empowered to help local emergency communications districts provide uniform emergency communications services. The State Board also has supervisory authority with regard to financially distressed utility districts. Further, the State Board is authorized, among other powers,

to, "[provide advisory technical assistance to any emergency communications district upon request[.]" But neither this provision, nor any other provision in the statutory scheme, gives this agency the authority to arbitrate distribution of assets of a joint emergency communications district in these circumstances.

Under Section 13, the County and City agree to indemnify the Committee, the emergency communications district, and "employees, agents and consultants" for any liability arising out of the Agreement. There is no explicit statutory authority for this commitment. This Office has concluded that a contract provision that requires a local governmental entity to indemnify or hold harmless another governmental entity or a private party beyond the liability imposed upon that entity by law is unenforceable. Op. Tenn. Atty. Gen. 93-1 (January 4, 1993). The Agreement also authorizes the County and the City to extend insurance coverage to the same entities, with the cost deducted from the City or County's funding share. We have found no statutory authority for this provision.

This discussion is not meant to be comprehensive. This Office has not reviewed the Agreement to determine whether it complies with any applicable private acts or local resolutions or ordinances. Further, in some cases the legality of a particular provision will depend on facts and circumstances not available to this Office. Attorneys for the parties to the Agreement should review it to determine its legality and enforce ability.

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July 22, 2004

Opinion No. 04-121

Local government use of federal general service administration contracts; Tenn. Code Ann. § 12-3-1001(c)

QUESTION

May local governments legally make purchases through federal general service administration ("GSA") contracts pursuant to Tenn. Code Ann. § 12-3-1001(c)?

OPINION

Yes, but only to the extent permitted by federal law or regulations.

ANALYSIS

Your question seeks to determine whether local governments may purchase through federal GSA contracts pursuant to Tenn. Code Ann. § 12-3-1001(c). Tenn. Code Ann. § 12-3-1001(c) states as follows:

> (c) To the extent permitted by federal law or regulations, local governments may make purchases of goods, except motor vehicles, or services included in federal general service administration contracts or other applicable federal open purchase contracts either directly or through the appropriate state department or agency; provided, that no purchase under this section shall be made at a price higher than that which is contained in the contract between the general service administration and the vendor affected.

One of the most basic principles of statutory construction requires the interpreter to ascertain and give effect to the intention and purpose of the legislature. That intent and purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, eschewing any forced or subtle constructions that might artificially limit or extend the meaning of the language.[1] Where the statutory language is plain, clear, and unambiguous, one must avoid any interpretation or

[1] *See, e.g., Tuggle v. Allright Parking Systems, Inc.*, 922 S.W.2d 105, 107 (Tenn. 1996); *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991); *Worrall v. Kroger Co.*, 545 S.W.2d 736, 738 (Tenn. 1977).

construction that departs from the words of the statute.[2]

Under a plain reading of Tenn. Code Ann. § 12-3-1001(c), local governments may purchase goods or services, other than motor vehicles, through federal GSA contracts. The statute does clarify, however, that such purchases may be made "to the extent permitted by federal law or regulations."[3] Additionally, even if permitted under federal law and regulations, a local government may not purchase through a GSA contract if the price of the good or service is cheaper under a contract between the Tennessee Department of General Services and a vendor.

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[2] *Tuggle v. Allright Parking Systems, Inc*., 922 S.W.2d at 107.

[3] The issue whether federal law or regulation allows local governments to use GSA contracts is beyond the scope of this opinion. It appears, however, that federal law permits only limited purchases through GSA contracts. *See e.g.*, 40 U.S.C.A. § 502(c) (stating that GSA Administrator may provide for use by state or local governments of GSA/federal supply schedules for automated data processing equipment, software, supplies, support equipment and services); 10 U.S.C.A. § 381 (state and local governments authorized to purchase law enforcement equipment through Federal procurement channels, including GSA, provided that the equipment is used in the performance of "counter-drug activities").

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October 13, 2005

Opinion No. 05-155

Public Records: Access to Recordings of 911 Calls and Law Enforcement Radio Transmissions

QUESTIONS

1. Are the recordings made by 911 telephone operators public records?

2. Under what circumstances may a state governmental agency deny or delay access by private citizens to recordings made by 911 telephone operators?

3. Is a criminal defendant entitled to obtain a copy of 911 telephone operator recordings prior to his or her preliminary hearing?

4. Are recordings made of law enforcement radio transmissions public records?

5. Under what circumstances may a governmental agency deny or delay access by private citizens to recordings made of law enforcement radio transmissions?

6. Is a criminal defendant entitled to obtain a copy of law enforcement radio transmissions prior to his or her preliminary hearing?

OPINIONS

1. As a general rule, recordings made by 911 telephone operators are public records. Exceptions to this rule exist, however, and a private citizen's or a criminal defendant's access to the recordings must be evaluated on a case-by-case basis.

2. A state governmental agency may deny or may delay access by private citizens to recordings made by 911 telephone operators when state law limits or prohibits disclosure. For example, a private citizen would not have a right to inspect or copy 911 recordings relevant to a pending criminal investigation or prosecution.

3. No. Tenn. R. Crim. P. 16 ("Rule 16") governs disclosure of records in criminal cases, and the criminal defendant does not have a right under Rule 16 to inspect or copy 911 recordings prior to his preliminary hearing.

4. As a general rule, recordings of law enforcement radio transmissions are public

records. Exceptions to this rule exist, however, and the private citizen's and the criminal defendant's access to the recordings must be evaluated on a case-by-case basis.

5. A governmental agency may deny or may delay access by private citizens to recordings of law enforcement radio transmissions when state law limits or prohibits disclosure. For example, a private citizen would not have a right to inspect or copy any records relevant to a pending criminal investigation or prosecution.

6. No. Tenn. R. Crim. P. 16 governs disclosure of records in criminal cases, and the criminal defendant does not have a right under Rule 16 to inspect or copy law enforcement radio transmission recordings prior to his preliminary hearing.

ANALYSIS

The Public Records Act provides that "all state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee ... unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a). Public records statutes should be construed broadly so as to give the fullest possible public access to public records. *See, e.g., Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. App. 2005). Normally, the first question is whether the requested material is a public record. *Coats v. Smyrna/Rutherford County Airport Authority*, 2001 WL 1589117, *4, No. M2000-00234-COA-R3-CV (Tenn. App. December 13, 2001). The proper test in determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with a government agency's transaction of official business. Tenn. Code Ann. § 10-7-301; *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991).

This Office has previously opined that, under *Griffin*, a 911 tape made or received by a state or local government agency in connection with the transaction of its official business would be a "public record" open for inspection under Tenn. Code Ann. § 10-7-503 and copying under Tenn. Code Ann. § 10-7-506, unless otherwise provided by state law. Op. Tenn. Att'y Gen. 93-65 (November 29, 1993). The definition of a public record expressly includes sound recordings such as a 911 tape. Tenn. Code Ann. §10-7-301(6). We have found no indication that law enforcement transmission recordings would be treated differently from 911 tapes under the Public Records Act. *See, e.g., State v. Kelly*, 697 S.W.2d 355, 358 (Tenn. Cr. App. 1985). This conclusion does not, however, end the inquiry.

Not all public records are open to inspection. *Coats*, 2001 WL 1589117 at *4. In Tenn. Code Ann. § 10-7-503 and -504, the General Assembly has provided exceptions to the availability of public records. For example, if a tape is part of an investigative record of the Tennessee Bureau of Investigation (TBI), Tenn. Code Ann. § 10-7-504(a)(2) requires that the "information in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." No specific exception for 911 tapes or recordings of radio transmissions of law enforcement personnel appears in these statutory provisions. The exceptions in Tenn. Code Ann. § 10-7-503 and -504 are not exclusive, however, and other statutes, rules and the common law also must be examined to determine whether 911 tapes and recordings of law enforcement radio

transmissions are available for public inspection and copying.

Tenn. R. Crim. P. 16 [1] governs disclosure of evidence in active criminal cases.[2] *Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987). In *Appman*, the Tennessee Supreme Court held that the Tennessee Rules of Criminal Procedure have the force and effect of state law. *Id.* at 166; *see also Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996) (applying same holding to the Tennessee Rules of Civil Procedure). The Court in *Appman* held that documents in an active criminal case that would not be subject to discovery under Tenn. R. Crim. P. 16 are not subject to inspection under the Public Records Act. *Appman*, 746 S.W.2d at 166. The Court reasoned that Rule 16's protection of certain material from disclosure constituted an exception to the Public Records Act. *Id*. Thus, if a 911 tape or a tape of radio transmissions is relevant to an active criminal case, the Tennessee Rules of Criminal Procedure will impact whether and to whom a record may be disclosed.

Prior to trial, a criminal defendant may be able to inspect and copy 911 or law enforcement radio transmission tapes under Rule 16. *See* Tenn. R. Crim. Proc. 16 (a)(1)(C). For the defendant to obtain access to such recordings, the defendant must show that the recordings are (1) material to the preparation of the defendant's defense, or (2) intended for use by the State as evidence in chief at the trial, or (3) material obtained from or belonging to the defendant. Tenn. R. Crim. P. 16(a)(1)(C). Clearly, this assessment would have to be made on a case-by-case basis.

The stage at which discovery will be available is not, however, before the preliminary hearing. Rule 16 does not apply to preliminary hearings. *See State v. Willoughby*, 594 S.W.2d 388, 390-91 (Tenn. 1980). "[A] preliminary hearing is simply a forum for determining (1) whether an offense has been committed, (2) whether there is reasonable ground to believe that the defendant is guilty of its commission and (3) whether and how much bail should be set." *McKeldin v. State*, 516 S.W.2d 82, 85 (Tenn. 1974). "The purpose of the [preliminary] hearing is to adjudicate the existence or absence of probable cause, and not to discover the State's case." *See* Tenn. R. Crim. P. 5.1, Committee Comment.

In brief, our conclusions are as follows:

1. As a general rule, recordings made by 911 operators are public records.
2. As a general rule, recordings of law enforcement transmissions are public records.
3. These materials are open to public inspection and copying unless they are excepted from disclosure under state statutes, rules or the common law.
4. These materials are not available to the public for inspection and copying when they are relevant to an active criminal case.
5. Rule 16 does not apply to preliminary hearings. Therefore, the materials are not open

---

[1] Rule 16 is not the exclusive procedure for a criminal defendant to obtain access to documents, records and other materials held by the State. *See* Rule 16 Committee Comment for discovery under laws other than Rule 16.

[2] Tenn. Code Ann. § 10-7-503 may not be used to widen the scope of permissible discovery or otherwise circumvent the rules of procedure. *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 361 (Tenn. Cr. App. 1998).

for inspection and copying by the criminal defendant at this stage of the criminal case.

6. Prior to trial, these materials may be available to a criminal defendant for inspection and copying if they meet the criteria of Rule 16(a)(1)(C).

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January 31, 2006

Opinion No. 06-022

Emergency 911 Employment of Aliens

QUESTIONS

1. Is there any statutory prohibition against employment of an alien (non-citizen) as a 911 call-taker or dispatcher?

2. If the answer is "yes," what course of action is recommended if a particular 911 District currently employs a non-citizen as a call-taker/ dispatcher?

OPINIONS

1. Yes. Tenn. Code Ann. § 7-86-205 specifically requires that "all emergency call takers or public safety dispatchers" be "a citizen of the United States."

2. This Office recommends that a 911 District employing a non-citizen dispatcher abide by the mandates of § 7-86-205, unless and until a court of competent jurisdiction declares the statute unconstitutional.

ANALYSIS

1. Tennessee Code Annotated § 7-86-205 sets forth the statutory requirements of emergency call takers and public safety dispatchers. One of the enumerated requirements is that the call taker or dispatcher be a citizen of the United States. Tenn. Code Ann. § 7-86-205(d)(2). Thus, a 911 District that employs a non-citizen violates this law.

2. This Office recommends that the 911 District comply with Tenn. Code Ann. § 7-86-205(d)(2). However, it should be noted that the statute is vulnerable to a constitutional challenge. In limited situations, a state may make citizenship a requirement for certain positions. For instance, in *Foley v. Connelie,* 435 U.S. 291 (1978), the United States Supreme Court upheld a New York statute prohibiting non-citizens from being employed as state troopers. *See also Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding *Foley* where non-citizens challenged a California statute requiring probation officers to be United States citizens); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a statute requiring school teachers to be United States citizens). In these situations, the United States Supreme Court has concluded that the job at issue is one that "fulfills a most fundamental obligation of government" and provides the employee with a "very high degree

of judgment and discretion." *Foley*, 435 U.S. at 297-99. These jobs are not "to be equated with a private person engaged in routine public employment or other 'common occupations of the community' who exercises no broad power over people generally." *Id.* at 299. Rather, the positions are "intimately related to the process of democratic self-government." *Bernal v. Fainter*, 467 U.S. 216, 220 (1984). The determining factor is whether the position is such that "the officeholder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population-- power of the sort that a self-governing community could properly entrust only to full-fledged members of that community." *Id.* at 224.

Thus, courts have struck down statutes making United States citizenship a requirement for a notary public, *Bernal*, 467 U.S. at 228, private civil engineers, *Examining Board v. Flores de Otero*, 426 U.S. 572 (1979), admission to the Connecticut bar, *In re Griffiths*, 413 U.S. 717 (1973), permanent positions in the competitive class of the New York civil service, *Sugarman v. Dougall*, 413 U.S. 634 (1973), and even airport security screeners, *Gebin v. Mineta*, 231 F. Supp. 2d 971 (C.D. Cal 2002). Nevertheless, the 911 District should abide by Tenn. Code Ann. § 7-86-205(d) unless and until a court of competent jurisdiction (i.e., a Tennessee court, the Sixth Circuit, or the United States Supreme Court) strikes it, or a statute that is materially indistinguishable from it, down.[1]

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[1] At least as of today's date, the Board members would enjoy qualified immunity in any action brought by someone aggrieved by the enforcement of the statutory restriction because non-citizens have no clearly established constitutional or statutory right to be employed as emergency dispatchers. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

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March 28, 2006

Opinion No. 06-054

Authority to Rename Public Roads

QUESTION

Who has the authority to rename public roads, including state routes and highways?

OPINION

The Tennessee General Assembly has control of public streets and highways within the State of Tennessee. The General Assembly delegated the authority to rename public roads and streets to local legislative bodies unless provided otherwise by law. Prior to this delegation, the General Assembly had already provided itself with the authority to rename any public road, street or highway within the territorial boundaries of the state under Tenn. Code Ann. § 3-2-112(a). Therefore, if the General Assembly chose to exercise its authority to rename a public street or highway, its actions would be controlling.

ANALYSIS

Control of the public streets and highways of the State of Tennessee resides primarily with the legislature. *BellSouth Telecommunication, Inc. v. City of Memphis,* 160 S.W.3d 901, 912 (Tenn.2004). However, the Tennessee General Assembly can delegate that control to local governments by proper legislative authority. *Id.*

In 1991 the General Assembly enacted Chapter 17 of the 1991 Public Acts of Tennessee. Section 1 of Chapter 17 acknowledges that the General Assembly has the authority "to take formal action to give a name to or to rename any road, highway, interstate highway, bridge, overpass, or other public structure, facility or property" but requires the General Assembly to take such action only through enactment of legislation or adoption of a joint resolution of the senate and the house of representatives. *See* Tenn. Code Ann. § 3-2-112.

In 1994 the General Assembly enacted Chapter 807 of the 1994 Public Acts of Tennessee to provide a uniform system of property addressing to facilitate Enhanced 911 service in each county of the state and to involve emergency communication districts in the addressing activity. At that time the General Assembly delegated the authority to name public and private roads and streets to the legislative bodies of counties for unincorporated areas and to municipalities within their incorporated boundaries *unless expressly provided otherwise by law.* 1994 Tenn. Public Acts, ch.

