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Open Records: A Guide for Municipal Officials (2008)

Josh Jones

Municipal Technical Advisory Service, jonesj@tennessee.edu

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OPEN RECORDS: A GUIDE FOR MUNICIPAL OFFICIALS

Josh Jones, Legal Consultant

December 2008

THE UNIVERSITY of TENNESSEE 
MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League



OPEN RECORDS: A GUIDE FOR MUNICIPAL OFFICIALS

Josh Jones, Legal Consultant

December 2008

MTAS OFFICES

Knoxville (Headquarters).....	(865) 974-0411
Johnson City	(423) 854-9882
	(423) 282-0416
Nashville.....	(615) 532-6827
Jackson	(731) 423-3710
Martin	(731) 587-7055

www.mtas.tennessee.edu

The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works,

law, ordinance codification, and wastewater management. MTAS houses a comprehensive library and publishes scores of documents annually.

MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a \$10 charge for additional copies of "Open Records: A Guide for Municipal Officials."

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A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governours, must arm themselves with the power which knowledge gives.

James Madison



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The University of Tennessee Municipal Technical Advisory Service and County Technical Assistance Service Statement on Open Records

1. A sound and equitably enforced open records policy is essential to a functioning local government and its citizenry.
 2. The public's right to inspect existing open records is inherent, and local governments should place no barrier in the way of rightful public access.
 3. Local governments should broadly construe open records policies so as to provide the fullest possible access.
 4. Cities should adopt open records policies that encourage the timely location and release of public records. Never should the release of records be unnecessarily or unreasonably delayed.
 5. Maintaining the confidentiality of protected records is of paramount importance to cities and city employees. Nonetheless, confidential information contained in an otherwise open record should not be used to deny citizen access to the whole document. Thus, a uniform and expedient redaction policy should be a part of every city's open records policy.
 6. Access to public records should not be cost prohibitive. To this end, cities should adopt uniform reasonable fees for providing copies of open records to citizens.
 7. Requests for records should be denied only where there is a clear showing of confidentiality. When required, cities should provide the requestor a written explanation.
 8. Requests, denials and releases of information should be documented. However, the refusal of a requesting citizen to complete paperwork should not be used by a city to deny access to public records.
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OPEN RECORDS: A GUIDE FOR MUNICIPAL OFFICIALS

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INTRODUCTION

As so eloquently stated by James Madison in the foreword to this guide, an informed constituency is at the heart of an effective democracy. And still today, some 200 years later, this proposition remains true.

The public's inherent right to inspect government records has officially been recognized by the state of Tennessee for more than 100 years. See *State ex rel. Wellford v. Williams*, 110 Tenn. 549 (Tenn. 1902). This right was statutorily adopted in 1957 by the enactment of the Tennessee Public Records Act (hereinafter "the act"). This law has since been amended by statutory enactments and interpreted by case law. From inception, the law in this arena has stressed disclosure wherever possible and struck down any avoidable barrier to public access.

This guide summarizes Tennessee's open records laws as of October 2008. The author recognizes the enormous task undertaken daily by municipal officials and employees who disseminate public records to requesting citizens. Every decision pertaining to open records made by a municipal agent has the potential for significant impact on the workings of the municipality. Contained herein are practical applications for municipal officials and employees who deal with these questions every day.

The general rule of the Tennessee Public Records Act is found at T.C.A. § 10-7-503(a) and reads:

All state, county and municipal records shall at all times, during business hours, be open for

personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

I. APPLICATION

The Tennessee Public Records Act is a statutory creation of broad scope and application. The legislature has stated that the act "shall be broadly construed so as to give the fullest possible public access to public records." T.C.A. § 10-7-705(d). The act requires that all state, county and municipal records be open for public inspection during normal business hours unless the records are confidential.

A. Who Is Entitled to Records?

Any citizen of the state of Tennessee is entitled to make requests for access to any public records. The attorney general opined in 2001 that persons who are not citizens of Tennessee may be denied access to public records. See Op. Tenn. Att'y Gen. 01-132 (Aug. 22, 2001). Other courts, however, specifically a federal district court, have found identification requirements to be improper impedances to access to public records. See *Lee v. Minner*, 369 F.Supp. 527 (Del. 2005).

The law permits a records custodian to require any citizen making a request to view a public record or to make a copy of a public record to present a government-issued photo identification that includes the person's address. If a person does not possess a photo identification, the records custodian may require other forms of identification acceptable to the records custodian.



For purposes of the act the term “citizen” is given a broad scope. Even a citizen with a felonious criminal record is entitled to make open records requests under the act. *Cole v. Campbell*, 968 S.W. 2d 274 (Tenn. 1998). Likewise, corporations and other conglomerations of persons are also considered citizens under the act and are entitled to request and receive public records in the same manner as individuals.

Municipalities may not deny access to public records based upon the requesting citizen’s use or intended use of the records. Requesters cannot be required to provide an explanation of their intended use of the records. Custodians of records should not inquire into a requester’s purpose for requesting the records. Questioning could be interpreted as an attempt to discourage citizens from seeking materials that they are legally entitled to inspect.

B. What Materials Are Covered by the Act?

Almost every record created, maintained or received by a municipal government is covered by the act.

The act defines “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. T.C.A. § 10-7-301(6).

Hence, to determine whether a document is a public record, one often must determine if the document was received in connection with the transaction of official business by any governmental agency. This determination should be made by considering the totality of circumstances.

It is important to note that just because a record is covered by the act it is not necessarily open

to public inspection. Many records covered are confidential and protected from disclosure.

