

Important Developments and Requirements in Open Government: Presentation to TMEPA

December 3, 2008 in Franklin, TN

Office of Open Records Counsel

Ann V. Butterworth, Director



Background Information

- ◆ Tennessee's commitment to transparency in government was first evidenced in the Tennessee Constitution (1796, 1870).
- ◆ Section 21 of Article II of the Constitution says, “[e]ach House [of the General Assembly] shall keep a journal of its proceedings, and publish it, except such parts as the welfare of the State may require to be kept secret. . . .”
- ◆ Section 22 of Article II says, “[t]he doors of each House and of committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret.”

Tennessee Open Government Statutes

- Tennessee Public Records Act, 1957
(T.C.A. § 10-7-501 et seq.)
- Tennessee Open Meetings Act, 1974
(T.C.A. § 8-44-101 et seq.)

Tennessee

Open Government Statutes

- Balancing need of public to know what government is doing with:
 - ◆ Need of government employees to have “intellectually safe” work environment
 - ◆ Need of members of governing bodies to be able to deliberate and reach best decision

Office of Open Records Counsel

- ◆ PC 1179, effective July 1, 2008, provides statutory authority for the Office. The Office of Open Records Counsel was created “to answer questions and provide information to public officials and the public regarding public records”.
- ◆ The Office was established originally as the Office of Open Records Ombudsman under the purview of the Comptroller of the Treasury in the fall of 2007 with funding provided in the FY2008 budget.



Office of Open Records Counsel

The functions of the Office include:

1. Working to resolve issues (mediation) between citizens who have made open records requests and the local government records custodians.
2. Issuing informal advisory opinions to local government officials, members of the public, and the media regarding the TPRA as it applies to local governments.
3. Monitoring and commenting on proposed legislation that deals with open record or open meeting laws.



Office of Open Records Counsel

4. Collecting data on inquiries and problems pertaining to the Open Meetings laws.
5. Informing Tennesseans about the TPRA through speaking engagements and educational programs.
6. Reviewing open record policies of governmental entities to verify compliance with both the TPRA and current court opinions.
7. Reporting annually to the General Assembly and the Governor.



Office of Open Records Counsel

8. Establishing a schedule of reasonable fees for copies and duplication of public records, developing a safe harbor policy for records custodians who adhere to the policies and guidelines established by the OORC, and developing a policy for responding to frequent and multiple requests for access and copies.
9. Educating citizens and public officials through establishment of educational programs and materials about Tennessee's Open Meetings laws.
10. Working with 13 member Advisory Committee on Open Government for guidance and advice.



ACOG Members

Appointed by Comptroller of the Treasury:

Dorothy Bowles (Tennessee Coalition for Open Government)

Frank Gibson (Tennessee Press Association)

Chad Jenkins (Tennessee Municipal League)

Jay West (Tennessee County Services Association or County Officials Association of TN)

Amy Martin (Tennessee School Board Association)

Dick Williams (Common Cause)

Margie Parsley/ Judy Poulson (League of Women Voters)

Joseph Dawson (Tennessee Hospital Association)

Mike Cutler (Tennessee Association of Broadcasters)

Chris Modisher (Tennessee Board of Regents or The University of Tennessee)

Ex Officio:

Janet Kleinfelter (designated by Attorney General Bob Cooper to represent his Office)

Senator Bill Ketron (Chairman of the Senate State and Local Govt. Committee)

Representative Ulysses Jones (Chairman of the House State and Local Govt. Committee)



OORC Contact Information

For question regarding local government open records issues or to set up a time for us to come and speak about the TPRA, call Ann Butterworth or Elisha Hodge at (615) 401-7891 or email us at

open.records@state.tn.us .

Our website is

<http://comptroller.state.tn.us/openrecords/> .



Office Location

Office of Open Records Counsel
Comptroller of the Treasury
State of Tennessee
Suite 1600, James K. Polk Building
505 Deaderick Street
Nashville, Tennessee 37243



Open Meetings or the Sunshine Law

- ◆ T.C.A. § 8-44-101(a): The general assembly hereby declares it to be the policy for this state that the formation of public policy and decisions is public business and shall not be conducted in secret.
 - The Act is to be construed most favorably to the public and applies to every meeting of a governing body except where statutory exclusion exists.
 - The Act does not guarantee citizens the right to participate in meeting but rather to attend and observe.

See Souder v. Health Partners, Inc., 997 S.W.2d 140 (Tenn. Ct. App. 1998)



Open Meetings or the Sunshine Law

- ◆ T.C.A. § 8-44-102(a): All **meetings** of any **governing body** are declared to be public meetings open to the public at all times, except as provided by the constitution of Tennessee.
[emphasis added]
- The Act does not apply to the General Assembly.
- Meetings may be closed in very limited situations: state-level audit committees (T.C.A. §§ 4-35-101 et seq.) and legal advice (litigation).

