

## TRANSPARENCY IN GOVERNMENT: PUBLIC RECORDS ACT & OPEN MEETINGS ACT

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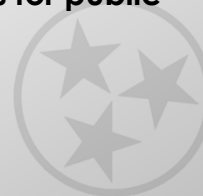


1

## 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 on its website



2

## 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
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3

## OFFICE OF OPEN RECORDS COUNSEL

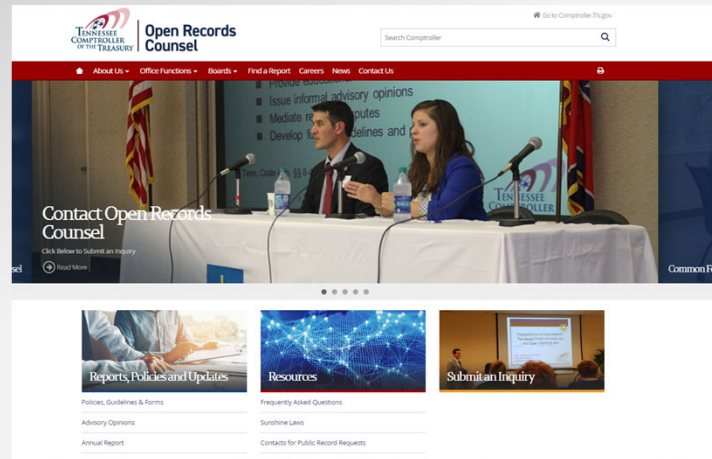
### Benefits of Utilizing OORC

- ✦ Determination of “Willfulness”
    - No Attorney Fees
  - ✦ Schedule of Reasonable Charges
    - Charges Presumed Reasonable
  - ✦ Familiarity with Records/Meetings Issues
  - ✦ Neutral Intermediary
  - ✦ We’re FREE
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4

# OFFICE OF OPEN RECORDS COUNSEL

## OORC Website



5

# 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 and the right to comment.
- ⊕ Applies to all “meetings” of any “governing body.”

6

## TENNESSEE OPEN MEETINGS ACT

### What is a “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”
  - 1. Origin or authority traced to state, city or county legislative action; and
  - 2. Possess authority to make decisions or recommendations concerning policy or administration.
- ⊛ Includes certain non-profits.
- ⊛ Does not include advisory committees created by a single official

7

## TENNESSEE OPEN MEETINGS ACT

### What is a “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.
- ⊛ “Deliberation” about an issue a quorum would have to vote upon
  - Weigh arguments for or against a proposed course of action
- ⊛ Doesn't include executive sessions or informational workshops/sessions
  - Does it go beyond the provision of information and extend into substantive discussion of positions and attempt to develop a consensus?

8

## TENNESSEE OPEN MEETINGS ACT

### TOMA Requirements

- ⊛ **"Meetings" must be open to the public**
- ⊛ **"Adequate Public Notice"**
- ⊛ **Meeting Minutes**
  - Persons present
  - Motions, proposals and resolutions offered
  - Results of any votes
- ⊛ **All votes by public vote, public ballot or public roll call**
- ⊛ **Agendas, sometimes**
- ⊛ **Opportunity for public comment**



9

## 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: Only Time & Place of Meeting**
- ⊛ **Special Meeting:**
  - Reasonably describe proposed actions to be taken or decisions to be made
  - Cannot discuss other matters during the meeting



10

## TENNESSEE OPEN MEETINGS ACT

### **“Executive Sessions”**

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



11

## 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



12

## TENNESSEE PUBLIC RECORDS ACT

### 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).



13

## TENNESSEE PUBLIC RECORDS ACT

### Tenn. Code Ann. § 10-7-503

- ⊕ All public records shall,
- ⊕ during business hours,
- ⊕ be open to inspection,
- ⊕ to any Tennessee citizen,
- ⊕ unless otherwise provided by state law.
  
- ⊕ **Creates a presumption of openness!**
  - Records are open to Tennessee citizens unless state law provides otherwise



14

## INTERPRETED BROADLY

- ✦ Courts are to interpret the provisions of the TPRA broadly so as 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).

15

## WHO IS SUBJECT TO THE TPRA?

- ✦ **Government Entities**
  - State, county and municipal records
  - Includes departments, divisions, boards and other separate units of government created by law or pursuant to law.
    - Tenn. Code Ann. § 10-7-503(a)(1) & (2).
- ✦ **“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

16



## 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

17

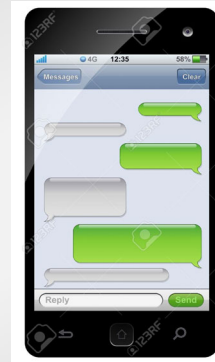
## WHAT IS A “PUBLIC RECORD”?

