Office of Open Records Counsel

Annual Report

March 2018

Justin P. Wilson
Comptroller of the Treasury

Jason E. Mumpower
Chief of Staff

Governor and Members of the 110th General Assembly:

This report provides an overview of the Office of Open Records Counsel's activities over the past year. The Office offers this report in conjunction with the Advisory Committee on Open Government.

During the first session of the 110th General Assembly, Lieutenant Governor McNally and Speaker Harwell requested that the Office compile a list of all statutory exceptions to the Tennessee Public Records Act. On January 30, 2018, the Office released a report containing 538 exceptions that make certain public records confidential and exempt from disclosure under the Tennessee Public Records Act. A copy of the report is available on the Office website at **https://www.comptroller.tn.gov/openrecords**. In addition to the report, the Office is providing an online searchable exception database as a useful resource for citizens and public officials.

Over the past year, the Office made significant progress toward promptly resolving open records and open meetings inquiries submitted by citizens and public officials from across the state. Utilizing a new inquiry database to better track and respond to inquiries, the Office resolved a residual backlog of inquiries and promptly handled all new inquiries received throughout the year. Additionally, the Office assisted government entities across the state with the development and implementation of public records policies that were required to be in place by July 1, 2017, in accordance with Public Chapter 722, Acts of 2016, and updated its model public records policy to reflect the requirements of Public Chapter 233, Acts of 2016. The Office conducted statewide training in conjunction with the County Technical Assistance Service and Municipal Technical Advisory Service to help ensure government entities' public records policies conform to the current requirements of the Tennessee Public Records Act.

On April 3, 2017, the Office hired a new Assistant Open Records Counsel, Rachel Buckley. Prior to joining the Comptroller's Office, Ms. Buckley served as an Assistant Attorney General as well as an Assistant General Counsel for the Tennessee Department of Children's Services. On July 6, 2017, the Comptroller appointed Lee Pope as Open Records Counsel. Mr. Pope previously served as Deputy Open Records Counsel.

We are proud of the Office's accomplishments over the past year, and we look forward to continuing to make government work better by assisting and educating public officials and citizens with respect to open records and open meetings. Thank you for your consideration of this report. Please feel free to contact our office if we can be of any assistance.

Lee Pope
Open Records Counsel

Rachel Buckley
Assistant Open Records Counsel

HISTORY OF THE OFFICE

The 104th General Assembly enacted the Sunshine in Government Improvement Act of 2006, which created a special joint committee to study open government laws. The committee was charged with determining whether there was a need for revisions to Tennessee's open government laws.

In 2007, the 105th General Assembly appropriated funding for the Office of Open Records Ombudsman, which opened in the fall of 2007 under the purview of the Comptroller of the Treasury. In the following year, based on the recommendations of the special joint committee, the General Assembly amended the Tennessee Public Records Act and provided statutory authority for the Office of Open Records Counsel by enacting Public Chapter 1179, Acts of 2008. The legislation also created the Advisory Committee on Open Government, which is composed of appointed persons and ex-officio members to guide and advise the Office on open records and open meetings issues.

Today, the Office of Open Records Counsel strives to make government work better by helping citizens and government officials better understand Tennessee's laws on public records and open meetings through educational outreach, resources on the Office website, and direct communication and interaction with citizens and government officials across the state.

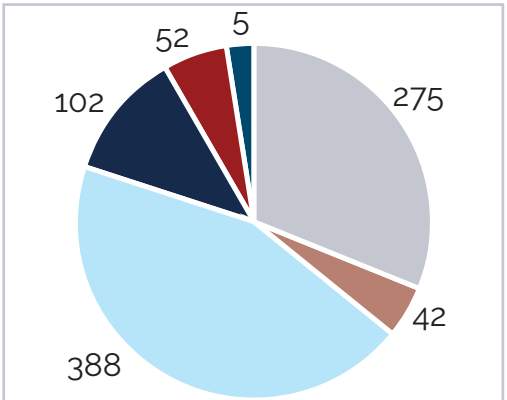
OFFICE RESPONSIBILITIES

The Office of Open Records Counsel is charged with the following responsibilities:

