

HELLO SUNSHINE: SHEDDING LIGHT ON TOMA & THE TPRA

2023 CCFO / CMFO Presentation

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TRANSPARENCY IN GOVERNMENT

What we're going to cover:

- Office of Open Records Counsel ("OORC")
- Tennessee Public Records Act ("TPRA")
- Common Exceptions to TPRA
- New Legislation
- Processing Public Record Requests
- Tennessee Open Meetings Act ("TOMA")



ABOUT THE OORC

Office of Open Records Counsel

- ⊕ Created in 2008
- ⊕ Helps citizens and government officials better understand Tennessee's laws on public records and open meetings.
 - Respond to questions and concerns
 - Educational outreach
 - Develop forms, schedules and policies for public record requests
 - Post resources online
 - Cannot enforce TOMA or TPRA



OFFICE OF OPEN RECORDS COUNSEL

Policies and Guidelines

- ⊕ Best Practices
- ⊕ Model Public Records Policy
- ⊕ Schedule of Reasonable Charges
- ⊕ Charges for Frequent Requests
- ⊕ Safe Harbor Policy
- ⊕ Informal Advisory Opinions
- ⊕ Mediation of Records Disputes
- ⊕ Records Request Form, Records Response Form
- ⊕ Internet Forum Approval



OFFICE OF OPEN RECORDS COUNSEL

Advisory Opinions

- 21-01 Basis for Denial
- 19-01 Emails b/w Members of Governing Body and Access to Public Meetings
- 18-01 Copying Records During Inspection
- 14-03 Charging for Electronic Copies of Records
- 15-01/12-04 Requests from Corporations
- 12-02 Calculating Labor Costs
- 12-01 Amending Meeting Agendas/Adequate Public Notice
- 09-05 Computing 7 Business Days
- 08-14 Attorney Client Privilege
- 08-05 Access to Public Employee Cell Phone Records
- 08-12 Specificity of Record Requests



OFFICE OF OPEN RECORDS COUNSEL

OORC Website

Learn about Public Records

Frequently Asked Questions

Reports, Policies and Updates

Resources

Submission Inquiry

Public Records Training

INSPIRING QUOTE

Symbol of Transparency

“Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee.”

⊕ *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007).



TENNESSEE OPEN MEETINGS ACT

Tenn. Code Ann. § 8-44-101, et. seq

- ⊕ The formation of public policy and decisions is public business and shall not be conducted in secret.
- ⊕ Construed broadly in favor of the public.
- ⊕ Provides the right to attend, not the right to participate.
- ⊕ Applies to all “meetings” of any “governing body.”



TENNESSEE OPEN MEETINGS ACT

What is a meeting of a governing body?

- ⊕ “Governing Body”
 - Members of a public body of 2 or more members with authority to make decisions for or recommendations to a public body on policy or administration.
 - “Public body” - origin and authority may be traced to legislative action and members have authority to make decisions or recommendations on policy or administration affecting government business. *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976).
 - Includes certain non-profits. Tenn. Code Ann. § 8-44-102(b)(1)(E)(i).



TENNESSEE OPEN MEETINGS ACT

What is a meeting of a governing body?

- ⊕ “Meeting”
 - Convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision.
 - Discussion or deliberation between member about matters a quorum of the body would need to vote upon. *Johnston v. Metro. Gov't of Nashville & Davidson Cnty.*, 320 S.W.3d 299, 303 (Tenn. Ct. App. 2009)
 - “Discuss or Deliberate” = weigh arguments for or against
 - Doesn't include executive sessions or workshops
 - Can always have executive session with attorney, but members still cannot discuss or deliberate during executive session



TENNESSEE OPEN MEETINGS ACT

TOMA Requirements

- ⊕ Meeting must be open to the public
- ⊕ Adequate Public Notice of the meeting
- ⊕ Meeting Minutes
 - Persons present
 - Motions, proposals and resolutions offered
 - Results of any votes
- ⊕ All votes by public vote, public ballot or public roll call
- ⊕ Nothing about agendas



TENNESSEE OPEN MEETINGS ACT

“Adequate Public Notice”

- ⊕ Under the totality of the circumstances, does notice give interested citizens a reasonable opportunity to exercise their right to attend?
- ⊕ Regular Meeting:
 - Time & Place of Meeting
- ⊕ Special Meeting:
 - Reasonably describe proposed actions to be taken or decisions to be made
 - Can only discuss proposed actions put in the notice



