

Updates to the Tennessee Public Records Act

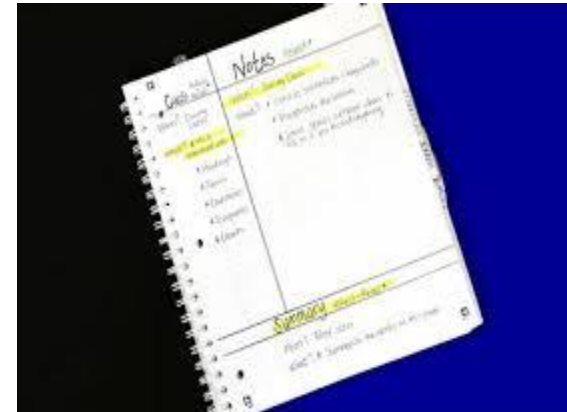
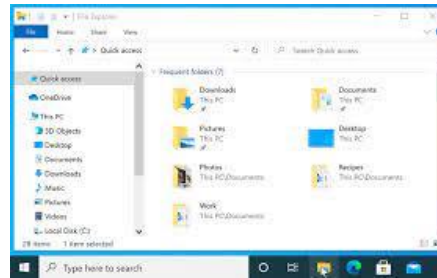
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Municipal Technical Advisory Service
INSTITUTE *for* PUBLIC SERVICE

Tennessee Public Records Act

Tennessee Public Records Act, 1957 (T.C.A. § 10-7-501 et seq.)



Public Record Defined in the TPRA

- “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.**”
- "Public record or records" or "state record or records" does not include the device or equipment, including, but not limited to, a cell phone, computer or other electronic or mechanical device or equipment, that may have been used to create or store a public record or state record.

T.C.A. § 10-7-503(a)(1)(A)(i) and (ii).



Tennessee Public Records Act (TPRA)

T.C.A. § 10-7-503(a)(2)(A):

- All state, county and municipal records shall at all times, during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law
- In T.C.A. § 10-7-505(d), the General Assembly directs the courts to interpret the provisions of the TPRA “broadly...so as to give the fullest possible public access to public records.”
- Tennessee courts have found that even in the face of serious countervailing considerations, unless there is an express exemption within the law, a record and/or information must be released.

What Records are Accessible Under the TPRA?

1. Personnel records/applications, disciplinary reports*, and references
2. Contracts*
3. Emails, text messages, and voicemails
4. Utility bills
5. Closed law enforcement case files
6. Traffic citations
7. Recordings (audio and visual)
8. Purchasing and payroll records/information
9. Information related to delinquent fines and taxes
10. Social media content

* These records are public whether in a draft form or a finalized version.



“Unless otherwise provided by state law”

- T.C.A. § 10-7-504 provides a list of records and/or information that are not open for public inspection; however, this list is not exhaustive.

<https://comptroller.tn.gov/office-functions/open-records-counsel/open-meetings/exceptions-to-the-tennessee-public-records-act.html>

- App. 800 exceptions to the TPRA are found in the following:
 - Tennessee Code Annotated (Statute)
 - Tennessee Rules of Civil and Criminal Procedure
 - Administrative Law Rules
 - Supreme Court Rules
 - Common Law
 - Federal Law



Public Records and Redaction



The fact that a public record contains confidential information does not mean that the entire record is confidential. The courts have found that in situations where confidential information is contained within a record that is otherwise public, the record custodian is responsible for redacting that information which is confidential. *See Eldridge v. Putman County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001).



Redaction is usually carried out by making a photocopy of the original requested document, striking through any information on the record that is confidential according to state law with a black marker, and then making another photocopy of the redacted version for the requestor to inspect. At no point would a records custodian ever redact an original document.

Are Private Entities Subject to the TPRA?

Tennessee courts have recognized that there are some private entities whose records should also be accessible under the TPRA because the private entity is operating as the “functional equivalent” of a governmental agency. See *Memphis Publishing Company v. Cherokee Children and Family Services, Inc.*, 87 S.W. 3d. 67 (Tenn. 2002) and *Friedmann v. Corrections Corporation of America*, 2009 WL 3131610 (Tenn. Ct. App. Sept. 16, 2009) and *City Press Communications, LLC v. Tennessee Secondary School Athletic Association*, 2014 WL 1778191 (Tenn. Ct. App. April 30, 2014).

