

Operating in the Sunshine: A Quick Guide to Public Records in Tennessee

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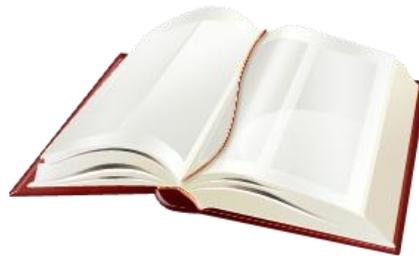
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Tennessee Open Records Act

- ◆ Tennessee Public Records Act, 1957
(T.C.A. § 10-7-501 et seq.)



Tennessee Public Records Act (TPRA)

- ◆ T.C.A. § 10-7-503(a)(2)(A):
All state, county and municipal records shall at all times, during business hours, which for public hospitals shall be during the business hours of their administrative offices, 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**.
- ◆ In Tenn. Code Ann. Section 10-7-505(d), the General Assembly directs the courts to interpret the provisions of the TPRA “broadly...so as to give the fullest possible public access to public records.”
- ◆ Tennessee Courts have found that even in the face of serious countervailing considerations, unless there is an express exemption within the law, a record and/or information must be released.

Public Record Defined in the TPR

- ◆ “Public record or records’ or ‘state record or records’ means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.”
- ◆ "Public record or records" or "state record or records" does not include the device or equipment, including, but not limited to, a cell phone, computer or other electronic or mechanical device or equipment, that may have been used to create or store a public record or state record.

Tenn. Code Ann. Section 10-7-503(a)(1)(A) and (B)

What Records are Accessible under the TPRA?

1. personnel records/applications, resumes, and references
2. contracts*
4. emails, text messages, and voicemails
5. financial or performance audits
6. personnel investigations
7. meeting agendas/minutes*
8. canceled checks
9. records related to RFP/RFQs
10. budgets*

* These records are public whether in a draft form or a finalized version.

“Unless otherwise provided by state law”

- ◆ Tenn. Code Ann. Section 10-7-504 provides a list of records and/or information that are not open for public inspection; however this list is not exhaustive.

- ◆ App. 350 exceptions to the TPRA are found in the following :
 - Tennessee Code Annotated (Statute)
 - Tennessee Rules of Civil and Criminal Procedure
 - Administrative Law Rules
 - Supreme Court Rules
 - Common Law
 - Federal Law

Who Can Access Government Records under the TPRA?

- ◆ Tenn. Code Ann. § 10-7-503(a)(2)(A) grants access to public records to “any citizen of Tennessee.”
- ◆ The Tennessee Attorney General has opined that this provision is constitutional, despite the fact that at least one other state with a similar statutory provision has found the provision to be unconstitutional. See Att’y Gen. Ops. 99-067 (March 18, 1999) and 01-132 (August 22, 2001) *but see Lee v. Miner*, 458 F. 3d 194 (Del. 2006). Also see *Jones v. City of Memphis*, 2012 WL 1228181 (W.D. Tenn. April 11, 2012).
- ◆ A records custodian has the right to deny a request inspect and/or copy public records from a non-citizen. The denial is not required, it is discretionary.
- ◆ In Tennessee, citizen does include a convicted felon. *Cole v. Campbell*, 968 S.W. 2d 274 (Tenn. 1998).

When and Where can Public Records be Accessed?

- ◆ A citizen has the right to request both inspection and copies of public records during normal business hours.
- ◆ Tenn. Code Ann. Section 10-7-503(a)(6) prohibits a governmental entity from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.
 - If the requestor desires to inspect public records, the inspection should take place in the office of the custodian, unless there is a legitimate reason as to why inspection cannot take place in the custodian's office.
 - The requestor should also be able to retrieve the requested records from the record custodian's office. However, the requestor is not required to retrieve the records from the custodian's office. The requestor has the ability to request that the records be mailed and upon payment for postage, the custodian is required to mail the records to the requestor.

