

## TENNESSEE'S PUBLIC RECORDS ACT – THE BASICS

### I. Tenn. Code Ann. § 10-7-503(a)(2)(A) provides:

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**.

### II. What can be accessed pursuant to Tenn. Code Ann. § 10-7-503(a)(2)(A)?

- A. “Public record” is defined 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.**” Tenn. Code Ann. § 10-7-503(a)(1)(A).
- B. The definition of “public record” 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.” Tenn. Code Ann. § 10-7-503(a)(1)(B).
- C. If information/records are maintained electronically, and you have the capability of providing the information/records in electronic format, **and** the requestor requests that the records be provided in electronic format, we are required to do so. *See Lance v. York*, 359 S.W. 3d 197 (Tenn. Ct. App. 2011). However, if the records are required to be printed and redacted, there is nothing in the law that requires the records to then be put back in electronic format.
- D. You are also required to extract requested information from electronically maintained records, even if this means you have to write a new program to extract the information. *See Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297 (Tenn. 1998). However, the Act does not

require you to create records that do not already exist, to manually compile information that is responsive to a request, or to guess what it is that is being requested. Tenn. Code Ann. §§ 10-7-503(a)(4). *See Hickman v. Tennessee Board of Probation and Parole*, 2003 WL 724474 (Tenn. Ct. App. March 4, 2003).

- E. Additionally, if the information/records are not maintained electronically, you are not required to provide them in electronic format. *Wells v. A.C. Wharton*, 2005 WL 3309651 (Tenn. Ct. App. Dec. 7, 2005).
- F. Requesting party is in litigation with governmental entity: In *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 249 S.W.3d 346, 360-61 (Tenn. 2008), the Supreme Court held that neither the discovery rules nor the public records act expressly limit or prevents persons who are in litigation with a government entity or who are considering litigation with a governmental entity from making public records requests and petitioning for access pursuant to Tenn. Code Ann. § 10-7-505.
- G. Exceptions – found in state and federal constitutions, state statutes, court rules, administrative rules, common law, and federal statutes.

### **III. Who has the right to access public records in Tennessee?**

Citizens of the State of Tennessee, which includes prisoners, have the right to access records pursuant to the TPRA. However, an agency is not precluded from providing access to records to non-citizens. *See McBurney v. Young*, 133 S.Ct. 1709 (2013).

### **IV. How to respond to a public records request.**

- A. Tenn. Code Ann. § 10-7-503(a)(2)(A) says that a citizen has the right to inspect records during normal business hours; however this does not mean that every time a citizen walks into an office and requests to inspect records, immediate access will be provided.
- B. Tenn. Code Ann. § 10-7-503(a)(2)(B) set out the time frame for responding to public records request and requires response within **7 business days**:

- (i) Make the information available to the requestor;
- (ii) Deny the request in writing. The response shall include the basis for the denial; or
- (iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce the record or information.

Copies of forms can be found at the Office of Open Records Counsel's website ([www.comptroller.state.tn.us/openrecords/index.htm](http://www.comptroller.state.tn.us/openrecords/index.htm))

**NOTE:** Failure to respond to a request as described in subdivision (a)(2) "shall constitute a denial and the person making the request shall have the right to bring an action as provided in § 10-7-505. See Tenn. Code Ann. § 10-7-503(a)(3).

C. Always remember that the agency is responsible for reviewing and redacting any confidential information from the records before they are provided to the public. See *Eldridge v. Putnam County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001). Also, while all of these provisions reference inspecting records, Tenn. Code Ann. § 10-7-506 makes it clear that anytime a requestor has the right to inspect records, the requestor also has the right to get a copy or duplicate of the record subject to the rules established by the agency.

## V. What can an agency require from a requestor?

A. An agency **can require** a requestor to make a sufficiently detailed request, which includes whether or not the request is for inspection or copies. Tenn. Code Ann. § 10-7-503(a)(7)(B).