Open Meetings or the Sunshine Law

T.C.A. § 8-44-102 (b) :

- (1)(A) “Governing body” means: The members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration . . .
- (2) “Meeting” means 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. “Meeting” does not include any on-site inspection of any project or program.

Open Meetings or the Sunshine Law

◆ Chance meeting: T.C.A. § 8-44-102(c):

Nothing in this section shall be construed as to require a chance meeting of two (2) or more members of a public body to be considered a public meeting. No such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.

Open Meetings or the Sunshine Law

- ◆ T.C.A. § 7-52-110(c): “The board [of public utilities] shall hold public meetings at least once per month, at such regular time and place as the board may determine. Changes in such time and place of meeting shall be made known to the public as far in advance as practicable.”
- ◆ T.C.A. § 7-52-113(a): “The board shall keep a complete and accurate record of all meetings and actions taken, . . . , and shall make reports of the same to the governing body of the municipality at stated intervals, not to exceed one (1) year.”

Open Meetings or the Sunshine Law

- ◆ Adequate Public Notice: T.C.A. § 8-44-103
 - Regular meeting: previously scheduled by statute, ordinance or resolution (also by bylaws).
 - Special meeting: not pursuant to previous scheduling but adequate notice still required.
 - This section is supplemental to other provisions of law requiring notice.

Open Meetings or the Sunshine Law

- ◆ Adequate Public Notice: T.C.A. § 8-44-103:
judged on facts and circumstances, not single formula
 - Notice timing: notice is deemed sufficient if “interested citizens” are given reasonable opportunity to exercise right to be present at meeting.
 - ◆ Right is to be present, not to participate.
 - Notice content: reasonably described proposed action.

Open Meetings or the Sunshine Law

- Notice posting- “location” where interested persons can become aware of meeting
 - ◆ Publication: Newspaper vs. internet
 - ◆ Physical posting: entity office vs. general public location

- ◆ Meeting Location
 - Physical layout: Space sufficiency and acoustics for both members and interested citizens
 - Access:
 - ◆ Procedures for entry to building, signage

Open Meetings or the Sunshine Law

- ◆ ADA accommodations: large print or Braille, sign language interpreter, availability of parking near meeting location

- ◆ Meeting Notice
 - **If any accommodations are needed for individuals with disabilities who wish to be present at the meeting, please contact** (individual's name) **at** (telephone number and TTY)(by writing to X at Y). **Requests should be made as soon as possible but at least** (time frame) **prior to the scheduled meeting in order for the entity to provide such needed aid or service.**

Open Meetings or the Sunshine Law

- ◆ Minutes and records of meeting: T.C.A. § 8-44-104
 - Minutes shall be:
 - ◆ promptly and fully recorded
 - ◆ open to public inspection
 - Minutes shall include:
 - ◆ record of persons present
 - ◆ all motions, proposals, and resolutions offered and results of votes taken

Open Meetings or the Sunshine Law

- ◆ Minutes and records of meeting: T.C.A. § 8-44-104
 - Roll call votes must be recorded indicating individual votes
 - All votes must be public (whether vote or ballot) and not secret
 - ◆ Statute specifies that “public vote” means vocal expression of either aye or nay, in that order

Open Meetings or the Sunshine Law

- ◆ Establish a compliant meeting process
 - Meeting dates: review for governmental and religious holidays
 - Meeting preparation: time needed for preparation and distribution of materials for consideration at meeting
 - Agendas: clearly identify issues on which actions need to be taken
 - Record keeping: promptly prepare minutes, circulate timely for review

Open Meetings or the Sunshine Law

- ◆ Individual board member compliance
 - Review materials in advance of meeting
 - ◆ Pose questions to staff, not other members, in advance of meeting
 - Avoid discussions about board business outside of published meetings:
 - ◆ Establish “walls” for social settings
 - ◆ Avoid “respond all” e-mails even if only cc’ing other members
 - Engage in open and public discussion during meeting prior to vote

Open Meetings or the Sunshine Law

- ◆ Electronic Participation T.C.A. § 8-44-108
 - Limited to boards, agencies and commissions of state government and “municipal governing bodies organized under title 6, chapter 18, and having a city commission of three (3) members, and having a population of more than two thousand five hundred (2,500), according to the 2000 federal census or any subsequent federal census”

Open Meetings or the Sunshine Law

- ◆ **Electronic Participation T.C.A. § 8-44-108**
 - An eligible governing body may (but is not required to) permit participation in a meeting by a member by electronic or other means of communication.
 - ◆ Meeting must otherwise comply with the Act and not be used to circumvent the spirit or requirements of the Act
 - ◆ Notice of the meeting must specify that participation by electronic or other means of communication will be permitted
 - ◆ Members so participating must receive in advance copies of any documents to be discussed, substantially the same in content

