



**STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
OFFICE OF OPEN RECORDS COUNSEL
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**Justin P. Wilson
Comptroller**

May 16, 2011

Ms. Jill Madajczyk
Memphis City Attorney's Office
125 N. Main St. Room 336
Memphis, Tennessee 38103

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

1. Is the City of Memphis (hereinafter referred to as the "City") required to provide a reporter for a local news station physical access to cellular phones purchased by the City that have service that is paid for by the City in order to respond to the reporter's public records request for access to all text messages sent and received on the phones by city employees?

I. Background

On January 21, 2011, an investigative reporter with a local news station made a public records request to the Memphis City Attorney's office for copies of "all incoming and outgoing SMS and MMS messages from City of Memphis Verizon phones during the last 7 days." As a result of the request, the City Attorney's office contacted the cellular phone service provider to determine how copies of the requested messages could be provided for each of the 200 city owned phones. The service provider informed the city that a notarized consent form had to be obtained from every user in order for the messages to be provided. On January 25, 2011, this information was provided to the reporter and on January 27, 2010, the reporter revised her request to read:

We would like to request access to all incoming and outgoing SMS and MMS messages from all City of Memphis phones. Please include the "Content of Text", not just the "Text Detail"...Also, to be clear, we're not requesting a specific date or week of messages. We are requesting access to the messages that are available at the time when the Consent Form has been sent to the carrier.

The reporter also made it clear that she would be making the request for the text messages on a weekly basis.

After receiving the reporter's revised request, the City began obtaining the notarized consent forms required by the service provider from every City employee who uses a City owned cellular phone. On April 2011, after all of the consent forms were obtained, the City and the service provider discussed both the process and costs associated with providing the requested text messages. On April 12, 2011, the City made the reporter aware that in order to place a 30 day hold on text messages, a \$50.00 charge would be assessed for each cellular phone and the text messages copied would only cover a 3-5 day time period. The reporter was told that it would cost a total of \$10,000.00 to place a text message hold on all 200 City owned cellular phones and that payment would be required from the requestor before any additional action was taken by the City. In response to this information, the request was again revised and physical access to the cellular phones has been requested so that the text messages can be inspected.

II. Analysis

The Tennessee General Assembly has declared that the Tennessee Public Records Act "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. Section 10-7-505(d). In turn, the courts in Tennessee have held that unless there is an exception for the disclosure of a record, disclosure is required "even in the face of serious contravailing considerations." *Memphis Publishing Company v. City of Memphis*, 871 S.W. 2d 681, 684 (Tenn. 1994). Tenn. Code Ann. Section 10-7-503(a)(1) defines what constitutes a "public record" for purposes of this part of the Tennessee Public Records Act (hereinafter "TPRA") and reads:

As used in this part and title 8, chapter 4, part 6, "public record or records" or "state record or records" means 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)(2)(A) goes on to require that all public records, whether maintained by a state, county, and municipal governmental agency, be open for public inspection by a citizen of Tennessee during normal business hours, unless there is a provision within state law that makes the record or a portion thereof confidential.

Based upon the above cited provisions, it is the opinion of this office that any text messages made or received on the City owned cellular phones that relate to City business are public records that are accessible to the public unless there is a provision that makes the entire text message or a portion of the content of the text message confidential. However, it is also the opinion of this office that the City is not required to provide the requestor physical access to the City owned cellular phones in order to respond to her request to inspect the text messages. When read together, Tenn. Code Ann. Section 10-7-503(a)(1) and Tenn. Code Ann. Section 10-7-503(a)(2)(A) provide the public with the right to inspect records, copies, extracts, etc., that are "made or received pursuant to law or ordinance or in connection with the transaction of official business." But, these provisions in no way provide the public with the right to access the equipment upon which the records, copies, extracts, etc. are made or received for a variety of reasons, the most important being the concern related to maintaining the confidentiality of certain records and information.

The courts in Tennessee have consistently held that when a record is requested pursuant to the TPRA, the records custodian is both entitled to and required to review the record and redact any

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confidential information from the record before making it accessible to the public. *See Eldridge v. Putnam County*, 86 S.W. 3d 572,574 (Tenn. Ct. App. 2001), *Schneider v. City of Jackson*, 226 S.W. 3d 332, 345 (Tenn. 2007) and *Kersey v. Jones*, 2007 WL 2198329 at*4 (Tenn. Ct. App. July 23, 2007). Therefore, even if the City would prefer to provide the requestor physical access to the City owned cellular phones so that the text messages could be inspected, it is the opinion of this office that if there is any confidential information contained in the text messages or contained elsewhere on the phones, physical access to the phones is prohibited until such times as the confidential information is removed. Additionally, because it is only those records that constitute “public records” that the public has the right to access, it is the opinion of this office that the City would not be required to allow a requestor to inspect any text message that was not a “made or received pursuant to law or ordinance or in connection with the transaction of official business” by the City.

Based upon the abovementioned, it is the opinion of this office that the City is not required to and in some situations may not be permitted to provide the requestor physical access to City owned cellular phones in order for the requestor to inspect text messages sent and received from those phones. However, it is also the opinion of this office that the City is required to take whatever steps are necessary to make those text messages that are “public records,” are not confidential, and are maintained on the 200 City owned cellular phones accessible to the requestor whether it be through copies and/or inspection.

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

Elisha D. Hodge
Open Records Counsel

Cc: Keli Rabon, WREG News Channel 3