The factors that the Court set out in determining whether a private entity is the “functional equivalent” of a governmental agency are as follows:

1. whether and to what extent the entity performs a governmental or public function;
2. the level of government funding of the entity;
3. the extent of government involvement with, regulation of, or control over the entity; and
4. whether the entity was created by an act of the legislature or previously determined by law to be open to public access.



Who Can Access Government Records Under the TPRA?

- T.C.A. § 10-7-503(a)(2)(A) grants access to public records to “any citizen of Tennessee.”
- The Tennessee Attorney General has opined that this provision is constitutional, despite the fact that at least one other state with a similar statutory provision has found the provision to be unconstitutional. See Att’y Gen. Ops. 99-067 (March 18, 1999) and 01-132 (August 22, 2001) *but see* *Lee v. Miner*, 458 F. 3d 194 (Del. 2006). *Also see* *Jones v. City of Memphis*, 2012 WL 1228181 (W.D. Tenn. April 11, 2012) and *McBurney v. Young*, 133 S. Ct. 1709 (U.S. Apr. 29, 2013).
- A records custodian has the right to deny a request to inspect and/or copy public records from a non-citizen. The denial is not required, it is discretionary.
- In Tennessee, “citizen” does include a convicted felon. *Cole v. Campbell*, 968 S.W. 2d 274 (Tenn. 1998).



When and Where Can Public Records be Accessed?

- A citizen has the right to request both inspection and copies of public records during normal business hours.
- T.C.A. § 10-7-503(a)(6) prohibits a governmental entity from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.
 - If the requestor desires to inspect public records, the inspection should take place in the office of the custodian, unless there is a legitimate reason as to why inspection cannot take place in the custodian's office.
 - The requestor should also be able to retrieve the requested records from the record custodian's office. However, the requestor is not required to retrieve the records from the custodian's office. The requestor has the ability to request that the records be mailed and upon payment for postage, the custodian is required to mail the records to the requestor.



Making a Public Records Request

- A public records request coordinator may not require a written request to view a public record but can require a request for copies to be in writing.
- T.C.A. § 10-7-503(a)(7)(A) provides that requests to inspect records may be submitted in person, by telephone, fax, mail or email, if the governmental entity conducts official business using such means or via an Internet portal, if the entity maintains a portal that is used for accepting public records requests. Provides that requests for copies can be required to be made in writing, on a form developed by the Office of Open Records Counsel (OORC), or on a form that complies with T.C.A. § 10-7-503(c).
- T.C.A. § 10-7-503(a)(7)(A) also provides that if a request for copies is not required to be made in writing, it can be made in any of the ways that a request to inspect can be made. Requires any form that is required to be used to make a request for copies to be made readily available to a requestor.



Making a Public Records Request (cont.)

- A records custodian may not assess a charge to view a public record.
- A custodian may require a requestor to produce photo identification that includes an address in order to inspect or receive copies of records.
- A request for copies “shall be sufficiently detailed to enable the custodian to identify the specific records” requested.



Response to a Public Records Request

- T.C.A. § 10-7-503(a)(2)(B) requires a records custodian or the custodian's designee to *promptly* make requested records available for inspection. If the records cannot be made promptly available, within seven (7) business days, the custodian must do one or more of the following:
 - Provide access to the record;
 - Deny in writing access to the record with legal basis for denial; or
 - Indicate in writing additional time necessary to produce the record.
- A custodian's failure to respond to a request in one of the above-mentioned ways within seven (7) business days, constitutes a denial and is actionable under T.C.A. § 10-7-505.

Response to a Public Records Request (cont.)

- A records custodian may not assess a charge to view a public record.
- The custodian shall provide the requestor an estimate of the reasonable cost for producing the requested records.
- A records custodian is not required to create a document that does not already exist in order to fulfill a public records request.
- A records custodian is not required to compile information or conduct searches for documents.
- 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.

The Format Issue

- In *Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 304 (Tenn. 1998), the editor of *The Tennessean* requested from NES the names, addresses, and phone numbers of all NES customers. Because NES did not maintain such a compilation of information, the request was denied. A petition for access was filed and ultimately the case was appealed to the Tennessee Supreme Court. The Court said the following with regard to the information sought:

Once information is entered into a computer, a distinction between information and record becomes to a large degree impractical. In our view, it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record.