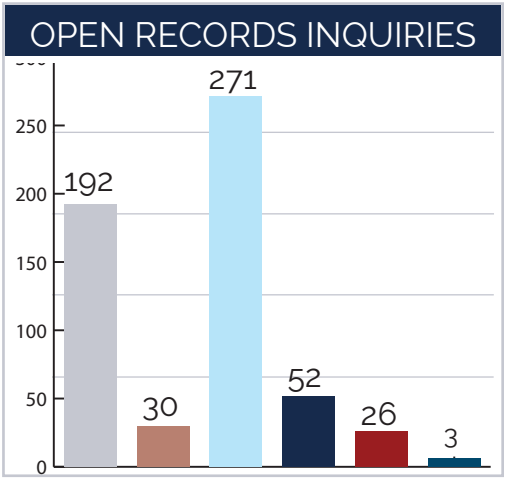
- Serve as a point of contact for questions and concerns regarding public records and open meetings;
- Assist citizens and public officials with requests for public records;
- Promote education and awareness of Tennessee's public records and open meetings laws;
- Collect data on open meetings inquiries and problems;
- Develop forms, schedules, policies, and guidelines for open record requests; and
- Issue informal advisory opinions.

OFFICE OF OPEN RECORDS INQUIRIES (MARCH 2017 - FEBRUARY 2018)

INQUIRIES BY CATEGORY	
Meetings Complaints (25 Governing Bodies)	18
Meetings Inquiries	60
Meetings & Records	14
Records Inquiries	574
Mediations	3
Presentations	15
TPRA Requests	47
Public Records Policy Inquires	99
Other	34
TOTAL: 864	



ALL INQUIRIES BY AFFILIATION

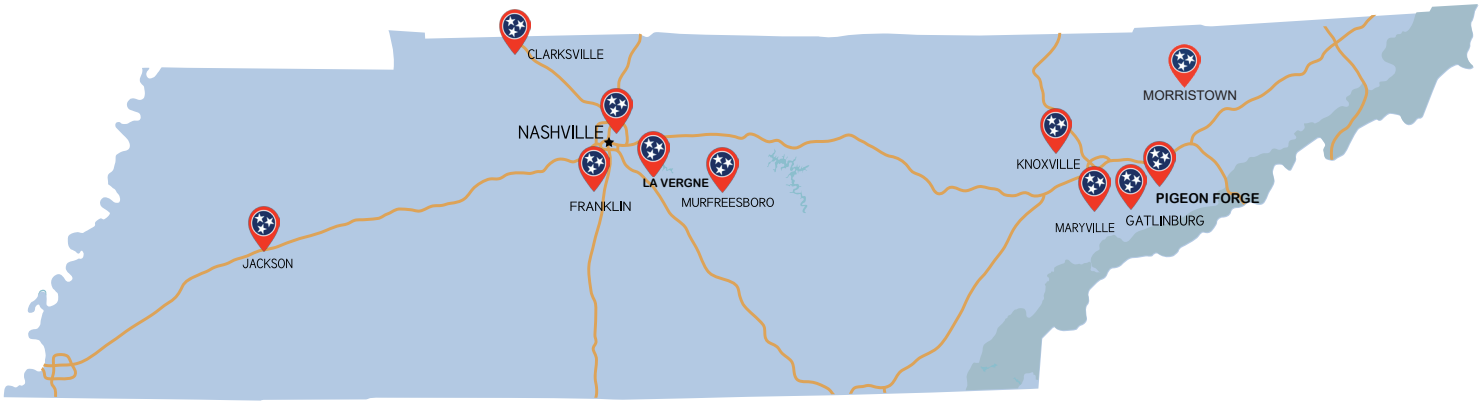


Citizens · Media · Local Government · State Government · Out of State · Unknown

OPEN RECORDS & OPEN MEETINGS TRAINING

Over the past year, the Office of Open Records Counsel conducted statewide trainings to educate various organizations and associations with respect to Tennessee's public records and open meetings laws. The Office worked with the County Technical Assistance Service and Municipal Technical Advisory Service to provide guidance to government entities that were developing and implementing new public records policies in Clarksville, Murfreesboro, Maryville, Jackson, and Knoxville. The Office also worked with the Tennessee Association of Utility Districts to conduct trainings for utility commissioners in Gatlinburg, Pigeon Forge, Murfreesboro, and Morristown.

