

TRANSPARENCY IN GOVERNMENT: PUBLIC RECORDS ACT & OPEN MEETINGS ACT

2023 Court Clerks Conference

J. Seth May, Assistant General Counsel
Office of Open Records Counsel



ABOUT THE OORC

Office of Open Records Counsel

- Created in 2008
- Helps citizens and government officials better understand Tennessee's laws on public records and open meetings.
 - Respond to questions and concerns
 - Educational outreach
 - Develop forms, schedules and policies for public record requests
 - Post resources on its website



OFFICE OF OPEN RECORDS COUNSEL

Policies and Guidelines

- Best Practices
- Model Public Records Policy
- Schedule of Reasonable Charges
- Charges for Frequent Requests
- Safe Harbor Policy
- Informal Advisory Opinions
- Mediation of Records Disputes
- Records Request Form, Records Response Form
- Internet Forum Approval



OFFICE OF OPEN RECORDS COUNSEL

Benefits of Utilizing OORC

- Determination of “Willfulness”
 - No Attorney Fees
- Schedule of Reasonable Charges
 - Charges Presumed Reasonable
- Familiarity with Records/Meetings Issues
- Neutral Intermediary
- We’re FREE



OFFICE OF OPEN RECORDS COUNSEL

OORC Website



TENNESSEE PUBLIC RECORDS ACT

Symbol of Transparency

“Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee.”

- 🌐 *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007).



TENNESSEE PUBLIC RECORDS ACT

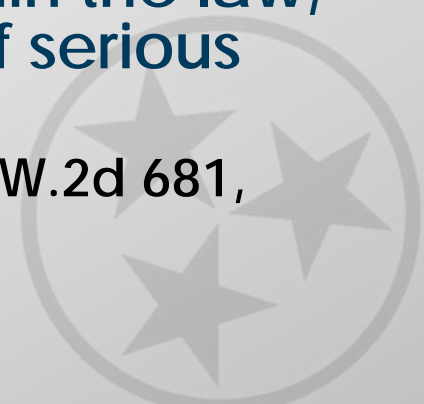
Tenn. Code Ann. § 10-7-503

- ⊛ All public records shall,
 - ⊛ during business hours,
 - ⊛ be open to inspection,
 - ⊛ to any Tennessee citizen,
 - ⊛ unless otherwise provided by state law.
- ⊛ Creates a presumption of openness!
 - Records are open to Tennessee citizens unless state law provides otherwise



INTERPRETED BROADLY

- Courts are to interpret the provisions of the TPRA broadly so as to give the fullest possible public access to public records.
 - Tenn. Code Ann. § 10-7-505(d).
- TPRA expresses a clear legislative mandate favoring disclosure of government records.
 - *State v. Caewood*, 134 S.W.3d 159, 164-5 (Tenn. 2004).
- Unless there is an express exemption within the law, disclosure is required “even in the face of serious countervailing considerations.”
 - *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).



WHO IS SUBJECT TO THE TPRA?

Government Entities

- State, county and municipal records
- Includes departments, divisions, boards and other separate units of government created by law or pursuant to law.
 - Tenn. Code Ann. § 10-7-503(a)(1) & (2).



WHO CAN ACCESS RECORDS?

- Open for personal inspection *by “any citizen of this state.”*
- May require presentation of photo ID that includes the person’s address or require alternative acceptable forms of ID.
 - Driver License
 - Student ID
 - Utility Bill
 - Proof of Property Ownership
- Proof of citizenship is discretionary
- Should be included in Public Records Policy
- Does not include corporations or other artificial entities



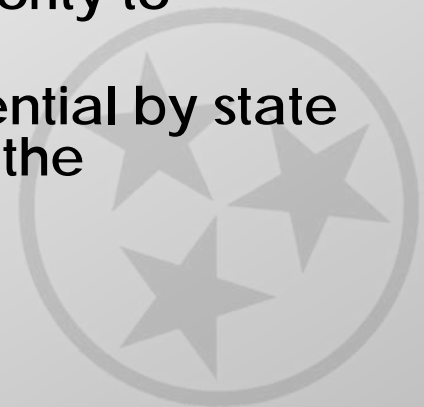
WHO CAN ACCESS RECORDS?

