



STATE OF TENNESSEE
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Ms. McGannon:

According to the information provided to this Office, the City of Murfreesboro (hereinafter “the City”) received and subsequently responded to a public records request from a local newspaper requesting copies of records related to a fatal car crash that involved a police officer. Among the records requested were the in-car videos taken from the vehicles of the police officers who responded to the crash scene. Thereafter, the City provided copies of the in-car videos that were requested. However, the portions of the videos that contained witness interviews were not provided. The local newspaper has since questioned why the witness interviews were not provided and the City’s response referenced the Tennessee Supreme Court’s decision in *Appman v. Worthington*, 746 S.W. 2d 165 (Tenn. 1987) and specifically cited Tennessee Rule of Criminal Procedure (hereinafter “Tenn. R. Crim. P.”)16(a)(2) as the legal basis for denying access to the witness statements. Since the former officer has now been indicted, the City’s position is that the portions of the videos that contain witness statements are relevant to an on-going criminal prosecution and are therefore not subject to inspection and/or copying pursuant to the TPRA.

You are now requesting an opinion from this Office that addresses the following issue:

Are records that are relevant to an ongoing, active, open criminal investigation by a local law enforcement agency and/or prosecution by a district attorney general

required to be produced for inspection or copying pursuant to the Tennessee Public Records Act (hereinafter "TPRA")?

It is the opinion of this Office that records that are relevant to a contemplated or pending criminal action, whether in the possession of the District Attorney General's Office or local law enforcement are not required to be produced for inspection and/or copying pursuant to the TPRA.

I. Analysis

The TPRA begins by defining public record 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.

Tenn. Code Ann. Section 10-7-503(a)(1). Thereafter, the TPRA says:

All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Tenn. Code Ann. Section 10-7-503(a)(2)(A). As such, unless there is an exception within the law that either requires that a record be maintained as confidential or authorizes a records custodian to maintain a record as confidential, any record that is made or received by a governmental agency in the normal course of business is going to be available for public inspection and/or copying.

Tennessee Courts have long recognized the fact that exceptions to the TPRA exist within various state and federal laws. In *Swift v. Campbell*, the Tennessee Court of Appeals said that exceptions to the TPRA are found "not only in statutes, but also the Constitution of Tennessee, the common law, the rules of court, and administrative rules and regulations because each of these has the force and effect of law in Tennessee." *Swift v. Campbell*, 159 S.W. 3d 565,571-572 (Tenn. Ct. App. 2004).

One such rule of court that creates an exception to the TPRA is Tenn. R. Crim. P. 16(a)(2) which reads as follows:

(a)(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or

law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

The Tennessee Supreme Court addressed the ability of a citizen who was not a party to a criminal proceeding to access records relevant to a contemplated or pending criminal proceeding in *Appman v. Worthington*, 746 S.W. 2d 165 (Tenn. 1987). In *Appman*, an inmate at Morgan County Regional Correctional Facility was murdered. *Id.* at 165. Internal Affairs conducted an internal investigation and thereafter, several inmates were indicted on various charges relating to the murder. *Id.* at 166. The attorneys for two of the indicted inmates subsequently made a public records request for all records relating to the death of the inmate that was murdered. *Id.* The requested was directed to the administrative assistant for internal affairs at the correctional facility. *Id.* The Supreme Court opined that Tenn. R. Crim. P.16(a)(2) precluded the attorneys from gaining access to the requested records. *Id.* With reference to Rule 16(a)(2) the Court said the following:

This exception to disclosure and inspection does not apply to investigative files in possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action.

Id.

The Supreme Court more recently took up the issue of whether or not records that are relevant to a pending or contemplated criminal action were subject to the TPRA in *Schneider v. City of Jackson*, 226 S.W. 3d 332 (Tenn. 2007). In *Schneider*, reporters from *The Jackson Sun* made a public records request for records that included “field interview cards generated by policy officers of the City.” *Id.* at 334-335. The initial request was denied as was a subsequent request made by legal counsel for *The Jackson Sun*. *Id.* at 335. A lawsuit was then filed demanding production of the requested records. *Id.* at 339. In its analysis, the Court reaffirmed its decision in *Appman*. *Id.* at 341. Additionally, the Court concluded that although the City had not asserted that the records were exempt from public inspection based upon Tenn. R. Crim. P. 16(a)(2) at the show cause hearing, “harmful and irreversible consequences could result from disclosing files that are involved in a pending criminal investigation.” *Id.* at 345-346. As such, the case was remanded to the trial court to give the City time to review the field cards and for an in camera review and determination as to what if any portions of the field interview cards were relevant to “an ongoing criminal investigation and exempt from disclosure.” *Id.* at 346.

In addition to the cases referenced above, the Tennessee Attorney General has also opined that any record made by the district attorney general, persons who are agents for the state, or law enforcement officers that is relevant to a pending or contemplated criminal action is exempt from public inspection based upon Tenn. R. Crim. P. 16(a)(2).

See Tenn. Op. Atty. No. 08-147 (Sept. 11, 2008)(to the extent any criminal prosecution is being contemplated, a request for access to a list created by Tennessee Department of Safety during an investigation into unauthorized use of the Integrated Criminal Justice Web by a state trooper is not required to be disclosed) and Tenn. Op. Atty. No. 05-155 (Oct. 13, 2005)(access to 911 recordings can be denied or delayed if relevant to a pending criminal investigation or prosecution).

Conclusion

For the above mentioned reasons, it is the opinion of this Office that a request made pursuant to the TRPA for any record made by the district attorney general, persons acting as agents for the state, or law enforcement officers, in connection with a pending or contemplated criminal action, whether investigatorial or prosecutorial in nature, may be denied based upon Tenn. R. Crim. P. 16(a)(2). As is the case here, Tenn. R. Crim. P. 16(a)(2) also permits a records custodian to deny a request for statements made by those who are or could potentially be a witness for the state in a criminal prosecution.

It is also important to note however that while a request for inspection and/or duplication of records relevant to a contemplated or pending criminal action may be denied based upon Tenn. R. Crim. P 16(a)(2), law enforcement and the district attorney general do retain the discretion to release such records.

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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