Additionally, the office performed presentations and provided continuing education for the Tennessee Attorney General's Office, Secretary of State's Office, County Clerks Association, County Attorneys Association, and Tennessee Registers Association, as well as the Jackson Police Department, LaVergne Police Department, Nashville Bar Association, Tennessee Public Risk Management Association, Society of Tennessee Archivists, and the Association of Government Accountants.



2018 ADVISORY COMMITTEE ON OPEN GOVERNMENT

The 17-member Advisory Committee on Open Government (ACOG) provides advice and guidance to the Office. Over the past year, the members of ACOG provided valuable input and advice on the model public records policy that was developed by the Office and distributed to governmental entities that were developing and implementing local public records policies.

2018 Committee Members	
Adam Yeomans	*Tennessee Coalition for Open Government*
Jack McElroy	*Tennessee Press Association*
Maya Siggers	*Tennessee Municipal League*
Kathryn Strong	*County Officials Association of Tennessee*
Debbie Shedden	*Tennessee School Boards Association*
Dick Williams	*Common Cause*
Vivian Underwood Shipe	*League of Women Voters*
Amy Garner	*Tennessee Hospital Association*
Robb Harvey	*Tennessee Association of Broadcasters*
Heather Stewart	*Tennessee Board of Regents*
Blake Farmer	*Society of Professional Journalists*
Jeff Hughes	*Tennessee Association of Chiefs of Police*
Jerry Vastbinder	*Tennessee Sheriffs' Association*
Dennis Weber	*AARP*

Ex Officio Committee Members

Senator Ken Yager
Chair, Senate State & Local Government Committee

Representative Bob Ramsey
Chair, House State Government Committee

Ms. Janet Kleinfelter
Deputy Attorney General
Office of the Attorney General

OPEN RECORDS QUESTIONS AND CONCERNS

What are "public records" in Tennessee?

The *Tennessee Code Annotated* defines "public record" broadly, without regard to physical or electronic form or characteristics, as long as the record is "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity." *TCA* § 10-7-503(a)(1)(A). The Tennessee Public Records Act (TPRA) does not require records to be created, and it does not distinguish between temporary and permanent records. The TPRA provides that if the record exists at the time of the request, and it is open for public inspection, access to the record must be provided promptly to a Tennessee citizen. *TCA* § 10-7-503(a)(2)(B).

What governs whether a public record is open?

All public records are presumed open for inspection by Tennessee citizens "unless otherwise provided by state law." *TCA* § 10-7-503(a)(2)(A). Although many exceptions are set forth in the TPRA, most exemptions are found elsewhere throughout the *Tennessee Code Annotated*, the *United States Code Annotated*, state and federal rules of procedure, court decisions, as well as in common law. While records custodians have a duty to provide access to public records promptly, they also have a duty to maintain the confidentiality of records not open to public inspection.

Are there limitations on public record requests?

The TPRA does not limit the number of public records a citizen may request, the frequency of such requests, or the motivation behind the requests. However, the TPRA does require requests to "be sufficiently detailed to enable the governmental entity to identify the specific records for inspection and copying." *TCA* § 10-7-503(a)(4). If requested records cannot be made promptly available, governmental entities should provide any readily available records and then establish a schedule or process for making the remaining records available promptly thereafter. Governmental entities cannot require that a request simply to inspect records be made in writing, but they may require that requests for copies of records be made in writing. *TCA* § 10-7-503(a)(7)(A) and (g)(1).

Who has the right to request records under the Tennessee Public Records Act?

