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Ms. Faulkner, Mr. Stafford, and Mr. Parker:

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

- (1) What does the Tennessee Public Records Act (hereinafter "TPRA") require a records custodian to do when a request for a public record has been made for records maintained by the records custodian?
- (2) Are incident reports and other local law enforcement investigative records relevant to adult defendants and closed criminal actions public records that are required to be produced when a public records request for those particular records is made?

All of the requests have been consolidated into this single opinion.

I. Responsibilities of a Records Custodian

The overarching provision of the TPRA, Tenn. Code Ann. Section 10-7-503(a)(2), states in part:

- (A) All state¹, 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.
- (B) The custodian of a public record or the custodian's designee shall promptly make available for inspection² any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:
 - (i) Make the information available to the requestor;
 - (ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or
 - (iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce the record or information.

Tenn. Code Ann. Section 10-7-503(a)(3) goes on to state that failure to respond to a request in accordance with the above-mentioned provision constitutes a denial and the requestor then has the right to bring a lawsuit in accordance with Tenn. Code Ann. Section 10-7-505.

Therefore, when a citizen of Tennessee makes a public records request to a records custodian, the custodian is required to allow the requestor to inspect and/or copy any public record made or received by the governmental entity unless there is a provision in law that exempts the record from public access. The records custodian is required to respond to the request in one of the above-mentioned ways within seven (7) business days from the date the request was made.

In addition to providing a time frame in which a records custodian has to respond to a public records request, the TPRA also provides records custodians with guidelines as to what can and cannot be required from an individual making a request for public records. Tenn. Code Ann. Section 10-7-503(a)(7)(A) states that a records custodian may neither require a requestor to make a request to inspect in writing nor charge a requestor to inspect public records. The provision also states that a records custodian may require both a request for copies to be made in writing and presentation of government issued photo identification with an

¹ Tenn. Code Ann. Section 10-7-503(a)(1) defines "public records" or "state 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."

² In addition to making records available for inspection, a records custodian is also required to make copies of records, if copies are requested. Tenn. Code Ann. Section 10-7-506(a) states, "In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or such custodian's authorized deputy; provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats."

address on it, or another acceptable form of identification, from an individual requesting either inspection or copies. Finally, Tenn. Code Ann. Section 10-7-503(7)(C)(i)-(ii) states that a records custodian may require a requestor to pay the reasonable cost associated with producing the requested records, as long as the costs are assessed in the manner established by the Office of Open Records Counsel.³

Additional responsibilities of records custodians are found in case law. In *Eldridge v. Putnam County*, the Tennessee Court of Appeals found that when there is confidential information within a record, the record custodian is responsible for redacting any information within the record that is confidential pursuant to state law prior to making the record available for public inspection and/or copying. *Eldridge v. Putnam County*, 86 S.W. 3d 572, 574 (Tenn. Ct. App. 2001). In *Waller v. Bryan*, the Tennessee Court of Appeals found that when a records request is sufficiently detailed, the requestor does not have to make the request in person and the requestor can request that the records be delivered through the mail. When such a request is made, the records custodian is responsible for mailing the records, but does have the ability to assess a fee for both producing the records and mailing the records. *Waller v. Bryan*, 16 S.W. 3d 770, 774 (Tenn. Ct. App. 1999). Finally, in *Tennessean v. Electric Power Board of Nashville*, the Tennessee Supreme Court found that when information is maintained electronically and a requestor requests the information in a certain format, the governmental entity is required to create a program or use an existing program and extract the information in the requested format; however, the requestor is required to pay the cost associated with producing the information in the format requested. *Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 305 (Tenn. 1998).

While you have specifically asked what a records custodian is required to do when a public records request is made for records maintained by the custodian, it is also important to note what a records custodian is not required to do when responding to a request. Tenn. Code Ann. Section 10-7-503(4) and (5) state that a records custodian is not required to sort through files to compile information or create a record that does not exist. Additionally, in *Waller v. Bryan*, the court said that a records custodian is not required to inspect records for a requestor; thus the request must be sufficiently detailed. *Bryan*, 16 S.W. 3d at 774. Finally, in *Wells v. Wharton*, the Tennessee Court of Appeals found that as long as a record is not distorted or access to the record inhibited, a records custodian is not required to provide the record to the requestor in the format requested. *Wells v. Wharton*, 2005 WL 3309651 at *9 (Tenn. Ct. App. Aug. 21, 2006).

II. Local Law Enforcement Records

Local law enforcement records, which include incident reports, sound recordings, video recordings, and pictures, are public records just like all other records made or received by a governmental entity. However, the fact that local law enforcement records are public records does not mean that the records are accessible to the public at all times. As stated previously, Tenn. Code Ann. Section 10-7-503(a)(2) requires that all state, county, and municipal records be accessible by Tennessee citizens, unless a provision within state law provides an exception to access. 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).

Tenn. R. Crim. P. 16(a)(2) which provides one such exception, reads as follows:

³See the Schedule of Reasonable Charges at:

[http://www.tn.gov/comptroller/openrecords/pdf/ScheduleofReasonableCharges\(final\)8.pdf](http://www.tn.gov/comptroller/openrecords/pdf/ScheduleofReasonableCharges(final)8.pdf).

(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.

In *Appman v. Worthington*, the Tennessee Supreme Court said the following with regard to the interplay between Tenn. R. Crim. P. 16(a)(2) and public records requests for law enforcement records:

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.

746 S.W. 2d 165, 166 (Tenn. 1987).

The court most recently re-examined the interplay between Tenn. R. Crim. P. 16(a)(2) and public records requests for law enforcement records 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. 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.

Additionally, the Tennessee Attorney General has also opined that any internal record made by the district attorney general, agents of 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).

In looking at the above-cited case law and attorney general opinions, it is clear that only those local law enforcement records that are open and relevant to a pending or contemplated criminal action are going to be exempt from public access pursuant to Tenn. R. Crim. P. 16(a)(2). If an investigation is closed and the local law enforcement records related to the investigation are not relevant to a pending or contemplated criminal action, then the records are accessible to the public and access must be provided if requested.

It is important to mention that in addition to Tenn. R. Crim. P. 16(a)(2), Tenn. Code Ann. Section 37-1-154 provides an exception to access to law enforcement records related to cases that are being adjudicated in

juvenile court; however, since you have asked specifically about cases involving adult defendants, there is no need to discuss this point in detail.

III. Conclusion

Pursuant to the TPRA, a records custodian has a number of responsibilities. Primarily, a records custodian is responsible for responding to public records requests in accordance with Tenn. Code Ann. Section 10-7-503, reviewing and redacting confidential information from records, and thereafter providing access or copies to public records that are responsive to a records request and are not otherwise exempt from public access. Additionally, if a request is made for local law enforcement records that are related to closed investigations and the requested records are not relevant to a pending or contemplated criminal action, then a records custodian is required to allow the requestor to inspect and/or receive copies of the records, whether the records are reports, sound recording, pictures, or any other record that constitutes a "public record."

Please feel free to call me at (615) 401-7891 if you have any further questions.

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