The Format Issue (cont.)

- In *Wells v. Wharton*, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2005), the requestor had developed a computer program that downloaded public records in bulk from the Shelby County Portal website. Eventually, Shelby County shut down the portal because it was overloaded. After several weeks, the website reopened but with restrictions on the amount of information that could be downloaded. The requestor then went into the various offices where the records were kept, in order to download the information in bulk but was unable to do so because either the office computers were unable to handle such requests or the offices did not have public access computers. The requestor then filed a petition for access and the court held:

[i]n Tennessee, the purpose of the Public Records is to allow maximum access to the information contained within public records [and] in light of the purpose of the Tennessee Public Records Act, we conclude that the Tennessee Public Records Act does not require a custodian of records to provide public records in the manner a citizen requests. *Id.* at *9.

According to the court, “allowing a custodian of records to choose the manner in which he or she presents public records to citizens is not unreasonable so long as that manner does not distort the record or inhibit access to that record.” *Id.*



The Format Issue (cont.)

- However, in *Lance v. York*, 359 S.W. 3d 197 (Tenn. Ct. App. 2011), the Tennessee Court of Appeals held that when records are maintained in electronic format and they are requested in that format, the records should be provided electronically.

**It does not appear that the case would require a records custodian to print copies of records, redact them, and then scan them into electronic format because they originally existed in electronic format.

Scenario:

- The City of Townsville employs 10 full time employees and 2 part-time employees. An individual representing U.S.A. Transparent requests the following employee information:
 - an electronic copy of any and all employees for year of 2019, (fiscal or calendar year). Each employee record should contain the employer name, employer zip code, year of compensation, first name, middle initial, last name, hire date (mm-dd-yyyy), base salary amount, bonus amount, overtime amount, gross annual wages and position title.
- The address on the letterhead is a Texas address.
- Is this individual entitled to the requested information?

Look Familiar?

Pursuant to the Public Records Act, this is a request for a copy of the following records: An electronic copy of 'any' and 'all' vendor (transfer of property or services) payee payments for the year 2021. Production shall include the vendor name; vendor address; vendor city; vendor state name; vendor zip code; Check Date/ ACH Date; Check Number/ACH code; Check Amount/ ACH Amount; department; agency; type of payment (i.e. contract, grant, etc.) and description of products or services/ purpose of payment.

The principal purpose of this is to make this information more accessible to the public and to access and disseminate information regarding the health, safety, and welfare of the general public. This request is not principally for personal or commercial benefit. Our agency is just exercising the general rights of the public. For these reasons, we are requesting a waiver of fees. If there is a charge for this service, please obtain my approval in writing prior to proceeding with request.

All documents can be e-mailed to Tennessee@openthebooks.com or mailed in electronic format (preferred format would be .csv or .xls) If any documents are not provided in the format specified, please provide the state or federal statutes relied upon for that decision. If any record or portion of a record responsive to this request is contained in a record or portion of a record deemed unresponsive to the request, I would like to inspect the entire document. Under the Open Records Act/Freedom of Information Act, all non-exempt portions of any partially-exempt documents must be disclosed. If any records or portions of records are withheld, please state the exemption on which you rely, the basis on which the exemption is invoked, and the name of the individual responsible for the decision.

Thank you for your prompt consideration of my request. If you have any questions, or if I can be of any assistance, please e-mail me at Tennessee@openthebooks.com.



Model Public Records Policy

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OORC Model:

- <https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/policies-and-guidelines/MODELPUBLICRECORDSPOLICY-1-20-17.pdf>



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Forms Developed by the OORC

- Records Request Form:

<https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/policies-and-guidelines/RecordsRequestForm.pdf>

- Records Response Form:

<https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/policies-and-guidelines/RecordsResponseForm.pdf>

Schedule, Policies, and Guidelines Developed by the OORC

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<https://comptroller.tn.gov/office-functions/open-records-counsel/office-of-open-records-counsel/policies---guidelines.html>

- Schedule of Reasonable Charges
- Reasonable Charges for Frequent and Multiple Requests
- Safe Harbor Policy
- Best Practices & Guidelines



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Copying Charges per the Schedule

- A records custodian may assess a charge of 15 cents per page for each standard 8 ½ x11 or 8 ½ x14 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 x11 or 8 ½ x14 color copy produced.



