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Dear Ms. Hayes:

As we discussed on Monday, I am of the opinion that until the court directly addresses the issue of whether parties involved in litigation with the government can use the Tennessee Public Records Act (hereinafter the "Act") to obtain access to records as opposed to discovery, the best guidance that is available on the issue is dicta found in *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*. The Court says 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. (*Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 2008 WL 375759 (Tenn.))

Until such time as a case is litigated that is exactly on point with this issue, this is the guidance that the court has given. As such, it seems that in your case, the Petitioner has the right to use the Act as a means of obtaining information in addition to or in exclusion of use of the discovery process.

Additionally there are no cases that are directly on point with the second issue you presented: can a citizen go into an office during normal business hours and demand immediate access to certain public records?

The analysis of this question must begin with a review of the statute that provides access to governmental records.

The Tennessee Code Annotated 10-7-503 (a) says the following:

- (a) Except as provided in § 10-7-504(f), all state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, 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.

This statute provides Tennessee citizens the right to inspect the records of governmental entities during business hours, unless an exception to access is found in state law. While the statute provides for access during business hours, it does not address whether access has to be granted immediately upon request.

There are a few cases that provide some guidance into the issue of immediacy in providing access to public records, however it is the dissenting opinion found in *Kersey v. Bratcher* that is directly on point, but in no way binding. In *Kersey v. Jones*, Plaintiff brought suit after his open record's request to inspect the file of a Rutherford County Sherriff's deputy was denied. Respondent's request was denied because the Sherriff's Department had a policy that open records request had to be handled by a certain employee and that employee was not available at the time the request was made. The Court of Appeals vacated and remanded the trial court's order granting summary judgment to the Sherriff's Department. In the Court's analysis of whether a genuine issue of material fact existed, the Court found that while the Sherriff's Department was not required to grant the Plaintiff immediate access to the file because redaction of confidential information needed to occur, they were also not allowed to limit or deny access to a record because the record contains confidential information. The Court says the following in its analysis:

it is logical to conclude that if a governmental entity or an agent thereof is unable to immediately satisfy a citizen's request for access to a public record pursuant to the Public Records Act because confidential information must be redacted from the document(s), then it should, at the time of the request, inform the citizen that access to the record will be allowed and also explain the reason for any delay in production of the document. *Kersey v. Jones*, 2007 WL 2198329 (Tenn. Ct. App.)

In *Kersey v. Bratcher*, the Plaintiff sued the Clerk of the Chancery Court of Rutherford County for failure to grant the Plaintiff immediate access to a court file he had requested in violation of T.C.A. § 10-7-503. The Plaintiff presented to the Clerk's office during regular business hours and requested to inspect the file; however, the file was unavailable at the time because the assigned Judge was reviewing the file for possible recusal purposes. The Plaintiff refused to come back on another day to inspect the file and was

then escorted by sheriff's deputies to the Judge's office where he was asked by the Judge's assistant to sit on the couch to review the file. Plaintiff refused to sit on the couch, became loud and disruptive, and was thereafter escorted from the Judge's office. The Court found that the Clerk had not violated T.C.A. § 10-7-503, nor had the Judge's assistant because access was never denied to the Plaintiff, he was simply given reasonable instructions as to the way in which his inspection was to occur. *Kersey v. Bratcher*, 2007 2702798 (Tenn. Ct. App.).

It is the dissenting opinion in *Bratcher* that directly addresses your issue. In the dissent, Justice Lee goes through a very thorough analysis of the issue of immediately granting access to public records. She cites portions of the *Jones* opinion and in particular the section found above regarding the procedure that should be used by governmental agencies when requested records are temporarily unavailable because redaction needs to occur. Justice Lee opines that the procedure set out in *Jones* should be followed not only when records are unavailable because they contain confidential information that needs to be redacted, but should be used whenever public records are requested and are temporarily unavailable for any reason.

Additionally, the Tennessee Supreme Court in *Schneider v. City of Jackson*, allowed the City of Jackson, once the matter was remanded to the trial court, time to review certain requested records for confidential information before granting access to those records, despite the fact that the City failed to establish that the records contained confidential information. While making this allowance, the Court does mandate that the entire process of review and redaction "be concluded as expeditiously as possible." *Schneider v. City of Jackson*, 226 S.W. 3d 332, 346 (Tenn. 2007).

With regard to the issue of the requestor having the right under the Act to require the custodian of the requested records to confirm in writing that the records being provided are complete and accurate, the Act does not contemplate or require this in any of its provisions.

It is the opinion of this Office, based upon the case law cited, that in situations such as the one in which you present where confidential information could be part of a record, it is permissible to require the requestor to wait a reasonable amount of time to inspect the requested records. A delay in access should only be used to review the requested records for confidential information and redact any confidential contained within the records. Additionally, it is the opinion of this Office that if you are going to delay access to records in order to review the records, the requestor should be told why the delay is taking place, when the records will be available for inspection and the review and redaction should be done as quickly as possible.

Please feel free to call either me or Ann upon receipt of this letter if you have anything further that you would like to discuss.

Sincerely,

Elisha D. Hodge  
Open Records Specialist