Intra and Intergovernmental Requests

- Typically not treated as formal public record request because sharing info as transaction of official gov't business.
- Confidentiality not waived and ongoing duty to maintain confidential information/records
- May want agreement re intergovernmental requests

When other gov't entities should not access records

- Request is from a federal agency without authority to access the records
- Records/Information sought are made confidential by state law and enumerates specific entities to which the records/information may be released



WHAT IS A “PUBLIC RECORD”?

Tenn. Code Ann. § 10-7-503(a)(1)(A)

- Made or received pursuant to law or ordinance; or
- In connection with the transaction of official gov't business.
- Does not include the actual device or equipment.
- Includes draft records.
- “Public Record” determined by substance of the record.



WHAT IS A “PUBLIC RECORD”?



TYPES OF PUBLIC RECORDS

Common “Public Records”

- ⊗ Records filed with a court, including evidence
- ⊗ Emails, texts, tweets, FB posts
- ⊗ Video recordings/surveillance
- ⊗ Personnel records/HR Investigations/Applicant Records
- ⊗ Travel/leave information
- ⊗ Meeting agenda and minutes
- ⊗ Contract/bidding documents
- ⊗ Budget records
- ⊗ Financial records



EXCEPTIONS TO THE TPRA

“Unless otherwise provided by state law”

- Tenn. Code Ann. § 10-7-504

- 50+ Exceptions; 600+ elsewhere in Tennessee Code

- “‘State law’ includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations.”

- *Tennessean v. Metro. Gov’t of Nashville and Davidson Cnty.*, 485 S.W.3d 857, 865-66 (Tenn. 2016), citing *Swift v. Campbell*, 159 S.W.3d 565, 571-72 (Tenn. 2004).

- OORC Report on Statutory TPRA Exceptions



EXCEPTIONS TO THE TPRA

Common Exceptions

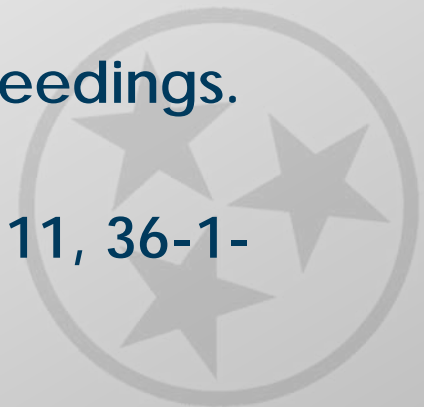
- Gov't Employee Personnel Information
- State Employee Performance Evaluations
- Personally Identifying Information
- Security/Surveillance of Gov't Buildings
- TBI Files
- Juvenile Information/DCS Files
- Medical Information – HIPAA
- Student Information – FERPA
- Proprietary Information/Trade Secrets



EXCEPTIONS TO THE TPRA

Court Clerk Exceptions

- ❁ Documents submitted with orders of protection, not including standard forms. Tenn. Code Ann. §10-7-504(a)(16)(I).
- ❁ Caseload data and information regarding persons adjudicated mentally defective or judicially committed. Tenn. Code Ann. §§ 16-1-117, 33-3-115.
- ❁ Jury book if unable to automate jury lists. Tenn. Code Ann. § 22-2-302.
- ❁ Records related to outpatient treatment proceedings. Tenn. Code Ann. § 33-6-624(e)(5).
- ❁ Adoption records. Tenn. Code Ann. §§ 36-1-111, 36-1-116, 36-1-118, 36-1-125, 36-1-126



EXCEPTIONS TO THE TPRA

Court Clerk Exceptions

- Juvenile court records. Tenn. Code Ann. §§ 37-1-153, 37-1-154.
- Reports of pregnancy related to statutory rape, unless court orders otherwise. Tenn. Code Ann. § 38-1-304.
- Shoplifting settlement agreements. Tenn. Code Ann. § 39-14-144.
- Expunged records maintained by courts. Tenn. Code Ann. §§ 40-32-101, 40-32-105.
- Grand Jury information/proceedings. Tenn. Code Ann. § 40-12-209
- Ignition interlock information. Tenn. Code Ann. § 55-10-423

EXCEPTIONS TO THE TPRA

Tenn. R. Sup. Ct. 34

- Court Records include Case Records, Administrative Records, and Judicial Records.
 - (i) Case Record means any record created, collected, received, or maintained by the courts as a part of the official court file in connection with a particular case.
 - (ii) Administrative Record means any record created, collected, received, or maintained by the courts pertaining to the administration of the courts and not associated with a particular case.
 - (iii) Judicial Record means any record of the courts other than Case Records or Administrative Records.



