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Navigating Your Way through Tennessee's Public Record and Record Retention Requirements

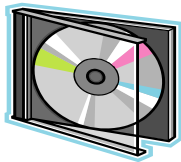
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Do You Ever Feel Like This?



Tennessee Open Records Act

- ◆ Tennessee Public Records Act, 1957
(T.C.A. § 10-7-501 et seq.)



What is a Public Record? The Test

- According to the Tennessee Supreme Court in *Griffin v. City of Knoxville*, the TRPA is an “all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity.”
- The court went on to say that the test for determining whether a record is public 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).

Public Record Defined in the TPRA

- “‘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.”
- “Public record or records” or “state record or records” does not include the device or equipment, including, but not limited to, a cell phone, computer or other electronic or mechanical device or equipment, that may have been used to create or store a public record or state record.

T.C.A. § 10-7-503(a)(1)(A)(i) and (ii).

Tennessee Public Records Act (TPRA)

T.C.A. § 10-7-503(a)(2)(A):

- **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**.
- In T.C.A. § 10-7-505(d), the General Assembly directs the courts to interpret the provisions of the TPRA “broadly...so as to give the fullest possible public access to public records.”
- Tennessee courts have found that even in the face of serious countervailing considerations, unless there is an express exemption within the law, a record and/or information must be released.

What Records are Accessible under the TPRA?

1. Personnel records/applications, disciplinary reports, and references
2. Contracts*
3. Emails, text messages, and voicemails
4. Financial or performance audits
5. Meeting agendas and minutes (and notes)*
6. Travel and leave information in Edison
7. Fiscal note support forms and related documentation
8. Records related to RFP/RFQs and other bids
9. Constituent communications*
10. Budgets*

* These records are public whether in a draft form or a finalized version.

“Unless otherwise provided by state law”

T.C.A. § 10-7-504 provides a list of records and/or information that are not open for public inspection; however this list is not exhaustive.

App. 350 exceptions to the TPRA are found in the following:

- Tennessee Code Annotated (Statute)
- Tennessee Rules of Civil and Criminal Procedure
- Administrative Law Rules
- Supreme Court Rules
- Common Law
- Federal Law

Public Records and Redaction

- The fact that a public record contains confidential information does not mean that the entire record is confidential. The courts have found that in situations where confidential information is contained within a record that is otherwise public, the record custodian is responsible for redacting that information which is confidential. See *Eldridge v. Putman County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001).
- Redaction is usually carried out by making a photocopy of the original requested document, striking through any information on the record that is confidential according to state law with a black marker, and then making another photocopy of the redacted version for the requestor to inspect. At no point would a records custodian ever redact an original document.

Attorney-Client Privilege

- Rooted in common law.
- T.C.A. § 23-3-105 is the codification of the common law privilege.
- Tenn. Sup. Ct. R. 8, RPC 1.6 states that a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation or when such disclosures are impliedly authorized in order for the lawyer to carry out the representation.
- Important to remember that not all attorney-client communications are confidential. The communication has to (1) involve the subject matter of the representation and (2) be made with the intent that the communication be kept confidential.

* See Rule 1.6 as there are a number of situations where an attorney **may** disclose client confidences, as well as a number of situations where disclosure **is required**.

Public Employee and Law Enforcement Personnel Records

- T.C.A. § 10-7-504(f) requires that any of the following information regarding a public employee or law enforcement officer in possession of a governmental entity or any other person in their capacity as an employer be maintained as confidential:
 - home and cellular telephone numbers;
 - personal email address;
 - 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, health savings account, retirement account, and pension account information;
 - social security number;
 - driver license information except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job;
 - the same information of immediate family members or household members; and
 - emergency contact information.

Public Employee and Law Enforcement Personnel Records (cont.)

