

# TRANSPARENCY IN GOVERNMENT: PUBLIC RECORDS ACT & OPEN MEETINGS ACT

## 2019 Public Records Seminar

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# ABOUT THE OORC

## Office of Open Records Counsel

- Created in 2008
- Helps citizens and government officials better understand Tennessee's laws on public records and open meetings.
  - Respond to questions and concerns
  - Educational outreach
  - Develop forms, schedules and policies for public record requests
  - Post resources on its website



# OFFICE OF OPEN RECORDS COUNSEL

## Policies and Guidelines

- 🌟 Best Practices
- 🌟 Model Public Records Policy
- 🌟 Schedule of Reasonable Charges
- 🌟 Charges for Frequent Requests
- 🌟 Safe Harbor Policy
- 🌟 Informal Advisory Opinions
- 🌟 Mediation of Records Disputes
- 🌟 Records Request Form, Records Response Form
- 🌟 Internet Forum Approval



# OFFICE OF OPEN RECORDS COUNSEL

## Benefits of Utilizing OORC

- ④ **Determination of “Willfulness”**
  - **No Attorney Fees**
- ④ **Schedule of Reasonable Charges**
  - **Charges Presumed Reasonable**
- ④ **Familiarity with Records/Meetings Issues**
- ④ **Neutral Intermediary**
- ④ **We’re FREE**



# OFFICE OF OPEN RECORDS COUNSEL

## OORC Website

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  - Sunshine Laws
  - Contacts for Public Record Requests
- Submit an Inquiry

# TENNESSEE PUBLIC RECORDS ACT

## Symbol of Transparency

“Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee.”

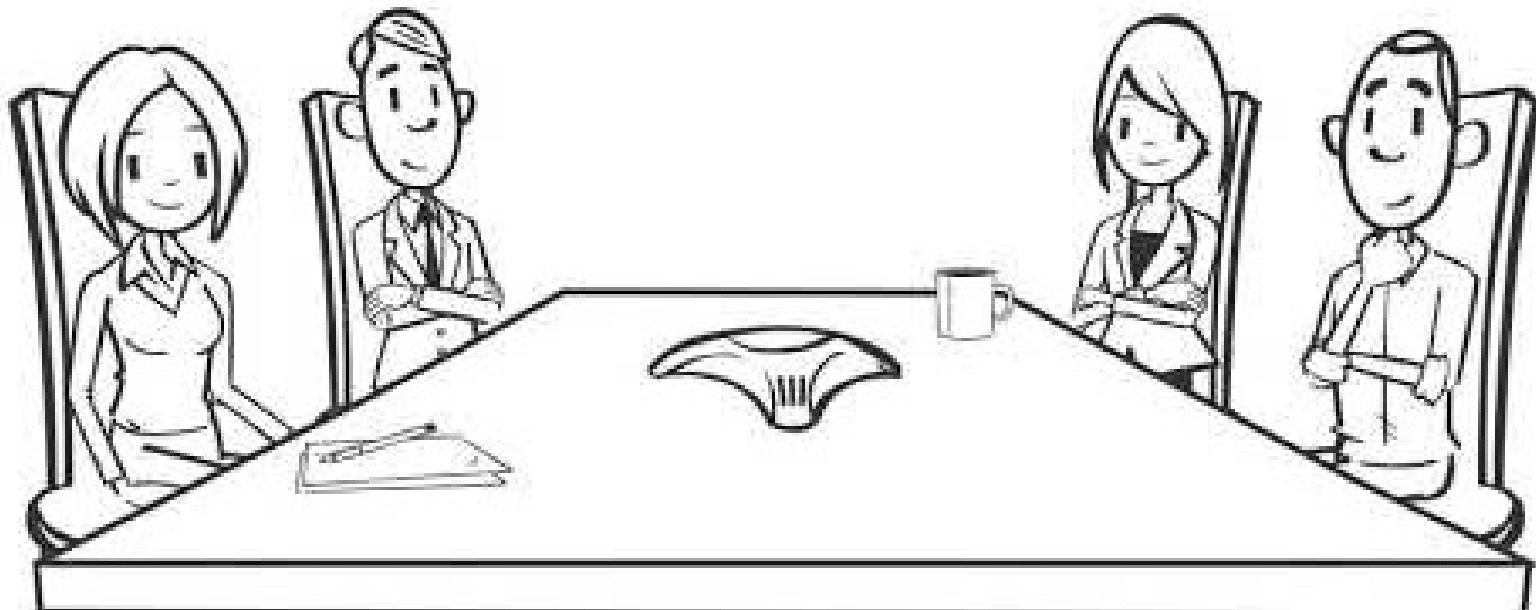
- 🌐 *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007).