ELECTRONIC MEETINGS

- ⊕ Only for state entities
- ⊕ TCA 8-44-108
 - Only allows state governing bodies to participate electronically
 - Local governing bodies intentionally excluded from legislation
- ⊕ TCA 8-44-109
 - Only allows for discussion via internet forum
 - Members still must be physically present at a public meeting to make decisions
 - Only allowed for elected governing body or school board
- ⊕ Hybrid Meeting – can still broadcast electronically



TENNESSEE OPEN MEETINGS ACT

“Executive Sessions”

- ⊕ Meeting with Attorney
- ⊕ Informational Sessions / Workshops
- ⊕ Hospital Boards
- ⊕ School Safety Planning
- ⊕ Government Audit Committees



Tenn. Code Ann. § 8-44-113 (?)

- Public Chapter 300, went into effect July 1, 2023. Not officially codified yet, but still in effect.
- Public Comment is required at meetings.
- Governing body can enact reasonable restrictions.
- Must allow both sides of an issue equal opportunity.



Tenn. Code Ann. § 8-44-112 (?)

- Public Chapter 213, effective as of April 25, 2023, not officially codified yet.
- Local government legislative bodies must make an agenda available to the public at no charge at least 48 hours prior to the meeting.
- Items can be added after the agenda is published, but don't act sus.
- Separate from notice of meeting.



TENNESSEE OPEN MEETINGS ACT

TOMA OOPS!

- ⊕ **What if a governing body violates TOMA?**
- ⊕ **Any action taken in violation of TOMA is null and void, except commitments affecting public debt.**
 - Tenn. Code Ann. § 8-44-105
- ⊕ **Court has broad jurisdiction to issue injunctions, impose penalties and otherwise enforce purpose of TOMA.**
 - Tenn. Code Ann. § 8-44-106
 - Court retains jurisdiction and governing body must report to the court semi-annually re TOMA compliance



TENNESSEE OPEN MEETINGS ACT

TOMA in Two Minutes

- ⊕ **Adequate Public Notice of the meeting.**
 - Regularly scheduled meeting notices include time and place.
 - Special called meeting notices include time, place, and agenda.
- ⊕ **Meeting and votes are public.**
 - Anyone who can vote in a meeting is a member of the governing body.
 - A meeting is when two or more members of a governing body talk about the business of the governing body.
 - Cannot talk about how members will vote, or the merits of a position.
 - Can talk about weather.
 - Deliberation and votes only take place in a properly noticed meeting.
 - Deliberation and votes are public.
- ⊕ **Violations are bad.**
 - Nothing in your meeting counts.
 - Can redo the meeting using proper notice and public votes.
 - Courts have broad discretion to remedy noncompliance.



TENNESSEE PUBLIC RECORDS ACT

Symbol of Transparency

“The Public Records Act has a noble and worthwhile purpose by providing a tool to hold government officials and agencies accountable to the citizens of Tennessee through oversight in government activities”.

⊕ *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 864 (Tenn. 2016)



TENNESSEE PUBLIC RECORDS ACT

Tenn. Code Ann. § 10-7-503

- ⊕ All public records
- ⊕ are open for inspection
- ⊕ by any citizen of the state
- ⊕ unless they're not.

- ⊕ **Creates a presumption of openness!**
 - Public records are open to Tennessee citizens unless state law provides otherwise



INTERPRETED BROADLY

- Courts are to interpret the provisions of the TPRA broadly to give the fullest possible public access to public records.
 - Tenn. Code Ann. § 10-7-505(d).
- TPRA expresses a clear legislative mandate favoring disclosure of government records.
 - *State v. Caewood*, 134 S.W.3d 159, 164-5 (Tenn. 2004).
- Unless there is an express exemption within the law, disclosure is required “even in the face of serious countervailing considerations.”
 - *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).



WHO IS SUBJECT TO THE TPRA?

- **Government Entities**
 - State agencies, counties, municipalities
 - Includes any subdivision, departments, divisions, boards and other government entities created by law.
 - Not subject to Freedom of Information Act (“FOIA”)
- **“Functional Equivalent”**
 - “When a private entity’s relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.”
 - *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.* 87 S.W.3d 67, 70 (Tenn. 2002).
 - Based on totality of the circumstances.
 - Level of government funding
 - Government involvement and control over entity
 - Whether entity created by legislative act or previously determined by law to be open to public access
 - Burden is on the petitioner



WHO CAN ACCESS RECORDS?