- T.C.A. § 10-7-504(g) provides that when a request for the personal information of a law enforcement officer is made, the chief law enforcement officer shall release all personal information that is not otherwise confidential when the request is for an official, business, or professional purpose, unless there is a reason not to disclose.
- Personal information includes the officer's residential address, home and cellular phone number, place of employment, name, work address and telephone numbers of the officer's immediate family; name, location, and telephone numbers of any educational institution or daycare provider where the officer's spouse or child is enrolled.
- If the request is made for any other purpose, then the officer must be notified of the request and be given an opportunity to oppose the release of the information.
- Information that could be used to identify or locate an undercover officer is not required to be released.
- If requested information is withheld, the requestor should be notified within two (2) business days that certain information is being withheld and thereafter the remainder of the file is to be released.

Public Employee and Law Enforcement Personnel Records (cont.)

- Tenn. Code Ann. Section 10-7-503(c) requires that within three (3) days of the date of inspection of an officer's personnel file, notification is to be given to the law enforcement officer. The notification shall include:
 - The fact that inspection has occurred;
 - The name, address, and telephone number of the person inspecting;
 - For whom the inspection was made; and
 - The date of the inspection.
- Additionally, any person making inspection of the officer's personnel records shall provide his/her name, address, business telephone number, home telephone number, driver's license number or other appropriate i.d. prior to inspection.

Who Can Access Government Records under the TPRA?

- T.C.A. § 10-7-503(a)(2)(A) grants access to public records to “any citizen of Tennessee.”
- The Tennessee Attorney General has opined that this provision is constitutional, despite the fact that at least one other state with a similar statutory provision has found the provision to be unconstitutional. See Att’y Gen. Ops. 99-067 (March 18, 1999) and 01-132 (August 22, 2001) *but see Lee v. Miner*, 458 F. 3d 194 (Del. 2006). Also see *Jones v. City of Memphis*, 2012 WL 1228181 (W.D. Tenn. April 11, 2012) and *McBurney v. Young*, 133 S.Ct. 1709 (U.S. Apr. 29, 2013).
- A records custodian has the right to deny a request to inspect and/or copy public records from a non-citizen. The denial is not required, it is discretionary.
- In Tennessee, “citizen” does include a convicted felon. *Cole v. Campbell*, 968 S.W. 2d 274 (Tenn. 1998).

When and Where can Public Records be Accessed?

- A citizen has the right to request both inspection and copies of public records during normal business hours.
- T.C.A. § 10-7-503(a)(6) prohibits a governmental entity from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.
 - If the requestor desires to inspect public records, the inspection should take place in the office of the custodian, unless there is a legitimate reason as to why inspection cannot take place in the custodian’s office.
 - The requestor should also be able to retrieve the requested records from the record custodian’s office. However, the requestor is not required to retrieve the records from the custodian’s office. The requestor has the ability to request that the records be mailed and upon payment for postage, the custodian is required to mail the records to the requestor.

Are Public Records Accessible during Litigation?

- While a party to a lawsuit is clearly not entitled to access the records of an opposing private litigant during the course of litigation outside of the discovery process, the same is not true for an opposing litigant who is a governmental entity.
- In *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 249 S.W. 3d 346, 360-361 (Tenn., 2008), the Supreme Court said the following:

It may very well be that the General Assembly neither intended nor anticipated that the public records statutes they enacted would be used by persons litigating with government entities to obtain records that might not be as readily available through the rules of discovery. However, at present, neither the discovery rules nor the public records statutes expressly limit or prevent persons who are in litigation with a government entity or who are considering litigation with a government entity from filing petitions under T.C.A. § 10-7-505(a) seeking access to public records relevant to the litigation.

Response to a Public Records Request

- T.C.A. § 10-7-503(a)(2)(B) requires a records custodian or the custodian's designee to *promptly* make requested records available for inspection. If the records cannot be made promptly available, within seven (7) business days, the custodian must do one or more of the following:
 - Provide access to the record;
 - Deny in writing access to the record with legal basis for denial; or
 - Indicate in writing additional time necessary to produce the record.
- A custodian's failure to respond to a request in one of the above-mentioned ways within seven (7) business days, constitutes a denial and is actionable under T.C.A. § 10-7-505.