807, § 2; which is codified as Tenn. Code Ann. § 7-86-127(a). Section 7-86-127(a) and (b) specifically provide:

> **Street names and numbers.** -- (a) Unless expressly provided otherwise by law, the authority to name public and private roads and streets, including roads and streets located within residential developments, and to assign property numbers relating to the roads and streets, is exclusively vested in the legislative bodies of counties for unincorporated areas, and municipalities within their incorporated boundaries; provided, that the exercise of this authority must be in a manner acceptable to the United States postal service.
>
> (b) The legislative bodies of any county or municipality may delegate the authority provided under this section to the emergency communications district, if there be one; provided, that the legislative body shall approve road or street name changes made by the district under such terms as the legislative body may determine.

Tenn. Code Ann. §7-86-127.

When interpreting a statute, the role of the interpreting court is "to ascertain and give effect to the legislative intent." *Sharp v. Richardson,* 937 S.W.2d 846, 850 (Tenn.1996). In construing statutes relating to the same subject matter, a court has a duty to avoid a construction that will place statutes in conflict and is to resolve such conflicts, whenever possible, so as to provide a harmonious interpretation of the laws. *Id.* In the absence of ambiguity, legislative intent is derived from the face of a statute, and the interpreting court may not depart from the "natural and ordinary" meaning of the statute's language. *Hawkins v. Case Management Incorporated,* 165 S.W.3d 296, 300 (Tenn.2004). In addition to being bound by the plain language of the statute, the interpreting court is also bound by the general rules of grammatical construction. *Id.* Furthermore, the legislature is always presumed to know of its prior enactments; and, consequently, an interpreting court should find repeals by implication only when statutes cannot be construed harmoniously. *State v. Hicks,* 55 S.W.3d 515, 523 (Tenn.2001).

In its 1994 delegation of the authority to name and rename public and private roads and streets to facilitate the development of a uniform system of property addressing for Enhanced 911 service, the General Assembly clearly transferred to local legislative bodies the exclusive authority to name and rename public and private roads and streets within their respective local jurisdictions *unless expressly provided otherwise by law.* Tenn. Code Ann. § 7-86-127(a) and (b). It must be presumed that the General Assembly, when it enacted Chapter 807 in 1994, knew that it also has the authority "to take formal action to give a name to or to rename any road, highway, interstate highway, bridge, overpass or other public structure . . . " within this state, as acknowledged in Tenn. Code Ann. § 3-2-112(a).

According to the natural and ordinary meaning of the plain language of Tenn. Code Ann.

§ 7-86-127(a), the authority to name public and private roads and streets within their respective local jurisdictions is exclusively vested in local legislative bodies *unless expressly provided otherwise by law.* The 1994 delegation of this authority was done to facilitate the development of a uniform system of property addressing for Enhanced 911 service, but that delegation of authority is expressly limited by the unambiguous language of the statute itself. Since the General Assembly has control of public roads, streets, and highways within the State of Tennessee, it has the authority to rename any public road, street or highway within the territorial boundaries of the state if it chooses to exercise that authority as provided by Tenn. Code Ann. § 3-2-112(a).

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March 28, 2007

Opinion No. 07-38

Application of E911 Charges to T-1 and PRI Circuits

QUESTION

In accordance with Tenn. Code Ann. § 7-86-108, which authorizes the local Emergency Communications Board to impose an emergency telephone service charge on all service users to fund E911 services, how many emergency telephone service charges should be imposed on T-1 circuits capable of transmitting digital signals through 24 separate channels, and on PRI circuits capable of transmitting through 23 channels?

OPINION

Pursuant to Tenn. Code Ann. §§ 7-86-108 and 7-86-103(7), it is the opinion of this Office that the E911 board may impose an emergency telephone service charge for each channel in a T-1 or PRI circuit that is capable of conveying an outbound voice telephone call from the service user to an E911 public safety answering point.

ANALYSIS

Emergency communications districts are established and operate under the Emergency Communications District Law ("the Act"), codified in Tenn Code Ann. §§ 7-86-101, et seq. The Act authorizes the E911 district to levy an "emergency telephone service charge" on telephone "service users." Tenn Code Ann. § 7-86-108(a)(1). The Act defines "service user" as "any person, corporation or entity that is provided 911 service." Tenn. Code Ann. § 7-86-103(13). The Act further defines "911 service" to include:

> regular 911 service enhanced universal emergency number service or enhanced 911 service that is a telephone exchange communications service whereby a public safety answering point may receive telephone calls dialed to the telephone number 911. "911 service" includes lines and may include the equipment necessary for the answering, transferring and dispatching of public emergency telephone calls originated by persons within the serving area who dial 911 . . . .

Tenn. Code Ann. § 7-86-103(10). Accordingly, an E911 charge may be assessed on each service user who is able to reach a public safety answering point by dialing the telephone number 911.

The Act authorizing the collection of E911 charges from "service users" mandates that the charges be collected by the telephone "service supplier." Tenn. Code Ann. § 7-86-108(d). The Act defines "service supplier" as "any person, corporation or entity providing exchange telephone service to any service user."[1] Tenn. Code Ann. § 7-86-103(14). The Act further outlines that "[n]o such service charge shall be imposed upon more than one hundred (100) exchange access facilities per service user per location." Tenn. Code Ann. § 7-86-108(A)(1)(a). The Act defines "exchange access facilities" as "all lines, provided by the service supplier for the provision of exchange telephone service, as defined in existing general subscriber services tariffs filed by the service supplier with the Tennessee regulatory authority." Tenn. Code Ann. § 7-86-103(7). Thus, it is evident that the E911 charges are imposed on service users according to the number of "lines" they are able to utilize.

Additionally, the Act indicates that the purpose of the E911 charge is to "fund the 911 emergency telephone service." Tenn. Code Ann. § 7-86-108(A)(1)(a). Moreover, the Tennessee Legislature expressly codified its desire that the E911 charge be levied in a fair and equitable manner so as to negate any competitive disadvantages, stating: "[a]ny such service charge shall have uniform application and shall be imposed throughout the entire district to the greatest extent possible in conformity with the availability of such service within the district." *Id.*

In sum, the Act allows the E911 district to assess a telephone service charge to all service users capable of telephoning a public safety answering point. These charges are collected by the telephone service supplier on "all lines" capable of "telephone exchange service," up to 100 lines per service user per location. The Legislature expressly declared that the purpose of the E911 charge is to pay for the 911 emergency service, and, with this in mind, the charges are to be applied uniformly. Accordingly, the language of the Act mandates that one E911 charge may be assessed for each "line" with a cap at 100 E911 charges for service users with multiple lines at the same location. The Act's language is relatively straightforward when applied in the context of traditional analog telephone exchange service, where one line supports one voice-based connection capable of accessing 911 service. The more difficult question is how the Act's one E911 charge per line mandate should be applied to voice-capable digital signals transmitted through T-1 and PRI circuits.

The Tennessee Emergency Communications Board has adopted a "policy" whereby it interprets the Act to allow for the collection of one E911 charge for "each of the twenty-four (24) lines available to the subscriber that can transmit a telephone call" in the case of a T-1 circuit, and "each of the twenty-three (23) lines used for telephonic purposes" in the case of PRI service.[2] This "policy" has not been adopted as a rule under the Uniform Administrative Procedures Act and thus lacks the force and effect of a duly-promulgated rule. It was noted in the request for this Opinion

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[1]The term "exchange telephone service" is not defined in the Act.

[2]Tennessee Emergency Communications Board Policy 23.

that at least one local telephone exchange service provider has elected to collect and remit only one E911 charge for its T-1 circuits and no more than five E911 charges for each ISDN circuit utilizing a PRI protocol. Other local service providers are following the Tennessee Emergency Communication Board's policy.

As a prerequisite to determining the number of E911 charges that should be assessed to T-1 and PRI digital transmission pathways pursuant to the Act, it is first necessary to briefly examine the telecommunications technology involved. While commonly referred to as a T-1 line, T-1 is more accurately defined as a voice and data transport system capable of transferring digital information at 1.455 megabytes per second over 24 dedicated channels, each channel supporting a transfer rate of 64 kilobytes per second. Accordingly, a T-1 line is actually a digital signal protocol that can operate physically through various media, including the same two-wire copper circuit as analog telephone traffic, or via fiber optics.[3] PRI, or Primary Rate Interface, is a type of protocol commonly used in an Integrated Services Digital Network (ISDN), and operates in a similar manner to that of T-1 service, with the exception that PRI service offers 23 channels (B channels) available for voice and data transfer while one channel (the D channel) is reserved for the system to communicate with itself. The advantage of T-1 and PRI protocols over traditional analog telephone service is the ability to transfer a greatly increased volume of both voice and data traffic over the same physical infrastructure by utilizing digital technology. For example, the same two-copper-wire circuit that would support only one telephone call at a time using an analog protocol could support 24 simultaneous voice telephone calls utilizing a T-1 protocol or 23 voice telephone calls under a PRI protocol.[4] Moreover, many service users prefer the T-1 and PRI service primarily because of its fast and efficient data transfer capabilities, and often utilize the technology more for this function than for traditional voice telephone exchange.

Because of the manner in which the digital signals are routed, the service supplier knows which channels under T-1 and PRI protocols are tagged for data transfer and which channels are reserved for voice telephone transmissions. As a general rule, with only a few exceptions, a T-1 or PRI circuit is dedicated to either data transfer or voice communication.[5] While current technology

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[3]While two wires are required as a bare minimum (one talk wire and one receive wire configured to complete a circuit), a four-wire conversion, sometimes described as a four-wire access loop, is often used to transfer digital signals over greater distances.

[4]The utilization of T-1 and PRI digital transfer protocols assumes that both the service supplier has the proper equipment in its central office (CO) and the service user has the proper digital-capable equipment at its end. Service users served by a T-1 line or PRI service will have either a channel bank with multiple attachment points to utilize the channels available to them, or more often some type of computerized system that automatically manages input devices. For voice telephone exchange service, it is often a Private Branch Exchange, or PBX system, that routes calls through to available voice-dedicated channels.

[5]These exceptions include data transfer over a channel designated for voice traffic utilizing the now relatively antiquated dial-up modem. Because of the higher tariff rates for T-1 and PRI service, it would be rare indeed to have significant data transfer conducted through a channel designated for voice traffic. Also, an increasingly popular exception involves the transfer of voice communication over channels designated for

allows the fractional use of the band-width available through a T-1 or PRI protocol, essentially allowing multiple service users to divide up the channels of a dedicated T-1 or PRI circuit, each channel is nonetheless assigned to a particular user and is dedicated to either data transfer or voice telephone service. For those channels designated for voice telephone service, three separate options are available to the end user: one-way outgoing voice calls, one-way incoming voice calls, and two-way voice calls. The service provider controls, and therefore knows, the designation of each channel. In sum, the service supplier designates and therefore knows for accounting purposes the following with regard to T-1 and PRI circuits: each channel that is assigned to each individual service user at a particular location; whether the channel is designated for data transfer or voice telephone service; and, if the channel is dedicated to voice telephone service, whether it provides incoming, outgoing, or two-way telephone service.

As noted above, the Act and the corresponding statutes allow for the collection of one E911 charge per line providing exchange telephone service. When this mandate is applied to digital service utilizing T-1 and PRI protocols, the issue is whether the E911 charges should be assessed based on the number of circuits (also called loops), or the number of digital channels contained in each circuit. Furthermore, if the fees are assessed based on the number of digital channels, another issue is whether these charges should be collected on all channels, or only those capable of connecting to 911 service. The resolution of these issues is essentially a matter of statutory interpretation.

The primary objective of statutory construction is to ascertain and give effect to the intent and purpose of the legislature. *Conley v. State*, 141 S.W.3d 591 (Tenn. 2004). When the statutory language is unambiguous, legislative intent is to be derived from the plain and ordinary meaning of the statutory language. *State v. Wilson*, 132 S.W.3d 340 (Tenn. 2004). Furthermore, the meaning of a statute is determined by viewing the statute as a whole and in light of its general purpose. *City of Lenoir City v. State ex rel. City of Loudon*, 571 S.W.2d 297, 299 (Tenn. 1978). A statute should not be given a forced construction in an effort to extend the import of the language. *State v. Butler*, 980 S.W.2d 359 (Tenn. 1998).

With these principles in mind, it is necessary to return to the language of the Act as codified in Title 7, Chapter 86. An "emergency telephone service charge" may be assessed on "service users." Tenn Code Ann. § 7-86-108(a)(1). A "service user" is "any . . . entity that is provided 911 service." Tenn Code Ann. § 7-86-103(13). "911 service" is "a telephone exchange communications service whereby a public safety answering point may receive telephone calls dialed to the telephone number 911. . . ." Tenn. Code Ann. § 7-86-103(10). The plain and ordinary meaning of this language, viewed in its entirety and with the general purpose of the Act in mind, leads to the conclusion that the legislature intended that emergency telephone service charges apply only to voice telephone exchange communication service. Additionally, this interpretation is also implicit within the language of the Act upon consideration of the fact that the E911 public safety answering

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data transfer though Voice Over Internet Protocol, or VOIP, technology. This technology presents a particular problem for the collection of E911 charges, and was recently directly addressed by the Tennessee Legislature, resulting in the amendments to the Act found in 2006 Tenn. Public Acts Chapter 925.

points can currently be reached only via voice telephone exchange communication.

The Act further states that an E911 charge is to be assessed on the first 100 "exchange access facilities" per service user per location. Tenn. Code Ann. § 7-86-108(A)(1)(a). The term "exchange access facilities" is defined as "all lines, provided by the service supplier for the provision of exchange telephone service, as defined in existing general subscriber services tariffs filed by the service supplier with the Tennessee regulatory authority." Tenn. Code Ann. § 7-86-103(7). However, despite the Act's reference to existing tariffs, the current general subscriber services tariffs on file with the Tennessee Regulatory Authority do not expressly define "exchange telephone services." Nonetheless, tariffs often define "exchange service" in language such as "[t]elecommunications service provided for subscribers within a specified geographical area for local calling and access to toll services." In short, the general subscriber services tariffs on file with the Tennessee Regulatory Authority indicate that "exchange telephone service" means voice telephone service. Accordingly, it is the opinion of this Office that the Act does not contemplate the assessment of E911 changes on lines devoted exclusively to non-voice telephone exchange service, such as T-1 or PRI channels used solely for data transfer.

The ultimate issue with regard to T-1 and PRI protocol circuits is the number of E911 charges that may be assessed when voice telephone exchange service is provided. As already noted, the Act requires the assessment of E911 charges on "service users" capable of reaching "911 Service" via voice telephone exchange service. Tenn. Code Ann. § 7-86-103(13) and (9). This E911 charge is assessed on "all lines" providing exchange telephone service, *see* Tenn. Code Ann. § 7-86-103(7), on a one-charge-per-line basis up to 100 charges per user per location, *see* Tenn. Code Ann. § 7-86-108(A)(1)(a). Moreover, the purpose of the E911 charge is to "fund the 911 emergency telephone service," and the funds are to be "used for the operation of the district and for the purchase of necessary equipment for the district." Tenn. Code Ann. § 7-86-108(A)(1)(a) and (e). With these purposes in mind, the Tennessee Legislature further mandated that the E911 charge be levied in an equitable manner, requiring that the "service charge shall have uniform application." Tenn. Code Ann § 7-86-108(A)(1)(a). Based on the plain and ordinary meaning of this language, viewed in its entirety and considering the general purpose of the Act, it is the opinion of this Office that the Act requires that one E911 charge be assessed per voice telephone pathway capable of reaching a public safety answering point by dialing 911, whether it be an analog wire circuit or a digital signal channel.

