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COMPTROLLER OF THE TREASURY
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John G. Morgan
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Mr. Robert L. Perry, Jr.
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November 13, 2008

Mr. Perry:

You have requested an opinion from this Office addressing the following issues:

(1) If a request for "all communications, email, written opinion, notes and memoranda, related to the legal opinions provided to the county from any legal counsel" is made to a county mayor, can that request be denied for any reason, including, but not limited to, confidentiality and attorney/client privilege?

2) If a request for inspection of a specific group of documents requires county employees to sort through over 3,000 different files and redact confidential information such as unpublished telephone numbers, etc. from the documents prior to publication/inspection, can the County charge for the labor involved in producing these records for inspection? Can the County assess the requestor a labor charge for any supervision that may be necessary to ensure that the integrity and order of the records are maintained during inspection? If the County is permitted to charge for the labor involved in producing records for inspection and for the supervision necessary during inspection, can the County require the requestor to pay a deposit for the estimated amount of labor necessary in locating, retrieving, reviewing, redacting, and reproducing the records?

I. The Tennessee Public Records Act and Exceptions to the Act

Tenn. Code Ann. Section 10-7-503(a), as amended by Public Chapter 1179, Acts of 2008, which is the overarching provision of the Tennessee Public Records Act (hereinafter referred to as "TPRA") reads as follows:

> 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.

While the Tennessee General Assembly instructed courts to interpret the TPRA broadly "so as to give the fullest possible public access to public records," it also recognized that there are times when records and information should not be made available to the public because "the reasons not to disclose a particular record or class of records… outweigh the policy favoring public disclosure." Tenn. Code Ann. Section 10-7-505(c); *Swift v. Campbell*, 159 S.W. 3d 565, 571 (Tenn. Ct. App. 2004). Tennessee Courts have long acknowledged that exceptions to the TPRA are found within various laws. In *Swift v. Campbell*, the Tennessee Court of Appeals said that exceptions to the TPRA are found "not only in statutes, but also the Constitution of Tennessee, the common law, the rules of court, and administrative rules and regulations because each of these has the force and effect of law in Tennessee." *Id.* at 571-572.

With regard to the first issue you present, it is well settled in Tennessee that both the attorney-client privilege which is based in common law and adopted in Tenn. Sup. Ct. R. 8, RPC 1.6 and the work-product doctrine codified in Tennessee Rule of Civil Procedure 26.02(3) create exceptions to the TPRA.

II. Attorney-Client Privilege

Tenn. Sup. Ct. R. 8, RPC 1.6 provides as follows:

> (a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
>
> (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by Rule 3.3;
> (2) to secure legal advice about the lawyer's compliance with these Rules; or
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
>
> (c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or

(3) to comply with Rules 3.3, 4.1, or other law.

While this privilege is broad, Courts have opined that there are categories of information that in most situations are not going to be protected by the privilege. The Tennessee Court of Criminal Appeals in *Knoxville-News Sentinel v. Huskey* found that public inspection of summary cover sheets of fees that were paid for the defense of an indigent defendant, when those cover sheets did not "reveal defense strategies" or "confidences, but merely attorneys' fees" neither violated the defendant's right to a fair trial nor the attorney-client privilege or the work-product doctrine. *Knoxville-News Sentinel v. Huskey*, 982 S.W. 2d 359, 362-363 (Tenn. Crim. App. 1998).

The United States Court of Appeals for the Sixth Circuit opined as follows:

> The attorney-client privilege only precludes disclosure of *communications* between attorney and client and does not protect against disclosure of the facts underlying the communication. *Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S.Ct. 677, 685, 66 L.Ed.2d 584 (1981). In general, the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged. In *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447 (6th Cir.1983), *cert. denied*, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984), this court reiterated the principle that the attorney-client privilege should be narrowly construed and held that the attorney-client privilege does not protect the identity of a client except in very limited circumstances. In *United States v. Haddad*, 527 F.2d 537, 538-39 (6th Cir.1975), *cert. denied*, 425 U.S. 974, 96 S.Ct. 2173, 48 L.Ed.2d 797 (1976), this court held that the amount of money paid or owed by a client to his attorney is not privileged except in exceptional circumstances…

Humphreys, Hutcheson and Moseley v. Donovan, 755 F.2d 1211, 1219 (6th Cir. 1985).

The United States Court of Appeals for the Ninth Circuit opined:

> Not all communications between attorney and client are privileged. Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. *See, e.g., Tornay*, 840 F.2d at 1426; *In re Grand Jury Witness (Salas and Waxman)*, 695 F.2d 359, 361-62 (9th Cir.1982); *Hodge and Zweig*, 548 F.2d at 1353; *United States v. Cromer*, 483 F.2d 99, 101-02 (9th Cir.1973). However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege. *Salas*, 695 F.2d at 362.

Clarke v. American Commerce Nat. Bank, 974 F.2d 127 (9th Cir. 1992).

The attorney-client privilege can likely be asserted to protect the requested records from inspection or duplication under the TPRA, unless the "communications, email, written opinion, notes and memoranda" that have been requested fall into one of the above-described situations where an attorney has the discretion to or must reveal information relating to the representation of a client, or the "communications, email, written opinion, notes and memoranda" consist of the type of information that Courts have consistently found is not protected by the privilege.