Response to a Public Records Request

- ◆ Tenn. Code Ann. Section 10-7-503(a)(2)(B) requires a records custodian or the custodian's designee to *promptly* make requested records available for inspection. If the records cannot be made promptly available, within seven (7) business days, the custodian must do one or more of the following:
 - Provide access to the record;
 - Deny in writing access to the record with legal basis for denial; or
 - Indicate in writing additional time necessary to produce the record.
- ◆ A custodian's failure to respond to a request in one of the above-mentioned ways within seven (7) business days, constitutes a denial and is actionable under Tenn. Code Ann. Section 10-7-505.

Response to a Public Records Request (cont.)

- ◆ A custodian may not require a written request to view a public record, but can require a request for copies to be in writing.
- ◆ A records custodian may not assess a charge to view a public record.
- ◆ A custodian may require a requestor to produce photo identification with an address in order to inspect or receive copies of records.
- ◆ A request for copies “shall be sufficiently detailed to enable the custodian to identify the specific records” requested.
- ◆ The custodian shall provide the requestor an estimate of the reasonable cost for producing the requested records.

Response to a Public Records Request (cont.)

- ◆ A records custodian is not required to create a document that does not already exist in order to fulfill a public records request.
- ◆ A records custodian is not required to compile information or conduct searches for documents.
- ◆ A records custodian may require an appointment to view a public record when there is a reasonable basis for requiring the appointment. Absent a reasonable basis, a court would likely view requiring an appointment to be tantamount to a denial or delay in access.

Records Retention and Disposition

- ◆ In *State v. Cawood*, 134 S.W. 3d 159 (Tenn. 2004), the defendant was convicted of various criminal acts during a bench trial. Audiotapes and videotapes were entered as exhibits during the trial. The defendant appealed the convictions and the convictions were overturned. Thereafter, the defendant filed a motion for removal of videotapes and audiotapes from the record and for all the tapes to be placed in his possession permanently. The Court held that the audiotapes and videotapes were “public record” and given that removal of the tapes from the Clerk’s custody was neither authorized nor contemplated as evidenced by the pertinent records disposition authorization that required the Clerk to maintain the records while a case was active and thereafter for the state Records Center to maintain the records for an additional fifty (50) years.
- ◆ Tenn. Code Ann. Section 10-7-404 requires the County Technical Assistance Service to compile and print a records retention manual for counties.
- ◆ Tenn. Code Ann. Section 10-7-702 requires the Municipal Technical Advisory Service to compile and print a records retention manual for municipalities.

Are Public Records Accessible during Litigation?

- ◆ While a party to a lawsuit is clearly not entitled to access the records of an opposing private litigant during the course of litigation outside of the discovery process, the same is not true for an opposing litigant who is a governmental entity.
- ◆ In *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 249 S.W. 3d 346, 360-361 (Tenn., 2008), the Supreme Court said the following:

It may very well be that the General Assembly neither intended nor anticipated that the public records statutes they enacted would be used by persons litigating with government entities to obtain records that might not be as readily available through the rules of discovery. However, at present, neither the discovery rules nor the public records statutes expressly limit or prevent persons who are in litigation with a government entity or who are considering litigation with a government entity from filing petitions under Tenn. Code Ann. § 10-7-505(a) seeking access to public records relevant to the litigation.

The Format Issue

- ◆ In *Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 304 (Tenn. 1998), the editor of *The Tennessean* requested from NES, the names, addresses, and phone numbers of all NES customers. Because NES did not maintain such a compilation of information, the request was denied. A petition for access was filed and ultimately the case was appealed to the Tennessee Supreme Court. The Court said the following with regard to the information sought:

once information is entered into a computer, a distinction between information and record becomes to a large degree impractical. In our view, it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record.

The Format Issue (cont.)

- ◆ In *Wells v. Wharton*, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2005), the requestor had developed a computer program that downloaded public records in bulk from the Shelby County Portal website. Eventually, Shelby County shut down the portal because it was overloaded. After several weeks the website reopened, but with restrictions on the amount of information that could be downloaded. The requestor then went into the various offices where the records were kept in order to download the information in bulk, but was unable to do so because the office computers were either unable to handle such requests or the offices did not have public access computers. The requestor then filed a petition for access and the court held:

[i]n Tennessee, the purpose of the Public Records is to allow maximum access to the information contained within public records [and] in light of the purpose of the Tennessee Public Records Act, we conclude that the Tennessee Public Records Act does not require a custodian of records to provide public records in the manner a citizen requests. *Id.* at *9.