C. Records of Nongovernmental and Quasi-Governmental Bodies

The act has been construed to cover the records of nongovernmental and quasi-governmental bodies in receipt of public monies as well as the boards of these bodies. To determine if the body is subject to the act, the Supreme Court offers a “functional equivalency” test. *Memphis Publishing Co. v. Cherokee Child & Family Services*, 87 S.W. 3d. 67 (Tenn. 2002). If the body is acting as the functional equivalent of government, its records are covered by the act. Here, too, one must consider the totality of circumstances; however, three factors mentioned as specifically relevant are:

1. The level of governmental funding;
2. The extent of governmental involvement or control; and
3. Whether the entity was created by the government.

Nongovernmental bodies found to be covered by the act include a sports authority pursuant to legislation, Op. Tenn. Atty. Gen. No. 96-011 (Feb 6, 1996); and sublessees of municipally owned property, *Creative Restaurants Inc. v. Memphis*, 795 S.W. 2d. 672 (Tenn. Ct. App. 1990).

D. Documents in Electronic and Other Nonpaper Formats

As the quantity of records produced by municipalities expands, the use of technology becomes increasingly necessary to process and store them. As this technology is implemented into the public sphere, municipalities must ensure that electronic storage does not fetter public access. For purposes of confidentiality, the act makes no distinction between electronic and paper records.

The legislative language defining public records is intentionally broad. The language of T.C.A. § 10-7-121 provides that electronically stored records must, like their paper counterparts, be made



available for public inspection. This, coupled with case law, solidifies the notion that regardless of format, a public record is open to the public during municipal business hours. T.C.A. §§ 47-10-101 *et seq.* allow cities to conduct business by electronic means and to determine the extent to which they will send, accept, and rely on electronic records and electronic signatures. T.C.A. § 47-10-112 provides that electronic records may be retained and have the same status as original records. The act covers a multitude of formats accepted as public records, including “electronic data.” The act does not, however, suggest that the requester has the right to choose in what format a requested record may be produced. The Tennessee Supreme Court has stated that if records are stored in an electronic database the producing municipality is required to provide the public information in the format requested. Hence, if a citizen requests a hard copy of a computerized spreadsheet or word processing document, it is the duty of the municipality to provide the hard copy. The *Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297 (Tenn 1998). This opinion additionally suggests that municipalities have the duty to perform reasonable searches for specific information contained within a more comprehensive electronic database if the requesting party is willing to pay the cost.

T.C.A. § 10-7-512 explicitly states that municipalities “shall adopt a written policy on any monitoring of electronic mail communications and the circumstances under which it will be conducted.” E-mail communications seem clearly subject to the act, but there is still question as to the openness of personal e-mails sent from government computers. It is best to assume that these, too, are open.

II. MUNICIPAL RECORDS CATEGORIES

A. Business and Financial Records and Contracts

Many of these types of records are confidential as

they are covered by statutory exemptions outside the act. They include:

- Proprietary information acquired by the Department of Economic and Community Development (See T.C.A. §§ 4-3-712, *et seq.*);
- Information submitted to or compiled by the Tennessee Competitive Export Corporation pertaining to commercially sensitive information (T.C.A. § 13-27-113);
- Information contained in examinations, reports, applications, credit, investments, financial statements, and balance sheets (T.C.A. § 45-7-216);
- Trade secrets, patentable information, proprietary information, and commercial or financial information used in university research (T.C.A. § 49-7-120);
- Trade secrets and other information disclosed to or obtained by the Department of Labor pursuant to enforcement of occupational safety and health laws (T.C.A. § 50-3-504, 914); and
- Information containing or revealing trade secrets obtained by the commissioner of labor while enforcing the Hazardous Chemical Right to Know Law (T.C.A. § 50-3-2013).

The names and addresses of owners and agents on business licenses are public record; however, other information appearing on business tax returns and license applications is confidential. (T.C.A. § 67-1-1702).

Case law suggests that the disclosure of information that would result in the disclosure of tax return information is protected from disclosure. *McClane v. State*, 115 S.W. 3d 925 (Tenn. Ct. App. 2002).

A 1996 Tennessee attorney general opinion stated that unpublished telephone numbers that were confidential under the terms of a contract between a private telecommunications carrier and a municipal utility were nonetheless public record. Furthermore, a municipal contract requiring the



confidentiality of these numbers is void against public policy. Op. Tenn. Atty. Gen. 96-144.

Contracts cannot affect the availability of otherwise public records. *Contemporary Media, Inc. v. City of Memphis*, 1999 WL 292264 (Tenn. Ct. of App., 1999).

B. Election Reports

Generally, election reports are open to public inspection. There are, however, statutory limitations. T.C.A. § 2-11-202(a)(5) protects reports of election law violation investigations. Additionally, the court of appeals has stated that these reports are public even where they are submitted to the Tennessee Bureau of Investigation as long as the request was made before delivery. In an opinion addressing the confidentiality of such records, the court promotes the notion that general intent and purpose of the act cannot be subverted by submitting otherwise open records to an exempted agency such as the TBI. *Chattanooga Publ'g Co. v. Hamilton County*, Not Reported in S.W. 3d, 2003 WL 22469808 (Tenn. Ct. App. May 8, 2003).

C. Personnel Records

Personnel records clearly fall under the act's definition of public record and are thus open to the public. Information including salary, disciplinary records, and employment applications is open for public inspection. Other personal information such as Social Security numbers, bank account and routing numbers, medical records, and driver's license information (unless driving is part of the employee's duties or job description) is confidential and should never be released. A 2008 public act made municipal employee home and personal cell telephone numbers and residential street addresses confidential.

Every personnel file contains confidential information. This is why original personnel files should never be released. Instead, even where

a citizen requests only inspection, a copy should be made, and all confidential information should be redacted before a citizen is allowed to view the records.