Open Meetings or the Sunshine Law

◆ Electronic Participation: T.C.A. § 8-44-108

- For any meeting at which participation by a member by electronic or other means of communication is permitted:
 - ◆ Each part of the meeting must otherwise comply with the Act and not be used to circumvent the spirit or requirements of the Act
 - ◆ Notice of the meeting must specify that participation by electronic or other means of communication will be permitted
 - ◆ Members so participating must receive in advance copies of any documents to be discussed, substantially the same in content

Open Meetings or the Sunshine Law

- ◆ **Electronic Participation T.C.A. § 8-44-108**
 - For any meeting at which participation by a member by electronic or other means of communication is permitted:
 - ◆ Members so participating must be able to simultaneously hear each other and speak to each other during the meeting and must be audible to the public at the meeting location
 - ◆ Members so participating must identify all persons present with them
 - ◆ All votes must be by roll call.
 - ◆ Participation not eligible for per diem reimbursement but may receive reimbursement related to the expense of the communication

Open Meetings or the Sunshine Law

- ◆ **Electronic Participation T.C.A. § 8-44-108**
 - If a physical quorum is present at location of meeting, no finding of necessity required.
 - If a physical quorum is not present at location, then governing body must find that necessity exists.
 - Findings of necessity must be filed with Secretary of State no later than two (2) working days after the meeting. SOS is to report to General Assembly at least annually regarding the filings.

Open Meetings or the Sunshine Law

- ◆ **Electronic Participation T.C.A. § 8-44-108**
 - “Necessity” means that the matters to be considered by the governing body at that meeting require timely action by the body, that physical presence by a quorum of the members is not practical within the period of time requiring action, and that participation by a quorum of the members by electronic or other means of communication is necessary

Open Meetings or the Sunshine Law

- ◆ Remedial nature T.C.A. § 8-44-105
 - If a meeting is held in violation of act, any action taken is void and of no effect; nullification of action rather than penal.
 - Commitments affecting public debt that are otherwise legal are not nullified or voided.
 - Open Meetings Act does not make a distinction between technical and substantive violations of its provisions. *Zselvay v. Metropolitan Government of Nashville and Davidson County*, 986 S. W.2d 581 (Tenn. Ct. App. 1998).

Open Meetings or the Sunshine Law

Enforcement: T.C.A. § 8-44-106

- Circuit, chancery and other equity courts
- Court's written findings of fact and conclusions of law and final judgment are to be filed with minutes of governing body
- Court "shall permanently enjoin any person adjudged by it in violation of this part from further violation of this part. Each separate occurrence of such meetings not held in accordance with this part constitutes a separate violation
- Jurisdiction retained for one (1) year from entry of judgment; written reports due semiannually from defendants

2008 Open Meetings Legislation

- ◆ PC 917 permits public hospitals to discuss and develop marketing strategies and strategic plans in closed meetings and related records are confidential until board of hospital moves to adopt. Amends T.C.A. § 68-11-269.
- ◆ PC 1179 establishes the Office of Open Records Counsel, directs the development of OM educational programs, and requires the collection of data on OM law inquiries and problems.
- ◆ Additionally PC 923, effective July 1, 2008, allows Knox County government to utilize internet relay chat on a pilot project basis. T.C.A. § 8-44-109.

<https://knoxgov.net/commission/commissionforum/>



Stated Use and Purpose of Knox Forum:

“On May 15, 2008, the Governor signed into law an amendment to the Public Meetings Act - Tenn. Code Ann. §§ 8-44-108(b) and 109. The Amendment enables the members of the Knox County Commission to communicate by electronic means under certain conditions, including the creation of a web site through which electronic communication by commissioners is conducted and is available for viewing by the public at all times and the archiving of the electronic communications to ensure that such electronic communications are publicly available for at least one (1) year after the date of the communication.

The Knox County Commission has exercised its option to communicate electronically in accordance with the Amended Public Meetings Act. Knox County has created this on line forum to allow Knox County Commissioners an opportunity to openly and transparently communicate electronically with other Commissioners in compliance with the Act. While only Knox County Commissioners may publish on the web site, the web site is designed so that citizens may read anything posted by any Commissioner at any time.

The postings on this forum are unedited. Once published, nothing can be deleted or edited in any fashion by Administrators or Commissioners and the postings become part of a stored record that will be available, by law, for a minimum of one (1) year after the date of the communication. Again, posting to this web site is strictly limited to the membership of the Knox County Commission.”

<https://knoxgov.net/commission/commissionforum/viewforum.php?f=2>



Chat Examples

Letter to Chairman Strickland

_by **Elaine Davis** on Thu Jul 31, 2008 2:01 pm

Dear Chariman Strickland,

I am formally requesting that a special called meeting be held on Wednesday, August 6, 2008 at 9:30a.m. in the Main Assembly Room of the City-County building to discuss the mediation settlement and our contract with Natural Resources Recovery.

I believe in light of new information that has been received by commission this body needs to address the seriousness of these matters as soon as possible.

I ask that 9 other commissioners sign onto this letter thereby complying with our rules to convene a special called meeting.