B. An agency **can require** a requestor to make a request for copies in writing, but **cannot require** a request to inspect to be in writing. Tenn. Code Ann. § 10-7-503(a)(7)(A).

1. Agency must accept requests by email.

2. While Agency cannot require a request to inspect be made in writing, agency can require that requestor provide address for contact purposes.

C. An agency **can require** a requestor to present government issued photo identification with an address on it (or some alternative form of identification with an address on it) for purposes of verifying that the requestor is a Tennessee citizen. Tenn. Code Ann. § 10-7-503(a)(7)(A). However, if an agency requires requestors to provide identification, that policy should be applied consistently.

D. An agency **can require** a requestor to pay the cost of copies, labor, and delivery of copies, if the agency has a policy in place that addresses the cost of copies of public records and is consistent with the Schedule of Reasonable Charges. If fees are going to be assessed, the agency is required to provide the requestor with an estimate of the fees. Tenn. Code Ann. §§ 10-7-506(a) and 10-7-503(a)(7)(C)(i)-(ii).

## VI. **Public Records Policy – Tenn. Code Ann. § 10-7-503(g)**

- Must be adopted by July 1, 2017
- Must include:
  - Process for making requests to inspect or copies and copy of any required request form
  - Process for responding to requests, including redaction practices
  - Statement of any fees charged and procedures for billing and payment
  - Name or title and contact information of individual(s) designated as public records request coordinator
- Public Records Request Coordinator – individual whose role is to ensure that public records requests are routed to the appropriate records custodian and that requests are fulfilled in accordance with 10-7-503(a)(2)(B)
- Records Custodian – office, official or employee responsible for the direct custody and care of a public record

## VII. What happens if access is denied and a lawsuit is filed.

- A. Statutory procedure set forth in Tenn. Code Ann. § 10-7-505 – suit may be filed in chancery or circuit court.
- B. Quick process — show cause hearing which constitutes a final determination on the merits. Burden of proof is on the official denying access and must demonstrate by a preponderance of the evidence. Court may require documents in question be submitted under seal.
- C. Court is required to make written findings of fact and conclusions of law.
- D. Subsection (f) provides that there is no criminal or civil liability for any official required to produce records as a result of a court's order – can't be held liable for any damages resulting from release of records.
- E. Subsection (g) provides that the court may, in its discretion, assess costs and attorney's fees against the governmental entity/official if it (1) finds that the governmental entity/official knew that the records in question were public records and (2) willfully refused to disclose the records.
  1. Pro-se litigants are not entitled to recover attorney's fees for their own time:
    - *Clarke v. City of Memphis*, 2015 WL 4737607 (Tenn. Ct. App. July 23, 2015)
    - *Sutton v. Bedford County Sheriff Department*, 2015 WL 6153742 (Tenn. Ct. App. Oct. 19, 2015)
  2. What constitutes "willfulness" for purposes of Tenn. Code Ann. § 10-7-505(g)

**OFFICE OF OPEN RECORDS COUNSEL**

- Has the authority to issue informal opinions to **local government officials, members of the public and the media** on open records issues
- Has the authority to informally mediate and assist with the resolution of open records issues
- Has duty to develop Schedule of Reasonable Charges and other policies (Best Practices, Safe Harbor, Frequent and Multiple Requests)
- Has duty to develop Model Public Records Policy
- <https://www.comptroller.tn.gov/openrecords/>

### **TIPS ON RESPONDING TO PUBLIC RECORDS REQUESTS**

- Make sure you respond within 7 business days
- Make sure you know and consistently follow your Public Records Policy
- Do not hesitate to ask for clarification from the requestor (in writing) – do not assume that you know what they want
- If the request is for a large number of documents – produce the documents in installments instead of waiting until all of the documents are ready for production.
- Use a common-sense, practical approach to responding to public records requests
- **If you have any questions, contact your legal counsel of the Office of Attorney General sooner rather than later.**

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