- Open for personal inspection by “any citizen of this state.”
- May require presentation of photo ID that includes the person’s address or require alternative acceptable forms of ID.
 - Driver License
 - Student ID
 - Utility Bill
 - Proof of Property Ownership
- Proof of citizenship is discretionary
- Should be included in Public Records Policy
- Does not include corporations or other artificial entities

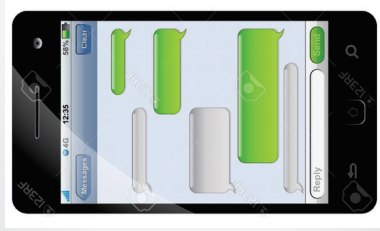
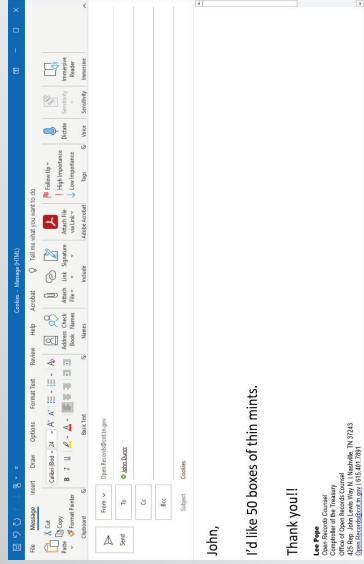


WHAT IS A “PUBLIC RECORD”?

- Tenn. Code Ann. § 10-7-503(a)(1)(A)**
- Made or received pursuant to law or ordinance; or
 - Made in connection with the transaction of official gov’t business.
 - Does not include the actual device or equipment.
 - Drafts can be public records.
 - “Public Record” determined by substance of the record.



WHAT IS A "PUBLIC RECORD"?



TYPES OF PUBLIC RECORDS

Common "Public Records"

- Emails, texts, tweets, FB posts
- Video recordings/surveillance
- Personnel records/HR Investigations/Applicant Records
- Travel/leave information
- Meeting agenda and minutes
- Contract/bidding documents
- Budget records
- Financial records



EXCEPTIONS TO THE TPRA

“Unless otherwise provided by state law”

- ⊕ Tenn. Code Ann. § 10-7-504
 - 60 Exceptions; 700+ elsewhere in Tennessee Code
- ⊕ “State law’ includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations.” *Tennessee v. Metro. Gov’t of Nashville and Davidson Cnty.*, 485 S.W.3d 857, 865-66 (Tenn. 2016), citing *Swift v. Campbell*, 159 S.W.3d 565, 571-72 (Tenn. 2004).
 - 10-7-504(y) – Admin rules making info confidential as condition to receive federal funds.
 - Rule 34 of Rules of Tennessee Supreme Court
- ⊕ OORC Report on Statutory TPRA Exceptions
 - 700+ statutory exceptions identified in Tennessee Code
 - Gov’t Ops Committee to review new exceptions

EXCEPTIONS TO THE TPRA

“Personally Identifying Information”

- ⊕ Tenn. Code Ann. § 10-7-504(a)(29)
 - Social security numbers;
 - Official state or government issued driver licenses or identification numbers;
 - Alien registration numbers or passport numbers;
 - Employer or taxpayer identification numbers;
 - Unique biometric data, such as fingerprints, voice prints, retina or iris images, or other unique physical representations; and
 - Unique electronic identification numbers, addresses, routing codes or other personal identifying data which enables an individual to obtain merchandise or service or to otherwise financially encumber the legitimate possessor of the identifying data.

EXCEPTIONS TO THE TPRA

Public Employee Personnel Records

- ⊕ Unless authorized by employee or provided for other governmental purposes, redact:
 - Home phone and cell phone numbers;
 - Personal, nongovernment issued email addresses;
 - Residential street address for non-state employees;
 - Bank account information, health savings account, retirement account, and pension account information;
 - Social security number;
 - Driver license information, except where driving or operating a vehicle is part of the employee's job description;
 - Emergency contact information; and
 - Above information for immediate family.

