

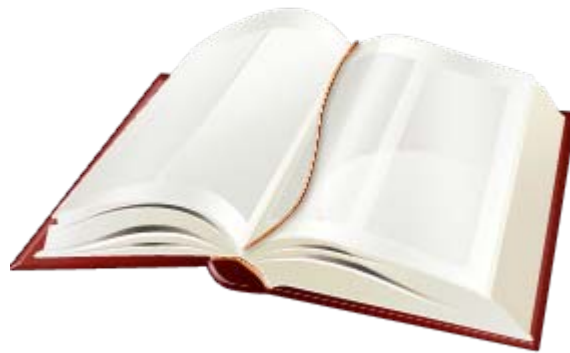
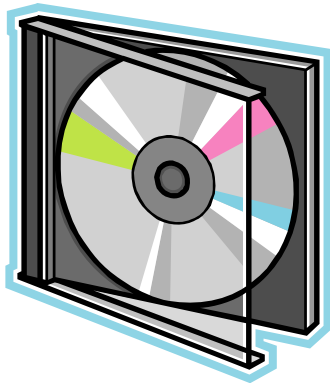
Tennessee Public Records Act: A Presentations to Bradley County and Cleveland Records Custodians

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Tennessee Open Records Act

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



The Purpose of Tennessee Public Records Act

- The TPRA attempts to balance the governmental entity's need to carry out the purpose for which it was established with the need of the public to know what government is doing.



Government Accountability

- ◆ According to the United States Supreme Court in *National Archives and Records Administration v. Favish*, 541 U.S. 157, 171-72 (2004), “providing access to public records promotes governmental accountability by enabling citizens to keep track of what the government is up to.”
- ◆ Additionally, President Obama has said the following with regard to public access to government records, “For a long time now, there's been too much secrecy in this city. This administration stands on the side not of those who seek to withhold information but with those who seek it to be known.” The mere fact that you have the legal power to keep something secret does not mean you should always use it. Transparency and the rule of law will be the touchstones of this presidency.”

Tennessee Public Records Act (TPRA)

- ◆ T.C.A. § 10-7-503(a)(2)(A) (*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**.
- ◆ In Tenn. Code Ann. Section 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 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 TPR

- ◆ “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.”

T.C.A. § 10-7-503(a)(1)

Whose Records are Accessible under the TPRA?

- ◆ According to Tenn. Code Ann. § 10-7-503 (a)(1) the records of any government agency, whether at the state, county or municipal level, that were “made or received pursuant to law or ordinance or in connection with the transaction of business” are open for public inspection.
- ◆ “Government agency” is defined as any department, division, board, bureau, commission, or other separate unit of government created by law or pursuant to law.

Whose Records are Accessible under the TPRA? (cont.)

- ◆ Additionally, Tennessee courts have recognized that there are some private entities whose records should also be accessible under the TPRA because the private entity is operating as the “functional equivalent” of a governmental agency. *See Memphis Publishing Company v. Cherokee Children and Family Services, Inc.*, 87 S.W. 3d. 67 (Tenn. 2002).

- ◆ The factors that the Court set out in determining whether a private entity is the “functional equivalent” of a governmental agency are as follows:
 1. whether and to what extent the entity performs a governmental or public function;
 2. the level of government funding of the entity;
 3. the extent of government involvement with, regulation of, or control over the entity; and
 4. whether the entity was created by an act of the legislature or previously determined by law to be open to public access.

What Records are Accessible under the TPRA?

1. employee personnel records
2. contracts*
4. emails and phone messages
5. financial or performance audits*
6. annual reports*
7. meeting agendas/minutes*
8. investigations*
9. customer lists
10. budgets*
11. rules, regulations, resolutions, policies, or ordinances*

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

What Records are Accessible under the TPRA? (cont.)

- ◆ 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.

“Unless otherwise provided by state law”

- ◆ Tenn. Code Ann. Section 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

Exceptions to the TPRA

Examples of Exceptions to the TPRA:

1. 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)).
2. 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 (cont.)

3. 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)).
4. 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)).

Exceptions (cont.)

5. The following records or information of any state, county, municipal or other public employee or former 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 and individual 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; and the same information of immediate family members or household members.* (T.C.A. § 10-7- 504(f)(1)).

6. Tenn. Code Ann. Section 10-7-504(a)(20)(A) requires a utility to treat the following consumer information as confidential:
 - credit card numbers, social security numbers, tax identification numbers, financial institution account numbers, burglar alarm codes, security codes, and access codes.

Exceptions (cont.)

