

REPORT OF THE COMMITTEE ON

OPEN RECORDS

HOUSE RESOLUTION 33

The Committee on Open Records was established pursuant to House Resolution 33, adopted by the House of Representatives on April 15, 1987. Judiciary Committee Chairman Frank Buck appointed Rep. Jerry Cross, Rep. Ed Moody, Rep. Chris Turner, Rep. Karen Williams and Rep. Bill Purcell to the Committee, requesting that Rep. Purcell serve as Chairman.

The Committee held 10 days of public hearings from August of 1987 through February 2, 1988. The findings of the Committee are set forth herein and submitted to the Judiciary Committee as required by the Resolution.

OVERVIEW

The Open Records Act is a simple and direct mandate to state and local governments to allow the people access to the work of those governments. For the now more than thirty years (30) since passage of this legislation, Tennessee has remained strongly in the company of those states which believe the people's business should be made open and available to the people.

Tennessee has also recognized that while our policy should always be weighted toward disclosure, there are some instances where individual privacy concerns or important governmental interests appear to override the presumption of access. As a result, with the passage of the Open Records Act the legislature simultaneously enacted provisions for confidential records which were to remain exceptions to the broad mandate of disclosure. These first exceptions are now codified at T.C.A. 10-7-504.

Throughout the three decades during which this state has operated under our Open Records Act, the basic mandate of T.C.A. 10-7-503 has remained inviolate. However, during this time a number of additional exceptions have been created. The Committee first undertook to catalogue these exceptions, a task not previously undertaken. A compilation of agency reports and computer search identified eighty-nine (89) separate exceptions. (This list is attached as an Appendix to this report).

Having first determined the state of the law, the Committee moved forward with its basic mandate, ". . . to determine if and how the law can be improved." In fulfilling this responsibility the Committee heard from numerous state agencies, local agencies, and private individuals and groups. The Committee received the comment of anyone who asked to be heard and at every meeting invited testimony or comment from any and all who were present. A final review of the law and its exceptions was undertaken, as the result of which the Committee submits this report together with its legislative proposals.

FINDINGS AND RECOMMENDATIONS

The Committee found that a strong and clear mandate for open records remained vital to responsible government. While there continue to be agencies and officials who fail to comply with the law, government and its employees at all levels are largely aware of the requirements of the law and are generally complying with these requirements. Nonetheless, several legislative initiatives and concerns are indicated.

Enforcement

At the time of the passage of the Act the law included a misdemeanor penalty for its violation. This penalty was applicable to both wrongful withholding of information requested under the Act, as well as the improper release of information designated as confidential. At the time of the passage of the judicial review procedures set out at T.C.A. 10-7-505, the criminal sanctions were abandoned.

While the Committee understands the many reasons why criminal sanctions may now not be most useful in insuring compliance with all of the requirements of the law, the Committee was concerned that there is now no explicit sanction for failure to follow the law. The Committee believes it is most important that compliance with the law be continually monitored to determine whether sanctions may again be necessary.

The Committee did find that it would be very beneficial for the law to provide for an award of reasonable attorneys fees where an individual was successful in challenging the withholding of a public record. Recognizing that there may not always be clear authority for the official charged with maintaining the record, the Committee recommends the trial court be given discretion to award fees where the withholding is in wilful violation of the law. The Committee has proposed legislation.

Department of Correction

The Committee is of the opinion that more access to the records of prisons and prisoners would be appropriate for the same reasons all other agencies' records are open. Therefore, the Committee recommends the opening of investigatory records upon the completion of the investigations and broader access to inmate records, with the authority being left in the Commissioner to delete identifying information where necessary to protect the safety of staff or inmates. The Committee has proposed legislation.

open

Department of Economic and Community Development

The Committee understands the important work of this Department and the need to be competitive with other states and governments. However, the Committee believes that the proper concerns of the Department and its business contacts can be protected without preserving the complete blanket of secrecy now allowed by law. The Committee has proposed legislation.

open

Library Records

The Attorney General has opined that constitutionally protected rights of privacy now surmount application of the Open Records Act to lending and other records of libraries. Nonetheless, librarians from across the state have expressed need for clear legislative direction in order to respond to regular attempts to review these records. The Committee has proposed legislation.

closed

Personnel Records

The Department of Personnel testified that they were functioning without difficulty under the law as presently applicable to them. However, the Department expressed great concern that Civil Service exams and similar testing instruments are now exposed to release under the law. The Committee believes these tests and their answers should be confidential for so long as necessary to protect the integrity of the test. The Committee has proposed legislation. class

The Committee has also been made aware of general public concerns that applicants for state jobs are discouraged from seeking employment by the open access to applications provided by the law. The Committee has proposed no legislation. We do feel that this issue merits further thoughtful consideration to resolve the dilemma of balancing the applicant's right of privacy against the public's need to know, before the job is filled, who may or will fill a public job.

Board of Claims

The Committee noted that the law now allows the Board of Claims to block access to public records which would otherwise be available were no claim anticipated. The Committee found that the Board's concerns could be better met by notice procedures which did not close state records. Legislation is proposed. open

Department of Health and Environment

This Department has a number of exemptions, most related to public health matters which implicate issues of personal privacy.

While most all such exclusions have long histories and continuing validity, the Committee did feel that the fact of a birth or death and date should be in the public domain. The Committee has proposed legislation. open

The Committee also recommends abolition of the provision allowing the location of water wells to be confidential, an archaic provision without modern support. The Committee has proposed legislation. open

Law Enforcement Records

During the pendency of these hearings, the Supreme Court of Tennessee issued its decision in Appman and Moncier v Worthington, decided November 23, 1987.

The Court has now spoken to some of the questions left unresolved at the time of the decision of Memphis Publishing vs Holt, 710 S.W.2d 513 (Tenn. 1986). While the Committee does not now believe legislation is indicated, there will need to be careful continuing scrutiny of this area to assure that further judicial definition of the Supreme Court's opinions does not erode the present assurance of access to those records which have for so long been within the public domain. No legislation is now proposed.

Local Boards and Commissions

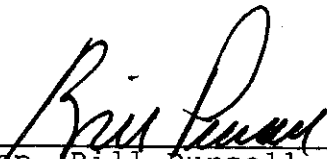
The Committee received testimony from the Hamilton County Air Pollution Control Board indicating their concern regarding certain proprietary information which may be shared with the Board by industries they regulate. The Committee understood the problems faced by the Board but did not feel that concerns presently justified a broad exclusion for local agency records.

CONCLUSION

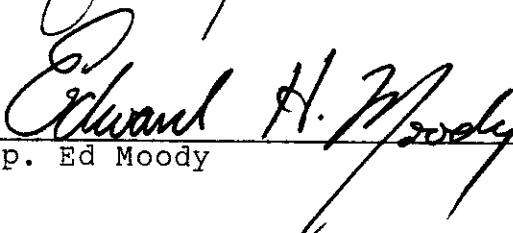
The Committee on Open Records submits this final report together with its proposed legislation for the review of the Judiciary Committee and consideration by the General Assembly.

Our thanks to Mr. Tom Tigue and the staff of the Office of Legal Services for their support throughout this process.

Respectfully submitted,


Rep. Bill Purcell, Chairman


Rep. Jerry Cross


Rep. Ed Moody


Rep. Chris Turner


Rep. Karen Williams