Tenn. Code Ann. § 10-7-504(f)

EXCEPTIONS TO THE TPRA

Tenn. R. Crim. P. 16

- ⊕ Materials relevant to ongoing or pending criminal proceedings are not subject to disclosure.
 - *Tennessee, et al. v. Metro. Gov't of Nashville and Davidson Cnty., et al.*, 485 S.W.3d 857 (Tenn. 2016).
- ⊕ Records must be investigatory in nature; ordinary public records do not become confidential due to association with criminal proceeding.
 - *Scripps Media, Inc. v. Tennessee Dept. of Mental Health and Substance Abuse Serv.*, 2019 WL 3854298 (Tenn. Ct. App., August 16, 2019).

EXCEPTIONS TO THE TPRA

Juvenile Information

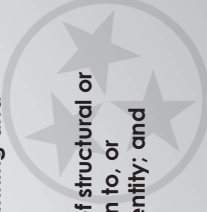
- **Generally open public record unless exception applies:**
 - Law enforcement records related to a juvenile court proceeding. (Tenn. Code Ann. § 37-1-154)
 - Juvenile victim of crime (Tenn. Code Ann. § 10-7-504(f))
 - Reports of harm (Tenn. Code Ann. §§ 37-1-409, 37-5-107)
 - Reports of sexual abuse (Tenn. Code Ann. § 37-1-612)
 - Law Enforcement Body Camera of Juvenile at School (Tenn. Code Ann. § 10-7-504(u)(1)(A))
 - Law Enforcement Records Regarding Incident at a School (Tenn. Code Ann. § 10-7-504(o)(4)(H))
 - Proceedings involving DCS
 - Ongoing criminal investigation/prosecution



EXCEPTIONS TO THE TPRA

Security of Gov't Buildings

- **Tenn. Code Ann. § 10-7-504(m)**
 - Information and records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection.
 - Such information and records include:
 - (A) Information and records about alarm and security systems used at the government building, including codes, passwords, wiring diagrams, plans and security procedures and protocols related to the security systems;
 - (B) Security plans, including security-related contingency planning and emergency response plans;
 - (C) Assessments of security vulnerability;
 - (D) Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity; and
 - (E) Surveillance recordings.



EXCEPTIONS TO THE TPRA

Other Common Exceptions

- Medical Information – HIPAA
- Student Information – FERPA
- Proprietary Information/Trade Secrets
- Expunged Records
- Tax information
- Attorney, Physician, or Therapist Privileges
- Mental Health & Substance Abuse information



PUBLIC RECORDS POLICY/RULE

Tenn. Code Ann. § 10-7-503(g)

Every Gov't Entity must have a policy that includes:

- Process for making requests, including any required forms;
- Process for responding to requests;
- Statement of fees and billing/payment procedures; and
- Contact information for the Public Records Request Coordinator (“PRRC”).

• OORC Model Policy released January 2017



SUBMITTING TPRA REQUESTS

Tenn. Code Ann. § 10-7-503(a)(7)

- ⊕ Identify PRRC in local policy and submit to PRRC using form
 - Requests to only inspect do not have to be in writing and may be made:
 - In person, telephone, fax, mail, email (if used) or internet portal (if used).
 - Requests for copies can be required to be in writing or on a form developed by OORC and may be made:
 - In person, mail, email (if used) or internet portal (if used).
- ⊕ Provide sufficient details to enable the custodian to identify the specific records requested.
 - Avoid “any and all” language if possible – vague requests may be denied.

RESPONDING TO TPRA REQUESTS

Tenn. Code Ann. § 10-7-503(a)(2)(B)

- ⊕ Records custodian shall promptly make records available
- ⊕ If not practicable to make promptly available, must do one of the following within 7 business days:
 - Make the records available;
 - Deny the request in writing with the basis for denial; or
 - Furnish in writing, or by completing a response form developed by OORC, the time reasonably necessary to produce the records or information.
- ⊕ Failure to respond as indicated above = denial

RESPONDING TO TPRA REQUESTS

- Local policy may require a requestor to produce a government-issued photo identification with an address in order to inspect or receive copies of records.
- Governmental entity not required to sort through files to compile information or to create or recreate a record that does not exist.
- Records requests shall be sufficiently detailed to enable the custodian to identify the specific records requested.



