

Public Record Acts, Freedom of Information Acts, and Right to Disclosure Acts: Is Your Agency Subject?

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May 21, 2018

Where to Find Your State's Records Act (West citations)

- Alabama- Alabama Code Ann. § 36-12-40
- Arkansas- Arkansas Code Ann. § 25-19-101
- Florida- Florida Stat. Ann § 119.01
- Georgia- Georgia Code Ann. § 50-18-71
- Kentucky- Kentucky Rev. Stat. Ann. § 61.870
- Maryland- Maryland Code Ann. § 4-202
- Mississippi- Mississippi Code Ann. § 25-61-1

Where to Find Your State's Records Act (West citations)(cont.)

- North Carolina- North Carolina Gen. Stat. Ann. § 132-1
- South Carolina-South Carolina Code Ann. § 30-4-30
- Tennessee- Tennessee Code Ann. § 10-7-503
- Virginia-Virginia Code Ann. § 2.2-3704
- West Virginia-West Virginia Code Ann. § 29B-1-3

Of Interest . . .

- *Kinney v. Southern Mississippi Planning and Development District, Inc.*, 202 So. 3d 187 (Miss. 2016)
- Florida Administrative Code Ann. § 29F-1.115
- Ky. Op. Att’y Gen. 00-ORD-168 (Sept. 6, 2000)

Tennessee Open Records Act

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



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*
6. Budgets
7. Travel requests and reimbursement records
8. Bid proposals and responses
9. Time and attendance records
10. Records related to projects or grants

* 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.

<https://www.comptroller.tn.gov/openrecords/PublicRecordsExceptionsDatabase.asp>

App. 538 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.

Public Employee 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.

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.

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 that includes 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

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

Records Request Form

Records Response Form

Schedule, Policies, and Guidelines Developed by the OORC

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

Schedule of Reasonable Charges

Reasonable Charges for Frequent and Multiple Requests

Safe Harbor Policy

Best Practices & 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.

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.

Best Practice Guidelines (Overview)

- A public records policy should balance a governmental entity's need to function efficiently, protect confidential information, and maintain the integrity of records with the public's right to access records pursuant to the Tennessee Public Records Act ("TPRA"). Any practices and procedures, including charging fees, should not be used to hinder the exercise of rights granted to citizens under the TPRA. The following sections address common best practices and guidelines in each subject area in an effort to achieve a balance of these interests.

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 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.

2017 Legislation

- **Chapter No. 233 (HB0058/SB0464). Amendments to the Tennessee Public Records Act.** Amends T.C.A. § 10-7-503 by providing that requests to inspect records may be submitted in person, by telephone, fax, mail or email, if the governmental entity conducts official business using such means or via an Internet portal, if the entity maintains a portal that is used for accepting public records requests. Provides that requests for copies can be required to be made in writing, on a form developed by the Office of Open Records Counsel (OORC), or on a form that complies with T.C.A. § 10-7-503(c). Also provides that if a request for copies is not required to be made in writing, it can be made in any of the ways that a request to inspect can be made. Requires any form that is required to be used to make a request for copies to be made readily available to a requestor.

2017 Legislation (Cont.)

- Also provides that when at least 2 requests to inspect are made within a 6 month period and for each request, the requestor does not inspect the records within 15 days of being made aware that records are available for inspection, the governmental entity is not required to comply with any additional records request from the requestor for 6 months from the date the second request was made, unless the entity determines there was good cause for failure to review the records. Provides that when a request for copies is made, an estimate provided, the requestor agrees to pay the estimate, the copies are made and then the requestor does not pay the estimate, the governmental entity is not required to comply with another request from the requestor until the requestor pays for such copies.

2018 Legislation and Updates

<http://publications.tnsosfiles.com/acts/110/pub/pc0712.pdf>

OORC Model:

[http://www.comptroller.tn.gov/openrecords/pdf/MODEL PUBLIC RECORDS POLICY 2017 UPDATE.pdf](http://www.comptroller.tn.gov/openrecords/pdf/MODEL_PUBLIC_RECORDS_POLICY_2017_UPDATE.pdf)

MTAS Model Policy:

<http://www.mtas.tennessee.edu/KnowledgeBase.nsf/0/D B3B7752418F3087852580D70057A993?OpenDocument>

Resources

- If you have questions regarding the Tennessee Public Records or Open Meetings Acts, call **Lee Pope or Rachel Buckley in the Office of Open Records Counsel** at (615) 401-7891 or toll-free at 1-866-831-3750. You can email us at open.records@cot.tn.gov. You can also visit the OORC website at <http://www.comptroller.tn.gov/openrecords/>.
- I can be reached by phone at 615-532-6827 or you can email me at Elisha.Hodge@tennessee.edu. You can access the MTAS website at <http://www.mtas.tennessee.edu/>.