It has been brought to the attention of this Office that at least one local service provider contends that T-1 and PRI circuits amount to only one line for E911 charge purposes because these architectures are referred to in the general subscriber services tariffs by language expressed in the singular, e.g, "a line" or "a path," as opposed to "lines" or "paths." While the Act does indicate that the E911 charges are to be applied to "all lines" providing "exchange telephone service, as defined in existing general subscriber tariffs," *see* Tenn. Code Ann. § 7-86-103(7), the existing tariffs simply do not define the terms associated with the digital signal architecture used to convey voice traffic via T-1 or PRI protocols. However, a plain and natural reading of the Act's provisions must take into account the fact that within the telecommunications industry, multiple communication pathways are frequently referred to in the singular when bundled together. For example, a telephone cable (singular) contains multiple lines (plural); a traditional telephone line (singular) contains multiple

wires (plural); a T-2 line (singular) contains multiple T-1 circuits (plural); and, of most significance to this issue, a T-1 and PRI "line" (singular) contains multiple channels (plural). It is a well established rule of statutory construction that the singular includes the plural and the plural the singular, except when the contrary intention is clearly manifest in the language interpreted. *See* Tenn. Code Ann. § 1-3-104(c); 2A Sutherland Statutory Construction § 47.34 (6th ed. 2000). Accordingly, when all of the provisions of the Act are considered as a whole in light of its general purpose, and when the language contained in the Act and the corresponding statutes is given its plain and natural meaning, the conclusion is that each separate analog line and each separate digital channel capable of reaching 911 service should be assessed a separate E911 charge. Therefore, in an effort to give effect to the legislative intent behind the Act, the "all lines" for which an E911 charge is assessed, *see* Tenn. Code Ann. § 7-86-103(7), should be interpreted to include each digital channel within a T-1 or PRI protocol circuit that supports voice telephone exchange service capable of obtaining E911 service.

The instant request relates that at least one local service provider remits only five E911 charges per PRI circuit, apparently because its considers a FCC rule that assesses only five subscriber line charges per PRI circuit to be analogous to Tennessee's E911 charge requirements. Curiously, this same service provider also finds the FCC rules pertaining to subscriber line charges attributed to T-1 lines not to be analogous to Tennessee's E911 charge requirements, and therefore remits only one E911 charge per T-1 circuit. Consequently, it is appropriate to examine the federal telecommunications fee structure and corresponding FCC rules.

At the federal level, local exchange carriers are allowed to recover costs for establishing and maintaining telecommunication lines through several charges collected from end users, including Subscriber Line Charges (SLC). The Federal Communications Commission has "long specified that carriers . . . must assess one SLC 'per line,' which is defined to mean per channel."[6] However, because the Subscriber Line Charges are set in accordance with the FCC's "long-standing efforts to align rates with costs,"[7] the FCC "created exceptions to the general rule that one SLC be assessed for each channel of service provided"[8] and promulgated rules expressly providing that a maximum of five SLCs be assessed for circuits used to provide PRI ISDN service.[9] These exceptions were deemed necessary because service provider cost studies at that time revealed that PRI ISDN

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[6]Federal Communications Commission Order Granting Petition for Rulemaking, Notice of Proposed Rulemaking, and Order Granting Interim Partial Waiver, FCC 04-174, released July 19, 2004, at 3 ("July 19, 2004 FCC Order"). *See also* 47 C.F.R Part 36, App.-Glossary (defining "Exchange Line" as "[a] communications channel between a telephone station, PBX or TWX station and the central office which serves it.").

[7]July 19, 2004 FCC Order, at 8.

[8]July 19, 2004 FCC Order, at 4.

[9]*See* 47 C.F. R. §§ 69.152(l) and 69.104(p). These rules were adopted in 1997 and 2001 respectively.

common line costs were approximately five times that of analog common line costs.[10] More recent cost studies have determined that T-1 services are provided in the same manner as PRI ISDN services, and therefore have the same costs.[11] Accordingly, the FCC has issued an order granting a waiver of the current rules to allow T-1 service also to be assessed SLCs at the same rate of five per channel as PRI circuits, and has issued a notice of proposed rulemaking that would expressly promulgate the rule that PRI and T-1 circuits be assessed the same number of SLCs.[12]

The key principles that can be gleaned from an examination of the FCC's treatment of Subscriber Line Charges are twofold: (1) as a general rule, "line" is to be interpreted as "channel" when dealing with digital T-1 and PRI ISDN service, and (2) federal Subscriber Line Charges are tied to the actual common line costs, and not to the volume of calls capable of being transmitted through the various lines or channels. Accordingly, the FCC's interpretation of "lines" as synonymous with digital "channels" supports the conclusions of this Opinion. Furthermore, the rationale behind the FCC rules on SLCs also clearly distinguishes its cost-based charge structure from the Tennessee E911 district's volume-based charge structure. The FCC currently allows only five SLCs per T-1 and PRI circuits because existing cost studies show that these digital circuits cost no more than five times that of analog circuits. However, there is no dispute that PRI and T-1 circuits are capable of handling up to 23 and 24 times more voice telephone exchange traffic, respectively, than a traditional analog line. Therefore, because the E911 charge is based on the number of lines capable of reaching 911 service — and not on the cost of those lines — there is no rational or objective basis to assess fewer E911 charges than actual digital channels capable of obtaining and using 911 service.

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[10]July 19, 2004 FCC Order, at 4.

[11]*Id.*, at 6. Recent studies have revealed that the 5:1 ratio may be too generous, as the cost of T-1 and PRI circuits is now estimated to be either the same as analog lines, or at a 1.5:1 ratio. *Id*. at 8. Regardless, the Commission determined that circuits used to provide T-1 service and PRI service are functionally comparable and therefore have comparable common line costs. Therefore, adherence to the principle of aligning pricing rates with costs, as well as the desire to avoid cost disparity harmful to rural carriers that do not support PRI service, mandated that T-1 and PRI circuits be assessed the same number of SLCs. *Id.* at 15-16.

[12]*Id.* at 1-46. The only exception is that certain carriers, termed competitive eligible telecommunications carriers by the FCC, are not subject to the waiver order and must continue to use the old assessment method of 24 charges per channel for T-1 service. *Id.* at 44. *See also* 47 C.F.R. § 54.307.

In conclusion, Tenn. Code Ann. § 7-86-108 authorizes an emergency communications district to impose a "telephone service charge" to all "service users" to fund 911 emergency telephone service. Pursuant to Tenn. Code Ann. § 7-86-103 (7), this charge is assessed on "all lines" that provide "exchange telephone service." Based on the foregoing analysis, "all lines" would include all digital channels in a T-1 or PRI circuit that transmit voice telephone exchange calls capable of connecting to 911 service. In a T-1 circuit, this would include a separate E911 charge on up to 24 channels per circuit, and in a PRI circuit, up to 23 channels. The applicable statutes do not contemplate assessing E911 charges on channels dedicated exclusively to data transfer or incoming-only voice telephone exchange service. However, every digital channel in a T-1 or PRI circuit that transmits voice telephone exchange traffic capable of reaching 911 service, whether two-way or one-way outbound service, is subject to an E-911 charge.

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August 27, 2007

Opinion No. 07-128

Use of Emergency Communications District Funds for Purposes Other Than 911

QUESTIONS

1. Is it a permissible use of funds for an Emergency Communications District (ECD) to advertise or educate citizens as to the use of phone services other than 911?

2. If not, is it permissible for an ECD to enter into an inter-local agreement with a local governing body to support a county effort to educate citizens on the existence of and use of 543-NEED or 311?

OPINIONS

1. No. The statute does not authorize ECDs to use their funds to promote phone services other than 911.

2. No. The statute does not authorize such an interlocal agreement.

ANALYSIS

1. Under the Emergency Communications District Law, Tenn. Code Ann. §§ 7-86-101, *et seq.* (the "Act"), a county or municipality may create an emergency communications district by resolution or ordinance. Tenn. Code Ann. § 7-86-103(1) and -104. The Act's purpose is to "provide a simplified means of securing emergency services, which will result in saving of life, a reduction in the destruction of property, quicker apprehension of criminals and, ultimately, the saving of money." Tenn. Code Ann. § 7-86-102(a). An ECD is the operating body established to implement and maintain this emergency notification system (911). *See* Tenn. Code Ann. §§ 7-86-104 and -105.

The Act permits use of an ECD's funds exclusively in the operation of the ECD. The Act is consistent on this requirement. Tenn. Code Ann. § 7-86-102(d) clearly states that all "funds [of the emergency district] from all sources shall be used exclusively in the operation of the emergency communications district." *See also* Tenn. Code Ann. §§ 7-86-108(a)(1)(C) (funds to be used for purposes described in § 7-86-303, *viz*. "the provision of 911 service"); 7-86-108(e) (revenues to be used for the operation of the district and for purchase of necessary equipment). It is clear from reading the Act as a whole that emergency communications means a 911 services system. Other public assistance numbers are not mentioned in the Act.

2. Both the Act and a policy of the Tennessee Emergency Communications Board (TECB) authorize interlocal agreements. Tenn. Code Ann. § 7-86-105(b)(6) and TECB Policy No. 5.[1] The Act authorizes two or more counties, cities or existing emergency communications districts to consolidate their operations to create a joint emergency communications district under an interlocal agreement. Tenn. Code Ann. § 7-86-105(b)(6). The statute does not refer to any other possible use of interlocal agreements. The authorization is intended to encourage consolidation "to provide the best possible technology and service to all areas of the state in the most economical and efficient manner possible." *Id.* The TECB's Policy Number 5 is a general requirement that interlocal agreements be in writing. The Policy does not provide a supplemental source of authority to enter into interlocal agreements for purposes other than those specified in Tenn. Code Ann. § 7-86-105(b)(6).

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[1] Available at the TECB website, http://www.state.tn.us/commerce/911. The policy reads as follows:

"Effective August 1, 2004, all agreements or arrangements between an emergency communications district and another governmental entity in which facilities, resources and/or income of any kind are shared, contributed or obtained shall be memorialized in written interlocal agreements and adopted by the board of directors of the local emergency communications district before the implementation of such an agreement."

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February 19, 2008

Opinion No. 08-30

Sheriff's Dispatcher Funded by Emergency Communications District Serving as District Director

QUESTION

The Clay County Sheriff hires emergency communications dispatchers, who work in his office. Each year, the county receives an E-911 Rural Dispatcher Assistance Grant. The communications district transfers this grant to the county, and the grant funds part of the dispatchers' salaries. May a sheriff's employee who serves as a dispatcher legally serve as a member of the emergency communications district board?

OPINION

Since the individual is an employee of the sheriff's office, and not of the district, this situation would not violate Tenn. Code Ann. § 7-86-105(i). So long as the board's award of the grant agreement does not control the terms of employment between the dispatcher and the sheriff's office, the director has no prohibited direct conflict of interest in that contract in violation of Tenn. Code Ann. § 12-4-101(a). The board director has an indirect interest in the employment contract that must be disclosed under section (b) of Tenn. Code Ann. § 12-4-101.

ANALYSIS

This opinion concerns whether a sheriff's employee may legally serve as a member of the county emergency communications district board of directors under the following circumstances. The request states that the Clay County Sheriff hires emergency communications dispatchers, who work in his office. Each year, the county receives an E-911 Rural Dispatcher Assistance Grant. The communications district transfers this grant to the county, and the grant funds part of the dispatchers' salaries.

Emergency communications districts are established and operate under Tenn. Code Ann. §§ 7-86-101, *et seq.* Tenn. Code Ann. § 7-86-105 provides for the membership and duties of the board of directors of an emergency communications district. Tenn. Code Ann. § 7-86-105(i) provides that "[n]o member of the board of directors shall be an employee of the emergency communications district." Based on the facts presented, the dispatcher is not an employee of the emergency communications district, but of the sheriff's office. The dispatcher's service as a director of the district, therefore, would not violate Tenn. Code Ann. § 7-86-105(i).

This arrangement must also be analyzed under Tenn. Code Ann. § 12-4-101, the general statute on conflicts of interest. This statute pertains to contracts. Under subsection (a)(1) of the statute, a public official may not be directly interested in a contract the official has a duty to vote for, let out, overlook, or superintend. Under subsection (b), a public official must disclose any indirect interest in such contracts. The statute provides in relevant part:

> It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. *"Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.* The provisions of this subdivision (a)(1) *shall not be construed to prohibit any officer, committeeperson, director, or any person, other than a member of a local governing body of a county or municipality, from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto,* unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which such person is directly interested.

Tenn. Code Ann. § 12-4-101(a)(1) (emphasis added). A person who becomes unlawfully interested in a contract under this statute must forfeit all pay and compensation for the contract. Tenn. Code Ann. § 12-4-102. Further, the person must be dismissed from office and remain ineligible for the same or a similar position for ten years. *Id.*

Section 12-4-101 prohibits officials from being directly interested in a contract that they have a duty to award or supervise. An individual is "directly interested" in a contract only if the contract is with that individual personally or with a business in which the individual owns the controlling interest. This office has taken the view that those who vote on budgets and appropriations superintend the contracts paid for by those budgets and appropriations. Op. Tenn. Att'y Gen. 98-188 (October 2, 1998). But, while the grant transfer funds part of the dispatcher's employment contract with the sheriff, based on the facts presented, the board has no other authority to supervise the contract or to specify its terms. So long as the board's award of the grant agreement does not control the terms of employment between the dispatcher and the sheriff's office, therefore, the director has no prohibited direct conflict of interest in that contract in violation of Tenn. Code Ann. § 12-4-101.

Under Tenn. Code Ann. § 12-4-101(b), an official must disclose his or her interest in a contract in which he or she is indirectly interested. The term "indirectly interested" means any contract in which the officer is interested but not directly so. Tenn. Code Ann. § 12-4-101(b). Under

this statute, the board director has an indirect interest in the employment contract that must be disclosed.

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December 29, 2008

Opinion No. 08-193

Maintenance of Effort: State Grants for Libraries and Emergency Communications Boards

QUESTIONS

1. Is the Tennessee 911 Communications Board authorized to impose a "maintenance of effort" condition on financial aid and other benefits conferred on local 911 emergency communications boards?

2. Is the Secretary of State authorized to impose a "maintenance of effort" condition on a county participating in the State's multi-county regional library program under Tenn. Code Ann. §§ 10-5-101, *et seq.?*

OPINIONS

1. We think a court would conclude that the Board may consider the county's commitment to maintain support of a district when considering the district's application for financial aid under Tenn. Code Ann. § 7-86-306(a)(11). Similarly, we think a court would conclude that the Board may reasonably consider a county's commitment to maintain funding for an emergency communications district when considering whether to approve higher rates for that district under Tenn. Code Ann. § 7-86-306(a)(12).

2. The Secretary of State is authorized to impose this requirement as a condition for local libraries to remain part of the state regional library system. The Secretary is generally authorized to set minimum appropriation requirements for counties electing to be part of the regional library system under Tenn. Code Ann. § 10-5-101. The requirement ensures that local funds will "supplement" the funds the library will receive from state and federal resources as contemplated under Tenn. Code Ann. § 10-5-104(a).

ANALYSIS

1. Maintenance of Effort Requirement for Emergency Communications Boards

This opinion addresses the authority of two different state agencies to impose a "maintenance of effort" condition on the availability of state aid to local governments. The request does not define the term "maintenance of effort." This opinion will assume the term

means that a local legislative body must provide local funding for an activity at the same level as the previous fiscal year as a condition for further state grants or other aid supporting that activity. This requirement ensures that state aid will supplement funding for the activity, rather than simply replace local funding.

The first question concerns the authority of the Tennessee Emergency Communications Board (the "Board"). The Board is established and operates under Tenn. Code Ann. §§ 7-86-301, *et seq.* The Board was established for the purpose of assisting emergency communications district boards of directors in the area of management, operations, and accountability. Tenn. Code Ann. § 7-86-302(a). The Board is authorized to exercise its powers and duties relative to all local emergency communications districts established pursuant to Tenn. Code Ann. §§ 7-86-101, *et seq.*, as well as those created under private acts. *Id.* This statutory scheme authorizes a city council or county commission to create an emergency communications district within all or part of the boundaries of the city or county. Voters within the boundaries of the proposed district must approve its creation. Tenn. Code Ann. § 7-86-104. A local emergency communications district may charge for services as authorized by the statute, but it may not levy or collect taxes. Tenn. Code Ann. § 7-86-106. Tenn. Code Ann. § 7-86-109 provides:

> In order to provide additional funding for the district and the service, the governing body of the district may receive funds from federal, state and local government sources, as well as funds from private sources, including funds from the issuance of bonds, and may expend such funds for the purposes of this part. Any legislative body of a municipality or county creating a district under the terms of this chapter may appropriate funds to the district to assist in the establishment, operations and maintenance of such district.

