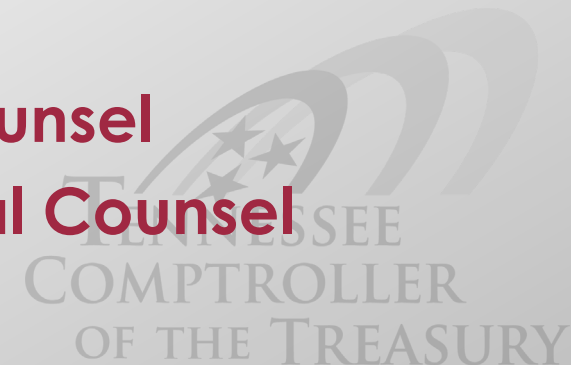


TRANSPARENCY IN GOVERNMENT: PUBLIC RECORDS ACT & OPEN MEETINGS ACT

2020 Public Records Seminar

Lee Pope, Open Records Counsel
Rachel Buckley, Assistant General Counsel



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

TENNESSEE COMPTROLLER OF THE TREASURY | **Open Records Counsel**

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- Policies, Guidelines & Forms
- Advisory Opinions
- Annual Report

Resources

- Frequently Asked Questions
- 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).



TENNESSEE PUBLIC RECORDS ACT

Symbol of Transparency

“The Public Records Act has a noble and worthwhile purpose by providing a tool to hold government officials and agencies accountable to the citizens of Tennessee through oversight in government activities”.

- 🇺🇸 *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 864 (Tenn. 2016)



TENNESSEE PUBLIC RECORDS ACT

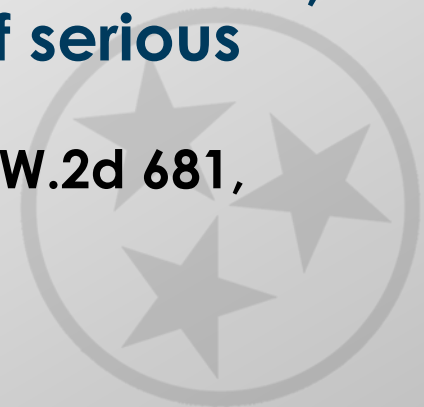
Tenn. Code Ann. § 10-7-503

- ⊙ 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!**
 - Public records are open to Tennessee citizens unless state law provides otherwise



INTERPRETED BROADLY

- 🇺🇸 Courts are to interpret the provisions of the TPRA broadly 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



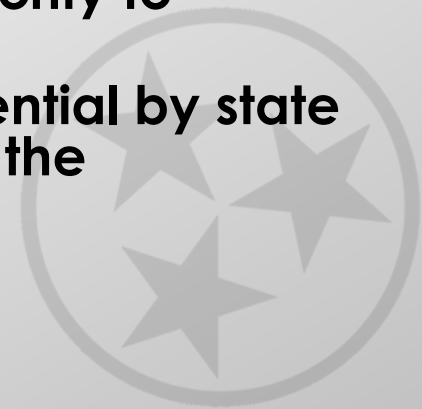
WHO CAN ACCESS RECORDS?

Intra and Intergovernmental Requests

- Typically not treated as formal public record request because sharing info as transaction of official gov't business.
- Confidentiality not waived and ongoing duty to maintain confidential information/records
- May want agreement re intergovernmental requests

When other gov't entities should not access records

- Request is from a federal agency without authority to access the records
- Records/Information sought are made confidential by state law and enumerates specific entities to which the records/information may be released



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 gov't business.

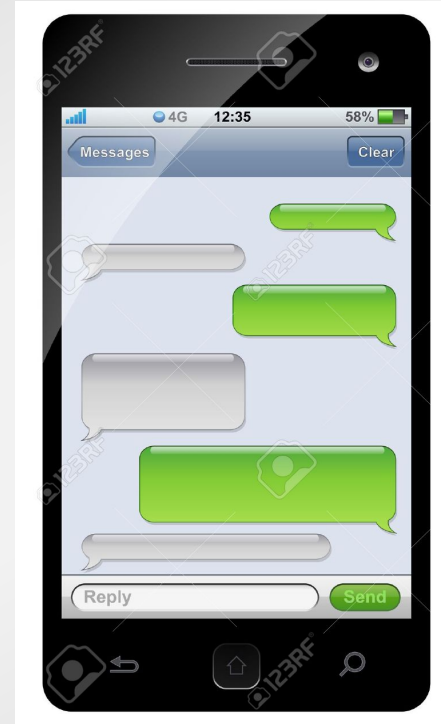
- ⊙ Does not include the actual device or equipment.