Thank you.
Elaine Davis

Re: Letter to Chairman Strickland

_by **Victoria DeFreese** on Thu Jul 31, 2008 3:50 pm

[quote="Elaine Davis"]Dear Chariman Strickland,

I am formally requesting that a special called meeting be held on Wednesday, August 6, 2008 at 9:30a.m. in the Main Assembly Room of the City-County building to discuss the mediation settlement and our contract with Natural Resources Recovery.

I believe in light of new information that has been received by commission this body needs to address the seriousness of these matters as soon as possible.

I ask that 9 other commissioners sign onto this letter thereby complying with our rules to convene a special called meeting.

Thank you.
Elaine Davis[/quote]
Victoria DeFreese

Re: Letter to Chairman Strickland

_by **Thomas Strickland** on Thu Jul 31, 2008 4:10 pm

Dear Commissioner Davis,

Thank you for the formal request. There will be a letter in the Commission office for Commissioners to sign for a special call meeting for the purpose of discussion and possible action regarding the agreement between Knox County and Natural Resource Recovery of Tennessee, LLC.

After ten Commissioners have signed on, I will set a date for the meeting.

Sincerely,

Thomas (Tank) Strickland

Re: Letter to Chairman Strickland

_by **Victoria DeFreese** on Thu Jul 31, 2008 11:34 pm

Chairman Strickland,

Why would this forum not suffice for 10 signers?

Surely we could all post our names here....this is sunshined...I believe the people desire to see who will sign and who will not sign. This forum is sunshined and archived.....very important parts of accountability.

Chairman, may I ask you to reconsider using this forum to collect the 10 signatures?

Most sincerely,
Victoria DeFreese



More Chat Examples

◆ **Protest of Process of Election of Committee Chairman**

by Richard Briggs on Fri Sep 05, 2008 12:55 am
To Chairman Strickand

I wish to express my concern regarding the proceedings on August 29, 2008 after the election of the Chairman and Vice Chairman of the Knox County Commission. The Committee on Committees retired to deliberate in private on the assignment of commissioners to the various Committees of the Knox County Commission. The deliberations were not held in public as required under the Open Meetings Act and the Committee returned to the Assembly Room to announce their appointments.

The Finance and Intergovernmental Committees then "huddled" in private to select the Chairman, Vice Chairman, and Secretary of the Committees. The proceedings were not conducted in the customary open fashion for electing officers. I can speak only for the Finance Committee, but no explanation was offered to the process for the newly sworn in commissioners, no nominations solicited for the chairmanship, no discussion took place, and no vote taken by roll call.

For those of us recently elected, we ran on a platform of openness and accountability in government. I feel we have a mandate from the public to insist business is conducted in an open and fair manner and it will no longer be "business as usual." All commissioners, even the new ones, have the right to participate and understand the process. We will not tolerate the appearance or perception of impropriety. I have grave concerns that the deliberations mentioned above met neither the letter nor the spirit of the Open Meetings Act. No minutes were taken on the nominations of the officers for the committees and no record made of the vote - thus no accountability. . . .

◆ **Happy Birthday to someone**

by Mark Harmon on Sun Oct 05, 2008 1:25 pm
Recently I received a birthday card, postmarked Oct. 1st, from the Tourism and Sports Corporation. It was particularly surprising in that my birthday is May 2nd. So, happy birthday to someone (Ivan Harmon? Mike Hammond?) to whom the sentiments probably were intended. All the best, Mark Harmon



More Chat Examples

Council to represent the Commission

by Thomas Strickland on Mon Aug 11, 2008 11:10 am

To all Commissioners,

I'm believing that all Commissioners have read their letter from our Council The Bosch Law Firm on the Hospitality/Grant Audits. I would like to hear from you on your thoughts about them meeting with you individually or in "executive session" or anything on your mind about the precedings.

Sincerely,
Tank

mail from Asst. DA John Gill, RE: Telephone Conversation

by Paul Pinkston on Fri Aug 01, 2008 10:18 pm

This is the e-mail from Asst. DA John Gill regarding our telephone conversation this morning. I hope this will give some insight to what is going on in the DA's Office. I was please that John called me about this. I hope this will clear up some of the questions that are being asked. When John stated that nothing moves as fast as we would like, I am aware that I want things to move and move fast. I appreciate all the efforts of the DA's Office and the work John has obviously put into this. Thank you John for the clarification.

From:"John Gill" <john.gill@knoxcounty.org>
to:<cpink910@comcast.net>
CC:"Charles Bowers" <chuckbowers@frontiernet.net>
Subject:Limitation on ouster suits
Date:Friday, August 01, 2008 1:10:28 PM
[View Source]

Commissioner Pinkston: As one of the citizens we are assisting in your request to bring an ouster suit against the County Mayor, I wanted to be sure you understood that an ouster suit can not be brought for acts (or failure to act) that occur in previous terms of the office holder whose ouster is sought. Ouster is aimed at removal from office during the term in which the acts occur. As you know, we have been working very hard to bring

attorneys experienced in this area of the law to take over the ouster matter and any other issue that needs to be addressed relating to any improper handling of Knox County finances. I expect to be able to tell you, and the other citizens who have sought our assistance, by next week who that will be. I will be out of town several days next week in meetings to get this done. I believe we have exactly the right people coming in to handle these matters. And they hold the same view that you and the other citizens, our office and I think just about everyone else in the county, that these matters need to resolved as soon as possible for the benefit of everyone in Knox County.