7. All tax returns, tax information, and tax administration information is confidential. (T.C.A. § 67-1-1702).
8. Tenn. R. Crim. P. 16(a)(2) provides for the confidentiality of investigative files pertaining to pending or contemplated criminal action.
9. Health Insurance Portability and Accountability Act of 1996 (HIPAA)
10. Family Educational Rights and Privacy Act (FERPA)
11. Tenn. Sup. Ct. R. 8, RPC 1.6-Attorney-Client Privilege



Who Can Access Government Records under the TPRA?

- ◆ Tenn. Code Ann. § 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).
- ◆ A records custodian has the right to deny a request 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.
- ◆ Tenn. Code Ann. Section 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.

Response to a Public Records Request

- Tenn. Code Ann. Section 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 Tenn. Code Ann. Section 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.

Records Retention and Disposition

- ◆ In *State v. Cawood*, 134 S.W. 3d 159 (Tenn. 2004), the defendant was convicted of various criminal acts during a bench trial. Audiotapes and videotapes were entered as exhibits during the trial. The defendant appealed the convictions and the convictions were overturned. Thereafter, the defendant filed a motion for removal of videotapes and audiotapes from the record and for all the tapes to be placed in his possession permanently. The Court held that the audiotapes and videotapes were “public record” and given that removal of the tapes from the Clerk’s custody was neither authorized nor contemplated as evidenced by the pertinent records disposition authorization that required the Clerk to maintain the records while a case was active and thereafter for the state Records Center to maintain the records for an additional fifty (50) years.
- ◆ Tenn. Code Ann. Section 10-7-404 requires the County Technical Assistance Service to compile and print a records retention manual for counties.
- ◆ Tenn. Code Ann. Section 10-7-702 requires the Municipal Technical Advisory Service to compile and print a records retention manual for municipalities.

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*, 2008 WL 375759 at *10 (Tenn. Feb. 13, 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 Tenn. Code Ann. § 10-7-505(a) seeking access to public records relevant to the litigation.

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:

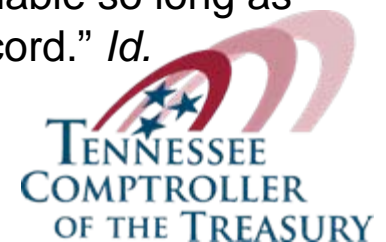
once information is entered into a computer, a distinction between information and record becomes to a large degree impractical. In our view, it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material 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 the office computers were either 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.*



Petitioning for Access to Public Records

- ◆ Tenn. Code Ann. Section 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

Forms Developed by the OORC

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

- ◆ 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.tn.gov/comptroller/openrecords/forms.htm>

- ◆ Schedule of Reasonable Charges
- ◆ Policy for Frequent and Multiple Requests for Copies of Public Records
- ◆ Safe Harbor Policy
- ◆ Best Practice Guidelines

Legislation from the 106th General Assembly

- ◆ **PC 310 (HB2189/SB1973)** effective May 27, 2009
 - makes certain information regarding a public employees or former employees health savings account, retirement account, and pension account confidential; however
 - Keeps public the amount and source of contributions to the accounts as well as the amount of pension and retirement benefits provided by the governmental entity

Legislation from 2009 (cont.)

- ◆ **PC 368** (HB1985/SB2042) effective June 5, 2009 makes confidential:
 - certain audit related documents; and
 - minutes of audit committee meetings held in executive session (including meetings of full boards sitting to hear the same matters).

- ◆ **PC 368** also allows local government audit committees to hold non-public meetings in certain circumstances.

Legislation from 2009 (cont.)

- ◆ **PC 567 (HB0703/SB0202)** effective July 1, 2009:
 - makes confidential any record related to the security of a government building; and
 - allows surveillance recordings to be released when the recordings include acts or incidents pertaining to public safety and security or possible criminal activity.

Legislation from 2009 (cont.)

- ◆ **PC 520** (HB1587/SB1655) effective June 25, 2009:
 - Raises maximum permitted county archives and management fee from two dollars (\$2.00) up to five dollars (\$5.00) per document filed;
 - Eliminates exemptions for judicial branch and for registers of deeds; and
 - Adds authority for city or town to establish and collect an archive and management fee.

Legislation from 2009 (cont.)

- ◆ **PC 175** (HB0533/SB0832) effective May 7, 2009 related to use of Internet forum for communication between members of governing body subject to open meetings law:
 - Expands authority to elected governing bodies of all county, city, metropolitan governments, and school boards;
 - Imposes certain requirements for forum; and
 - Requires submission to OORC of a plan of compliance prior to implementation of forum.

OORC Contact Information

For questions regarding public records issues ,
call Elisha Hodge at (615) 401-7891 or 1 (866)
831-3750.

Email open.records@tn.gov .

Website

<http://www.tn.gov/comptroller/openrecords/>