When a city participates in the Drug-Free Workplace Program, employee drug test results generally are protected from disclosure. T.C.A. § 50-9-109 specifically addresses drug test results. The statute states:

(a) All information, interviews, reports, statements, memoranda and drug or alcohol test results, written or otherwise, received by the covered employer through a drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery or disclosed in any public or private proceedings, except in accordance with this section or in determining compensability under this chapter.

The section goes on to say that this information remains protected until the tested person signs a voluntary consent form or a judicial ruling orders disclosure.

The confidentiality of these records is further cemented by a 1999 Tennessee attorney general opinion (Op. Tenn. Atty. Gen. No. 99-126, June 29, 1999). In this opinion the attorney general suggests that even where drug test results are kept in an employee's personnel file pursuant to the Drug-Free Workplace Program, they are nonetheless confidential and not subject to disclosure under the Tennessee Public Records Act. Furthermore, the opinion recommends the practice of maintaining all drug testing records separate from the employee's personnel file.

D. Police Personnel Records

Some of the most commonly requested personnel records are those of police officers. Law enforcement personnel records also are the most exempted, and subsequently litigated, personnel records.



When a request is made for the personnel records of a law enforcement officer, the municipality must, within three days, notify the officer whose records were requested. The notice must say that an inspection took place and note the name, address, and telephone number of the person making the inspection; for whom the inspection was made; and the date of the inspection. T.C.A. § 10-7-503(c). T.C.A. § 10-7-504(g)(1) (A) allows the chief to “segregate” personal information about any undercover police officer or member of his or her immediate family. The chief may refuse to release such information if he or she reasonably believes it may endanger the officer or the officer’s family.

In the 2007 legislative session, the procedures for reviewing and releasing law enforcement personnel records were expanded. Now, an officer’s address; home and cell phone numbers; place of employment; names, work addresses, and phone numbers of the officer’s immediate family; and the names, locations, and phone numbers of any educational institution or day-care center where the officer’s spouse or child is enrolled shall be redacted when there is a reason not to disclose the information as determined by the chief of police. This is in addition to the 2008 mandatory confidentiality of municipal employee home and personal cell telephone numbers and residential street addresses.

T.C.A. § 10-7-504 (g)(1)(A)(ii) requires the chief or the chief’s designee to make a determination “when a request to inspect includes such personal information *and the request is for a professional, business, or official purpose*” (emphasis added). However, under Tennessee law, a requesting citizen does not have to state his or her purpose for requesting records. This being the case, municipalities should have the police chief make the determination *every time* a request is made for personal information in a law enforcement personnel file. Considering a totality of the circumstances, the

chief will decide what of the personal information should be redacted and what should be released.

If the chief decides to withhold any information, he or she must give specific justification in writing to the requester within two days and release the redacted file. If the chief decides there is no justification for keeping the personal information confidential, the officer must be notified and given reasonable opportunity to oppose release. When the request is from a business entity, it must also include the name and contact information for a supervisor for verification.

E. Police Records

In 2007, the Tennessee Supreme Court ruled in *Schneider v. City of Jackson* that the law enforcement privilege has never been adopted as a common law privilege in this state. Hence, the law enforcement privilege is not an exception to the Public Records Act, and many police records are open to public inspection.

While police records generally are open to public inspection, some protections have been enacted to safeguard ongoing investigations. Police records open to the public include:

- Accident reports. All vehicle accident reports, including liability insurance information, is open to the general public, with confidential information redacted.
- 911 emergency dispatch recordings. Op. Tenn. Att’y Gen. 93-65 (Nov. 29, 1993).
- Arrest records. Some juvenile arrest records remain confidential. See T.C.A. 37-1-154.

F. Police Investigative Records

The primary factor in determining the openness of a police investigative file is whether or not it is part of an active investigation. Records contained in an active investigation generally are closed, under Rule 16 of the Tennessee Rules of Criminal



Procedure. This is an obvious measure established to protect the law enforcement officers involved and to ensure that criminal participants remain unaware of police surveillance.

Once an investigation is closed, however, the justifications for the exception disappear. For an in-depth discussion on the confidentiality of closed investigative files see *Schneider v. City of Jackson*, 226 S.W. 3d 332 (Tenn. 2007).

In part, *Schneider* dealt with police officer field interview cards requested by a citizen. The case held, among other things, that these field interview cards are not protected from disclosure by the act. The case, in part, was remanded to the lower court to allow for redaction of information directly related to ongoing police investigations. This court opined that a common law privilege has never been formally adopted by Tennessee law and is not available for the protection of law enforcement records.

G. Prison, Probation and Parole Records

Where the release of prison, probation, or parole records would result in jeopardizing the safety of inmates or correctional officers, the commissioner of correction may restrict access to these records. T.C.A. § 4-6-140(c). Other Department of Correction records are likewise protected. These include certain juvenile records and all investigative records of its internal affairs department. T.C.A. §§ 37-1-154 and 10-7-504 (a)(8). The Department of Correction is permitted to promulgate rules regarding the protection and distribution of its records. T.C.A. § 4-6-140(c). These rules, however, are public record. *Taylor v. Campbell*, LEXIS 85 (Tenn. Ct. App. 2001).

H. School and University Records

Records of students currently enrolled in public schools, including academic, financial, and medical records, are closed. However, statistical information not identified with a particular student may be released. Additionally, information relating only

to an individual student's name, age, address, dates of attendance, grade levels completed, class placement, and academic degrees awarded may be disclosed. T.C.A. § 10-7-504(a) (4).

Other public school records are open. These include athletic and trustee records so far as they do not disclose otherwise confidential information.

III. EXEMPTIONS

A. Confidential Exemptions

T.C.A. § 10-7-504 provides an extensive list of government records that are exempted from disclosure, and this statute is amended regularly. Following is a list of the most common exemptions for municipal records.

