

Jonathon James
Tullahoma, Tennessee

May 12, 2008

Dear Mr. James:

The facts you presented the Office were as follows:

On April 3, 2008, you made a written open records request to the City Administrator for the city-paid cellular phone records of the Mayor of Tullahoma. On April 10, 2008, you received approximately 103 pages of records and paid a fee of \$25.75 for the records. Within a few hours of receiving the records, you were asked by the City Administrator to return the records. You were requested to return the records so that the records custodian could redact any information made confidential by Tennessee Code Annotated (hereinafter "T.C.A.") § 10-7-504(f)(1)(A), which states that the unpublished telephone number of a public employee is confidential. You thereafter returned the records to the City Administrator on the same day the request was made of you. As of today, the requested records have not been provided with the necessary redaction or otherwise, nor has the money you paid for copies of the records been refunded to you.

It is your contention that the cellular phone records should not be redacted and should be made available for your inspection immediately.

The first issue addressed in this opinion is what if any duty a records custodian has to redact confidential information contained within otherwise public records before making the records available for public inspection. The second issue addressed in this opinion is how quickly public records must be made available for public inspection after a request is made.

The analysis of both of these issues must begin with the language encompassed within the Tennessee Public Records Act. The Tennessee General Assembly codified the Tennessee Public Records Act in 1974. In order to ensure that the citizens of the State of Tennessee were able to access government records, the following language was adopted:

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.

T.C.A. § 10-7-503(a).

The premise of the Act is that government records, whether state, municipal, or county, are open to inspection by citizens of the State of Tennessee, with few exceptions. The Court in *Brennan v. Giles County Board of Education* said, “unless it is clear that disclosure of a record or class of records is excepted from disclosure, we must require disclosure even in the face of ‘serious countervailing considerations’.” *Brennan v. Giles County Board of Education*, 2005 WL 1996625 (Tenn. Ct. App. 2005). However with that said, the General Assembly has also seen fit to adopt over one hundred exceptions to the Act, as well as acknowledge that other forms of state law, whether it is common law or court rules, can create the basis for exceptions to the Act.

The exception that directly impacts your request is codified at T.C.A. § 10-7-504(f)(1). The statute says the following:

The following records or information of any state, county, municipal or other public employee, or of any law enforcement officer commissioned pursuant to [§ 49-7-118](#), in the possession of a governmental entity or any person in its capacity as an employer shall be treated as confidential and shall not be open for inspection by members of the public:

(A) Unpublished telephone numbers...

T.C.A. § 10-7-504(f)(1)(A).

This exception makes the unpublished telephone numbers of any public employee and any of the same information for the employee’s immediate family members confidential. Additionally, T.C.A. § 10-7-504(f)(2) requires that the unpublished telephone numbers be redacted when possible. However, the duty to redact should not be used as a means to deny or limit access to information that is otherwise public. In looking to the Courts for guidance on this issue, the case that is most on point is *Eldridge v. Putnam County*. *Eldridge v. Putnam County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001).

In *Eldridge*, a citizen made a public records request for the telephone records, cellular phones records included, of the Thirteenth Judicial Drug Task Force. *Id.* at 573. Putnam County delayed in providing the records asserting that the records might contain confidential information. The requestor then filed suit against the entity for denial of her right to inspect and copy public records. The lower court found that Putnam County had

failed to carry its burden of proof showing that the records were exempt from inspection and ordered that the records be produced for inspection and copying. On appeal, the Tennessee Court of Appeals, Middle Section, affirmed the lower court's ruling that Putnam County had failed to meet its burden of proof regarding the records being exempt, but the Court also remanded the case based upon the following language:

The chancellor was correct in finding that the county had failed to show that the records in question contained any confidential information... We hesitate, however, to take any action that would place anyone's life in danger. If the County shares that concern, it should be allowed, at its own expense, to redact the telephone records to remove any information made confidential by Tenn. Code Ann. § 10-7-504(f).

Id. at 574.

Based upon the above cited opinion, it is this Office's opinion that the city attorney does have an obligation as custodian of the requested records to redact any information that is made confidential under not only T.C.A. § 10-7-504(f), but under any state law. However, it is additionally this Office's opinion that the requested records should be redacted as quickly as possible and thereafter immediately made available for public inspection, as set out in *Kersey v. Jones*. *Kersey v. Jones*, 2007 WL 2198329 (Tenn. Ct. App. 2007).

In *Kersey v. Jones*, the Plaintiff brought suit after his open records 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 offers the following guidance to records custodians with regard to the issue of granting immediate access to records that are required to be redacted:

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.

Id. at *4.

The Tennessee Supreme Court in *Schneider v. City of Jackson* also took up the issue of providing requested records immediately after a request is made when redaction is

required. In *Schneider*, The Supreme Court ordered that once the case was remanded to the lower court, the City of Jackson be allowed 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. *Schneider v. City of Jackson*, 226 S.W. 3d 332, 346 (Tenn. 2007). While making this allowance, the Court does mandate that the entire process of review and redaction “be concluded as expeditiously as possible.” *Id.*

Based upon the above cited case law and statutory authority, it is the opinion of this Office that the records custodian of the cellular phone records of the Mayor does have an obligation to review the records and redact any information made confidential by any state law. Additionally, it is the opinion of this Office that any review and subsequent redaction of the requested records should be done as quickly as possible. Any unnecessary and unreasonable delay could constitute the effective equivalent of a denial of the right to inspect public records, which would subject the governmental entity to action under T.C.A. § 10-7-505(a).

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

Sincerely,

Elisha D. Hodge
Open Records Specialist