The right to inspect public records is granted to "any citizen of this state." *TCA* § 10-7-503(a)(2)(A). Accordingly, a records custodian has discretion to "require any person making a request to view or make a copy of a public record to present a government-issued photo identification, if the person possesses photo identification, that includes the person's address." *TCA* § 10-7-503(a)(7)(A)(vi). Governmental entities should determine whether they will require proof of citizenship or respond to requests from non-Tennessee citizens and include such determinations in their written public records policies. *TCA* § 10-7-503(g)(1).

ALL PUBLIC RECORDS ARE PRESUMED OPEN, UNLESS OTHERWISE PROVIDED BY STATE LAW.

OPEN MEETINGS QUESTIONS AND CONCERNS

Who must comply with the "Sunshine Law"?

The "Sunshine Law," or the Tennessee Open Meetings Act (TOMA), *TCA* § 8-44-101 *et seq*., prohibits members of a governing body from meeting and deliberating toward, and/or making decisions on, public business, unless the public receives adequate notice of the meeting. A governing body of a public entity is a multiple-member entity created by state, county, or municipal legislative action. Committees of governing bodies with the authority to make decisions for, or recommendations to, a governing body on policy or administration must also comply with TOMA.

TOMA does not grant the public a right to speak at, or to participate in, a meeting. The act does grant the right to be present and to listen to the transaction of business. Other provisions of law may grant the public a right to speak to a governing body or may require a governing body to hold a public hearing at which the public may speak.

What is an "open meeting"?

"Meeting" is defined in part as "the 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 on any matter." *TCA* § 8-44-102(b)(2). TOMA requires adequate public notice of any meeting of a governing body. Such notice should be sufficient to provide interested individuals an opportunity to become aware of and attend the meeting.

Open meetings issues in Tennessee

The following are specific open meetings issues that have gained attention in Tennessee over the past year:

- Members of governing bodies meeting outside of properly noticed meetings.
- Committees of governing bodies not providing public notice of meetings and preparing meeting minutes.
- Meeting agendas not clearly describing matters to be deliberated and decided.
- Governing bodies discussing matters during an executive session that should only be discussed during an open public meeting.

EXCEPTIONS

AN EXCEPTION MAKES A PUBLIC RECORD, OR INFORMATION WITHIN A PUBLIC RECORD, CONFIDENTIAL.

When the TPRA was enacted in 1957, it provided for only two statutory exceptions. In 1988, the Legislative Committee on Open Records reported 89 exceptions. As of November 2017, the Office of Open Records Counsel identified 538 statutory exceptions. Currently, only two exceptions are scheduled to sunset.

1957 2 Exceptions

1988 89 Exceptions

2018 538 Exceptions

COMMON EXCEPTIONS

***TCA* § 10-7-504(a)(29)**

Personally Identifying Information

- Social Security Numbers
- Driver License and Passport Numbers
- Taxpayer Identification Numbers
- Fingerprints and Retina Images
- Financial Routing Codes

***TCA* § 10-7-504(a)(1)**

Medical Records

- Patients in state, county and municipal hospitals and medical facilities.
- Source of a body part for transplantation or information about the person who donates a body part.

The Challenges of Exceptions

- There is a reason it was created; someone felt it was important at that time.
- Technological advances often prompt new exceptions.
- Open government advocates and media groups desire more transparency.
- Exceptions are open to interpretation.

Exceptions to Exceptions

***TCA* § 10-7-504(a)(29)**
Provides that citizen driver license numbers are confidential.

***TCA* § 10-7-504(f)(1)(E)**
Provides that if a job involves driving, driver license information may be released.

Exceptions are not Universal

Government employers cannot give out certain employee information, such as addresses. However, addresses can still be obtained through other non-employer government entities, such as the property assessor.

Obsolete Exception?

***TCA* 10-7-504(e)**
Related to unpublished phone numbers in possession of 911 districts; 911 centers do not have a way of knowing if phone numbers are unpublished or not.

CONTACT INFORMATION

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For additional information about the Office of Open Records Counsel and other related resources, visit:
www.comptroller.tn.gov/openrecords