Nothing ever moves as fast as we would like, but since the spring of this year we have been forwarding all the information and the audits that are available to the prosecutor in Memphis who is already working on some aspects of these matters. And for the past several weeks doing the same with the office that will take over all of the issues arising out of the audits and related allegations here. There has been substantial legal research and consultation done by the Knox County DA's office, the Memphis prosecutor and the other office that will be coming in next week. So no one has been sitting on their hands.

I will continue to keep you and the other citizens in the ouster matter advised and we always respond to any questions or concerns by you or the other County Commissioners. As in most matter, we do not talk a lot about them in the news media until after cases are concluded.

I hope this information is helpful to you.
John W. Gill Jr., Special Counsel,
Knox County District Attorney's Office



Potential Open Meetings Legislation

- ◆ Expansion of electronic participation:
 - Eligible governing bodies
 - Removing/reducing restriction of “necessity”
- ◆ Increase number of members triggering “meeting”
- ◆ Elimination of requirement of newspaper publication
- ◆ Expansion of executive or closed sessions

Tennessee Public Records Act

The Act begins with the general premise that all government records, whether state or local, are open for inspection by citizens of Tennessee.

Then, much like in the Constitutional provisions, exceptions are enumerated.



Tennessee Public Records Act

- ◆ T.C.A. § 10-7-503(a)(2)(A)
(as amended by Section 1 of PC 1179 effective July 1, 2008):

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**.

Public Record Defined

- ◆ As used in this part and Title 8, Chapter 4, Part 6, "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.

Section 1 of PC 1179 adds this definition to T.C.A. § 10-7-503(a)(1), which is the same definition found in T.C.A. § 10-7-301(6).

The Test

- Prior to PC1179, the Tennessee Supreme Court in *Griffin v. City of Knoxville* determined the test for public records is “whether it was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” *Griffin v. City of Knoxville*, 821 S.W. 2d 921, 924 (Tenn. 1991).

Tennessee Public Records Act

- ◆ Other provisions of law provide access to records
 - Open Meetings Law: T.C.A. § 8-44-104(a): “The minutes of a meeting of any such governmental body shall be promptly and fully recorded, *shall be open to public inspection, . . .*” (emphasis added)
 - T.C.A. §10-7-604: Copies of Open Appointment Annual Report “available for viewing by interested persons” and “at cost”.
- ◆ T.C.A. § 10-7-504 provides a list of records that are not open for public inspection; however this list is not exhaustive. Most of the exceptions to the Act are codified in various other parts of the Code.

Examples of Public Records

1. Work related emails, phone records, written correspondence.
2. Minutes and agendas of meetings of governing bodies.
3. Annual reports.
4. Employee files.
5. Policies and rules.
6. Customer lists.

Open or Public Records Related to Municipal Electric Plants

- ◆ T.C.A. § 7-52-110(b): The board of commissioners shall designate a secretary (or secretary-treasurer), who need not be a member of the board.
- ◆ T.C.A. § 7-52-113(a): “The board shall keep a complete and accurate record of all meetings and actions taken, and of all receipts and disbursements, and shall make reports of the same to the governing body of the municipality at stated intervals, not to exceed one (1) year.”

2008 Open Records Legislation

- ◆ PC 1179 establishes the Office of Open Records Counsel, specifies records custodian response time, fees for duplication, and makes other changes, effective July 1, 2008.
- ◆ PC 853 makes telephone and cell phone numbers and certain residential information of public employees confidential, effective on May 1, 2008.

Exceptions to the TPRA

Examples of Exceptions to the TPRA:

1. All investigative records of the TBI, Office of Inspector General, all criminal investigative files of the Department of Agriculture and the Department of Environment and Conservation, and certain files from the Department of Safety are confidential. (T.C.A. § 10-7-504(a)(2)(A)).
2. The identifying information compiled and maintained by any governmental entity concerning a person who has obtained a valid order of protection document **may** be confidential if certain steps are followed. (T.C.A. § 10-7-504(a)(16)(B)).

Exceptions to the TPRA

3. The identifying information compiled and maintained by utility service provider concerning a person who has obtained a valid order of protection document **shall** be treated as confidential and not open to the public if certain steps are followed. (T.C.A. § 10-7-504(a)(15)(B)).
 - “Identifying information”: home and work addresses and telephone numbers, social security number and other information that could reasonably be used to determine physical location.
 - “Utility Service Provider”: “any entity, whether public or private, that provides electricity, natural gas, water, or telephone service to customers on a subscription basis, whether or not regulated by the Tennessee regulatory authority.”

