

Dana Dye, Esq.
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P.O. Box 11
Centerville, Tennessee 37033

June 11, 2008

Dear Ms. Dye:

This Office received a complaint from Mr. and Mrs. Neal Lovlace regarding a letter received from you as the attorney for the Hickman County School System (hereinafter referred to as “school system”) that denied them access to public records. As we discussed during our phone conversation on Monday, it is the opinion of this Office that the school system violated the Tennessee Public Records Act (hereinafter referred to as the “TPRA”) by wholly denying the request. Clearly there are exceptions in the TPRA that make information relative to students confidential. *See* Tenn. Code Ann. §§ 10-7-504(a)(4)(A) and 49-6-5105. Additionally, there is case law that makes the email of public employees subject to a case-by-case review to determine whether the records meet the definition “public record.” *See Brennan v. Giles County Board of Education*, 2005 WL 1996625 (Tenn. Ct. App. August 18, 2005). However, the fact that confidential information is contained within a record does not make the entire record confidential and the fact that some of the emails requested fail to meet the definition of “public record” does not mean that none of the requested emails are public records. It is also the opinion of this Office that a denial based on your conclusion that “the time and manpower necessary to pull out all e-mail communications received or sent by a particular employee makes ‘fishing’ for such records in an effort to determine if any particular item is subject to public inspection simply prohibitive,” violates both the spirit and the letter of the TPRA.

You have requested that this Office follow-up the conversation that took place on Monday with an opinion that outlines all statutory provisions and any case law relevant to public records request for emails sent or received by public employees.

1. Access to Public Records

Tenn. Code Ann. § 10-7-503(a) says the following:

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.

The records that are referred to in the above-cited statutory provision are often called “public records.” While the definition of “public record” is currently not found within the TPRA, Tennessee Courts have adopted the definition of “public records” that is found in Tenn. Code Ann. § 10-7-301(6) which defines public records 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.¹

With this definition in mind, the first thing that is going to be necessary for the school system to do is a review all of the requested emails to determine whether or not they meet the definition of “public record.” In the above-cited *Brennan* case, a public records request was made to Giles County Board of Education for the “digital records of Internet activity, including e-mails sent and received, websites visited and transmissions sent and received and the identity of any and all Internet Service Providers.” *Id.* at * 1. Because there were no cases on point in Tennessee dealing with the issue presented in this case and because Florida’s definition of public record is almost verbatim to the statutory definition found in Tenn. Code Ann. § 10-7-301(6), the Tennessee Court of Appeals looked at case law on point in Florida. The Court in *Brennan* quotes the Florida Appellate Court in *Times Publishing Co. v. City of Clearwater*, 830 So.2d 844 (Fla. App. 2002), which made the following distinction between records that fit the definition of “public records” and records that do not:

Information stored on a computer is as much a public record as written documents in official files. Moreover, because section 119.01, Florida Statutes (2000), established a state public policy of open records, the public records law must be construed liberally in favor of openness. *City of St. Petersburg v. Romine*, 719 So.2d 19 (Fla. 2d DCA 1998). In this case, however, "private" or "personal" e-mail simply falls outside the current definition of public records. Such e-mail is not "made or received pursuant to law or ordinance." Likewise, such

¹ If SB3280 is signed into law, then effective July 1, 2008, the TPRA will contain a definition of “public records” that is identical to the definition found in Tenn. Code Ann. § 10-7-301(6).

e-mail by definition is not created or received "in connection with the official business" of the City or "in connection with the transaction of official business" by the City...

Id. at *4.

The Court in *Brennan*, echoing the Florida Appellate Court in *Times*, declined to make a bright-line rule making all records stored on government computers public records, but at the same time acknowledged that some records created or stored on a government computer could meet the definition of "public record." *Id.* at *5. The Court concludes by saying, "the determination of whether the requested documents fall within the statutory definition requires a case-by-case, or record-by-record review. *Id.*

It is this Office's opinion that the school system needs to conduct a thorough review of the emails requested and make a determination of whether the emails requested are public records" based upon the definition cited above. The Office would also advise the school system that, while not required by law to do so, best practice would be for the school system to let the requestors know that all of the documents that are being provided pursuant to their open records request are all those that meet the definition of public record, and if any emails were excluded, the basis on which they were excluded.

Once a review is completed and it is determined that a requested email is a "public record," the school system also has the responsibility to review the record and redact any information contained within the record that is made confidential by state law. In *Eldridge v. Putnam County*, the Tennessee Court of Appeals opined that prior to making records available for both inspection and copying, it is the responsibility of the records custodian to redact any information found within the requested record that is made confidential by state law. *Eldridge v. Putman County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001).

The *Eldridge* opinion makes it clear that simply because a record contains confidential information that does not mean that the entire record is confidential. As such, the emails that were requested by the Lovlaces that contain information that would identify any student or any information relating to a students academic performance, financial status or his/her parent's financial status, medical or psychological treatment or testing would need to redacted in accordance with Tenn. Code Ann. §§ 10-7-504(a)(4)(A) and 49-6-5105 which make such information confidential.

II. Conclusion

It is the opinion of this Office that based upon the above-cited case law and statutory provisions, the school system is required to provide any and all emails that are considered "public records" to the requestors with any information made confidential by state law redacted. While it is understandable that responding to this request could be extremely time consuming and tedious, Courts in Tennessee have said time and time again that absent an exception found within state law making a record confidential, a citizen has the

right to inspect and copy any public record during business hours, and the courts have at no point mentioned this right being restricted due to the volume of the request.

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