EXCEPTIONS TO THE TPRA

Tenn. R. Sup. Ct. 34

- The following Court Records shall be treated as confidential and shall not be open for inspection by members of the public:
 - (i) Documents expressly excepted from inspection under the Public Records Act, Tennessee Code Annotated section 10-7-504, or otherwise excepted from inspection under state law, Tennessee Code Annotated section 10-7-503(a)(2)(A);
 - (ii) Documents protected from disclosure by order or rule of court, including but not limited to documents sealed pursuant to an order of the court or the subject of a protective order;
 - (iii) Unpublished drafts of judicial orders and opinions;

EXCEPTIONS TO THE TPRA

Tenn. R. Sup. Ct. 34

- (iv) Copies, unless intentionally filed as part of the Case Record, of motions, petitions, briefs, and other similar documents filed with the clerks of the courts that have been furnished to a judge for his or her individual use;
- (v) Written or electronic conference records, notes, memoranda, reports, or other documents of a similar nature prepared by a judge, judicial staff, or the Administrative Office of the Courts on behalf of, or at the direction of, a court or judge. This includes written or electronic records, notes, memoranda, reports, or other documents of a similar nature created or received as a part of a court's judicial or administrative deliberative process unless intentionally filed as part of the Case Record;

EXCEPTIONS TO THE TPRA

Tenn. R. Sup. Ct. 34

- (vi) All internal case management information except for information concerning the composition of appellate case panels assigned to consider a particular case;
- (vii) Information maintained by individual judges with regard to their recusal from particular cases unless the information is intentionally filed as part of the Case Record or unless it is subject to disclosure pursuant to Tenn. Code Ann. §§ 8-50-501, 8-50-506 or Tenn. S. Ct. R. 10; and
- (viii) Any other written or electronic record the disclosure of which would frustrate or interfere with the judicial function of the courts or potentially undermine the inherent constitutional powers granted the court, in addition to the powers recognized in Tennessee Code Annotated sections 16-3-501 through 16-3-504.

EXCEPTIONS TO THE TPRA

Tenn. R. Crim. P. 16

- Materials relevant to ongoing or pending criminal proceedings are not subject to disclosure.
 - *Tennessean, et al. v. Metro. Gov't of Nashville and Davidson Cnty., et al.*, 485 S.W.3d 857 (Tenn. 2016)
- Applies to proceedings for post-conviction relief
 - Some district attorneys are prohibiting disclosure until 1 year after judgment



BASIC TPRA ANALYSIS

First:

- 🌐 Is requestor a TN citizen?
- 🌐 Is it a request for public records?
 - Are they asking for records or just asking questions?
 - Not everything is a public record
 - Can you tell what's being requested?
- 🌐 Do records exist?

Then:

- 🌐 Respond:
 - Request more info – driver's license, clarification of what records they want
 - Approve
 - Deny
 - Timeline to respond



PUBLIC RECORDS POLICY

Tenn. Code Ann. § 10-7-503(g)

Every Gov't Entity must have a policy that includes:

- Process for making requests, including any required forms;
 - Process for responding to requests;
 - Statement of fees and billing/payment procedures; and
 - Contact information for the Public Records Request Coordinator ("PRRC").
- OORC Model Policy released January 2017



RECEIVING TPRA REQUESTS

Tenn. Code Ann. § 10-7-503(a)(7)

- ⊕ Requests for only inspection do not have to be in writing and may be made:
 - In person, telephone, fax, mail, email (if used) or internet portal (if used).
- ⊕ Requests for copies can be required to be in writing or on a form developed by OORC and may be made:
 - In person, mail, email (if used) or internet portal (if used).
- ⊕ Any required forms should be included in policy and must be made readily available to requestors

RESPONDING TO TPRA REQUESTS

- ⊕ A records custodian may require a request for copies to be in writing but cannot require a request to be in writing if a requestor only wants to view the records.
- ⊕ A records custodian may not assess a charge if requestor only views/inspects public records.
- ⊕ A custodian may require a requestor to produce a government-issued photo identification with an address in order to inspect or receive copies of records.
- ⊕ Records requests “shall be sufficiently detailed to enable the custodian to identify the specific records” requested.