Exceptions to the TPRA

4. The telephone number, address and any other information which could be used to locate the whereabouts of a domestic violence shelter or rape crisis center *may* be treated as confidential by a governmental entity, and *shall* be treated as confidential by a utility service provider as defined in subdivision (a)(15) upon the director of the shelter or crisis center giving written notice to the records custodian of the appropriate entity or utility that such shelter or crisis center desires that such identifying information be maintained as confidential. (T.C.A. §10-7-504(a)(17)).

Exceptions to the TPRA

5. The credit card number of persons doing business with the state or political subdivision thereof and any related personal information identification numbers (PIN) or authorization codes. (T.C.A. § 10-7-504(a)(19); and “private records” or credit card numbers, social security numbers, tax identification numbers, bank account numbers, security codes, access codes, and burglar alarm codes associated with customers and customer accounts that are in possession of a public utility shall be treated as confidential (T.C.A. § 10-7-504(a)(20).
- Customer can authorize release of information (T.C.A. § 10-7-504(a)(20)(E).
 - Not limitation on access to information by law enforcement, courts, or other governmental agencies performing official functions (T.C.A. § 10-7-504(a)(20)(D).

Exceptions to the TPRA

6. Records allowing identification of areas of structural/operational vulnerability or permit unlawful disruption/interference with services by utility services provider and contingency plans of a governmental entity prepared to respond to or prevent any violent incident, bomb threat, ongoing act of violence at business, or terrorist incident. (T.C.A. § 10-7-504(a)(21)(A)).
 - Documents related to costs and vendors related to above not confidential, but confidential information to be redacted or deleted. (T.C.A. § 10-7-504(a)(21)(B)).
 - Utility Services Provider- (whether or not regulated by TRA) provides gas, water, sewer, or telephone services to Tennessee citizens. T.C.A. § 10-7-504(a)(21)(C)).

Exceptions to the TPRA

7. Records of any employee's identity, diagnosis, treatment, or referral for treatment that are maintained by any state or local government employee assistance program.
(T.C.A. § 10-7-504(d)).

8. Information that would allow a person to obtain unauthorized access to confidential information or to government property shall be maintained as confidential. For the purpose of this section, government property includes electronic information processing systems, telecommunication systems, or other communications systems of a governmental entity subject to this chapter.
(T.C.A. § 10-7-504(i)).

Exceptions to the TPRA

9. The following records or information of any state, county, municipal or other public employee, or of any records of any governmental employee that are in the possession of a governmental entity or any person in its capacity as an employer that contain *home and cell phone numbers; residential information (including street address, city, state and zip code) for state employees and residential street address for county, municipal and other employees**; bank account information; social security number; driver license information except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job; and the same information of immediate family members or household members.

(T.C.A. § 10-7- 504(f)(1)). *PC853, effective May 1, 2008



Exceptions to the TPRA

10. Information and documents regarding any mental health service applied for or received by any person currently or in the past and any information directly or indirectly identifying the person receiving the service. (T.C.A. § 33-3-103).
11. Expunged records (T.C.A. § 40-32-101).
12. Information communicated to or obtained by an accountant as a result of the confidential nature of employment and/or information derived from professional employment is confidential. (T.C.A. § 62-1-116).

Exceptions to the TPRA

13. Taxpayer information submitted to the commissioner of the Department of Revenue (T.C.A. § 67-1-110).
14. All Department of Revenue statements, reports, returns, and audits of any person paying business tax are confidential, with limited exceptions. (T.C.A. § 67-4-722(c)(1)).
15. A part from a taxpayer's annual reporting schedule filed with the assessor, information required to be filed or submitted by a taxpayer with regard to an assessment of tangible personal property, or provided by a taxpayer in response to an audit or information request by assessing officials or their agents with regard to an assessment of tangible personal property, shall be confidential and shall not be disclosed by state or local officials, agents or employees. (T.C.A. § 67-5-402(a)).

Exceptions to the TPRA

16. Social Security Numbers may not be disclosed by state entities, unless disclosure falls within enumerated exception (T.C.A. § 4-4-125)
17. Tenn. R. Crim. P. 16(a)(2) provides for the confidentiality of investigative files pertaining to pending or contemplated criminal action.
18. Health Insurance Portability and Accountability Act of 1996 (HIPAA)
19. Tenn. Sup. Ct. R. 8, RPC 1.6-Attorney-Client Privilege



Record Custodian's Response to an Open Records Request

- ◆ July 1, 2008 and forward:
 - Grant access to citizens of Tennessee.
 - Impose no charge for inspecting or reviewing an open record at office.
 - May charge and receive upfront payment for copies (and for delivery charges, if any).
 - Promptly make available for inspection

Response to an Open Records Request (cont.)