According to the Court, ““allowing a custodian of records to choose the manner in which he or she presents public records to citizens is not unreasonable so long as that manner does not distort the record or inhibit access to that record.” *Id.*

Petitioning for Access to Public Records

- ◆ Tenn. Code Ann. Section 10-7-505 addresses the ability of a citizen to petition the court once a request has been denied. The petition is to be filed in either chancery court, circuit court, or any other court in the county having equity jurisdiction.
 - For state level records, the petition is to be filed in either chancery or circuit court of Davidson County.
 - For local government records, the petition is to be filed in either chancery or circuit court in the county where the records are located.
- ◆ If a request is denied and a petition is filed, the records custodian must prove by a preponderance of the evidence that there is a provision within state law that authorizes the nondisclosure of the requested record(s).
- ◆ Upon ruling on the petition the court must issue findings of fact and conclusions of law and have the power to exercise full injunctive remedies and relief so as to carry out the purpose and intent of the TRPA.

Petitioning for Access to Public Records (cont.)

- ◆ If the court finds in favor of the requestor, the records are to be made available to the requestor unless a notice of appeal is filed or the court finds that there is a substantial legal issue that exists that should be decided by an appellate court.
- ◆ If the court finds that the governmental entity willfully* refused to provide the records, then the court has the discretion to assess the entity the requestor's attorney's fees as well as all reasonable fees related to the production of the records.
- ◆ In determining whether the entity's action in denying the records was willful, the court will look at any guidance given to the entity by the Office of Open Records Counsel (OORC).

* Willful is not the equivalent of negligence or bad judgment, but rather bad faith

Forms Developed by the OORC

<http://www.tn.gov/comptroller/openrecords/forms.htm>

- ◆ Inspection/Duplication Of Records Request
- ◆ Records Request Denial Letter
- ◆ Records Production Letter
- ◆ Notice of Aggregation Form

Schedule, Policies, and Guidelines Developed by the OORC

<http://www.tn.gov/comptroller/openrecords/forms.htm>

- ◆ Schedule of Reasonable Charges
- ◆ Policy for Frequent and Multiple Requests for Copies of Public Records
- ◆ Safe Harbor Policy
- ◆ Best Practice Guidelines

Schedule of Reasonable Charges (Overview)

- ◆ Public Chapter 1179 required the OORC to develop a Schedule of Reasonable Charges (hereinafter “schedule”) and on October 1, 2008, the OORC released the schedule.
- ◆ The schedule may be used by records custodians as a guideline to charge citizens requesting copies or duplication of public records under the TPRA.
- ◆ For those records custodians who choose not to adopt the schedule, any charges assessed for copies or duplication of public records must reflect the actual cost to the entity producing the requested material.
- ◆ A records custodian can assess less than the charges reflected in the schedule and/or have a higher labor threshold and not have to provide justification for those charges.
- ◆ The schedule also provides that any or all of the charges provided for in the schedule can be waived, so long as the waiver is done pursuant to a rule authorized by the entity’s governing authority.

Copying Charges per the Schedule

- ◆ A records custodian may assess a charge of 15 cents per page for each standard 8 ½ x11 or 8 ½ x14 black and white copy produced. A records custodian may assess a requestor a charge for a duplex copy that is the equivalent of the charge for two (2) separate copies.
- ◆ If a public record is maintained in color, the records custodian shall advise the requestor that the record can be produced in color if the requestor is willing to pay a charge higher than that of a black and white copy. If the requestor then requests a color copy, a records custodian may assess a charge of 50 cents per page for each 8 ½ x11 or 8 ½ x14 color copy produced.