# OVERVIEW

## Tennessee Public Records & OORC

Promptly provide access



# TENNESSEE PUBLIC RECORDS ACT

## Tenn. Code Ann. § 10-7-503

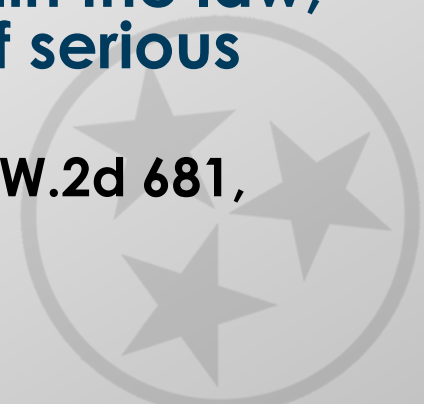
- ⊙ All public records shall,
  - ⊙ during business hours,
  - ⊙ be open to inspection,
  - ⊙ to any Tennessee citizen,
  - ⊙ unless otherwise provided by state law.
- ⊙ **Creates a presumption of openness!**
  - Records are open to Tennessee citizens unless state law provides otherwise





# INTERPRETED BROADLY

- 🇺🇸 Courts are to interpret the provisions of the TPRA broadly so as to give the fullest possible public access to public records.
  - Tenn. Code Ann. § 10-7-505(d).
- 🇺🇸 TPRA expresses a clear legislative mandate favoring disclosure of government records.
  - *State v. Caewood*, 134 S.W.3d 159, 164-5 (Tenn. 2004).
- 🇺🇸 Unless there is an express exemption within the law, disclosure is required “even in the face of serious countervailing considerations.”
  - *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).



# WHO IS SUBJECT TO THE TPRA?

## Government Entities

- State, county and municipal records
- Includes departments, divisions, boards and other separate units of government created by law or pursuant to law.
  - Tenn. Code Ann. § 10-7-503(a)(1) & (2).

## “Functional Equivalent”

- “When a private entity’s relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.”
  - *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.* 87 S.W.3d 67, 70 (Tenn. 2002).
- Based on totality of the circumstances.
  - Level of government funding
  - Government involvement and control over entity
  - Whether entity created by legislative act or previously determined by law to be open to public access
- Burden is on the petitioner



# WHO CAN ACCESS RECORDS?

- Open for personal inspection *by “any citizen of this state.”*
- May require presentation of photo ID that includes the person’s address or require alternative acceptable forms of ID.
  - Driver License
  - Student ID
  - Utility Bill
  - Proof of Property Ownership
- Proof of citizenship is discretionary
- Should be included in Public Records Policy
- Does not include corporations or other artificial entities



# WHO IS THE “RECORDS CUSTODIAN?”

## “Records Custodian”

- Any office, official, or employee lawfully responsible for the custody and care of a public record.
  - Tenn. Code Ann. § 10-7-503(a)(1)(C).

## “Public Records Request Coordinator”

- Individual within governmental entity whose role is to ensure that public records requests are routed to the appropriate records custodian AND
- That requests are fulfilled in accordance with Tenn. Code Ann. § 10-7-503(a)(2)(B).
  - Tenn. Code Ann. § 10-7-503(a)(1)(B).