Under Tenn. Code Ann. § 7-86-306(a)(11), the state Board has authority to:

> Respond to requests from emergency communications districts, commercial mobile radio service (CMRS) providers or other parties and subject to availability of funds, review and approve requests for reimbursements for expenditures or payment of obligations incurred to implement, operate, maintain, or enhance statewide wireless enhanced 911 service in conformance with any rules or orders of the FCC, and other federal and state requirements that pertain to wireless enhanced 911 service.

We think a court would conclude that the Board may consider the county's commitment to maintain support of a district when considering the district's application for financial aid under this statute. The "maintenance of effort" requirement ensures that the aid will fund improved service, rather than replace county funding.

The Board is also authorized to raise emergency telephone service charges of a local emergency communications district. Tenn. Code Ann. § 7-86-306(a)(12). This statute provides:

> In order to effectuate the purposes of this part, the board has the power and authority to:
>
> * * * *
>
> Raise the emergency telephone service charge rates of an individual emergency communications district up to the maximum established in § 7-86-108(a)(2)(A); *provided, that the district meets financial and operational criteria established by the board in consultation with the comptroller of the treasury*[.]

(Emphasis added). The Board addresses rate increases under this statute in its amended Policy 14. Under this Policy, an emergency communications district requesting an initial increase must submit an application to the Board. Paragraph 7 of Policy 14 provides:

> 7. In the application packet, the ECD [emergency communications district] shall include an interlocal agreement with each local governmental entity that contributes facilities, resources and/or income of any kind to the ECD or receives such from the ECD, ***in which such entity agrees that in exchange for the added or continued service that will be facilitated by the Emergency Communications Board's approval of an increase to the emergency telephone service charge within the ECD, the local governmental entity will not decrease its contribution to the ECD below the maximum amount it contributed during the prior fiscal year;***

(Emphasis added). This provision is footnoted as follows:

> This requirement is evidentiary. The fact that a district is unable to obtain such an agreement will be considered as part of the rate increase information, but will not, in and of itself, preclude a district from receiving a rate increase, so long as the district provides evidence of its attempt to comply with this requirement.

Every three years following the Board's decision to increase rates, the emergency communications district must file a report that includes a current copy of applicable interlocal agreements. Policy 14, Paragraph 16.6. We think a court would conclude that the Board may reasonably consider a county's commitment to maintain funding for an emergency communications district when considering whether to approve higher rates for that district under Tenn. Code Ann. § 7-86-306(a)(12). Maintenance of county support ensures that the increased rates will fund improvements in district service, rather than replace county funding.

2. Maintenance of Effort by County in Regional Library Program

The second question is whether a county may be required to support its library at a minimal level as a condition for receiving state library grants. Tenn. Code Ann. §§ 10-1-101, *et seq.,* authorize the Secretary of State, acting through the Division of Public Libraries and Archives, to collect library materials, distribute state publications, and encourage library

development throughout the state. Tenn. Code Ann. § 10-1-104. Tenn. Code Ann. §§ 10-5-101, *et seq.*, govern the creation of regional library boards. Tenn. Code Ann. § 10-5-101 provides in relevant part:

> Two (2) or more counties that have qualified for participation in the state's multi-county regional library program and that have been recognized as a region by the secretary of state ***and have made the minimum local appropriation of funds that may now or hereafter be required by the secretary of state***, are empowered and authorized to execute contracts with each other to create a regional library board to assist the secretary of state, acting through the division of public libraries and archives, in administering and controlling the regional library services within the region.

(Emphasis added). Cities within the county may participate in the regional library services after the governing body of a county authorizes participation, and so long as the county participates. *Id.* Tenn. Code Ann. § 10-5-104(a) provides:

> The county legislative bodies and municipal governing bodies of counties and cities which have signed agreements for regional library services are authorized to make available to the secretary of state, acting through the division of public libraries and archives, such funds as may be deemed necessary to ***supplement the funds received by the regional library through state and federal resources.*** Such funds shall be expended only for the library service for which the county or city agreed in writing and for no other purpose.

(Emphasis added). Thus, local libraries that are part of the regional library system receive funds from state and federal sources. The Secretary of State, acting through the Division of the Tennessee State Library and Archives, requires local governments where local libraries are part of the regional library system to sign an annual Public Library Maintenance of Effort Agreement. The first paragraph of an example agreement states:

> The Office of the Secretary of State, Tennessee State Library and Archives, Regional Office is hereby notified that public funds were appropriated and expended in the fiscal year just completed. This amount will be matched or exceeded during the current fiscal year.

The Secretary of State is authorized to impose this requirement as a condition for local libraries to remain part of the state regional library system. The Secretary is generally authorized to set minimum appropriation requirements for counties electing to be part of the regional library system under Tenn. Code Ann. § 10-5-101. The requirement ensures that local funds will "supplement" the funds the library will receive from state and federal resources as contemplated under Tenn. Code Ann. § 10-5-104(a).

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February 6, 2009

Opinion No. 09-13

Removal of Members of the Board of Directors of an Emergency Communications District

QUESTION

Whether the provisions of state law supersede a county policy relating to attendance requirements of members of county boards and prohibit the removal of 911 board members except as authorized by state law.

OPINION

A county policy relating to attendance of members of county boards does not apply to the board of directors of an emergency communications district because the board of directors is not a county board. Pursuant to Tenn. Code Ann. § 7-86-106, an emergency communications district is an independent "municipality" or public corporation, not an arm of the county. Furthermore, Tenn. Code Ann. § 7-86-314 provides the exclusive grounds and procedures for removal of members of the board of directors of an emergency communications district and thus prohibits the removal of board members except as authorized by that section.

ANALYSIS

This Office is informed that the Bedford County Commission has approved a policy that authorizes the removal of any member of a county board if that board member misses three meetings during a term, regardless of whether the absences are excused, and regardless of whether the absences are consecutive. The County Mayor seeks to remove members of the Board of Directors ("the Board") of the County Emergency Communications District ("the District") who have missed three or more meetings. Minutes of the Board's meetings reflect that member absences were excused and that the absences were not consecutive. We are asked whether state law supersedes the county's policy relating to attendance requirements of county boards and whether state law prohibits the removal of members of the Board except as authorized by state law.

Tenn. Code Ann. § 7-86-104(a) authorizes the legislative body of any county, by resolution, to create an emergency communications district within all or part of the boundaries of such county. Prior to the establishment of such district, Tenn. Code Ann. § 7-86-104(b) requires the county legislative body, by resolution, to request the county election commission to submit to the voters within the boundaries of a proposed emergency communications district the question

of creating such district in an election to be held pursuant to Tenn. Code Ann. § 2-3-204. Tenn. Code Ann. § 7-86-105(b) provides that an emergency communications district shall have a board of directors of no fewer than seven nor more than nine members to govern the affairs of the district. The board of directors is appointed by the county mayor, subject to confirmation by the county legislative body. The members serve for a term of four years. *See* Tenn. Code Ann. § 7-86-105(c). Once created, the emergency communications district "shall be a 'municipality' or public corporation in perpetuity under its corporate name, and the district shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes." Tenn. Code Ann. § 7-86-106.

Tenn. Code Ann. § 7-86-314 governs the removal of members of the board of directors of an emergency communications district. Tenn. Code Ann. § 7-86-314(a) provides that a board member may be removed if he or she has three or more consecutive unexcused absences from meetings. Tenn. Code Ann. § 7-86-314(b) provides that a board member may also be removed if he or she refuses to carry out either the provisions of the Emergency Communications District Law or an order of the board. Tenn. Code Ann. § 7-86-314(c) provides that a board member may also be removed if he or she knowingly or willfully neglects to perform the duties of such office. If one or more of these grounds for removal exists, the process by which a board member may be removed is by order of the chancery court in the jurisdiction in which the emergency communications district operates, upon petition by either the board or a county or city governing body in the service area of such district. *See* Tenn. Code Ann. § 7-86-314(a)-(c).

The issue that we are asked to address in this opinion is whether state law allows Bedford County to apply a policy authorizing the removal of any member of a county board if that board member misses three meetings during a term (regardless of whether the member's absences are excused or consecutive) to members of the Board of Directors of the County Emergency Communications District. It is our opinion that Bedford County's attendance policy does not apply to members of the Board because the Board is not a county board. Pursuant to Tenn. Code Ann. § 7-86-106, the District is an independent "municipality" or public corporation, not an arm of the county. Because the members of the Board are not members of a county board, the county does not have authority to apply its attendance policy to them. The mere fact that the county mayor appoints and the county commission confirms the members of the Board does not make the Board a county board, particularly in the context of a clear statutory declaration that the Board constitutes a municipality or public corporation in its own name.

Additionally, the county's attendance policy and removal procedures are in conflict with Tenn. Code Ann. § 7-86-314. It has long been held that local government rules which are "in conflict with and repugnant to a State law of a general character and state-wide application are universally held to be invalid." *Southern Ry. Co. v. City of Knoxville*, 442 S.W.2d 619, 621 (Tenn. 1968). A local government may not enact a rule "which ignores the State's own regulatory acts, or deny rights granted by the State or grant rights denied by the State and thus in effect nullify the State law." *State ex rel. Beasley v. Mayor and Aldermen of Town of Fayetteville*, 268 S.W.2d 330, 334 (Tenn.1954). If a local government rule is in conflict with the general law of the state, it is an unconstitutional violation of Art. 11, § 8 of the Tennessee Constitution, which forbids the powers of a corporation from being increased by special laws. *See Smith Amusement Co. v. Mayor & Bd. of Commissioners*, 330 S.W.2d 320 (Tenn. 1959).

The county's attendance policy, if applied to members of the Board of Directors of the County Emergency Communications District, would conflict with Tenn. Code Ann. § 7-86-314 by countermanding provisions and procedures that Tenn. Code Ann. § 7-86-314 establishes. Tenn. Code Ann. § 7-86-314 provides that a Board member is subject to removal if he or she has three or more consecutive unexcused absences from meetings. The county's policy would subject a Board member to removal for three or more absences, regardless of whether the absences were excused or consecutive. Moreover, Tenn. Code Ann. § 7-86-314 provides that Board members are to be removed "by order of the chancery court . . . upon petition by either the board, or a county or city governing body in the service area of such district." Under the purported county policy, Board members would be subject to removal by the county mayor, without an order of the chancery court. Such a policy conflicts with Tenn. Code Ann. § 7-86-314 and thus cannot be applied to remove members of the Board of Directors of the County Emergency Communications District.

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Requested by:

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May 18, 2009

Opinion No. 09-87

Allocation of Emergency Communications Fund; "SafeLink" Program

QUESTIONS

1. May the State government use for general purposes the Emergency Communications Fund (ECF), given the prohibition in Tenn. Code Ann. § 7-86-303(d)?

2. Does access to the ECF and/or the interest derived from it require specific and explicit repealing language, given the clear statement of intent by the General Assembly in Tenn. Code Ann. § 7-86-303(d) that prohibits such a diversion, and, if so, is the general reference language in the 2008 State budget act legally sufficient to override the prohibition in Tenn. Code Ann. § 7-86-303(d) and other expressions of legislative intent in Title 7, Chapter 86 concerning the use of 911 funds for 911 purposes only?

3. Does the recently enacted federal law, ENHANCE 911, prohibit the use and/or diversion of 911 funds for non-911 purposes by the State?

4. If the answer to Question 3 is yes, is the interest on the ECF affected by the federal law prohibition?

5. Is the State's recently implemented "SafeLink" program, which distributes prepaid cellular phones, defined by Tenn. Code Ann. § 7-86-103(3) as commercial mobile radio service (CMRS), subject to the funding requirement applicable to prepaid CMRS users set forth in Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv)?

6. If the answer to Question 5 is yes, does the Executive Director of the Tennessee Emergency Communications Board have the authority to waive the requirements of Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv)?

OPINIONS

1. The prohibition contained in Tenn. Code Ann. § 7-86-303(d) is not sufficient by itself to prevent the General Assembly from using the ECF for other purposes. Subsection 4-3-1016(d)(44) expressly authorizes transfers from the ECF. Chapter No. 1191 of the 2008 Public Acts, codified in Tenn. Code Ann. § 4-3-1016, permits the transfer of certain funds, including the ECF, to the general fund. This section applies "notwithstanding any provision of law to the

contrary." Tenn. Code Ann. § 4-3-1016(a). Although Tenn. Code Ann. § 7-86-303(d) prohibits use of the ECF for other purposes, Tenn. Code Ann. § 4-3-1016 supersedes and controls. However, as explained in response to Questions 3 and 4, except as to the interest earned on the ECF, federal law preempts and prevents such use of the ECF and renders these State statutory issues moot.

2. Applying State law only, the answer is that because Tenn. Code Ann. § 4-3-1016 controls, no additional specific and explicit repealing language is necessary. Combined with the other provisions in Tenn. Code Ann. § 4-3-1016, the reference to the ECF in Tenn. Code Ann. § 4-3-1016(d)(44) is legally sufficient to allow the diversion of ECF funds to the general fund. Because of federal preemption, however, the State may not use the ECF for general purposes, notwithstanding Tenn. Code Ann. § 4-3-1016(d)(44), except that preemption does not affect the interest earned on the ECF.

3. Yes. Federal law prohibits the use of fees charged as part of the State's 911 or enhanced 911 program for other purposes. The specific legislation named in the request, the ENHANCE 911 Act of 2004, enacted as Public Law 108-494, penalizes grantees if a state diverts 911 fees for other use. In addition, the New and Emerging Technologies 911 Improvement Act of 2008, enacted as Public Law 110-283, expressly preempts a State from using fees charged as part of the State's 911 or enhanced 911 program for other purposes. The State may not, therefore, transfer fees collected and placed in the ECF to the general fund.

4. No. Neither federal law cited in response to Question 3 applies to the interest earned on the collected fees. The interest may be transferred to the general fund.

5. No. The emergency telephone service charge does not apply to users of mobile phones provided through the "SafeLink" program, since those persons are not billed or charged for their mobile phone use and thus do not come within the provisions implementing the service charge at Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) and (iv).

6. Since the answer to Question No. 5 is negative, this Office will not address Question No. 6.

ANALYSIS

1 The Emergency Communications Board (the "Board") was established and operates under Tenn. Code Ann. §§ 7-86-301, *et seq.* The Board is funded through a charge on all commercial mobile radio service providers, established pursuant to Tenn. Code Ann. § 7-86-108(c). Tenn. Code Ann. § 7-86-303(d) provides in relevant part:

> Any funds collected by the board shall be deposited in the state treasury in a separate interest-bearing fund to be known as the 911 Emergency Communications Fund. ***Disbursements from this fund shall be limited solely to the operational and administrative expenses of the board and the purposes as expressed in this part. At no time during its existence shall the 911 Emergency***

> ***Communications Fund be used to fund the general expenses of the state of Tennessee.***

Tenn. Code Ann. § 7-86-303(d)(emphasis added). The rest of subsection (d) lists several purposes for which the funds may be used. All of these purposes relate to 911 service.