Additional Production Charges

- ◆ The presumption is that records will be delivered to a requestor at the records custodian's office; however when a requestor is unable to physically appear in person, the records custodian can charge the requestor the actual cost incurred in mailing the records.
- ◆ A records custodian is only required to use the United States Postal Service for delivery when a requestor is not returning to the records custodian's office to retrieve the records; however it is within the discretion of the records custodian to deliver the records through other means, which would include electronic delivery.
- ◆ When a records custodian uses an outside vendor to produce the requested copy or duplication because the records custodian is legitimately unable to produce the requested material in his/her office, the charges assessed by the vendor to the entity may be recovered from the requestor.
- ◆ When records have to be retrieved from archives or any other entity having possession of the documents and the records custodian is assessed a fee for the retrieval, that charge may also be recovered from the requestor.

Labor Charges per the Schedule

- ◆ Labor is defined as the time reasonably necessary to produce the requested records and includes the time spent locating, retrieving, reviewing, redacting, and reproducing the records.
- ◆ The schedule permits a records custodian to charge for labor after one (1) hour is spent producing the requested material.
- ◆ If labor is assessed, that charge should be based upon the hourly rate of those employees reasonable necessary to produce the requested material, after one (1) hour.
- ◆ If more than one employee is necessary to produce the requested material, the one (1) hour of labor that cannot be assessed it to be subtracted from the total number of hours the highest paid employee spends on the request.

Policy for Frequent and Multiple Requests for Copies of Public Records (Overview)

- ◆ The Schedule of Reasonable Charges gives records custodians the ability (optional and not required) to access a requestor a labor fee after one (1) hour of labor has been incurred producing copies of public records pursuant to a request for copies under the TPRA.
- ◆ This policy gives a records custodian the ability (optional and not required) to access a single requestor or a group of requestors working in concert or as the agent of another individual, a fee for any and all labor incurred producing a request after the requestor or group of requestor has made four (4) other requests for records in a calendar month. This policy does not allow a records custodian to aggregate the number of requests made when the requests are for certain types of routinely released and readily accessible documents.

Safe Harbor Policy

- ◆ Any fee related to the production of a copy or duplication that is charged by an entity required to provide access to public records pursuant to the Tennessee Public Records Act is presumed to be reasonable if the entity adopts and implements either the Schedule of Reasonable Charges or a separate schedule developed in accordance with the provisions of the Schedule of Reasonable Charges. Likewise, the aggregation of frequent and multiple requests for copies of public records and the labor fees charged as the result of that aggregation are presumed to be reasonable if the entity adopts and implements the Frequent and Multiple Request Policy or a separate policy developed in accordance with the provisions of the Frequent and Multiple Request Policy.

Best Practice Guidelines (Overview)

- ◆ The Best Practice Guidelines embody what the OORC believes to be a very good road map for records custodians.
- ◆ The Guidelines provide instruction and guidance relative to questions that are frequently asked by records custodians, as well as guidance on ways to better comply with the TPRA. While the Office understands that no two agencies operate alike, the Guidelines create a starting point for discussion within an agency as to the types of considerations that need to be made in order to determine how the agency will deal with public records requests.

OORC Opinions

- ◆ [09-01](#) Access to Courtroom Surveillance Footage
- ◆ [09-02](#) GIS Data
- ◆ [09-03](#) Confidentiality of Driver Identification Numbers
- ◆ [09-04](#) Interplay between the Federal Copyright Law and the Tennessee Public Records Act
- ◆ [09-05](#) Computation of 7 Business Days
- ◆ [09-06](#) Records Relevant to a Contemplated or Pending Criminal Action
- ◆ [09-07](#) Private Entities and the Functional Equivalency Test.
- ◆ [09-08](#) Applicability of the Open Meetings Act and the Tennessee Public Records Act to a Home Rule City Charter Commission
- ◆ [09-09](#) Exceptions to the Tennessee Public Records Act: the Attorney Work Product Doctrine and Tenn. R. Crim. P. 16(a)(2)
- ◆ [09-10](#) The Duty of Court Clerks to Redact Confidential Information in Files and Exhibits
- ◆ [09-11](#) Duties of a Records Custodian and the Release of Local Law Enforcement Records
- ◆ [09-12](#) Special Called Meetings and Adequate Public Notice
- ◆ [09-13](#) Access to Law Enforcement Dash Cam Videos
- ◆ [09-14](#) The Release of Drivers License Numbers to Insurance Companies

OORC Opinions (cont.)