- Medical records of patients in state, county, and municipal hospitals and medical facilities and records concerning the source of body parts for transplantation or any information concerning persons donating body parts.
- Records of students in public educational institutions; however, statistical data not identified with a particular student may be released; and information relating only to an individual student's name, age, address, dates of attendance, grade levels completed, class placement, and academic degrees awarded may likewise be disclosed.
- Certain books, records, and other materials in the possession of the office of the attorney general relating to any pending or contemplated legal or administrative proceeding.
- Records of historical research value that are given or sold to public archival institutions, public libraries, or libraries of a unit of the Tennessee Board of Regents or the University of Tennessee when the owner or donor requires that the records are kept confidential. This exception does not apply to any records prepared or received in the course of operating state or local governments.
- Personal information contained in motor vehicle records.



- All memoranda, work notes or products, case files, and communications related to mental health intervention techniques conducted by professionals in a group setting to provide job-related critical incident counseling and therapy to law enforcement officers, EMTs, paramedics, or firefighters. This privilege may be waived.
- Records of any employee's identity, diagnosis, treatment, or referral for treatment by a state or local government employee assistance program.
- Unpublished telephone numbers in the possession of emergency communications districts.
- Information contained in employment records of municipal employees, including home or personal cell telephone numbers, residential street addresses, bank account information, Social Security numbers, or driver's license information (except where driving or operating a vehicle is part of the employee's job duties) of the employee or an immediate family or household member. [NOTE: Under the law, this information in employment records should be redacted whenever possible and not be used to limit or deny access to otherwise public information.]
- Certain personal information of undercover police officers and their immediate family and household members.
- Identifying information, such as unlisted telephone numbers, in the possession of a private or public utility service provider that could be used to locate an individual when the utility has been provided with a copy of a valid protection document and confidentiality has been requested.
- Contingency plans of law enforcement agencies to deal with bomb threats, terrorist acts and other acts of violence.
- Credit card numbers, Social Security numbers, account numbers, security codes, and other identifying information in the hands of a utility.
- Records of a utility that would identify areas of vulnerability or allow disruption of utility service.
- Any confidential public record in existence more than 70 years is open unless disclosure of the record is specifically prohibited or restricted by federal law or unless the record is a record of services for a person with mental illness or mental retardation.

B. Court Created and Other Exemptions

This list of confidential records found in T.C.A. § 10-7-504 is not exclusive, however, and many other statutes, rules, and the common law dealing with a subject can also make a specific record confidential. The following is a nonexhaustive list of statutes that designate certain records as confidential.

- Many records regarding juveniles. T.C.A. §§ 37-1-153, 37-1-154, 37-1-155, 37-1-409, 37-1-612, 37-1-615, 37-2-408.
- Law enforcement photographs and recordings of juveniles. T.C.A. § 37-1-155.
- Mental health intervention techniques for municipal correction officers and dispatchers. T.C.A. § 10-7-504(a)(13)(A).
- Certain student information.
- Whistleblowing reports of violations of the Education Trust in Reporting Act. T.C.A. § 49-50-1408.
- Certain records of an employer's drug testing program. T.C.A. § 50-9-109. (See Op. Tenn. Att'y Gen. 99-126).
- Tax returns, audits, letter rulings, and other taxpayer identifying information. T.C.A. § 67-1-1702.
- Business tax statements, reports, audits, and returns. T.C.A. § 67-4-722.
- Information or records held by a local health department regarding sexually transmitted diseases. T.C.A. § 68-10-113.
- Patient medical records of hospitals and local and regional health departments. T.C.A. § 68-11-305.
- Nursing home patient records. T.C.A. § 68-11-804.



Please note that this list highlights only some of the other provisions of the T.C.A. that make records confidential. Additionally, the Tennessee Court of Appeals held that municipal attorney work product is confidential. *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 784 (Tenn.Ct.App. 1999).

In addition to state law exceptions, there are federal statutes that create exemptions to the act. One example is the Health Insurance Portability and Accountability Act (HIPAA), which makes all documents relating to medical treatment confidential.

IV. POLICIES AND PROCEDURES

A. Open Records Procedures for Municipalities

Tennessee law allows municipalities to adopt reasonable rules and regulations for providing copies of public records. Every municipality should adopt an open records policy. Such a policy will not only make records custodians clear on the procedures for providing records to constituents but also will alleviate citizen concerns about access. A municipality's open records policy must, as a whole, harmoniously balance the municipality's need to preserve and maintain records with the public's right to inspect those records.

A sample open records policy is attached to the end of this document.

B. Fees and Copying

As stated previously, municipal records must be open to the public during regular business hours. A municipality has no legal authority to charge any fee for viewing and inspecting public records. T.C.A. § 10-7-123. If a citizen wants to merely view a public document, no fee can be assessed.

More often, however, the citizen will want a copy of the requested materials. If the record is open, the requestor has a right to that copy as the right to inspect public records includes the right to make copies. T.C.A. § 10-7-506(a). Municipalities may

adopt and enforce reasonable rules governing the making of copies of public records. *Id.* Before any costs can be assessed, a municipality must first adopt a policy setting reasonable charges.

Assessing costs associated with copying public records was a murky endeavor. The 2008 legislative session, however, charged the Office of Open Records Counsel with providing municipalities a schedule of fees. (See appendices.) Municipalities are not required to adopt this schedule; however, if a city's charges are higher it can be required to produce documentation justifying the difference. MTAS strongly encourages every municipality to align its fees with the schedule. The schedule sets the following as reasonable charges:

- Black and white copy,
8 ½ X 11 or 8 ½ X 14 \$0.15
- Color copy,
8 ½ X 11 or 8 ½ X 14 \$0.50

Duplication of other materials such as DVDs, CDs, audio tapes, maps, plats, etc. should be reproduced at actual cost. If a city lacks the means to reproduce a requested record, the records custodian may use a private vendor. When doing so, the custodian must use the most cost efficient method of reproducing the requested record. Please see the section of this publication addressing Requests for Records for further information on using private vendors to make copies of municipal documents.