- ⊙ 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

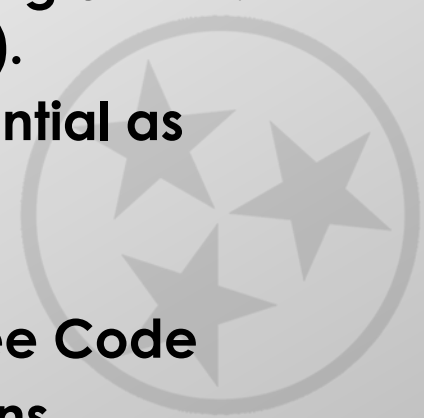
- 60 Exceptions; 550+ elsewhere in Tennessee Code

🌐 “‘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).
- 10-7-504(y) – Admin rules making info confidential as condition to receive federal funds.

🌐 OORC Report on Statutory TPRA Exceptions

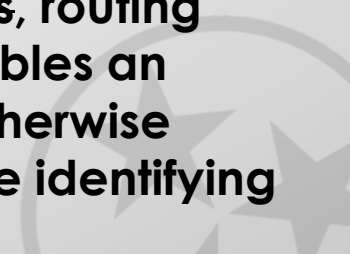
- 560 statutory exceptions identified in Tennessee Code
- Gov’t Ops Committee to review new exceptions



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)

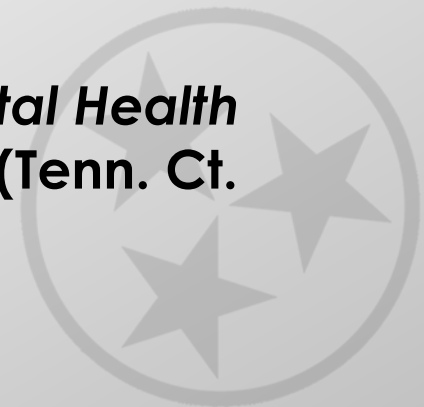


EXCEPTIONS TO THE TPRA

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; ordinary public records do not become confidential due to association 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

Procurement Records

- Local RFP/Bidding Records

- Tenn. Code Ann. § 10-7-504(a)(28)

- Proposals and statements of qualifications received by a local government entity in response to a personal service, professional service, or consultant service request for proposals or request for qualifications solicitation, and related records, including, but not limited to, evaluations, names of evaluation committee members, and all related memoranda or notes, shall not be open for public inspection until the intent to award the contract to a particular respondent is announced.

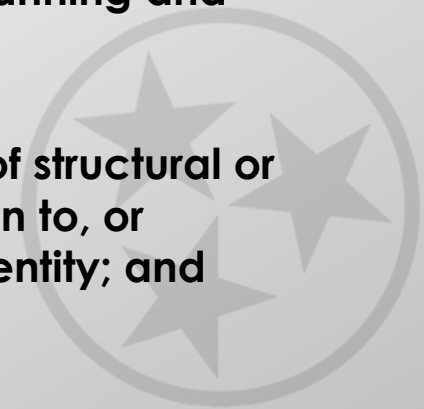


EXCEPTIONS TO THE TPRA

Security of Gov't Buildings

Tenn. Code Ann. § 10-7-504(m)

- Information and records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection.
- Such information and records include:
 - (A) Information and records about alarm and security systems used at the government building, including codes, passwords, wiring diagrams, plans and security procedures and protocols related to the security systems;
 - (B) Security plans, including security-related contingency planning and emergency response plans;
 - (C) Assessments of security vulnerability;
 - (D) Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity; and
 - (E) Surveillance recordings.