- ◆ [10-01](#) The Release of Law Enforcement Records pursuant to Tenn. Code Ann. Section 37-1-154
- ◆ [10-02](#) The Release of Juvenile Witness Statements
- ◆ [10-03](#) The Release of Information Obtained from the Department of Safety's Motor Vehicle Database
- ◆ [10-04](#) Charter Commission Meetings
- ◆ [10-05](#) Public Access to Board Packet Materials
- ◆ [10-06](#) Labor Fees and the Inspection of Public Records
- ◆ [10-07](#) Meetings and the Requirement to Record Minutes
- ◆ [11-01](#) Public Records Generated by the Use of Personal Smartphone for City Business
- ◆ [11-02](#) Accessing Unredacted Certified Payroll Records
- ◆ [11-03](#) Physical Access to Cellular Phone to Inspect Text Messages
- ◆ [11-04](#) The Accessibility of Carter County Building Permit Applications
- ◆ [11-05](#) The Interplay between FERPA and the TPRA
- ◆ [12-01](#) Amending Meeting Agendas during Meeting
- ◆ [12-02](#) Calculation of Labor Fees
- ◆ [12-03](#) Fees for Accident and Incident Reports
- ◆ [12-04](#) Requests from Corporations and Fees for Records Sent Electronically

Court and AG Opinions

- ◆ In addition to traditional governmental entities, private entities that operate as the functional equivalent of a governmental agency are also subject to the TPRA. *Memphis Publishing Company v. Cherokee Children & Family Services, Inc.*, 87 S.W. 3d 67 (Tenn. 2002).
- ◆ Records are to be open for inspection by citizens (see Tenn. Att’y Gen. 01-132 (August 22, 2001); and *Lee v. Minner*, 369 F. Supp. 527 (Del. 2005).
- ◆ Record custodian was required to provide information in the format requested, even though the entity did not keep information in the requested format. Requestor was required to pay for the program that extracted the information in the desired format. *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998).
- ◆ In *Brennan v. Giles County Board of Education*, the Western Section Court of Appeals declined to make a bright-line rule that all emails created on a government computer is a public record. The Court said that the emails had to be examined on a case-by case basis, because it is possible that some emails were not “made or received in connection with the transaction of official business.” *Brennan v. Giles County Board of Education*, 2005 WL1996625 (Aug.18, 2005).

Court and AG Opinions (cont.)

- ◆ When confidential information is found within a public record, the confidential information should be redacted. *Eldridge v. Putnam County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001).
- ◆ Record Custodian is not required to make inspection for a citizen when the citizen cannot personally appear, but if the citizen can sufficiently identify the records requested for copying, personal appearance is not necessary. *Waller v. Bryan*, 16 S.W. 3D 770 (Tenn. Ct. App. 1999).
- ◆ A request for access to public records cannot be denied because the request was not made in writing. *Wells v. Wharton*, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2006)(see also T.C.A. § 10-7-504(g)regarding law enforcement personnel information).
- ◆ The Tennessee Public Records Act does not require a governmental entity to manually sort through records and compile information gained from those records. An agency has an obligation to provide those documents or records that are sufficiently identified by the requestor, but has no obligation “to review and search their records pursuant to a Public Records Act request or to “compile or collect statistics. *Hickman v. Tennessee Board of Probation and Parole*, 2003 WL 724474 Tenn. Ct. App. March 4, 2003).

OORC Contact Information

If you have questions regarding the Tennessee Public Records Act, call ***Elisha Hodge*** at (615) 401-7891 or toll-free at 1-866-831-3750. You can email us at open.records@cot.tn.gov

You can also visit our website at:

<http://www.comptroller.tn.gov/openrecords/>

for information on the Office of Open Records Counsel.