T.C.A. § 10-7-504(f) suggests that confidential personnel information should be redacted wherever possible, and confidential information in the requested record cannot be used to limit or deny access.

In addition to copy costs, the schedule of fees allows municipalities now to charge for certain labor costs associated with fulfilling records requests. Labor as defined by the schedule is "the time



reasonably necessary to produce the requested records and includes the time spent locating, retrieving, reviewing, redacting and reproducing the records.” When assessing labor costs, a municipality can charge the hourly wage of the employee completing the request. The hourly wage is based on the base salary of the employee and does not include benefits.

Municipalities may recover all labor costs exceeding one hour required to complete a records request. When request production involves more than one employee, the schedule offers the following formula for calculating labor costs:

In calculating the charge for labor, a records custodian shall determine the number of hours each employee spent producing a request. The records custodian shall then subtract the one (1) hour threshold from the number of hours the highest paid employee(s) spent producing the request. The records custodian will then multiply the total number of hours to be charged for the labor of each employee by that employee’s hourly wage. Finally, the records custodian will add together the totals for all the employees involved in the request and that will be the total amount of labor that can be charged.

A municipality has the authority to waive costs for copying records when they are requested by a public official. MTAS suggests a policy of assessing no copying charges for requests made by public officials where the total cost, as prescribed for the general public, would not exceed \$25. For larger requests, where costs are above the limit, department heads should have the option to waive these fees when it is in the best interest of the municipality.

If a requesting party is not physically present and the requested records must be physically sent to the requester, case law states that cities may recover actual costs associated with delivery

of the records. *Waller v. Bryan*, 16 S.W. 3d 770 (Tenn. Ct. App. 1999).

C. Requests for Records

The Tennessee Court of Appeals opined that municipal officials cannot deny a citizen access to records based upon a refusal to make a request in writing. See *Wharton v. Wells*, 2005 WL 3309651. Nonetheless, to ensure accuracy of the records provided and to keep a record of what was requested and provided, the records custodian should keep written documentation. If the requesting citizen refuses to complete a written form, the records custodian or attending clerk should complete the form for the requester. A sample Request for Records form is provided at the end of this document.

The 2008 amendments to the act state that municipalities have seven days to respond to records requests. Before that seven-day period tolls, the municipality must provide the requestor with one of the following:

1. The records requested;
2. A written denial of the requested record with an explanation for denial; or
3. In the case of a voluminous request, an estimated date for completion of the request and an estimation of the charges.

Municipalities should make every reasonable effort to produce requested records immediately. Requests for voluminous or archival records will understandably require additional time. Even with voluminous requests, however, public records should be produced without unnecessary delay.

While the requesting citizen should make his or her request for public records to the department likely to house the records in question, most requests likely will be received by the records custodian. When requests made to the records custodian are for information housed in the files of specific departments, the records custodian should take these requests directly to the department head.



Each department head should be responsible for producing the requested documents within a reasonable amount of time.

For most requests, same-day production should be feasible, but certain factors can make same-day production impossible. These factors include the kind, amount, and nature of the records requested; uncertainty as to what records are requested; the location of the records requested; the format in which the records are requested; the extent of the department head's resources to locate the records at the time the request is made; intervening emergencies, problems, and other events that might reasonably delay the delivery of the records for inspection; and the propensity of the request to create undue disruption of other essential department functions. When records cannot be produced on the same day, the records custodian should notify the requesting party and provide the reason for the delay and the anticipated date of production. Regardless of the production time required, a municipality should take every precaution to not unnecessarily delay the delivery of requested records.

For records existing solely in electronic format, requesters have the right to access the information via the municipality's computer system so long as this does not reveal confidential information. If the electronic records contain confidential information, the only viable option may be to print a paper copy of the records and redact the confidential information. A requesting citizen always has the right to opt for access to the computer records or to request paper records.

It is the paramount duty of the records custodian to oversee the inspection and at all times ensure the protection of municipal records. Under no circumstances should a requesting citizen be left unattended while inspecting records. Likewise, when municipal records are to be copied, they should always be copied by municipal employees using municipal copying equipment. When circumstances

prevent the use of municipal copying equipment, commercial copying services may be used. In this situation, the records custodian should receive a quote from the commercial copy service to be used. The quote should then be forwarded to the requester along with an explanation of the need to use the commercial service and a time frame for completion. Finally, the requester should be given an opportunity to proceed with the commercial service or to withdraw the request. However, strict precautions must be taken to ensure the integrity of the records. Ideally, a municipal employee should physically oversee the commercial copy process. If this is not feasible, a detailed inventory should be taken of the original records before they are delivered to the commercial entity, and the inventory should be thoroughly cross referenced with the materials upon return.

D. Maintaining the Integrity of Records

As a municipality's records serve as the legal foundation for all of its actions, preserving these records is of paramount importance. At no time should original records leave the physical custody of the records custodian.

For exhaustive coverage of records maintenance, including a comprehensive record retention schedule, see the MTAS publication *Records Management for Municipal Governments* by Dennis Huffer. This document is available at <http://www.mtas.tennessee.edu>.

E. Redaction Process

The question of the necessity for redaction is often difficult. Otherwise public documents often contain smaller fragments of confidential information, which does not negate the openness of the rest of the document. It is the duty of the municipality, wherever possible, to redact the confidential information before providing the remaining public information to the requester.



While there is no specific time frame for completing redaction, it should be undertaken as quickly as possible without any unnecessary delay in public access. In most cases, the records custodian can determine what information to release. In cases of voluminous requests or uncertainty, the city recorder and/or the city attorney may need to be consulted. When the determination as to release cannot be made within one working day, the requester should be notified in writing of the specific reason for delay and the approximate time frame for completion.

