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February 4, 2009

Mr. DeBoard:

You have requested an opinion from this Office that addresses the following issues:

- (1) Does Memphis Daily News (hereinafter referred to as "MDN") qualify under Tenn. Code Ann. Section 10-7-506 as "news media" requesting geographic information system (hereinafter referred to as "GIS") data for "news gathering purposes" such that it is entitled to pay a reduced fee for such GIS data?
- (2) Can Knoxville, Knox County, and the Knoxville Utilities Board Geographic Information System (collectively known as and hereinafter referred to as "KGIS") require citizens who request certain GIS data or the entire GIS database pursuant to the Tennessee Public Records Act (hereinafter referred to as "TPRA") to sign a licensing agreement in order to receive the requested data?

I. Memphis Daily News

According to the information you provided, MDN is a "general interest newspaper covering business, law, government, and real estate and development, and specializes in the publication of public notices and other public records." MDN offers to its subscribers various subscription types which provide "the subscriber access to its online database of public records, public notices and other content, and also includes a subscription to the print and online editions of the newspaper." With regard to the GIS data provided by KGIS, MDN uses the data as a basis for articles and reports which it publishes in the print and online editions of the newspaper, as well as providing its customers direct access to that data."

MDN has a website that is found at www.memphisdailynews.com/Register.aspx. The website provides subscribers with a number of different subscription options that provide access to various data. However in the “Description of Data” that is available on MDN’s website at www.memphisdailynews.com/About.aspx, GIS data is not mentioned. Direct access to GIS data is referenced on the website for “Chandler Reports.” “Chandler Reports,” which is a division of MDN, operates a separate website that offers subscribers “updated sales information, GIS mapping, [and] tax lines, foreclosed properties & more!” According to the website, “what started as a simple way for local appraisers to share with each other, soon developed into the most comprehensive property data resource available. Today Chandler Reports is a must-have for anyone who deals with real estate transactions and development.” See www.chandlerreports.com/Site/Products.asp.

II. GIS Data and the TPRA

On June 6, 2000, Public Chapter 868, Acts of 2000, became effective. This legislation amended Tenn. Code Ann. Section 10-7-506(c) and in doing so added statutory language that is key to determining the issues presented. Tenn. Code Ann. Section 10-7-506(c)(1) reads as follows:

If a request is made for a copy of a public record that has commercial value, and such request requires the reproduction of all or a portion of a computer generated map or other similar geographic data that was developed with public funds, a state department or agency or a political subdivision of the state having primary responsibility for the data or system may establish and impose reasonable fees for the reproduction of such record, in addition to any fees or charges that may lawfully be imposed pursuant to this section. The additional fees authorized by this subsection may not be assessed against individuals who request copies of records for themselves or when the record requested does not have commercial value. State departments and agencies and political subdivisions of the state may charge a reasonable fee (cost of reproduction only) for information requested by the news media for news gathering purposes (broadcast or publication).

Additionally, Tenn. Code Ann. Section 10-7-506(c)(4) provides the following definitions:

As used in this subsection, “record that has commercial value” means a record requested for any purpose other than:

- (A) A non-business use by an individual; and
- (B) A news gathering use by the news media.

Prior to the 2000 amendment, only citizens who were requesting GIS data or computer generated maps for their own personal use were charged a reduced fee for the data; however, with the passage of that amendment, “news media” that requested data for “news gathering purposes” could also obtain the data at a reduced price.

In order to address the first issue presented, it is important to determine who and/or what constitutes “news media” and what constitutes “news gathering purposes.” Since neither of these terms is defined within the statutory provision, the Office looked to the legislative intent of the language for guidance. Audio tapes of all of the legislative committee meetings, as well as all of the discussion on both the House and Senate floor, were reviewed. Unfortunately, while there was significant discussion surrounding the legislation as a whole, there was only brief testimony given about the news media issue and that limited testimony merely summarized the above mentioned statutory language without providing any explanation as to what was meant by the language. *GIS Data: Hearing on S.B. 2802 Before the Senate Judiciary Committee*, 101st Sess. (April 27, 2000)(statement of Frank Gibson, Lobbyist, Tennessee Press Association.) Additionally, since this issue has not been litigated in Tennessee, Tennessee courts have not interpreted the statutory language.

Because of the lack of guidance provided from both the statutory provisions and the legislative intent and because the Tennessee courts have never been presented with the opportunity to interpret the statutory provisions, this Office next turned its attention to relevant cases law in other jurisdictions. While the language that has been the subject of litigation in these other jurisdictions is not specific to GIS data, the guidance is relevant to the issues presented in this opinion because the language considers who or what qualifies as “news media” and therefore qualifies for reduced fees for copies of public records.