### **Tenn. Code Ann. § 10-7-503(a)(1)(A)**

- ⊛ Made or received pursuant to law or ordinance; or In connection with the transaction of official business.
- ⊛ Does not include the actual device or equipment.
- ⊛ Includes draft records.
- ⊛ “Public Record” determined by substance of the record.

18

## WHAT IS A "PUBLIC RECORD"?



19

## 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



20

## EXCEPTIONS TO THE TPRA

### “Unless otherwise provided by state law”

- ⊗ **Tenn. Code Ann. § 10-7-504**
  - 50+ Exceptions; 500+ elsewhere in Tennessee Code
  
- ⊗ **“‘State law’ includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations.”**
  - *Tennessean 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).
  
- ⊗ **OORC Report on Statutory TPRA Exceptions**
  - 560 statutory exceptions identified in Tennessee Code
  - Committee to review exceptions



21

## EXCEPTIONS TO THE TPRA

### Common Exceptions

- ⊗ **Security/Surveillance of Gov’t Buildings**
- ⊗ **TBI Files**
- ⊗ **Medical Information – HIPAA**
- ⊗ **Student Information – FERPA**
- ⊗ **Proprietary Information/Trade Secrets**
- ⊗ **Expunged Records**
- ⊗ **Tax information**
- ⊗ **Attorney, Physician or Therapist Privileges**
- ⊗ **Mental Health & Substance Abuse information**



22

## EXCEPTIONS TO THE TPRA

### New Exceptions

- ✦ 2022 OORC Legislative Update
- ✦ Acceptable forms of requestor's residency – P.C. 721
- ✦ Body cam footage containing minors – P.C. 916
- ✦ Personal information of public employees – P.C. 989
- ✦ Photographs of deceased minors and victims of fatal motor vehicle accidents – P.C. 1064
- ✦ Law enforcement related-deaths record retention – P.C. 850
- ✦ County Legislative Body Meeting Notice – P.C. 830
- ✦ Adoption records after 100 years – P.C. 937
- ✦ Display of Property Owner Name in Property Assessor Online Searchable Databases – P.C. 996

23

## BASIC TPRA ANALYSIS

- ✦ Tennessee Citizen? (if required)
- ✦ Government Entity or Functional Equivalent?
- ✦ Public Record?
- ✦ Do Responsive Records Exist?
  - Request for records vs. information
  - Sufficient description to identify records?
- ✦ Does an Exception Apply?
  - Entire record or information within the record?
  - Exception to an Exception?

24

## PUBLIC RECORDS POLICY

### 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



25

## RECEIVING TPRA REQUESTS

### Inspection vs. Copies

- ⊕ **Requests for only inspection:**
  - Cannot require the request to be in writing
  - Cannot assess a charge (even for labor)
  - Except under Tenn. Code Ann. § 10-7-504(a)(20) for redaction of "private records" of a utility
- ⊕ **Requests for copies:**
  - Can require to be in writing or on a form
  - Can charge reasonable costs incurred to produce the requested records.



26

## RECEIVING TPRA REQUESTS

### Tenn. Code Ann. § 10-7-503(a)(7)

- ⊕ Requests for only inspection 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).
- ⊕ Any required forms should be included in policy and must be made readily available to requestors

27

## 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 information available;
  - Deny the request in writing with the basis for denial; or
  - Furnish a completed record request response stating the time reasonably necessary to produce the records or information.
- ⊕ Failure to respond as indicated above = denial

28

## RESPONDING TO TPRA REQUESTS

### Grounds for Denying Requests

- ❖ Not the custodian of the records
- ❖ Cannot identify responsive records
  - Seek clarification, if possible
- ❖ Records do not exist
- ❖ Proof of citizenship
- ❖ Not a Tennessee citizen
- ❖ Has not paid for copies
- ❖ State law makes the records confidential



29

## 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



30

## 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

31

## 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).

32



## RECORDS RETENTION

- \* **Municipal Records – MTAS**
  - **Tenn. Code Ann. § 10-7-702** authorizes the **Municipal Technical Advisory Service** to compile and print a records retention manual for municipalities.
  - <http://mtasresource.mtas.tennessee.edu/reference/retention-schedules>
  
- \* **County Records - CTAS**
  - **Tenn. Code Ann. § 10-7-404** authorizes the **County Technical Assistance Service** to compile and print a records retention manual for counties.
  - <http://eli.ctas.tennessee.edu/reference/current-retention-schedules>

33

## CONTACT INFORMATION

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34