F. When Requests for Records Are Denied

When a municipality denies a request for records, the act guarantees the requester's right to petition for access to the records denied and to "obtain judicial review of the actions taken to deny access." T.C.A. § 10-7-505(a). At trial a denying governmental agency has the burden of proving confidentiality by a preponderance of the evidence. T.C.A. § 10-7-505(c). A court must then weigh this with the court's duty to construe the act "to give the fullest possible access to public records." T.C.A. § 10-7-505(d).

G. Office of Open Records

The 2008 amendment created the Office of Open Records Counsel (OORC), which is housed within the office of comptroller of the treasury and is overseen by a 10-member advisory council. The OORC provides local governments with information and informal opinions on open records questions. These opinions are available for viewing on its Web site. Additionally, the OORC is available to mediate disputes between local governments and requesting citizens.

Not only are opinions issued by the OORC valuable for the information contained therein, they also can provide a safe harbor for employees who rely on them. In an action brought by a citizen denied

a requested record, a court may consider guidance provided by the OORC in determining the willfulness of denial.

CONCLUSION

It is hoped that the preceding materials have shed light on the state of open records laws in Tennessee, and more importantly, your municipality's role in the process. A well-informed and equitably implemented open records policy will lead to a more informed public and, consequently, a more responsive local government.

The following appendix consists of a sample open records policy and forms promulgated by the Office of Open Records Counsel. Before adopting the policy for your municipality, it would be wise to consult your city attorney or this office.



APPENDIX A

CITY OF _____, TENNESSEE

RESOLUTION NO. _____

A RESOLUTION ESTABLISHING PROCEDURES FOR PUBLIC INSPECTION OF, ACCESS TO AND DUPLICATION OF PUBLIC RECORDS UNDER THE TENNESSEE PUBLIC RECORDS ACT (T.C.A. § 10-7-504, *et seq.*)

BE IT RESOLVED by the _____ of the City of _____, Tennessee,

Section 1. Procedures regarding access to an inspection of public records:

- A. Consistent with the Public Records Act of the State of Tennessee, personnel of the City of _____ shall provide full access and assistance in a timely and efficient manner to Tennessee residents who request access to public documents.
- B. Employees of the City of _____ shall protect the integrity and organization of public records with respect to the manner in which the records are inspected and copied. All inspections of records must be performed under the supervision of the records custodian or designee. All copying of public records must be performed by employees of the city, or, in the event that city personnel are unable to copy the records, by an entity or person designated by the records custodian.
- C. To prevent excessive disruptions of the work, essential functions, and duties of employees of the City of _____, persons requesting inspection and/or copying of public records shall complete a records request form to be furnished by the city. If the requesting party refuses to complete a request form, a city employee shall complete the form with the information provided by the requesting party. Persons requesting access to open public records shall describe the records with specificity so that the records may be located and made available for public inspection or duplication, as provided in B above. All requests for public records shall be directed to the records custodian.
- D. When records are requested for inspection or copying, the records custodian has seven days to determine whether the city can retrieve the records requested and whether the requested records contain any confidential information, and the estimated charge for copying based upon the number of copies and amount of time required.

Within seven days of a request for records the records custodian shall:

- 1) produce the records requested;
- 2) deny the records in writing, giving explanation for denial; or,
- 3) in the case of voluminous requests, provide the requestor, in writing, with an estimated time frame for production and an estimation of duplication costs.



- E. There is no charge assessed to a requester for inspecting a public record. Charges for physical copies of records, in accordance with the Office of Open Records Counsel (OORC) schedule of reasonable charges, are as follows:
- a. \$0.15 per copy for black and white copies.
 - b. \$0.50 per copy for colored copies.
 - c. \$0.15 per copy for accident reports.
 - d. Maps, plats, electronic data, audio discs, video discs, and all other materials shall be duplicated at actual costs to the city.
- F. Requests requiring less than one hour of municipal employee labor for research, retrieval and duplication are free to the requester. Labor in excess of one hour may be charged by the city, in addition to the cost per copy, as provided in E. The city may require payment in advance of producing voluminous records. Requests for copies of records may not be broken down to multiple requests for the same information in order to qualify for the first free hour. For a request requiring more than one employee to complete, labor charges will be assessed based on the following formula:
- In calculating the charge for labor, a department head shall determine the number of hours each employee spent producing a request. The department head shall then subtract the one (1) hour threshold from the number of hours the highest paid employee(s) spent producing the request. The department head will then multiply the total number of hours to be charged for the labor of each employee by that employee's hourly wage. Finally, the department head will add together the totals for all the employees involved in the request and that will be the total amount of labor that can be charged.
- G. The police chief shall maintain in his or her office records of undercover investigators containing personally identifying information. All other personnel records of the police department shall be maintained in the office of the records custodian. **[This provision is for small police departments that do not have personnel trained in records management. Larger police departments should maintain personnel records in the department under the supervision of a trained records custodian.]** Requests for personnel records, other than for undercover investigators, shall be made to the records custodian, who shall promptly notify the police chief of such request. The police chief shall make the final determination as to the release the information requested. In the event that the police chief refuses to release the information, he shall provide a written explanation of the reasons for not releasing the information.
- H. If the public records requested are frail due to age or other conditions and copying of the records will cause damage to the original records, the requesting party may be required to make an appointment for inspection.

Section 2. This resolution shall become effective upon its passage, the public welfare requiring it.

