

Bill Buckley, Esq.
City Attorney, City of Niota
P.O Box 533
Athens, Tennessee 37371

March 5, 2008

Dear Mr. Buckley:

Last week, you inquired into whether or not audio recordings of local commission meetings are public records, when the recordings are made by the city recorder who then prepares the minutes for the meeting based up the recordings. You indicated that the city recorder records the meeting on audiotape, prepares the minutes from what she hears on the audiotape, and thereafter records over the meeting once the minutes are approved.

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.

In determining whether the audiotapes are public records open for inspection by a citizen, it must first be determined what constitutes a “public record.” In Tennessee Code Annotated (hereinafter “T.C.A.”) § 10-7-301, “public record” is defined as:

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

While this definition is not found in the Tennessee Public Records Act, the Courts in Tennessee have adopted this definition when dealing with open record disputes. (See *Griffin v. City of Knoxville*, 821 S.W.2d 921 (Tenn., 1991); *State v. Cawood*, 134 S.W.3d 159 (Tenn., 2004); and *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn., 2007). As such, the audiotapes do fall within the definition of “public record.” The next issue is whether the audiotapes are public records that are open for inspection by a citizen of Tennessee.

The test for determining whether or not a record in the possession of a governmental entity qualifies as a public record subject to inspection under the Tennessee Public Records Act was set out by the Tennessee Supreme Court in *Griffin v. City of Knoxville*. According to the Court, a record in the possession of a governmental entity is a public record if the record 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). This same language is found in T.C.A. § 10-7-301, within the definition of “public record.” The audiotapes that are made by the recorder in carrying out her official function are public records that are made in connection with the transaction of official governmental business similar to the audiotapes at issue in *State v. Cawood*.

In *State v. Cawood*, the Tennessee Supreme Court examined all of the above mentioned statutory provisions and cited case law in determining whether or not audiotapes in the possession of the Clerk of the Appellate Courts were public records subject to the Tennessee Public Records Act. *State v. Cawood*, 134 S.W. 3d 159 ((Tenn. 2004). In *Cawood*, audiotapes made by local law enforcement were entered as evidence against a defendant in a criminal trial. The defendant was convicted of the charges pending against him, appealed the conviction, and the Court of Criminal Appeals subsequently reversed the convictions and dropped the charges. *Id.* at 162. The State then applied for permission to appeal to the Supreme Court, but the application was denied. *Id.* Thereafter, the defendant filed a “Motion for Withdrawal of Part of the Record” with the Supreme Court seeking possession of the audiotapes as well as a videotape. *Id.* The Motion was heard by the Court of Criminal Appeals and the Court ruled that the defendant could take permanent possession of the evidence. *Id.* The State appealed. *Id.* In its analysis the Court examined whether the audiotapes were public records and determined that they were public records subject to the Tennessee Public Records Act. Specifically, in making its decision to reverse the Court of Criminal Appeals, the Court said that the tapes fell into the definition provided for public records in T.C.A. § 10-7-301, the tapes fit the test set out in *Griffin v. City of Knoxville*, and the tapes were not subject to any of the enumerated exceptions to the Public Records Act. *Id.* at 164-65. The Court also found that if the tapes were to be returned to the defendant then that would constitute disposal of the records and there are specific measures in place to deal with disposal of public records by the Supreme Court Clerk and returning the records to the defendant was not an acceptable method of record disposal. *Id.* at 165-66.

It is clear from the statutory provisions as well as the applicable case law that the audiotapes of the commission meetings are public record subject to the Tennessee Public

Records Act and any tape that has been requested that is still in the possession of the recorder should be made open for inspection to any citizen requesting access. The tapes should be reviewed before access is granted to any citizen for inspection to verify that there is no confidential information on the tape that took place during an executive session. If there was an executive session that took place, that information should be removed from the copy of the tape provided to any citizen for inspection.

As to your second question regarding whether the recorder can continue to record the meetings on audiotape and thereafter record over the meetings once the minutes are approved, it seems, based upon the City of Niota's municipal code, that the city recorder is only responsible for keeping the minutes of the Commission meetings. The process the recorder uses to generate the minutes is not set out in any applicable law; therefore, the recorder is not required to make an audiotape of the meeting nor is she required to maintain the recording for any definite time period. The only public records that are contemplated in the applicable law are the meeting minutes. It does seem however, that since there has been an open records request for the tape recordings of recent meetings, best practice would be for the recorder, from this point forward, to retain the tapes of every meeting for a reasonable period of time after the meeting, so that if a request is made in the future the tape will be available for inspection.

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