EXCEPTIONS TO THE TPRA

Other Common Exceptions

- 🌟 **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 Legislation

- 🌟 **2020 OORC Legislative Update**
- 🌟 **TPRA Cleanup Bill – Pub. Ch. 676**
 - No longer required to use OORC form to provide time reasonably necessary to produce public records
 - 2 exceptions moved from 10-7-503 to 10-7-504(y) & (z).
- 🌟 **Destruction of Public Records – Pub. Ch. 738**
 - Cannot destroy records responsive to a pending request
 - Must contact PRRC prior to authorizing destruction of public records
 - Can dispose of public records in ordinary course of business in accordance with retention schedule and unaware records are responsive to a request
 - Must retain records related to record requests for 1 year
 - Violation = \$500 fine against gov't entity
- 🌟 **Sen. Haile TPRA “Harassment” Bill being reviewed by ACOG**



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

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

- ⊙ A records custodian may require a request for copies to be in writing but cannot require a request to be in writing if a requestor only wants to view the records.
- ⊙ A records custodian may not assess a charge to only view public records.
- ⊙ A custodian may require a requestor to produce a government-issued photo identification with an address in order to inspect or receive copies of records.
- ⊙ Records requests “shall be sufficiently detailed to enable the custodian to identify the specific records” requested.

RESPONDING TO TPRA REQUESTS

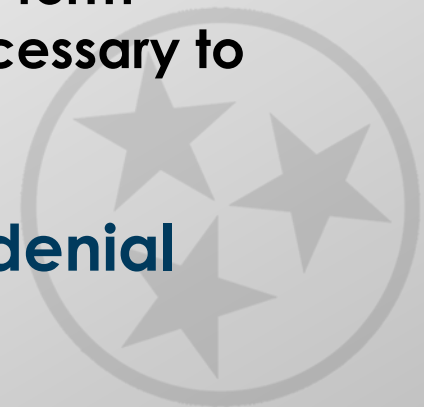
- ❁ A records custodian is not required to compile information from records or create a document that does not already exist in order to fulfill a public records request.
- ❁ A records custodian may require an appointment to view a public record when there is a reasonable basis for requiring the appointment.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



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 in writing, or by completing a response form developed by OORC, the time reasonably necessary to produce the records or information.
- 🌐 Failure to respond as indicated above = denial



RESPONDING TO TPRA REQUESTS

Electronic Records

- ⊙ Not required to convert paper records into electronic format, BUT required to produce records electronically if records held electronically
- ⊙ Must produce records in format in which they are typically held or other unaltered format
 - Requestor cannot dictate electronic format
- ⊙ Only charge for copies if electronic copy must be printed – usually only have labor charges



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

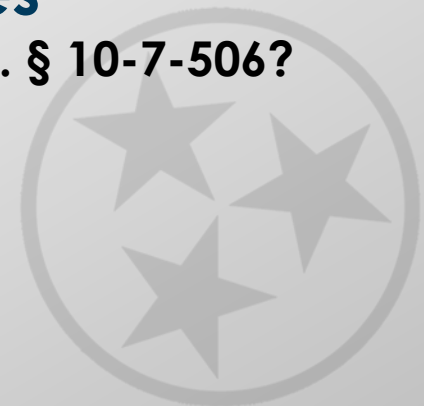
- ⊙ If a requestor, or group of requestors, makes four 4 or more requests within in a calendar month, arecords custodian no longer is required to waive the first hour of labor or waive any other fees that would normally be waived in accordance with the local public records policy.
- ⊙ This policy does 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

- ❁ 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
- ❁ 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

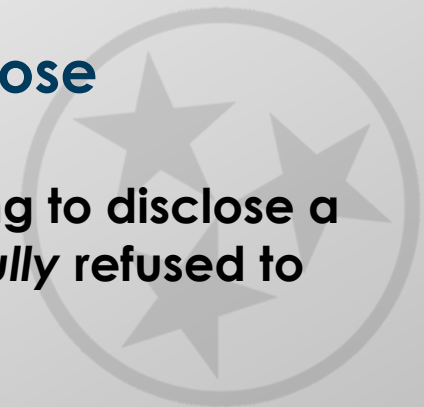
- Failure to respond in accordance with 503 = denial
- Imposition of unreasonable fee = denial

🇺🇸 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).
- Not willful when “the State had a tenable, if, in the end, erroneous, basis for acting as it did.” *Scripps*, 2019 WL 3854298 (Tenn. Ct. App., August 16, 2019).