Tenn. Code Ann. § 4-3-1016, as amended by 2008 Tenn. Pub. Acts Ch. 1191, authorizes the Commissioner of Finance and Administration to transfer monies from various accounts to defray the expenses of state government. The statute provides in relevant part:

> (a) ***Notwithstanding any provision of the law to the contrary,*** subject to the specific provisions of an appropriation act, the commissioner of finance and administration is authorized to deny carry forwards for, and to transfer funds from, the funds, reserve accounts or programs identified in this section to the state general fund for the purpose of meeting the requirements of funding the operations of state government for the fiscal year ending June 30, 2006, and subsequent fiscal years. ***The authorization provided for in this subsection (a) shall not apply to allow the transfer of any fund balances that are mandated by federal law to be retained in such fund.*** This authority shall only apply to transfers and carry forwards necessary to fund the expenditures for the state for the fiscal year ending June 30, 2006, and subsequent fiscal years.
>
> (b) No funds shall be transferred unless specifically appropriated in an appropriations act and such funds shall only be expended in accordance with the provisions of such act.
>
> * * *
>
> (d) In the fiscal years ending June 30, 2008, and June 30, 2009, transfers are authorized from the following funds, reserve accounts and programs:
>
> * * *
>
> (44) Department of commerce and insurance, emergency communications funds, created or referenced in title 7, chapter 86, part 1;
>
> * * *

Tenn. Code Ann. § 4-3-1016 (a), (b), and (d)(emphasis added). The question concerns whether, in light of the limitation on the use of emergency communications funds in Tenn. Code Ann. § 7-86-303(d), these funds may be transferred under Tenn. Code Ann. § 4-3-1016. By its terms, Tenn. Code Ann. § 4-3-1016 applies, "[n]otwithstanding any provision of law to the contrary." Although the limitation in Tenn. Code Ann. § 7-86-303(d) is expressed in absolute terms, it is subject to amendment by the General Assembly. Tenn. Code Ann. § 7-86-303 has not been

amended since 1998. In contrast, Tenn. Code Ann. § 4-3-1016(d) was amended to include emergency communications funds in 2008. 2008 Tenn. Pub. Acts Ch. 1191. A statute adopted later in time controls over a conflicting statute adopted earlier in time. *Steinhouse v. Neal*, 723 S.W.2d 625, 627 (Tenn. 1987); *Stewart Title Guaranty Co. v. McReynolds*, 886 S.W.2d 233, 236 (Tenn. Ct. App. 1994). In this case, to the extent these two statutes conflict, Tenn. Code Ann. § 4-3-1016 controls. Thus, insofar as Tennessee law is concerned, these funds may be used for the purposes specified in § 4-3-1016.

2. Because Tenn. Code Ann. § 4-3-1016 controls, no specific and explicit repealing language is necessary. Combined with the other provisions in Tenn. Code Ann. § 4-3-1016, the reference to the ECF in the 2008 act is sufficient under Tennessee law to allow the diversion of ECF funds to the general fund.

3. The request refers to the ENHANCE 911 Act of 2004, which became Public Law 108-494. This Act provides for federal matching grants to eligible entities, which include state and local governments. The Act penalizes certain grantees if a state diverts 911 fees for some other use. An applicant for a grant must certify:

> that no portion of any designated E-911 charges imposed by a State or other taxing jurisdiction within which the applicant is located are being obligated or expended for any purpose other than the purposes for which such charges are designated or presented during the period beginning 180 days immediately preceding the date of the application and continuing through the period of time during which the funds from the grant are available to the applicant.

47 U.S.C. § 942(c)(2). The term "designated E-911 charges" means

> any taxes, fees, or other charges imposed by a State or other taxing jurisdiction that are designated or presented as dedicated to deliver or improve E-911 services.

47 U.S.C. § 942(c)(1). As a condition of the grant, grantees must agree that grant funds will be returned if the State or other taxing jurisdiction obligates or expends designated E-911 charges for any purpose other than the purposes for which such charges are designated or presented. 47 U.S.C. § 942(c)(3). The ENHANCE 911 Act, therefore, places strict limitations on states' use of their E-911 charges. Use of E-911 charges for other purposes would prevent a State from receiving the federal matching grants.

A later provision in federal law has an even more direct preemptive effect. Effective July 23, 2008, Congress passed the New and Emerging Technologies 911 Improvement Act of 2008, PL 110-283. Among other provisions, that act added 47 U.S.C. § 615a-1 to the federal code. Subsection (f) of this statute provides:

> (f) State authority over fees
>
> (1) Authority

> Nothing in this Act, the Communications Act of 1934 (47 U.S.C. 151 *et seq.*), the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State, . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services, ***provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge.*** For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.
>
> (2) Fee accountability report
>
> To ensure efficiency, transparency, and accountability in the collection and expenditure of a fee or charge for the support or implementation of 9-1-1 or enhanced 9-1-1 services, the Commission shall submit a report within 1 year after July 23, 2008, and annually thereafter, to the Committee on Commerce, Science and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives detailing the status in each State of the collection and distribution of such fees or charges, and including findings on the amount of revenues obligated or expended by each State or political subdivision thereof for any purpose other than the purpose for which any such fees or charges are specified.

47 U.S.C. § 615a-1(f)(emphasis added). The committee report on this provision emphasizes Congress's intent to limit the expenditure of state-imposed fees to purposes related to 911 or E-911 services:

> New subsection 6(f) would also provide that fees collected by States or their political subdivisions may only be used for 911 or E-911 services, or enhancements of such services, as specified in the law adopting the fee. States and their political subdivisions should use 911 or E-911 fees only for direct improvements to the 911 system. Such improvements could include improving the technical and operational aspects of PSAPs; establishing connections between PSAPs and other public safety operations, such as a poison control center; or implementing the migration of PSAPs to an IP-enabled emergency network. This provision is not intended to allow 911 or E-911 fees to be used for other public safety activities that, although potentially worthwhile, are not

> directly tied to the operation and provision of emergency services by the PSAPs.

HOUSE REPORT NO. 110-442, 2008 U.S.C.C.A.N. 1011, 1020 (2007).

The Tenth Circuit Court of Appeals summarized the constitutional doctrine of preemption in the following words:

> Congress' power to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2. Congressional intent is paramount in preemption analysis. *See Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998). Preemption may be either (1) expressed or (2) implied from a statute's structure and purpose. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L.Ed.2d 604 (1977). Nevertheless, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. " *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981). Accordingly, in the absence of express preemptive language, federal courts should be "reluctant to infer pre-emption." *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297 (10th Cir. 1999) (footnote omitted). 47 U.S.C. § 615a-1 expressly preempts a State from using fees charged as part of the State's 911 or enhanced 911 program for other purposes. The State may not, therefore, transfer fees collected and placed in the 911 Emergency Communications Fund to the general fund.

4. However, 47 U.S.C. § 615a-1 does not address any interest that may have accrued on fees collected by a State as part of its 911 or enhanced 911 program. The existence of interest on the Emergency Communications Fund is the result of the State's having deposited the fees collected in an interest-bearing account and not the State's having collected the fees pursuant to its 911 or enhanced 911 program. Thus, such monies are not fees charged as part of the 911 program, but are the result of the State's prudent fiscal management. Federal preemption, therefore, does not apply to the interest on this Fund. That being the case, Tenn. Code Ann. § 4-3-1016, as amended by 2008 Tenn. Pub. Acts Ch. 1191, permits the transfer of the interest from the Fund to the general fund, notwithstanding the provisions of Tenn. Code Ann. § 7-86-303(d), as stated above.

5. The Tennessee Department of Safety recently implemented SafeLink Wireless service, a federally-funded program which provides free mobile phones to eligible low-income households. The provided phones permit unlimited access to emergency (911) services, over an hour of air time each month, and other features.

Tenn. Code Ann. § 7-86-108(a)(1)(B) provides that:

> Effective April 1, 1999, commercial mobile radio service (CMRS) subscribers and users shall be subject to the emergency telephone service charge, a flat statewide rate, not to exceed the business classification rate established in subdivision (a)(2)(A).

Participants in the SafeLink program may not be "subscribers" of mobile phone service in the full sense, but they are "users." Accordingly, one might initially assume that the emergency telephone service charge would apply to them. It would nevertheless seem peculiar for persons who are supplied a free phone to be subjected to a monthly service charge, and the portions of the statute that implement the service charge do indeed tie liability for that charge to those customers who are charged and billed monthly for the service. Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) and (iv) provide:

> (iii) For customers who are billed retrospectively, known as standard customers, CMRS providers shall collect the service charge on behalf of the board as part of their monthly billing process and as a separate line item within that billing process.
> (iv) The service charge shall also be imposed upon customers who pay for service prospectively, known as prepaid customers. CMRS providers shall remit to the board the service charge under one of two methods:
>
> (a) The CMRS provider shall collect, on a monthly basis, the service charge from each active prepaid customer whose account balance is equal to or greater than the amount of the service charge; or
> (b) The CMRS provider shall divide the total earned prepaid wireless telephone revenue received by the CMRS provider within the monthly 911 reporting period by fifty dollars ($50.00), and multiply the quotient by the service charge amount.

From these provisions, it is apparent that liability for the service charge is indeed tied to payment for the service and is implicitly limited to those who must make such payments. As to standard customers who pay retrospectively, the statute ties liability to the monthly billing process. Similarly, the statute also refers to customers "who pay for service prospectively, known as prepaid customers." In neither instance is there a mechanism for payment of the service charge by someone who is not charged or billed and does not pay at all. Because the users of these phones will not be "customers who pay" for the service, the phones provided under the SafeLink program do not fall within the terms of Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) or (iv), and no service charge is due for them.

6. Since the answer to Question No. 5 is negative, this Office will not address Question No. 6.

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Requested by:
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July 22, 2009

Opinion No. 09-128

Donation of Real Property by Emergency Communications District

QUESTIONS

1. May an Emergency Communications District ("ECD") created pursuant to Title 7, Chapter 86, of the Tennessee Code donate real property to a county government?

2. If not, must the real property be sold or transferred for fair market value?

OPINIONS

1. No. Because the assets of an ECD are devoted solely to providing emergency communications, it may not donate its real property to a county for use for other purposes.

2. Yes. If an ECD desires to dispose of real property, that property must be transferred for fair market value.

ANALYSIS

1 The powers of an Emergency Communications District are set forth in various provisions in Title 7, Chapter 86, Part 1, of the Tennessee Code. Tenn. Code Ann. § 7-86-106 provides, in part:

> The emergency communications district so created shall be a "municipality" or public corporation in perpetuity under its corporate name, and the district shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.

An ECD, therefore, is comparable to other entities that are municipalities or public corporations, such as a metropolitan government. Tenn. Code Ann. § 7-2-108. Unlike a metropolitan government, however, an ECD is not expressly granted the power "of selling, leasing or disposing of property, real and personal, to the same extent as other governmental entities." Tenn. Code Ann. § 7-2-108. Unlike a sports authority created under Title 7, Chapter 67, an ECD lacks the express authority to "[s]ell, exchange, donate, and convey any or all of its properties" provided by Tenn. Code Ann. § 7-67-109(12), or the similar authority granted to public building authorities under Tenn. Code Ann. § 12-10-109(10).

The authority of an ECD to own property arises by implication in provisions other than the one establishing an ECD as a municipality and public corporation. Tenn. Code Ann. § 7-86-114(a) refers to the ECD's use of bonds "for the purpose of constructing, acquiring, reconstructing, improving, bettering or expanding any facility or service authorized by this part." Tenn. Code Ann. § 7-86-117 provides that an ECD "and all properties at any time owned by it . . . shall be exempt from all taxation in the state of Tennessee." Tenn. Code Ann. § 7-86-120(6) requires from an ECD a "statement of pending capital projects and proposed new capital projects." These provisions contemplate the ECD's use of the funds it receives to purchase, among other things, real property. Given the general mandate to the ECD to provide emergency communications service in the area in which it is located, it can be inferred that such purchases of real property are intended to be for the purpose of providing emergency communications service, namely, through the purchase of land and erection of buildings for emergency communications facilities.

Accordingly, an ECD has the implied authority to purchase and own real property. Although the ECD lacks express authority to sell real property, such authority can be inferred to the extent necessary for the ECD to carry out its duties. The law restricts an ECD's use of its funds, however. Tenn. Code Ann. § 7-86-102(d) provides:

> It is the intent that all funds received by the district are public funds and are limited to purposes for the furtherance of this part. The funds received by the district are to be used to obtain emergency services for law enforcement and other public service efforts requiring emergency notification of public service personnel, and the funds received from all sources shall be used exclusively in the operation of the emergency communications district.

In addition, Tenn. Code Ann. § 7-86-108(e) provides that "revenues from the tariffs authorized in this section shall be used for the operation of the district and for the purchases of necessary equipment for the district."

This Office has stated that funds received by an ECD are not to be used for purposes other than those authorized by Title 7, Chapter 86. *See* Op. Tenn. Att'y Gen. No. 94-007 (Jan. 13, 1994); Op. Tenn. Att'y Gen. No. 95-064 (June 19, 1995). In Op. Tenn. Att'y Gen. No. 95-064, this Office opined that an ECD "may only dispose of surplus equipment by selling it for fair market value." In Op. Tenn. Att'y Gen. No. 08-193 (Dec. 29, 2008), this Office stated that the Tennessee Emergency Communications Board "may reasonably consider a county's commitment to maintain funding for an emergency communications district under Tenn. Code Ann. § 7-86-306(12)." This Office explained that "[m]aintenance of county support ensures that the increased rates will fund improvements in district service, rather than replace county funding."

The provisions governing ECDs make no distinction between an ECD's powers related to personal property and those related to real property. For the reasons stated above and in Op. Tenn. Att'y Gen. No. 95-064, an ECD may dispose of real property only by selling it for fair market value. Outright donation or sale for less than fair market value would amount to

diverting the ECD's funds to uses other than those for which the ECD was created and would violate Tenn. Code Ann. §§ 7-86-102(d) and 7-86-108(e).

2. As stated above, an ECD may dispose of real property only by selling it for fair market value.

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Requested by:
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June 5, 2013

The Honorable Charlotte Burks
State Senator
304 War Memorial Building
Nashville, Tennessee 37243-0215

Dear Senator Burks:

Enclosed is the attached opinion per your request. Please let us know if you have any further questions. As always, we appreciate your assistance and cooperation.

Sincerely,

ROBERT E. COOPER, JR.
Attorney General and Reporter

REC/JNW:dj

Enclosure

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June 5, 2013

Opinion No. 13-43

Emergency Telephone Charges on Wireless Phone Service

QUESTIONS

1. Does a wireless cell phone service plan that has a flat fee due each month prior to use but does not have an associated amount of dollars or minutes which decline with use (also known as an unlimited prepaid plan) satisfy the requirements of Tenn. Code Ann. § 7-86-128(a)(5) for "prepaid wireless emergency telephone service"?

2. If such a wireless service plan does not qualify as "prepaid wireless emergency telephone service" pursuant to Tenn. Code Ann. § 7-86-128, should those plans carry the statewide 911 service charge set pursuant to Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*)?

OPINIONS

1. No, a wireless cell phone service plan for which a flat fee is charged each month before use but which is not "sold in predetermined units or dollars of which the number declines with use in a known amount" does not satisfy the requirements of Tenn. Code Ann. § 7-86-128.

2. Yes, a plan of this type should carry the statewide 911 service charge of $1.00 set pursuant to Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*).

ANALYSIS

All "commercial mobile radio service" subscribers and users in Tennessee are required to pay an emergency telephone service charge at a flat statewide rate, which is set by the Tennessee Emergency Communications Board. Tenn. Code Ann. § 7-86-108(a)(1)(B)(i). This statute specifically provides as follows:

> Effective April 1, 1999, commercial mobile radio service (CMRS) subscribers and users shall be subject to the emergency telephone service charge, a flat statewide rate, not to exceed the business classification rate established in subdivision (a)(2)(A). The specific amount of such emergency telephone service charge, and any subsequent increase in such charge, shall be determined by the board, but must be ratified by a joint resolution of the general assembly prior to implementation.

Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*). The Emergency Communications Board has advised this Office that the statewide rate is currently set at $1.00.

A separate "prepaid wireless emergency telephone service charge" for the purchase of "prepaid wireless telecommunications service" is established by Tenn. Code Ann. § 7-86-128. The term "prepaid wireless telecommunications service" means

> a wireless telecommunications service that allows a caller to dial 911 to access the 911 system, which service must be paid for in advance and is sold in predetermined units or dollars *of which the number declines with use in a known amount*;

Tenn. Code Ann. § 7-86-128(a)(5) (emphasis added). A statewide prepaid wireless emergency telephone service charge is imposed in place of the emergency telephone service charge contained in Tenn. Code Ann. § 7-86-108(a)(1)(B)(i) as follows:

> A statewide prepaid wireless emergency telephone charge of fifty-three cents (53¢), or an adjusted amount as provided in subdivision (b)(6), shall be imposed on each retail transaction in lieu of the charge imposed pursuant to § 7-86-108.

Tenn. Code Ann. § 7-86-128(b)(1)(A). The seller may elect not to apply this charge if a minimal amount of prepaid wireless telecommunications service is sold, minimal meaning ten minutes or less or five dollars or less. Tenn. Code Ann. § 7-86-128(b)(1)(B).