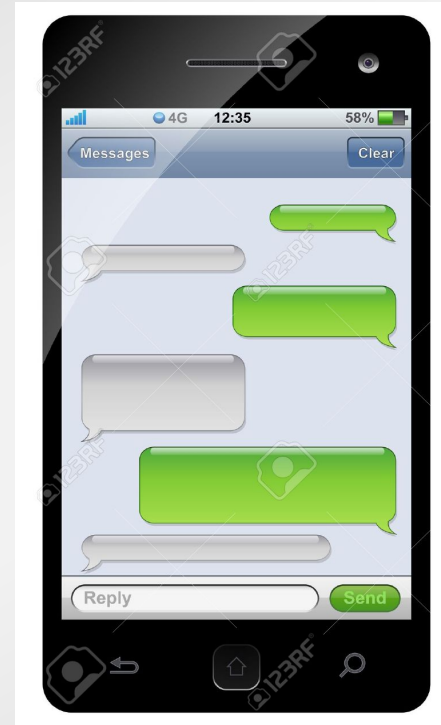
# WHAT IS A “PUBLIC RECORD”?

## Tenn. Code Ann. § 10-7-503(a)(1)(A)

- ⊙ Made or received pursuant to law or ordinance; or
- ⊙ In connection with the transaction of official business.
- ⊙ Does not include the actual device or equipment.
- ⊙ Includes draft records.
- ⊙ “Public Record” determined by substance of the record.



# WHAT IS A "PUBLIC RECORD"?



# TYPES OF PUBLIC RECORDS

## Common “Public Records”

- 🌐 Emails, texts, tweets, FB posts
- 🌐 Video recordings/surveillance
- 🌐 Personnel records/HR Investigations/Applicant Records
- 🌐 Travel/leave information
- 🌐 Meeting agenda and minutes
- 🌐 Contract/bidding documents
- 🌐 Budget records
- 🌐 Financial records



# EXCEPTIONS TO THE TPRA

## “Unless otherwise provided by state law”

### 🌐 Tenn. Code Ann. § 10-7-504

- 50+ Exceptions; 500+ elsewhere in Tennessee Code

### 🌐 “‘State law’ includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations.”

- *Tennessean v. Metro. Gov’t of Nashville and Davidson Cnty.*, 485 S.W.3d 857, 865-66 (Tenn. 2016), citing *Swift v. Campbell*, 159 S.W.3d 565, 571-72 (Tenn. 2004).

### 🌐 OORC Report on Statutory TPRA Exceptions

- 560 statutory exceptions identified in Tennessee Code
- Committee to review exceptions



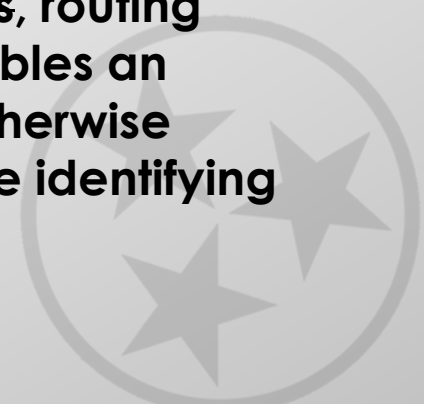


# EXCEPTIONS TO THE TPRA

## “Personally Identifying Information”

### 🇺🇸 Tenn. Code Ann. § 10-7-504(a)(29)

- Social security numbers;
- Official state or government issued driver licenses or identification numbers;
- Alien registration numbers or passport numbers;
- Employer or taxpayer identification numbers;
- Unique biometric data, such as fingerprints, voice prints, retina or iris images, or other unique physical representations; and
- 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.



# EXCEPTIONS TO THE TPRA

## Public Employee Personnel Records

⊕ Unless authorized by employee or provided for other governmental purposes, redact:

- Home phone and cell phone numbers;
- Personal, nongovernment issued email addresses;
- Residential street address for non-state 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;
- Emergency contact information; and
- Above information for immediate family.