Response to a Public Records Request (cont.)

- A custodian may not require a written request to view a public record, but can require a request for copies to be in writing.
- A records custodian may not assess a charge to view a public record.
- A custodian may require a requestor to produce photo identification with an address in order to inspect or receive copies of records.
- A request for copies “shall be sufficiently detailed to enable the custodian to identify the specific records” requested.
- The custodian shall provide the requestor an estimate of the reasonable cost for producing the requested records.

Response to a Public Records Request (cont.)

- A records custodian is not required to create a document that does not already exist in order to fulfill a public records request.
- A records custodian is not required to compile information or conduct searches for documents.
- A records custodian may require an appointment to view a public record when there is a reasonable basis for requiring the appointment. Absent a reasonable basis, a court would likely view requiring an appointment to be tantamount to a denial or delay in access.

The Format Issue

- In *Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 304 (Tenn. 1998), the editor of *The Tennessean* requested from NES the names, addresses, and phone numbers of all NES customers. Because NES did not maintain such a compilation of information, the request was denied. A petition for access was filed and ultimately the case was appealed to the Tennessee Supreme Court. The Court said the following with regard to the information sought:

Once information is entered into a computer, a distinction between information and record becomes to a large degree impractical. In our view, it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record.

The Format Issue (cont.)

- In *Wells v. Wharton*, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2005), the requestor had developed a computer program that downloaded public records in bulk from the Shelby County Portal website. Eventually, Shelby County shut down the portal because it was overloaded. After several weeks, the website reopened but with restrictions on the amount of information that could be downloaded. The requestor then went into the various offices where the records were kept, in order to download the information in bulk but was unable to do so because either the office computers were unable to handle such requests or the offices did not have public access computers. The requestor then filed a petition for access and the court held:

[i]n Tennessee, the purpose of the Public Records is to allow maximum access to the information contained within public records [and] in light of the purpose of the Tennessee Public Records Act, we conclude that the Tennessee Public Records Act does not require a custodian of records to provide public records in the manner a citizen requests. *Id.* at *9.

According to the court, "allowing a custodian of records to choose the manner in which he or she presents public records to citizens is not unreasonable so long as that manner does not distort the record or inhibit access to that record." *Id.*

The Format Issue (cont.)

- However, in *Lance v. York*, 359 S.W. 3d 197 (Tenn. Ct. App. 2011), the Tennessee Court of Appeals held that when records are maintained in electronic format and they are requested in that format, the records should be provided electronically.

**It does not appear that the case would require a records custodian to print copies of records, redact them, and then scan them into electronic format because they originally existed in electronic format.

Forms Developed by the OORC

- <http://www.comptroller.tn.gov/openrecords/forms.asp>

Inspection/Duplication Of Records Request

Records Request Denial Letter

Records Production Letter

Notice of Aggregation Form

Schedule, Policies, and Guidelines Developed by the OORC

- <http://www.comptroller.tn.gov/openrecords/forms.asp>

Schedule of Reasonable Charges

Policy for Frequent and Multiple Requests for Copies of
Public Records

Safe Harbor Policy

Best Practice Guidelines

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, the charge should be based upon the hourly rate of the employees that are reasonably 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 is to be subtracted from the total number of hours the highest paid employee spends on the request.

Safe Harbor Policy

Any fee related to the production of a copy or duplication that is charged by an entity required to provide access to public records pursuant to the Tennessee Public Records Act is presumed to be reasonable if the entity adopts and implements either the Schedule of Reasonable Charges or a separate schedule developed in accordance with the provisions of the Schedule of Reasonable Charges. Likewise, the aggregation of frequent and multiple requests for copies of public records and the labor fees charged as the result of that aggregation are presumed to be reasonable if the entity adopts and implements the Frequent and Multiple Request Policy or a separate policy developed in accordance with the provisions of the Frequent and Multiple Request Policy.