A prepaid wireless telecommunications service plan that requires a monthly payment before use but provides an unlimited number of minutes does not qualify for the charge of fifty-three cents established by Tenn. Code Ann. § 7-86-128(b)(1)(A), since the service available does not decline with use and the fee must be paid every month in full even if the phone is not used at all. In contrast, some wireless phone service is offered for a one-time payment in a specific dollar amount, with such payment entitling the user to a fixed amount of phone time. The usage available then declines, measured either in terms of the dollar amount or the number of minutes remaining, as a result of the user's using the phone; thus, the remaining available units "decline with use." This is the only type of service that fits the definition of "[p]repaid wireless emergency telephone service" in Tenn. Code Ann. § 7-86-128(a)(5), and thus it is the only type of service to which the telephone service charge in § 7-86-128(b)(1)(A) applies. *See Rich v. Tennessee Bd. of Medical Examiners*, 350 S.W.3d 919, 926 (Tenn. 2011) (*quoting State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)) (explaining that courts will examine "the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning").

In summary, the lower charge established in Tenn. Code Ann. § 7-86-128(b)(1)(A), which imposes a fifty-three cent charge "in lieu of the charge imposed pursuant to § 7-86-108," applies only if the conditions stated in § 7-86-128(a)(5) are met. This structure thus requires that the charge for emergency telephone service imposed under Tenn. Code Ann. § 7-86-108 continues to apply to other types of service plans. Those plans would presumably be ones that do

not have an associated dollar or minute amount that "declines with use." Applying the lower charge to plans in which a flat fee is required and in which no gradual reduction in available use occurs would improperly substitute the exception established under Tenn. Code Ann. § 7-86-128(b)(1)(A) for the default charge set under Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*).

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December 20, 2013

Opinion No. 13-109

Locally Collected 911 Fee for Wireline and Non-Wireline Telephones

QUESTION

Is there any legal impediment to changing the 911 funding model to authorize emergency communications districts ("ECDs") to collect the 911 service charge locally and at the current landline rates on both landline and all non-wireline telecommunications service capable of connecting a person dialing or entering the digits 911, with the single exception of cell-phone service?

OPINION

No. No such impediment exists in federal or Tennessee law.

ANALYSIS

The request provides the following background:

> Under the current funding model, the 911 fees on landlines and non-wireline telecommunications service differ. The law authorizes each of the State's 100 emergency communications districts (ECDs) to collect a 911 service charge on landlines. The current 911 fees on landlines range up to a maximum of $1.50 for each residential line and $3.00 for each business line up to a maximum of 100 lines per location. In contrast, the Tennessee Emergency Communications Board (TECB) collects the 911 fee on all non-wireline telecommunications service capable of connecting a person using or dialing the digits 911 to a 911 call center. The non-wireline fee is $1.00 per user or subscriber per month.

The request then proposes the following method of funding:

> The per line charge would be replaced by a per number charge up to a maximum of 100 numbers per business location for non-wireline telecommunications service. In short, the ECDs would collect 911 fees on all telecommunications service, both wireline and non-wireline, except cell phone service which would continue to be remitted to the TECB.

Currently, an ECD may impose "an emergency telephone service charge in an amount not to exceed sixty-five cents (65¢) per month for residence-classification service users, and not to exceed two dollars ($2.00) per month for business-classification service users." Tenn. Code Ann. § 7-86-108(a)(1)(A). An ECD may also "submit to the people of the district the question of whether to increase the emergency telephone service charge"; any such increase shall not exceed $1.50 per month for residence-classification service users and $3.00 per month for business-classification service users. Tenn. Code Ann. § 7-86-108(a)(2)(A). Those charges are, in effect, imposed only on users of wireline telephone service.

As to non-wireline service, Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*) provides for "a flat statewide rate, not to exceed the business classification rate established in subdivision (a)(2)(A)." This statewide rate is set by the TECB, and the charge is paid to the TECB. Tenn. Code Ann. § 7-86-108(a)(1)(B)(i)(*a*) and (*b*). "Effective July 1, 2006," the statewide rate applies "to all subscribers and users of non-wireline service, to the extent such application is not inconsistent with the orders, rules and regulations of the federal communications commission." Tenn. Code Ann. § 7-86-108(a)(1)(B)(vi). Under Tenn. Code Ann. § 7-86-103(11),

> "[n]on-wireline service" means any service provided by any person, corporation or entity, other than a service supplier as defined in this part, that connects a user dialing or entering the digits 911 to a PSAP, including, but not limited to, commercial mobile radio service ["CMRS"] and IP-enabled services.

And, under Tenn. Code Ann. § 7-86-103(9),

> "IP-enabled services" means services and applications making use of Internet protocol (IP) including, but not limited to, voice over IP and other services and applications provided through wireline, cable, wireless, and satellite facilities, and any other facility that may be provided in the future through platforms that may not be deployable at present, that are capable of connecting users dialing or entering the digits 911 to public safety answering points (PSAPs).

"Non-wireline service," therefore, consists at a minimum of both CMRS and IP-enabled service, which is also called "voice over Internet protocol" or "VOIP" service.

The separation of 911 charges into charges imposed on landline subscribers and collected locally by ECDs and charges imposed on "non-wireline service" subscribers and collected by the TECB results merely from the General Assembly's decision to fund 911 service in this manner, and not from any known legal or other requirement. Federal law states that "[i]t shall be the duty of each IP-enabled voice service provider to provide 9-1-1 service and enhanced 9-1-1 service." 47 U.S.C. § 615a-1. That statute further provides:

> Nothing in this Act,[1] the Communications Act of 1934 (47 U.S.C. 151 et seq.), the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a

[1] The Wireless Communications and Public Safety Act of 1999, Pub. L. 106-81.

> fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State, political subdivision thereof, Indian tribe, or village or regional corporation serving a region established pursuant to the Alaska Native Claims Settlement Act, as amended (85 Stat. 688) for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge. For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.

47 U.S.C. § 615a-1(f)(1). Federal law, therefore, expressly preserves the ability of both state and local governments to impose 911 charges on IP-enabled subscribers, subject to the requirement that such charges be used exclusively for 911 operations and not discriminate within any particular class of subscribers. Some states have structured their funding models so that 911 charges on IP-enabled services are collected locally. *See, e.g.*, Colo. Rev. Stat. Ann. § 29-11-102(2)(a); Okla. Stat. Ann. tit. 63, § 2853; 35 Pa. Cons. Stat. Ann. § 5311.14; W. Va. Code § 7-1-3cc(b). Accordingly, nothing would prevent the General Assembly from restricting the funding mechanism in Tenn. Code Ann. § 7-86-108 to allow for local collection of 911 charges on IP-enabled subscribers.

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August 8, 1985

U85-039

Hon. Jim Rout, Chairman
Board of Commissioners of Shelby County
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Memphis, Tennessee 38103

Dear Mr. Rout:

This letter responds to your request for an opinion concerning the following topic:

QUESTION

Must contracts awarded by the Shelby County Emergency Communications District in excess of $50,000.00 be approved by the Shelby County Commission?

ANSWER

No. However, receipt of supplemental county funds pursuant to T.C.A. §7-86-109 might, in certain circumstances, be made contingent on permitting the county commission to perform a contract approval function.

ANALYSIS

The Shelby County Emergency Communications District is established pursuant to T.C.A. §§7-86-101 et seq. The statute provides that the powers of such a district are vested in its board of directors. T.C.A. §7-86-106.

The resolution of the Shelby County Commission which, pursuant to T.C.A. §7-86-104, establishes the Emergency Communications District within the county's boundaries provides, in paragraph 11, that:

The Emergency Communications

> District Board shall exercise all authority granted to it by Chapter 867 of the Public Acts of 1984, [T.C.A. §§7-86-101 et seq.], but in all circumstances in which authority is unclear or not addressed by the Act, the provisions of Chapter 260 of the Private Acts of 1974 (Shelby County Restructure Act) and the subsequent Shelby County Charter effective September 1, 1986, shall prevail including all purchasing procedures.

The Shelby County Restructure Act provided for the County Commission to approve contracts in excess of $50,000.00. Private Acts 1974, Chapter 260, §4.03. It is our understanding based on information in your letter, that the new Shelby County charter, which becomes effective September 1, 1986, contains a similar provision.

We do not believe the provisions of T.C.A. §7-86-106 are ambiguous. The statute clearly vests "[t]he powers of each district" in its Board of Directors. Therefore, no authority exists, even under the county resolution, for the contract approval requirement.

However, T.C.A. §7-86-109 permits a county to appropriate additionalfunds to assist in the establishment, operation and maintenance of a district. Receipt of such additional funding might, in certain circumstances, be made contingent on permitting the county commission to exercise a contract approval function.

Sincerely,

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FEBRUARY 16, 1989

OPINION NO.U89-16

Emergency Communication Districts

QUESTIONS

(1) May an emergency communication district use monies collected from the five percent (5%) tariff rate under T.C.A. § 7-86-108(a) to fund not only a public safety answering point, but also for radio dispatching of emergency calls to include salaries and all equipment necessary to do the radio dispatching?

(2) If the emergency communication district can do radio dispatching, who has the power to authorize this function within a county or municipality?

(3) Is it permissible for a county or municipality to supplement funding to provide a radio dispatch should the emergency communication district not have these funds available?

(4) If there is an emergency communication district established, where does the responsibility lie in regard to dispatching all emergency calls county-wide?

OPINIONS

(1) It is the opinion of this Office that an emergency communication district may use monies collected from the five percent (5%) tariff rate under T.C.A. § 7-86-108(a) for radio dispatching of emergency calls to include salaries and all equipment necessary to do the radio dispatching if the emergency communication board of directors determines to use the "direct dispatch method" as defined in T.C.A. § 7-86-103(1).

(2) It is the opinion of this Office that the board of directors of the emergency communication district has the power to authorize direct radio dispatching pursuant to T.C.A. § 7-86-107(a)(1).

(3) It is the opinion of this Office that any legislative body of a municipality or county creating a district under T.C.A. § 7-86-101, et seq., may appropriate funds to the district to assist in the establishment, operations, and maintenance of such district pursuant to T.C.A. § 7-86-109.

(4) If the board of directors of a county-wide emergency communication district establishes a "direct dispatch method", then the county-wide radio dispatching responsibility rests with the emergency communication district; otherwise, the radio dispatching responsibility would rest with the appropriate public safety agency or provider of emergency service.

ANALYSIS

The first question pertains to the use of funds collected from the five percent (5%) tariff rate under T.C.A. § 7-86-108(a). In particular, the question raised is whether such funds can be used not only for the public safety answering point, but also for radio dispatching of emergency calls to include salaries and all equipment necessary to do the radio dispatching. T.C.A. § 7-86-107(a) authorizes the board of directors of an emergency communication district to design an emergency communications service to have the capability of utilizing one of the following four (4) methods in response to emergency calls: (1) direct dispatch method, (2) referral method, (3) relay method, or (4) transfer method. The term "direct dispatch method" is defined in T.C.A. § 7-86-103(1) as follows:

> "Direct dispatch method" means a 911 service in which a public service answering point, upon receipt of a telephone request for emergency services, provides for the dispatch of appropriate emergency service units and a decision as to the proper action to be taken.

If the board of directors of an emergency communication district determines to establish a "direct dispatch method", then it is the opinion of this Office that the actual cost of dispatching emergency calls would include salaries and all equipment necessary to do such radio dispatching. On the other hand, if the board of directors of an emergency communication

district determines to establish the "referral," "relay," or "transfer" method, then radio dispatching of emergency calls would not be part of the costs to the emergency communication district; rather, the radio dispatching costs in such a system would be borne by the appropriate public safety agency or other provider of emergency services.

The second question pertains to who has the power to authorize an emergency communication district to operate a radio dispatching service within a county or municipality. T.C.A. § 7-86-107(a)(1) authorizes the board of directors of an emergency communication district to establish the "direct dispatch method" as an emergency communication service within the boundaries of the emergency communication district. The establishment of an emergency communication district is by ordinance or resolution of a legislative body of a municipality or county, respectively, subject to the approval by the voters. Once an emergency communication district is established, either within the boundaries of a municipality or the boundaries of the county, the board of directors of the emergency communication district would have the power to establish a "direct dispatch method", either within the boundaries of the entire county or within the boundaries of the municipality depending upon the origin of the emergency communication district.

The third question pertains to whether a county or municipality has the authority to supplement funding to provide a radio dispatch should the emergency communication district not have sufficient funds available. T.C.A. § 7-86-109 provides, in pertinent part, that "any legislative body of a municipality or county creating a district under the terms of this chapter may appropriate funds to the district to assist in the establishment, operations and maintenance of such district." This statutory provision is clear authority for the county or municipality to supplement funding for a radio dispatch should the board of directors of an emergency communication district determine to use the "direct dispatch method" under T.C.A. § 7-86-107(a)(1).

The final question concerns where the responsibility lies in regard to dispatching all emergency calls county-wide if an emergency communication district is established. The answer to this question depends upon the type of method adopted by the board of directors of the emergency communication district and the jurisdiction of the emergency communication district. If the board of directors of a county-wide communication district adopts a "direct dispatch method" under T.C.A. § 7-86-107(a)(1), then the emergency communication district itself would be responsible for dispatching all emergency calls county-wide. Otherwise, the radio dispatching

responsibility would rest with the public safety agency or provider of emergency service to which the emergency communication district referred, relayed, or transferred the emergency call.

Under these latter three methods of emergency communications service, it is the responsibility of the emergency communication district to be the public service answering point and to refer, relay, or transfer emergency calls to the appropriate public safety agency or other provider of emergency services. Thus, if the emergency communication district public service answering point receives an emergency call within a particular city, it would refer, relay, or transfer the emergency call to the appropriate public safety agency or other provider of emergency services within that city, i.e., city police department, city fire department, or private ambulance service, depending upon the nature of the emergency request.

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7-86-105

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March 13, 1990

OPINION NO. U90-49

Legality of an Emergency Communications District Contracting with a Private Organization for Answering and Dispatching Emergency Calls to Agencies

QUESTION

Whether it is legal for an emergency communications district to contract with a private organization for answering and dispatching emergency calls to agencies.

OPINION

No.

ANALYSIS

The Emergency Communications District Law, T.C.A. §§7-86-101--7-86-151 (1985 & Supp. 1989), governs the creation and operation of emergency communications districts. Pursuant to T.C.A. §7-86-104, a municipal or county legislative body can create an emergency communications district, but only after submitting the question of creating such a district to the voters. If a majority of the voters approve of establishing an emergency communications district, T.C.A. §7-86-105 allows for the appointment of a board of directors to run the district.

Pursuant to T.C.A. §7-86-107(a), the board of directors "shall create an emergency communications service designed to have the capability of utilizing at least one of" four response methods for connecting the caller with needed emergency services. Depending on the response method, the

answering point may directly dispatch emergency service units, refer or transfer the caller to the appropriate public safety agency, or relay the information to the appropriate public safety agency. See T.C.A. §7-86-103.

T.C.A. §7-86-105(g) states:

> The board shall have authority to employ such employees, experts, and consultants as it may deem necessary to assist the board in the discharge of its responsibilities to the extent that funds are made available.

A prior opinion of this office, Op. Tenn. Atty. Gen. 85-205 (June 27, 1985), interpreted T.C.A. §7-86-105(g) to give a board the authority to hire and manage the employees needed to operate an independent answering point. (An independent answering point is one which is not part of an existing public safety agency.) The opinion further concluded that, under the Interlocal Cooperation Act, T.C.A. §§12-9-101--12-9-109 (1987), a board could enter into a joint venture or contract with an existing public safety agency to perform the answering point functions.

The language of T.C.A. §7-86-105(g) gives the board the authority to "employ" anyone needed to carry out the board's responsibilities. There is no mention of contracting out for needed services. Under the Interlocal Cooperation Act, the board can work through an existing public safety agency. Such an arrangement would jibe with the board's purpose since the answering point is designed to connect the caller with the appropriate public safety agencies.

This office knows of no authority which would allow an emergency communications district to contract with a private organization to act as the answering point for emergency calls. Therefore, it is the opinion of this office that a board does not have the authority to contract with a private organization to perform the responsibilities entrusted to the board.