II. The “News Media,” “News Gathering Purpose v. Commercial Purpose,” and Reduced Fees

The United States Court of Appeals, District of Columbia Circuit took up the issue of who constitutes a “representative of the news media” and when a “representative of the news media” should be assessed a reduced fee for public records in *National Security Archives v. United States Department of Defense*, 880 F. 2d 1381 (D.C. Cir. 1989). Therein, the court opined that “a representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Id.* at 1387.

In *National Security Archives*, the United States Department of Defense (hereinafter referred to as “DoD”) received a Freedom of Information Act (hereinafter “FOIA”) request from National Security Archives (hereinafter referred to as “NSA”) for certain public records that it intended to use when publishing “document sets” on various issues of public interest. *Id.* at 1386. In making the request, NSA made the claim that it qualified for preferential fee treatment under FOIA as either an educational institution or the news media. *Id.* at 1383. FOIA provides that when requests are made for any public record “not...for commercial use” by “an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media, the requestor can only be charged the cost of duplication.” *Id.* at 1382-83

(quoting 5 U.S.C. § 552(a)(4)9A)(ii)(II)). DoD rejected both claims and NSA filed suit. *Id.*

The court rejected NSA contention that it was an “educational institution,” but did find that NSA was “a representative of the news media.” *Id.* at 1385. Even though NSA had only published one book at the time, the court found that its intention to publish the “document sets” from the requested information fell firmly within the legislature’s intent that dissemination of information in government files is to be encouraged and that broadly construing “news media” helps meet that intent. *Id.* at 1386. Additionally, the court found that even though the “document sets” were going to be sold, the selling of the documents did not constitute a “commercial use” because DoD’s own regulations provide that “[a] request for records supporting the news dissemination function of the requestor shall not be considered a request that is for a commercial use.” *Id.* at 1387-88 (quoting 32 C.F.R. § 286.33(e)(7)(ii)). In getting to this point however, the court did note that “there is no reason to treat an entity with news media activities in its portfolio, such as CBS, Inc. or the Washington Post Co., as a ‘representative of the news media’ when it requests documents, from let us say the SEC, in aid of its nonjournalistic activities.” *Id.* at 1387.

In its conclusion, the court said NSA qualified as a representative of the news media due to the fact that it published information and so long as the records requested furthered that function, NSA was entitled to reduced fees.

Arizona has also dealt with this issue. While there is nothing in Arizona’s law that differentiates between access to public records afforded the news media versus an individual, the law does make a distinction with regard to access and fees based upon the intended use of the public record, regardless of who is requesting the record. In Arizona, a records custodian has the ability to restrict access to public records or charge a fee if the requestor intends to use the records for a commercial purpose. In *Star Publishing Company v. Parks*, 875 P.2d 837 (Ariz. App. Div. 2, 1993), the Arizona Court of Appeals, Division 2, Department A, examined whether or not a for-profit newspaper was seeking public records for a “commercial purpose” when the records contained information that would be included in a newspaper publication.

In *Star Publishing*, Star Publishing Company, the parent company of a local newspaper, sued the county’s chief medical examiner for the release of autopsy reports for three deceased individuals. *Id.* at 837. The medical examiner delayed production of the records until the families of the deceased could be notified and required the newspaper to pay a fee for the records. *Id.* The medical examiner argued that since the information from the reports was going to be published and the publication then sold, that the newspaper was using the records for a commercial purpose and thus could be charged for the records. *Id.* at 837. The court rejected this argument and found that Star publishing Company was not seeking the records for a commercial purpose simply because the information within the records would be used in a publication that would be sold. *Id.* at 838.

The Arizona Public Records Act defines “commercial purpose” as:

The use of public records for the purpose of sale or resale or for the purpose of producing a document containing all or part of the copy, printout or photograph for sale or the obtaining of names and addresses from such public records for the purpose of solicitation or the sale of such names and addresses to another for the purpose of solicitation or for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of such public record.

Id. at 838 (quoting A.R.S. § 39-121.03). In interpreting this definition, the court said, “We believe this section to be aimed at the direct economic exploitation of public records not at the use of information gathered from public records in one’s trade or business.” *Id.* The court goes on to further interpret the provision by saying, “Learning facts from public records that might inform one in a daily occupation or might be newsworthy would not be a commercial purpose,” however; “the reproduction of a public report or a group of public records for sale as such would be a commercial purpose.” *Id.*

While both the federal court and the Arizona court are interpreting statutory provisions that are not as ambiguous as the statutory provision at issue in this opinion, a Tennessee Court would likely look to these cases for guidance on this issue. Tenn. Code Ann. Section 10-7-506(c) does not expressly use the phrase “commercial purpose.” Based on the language, “As used in this subsection, ‘record that has commercial value’ means a record requested for any purpose other than: (1) a non-business use by an individual; and (2) a news gathering use by the news media” it is clear to this Office that the General Assembly intended for a factual inquiry to be done to determine whether or not an individual or the news media requesting GIS data was doing so for a commercial purpose.