RECORDS RETENTION

Municipal Records – MTAS

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

County Records - CTAS

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

State Records – Secretary of State

- Division of Records Management directs the disposition of all state records. Tenn. Code Ann. § 10-7-303



BASIC TPRA ANALYSIS

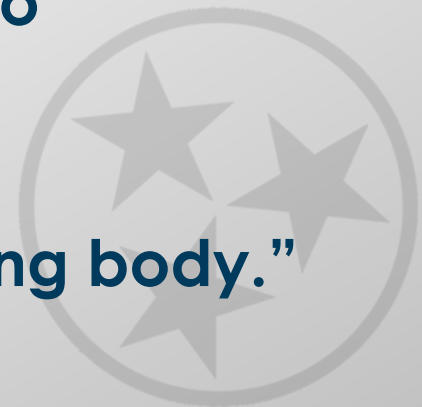
- 🇺🇸 **Tennessee Citizen? (if required)**
- 🇺🇸 **Government Entity or Functional Equivalent?**
- 🇺🇸 **Public Record?**
- 🇺🇸 **Do Responsive Records Exist?**
 - **Request for records vs. information**
 - **Sufficient description to identify records?**
- 🇺🇸 **Does an Exception Apply?**
 - **Entire record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



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.”

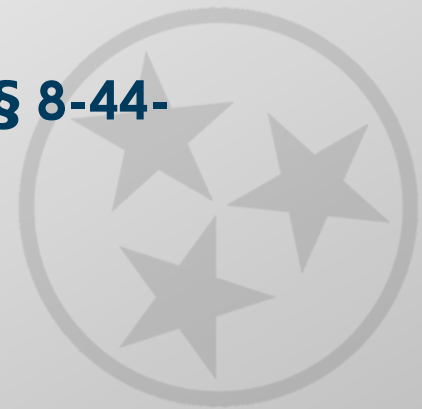


TENNESSEE OPEN MEETINGS ACT

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.
- “Public body” - origin and authority may be traced to legislative action and members have authority to make decisions or recommendations on policy or administration affecting government business. *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976).
- Includes certain non-profits. Tenn. Code Ann. § 8-44-102(b)(1)(E)(i).



TENNESSEE OPEN MEETINGS ACT

What is a meeting of a governing body?

🌐 “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.
- Members must discuss or deliberate matters a quorum of the body would need to vote upon. Johnston v. Metro. Gov't of Nashville & Davidson Cnty., 320 S.W.3d 299, 303 (Tenn. Ct. App. 2009)
- “Discuss or Deliberate” = weigh arguments for or against
- Doesn't include executive sessions or workshops
 - Can always have executive session with attorney, but members still cannot discuss or deliberate during executive session

TENNESSEE OPEN MEETINGS ACT

TOMA Requirements

- ④ **“Meetings” must be open to the public**
- ④ **“Adequate Public Notice”**
- ④ **Meeting Minutes**
 - **Persons present**
 - **Motions, proposals and resolutions offered**
 - **Results of any votes**
- ④ **All votes by public vote, public ballot or public roll call**



TENNESSEE OPEN MEETINGS ACT

“Adequate Public Notice”

- ❁ **Under the totality of the circumstances, does notice give interested citizens a reasonable opportunity to exercise their right to attend?**

- ❁ **Regular Meeting:**
 - **Time & Place of Meeting**

- ❁ **Special Meeting:**
 - **Reasonably describe proposed actions to be taken or decisions to be made**
 - **Can only discuss proposed actions during the meeting**



TENNESSEE OPEN MEETINGS ACT

Misleading Notice

- ❶ **Misleading notice is not adequate public notice under TOMA.**
- ❷ **This is why specially-called meetings can only address matters specified in the public notice.**
- ❸ **If an agenda is included in the notice, limited to only those items in the agenda.**
 - **May want to include a new business catch-all in agenda so additional matters may be raised by board members during the meeting without potentially violating TOMA.**

TENNESSEE OPEN MEETINGS ACT

“Executive Sessions”

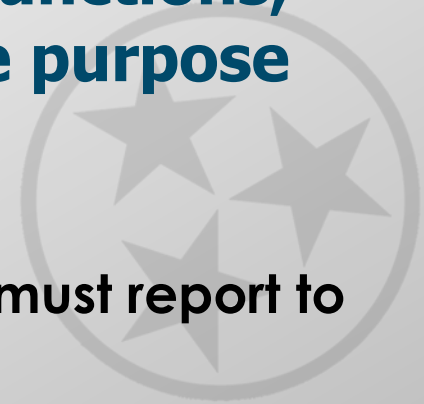
- ⊙ **Meeting with Attorney**
- ⊙ **Informational Sessions/Workshops**
- ⊙ **Hospital Boards**
- ⊙ **School Safety Planning**
- ⊙ **Government Audit Committees**



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**



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