- When not practicable to promptly make available, may take up to 7 business days to:
 - ◆ Provide access to record;
 - ◆ Deny in writing (or on OORC form) access to record with explanation of basis for denial; or
 - ◆ Indicate additional time necessary to produce the record (OORC form mandatory).

Response to an Open Records Request (cont.)

- May require requestor to produce government issued photo id with address in order to inspect or to receive copies.
- May require request for copies to be in writing.
- May require request to “be sufficiently detailed to enable the custodian to identify the specific records”.
- Shall provide an estimate of reasonable costs to provide copies.

Record Request Forms

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

- ◆ Inspection/Duplication Of Records Request
- ◆ Records Request Denial Letter
- ◆ Records Production Letter

INSPECTION/DUPLICATION OF RECORDS REQUEST

Requestor Instructions: To make a request for copies of public records fill in sections 1-4. Do not sign and date the signature line until the records are received.

Custodian Instructions: For requests to inspect, the **records custodian** is to fill in sections 1-5 and 8. For requests for copies, the records custodian is to fill in sections 5-8. Do not sign and date the signature line until the records are delivered to the requestor.

Note: Section 1 of Public Chapter 1179, Acts of 2008, amends Tenn. Code Ann. § 10-7-503(a) adding (7)(A) to provide that unless the law specifically requires such, a request to inspect is not required to be writing nor can a fee be assessed for inspection of records.

(FRONT)

1. Name of requestor: _____

(Print or Type; Initials required for copy requests)

2. Form of identification provided:

Photo ID issued by governmental entity including requestor's address

Other: _____

3. Requestor's address and contact information: _____

4. Record(s) requested to be inspected/copied:

a. Previously inspected on _____ (date); Inspection waived

b. Type of record: Minutes Annual Report Annual Financial Statements
Budget Employee file Other

c. Detailed Description of the record(s) including relevant date(s) and subject matter:

5. Request submitted to: _____

(Name of Governmental Entity, Office or Agency)

a. Employee receiving request: _____

(Print or Type and Initial)

b. Date and time request received: _____

c. Response: Same day Other _____

6. Costs

a. Number of pages to be copied: _____ Estimated

b. Cost per page: _____

c. Estimate of labor costs to produce the copy (for time exceeding 5 hours):

_____ Labor at \$ _____ /hour for _____ hour(s).

Labor at \$ _____ /hour for _____ hour(s).

Labor at \$ _____ /hour for _____ hour(s).

d. Programming cost to extract information requested: _____

e. Method of delivery and cost: _____ Estimated

On-site pick-up U.S. Postal Service Other: _____

f. Estimate of total cost to produce request: _____

g. Estimate of total cost provided to requestor: in person by U.S.P.S.

by phone Other: _____

(BACK)

7. Form, Amount, Date of Payment:

a. Form of payment: Cash Check Other _____

b. Amount of payment: _____

c. Date of payment: _____

8. Date of Delivery: _____

Signature of Records Custodian Date

Signature of Requestor Date

Inspection/Duplication of Records Request Form Tenn. Code Ann. § 10-7-503(a)(7)(A) as amended by
Section 1 of Public Chapter 1179, Acts of 2008

RECORDS REQUEST DENIAL LETTER

(Insert Agency Name and Address)

(Insert Date)

Dear Sir or Madam:

On (insert date) this Office received your open records request to inspect/receive copies of (insert type of records). After reviewing the request, this Office is unable to provide you with either all or part of the requested record(s). The basis for this denial is:

No such record(s) exists.

This office is not the records custodian for the requested record(s).

Additional information is needed to identify the requested record(s): _____

The following law (citation and brief description why access denied):

Tenn. Code Ann. Section: _____

Court Rule: _____

Common Law Provision: _____

Federal Law (HIPAA, FERPA, etc.): _____

If you have any additional questions please contact (insert contact person and phone number).

Sincerely,

(Record Custodian's signature and title with contact information)

RECORDS PRODUCTION LETTER

(Insert Agency Name and Address)

(Insert Date)

Dear Sir or Madam:

On (insert date) this Office received your open records request to inspect/receive copies of (insert type of records). Section 1 of Public Chapter 1179, Acts of 2008 amends Tennessee Code Annotated § 10-7-503(a) and provides the following:

(2)(B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall within seven (7) business days:

- (i) Make such information available to the requestor;
- (ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or
- (iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce such record or information. [emphasis added]**

This Office is currently in the process of retrieving, reviewing, and/or redacting the requested records. In accordance with the above-cited law, this letter is being sent to inform you that either the records you have requested to inspect/receive copies of will be available or a determination will be made regarding the accessibility of the requested records by (insert reasonably necessary time to produce the records). Additional time is necessary as it is a record custodian's responsibility under state law to ensure that any confidential information contained within the requested records has been removed prior to providing access to the records.

If you have any additional questions please contact (insert contact person and phone number).