Tenn. Code Ann. § 10-7-504(f)



# EXCEPTIONS TO THE TPRA

## Tenn. R. Crim. P. 16

- ⊙ **Materials relevant to ongoing or pending criminal proceedings are not subject to disclosure.**
  - *Tennessean, et al. v. Metro. Gov't of Nashville and Davidson Cnty., et al.*, 485 S.W.3d 857 (Tenn. 2016)
- ⊙ **Records must be investigatory in nature; ordinarily open public records do not become confidential because associated with criminal proceeding.**
  - *Scripps Media, Inc. v. Tennessee Dept. of Mental Health and Substance Abuse Serv.*, 2019 WL 3854298 (Tenn. Ct. App., August 16, 2019).

# EXCEPTIONS TO THE TPRA

## Juvenile Information

### 🌐 Generally open public record unless exception applies:

- Law enforcement records related to a juvenile court proceeding. (Tenn. Code Ann. § 37-1-154)
- Juvenile victim of crime (Tenn. Code Ann. § 10-7-504(t))
- Reports of harm (Tenn. Code Ann. §§ 37-1-409, 37-5-107)
- Records related to reports of child sexual abuse (Tenn. Code Ann. § 37-1-612)
- Proceedings involving DCS
- Ongoing criminal investigation/prosecution



# EXCEPTIONS TO THE TPRA

## Victim Information

- 🌐 **Depends on the type of victim**
  - **Identifying information of a victim obtained pursuant to the Victim's Bill of Rights.** Tenn. Code Ann. § 40-38-111(i).
  - **Identifying information of victims with active orders of protection.** Tenn. Code Ann. § 10-7-504(a)(16)
  - **Identifying information of victims that applied for criminal injuries compensation.** Tenn. Code Ann. § 10-7-504(k).
  - **Identifying information of Victims of certain sexual offenses.** Tenn. Code Ann. § 10-7-504(q).
  - **Juvenile victim.** Tenn. Code Ann. § 10-7-504(t)



# EXCEPTIONS TO THE TPRA

## Accident/Crash Reports

### **Tenn. Code Ann. § 10-7-504(a)(31)**

- **Redact “Personally Identifying Information”**
  - **Street Address and zip code**
  - **Telephone number**
  - **DL#**
  - **Insurance information**
- **Any person named in report can obtain unredacted copy**
- **Attorney or insurance company that certifies they are acting on behalf of person named in report can obtain unredacted copy**
- **Any other person authorized by person named in report can obtain unredacted copy.**



# EXCEPTIONS TO THE TPRA

## Other Common Exceptions

- 🌟 Security/Surveillance of Gov't Buildings
- 🌟 TBI Files
- 🌟 Medical Information – HIPAA
- 🌟 Student Information – FERPA
- 🌟 Proprietary Information/Trade Secrets
- 🌟 Expunged Records
- 🌟 Tax information
- 🌟 Attorney, Physician or Therapist Privileges
- 🌟 Mental Health & Substance Abuse information



# EXCEPTIONS TO THE TPRA

## New Exceptions

- 🌟 2019 OORC Legislative Update
- 🌟 Off-Site Storage of public records – P.C. 68, 79
- 🌟 Personal Info in accident reports – P.C. 111
- 🌟 Redaction of Court Filings – P.C. 151
- 🌟 Disclosure of juvenile records related to aggravated sexual battery – P.C. 177
- 🌟 Court records related to expungement of prostitution convictions related to human trafficking– P.C. 199
- 🌟 Gov. Ops. review of new exceptions – P.C. 221
- 🌟 College sports playbook information – P.C. 248





# BASIC TPRA ANALYSIS

- 🇺🇸 **Tennessee Citizen? (if required)**
- 🇺🇸 **Government Entity or Functional Equivalent?**
- 🇺🇸 **Public Record?**
- 🇺🇸 **Do Responsive Records Exist?**
  - **Request for records vs. information**
  - **Sufficient description to identify records?**
- 🇺🇸 **Does an Exception Apply?**
  - **Entire record or information within the record?**
  - **Exception to an Exception?**



# PUBLIC RECORDS POLICY

## Tenn. Code Ann. § 10-7-503(g)

**Every Gov't Entity must have a policy that includes:**

- ❁ **Process for making requests, including any required forms;**
- ❁ **Process for responding to requests;**
- ❁ **Statement of fees and billing/payment procedures; and**
- ❁ **Contact information for the Public Records Request Coordinator (“PRRC”).**
- ❁ **OORC Model Policy released January 2017**