RESPONDING TO TPRA REQUESTS

- A governmental entity can require an appointment for a citizen to inspect public records at a time that would not unduly disrupt the functioning of the office.
- “members of the public have the right to view a public record, our General Assembly has not given them either the right to demand that such viewing be done strictly on their terms or the right to disrupt the functioning of a public official’s office to the detriment of all other citizens of this state.”
- *Kersey v. Bratcher*, 253 S.W.3d 625, 630 (Tenn. Ct. App. 2008); also, *Swift v. Campbell*, 159 S.W.3d 565, 573 (Tenn. Ct. App. 2004)



RESPONDING TO TPRA REQUESTS

Electronic Records

- ⊕ Not required to convert paper records into electronic format, BUT required to produce records electronically if records held electronically
- ⊕ Must produce records in format in which they are typically held or another unaltered format
 - Requestor cannot dictate electronic format
- ⊕ Only charge for copies if electronic copy must be printed – usually only have labor charges

THE NES CASE

You don't have to create new records, except sometimes you do.

- ⊕ *Tennessee v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998).
- ⊕ If the requested information exists electronically, a records custodian is obligated to produce the information requested, provided that the requestor is willing to pay the costs incurred in obtaining the electronic information. *Tennessee v. Electric Power Bd. of Nashville*, 979 S.W.2d 297 (Tenn. 1998).

RESPONDING TO TPRA REQUESTS

Grounds for Denying Requests

- ⊕ Not the custodian of the records
- ⊕ Cannot identify responsive records
- ⊕ Records do not exist
- ⊕ Not a Tennessee citizen
- ⊕ Didn't pay for copies/inspect previously requested records
- ⊕ State law makes the records confidential



CHARGING FOR PUBLIC RECORDS

OORC Schedule of Reasonable Charges

- ⊕ Schedule sets forth reasonable charges for copies and labor
 - Can charge for copies and labor
 - \$.15 per page/\$.50 per page for color
 - Use lowest possible labor
 - One-hour labor threshold
 - Can charge for redaction of copies
 - Can only charge for labor related to providing electronic copies unless physical copies are printed
- ⊕ Must provide estimate of costs
- ⊕ Cannot charge if only inspecting records



CHARGING FOR PUBLIC RECORDS

Additional Production Charges

- ⊕ Presumed that records will be delivered at the records custodian's office. If a requestor is unable to physically appear in person, the records custodian can charge the requestor the actual cost incurred in mailing the records.
 - Only required to deliver records via USPS
 - Can deliver records by other means
 - Only required to provide records electronically if they are maintained electronically
- ⊕ Can assess charges associated with utilizing a third-party vendor.
 - Records held in archives
 - No internal IT staff
 - Hiring programmer to extract information.



CHARGING FOR PUBLIC RECORDS

Charges for Multiple Requests

- ⊕ If a requestor, or group of requestors, makes four 4 or more requests within in a calendar month, a records custodian no longer is required to waive the first hour of labor or waive any other fees that would normally be waived in accordance with the local public records policy.
- ⊕ This policy does not allow a records custodian to aggregate requests when the requests are for certain types of routinely released and readily accessible documents.



TPRA PENALTIES

Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)

- ⊕ **Failure to Inspect**
 - 2 or more requests to inspect in 6 months
 - Fails to view records within 15 days of being notified that records are available to view
 - No TPRA requests for 6 months, unless failure to view was for “good cause.”
- ⊕ **Failure to Pay for Copies**
 - Government entity provides estimate of costs
 - Requestor agrees to pay estimated costs
 - Requestor fails to pay for copies after they are produced
 - No more TPRA requests until requestor pays costs



PETITIONING FOR ACCESS

Tenn. Code Ann. § 10-7-505

- ⊕ **Denial Required**
 - Failure to respond in accordance with 503 = denial
 - Imposition of unreasonable fee = denial
- ⊕ **Petition filed in chancery or circuit court**
- ⊕ **Burden is on governmental entity to prove denial was justified**
- ⊕ **Court orders access to records and may impose attorney’s fees if it finds denial was “willful.”**
 - “[T]he governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it.” Tenn. Code Ann. § 10-7-505(g).



RECORDS RETENTION

- ❖ **Municipal Records – MTAS**
 - Municipal Technical Advisory Service to compile and print a records retention manual for municipalities. Tenn. Code Ann. § 10-7-702
 - <http://mtasresource.mtas.tennessee.edu/reference/retentijon-schedules>
- ❖ **County Records - CTAS**
 - The County Technical Assistance Service to compile and print a records retention manual for counties. Tenn. Code Ann. § 10-7-404
 - <http://eli.ctas.tennessee.edu/reference/current-retention-schedules>
- ❖ **State Records – Secretary of State**
 - Division of Records Management directs the disposition of all state records. Tenn. Code Ann. § 10-7-303

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