Sincerely,

(Record Custodian's signature and title with contact information)

Records Production Letter Tenn. Code Ann. § 10-7-503(a)(2)(B)(iii) as amended by Section 1 of Public Chapter 1179, Acts of 2008

Opinions of Office of Open Records Counsel (as of 11/24/08)

◆ <http://comptroller.state.tn.us/openrecords/opinion.htm>

- 08-01: Fee components and duplication
- 08-02: Interplay of litigation with TPRA
- 08-03: Audio recordings of commission meetings
- 08-04: Juvenile traffic offense
- 08-05: Cell phone records
- 08-06: On-site computer access
- 08-07: Format of public record requested

Opinions of OORC (cont.)

- 08-08: Effective date of Public Chapter 853
- 08-09: Public records request for emails
- 08-10: Access to public records and review of copying policy
- 08-11: Access to constituent communications by local government official
- 08-12: Specificity and computer access
- 08-13: FACTA and the TPRA
- 08-14: Access to attorney-client communications and charges for labor related to inspection

FACTA: Federal Fair and Accurate Credit Transactions Act of 2003

- ◆ FACTA required several agencies to jointly promulgate rules, referred to as “Identity Theft Red Flag Rules”
 - Issued on January 1, 2008
 - Compliance Deadline November 1, 2008 (extended to May 1, 2009)

FACTA: Federal Fair and Accurate Credit Transactions Act of 2003 (cont.)

- Requires “creditors” who maintain “covered accounts” to “customers” must establish and implement a written Identity Theft Prevention Policy.
- Does not cover release of information (disclosure).
- Does cover ensuring customer information received is authentic, and not gained through identity theft.

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 without having 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.

Schedule of Reasonable Charges Overview (cont.)

- ◆ The schedule does not make a distinction regarding the purpose for which the records or information was requested, because the TPRA does not make those distinctions, except in very limited circumstances and when those types of records are requested the charges for reproduction of the records or duplication should be based upon a specific statutory provision.

T.C.A. Section 7-52-135

(Municipal Electric Plant Law)

- ◆ **(a)** If a request is made for a copy of a public record that has commercial value, and such request requires the reproduction of all or a portion of a computer generated map that was developed by an electric system, the board of directors of any such system may establish and impose reasonable fees for the reproduction of such map, in addition to any fees or charges that may lawfully be imposed pursuant to § 10-7-506. The additional fees authorized by this subsection (a) may not be assessed against individuals who request copies of such maps for themselves or when the map requested does not have commercial value.
- ◆ **(b)** The additional fees authorized by subsection (a) shall relate to the actual development costs of such maps and may include: **(1)** Labor costs; **(2)** Costs incurred in design, development, testing, implementation and training; and **(3)** Costs necessary to ensure that the map is accurate, complete and current, including the cost of adding to, updating, modifying and deleting information.

T.C.A. Section 7-52-135 (cont.)

- ◆ **(c)** The total collections for the additional fees authorized by subsection (a) shall not exceed the total development costs of the system producing the maps. Once such additional fees have paid the total development costs of the system, such fees shall be adjusted to generate only the amount necessary to maintain the data and ensure that it is accurate, complete and current for the life of the particular system.
- ◆ **(d)** As used in subsection (a), “commercial value” means a record that may be used for commercial real estate development or related activities and for which a monetary profit may be realized.

Schedule of Reasonable Charges Overview (cont.)

- ◆ The schedule does not provide a flat fee for records produced on a medium other than 8 ½ x11 or 8 ½ x14 paper. If a record or duplication is produced on medium such as a DVD, CD, or audio tape, the records custodian is permitted to charge the requestor the actual cost of the medium.
- ◆ Throughout the schedule emphasis is placed on the fact that records custodians are to use the most cost efficient method of producing the requested records and/or information.

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.

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).

Court and AG Opinions (cont.)

- ◆ 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).
- ◆ 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).

Court and AG Opinions (cont.)

- ◆ 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).
- ◆ Copying fees are permissible so long as there are reasonable rules in place governing the making of such copies or extracts (T.C.A. § 10-7-506). Op. Tenn. Att'y Gen. 01-021 (February 8, 2001)

Court and AG Opinions (cont.)

- ◆ The Tennessee Attorney General has opined that “a local government may generally not charge more than its actual cost to copy public records.” The opinion also indicates that charging for researching, locating or retrieving public records is not proper “per se.” Op. Tenn. Att’y. Gen. 01-021 (February 8, 2001).
- ◆ It is expressly permissible to charge for actual copying costs and the cost of delivery when the requestor is unable to appear before the custodian to retrieve the copies in person. *Waller v. Bryan*, 16 S.W. 3d 770 (Tenn. Ct. of App., 1999).

Court and AG Opinions (cont.)

- ◆ The Tennessee Attorney General has opined that when requested public records are in the custody or control of a records custodian, those records must be made available for inspection during normal business hours and the custodian “cannot avoid its obligations by directing a citizen to another governmental agency that may also have copies of the requested records.” Op. Tenn. Att’y. Gen. 08-064 (March 24, 2008).