Best Practice Guidelines (Overview)

The Best Practice Guidelines embody what the OORC believes to be a very good road map for records custodians.

The Guidelines provide instruction and guidance relative to questions that are frequently asked by records custodians, as well as guidance on ways to better comply with the TPRA. While the Office understands that no two agencies operate alike, the Guidelines create a starting point for discussion within an agency as to the types of considerations that need to be made in order to determine how the agency will deal with public records requests.

Petitioning for Access to Public Records

- T.C.A. § 10-7-505 addresses the ability of a citizen to petition the court once a request has been denied. The petition is to be filed in either chancery court, circuit court, or any other court in the county having equity jurisdiction.
 - For state level records, the petition is to be filed in either chancery or circuit court of Davidson County.
 - For local government records, the petition is to be filed in either chancery or circuit court in the county where the records are located.
- If a request is denied and a petition is filed, the records custodian must prove by a preponderance of the evidence that there is a provision within state law that authorizes the nondisclosure of the requested record(s).
- Upon ruling on the petition, the court must issue findings of fact and conclusions of law and have the power to exercise full injunctive remedies and relief so as to carry out the purpose and intent of the TRPA.

Petitioning for Access to Public Records (cont.)

- If the court finds in favor of the requestor, the records are to be made available to the requestor unless a notice of appeal is filed or the court finds that there is a substantial legal issue that exists that should be decided by an appellate court.
- If the court finds that the governmental entity willfully* refused to provide the records, then the court has the discretion to assess the entity the requestor's attorney's fees as well as all reasonable fees related to the production of the records.
- In determining whether the entity's action in denying the records was willful, the court will look at any guidance given to the entity by the Office of Open Records Counsel (OORC).

* Willful is not the equivalent of negligence or bad judgment, but rather bad faith.

Recent Legislation

- Public Chapter 722, Acts of 2016
- Section 1
 - Definition of “public records request coordinator” in subsection (B).
 - Definition of “records custodian” in subsection (C).

Recent Legislation (cont.)

- Section 2
 - Combines a number of provisions that already existed. No new substantive language added.
- Section 3
 - Deletes language that is included in Section 2.

Recent Legislation (cont.)

- Section 4
 - Requires every entity subject to the TPRA to have a public records policy in place by July 1, 2017. It also requires the policy to be adopted by the appropriate governing authority.
 - Specifies that the policy cannot contain requirements more burdensome than state law.

Recent Legislation (cont.)

Requires the policy to include:

1. The process for making requests to inspect public records or receive copies of public records and a copy of any required request form;
2. The process for responding to requests, including redaction practices;
3. A statement of any fees charged for copies of public records and the procedures for billing and payment; and
4. The name or title and the contact information of the individual or individuals within such governmental entity designated as the public records request coordinator.

Recent Legislation (cont.)

- Section 5
 - Amends Tenn. Code Ann. Section 10-7-504(a) by adding subdivision (28) which prohibits a governmental entity from publically disclosing personally identifying information about any citizen of Tennessee, except in very limited circumstances.

Recent Legislation (cont.)

Personally identifying information includes:

1. Social security numbers;
2. Official state or government issued driver licenses or identification numbers;
3. Alien registration numbers or passport numbers;
4. Employer or taxpayer identification numbers;
5. Unique biometric data, such as fingerprints, voice prints, retina or iris images, or other unique physical representations; or
6. Unique electronic identification numbers, addresses, routing codes or other personal identifying data which enables an individual to obtain merchandise or service or to otherwise financially encumber the legitimate possessor of the identifying data.

Recent Legislation (cont.)

- Authorizes the use of personally identifying information by a governmental entity for official purposes.
- Authorizes the disclosure of personally identifying information to other governmental entities, federal agencies and private individuals authorized to perform certain duties as contractors for governmental entities.
- Confidentiality provisions still apply.

Recent Legislation (cont.)