Additional Production Charges



The presumption is that records will be delivered to a requestor at the records custodian's office; however, when a requestor is unable to physically appear in person, the records custodian can charge the requestor the actual cost incurred in mailing the records.



A records custodian is only required to use the United States Postal Service for delivery when a requestor is not returning to the records custodian's office to retrieve the records; however, it is within the discretion of the records custodian to deliver the records through other means, which would include electronic delivery.



When a records custodian uses an outside vendor to produce the requested copy or duplication because the records custodian is legitimately unable to produce the requested material in his/her office, the charges assessed by the vendor to the entity may be recovered from the requestor.



When records have to be retrieved from archives or any other entity having possession of the documents and the records custodian is assessed a fee for the retrieval, that charge may also be recovered from the requestor.

Labor Charges per the Schedule



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.



The schedule permits a records custodian to charge for labor after one (1) hour is spent producing the requested material.



If labor is assessed, the charge should be based upon the hourly rate of the employees that are reasonably necessary to produce the requested material, after one (1) hour.



If more than one employee is necessary to produce the requested material, the one (1) hour of labor that cannot be assessed is to be subtracted from the total number of hours the highest paid employee spends on the request.

Safe Harbor Policy

- Any labor fees and charges related to the copying or duplicating of public records are presumed to be reasonable if the entity's public records policy and such fees are consistent with the Schedule of Reasonable Charges.
- The aggregation of frequent and multiple requests for copies of public records and the labor fees charged as the result of that aggregation are presumed to be reasonable if the entity includes fees for aggregation within the entity's public records policy that are consistent with the Reasonable Charges for Frequent and Multiple Requests Policy.



Best Practice Guidelines (Overview)

- A public records policy should balance a governmental entity's need to function efficiently, protect confidential information, and maintain the integrity of records with the public's right to access records pursuant to the Tennessee Public Records Act ("TPRA"). Any practices and procedures, including charging fees, should not be used to hinder the exercise of rights granted to citizens under the TPRA. The following sections address common best practices and guidelines in each subject area in an effort to achieve a balance of these interests.



Petitioning for Access to Public Records

- T.C.A. § 10-7-505 addresses the ability of a citizen to petition the court once a request has been denied. The petition is to be filed in either chancery court, circuit court, or any other court in the county having equity jurisdiction.
 - For local government records, the petition is to be filed in either chancery or circuit court in the county where the records are located.
- If a request is denied and a petition is filed, the records custodian must prove by a preponderance of the evidence that there is a provision within state law that authorizes the nondisclosure of the requested record(s).
- Upon ruling on the petition, the court must issue findings of fact and conclusions of law and have the power to exercise full injunctive remedies and relief so as to carry out the purpose and intent of the TRPA.



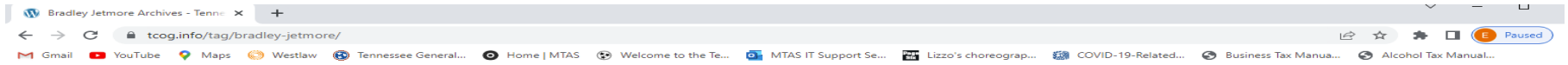
Petitioning for Access to Public Records (cont.)

- If the court finds in favor of the requestor, the records are to be made available to the requestor unless a notice of appeal is filed, or the court finds that there is a substantial legal issue that exists that should be decided by an appellate court.
- If the court finds that the governmental entity willfully* refused to provide the records, then the court has the discretion to assess the entity the requestor's attorney's fees as well as all reasonable fees related to the production of the records.
- In determining whether the entity's action in denying the records was willful, the court will look at any guidance given to the entity by the Office of Open Records Counsel (OORC).

* Willful is not the equivalent of negligence or bad judgment, but rather bad faith.



Examples of Cities Ordered to Pay Attorney's Fees



Metro Nashville must pay nearly \$57K in attorneys fees in public records case

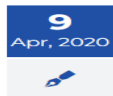
By Deborah Fisher | October 4, 2016 | Categories: public records lawsuits Tennessee, requests | Tags: Alex Friedmann, attorneys' fees, Bradley Jetmore, Doug Pierce, Judge Robert E. Lee Davies, Metro Nashville, promptly, public records request, traffic accident reports | 0 Comments

Senior Judge Robert E. Lee Davies ordered Metro Nashville to pay nearly \$57K in attorneys fees to a public records requester, saying that the city "misinterpreted and ignored the 'promptness' requirement" in the Tennessee Public Records Act. Davies found the city was willful in not complying with the law, a requirement for awarding attorneys fees in a public records lawsuit. Senior Judge Robert E. Lee Davies orders Metro Nashville to pay attorneys fees in public records case that challenged the city's delay in releasing records. Plaintiff Bradley Jetmore filed a lawsuit against the city, claiming Metro Nashville's police department records division had begun delaying release of traffic reports after about [...]