II. Work-Product Doctrine

The relevant portion of the work product doctrine is codified in Tennessee Rules of Civil Procedure 26.02(3) and reads as follows:

> Trial Preparation: Materials. Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Tennessee Court of Appeals in *The Tennessean v. Tennessee Dept. of Personnel* said the following with regard to what qualifies as work-product and the interplay between work-product and the TPRA, which the Court refers to as the "Act":

> In order to qualify as work product, the party seeking protection must establish the following three elements: (1) that the material sought is tangible, (2) that the documents were prepared in anticipation of litigation or trial, and (3) that the documents were prepared by or for legal counsel.
>
> Any document that meets the definition of work product under Rule 26.02(3) of the Rules of Civil Procedure is exempt from the Act.

The Tennessean v. Tennessee Dept. of Personnel 2007 WL1241337 at *10 (Tenn. Ct. App. April 27, 2007).

Justice Koch, in delivering the opinion for the Tennessee Court of Appeals in *Swift v. Campbell* opined as follows with regard to both the purpose and the importance of the work-product doctrine:

> The central purpose of the work product doctrine is to protect an attorney's preparation for trial under the adversary system. The policy underlying the doctrine is that lawyers preparing for litigation should be permitted to assemble information, to separate the relevant facts from the irrelevant, and to use the relevant facts to plan and prepare their strategy without undue and needless interference. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 219-20 (Tenn.Ct.App.2002). Thus, the doctrine protects parties from "learning of the adversary's mental impressions, conclusions, and legal theories of the case," *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d at 689, and prevents a litigant "from taking a free ride on the research and thinking of his opponent's lawyer." *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir.1999).

As such, if any of the "communications, email, written opinion, notes and memoranda" that have been requested were prepared by or for "any legal counsel" in anticipation of litigation or trial, then the documents will be exempt from inspection and/or copying under the TPRA.

IV. Charging for Labor Associated with Inspection

In responding to this question, it is first important that the distinction be made between the concept of "sort" that you reference in your question and the concept of "sort" that is referenced in the TPRA. Tenn. Code Ann. Section 10-7-503(a)(4), as amended by PC 1179, Acts of 2008, states that a records custodian is not required to "sort through files to compile information." However, while you use the word "sort" it appears as though you are speaking of reviewing a group of documents for the purpose of redacting any confidential information and cases such as *Eldridge v. Putnam County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001) and *Kersey v. Jones*, 2007 WL 2198329 (Tenn. Ct. App. July 23, 2007) make it clear that it is the governmental entity's responsibility to review and redact confidential information from records prior to providing the records for inspection or copying by a citizen.

With regard to your question about the ability to access a requestor a charge for labor associated with the preparation of records for inspection, Tenn. Code Ann. Section 10-7-503(a)(7)(A) as amended by Public Chapter 1179, Acts of 2008, provides that a records custodian can not charge a requestor to view public records unless otherwise required by law. Tenn. Code Ann. Section 10-7-503(a)(7)(C) as amended by Public Chapter 1179, Public Acts of 2008, which is specific to charges that may be assessed a requestor seeking copies of public records, provides that a records custodian may charge a requestor the custodian's reasonable costs to produce the requested material. In accordance with our recently released Schedule of Reasonable Charges, those cost may include but are not limited to the cost of making the copy/duplication and staff time after the custodian has spent an hour (1) hour [or more if so established by the records custodian] producing the requested material. The ability to charge in the above-mentioned sections is only applicable when the requestor is seeking a copy or duplicate of a public record. The same is true for a number of other statutory provisions found within the TPRA. *See* Tenn. Code Ann. Sections 10-7-503(a)(2)(C), as amended by PC 1179, Acts of 2008, 10-7-506(a), and 10-7-506(c).

Based upon the above, it is this Office's opinion that a records custodian, when responding to a request to inspect pursuant to the TPRA, is not permitted to charge for inspection of public records or any retrieval, review, or redaction done in preparation for inspection by a citizen, unless there is specific statutory authority to do so. Likewise, it is the opinion of this Office that a records custodian is not permitted to charge a requestor for the time that is incurred supervising a citizen who is inspecting public records. However, if subsequent to inspection, the requestor asks for a copy or duplicate of any of the inspected records, the records custodian may then charge the requestor a reasonable apportionment of the costs related to any supervision and the retrieval, review, and redaction of those records for which a copy or duplicate is sought.

V. Conclusion

In summation, it is the opinion of this Office that the "communications, email, written opinion, notes and memoranda" related to the legal opinions provided by counsel to the county via the mayor could be exempt from public inspection and copying by both the attorney-client privilege which is found in Tenn. Sup. Ct. R. 8, RPC 1.6 and the work-product doctrine codified in Tennessee Rule of Civil Procedure 26.02(3) if the communications meet the criteria for attorney-client privileged communication and work-product as set out through the above referenced statute, rule, and case law. It is also the opinion of this Office based upon the above-cited statutory provisions that a records custodian may not assess a fee for supervision and the retrieval, review, and/or redaction of public records when the request made by the citizen is for inspection only.

Please feel free to call either myself or Ann V. Butterworth at (615) 401-7891 if you have any further questions.

Elisha D. Hodge
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