RESPONDING TO TPRA REQUESTS

- ❖ A records custodian is not required to compile information from records or create a document that does not already exist in order to fulfill a public records request.
- ❖ A records custodian may require an appointment to view a public record when there is a reasonable basis for requiring the appointment. Absent a reasonable basis, a court would likely view requiring an appointment to be tantamount to a denial or delay in access.



RESPONDING TO TPRA REQUESTS

Electronic Records

- ⊕ Not required to convert paper records into electronic format, BUT required to produce records electronically if records held electronically
- ⊕ Must produce records in format in which they are typically held or other unaltered format
 - Requestor cannot dictate electronic format
- ⊕ Only charge for copies if electronic copy must be printed – usually only have labor charges



RESPONDING TO TPRA REQUESTS

Tenn. Code Ann. § 10-7-503(a)(2)(B)

- ⊕ Shall promptly make records available
- ⊕ If not practicable to make promptly available, must do one of the following within 7 business days:
 - Make the information available;
 - Deny the request in writing with the basis for denial; or
 - Furnish a completed record request response stating the time reasonably necessary to produce the records or information.
- ⊕ Failure to respond as indicated above = denial



RESPONDING TO TPRA REQUESTS

Grounds for Denying Requests

- ❖ Cannot identify responsive records
 - Seek clarification, if possible
- ❖ Records do not exist
- ❖ No proof of citizenship
- ❖ Not a Tennessee citizen
- ❖ Has not paid for copies
- ❖ State law makes the records confidential



CHARGING FOR PUBLIC RECORDS

OORC Schedule of Reasonable Charges

- 🌐 Schedule sets forth reasonable charges for copies and labor
 - Can charge for copies and labor
 - \$.15 per page/\$.50 per page for color
 - Use lowest possible labor
 - One-hour labor threshold
 - Can charge for redaction of copies
 - Can only charge for labor related to providing electronic copies unless physical copies are printed
- 🌐 Must provide estimate of costs
- 🌐 Cannot charge if only inspecting records



CHARGING FOR PUBLIC RECORDS

Court Clerks Are Special

- Court clerks do have separate statutory authority to charge .50 cents per page for providing copies of court records. Tenn. Code Ann. § 8-41-201.
- Court clerks have a statutory basis for charging a per-copy amount that is higher than the amounts set forth in our office's Schedule of Reasonable Charges.



TPRA PENALTIES

Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)

Failure to Inspect

- 2 or more requests to inspect in 6 months
- Fails to view records within 15 days of being notified that records are available to view
- No TPRA requests for 6 months, unless failure to view was for "good cause."

Failure to Pay for Copies

- Government entity provides estimate of costs
- Requestor agrees to pay estimated costs
- Requestor fails to pay for copies after they are produced
- No more TPRA requests until requestor pays costs



PETITIONING FOR ACCESS

Tenn. Code Ann. § 10-7-505

⊕ Denial Required

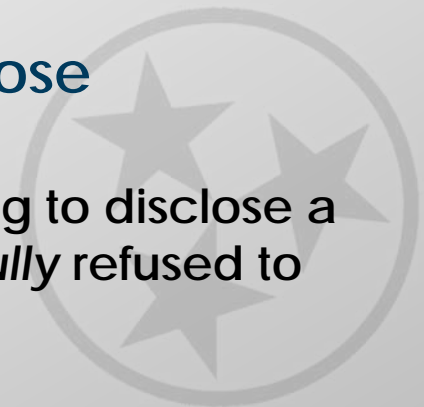
- Failure to respond in accordance with 503 = denial
- Imposition of unreasonable fee = denial

⊕ Petition filed in chancery or circuit court

⊕ Burden is on governmental entity to prove denial was justified

⊕ Court orders access to records and may impose attorney's fees if it finds denial was "willful."

- "[T]he governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and *willfully* refused to disclose it." Tenn. Code Ann. § 10-7-505(g).