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Bradley Jetmore



Memphis ordered to pay attorney's fees for violating public records law over traffic accident reports

By Deborah Fisher | April 9, 2020 | Categories: public records lawsuits Tennessee | Tags: attorney's fees, Bradley Jetmore, Doug Pierce, Memphis, traffic accident reports | 1 Comment

Memphis and Nashville have both lost public records lawsuits over the past two years in which they were found to willfully violate the public records law in not releasing traffic accident report information or delaying release. Combined, the cities had to pay more than \$234,690 in attorney's fees and court costs to Bradley Jetmore, who brought the litigation. (Photo, public domain via Wikimedia) The City of Memphis in March was ordered to pay \$107,687 in attorney's fees in a public records case in which it was found to willfully violate the law in redacting public information from traffic accident reports. It was the second case won by Bradley Jetmore involving [...]

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Bad Actor Provisions

T.C.A. § 10-7-503(a)(7)(A)(vii) reads:

(a) when at least 2 requests to inspect are made within a 6-month period and for each request, the requestor does not inspect the records within 15 days of being made aware that records are available for inspection, the governmental entity is not required to comply with any additional records request from the requestor for 6 months from the date the second request was made, unless the entity determines there was good cause for failure to review the records.

(b) when a request for copies is made, an estimate provided, the requestor agrees to pay the estimate, the copies are made and then the requestor does not pay the estimate, the governmental entity is not required to comply with another request from the requestor until the requestor pays for such copies.

Public Chapter 850, Acts of 2022

Requires certain information about law-enforcement related deaths to be open for public inspection. Amends T.C.A. § 38-10-102 by requiring that all municipal law enforcement and correctional agencies mandated to provide a report related to law enforcement related deaths to the director of TBI, maintain a record of the deaths of individuals in police custody, that includes the name and age of the deceased individual, the time and date of death, and the cause of death as determined by the medical examiner. Provides that the record is to be open to public inspection.

Effective April 20, 2022.



Public Chapter 916, Acts of 2022

Language related to the confidentiality of certain recordings from body worn cameras amended. Amends T.C.A. §10-7-504(u)(5) by extending the repeal date of the provision that makes certain footage from body worn cameras confidential to July 1, 2027. Also adds that footage taken in childcare agencies, as defined by T.C.A. § 71-3-501, childcare programs, as defined by T.C.A. § 49-1-1102, preschools, and nursery schools is confidential.

Effective April 27, 2022,
and repealed July 1, 2027.



Public Chapter 989, Acts of 2022

Clarifies which records related to public employees are required to be maintained as confidential. Amends T.C.A. § 10-7-504(f) by clarifying that “records and information” about an employee that is required to be maintained as confidential by a municipality in its capacity as an employer are employment records only. Also includes that the records are confidential regardless of what office or department within the municipality maintains them.

Effective May 4, 2022.



Public Chapter 1064, Acts of 2022

Photographic evidence of deceased victim at the scene of a motor vehicle accident required to be maintained as confidential. Amends T.C.A. § 10-7-504(aa) by making the photographic evidence of a deceased victim at the scene of a motor vehicle accident confidential. Allows the estate of the victim to waive the confidentiality of the records.

Effective July 1, 2022.



Questions?



Resources

- If you have questions regarding the Tennessee Public Records or Open Meetings Acts, call Maria Bush, Open Records Counsel, in the Office of Open Records Counsel at (615) 401-7891 or toll-free at 1-866-831-3750. You can email OORC at open.records@cot.tn.gov.
- You can also visit the OORC website at <https://www.comptroller.tn.gov/office-functions/open-records-counsel.html>.
- I can be reached by phone at 615-532-6827 or you can email me at Elisha.Hodge@tennessee.edu.
- You can access the MTAS website at <https://www.mtas.tennessee.edu/>.