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June 26, 1990

OPINION NO. U90-104

Boundaries, Consolidation and Exclusivity of Emergency Communications Districts

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QUESTIONS

1. Whether the area encompassed by a district is an exclusive service area. In other words, if a district has been created by a municipality, is the county then limited to the creation of a district which excludes all territory contained in the municipally created district?

2. Whether the district established by a county may include territory beyond the boundaries of the county but within the boundaries of a municipality, the majority of which is located in the county creating the district. For Anderson County, two municipalities, Oak Ridge and Oliver Springs have municipal boundaries which extend beyond the boundaries of the county.

3. Whether the statute contains or envisions any process for the merger or consolidation of two districts beyond the broad grant of power to consolidate found in Article XI, Section 9, of the Tennessee Constitution.

OPINIONS

1. It is the opinion of this Office that such districts are exclusive service areas.

EMD-1

2. A district established by a county may not extend beyond the county's boundaries.

3. The Emergency Communications District Law does not contain such a process. The Interlocal Cooperation Act, however, may be utilized.

ANALYSIS

1. The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature. Worrall v. Kroger Co., 545 S.W.2d 736 (Tenn. 1977). A statute should be viewed as a whole and in light of its general purpose. City of Lenoir City v. State ex rel City of Loudon, 571 S.W.2d 297 (Tenn. 1978). The Emergency Communications District Law, T.C.A. § 7-86-101 et seq., contains an explicit statement of intent:

> The general assembly finds and declares that the establishment of a uniform emergency number to shorten the time required for a citizen to request and receive emergency aid is a matter of public concern and interest. The general assembly finds and declares that the establishment of the number 911 as the primary emergency telephone number will provide a single, primary, three-digit emergency telephone number through which emergency service can be quickly and efficiently obtained and will make a significant contribution to law enforcement and other public service efforts requiring quick notification of public service personnel. It is the intent to provide a simplified means of securing emergency services which will result in saving of life, a reduction in the destruction of property, quicker apprehension of criminals and ultimately the saving of money.

T.C.A. § 7-86-102. Having two emergency communications districts serve the same area would appear to be inconsistent with the intention of the Legislature. Therefore, it is the opinion of this Office that each district is an exclusive service area. It should be noted, however, that two districts could enter into a mutual agreement regarding these services pursuant to the Interlocal Cooperation Act, T.C.A. § 12-9-101

et seq. See Op. Tenn. Atty. Gen. U87-128 (December 17, 1987) (attached).

2. This Office has previously opined that "the Emergency Communications District Law envisions such a district as being within the boundaries of a municipality or county." Op. Tenn. Atty. Gen. U87-128 (December 17, 1987). This Office continues to adhere to this view.

3. The Emergency Communications District Law does not address any process for merger or consolidation of districts. As previously noted, the Interlocal Cooperation Act may be utilized to accomplish the same purpose.

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February 25, 1991

OPINION NO. U91-31

Payment of Compensation to Emergency Communications District Board Members for Services Performed at the Direction of the Board

QUESTIONS

(1) May the Board of Directors of an Emergency Communications District ("ECD") pay a member of the Board for bookkeeping and accounting services rendered on the ECD's behalf?

(2) May the Board of Directors for an ECD pay a member of the Board for supervising the answering and dispatching functions for the ECD?

OPINIONS

(1) It is the opinion of this office that an agreement to pay a Board member for professional services rendered the Board is, in substance, the award and supervision of a public contract for those services by one with a direct interest in that contract. As such, it is an unlawful conflict of interest, and it is not cured by the abstention of the beneficiary in the vote approving the agreement.

(2) It is the opinion of this office that the arrangement proposed is unlawful for the same reasons as in question (1).

ANALYSIS

An Emergency Communications District (ECD) may be established under the provisions of T.C.A. §§ 7-86-101 et seq. The creation of a Board of Directors for and ECD, and the powers of such a Board, are discussed in T.C.A. § 7-86-105. Subsection (d) states: "The members [of the Board] shall serve without compensation." Also relevant to this inquiry is subsection (g), which states: "The Board shall have authority to employ such employees, experts, and consultants as it may deem necessary to assist the Board in the discharge of its responsibilities to the extent that funds are available."

The arrangement proposed by the question amounts to the award of a contract to the affected board member for the performance of bookkeeping and accounting services. The request for this opinion also raises the question whether the affected member's abstention from voting on the award is sufficient to cure the conflict of interest.

T.C.A. § 12-4-101(2) provides that "Any member of a local governing body of a county or municipality who is also an employee of such county or municipality and whose employment began on or after [his service on the governing body began] shall not vote on matters in which he has a conflict of interest." However, this subsection does not apply to the proposed ECD arrangement, since an ECD board is not a "governing body of a county or municipality."

Because the interest of the ECD board member in the proposed arrangement is direct within the meaning of subsection (a)(1) ("'Directly interested' means any contract with the officer himself . . ."), the matter seems to come within the general prohibition of such transactions in the same subsection:

> It shall not be lawful for any officer, committeeman, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development districts, utility district, human resource agencies, and other political subdivisions created by such a statute shall or may be interested, to be directly interested in any such contract.

The statute, by its terms, does not provide any exception for directly interested officials who attempt to cure the problem by abstaining from the vote on the award. This

omission is the more significant, since subsection (b) does provide for a procedure whereby an official with an indirect interest may vote on a matter affecting that interest, provided he openly acknowledges that interest. Thus, it would seem that the arrangement proposed is forbidden by the conflict-of-interest statute.

Obviously, the same considerations would make it improper for an ECD Board member to serve, with pay, as a supervisor of the answering and dispatch operations of the district.

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December 4, 1991

OPINION NO. U91-154

Emergency Communications Districts

QUESTIONS

1. May an Emergency Communications District created pursuant to Tennessee Code Annotated Section 7-86-101, et. seq., record the telephone calls which it receives when same are made to the number 911?

2. Does an Emergency Communications District created pursuant to Tennessee Code Annotated Section 7-86-101, et. seq., have complete authority to determine the method used in handling telephone calls made to the number 911? (Direct dispatch method, referral method, relay method, transfer method). If so, is each emergency service agency required to abide by and cooperate with said Emergency Communications District in regard to the method used in handling telephone calls made to the number 911?

3. May an Emergency Communications District created pursuant to Tennessee Code Annotated Section 7-86-101, et. seq., remain on the line and continue to record the telephone calls made to the number 911 after said telephone calls have been transferred to an emergency service agency by way of the transfer method?

4. May an Emergency Communications District created pursuant to Tennessee Code Annotated Section 7-86-101, et. seq., contract for pay with emergency service agencies or municipalities to handle and dispatch telephone calls (whether to the number 911 or to the regular number) for said emergency service agencies or municipalities?

5. May an emergency service agency be in control of and operate a system whereby calls are made to the number 911?

6. May an Emergency Communications District created pursuant to Tennessee Code Annotated Section 7-86-101, et. seq., obtain and operate NCIC terminal?

OPINIONS

1. Yes, the district may record incoming telephone calls to the 911 number.

2. The district has the authority to determine the method to be used in handling 911 calls and the emergency service agencies must abide by this choice.

3. Recording of the call after transfer is not legal unless a party's consent has been obtained prior to the transfer.

4. The district's board may contract with a public agency to perform answering point functions, but there is no authority to so contract with a private organization.

5. The district controls the 911 system.

6. There is no authority in the Emergency Communications District Law for a district to obtain and operate an NCIC terminal.

ANALYSIS

1. The interception of telephone communications is often illegal. See 18 U.S.C. §2511 (1). It is not unlawful under federal law, however, "for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. §2511(2)(c). A "person" includes an employee or agent of any state political subdivision. 18 U.S.C. §2510(6). An emergency communications district is a "municipality". T.C.A. §7-86-106. Thus, an emergency communications district's employee or agency may record an incoming telephone call without violating 18 U.S.C. §2511.

Tennessee law also permits the recording of a telephone conversation when one party consents. See Stroup v. State, 552 S.W.2d 418 (Tenn. Ct. Crim. App. 1977); T.C.A. §§39-14-411 & 65-21-110.

2. T.C.A. §7-86-107(a) provides:

> The board of directors of the district shall create an emergency communications service designed to have the capability of utilizing at least one of the following four (4) methods in response to emergency calls:
> (1) Direct dispatch method;
> (2) Referral method;
> (3) Relay method; or
> (4) The transfer method.
> The board of directors of the district shall elect the method which it determines to be the most feasible for the district.

Statutes are to be construed in accordance with the natural and ordinary meaning of the language used. Worrall v. Kroger Co., 545 S.W.2d 736 (Tenn. 1977). The word "shall" is ordinarily construed as being mandatory. Stubbs v. State, 216 Tenn. 567, 393 S.W.2d 150 (1965). Thus, T.C.A. §7-86-107(a) gives the district the authority to determine the method to be used in handling 911 calls. Implicit in this statutory scheme is the fact that emergency service agencies must abide by and cooperate with the district's decision.

3. As previously noted, the district could record incoming telephone calls since its employees or agents would be parties to the call. If a call was transferred to an emergency service agency, it is not clear that the district's employee or agent would continue to be a party. It would depend on exactly what was done and what was said. Under the "transfer method" as defined in T.C.A. §7-86-105(9) the answering point "directly transfers such request to an appropriate public safety agency or other provider of emergency services,..." The natural and ordinary meaning of this language indicates that the district would actually "give away" the call to the provider. Consequently the district's employee or agent would no longer be a party to the communication. Therefore, in order to utilize the exception found in 18 U.S.C. §2511(2)(c) the district would have to obtain a party's consent to continue recording after the transfer.

4. This Office has previously opined that an Emergency Communications District Board is authorized by the Interlocal Cooperation Act, T.C.A. §12-9-101 et seq. to

contract with a public agency to perform answering point functions. Op. Tenn. Atty. Gen. 85-205 (June 27, 1985). There is no authority, however, for a board to contract with a private organization to answer and dispatch emergency calls. Op. Tenn. Atty. Gen. U90-49 (March 13, 1990).[1]

5. The Emergency Communications District Law, T.C.A. §§7-86-101 et seq. clearly envisions the District's board as being in control of the 911 system, however, as previously discussed, the board could contract with a public agency to operate it.

6. An administrative agency's power "must be based expressly upon a statutory grant of authority or must arise therefrom by necessary implication." Wayne County v. Tennessee Solid Waste Disposal Control Board, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988). Nothing in the Emergency Communications District Law gives a District the authority, express or implied, to obtain and operate an NCIC terminal.

CHARLES W. BURSON
Attorney General & Reporter

JOHN KNOX WALKUP
Solicitor General

ANDY D. BENNETT
Deputy Attorney General

Requested by:

The Honorable Milton H. Hamilton, Jr.
State Senator
Suite 13, Legislative Plaza
Nashville, Tennessee 37243-0024

[1] In view of the wording of your question, this office would note that T.C.A §7-86-107(b) requires 911 to be the primary emergency telephone number.

7-86-105

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219

December 29, 1992

OPINION NO. U92-137

Emergency Communications District Fees

QUESTION

Whether Gibson County can legally have its residents' 911 service fee raised to cover the cost of dispatching all emergency calls, all sheriff's patrol calls and emergency calls made to the police and fire departments of various rural towns, the county ambulance authority, and the county fire department.

OPINION

Under T.C.A. §7-86-108, the board of directors of an emergency communications district has the authority to levy an emergency telephone service charge. According to the information given to this office, the emergency communications district in Gibson County is presently charging the maximum service charge allowed under T.C.A. §7-86-108. Therefore, the board cannot increase the amount of the service charge. This office knows of no authority for the district to impose a mandatory dispatch fee upon the county; the county can make appropriations to support the district. It should be noted that T.C.A. §7-86-107(d) requires the agencies involved to have a separate number to handle nonemergency calls.

ANALYSIS

The Emergency Communications District Law, T.C.A. §§7-86-101--7-86-151 (1985 & Supp. 1992), permits a municipal or county legislative body, after a referendum, to create an emergency communications district. T.C.A. §7-86-105 allows for the appointment of a board of directors to run the district.

Under T.C.A. §7-86-107, the board is to create an emergency communications district capable of using one of four methods of responding to emergency calls: direct dispatch, referral, relay, or transfer. The emergency communications district in Gibson County uses the direct dispatch method, which is defined as follows:

> 'Direct dispatch method' means a 911 service in which a public service answer point, upon receipt of a telephone request for emergency services, provides for the dispatch of appropriate emergency service units and a decision as to the proper action to be taken.

T.C.A. §7-86-103(1).

T.C.A. §7-86-108(a) provides, in pertinent part:

> The board of directors of the district may levy an emergency telephone service charge in an amount not to exceed sixty-five cents (65¢) per month for residence-classification service users, and not to exceed two dollars ($2.00) per month for business-classification service users, to be used to fund the 911 emergency telephone service.

According to the information supplied by the county attorney, the emergency communications district in Gibson County is charging the maximum service charge permitted under T.C.A. §7-86-108.

The district in Gibson County has also been charging cities participating in the 911 service a dispatch fee and is now asking the county to pay a dispatch fee for dispatching for the sheriff's department, the county ambulance authority, and the county fire department. From the county attorney's letter, it appears that your question has three component parts: (1) whether it is legal for Gibson County not to pay a dispatch fee; (2) whether the service charges can be used to pay the county's dispatch fee; and (3) whether the county can raise the service charge to cover the additional costs of operating the 911 service and still not pay a dispatch fee.

The direct dispatch method of responding to emergency calls is unlike the other three methods in that the 911 service actually dispatches the appropriate emergency services. This office has previously opined that, if an emergency communications district uses the direct dispatch method, the district is responsible for dispatching emergency services and can use the service charges collected to pay for the costs of

dispatching. See Op. Tenn. Atty. Gen. U89-16 (February 16, 1989). However, since the district in Gibson County is already charging the maximum emergency telephone service charge allowed, the district cannot increase the service charge.

The Emergency Communications District Law does not mention dispatch fees. The only fees or charges authorized by the statute are the emergency telephone service charges. In the absence of any statutory authority for imposing dispatch fees, it is the opinion of this office that the district cannot require the county to pay such a fee. Under T.C.A. §7-86-109, the district can accept additional funding from federal, state, or local governments or from private sources. T.C.A. §7-86-109 also provides that, "Any legislative body of a municipality or county creating a district under the terms of this chapter may appropriate funds to the district to assist in the establishment, operations and maintenance of such district." Thus, the county legislative body could decide to appropriate funds to the district.

The opinion request notes that, under the dispatch system currently used in Gibson County, there is a number other than 911 that is used for emergency and nonemergency calls. Nonemergency calls to this other number are, however, handled by the 911 operator, who dispatches such calls to the appropriate agency. T.C.A. §7-86-107(d) provides that, "The involved agencies may maintain a separate secondary backup number and shall maintain a separate number for nonemergency telephone calls." Allowing the 911 operator to handle nonemergency calls appears to be inconsistent with T.C.A. §7-86-107(d).

Charles W. Burson

CHARLES W. BURSON
Attorney General and Reporter

John K. Walkup

JOHN KNOX WALKUP
Solicitor General

Diane M. Nisbet

DIANE M. NISBET
Special Assistant Attorney General

Requested by:

The Honorable Joe Nip McKnight
State Senator
Suite 8, Legislative Plaza
Nashville, Tennessee 37243-0027

Office of the Attorney General
State of Tennessee

***1** Opinion No. **U93-19**
February 26, 1993

Emergency Communications District/Installation of Road Signs

The Honorable Steve McDaniel
State Representative
202 War Memorial Building
Nashville, Tennessee 37243-0163

QUESTION

Whether the board of directors of an emergency communications district, acting pursuant to the provisions of T.C.A. § 7-86-101 et seq., may expend district revenues for the acquisition and installation of highway, road, and street signs.

OPINION

It is the opinion of this office that the board of directors of an emergency communications district does not have the authority to expend district revenues for the acquisition and installation of highway, road, and street signs.