# RECEIVING TPRA REQUESTS

## Inspection vs. Copies

- 🌐 **Requests for only inspection:**
  - Cannot require the request to be in writing
  - Cannot assess a charge (even for labor)
  - Except under Tenn. Code Ann. § 10-7-504(a)(20) for redaction of “private records” of a utility
- 🌐 **Requests for copies:**
  - Can require to be in writing or on a form
  - Can charge reasonable costs incurred to produce the requested records.



# RECEIVING TPRA REQUESTS

## Tenn. Code Ann. § 10-7-503(a)(7)

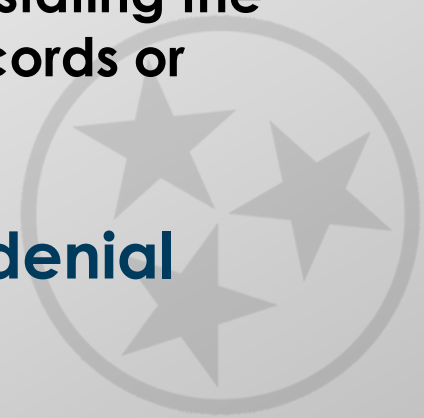
- ⊙ Requests for only inspection do not have to be in writing and may be made:
  - In person, telephone, fax, mail, email (if used) or internet portal (if used).
- ⊙ Requests for copies can be required to be in writing or on a form developed by OORC and may be made:
  - In person, mail, email (if used) or internet portal (if used).
- ⊙ Any required forms should be included in policy and must be made readily available to requestors



# RESPONDING TO TPRA REQUESTS

## Tenn. Code Ann. § 10-7-503(a)(2)(B)

- ⊙ Records custodian shall promptly make records available
  
- ⊙ If not practicable to make promptly available, must do one of the following within 7 business days:
  - Make the information available;
  - Deny the request in writing with the basis for denial; or
  - Furnish a completed record request response stating the time reasonably necessary to produce the records or information.
  
- ⊙ Failure to respond as indicated above = denial



# RESPONDING TO TPRA REQUESTS

## Tenn. Code Ann. § 10-7-503(a)(4)

- ⊙ Not required to sort through files and compile information to create or recreate records that do not already exist; and
- ⊙ Requests must sufficiently identify the records.
- ⊙ Can deny general requests for information and overly broad/vague requests.



# RESPONDING TO TPRA REQUESTS

## Grounds for Denying Requests

- ⊙ Not the custodian of the records
- ⊙ Cannot identify responsive records
  - Seek clarification, if possible
- ⊙ Records do not exist
- ⊙ Proof of citizenship
- ⊙ Not a Tennessee citizen
- ⊙ Has not paid for copies
- ⊙ State law makes the records confidential



# CHARGING FOR PUBLIC RECORDS

## OORC Schedule of Reasonable Charges

- 🇺🇸 **Schedule sets forth reasonable charges for copies and labor**
  - Can charge for copies and labor
  - \$.15 per page/\$.50 per page for color
  - Use lowest possible labor
  - One-hour labor threshold
  - Can charge for redaction of copies
  - Can only charge for labor related to providing electronic copies unless physical copies are printed
- 🇺🇸 **Must provide estimate of costs**
- 🇺🇸 **Cannot charge if only inspecting records**





# CHARGING FOR PUBLIC RECORDS

## OORC Schedule of Reasonable Charges

- ⊛ 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 and not have 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 but should be waived in accordance with local public records policy.