Mayor

Date: _____

Attest: _____
City Recorder



APPENDIX B

SCHEDULE OF REASONABLE CHARGES FOR COPIES OF PUBLIC RECORDS

Section 6 of Public Chapter 1179, Acts of 2008 (“Public Chapter 1179”) adds T.C.A. Section 8-4-604(a)(1) which requires the Office of Open Records Counsel (“OORC”) to establish a schedule of reasonable charges (“Schedule of Reasonable Charges”) which may be used as a guideline in establishing charges or fees, if any, to charge a citizen requesting copies of public records under the Tennessee Public Records Act (T.C.A. Sections 10-7-503, *et seq.*) (“TPRA”). The development date of the Schedule of Reasonable Charges is October 1, 2008, and notification of the development will be given to the Tennessee Code Commission on October 31, 2008. This Schedule of Reasonable Charges will be reviewed at least annually by the OORC.

The TPRA grants Tennessee citizens the right to request a copy of a public record to which access is granted under state law. Public Chapter 1179 adds T.C.A. Section 10-7-503(a)(7)(A) which expressly prohibits a records custodian from charging a fee for inspection under the TPRA unless otherwise required by law. However, the TPRA in T.C.A. Section 10-7-506 does permit records custodians to charge for copies or duplication pursuant to properly adopted reasonable rules.

This Schedule of Reasonable Charges should not be interpreted as requiring a records custodian to impose charges for copies or duplication of public records. If a records custodian determines to charge for copies or duplication of public records, such determination and schedule of charges must be pursuant to a properly adopted rule and evidenced by a written policy authorized by the governmental entity’s governing authority. Application of an adopted schedule of charges shall not be arbitrary. Additionally, excessive fees and other rules shall not be used to hinder access to non-exempt, public records. A records custodian may reduce or waive, in whole or in part, any charge only in accordance with the governmental entity’s properly adopted written policy. Pursuant to Tennessee case law, a records custodian may also require payment for the requested copies or duplication prior to the production of the copies or duplication.

Copy Charges

- A records custodian may assess a charge of 15 cents per page for each standard 8 ½ x 11 or 8 ½ x 14 black and white copy produced. A records custodian may assess a requestor a charge for a duplex copy that is the equivalent of the charge for two (2) separate copies.
- If a public record is maintained in color, the records custodian shall advise the requestor that the record can be produced in color if the requestor is willing to pay a charge higher than that of a black and white copy. If the requestor then requests a color copy, a records custodian may assess a charge of 50 cents per page for each 8 ½ x 11 or 8 ½ x 14 color copy produced.
- If a records custodian’s actual costs are higher than those reflected above or if the requested records are being produced on a medium other than 8 ½ x 11 or 8 ½ x 14 paper, the records custodian may develop its own charges. The records custodian must establish a schedule of charges documenting “actual cost” and state the calculation and reasoning for its charges in a properly adopted policy. A records custodian may charge less than those charges reflected above. Charges greater than 15 cents for black and white, and 50 cents for color, can be assessed or collected only with documented analysis of the fact that the higher charges actually represent such governmental entity’s cost of producing such material; unless there exists another basis in law for such charges.



- The TPRA does not distinguish requests for inspection of records based on intended use, be it for research, personal, or commercial purposes. Likewise, this Schedule of Reasonable Charges does not make a distinction in the charges assessed an individual requesting records under the TPRA for various purposes. Other statutory provisions, such as T.C.A. Section 10-7-506(c), enumerates fees that may be assessed when specific documents are requested for a specific use. Any distinctions made, or waiver of charges permitted, must be expressly permitted in the adopted policy.

Additional Production Charges

- A records custodian shall utilize the most cost efficient method of producing the requested records.
- Delivery of copies of records to a requestor is anticipated to be by hand delivery when the requestor returns to the custodian's office to retrieve the requested records. If the requestor chooses not to return to the records custodian's office to retrieve the copies, the records custodian may deliver the copies through means of the United States Postal Service and the cost incurred in delivering the copies may be assessed in addition to any other permitted charge. It is within the discretion of a records custodian to deliver copies of records through other means, including electronically, and to assess the costs related to such delivery.
- If a records custodian utilizes an outside vendor to produce copies of requested records because the custodian is legitimately unable to produce the copies in his/her office, the cost assessed by the vendor to the governmental entity may be recovered from the requestor.
- If the records custodian is assessed a charge to retrieve requested records from archives or any other entity having possession of requested records, the records custodian may assess the requestor the cost assessed the governmental entity for retrieval of the records.

Labor Charges

- "Labor" is defined as the time reasonably necessary to produce the requested records and includes the time spent locating, retrieving, reviewing, redacting, and reproducing the records.
- "Labor threshold" is defined as the labor of the employee(s) reasonably necessary to produce requested material for the first hour incurred by the records custodian in producing the material. A records custodian is not required to charge for labor or may adopt a labor threshold higher than the one reflected above.
- A records custodian is permitted to charge the hourly wage of the employee(s) reasonably necessary to produce the requested records above the "labor threshold." The hourly wage is based upon the base salary of the employee(s) and does not include benefits. If an employee is not paid on an hourly basis, the hourly wage shall be determined by dividing the employee's annual salary by the required hours to be worked per year. For example, an employee who is expected to work a 37.5 hour work week and receives \$39,000 in salary on an annual basis will be deemed to be paid \$20 per hour. Again, a records custodian shall utilize the most cost efficient method of producing the requested records.
- In calculating the charge for labor, a records custodian shall determine the number of hours each employee spent producing a request. The records custodian shall then subtract the one (1) hour threshold from the number of hours the highest paid employee(s) spent producing the request. The records custodian will then multiply the total number of hours to be charged for the labor of each employee by that employee's hourly wage. Finally, the records custodian will add together the totals for all the employees involved in the request and that will be the total amount of labor that can be charged.