Thus, the inquiry becomes how would a Tennessee court distinguish between GIS data being used for a commercial purpose and it being used for news gathering. This Office is guided by the distinction made in the above cited cases. It is possible that a Tennessee court would follow the reasoning set out in *National Security Archives* and *Star Publishing Company* and find that when the news media takes information within a public record, edits that information, and thereafter disseminates the information to its customers, the records are not being used for a commercial purpose, therefore the media is eligible for a reduced fee for the records. However, when the news media takes the public records and sells them outright becoming what the DoD characterizes as “information vendors or media brokers”, the media is using the records for a commercial purpose and as such should not be charged a reduced fee for the requested information. 32 C.F.R. § 286.28(e)(7)(iii).

While this Office is not certain as to how Tennessee courts would opine on this issue, we are inclined to believe that Tennessee courts would follow the reasoning set out above. As such, if MDN is able to provide KGIS with sufficient information to prove that it is going to take the GIS data requested and turn it into a distinct work and not merely

reproduce it “as is” and thereafter sell the information to subscribers, then this Office believes MDN is entitled to the data for the cost of reproduction only; otherwise, MDN would have to pay the same price as anyone else requesting the data for a commercial/business purpose.

III. KGIS’s Use of Licensing Agreements

As a condition to acquiring particular GIS data or the entire KGIS database, KGIS requires a requestor to complete and sign a licensing agreement which includes a number of different provisions. For purposes of this opinion, you question whether a requestor can be required to sign such an agreement in order to acquire particular GIS data or the entire database and whether the provisions that (1) require the requestor acknowledge that the GIS database is not a public record; and (2) restrict the use of the database by mandating that the user “shall not disclose, publish, sell, assign, lease, sublicense, market or transfer the Database or any portion thereof” are valid provisions.

The issue that must first be addressed is whether or not KGIS has the ability to require a requestor to sign a licensing agreement in order to acquire a copy of the database. As with the above stated issue, the courts in Tennessee have never taken up this issue and there is little to glean from the legislative history, aside from the fact that the issue of requiring licenses was contemplated but never acted upon. However, the Tennessee Supreme Court in *Bayless v. Knox County*, held that authority of a county is limited to the express authority provided by statute or necessarily implied from the provisions of a statute. *Bayless v. Knox County*, 286 S.W. 2d 579 (Tenn. 1956). This Office is unaware of any provision that expressly or impliedly gives counties the ability to require a requestor to sign a licensing agreement as a condition of acquiring particular GIS data or an entire GIS database.

As such, it is the opinion of this Office that KGIS cannot require a requestor to complete and sign a licensing agreement as a condition to acquiring particular GIS data or the entire KGIS database.

Because it is the opinion of this Office that the law does not authorize KGIS to require a requestor to sign a licensing agreement as a condition to receipt of particular GIS data or the entire KGIS database, we do not find it necessary to address the remaining questions regarding the validity of the conditions of the agreement.

Conclusion

For the above mentioned reasons, this Office is unable to determine how a Tennessee Court would rule on the issue of whether or not MDN is “news media” requesting KGIS’s GIS data for “news gathering purposes.” It is this Office’s opinion however that since KGIS lacks the express statutory authority to require an individual requesting copies or duplication of public records to sign a licensing agreement as a condition of receiving the records, a court would find this to be in violation of the TPRA. However; this Office also feels that because Tenn. Code Ann. Section 10-7-503(a)(7) allows a records custodian to require a request for records to be in writing and Tenn. Code Ann.

Section 10-7-506(c) contemplates that KGIS will inquire into the purpose of the request in order to access the appropriate fees in accordance with the statute, it is legally permissible for KGIS to require that any requestor's request for particular GIS data or the entire GIS database be in writing with the intended use of the data specified.

With that said, if a court were to find MDN to be a representative of the "news media" and the requests made by MDN to be for "news gathering purposes" then MDN should only be charged the cost of reproduction. However, if a court were to find that MDN either was not a representative of the "news media," or the use of the GIS data by MDN was not for "news gathering purposes," then KGIS would be permitted to charge a non-reduced fee for the records. Additionally, while state law fails to give any county the authority to require a requestor to sign a licensing agreement in order to obtain public records, Tenn. Code Ann. Sec. 10-7-506(c) clearly contemplates that in order for fees to be properly assessed for the data, a factual inquiry should be conducted regarding who is making the request and for what purpose. It seems reasonable to believe that if an entity holds itself out to be a representative of the "news media" requesting either certain GIS data or an entire database for "news gathering purposes," but in actuality acquires and uses the data for a commercial purpose, the governmental entity would have a cause of action against the requestor for recovery of the fees that were reduced due to the misrepresentations of the requestor.

Please feel free to call either myself or Ann V. Butterworth at (615) 401-7891 if you have any further questions.

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