Comments and Suggestions for Changes
Draft Best Practices & Guidelines and Model Public Records Policy
By Tennessee Coalition for Open Government
Dec. 7, 2016

1. **Purpose of the statute**. In the first paragraph under "Purpose", the guidelines quote only part of T.C.A. §10-7-503 (g). Omitted was a key part of the statute that gives important guidance to government entities. The omitted part states: "The public records policy shall not impose requirements on those requesting records that are more burdensome than state law and shall include…"

Here is the statute in full, with the omitted part in boldfaced:

> No later than July 1, 2017, every governmental entity subject to this section shall establish a written public records policy properly adopted by the appropriate governing authority. **The public records policy shall not impose requirements on those requesting records that are more burdensome than state law** and shall include:
>
> (1) The process for making requests to inspect public records or receive copies of public records and a copy of any required request form;
>
> (2) The process for responding to requests, including redaction practices;
>
> (3) A statement of any fees charged for copies of public records and the procedures for billing and payment; and
>
> (4) The name or title and the contact information of the individual or individuals within such governmental entity designated as the public records request coordinator.

We recommend that the omitted sentence from §10-7-503 (g) should be included and put in the appropriate place between the two sentences already quoted.

2. **Rules and restrictions.** The third paragraph begins appropriately, stating "The Tennessee General Assembly declares that the TPRA 'shall be broadly construed so as to give the fullest possible access to public records.' …"

However, we were surprised, confused and concerned by the third sentence, which says that "records custodians may adopt reasonable rules governing the manner in which records requests are to be made and fulfilled."

We could not find in the Tennessee Public Records Act, nor in the new statute regarding public records policies, any statutory authority for a governing entity to create additional discretionary rules — rules that could be viewed as replacing or overriding state law — regarding public records access.

The statute regarding fees for copies of public records in 10-7-503(a)(7)(C)(i) does allow a records custodian to require a requester to pay "reasonable costs in the manner established by the office of open records counsel." But the TPRA does not contain similar language allowing

additional rules to be set by a government entity (or the Office of Open Records Counsel) regarding the manner in which records requests are to be made and fulfilled.

In fact, the new statute in TPRA clearly has cautionary language, as mentioned above, that policies cannot impose rules "that are more burdensome that state law" allows.

We strongly urge that the sentence be removed or rewritten, as it could open the door for adoption of a host of new rules and restrictions that prevent access, delay access or otherwise interfere with a citizen's right to access public records under the law.

The Supreme Court of Tennessee has repeatedly held that "the public's right of access to records of governmental agencies under the Public Records Act is very broad" and that the TPRA does not allow a government agency "to establish rules that would substantially inhibit disclosure of records."

As I'm sure you are aware, a trial court judge recently ruled that the Sumner County School Board violated state law when it operated under a rule it established that was outside state law. That rule required requests be made in person or by a letter sent through the U.S. Postal Service. The school board has appealed the lower court's ruling, arguing it does have authority to set whatever local rules it wants. But as of yet, a court has not agreed with them.

We believe that including the language currently in the draft would be misguided and a signal to government entities that they may set requirements upon the requester above and beyond what is already allowed or required by statute in the access to public records.

3. **Taking pictures of public records.** Under "**Policy: Policy Considerations**" No. 14: The question of "Will requesters be permitted to use personal devices to make copies" implies that a government entity has the right to deny a citizen the ability to take a photograph with their phone or traditional camera, or use a copy machine owned or supplied by the requester, to make copies of a public record. First, there is no state law that prohibits citizens from taking pictures of public records. Second, for a government entity to adopt a policy preventing citizens from taking a picture of public records would be unreasonable even under this draft's proposed language and is at odds with the TPRA and court decisions regarding access.

We understand that there may be legitimate reasons to prevent a citizen from using a copy machine owned by the requester to make copies of fragile records in a way that might tear or harm the record itself. But we believe that is a separate and narrow reason for not allowing someone to handle a public record. We strongly urge deleting this policy consideration, or narrowing it to a legitimate reason for preventing someone from using a scanner or device that could harm the record.

We have yet to hear an argument about how taking a picture of a record could harm a record. There is no legitimate reason for any government entity to ban this, or criminalize a person who takes such a picture.

4. **Hindering access.** In the introductory paragraph under "Best Practices & Guidelines" we strongly suggest adding a sentence that says "Fees and other rules should not be used to hinder lawful access to public records." This would be in line with state law, and offers important balance at the beginning of the Best Practices.

5. **Denying organizations access to public records.** In the Best Practices section, under "**B. Citizenship**," paragraph "a", we are confused by the sentence: "Additionally, a governmental entity has discretion to provide access when requests are made by entities (such as businesses or associations) rather than individual persons." First, we disagree that a government entity can refuse to provide a request made by a representative of an organization, simply because the person is representing an organization. A newspaper or television station, for example, is an entity, not a person. Does this sentence imply that a government entity has permission to refuse to comply with a newspaper's representative's request? Or a request from a representative from a nonprofit organization? We believe this last sentence is confusing and recommend it be deleted.

6. **Itemized estimates of fees.** In the Best Practices section, under "**C. Fees,**" we think that language should be included that says that if charges are going to be required beforehand, that an itemized estimate, including estimated hours and per-hour labor rates, be provided to the requester. Too often, requesters are not receiving itemized estimates. Citizens deserve to know how the estimated cost is calculated.