# CHARGING FOR PUBLIC RECORDS

## Additional Production Charges

- ⊙ Presumed that records will be delivered at the records custodian's office. If a requestor is unable to physically appear in person, the records custodian can charge the requestor the actual cost incurred in mailing the records.
  - Only required to deliver records via USPS
  - Can deliver records by other means
  - Only required to provide records electronically if they are maintained electronically
- ⊙ Can assess charges associated with utilizing a third-party vendor.
  - Records held in archives
  - No internal IT staff



# CHARGING FOR PUBLIC RECORDS

## Charges for Multiple Requests

- ⊙ If a requestor, or group of requestors, makes four 4 or more requests within in a calendar month, arecords custodian no longer is required to waive the first hour of labor or waive any other fees that would normally be waived in accordance with the local public records policy.
- ⊙ This policy does not allow a records custodian to aggregate requests when the requests are for certain types of routinely released and readily accessible documents.



# PUBLIC RECORDS POLICY

## Recent Policy Issues

- ❁ Requiring forms for inspection
- ❁ Not including forms
- ❁ Improper charges/fees
  - Charging for redaction under 504(a)(20)(C) for utilities
- ❁ Charging for labor re electronic copies
- ❁ No contact information for PRRC
- ❁ Mandating submission of request to PRRC
- ❁ Improper response times – Prompt requirement
- ❁ Using personal equipment to make copies
  - What rules are “reasonable” under Tenn. Code Ann. § 10-7-506?
- ❁ Application of exceptions
- ❁ Forms of ID for citizenship



# TPRA PENALTIES

## Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)

### Failure to Inspect

- 2 or more requests to inspect in 6 months
- Fails to view records within 15 days of being notified that records are available to view
- No TPRA requests for 6 months, unless failure to view was for “good cause.”

### Failure to Pay for Copies

- Government entity provides estimate of costs
- Requestor agrees to pay estimated costs
- Requestor fails to pay for copies after they are produced
- No more TPRA requests until requestor pays costs



# PETITIONING FOR ACCESS

## Tenn. Code Ann. § 10-7-505

### 🇺🇸 Denial Required

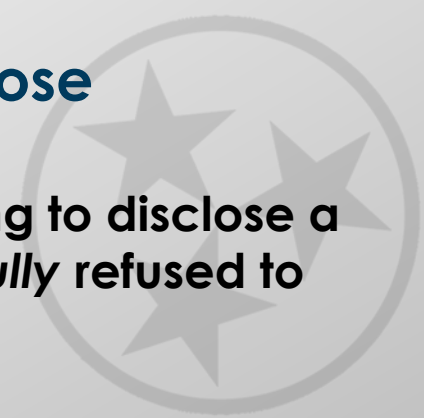
- Failure to respond in accordance with 503 = denial
- Imposition of unreasonable fee = denial

### 🇺🇸 Petition filed in chancery or circuit court

### 🇺🇸 Burden is on governmental entity to prove denial was justified

### 🇺🇸 Court orders access to records and may impose attorney's fees if it finds denial was "willful."

- "[T]he governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and *willfully* refused to disclose it." Tenn. Code Ann. § 10-7-505(g).



# PETITIONING FOR ACCESS

## Evolution of “Willfulness”

### 🇺🇸 “Bad Faith” Standard

- “Willfully” described as synonymous with “Bad Faith.” *Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007).
- “City acted consciously to withhold the records with a dishonest purpose.” *Little v. City of Chattanooga*, No. E2011-027-24-COA-R3-CV, 2012 WL 4358174, \*15 (Tenn. Ct. App. 2012).

### 🇺🇸 Recent Shift to Legal Justification

- “The analysis focuses on the legal validity of the position of the government entity” *Friedmann v. Marshall County*, 471 S.W.3d 427, 439 (Tenn. Ct. App. 2015).
- “[I]f a municipality denies access to records by invoking a legal position that is not supported by existing law or by a good faith argument for the modification of existing law, the circumstances of the case will likely warrant a finding of willfulness.” *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App. 2015).
- *Taylor v. Town of Lynnville*, No. M2016-01393-COA-R3-CV, 2017 WL 2984194 (Tenn. Ct. App. 2017)

# RECORDS RETENTION

## Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)

### 🌐 Municipal Records – MTAS

- Tenn. Code Ann. § 10-7-702 authorizes the Municipal Technical Advisory Service to compile and print a records retention manual for municipalities.
- <http://mtasresource.mtas.tennessee.edu/reference/retention-schedules>