- Sections 6, 7, and 8
 - Section 6 deletes the language in Tenn. Code Ann. Section 4-4-125. Folds the language into Section 5.
 - Section 7 adds language to Tenn. Code Ann. Section 8-4-604(a) by requiring the OORC to develop a model public records policy.
 - Section 8 requires the draft policy to be provided to the Advisory Committee on Open Government for comment before the final policy is established.

Recent Legislation (cont.)

- Public Chapter 686, Acts of 2016 makes local government RFP and RFQ records confidential until the intent to award is announced.
- Public Chapter 974, Acts of 2016 makes the specific amount of money spent in a given market on digital and traditional media or specifics about targeted audiences identified for marketing purposes confidential in municipalities whose primary industry is tourism. Aggregate amounts spent remain public information.

Recent Legislation (cont.)

- Public Chapter 1009, Acts of 2016 makes the identity of the vendor used to protect government property, government employee information and citizen information confidential at the state level; however the information will only be confidential at the local level if the local government votes in the affirmative to make the information confidential. The amount paid to the vendor remains public record.
- **Public Chapter 796, Acts of 2016**

Recent and Emerging Issues

- <http://knoxblogs.com/humphreyhill/2016/09/02/lawsuit-public-records-via-email/>
- <http://tcog.info/davidson-county-must-pay-nearly-57k-attorneys-fees-public-records-case/>
- <http://nooga.com/174142/whatsapp-with-the-citys-lack-of-transparency/>
- <http://wate.com/2016/09/19/knoxville-officials-smokies-relocation-emails-reveal-desire-for-secrecy/>
- <http://www.timesfreepress.com/news/local/story/2016/sep/27/chattanooga-open-data-portal-usage-increases/388777/>

Records Retention and Disposition

- T.C.A. § 10-7-702 requires Municipal Technical Advisory Service to compile and print a records retention manual for municipalities.
 - <https://mtasresource.mtas.tennessee.edu/reference/retention-schedules> (link to entire retention schedule)
- T.C.A. § 10-7-404 requires County Technical Assistance Service to compile and print a records retention manual for counties.
 - <http://ctas-eli.ctas.tennessee.edu/printpdf/book/export/html/2068> (link to entire retention schedule)

Computer Storage of Records

- Tenn. Code Ann. Section 10-7-121

(a)(1) Notwithstanding any other law to the contrary, any information required to be kept as a record by any government official may be maintained on a computer or removable computer storage media, including in any appropriate electronic medium, instead of bound books or paper records if the following standards are met:

(A) Such information is available for public inspection, unless it is a confidential record according to law;

(B) Due care is taken to maintain any information that is a public record during the time required by law for retention;

(C) All daily data generated and stored within the computer system shall be copied to computer storage media daily, and the newly created computer storage media more than one (1) week old shall be stored at a location other than at the building where the original is maintained; and

(D) The official can provide a paper copy of the information when needed or when requested by a member of the public.

Intentional and Unlawful Destruction of Government Records

- Tenn. Code Ann. Section 39-16-504

(a) It is unlawful for any person to . . .

(3) Intentionally and unlawfully destroy, conceal, remove or otherwise impair the verity, legibility or availability of a governmental record.

(b) A violation of this section is a Class A misdemeanor.

(c)(1) Upon notification from any public official having custody of government records, including those created by municipal, county or state government agencies, that records have been unlawfully removed from a government records office, appropriate legal action may be taken by the city attorney, county attorney or attorney general, as the case may be, to obtain a warrant for possession of any public records which have been unlawfully transferred or removed in violation of this section. . .

Grant Assistance Available

<http://sos.tn.gov/products/tsla/grants-local-archives>

Resources

- If you have questions regarding the Tennessee Public Records or Open Meetings Acts, call **Ann Butterworth in the Office of Open Records Counsel** at (615) 401-7891 or email your question to <https://www.comptroller.tn.gov/openrecordsinquiry/>.
- I can be reached by phone at 615-532-4963 or you can email me at Elisha.Hodge@tennessee.edu. You access the MTAS website at <http://www.mtas.tennessee.edu/web2012.nsf/Web/Home>.