7. **Producing records in data format.** In the Best Practices section, under "**F. Records Custodians,**" paragraph "d" refers to producing records electronically. We suggest adding language that advises government entities to provide data in data-format when it is stored by government in that format so that citizens can enjoy the same efficiency and benefit of understanding information provided through taxpayer-funded technology that is enjoyed by government officials. The Tennessee Supreme Court has said that "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 the record."

8. **Frequently requested records.** In the Best Practices section, under "**F. Records Custodians**," paragraph "e", can we add that records custodians should post on the government entity's website frequently requested records for efficiency?

9. **Posting draft minutes.** In the Best Practices section, under "**H. Website,**" paragraph "c" lists types of public records that should be posted to the website when practicable. We think that draft minutes should also be on this list, since these are often the most readily available record of a meeting and are often withheld from a requester because of incorrect understanding that, because they are a draft, they are not a public record. Obviously, if a government entity waits to post "approved minutes" of a meeting, what happened at the meeting would not be available for weeks or months later, depending on when the governing body meets again.

10. **Proof of citizenship not required.** Under the Model Public Records Policy, in the 7th paragraph that begins "The (name of the government entity) will respond promptly to public record requests upon proof of Tennessee citizenship by presentation of a valid/issued Tennessee driver's license…" we believe that language here needs to include an option that the entity will not require proof of Tennessee citizenship, or will waive it.

11. **Making public records requests by email.** In the Model Public Records Policy section under "**II. Making Public Records Requests,**" A.(1) and A(2) suggest that government entities have discretion to not fulfill requests if they are received by email, phone or fax. As I'm sure the Office of Open Records Counsel is aware, a very expensive lawsuit has dragged on in Sumner County after an official with the school district refused to fulfill a public records request made by email. A judge sided with the records requester and said the school board violated the Tennessee Public Records Act. The case is on appeal.

We suggest very reasonable language, providing sound guidance, that says: “A records custodian should not limit how written records requests are received, and should allow a requester to submit written records requests by email if the government entity regularly uses email to conduct other government business.”

If the Court of Appeals overturns the lower court’s ruling in the Sumner County School Board Case and establishes that records requests received by email can be denied based on the method of delivery, then this section could be revisited. **But as of now, we believe it would be unwise and imprudent to suggest government entities can lawfully deny public records requests that they received based on the method of receipt.**

12. **When the government entity is not custodian of the record.** In the Model Public Records Policy section, under “**III. Responding to Public Records Requests**,” we are confused by A.(1)(d) that says “If the governmental entity is the custodian of the records requested.” If a government entity is not the custodian, what is a citizen to do? For example, if a citizen requests email sent/received by a city manager that are related to government business, but sent/received on his personal email, who is the custodian? Some additional guidance is needed here. This is not an uncommon problem.

13. **Fulfilling public records requests promptly**. In the Model Public Records Policy section, under “**III. Responding to Public Records Requests**”, in this section and wherever in this document that refers to “promptly as practical”, it needs to be changed to “promptly.” We think the accurate course here is to the state the statute plainly, as the statute uses the word “promptly” not the phrase “promptly as practical.” Also, by statute, a response in seven days is not prompt. Many custodians are misreading the statute to believe they do not have to respond until seven days. For example, the Metro Nashville Police Department had adopted a written policy stating they simply did not have to respond until seven days. A judge later had to order Metro to change the policy before they would do so.

14. **Making redactions**. In the Model Public Records Policy section, under “**III. Responding to Public Records Requests**,” in C.(1), we think it needs to be made clear that an attorney is not the only qualified person to make redactions. Where you have a question mark, could we add “other qualified person”? Obviously, an attorney’s per-hour charge to redact a document of personal email addresses or phone numbers would be much more expensive than a clerk’s per-hour rate to do the same — yet both are qualified.

15. **Explaining redactions.** In the Model Public Records Policy section, under “**III. Responding to Public Records Requests**,” in C.(2), we would like to see language that made clear that if different redactions are based on different state law exemptions, each state law exemption should be cited as a reason for each redaction. With an increase in redacted material, we think it is important that custodians realize that EACH state exemption must be cited for each redaction.

16. **Limiting when citizens can inspect records**. In the Model Public Records Policy section, under “**IV. Inspection of Records,”** we disagree with the language in No. 3 that appears to allow less than the “at all times during business hours” required in statute for inspection. For example, would this policy imply that a governmental entity could set a rule that they will only allow inspection of public records between 2 and 3 p.m. on Tuesdays and Thursdays? The law says that citizens have a right to inspect “at all times during business hours.” We are very concerned

about this language, and think it could lead to obstruction of access to public records. We think this deserves more discussion.

Here is what the T.C.A. 10-7-503 (a)(2)(A) states:

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

17. **Taking pictures of public records.** In the Model Public Records Policy section, under "**V. Copies of Records**", related to making copies of records with personal equipment, please see our earlier comment above (No. 3 Taking Pictures of Public Records.) We believe by including this language, the Office of Open Records Counsel is creating or misreading state law to allow for government entities to arrest / detain or otherwise ban a citizen from taking photographs of public records. We do not think this is lawful.

18. **Encouraging other, unexplained fees**. In the Model Public Records Policy section, under "**VI. Fees and Charges**," the language in No. 1 permits government too broad of an interpretation of fees allowed in statute. Specifically, the inclusion of the word "other" implies that there are other fees that can apply that are not specified in the Schedule of Reasonable Charges.