### 🌐 County Records - CTAS

- Tenn. Code Ann. § 10-7-404 authorizes the County Technical Assistance Service to compile and print a records retention manual for counties.
- <http://eli.ctas.tennessee.edu/reference/current-retention-schedules>

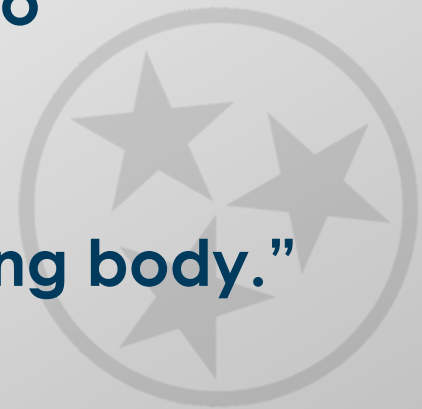




# TENNESSEE OPEN MEETINGS ACT

## Tenn. Code Ann. § 8-44-101, *et. seq*

- 🇺🇸 The formation of public policy and decisions is public business and shall not be conducted in secret.
- 🇺🇸 Construed broadly in favor of the public.
- 🇺🇸 Provides the right to attend, not the right to participate.
- 🇺🇸 Applies to all “meetings” of any “governing body.”



# TENNESSEE OPEN MEETINGS ACT

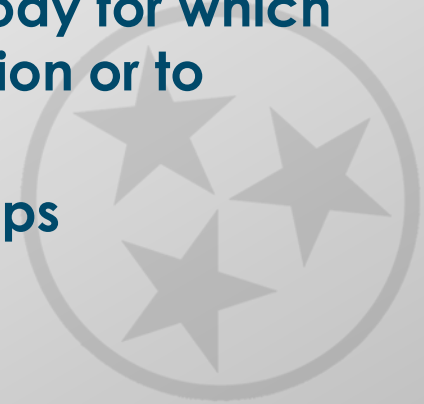
## What is a meeting of a governing body?

### “Governing Body”

- Members of a public body of 2 or more members with authority to make decisions for or recommendations to a public body on policy or administration.
- Includes certain non-profits

### “Meeting”

- 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.
- Doesn't include executive sessions or workshops



# TENNESSEE OPEN MEETINGS ACT

## TOMA Requirements

- 🇺🇸 **“Meetings” must be open to the public**
- 🇺🇸 **“Adequate Public Notice”**
- 🇺🇸 **Meeting Minutes**
  - **Persons present**
  - **Motions, proposals and resolutions offered**
  - **Results of any votes**
- 🇺🇸 **All votes by public vote, public ballot or public roll call**



# TENNESSEE OPEN MEETINGS ACT

## *“Adequate Public Notice”*

- ④ **Under the totality of the circumstances, does notice give interested citizens a reasonable opportunity to exercise their right to attend?**
  
- ④ **Regular Meeting: Only Time & Place of Meeting**
  
- ④ **Special Meeting:**
  - **Reasonably describe proposed actions to be taken or decisions to be made**
  - **Cannot discuss other matters during the meeting**



# TENNESSEE OPEN MEETINGS ACT

## *“Executive Sessions”*

- 🌟 **Meeting with Attorney**
- 🌟 **Informational Sessions/Workshops**
- 🌟 **Hospital Boards**
- 🌟 **School Safety Planning**
- 🌟 **Government Audit Committees**



# TENNESSEE OPEN MEETINGS ACT

## TOMA OOPS!

- 🇺🇸 **What if a governing body violates TOMA?**
- 🇺🇸 **Any action taken in violation of TOMA is null and void, except commitments affecting public debt.**
  - **Tenn. Code Ann. § 8-44-105**
- 🇺🇸 **Court has broad jurisdiction to issue injunctions, impose penalties and otherwise enforce purpose of TOMA.**
  - **Tenn. Code Ann. § 8-44-106**
  - **Court retains jurisdiction and governing body must report to the court semi-annually re TOMA compliance**

# CONTACT INFORMATION

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