RECORDS RETENTION

Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)

🌐 Municipal Records – MTAS

- Tenn. Code Ann. § 10-7-702 authorizes the Municipal Technical Advisory Service to compile and print a records retention manual for municipalities.
- <http://mtasresource.mtas.tennessee.edu/reference/retention-schedules>

🌐 County Records - CTAS

- Tenn. Code Ann. § 10-7-404 authorizes the County Technical Assistance Service to compile and print a records retention manual for counties.
- <http://eli.ctas.tennessee.edu/reference/current-retention-schedules>

CONTACT INFORMATION

Maria Bush or Seth May
Office of Open Records Counsel
615.401.7891

open.records@cot.tn.gov

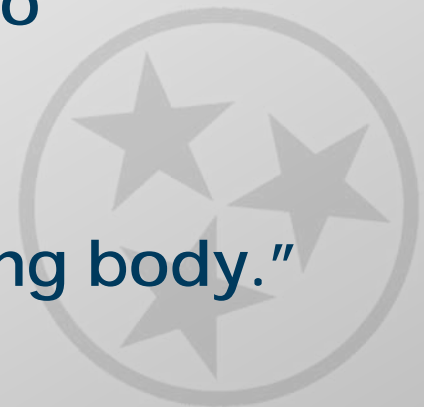
<http://www.comptroller.tn.gov/openrecords>



TENNESSEE OPEN MEETINGS ACT

Tenn. Code Ann. § 8-44-101, *et. seq*

- ⊕ The formation of public policy and decisions is public business and shall not be conducted in secret.
- ⊕ Construed broadly in favor of the public.
- ⊕ Provides the right to attend, not the right to participate.
- ⊕ Applies to all “meetings” of any “governing body.”

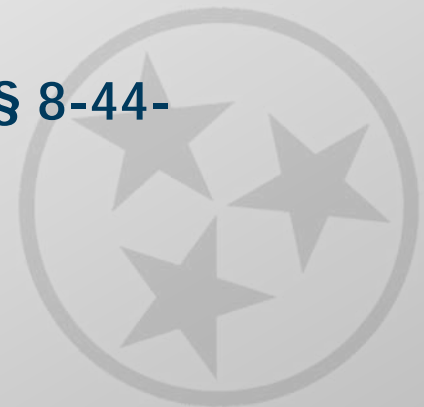


TENNESSEE OPEN MEETINGS ACT

What is a meeting of a governing body?

🌐 “Governing Body”

- Members of a public body of 2 or more members with authority to make decisions for or recommendations to a public body on policy or administration.
- “Public body” - origin and authority may be traced to legislative action and members have authority to make decisions or recommendations on policy or administration affecting government business. *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976).
- Includes certain non-profits. Tenn. Code Ann. § 8-44-102(b)(1)(E)(i).



TENNESSEE OPEN MEETINGS ACT

What is a meeting of a governing body?

"Meeting"

- Convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision.
- Members must discuss or deliberate matters a quorum of the body would need to vote upon. Johnston v. Metro. Gov't of Nashville & Davidson Cnty., 320 S.W.3d 299, 303 (Tenn. Ct. App. 2009)
- "Discuss or Deliberate" = weigh arguments for or against
- Doesn't include executive sessions or workshops
 - Can always have executive session with attorney, but members still cannot discuss or deliberate during executive session

TENNESSEE OPEN MEETINGS ACT

TOMA Requirements

- “Meetings” must be open to the public
- “Adequate Public Notice”
- Meeting Minutes
 - Persons present
 - Motions, proposals and resolutions offered
 - Results of any votes
- All votes by public vote, public ballot or public roll call



TENNESSEE OPEN MEETINGS ACT

“Adequate Public Notice”

- Not defined in TOMA
- Depends on the totality of the circumstances
- Sufficient if:
 - Gives interested citizens a reasonable opportunity to exercise their right to attend.
- Content of the notice should reasonably describe proposed actions or decisions
 - TOMA does not require agenda to be included as part of notice, but advisable for specially called meetings.

TENNESSEE OPEN MEETINGS ACT

“Executive Sessions”

- **Meeting with Attorney**
- **Informational Sessions/Workshops**
- **Hospital Boards**
- **School Safety Planning**
- **Government Audit Committees**



TENNESSEE OPEN MEETINGS ACT

TOMA OOPS!

- ⊙ What if a governing body violates TOMA?
- ⊙ Any action taken in violation of TOMA is null and void, except commitments affecting public debt.
 - Tenn. Code Ann. § 8-44-105
- ⊙ Court has broad jurisdiction to issue injunctions, impose penalties and otherwise enforce purpose of TOMA.
 - Tenn. Code Ann. § 8-44-106
 - Court retains jurisdiction and governing body must report to the court semi-annually re TOMA compliance

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