- **Example:**

The hourly wage of Employee #1 is \$15.00. The hourly wage of Employee #2 is \$20.00. Employee #1 spends 2 hours on a request. Employee #2 spends 2 hours on the same request. Because employee #2 is the highest paid employee, subtract the one hour threshold from the hours employee #2 spent producing the request. Multiply the number of hours each employee is able to charge for producing the request by that employee's hourly wage and then add the amounts together for the total amount of labor that can be charged (i.e. $(2 \times 15) + (1 \times 20) = \50.00). For this request, \$50.00 could be assessed for labor.

Questions regarding this Schedule of Reasonable Charges should be addressed to OORC.

Office of Open Records Counsel
505 Deaderick Street, Suite 1700
James K. Polk Building
Nashville, Tennessee 37243
(615) 401-7891, Fax (615) 532-9237
Toll free number: 1-866-831-3750
E-mail address: open.records@state.tn.us

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



APPENDIX C

INSPECTION/DUPLICATION OF RECORDS REQUEST

Requestor Instructions: To make a request for copies of public records fill in sections 1-4. Do not sign and date the signature line until the records are received.

Custodian Instructions: For requests to inspect, the records custodian is to fill in sections 1-5 and 8. For requests for copies, the records custodian is to fill in sections 5-8. Do not sign and date the signature line until the records are delivered to the requestor.

Note: Section 1 of Public Chapter 1179, Acts of 2008, amends Tenn. Code Ann. § 10-7-503(a) adding (7)(A) to provide that unless the law specifically requires such, a request to inspect is not required to be in writing nor can a fee be assessed for inspection of records.

(FRONT)

1. Name of requestor: _____
(Print or Type; Initials required for copy requests)
2. Form of identification provided:
 - Photo ID issued by governmental entity including requestor's address
 - Other: _____
3. Requestor's address and contact information: _____
4. Record(s) requested to be inspected/copied:
 - a. Previously inspected on _____ (date); inspection waived
 - b. Type of record:

<input type="checkbox"/> Minutes	<input type="checkbox"/> Annual Report	<input type="checkbox"/> Annual Financial	<input type="checkbox"/> Statements
<input type="checkbox"/> Budget	<input type="checkbox"/> Employee File	<input type="checkbox"/> Other _____	
 - c. Detailed Description of the record(s) including relevant date(s) and subject matter:

5. Request submitted to: _____
(Name of Governmental Entity, Office or Agency)
 - a. Employee receiving request: _____
(Print or Type and Initial)
 - b. Date and time request received: _____
 - c. Response: Same Day Other _____
6. Costs
 - a. Number of pages to be copied: _____ Estimated
 - b. Cost per page: _____
 - c. Estimate of labor costs to produce the copy (for time exceeding 5 hours): _____
 Labor at \$ _____ /hour for _____ hour(s).
 Labor at \$ _____ /hour for _____ hour(s).
 Labor at \$ _____ /hour for _____ hour(s).



(BACK)

- d. Programming cost to extract information requested: _____
- e. Method of delivery and cost: _____ Estimated
 - On-site pick-up
 - U.S. Postal Service
 - Other: _____
- f. Estimate of total cost to produce request: _____
- g. Estimate of total cost provided to requestor: in person by U.S.P.S. by phone
 Other: _____
- 7. Form, Amount, Date of Payment:
 - a. Form of payment: Cash Check Other: _____
 - b. Amount of payment: _____
 - c. Date of payment: _____
- 8. Date of Delivery: _____

Signature of Records Custodian

Date

Signature of Requestor

Date



APPENDIX D

RECORDS REQUEST DENIAL LETTER

(Insert Agency Name and Address)

(Insert Date)

Dear Sir or Madam:

On (insert date) _____ this Office received your open records request to inspect/ receive copies of (insert type of records). After reviewing the request, this Office is unable to provide you with either all or part of the requested record(s). The basis for this denial is:

- No such record(s) exists.
- This office is not the records custodian for the requested record(s).
- Additional information is needed to identify the requested record(s):

- The following law (citation and brief description why access denied):

- Tenn. Code Ann. Section: _____
- Court Rule: _____
- Common Law Provision: _____
- Federal Law (HIPPA, FERPA, etc.): _____

If you have any additional questions, please contact *(insert contact person and phone number)*

_____.

Sincerely,

(Record Custodian's signature and title with contact information)



APPENDIX E

RECORDS PRODUCTION LETTER

(Insert Agency Name and Address)

(Insert Date)

Dear Sir or Madam:

On (insert date) _____ this Office received your open records request to inspect/receive copies of (insert type of records). Section 1 of Public Chapter 1179, Acts of 2008 amends *Tennessee Code Annotated* § 10-7-503(a) and provides the following:

(2)(B) The custodian of a public record or the custodian's designee shall promptly make available for inspection 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 such 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 such record or information. [emphasis added]

This Office is currently in the process of retrieving, reviewing, and/or redacting the requested records. In accordance with the above-cited law, this letter is being sent to inform you that either the records you have requested to inspect/receive copies of will be available or a determination will be made regarding the accessibility of the requested records by (insert reasonably necessary time to produce the records). Additional time is necessary as it is a record custodian's responsibility under state law to ensure that any confidential information contained within the requested records has been removed prior to providing access to the records.

If you have any additional questions, please contact *(insert contact person and phone number)*

_____.

Sincerely,

(Record Custodian's signature and title with contact information)



THE UNIVERSITY of TENNESSEE

MUNICIPAL TECHNICAL ADVISORY SERVICE

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Inquiries and charges of violation concerning Title VI, Title IX, Section 504, ADA or the Age Discrimination in Employment Act (ADEA) or any of the other above referenced policies should be directed to the Office of Equity and Diversity (OED), 1840 Melrose Avenue, Knoxville, TN 37996-3560, telephone (865) 974-2498 (V/TTY available) or 974-2440. Requests for accommodation of a disability should be directed to the ADA Coordinator at the UTK Office of Human Resources, 600 Henley Street, Knoxville, TN 37996-4125.

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