ANALYSIS

The Emergency Communications District Law, T.C.A. §§ 7-86-101-7-86-151 (1992), permits a municipal or county legislative body, after a referendum, to create an emergency communications district. T.C.A. § 7-86-102, which sets forth the legislative intent in enacting the Emergency Communications District Law, states the general assembly's finding that "the establishment of the number 911 as the primary emergency telephone number will provide a single, primary, three-digit emergency telephone number through which emergency service can be quickly and efficiently obtained and will make a significant contribution to law enforcement and other public service efforts requiring quick notification of public service personnel."

T.C.A. § 7-86-105 allows for the appointment of a board of directors to run the emergency communications district. Under T.C.A. § 7-86-107, the board of directors is to create an emergency communications service capable of using at least one of four methods of responding to emergency calls: direct dispatch, referral, relay, or transfer. These four types of 911 service are specifically defined in T.C.A. § 7-86-103; each type of 911 service provides a system whereby a public service

answering point helps a caller get connected with the appropriate emergency service units. Under T.C.A. § 7-86-103(11), "911 service" is defined to include "lines and equipment necessary for the answering, transferring and dispatching of public emergency telephone calls originated by persons within the serving area who dial 911."

There is no provision in the Emergency Communications District Law that would authorize the board of directors of a district to expend district revenues for the acquisition and installation of highway, road, and street signs. Such signs could help emergency units find those in need of assistance more quickly. Providing signs for emergency units is not, however, within the purposes of an emergency communications district. An emergency communications district is authorized to set up a system for connecting a caller with the appropriate emergency units; the 911 service can provide "lines and equipment for the answering, transferring and dispatching of public emergency telephone calls." T.C.A. § 7-86-103(11). The district is not authorized to expend funds to provide services other than emergency telephone services.

***2** Thus, it is the opinion of this office that an emergency communications district does not have the authority to use district revenues to acquire and install road signs.

Charles W. Burson

Attorney General and Reporter

John Knox Walkup

Solicitor General

Diane M. Nisbet

Special Assistant Attorney General

Tenn. Op. Atty. Gen. No. U93-19, 1993 WL 603238 (Tenn.A.G.)

END OF DOCUMENT

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-0485

February 26, 1993

OPINION NO. U93-21

Conflict of Interest; Monroe County Commissioner Serving on E911 Communications District Board

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QUESTION

Is it a conflict of interest for a member of the Monroe County Board of County Commissioners to serve as a member of the 911 Emergency Communications District Board of Directors.

OPINION

Yes. Because T.C.A. § 7-86-105(b)(1) gives the Monroe County Commissioners power to appoint the board of directors, public policy prohibits them from appointing one or more of their members to the board.

ANALYSIS

Emergency Communications Districts are created pursuant to T.C.A. §§ 7-86-101 et seq. Pursuant to T.C.A § 7-86-104, the legislative body of any municipality or county may by ordinance or resolution, respectively, create an emergency communications district within all or part of the boundaries of such municipality or county. The district must be approved by a majority of eligible voters within the area of the proposed district voting at a referendum. T.C.A. §§ 7-86-104 and 105. The method of appointing a board of directors for the district is set forth in T.C.A. § 7-86-105(b)(1). That subsection, applicable to Monroe County, states that "The legislative body may appoint a board of directors composed of not less than seven (7) nor more than nine (9) members to govern the affairs of the district."

The county legislative body for Monroe County is made up of a board of county commissioners. T.C.A. § 5-5-102(f). The question asks whether one or more of the Monroe County Board of County Commissioners could legally serve as a member of the 911 Emergency Communications District Board of Directors. It would first appear there is no state constitutional prohibition. While Article II, Section 26 of the Tennessee Constitution provides "nor shall any person in this State hold more than one lucrative office at the same time," that provision has been interpreted to forbid a person only from holding more than one lucrative office in the State government at the same time, and not to apply to local, either municipal or county, office holding. Phillips v. West, 187 Tenn. 57, 213 S.W.2d 3 (1948); Boswell v. Powell, 163 Tenn. 445, 43 S.W.2d 495 (1931). The positions under consideration are not offices in the State government, so we conclude that one serving simultaneously in them does not violate Article II, Section 26, of the State Constitution. In any event, the board of directors of an emergency communications district is not a lucrative position, in that the board members serve without compensation. T.C.A. § 7-86-105(d).

However, under common law principles of conflicts, this office opines that there is an inherent conflict of interest in the positions. There is a well recognized common law prohibition against a public officer holding two incompatible offices at the same time. State ex rel Little v. Slagle, 115 Tenn. 336, 89 S.W.316 (1905). The prohibition is generally applied when an individual occupies two inherently inconsistent offices. 63A Am. Jur. 2d Public Officers and Employees § 65 (1984). The question of incompatibility of necessity depends on the circumstances of the individual case. For example, an inherent inconsistency exists where one office is subject to the supervision or control of the other. State ex rel v. Thompson, 193 Tenn. 395, 246 S.W.2d 59 (1952).

We have attempted to determine if there is any inconsistency from the statutory scheme relating to the emergency communications district. It would appear an inherent inconsistency exists. The County Commissioners' power to appoint the members of the district's board of directors creates a disqualification for a County Commissioner to serve on the board. It has been stated as a general principle that it is contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint

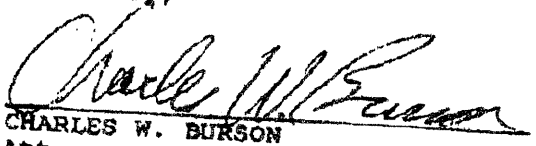
one of its own members. See State ex rel v. Thompson, supra, 193 Tenn. 395, 401 (1952). As noted above, under T.C.A. § 7-86-105(b)(1), the Monroe County Commissioners have the power to appoint the board of directors of the emergency communications district, and the Thompson case could be construed to prohibit the appointment of a Monroe County Commissioner to the board. This Office has taken the position that "a local legislative body is prohibited from appointing or electing one of its own members to an office over which the legislative body has the power of appointment or election." Op. Tenn. Atty. Gen. U90-04 (January 8, 1990) at p. 3; Op. Tenn. Atty. Gen. U92-21 (January 28, 1992) (copies attached). This Office has further concluded in the cited opinions that, where T.C.A. § 5-5-102(c)(3) does not cover a particular situation, the rule in Thompson still applies.

T.C.A. § 5-5-102(c)(3) addresses situations in which a sitting county legislative body member is nominated for or elected to another office and provides:

> If any member of the county legislative body accepts the nomination as a candidate for the office of county executive, sheriff, trustee, register, county clerk, superintendent of roads, superintendent of schools, circuit court clerk, assessor of property, judge of a court of general sessions or seat in the general assembly, when such office is being filled by the county legislative body, such member shall automatically become disqualified to continue in office as a member of the county legislative body, and a vacancy on the body shall exist.

T.C.A. § 5-5-102(c)(3) covers only the listed officers, which do not include an emergency communications district board member. Thus, the rule of Thompson applies, and it is the opinion of this office that public policy prohibits the Monroe County Board of Commissioners from appointing any of its own members to the emergency communications district board of directors.

Sincerely,



CHARLES W. BURSON
Attorney General and Reporter

JOHN KNOX WALKUP
Solicitor General

SARAH A. HIESTAND
Assistant Attorney General

Requested by:

The Honorable Lou Patten
State Senator
304 War Memorial Building
Nashville, TN 37243-0209

1-86-102

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-0485

March 12, 1993

OPINION NO. U93-30

Emergency Communications District/Authority to Determine Location of Dispatcher

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QUESTION

Does the board of directors of an emergency communications district or the county commission determine where the dispatcher for the emergency communications district will be placed?

OPINION

The board of directors of an emergency communications district has the authority to determine the location of the dispatcher for the district.

ANALYSIS

The Emergency Communications District Law, T.C.A. §7-86-101--7-86-151 (1992), allows a county or municipal legislative body to create an emergency communications district after the establishment of such a district has been approved in a referendum. The legislative body can appoint a board of directors to "govern the affairs of the district." T.C.A. §7-86-105.

T.C.A. §7-86-106 provides that, "The powers of each district shall be vested in and exercised by a majority of the members of the board of directors of the district." Under T.C.A. §7-86-107(a), the board "shall create an emergency communications service designed to have the capability of utilizing at least one" of four methods of responding to emergency calls.

Once the county legislative body has exercised its power to establish an emergency communications district, it is the board of directors that sets up the emergency communications service and exercises the powers of the emergency communications district. It is, therefore, the opinion of this office that the board of directors has the authority to decide on the location of the dispatcher for the district.

CHARLES W. BURSON
Attorney General and Reporter

JOHN KNOX WALKUP
Solicitor General

DIANE M. NISBET
Special Assistant Attorney General

Requested by:

The Honorable Frank Buck
State Representative
Suite 32, Legislative Plaza
Nashville, Tennessee 37243-0140

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-0485

TCA 7-86-101 et seq.

March 3, 1995

OPINION NO. U95-013

E-911 District Service Charges

QUESTION

Whether an E-911 district may impose its service charge on an agency of the federal government.

OPINION

Because we think a court would conclude, based on all the relevant facts and circumstances, that this charge is a fee and not a tax, and in the absence of any federal statute or regulation preventing it, we think an E-911 district may impose its service charge on an agency of the federal government. We emphasize, however, that only a court of competent jurisdiction could make a binding determination on this issue.

ANALYSIS

Emergency communications districts are established and operate under the Emergency Communications District Law, T.C.A. §§ 7-86-101, et seq. ("the Act"). A statement of legislative intent appears at T.C.A. § 7-86-102. This section declares that the establishment of a 911 number as the primary emergency telephone number will "provide a simplified means of securing emergency services which will result in saving of life, a reduction in the destruction of property, quicker apprehension of criminals and ultimately the saving of money." T.C.A. § 7-86-102(a) (Supp. 1994). The Act authorizes local legislative bodies to create an emergency communications district within the county or municipality, after an approving referendum. The directors of the district are responsible for creating an emergency communications service according to certain specifications. T.C.A. § 7-86-107 (1992). Directors are expressly authorized to subscribe to the appropriate telephone services from telephone service suppliers. Id. The Act authorizes the directors to levy an "emergency telephone service charge" on telephone service users to be used to fund the 911 emergency telephone service. T.C.A. § 7-86-108 (Supp. 1994). The legislative body of the local government where the district is located may reduce the service charge by ordinance or resolution, but not

below the level reasonably required to fund the authorized activities of the emergency communications district. T.C.A. § 7-86-108(c) (Supp. 1994).

The statute expressly provides that the service charge is not to be construed as a tax and that it is payable by all service users, including governmental entities.

> **Status--Corporate powers--Charges not taxes.--** The emergency communications district so created shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein shall not be construed as taxes and shall be payable as bona fide service charges by all service users, whether private or public, profit making, or not-for-profit, including governmental entities. The powers of each district shall be vested in and exercised by a majority of the members of the board of directors of the district.

T.C.A. § 7-86-106 (1992)(emphasis added). The statute requires the service charge to be reduced or suspended if the proceeds exceed the amount necessary to fund the service, and raised if the proceeds are inadequate to fund the service. T.C.A. § 7-86-112 (1992). The charge is collected by the service supplier which provides phone service to the user. T.C.A. § 7-86-110 (1992). The supplier may terminate service to a user who fails to pay the charge. Id.

In 1985, this Office opined that governmental entities were exempt from the emergency communications district service charge because the statute, at that time, did not expressly make them subject to it. Op.Tenn.Atty.Gen. 85-114 (April 12, 1985). Since then, the General Assembly enacted legislation adding the underlined portion of the statute. As a result, it is clear that the General Assembly intended all governmental entities using the service to pay the service charge.

Under the statute, the service charge is collected by the phone company supplying the service, and remitted to the district every two months. T.C.A. § 7-86-110 (1992). In your request, you indicate that some phone companies have been refunding the service charge to federal agencies which are service users. Your request does not indicate the reason the phone company provided for this refund. We would suggest that the district wishing to collect the service charge consult with the phone company and, perhaps with federal agencies, to determine the reasons for the refund. Based on the facts available to this Office, the only possible legal bar to imposing the charge on federal agencies would be the Supremacy Clause of the United States Constitution. Thus, without congressional action there is immunity from state and local taxation of all properties, functions and instrumentalities of the federal government. Smith v. Davis, 323 U.S. 111 (1944). This immunity arises from the necessity for preserving the

independence of the dual system of federal and state governments under our constitutional system. M'Culloch v. Maryland, 4 Wheat (U.S.) 316 (1819).

An examination of the cases interpreting federal immunity, however, indicates it does not extend to a fee for a service. See, e.g., Federal Land Bank of New Orleans v. Crosland, 261 U.S. 374 (1923)(interpreting immunity conferred by a federal statute). In that case, the Supreme Court held that Alabama could not levy a privilege tax for recording a lien on land in favor of a federal agency. The amount of the tax was based upon the principal amount secured by the mortgage. The Court acknowledged that the state was authorized to charge a reasonable fee to meet the expenses of recording the mortgage. Id. at 378. The Court noted, however, that the state had clearly distinguished between the recording fee and the privilege tax, and struck down the latter.

The emergency communications district service charge, unlike the privilege tax at issue in Crosland, is clearly termed a "fee" by the General Assembly. In determining when a particular assessment is a tax from which the federal government is immune, however, the Supreme Court has adhered to the general rule that what must be considered is, "'the real nature of the tax and its effect upon the federal right asserted.' The proper analysis to arrive at the real nature of the assessment is to examine 'all the facts and circumstances . . . and assess them on the basis of economic realities . . .'" United States v. Huntington, West Virginia, 999 F.2d 71, 73 (4th Cir. 1993), cert. denied, 114 S.Ct. 1048 (1994)(citations omitted). Thus, the United States is liable for reasonable user fees based, for example, on the amount of water or sewer services rendered. Id. While user fees are payments given in return for a government-provided benefit, taxes are enforced contributions for the support of government. Id. at 74. In Huntington, the United States Court of Appeals for the Fourth Circuit concluded that federal agencies were immune from assessment of a fire protection fee a city levied on property owners. The charge was based on square footage of property. In concluding that the fee was really a tax, the Court pointed out that fire and flood protection and street maintenance are core government services. The Court noted that liability for the user fees arose, not from use of a city service, but from the status of the agencies as property owners. The Court saw no difference between a "service charge" based on square footage and an ad valorem property tax levied on the value of real property. The Court thus concluded that the charge was a "thinly disguised tax" from which the federal government was immune.

In United States v. Columbia, Missouri, 914 F.2d 151 (8th Cir. 1990), the Eighth Circuit Court of Appeals concluded that a component of a city's utility rate referred to as "payment in lieu of taxes" was not an impermissible tax on a Veterans' Administration hospital, but simply a profit component of the city's utility rate. The Court noted that the payment of the rate was based, not upon the hospital's status as a property owner, resident, or income earner, but on the agency's voluntary purchase of services. The

Court pointed out that the city was authorized to terminate service upon any customer's failure to pay the utility rate. Thus, the city imposed the charge not in its capacity as a sovereign, but as a vendor of goods and services. Id. at 156.

Based on the cases discussed above, the emergency communications district service charge has some characteristics of a tax from which a federal agency would be immune, and some characteristics of a fee for which a federal agency would be liable. On the one hand, the charge is not assessed based on the number of emergency calls any particular user makes. No telephone user may refuse the service. Further, it can be argued that the service is provided in the exercise of the local government's police powers.

On the other hand, the fee is directly related to the provision of emergency telephone service. The fee is assessed only upon the establishment of a 911 district, and proceeds from the fee remain separate from the general fund of the local government which created the district. The statute authorizes the phone company collecting the fee to terminate service to any user who fails to pay it. Further, if the fee generates more revenue than the district needs to provide the emergency service, the district must reduce or suspend it. If the fee generates less than the district needs to provide the emergency service, the district must increase it. Thus, we think a court, weighing all the relevant facts and circumstances, and assuming that the E-911 district collecting the charge is being operated in fact as contemplated by the statutory scheme, would conclude that the service charge is a fee and not a tax. We have been unable to find any federal statute or regulation that would prevent the district from charging the fee to federal agencies. In the absence of such a provision, we think the fee may be charged to federal agencies. We emphasize, however, that only a court of competent jurisdiction could make a binding determination on this issue.

CHARLES W. BURSON
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General