

Keys to Open Government

A guide to Tennessee's open records and open meetings laws



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Open Government



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by Frank Gibson and Deborah Fisher

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Table of Contents

Introductionpage 1

Chapter 1 - Open Meetings Actpage 4

Who is subject to the Open Meetings Lawpage 4

 The Legislature exemption.....page 5

What constitutes a meetingpage 6

 Deliberations must be public.....page 7

Notice of public meetingspage 8

 Fairly inform the publicpage 9

 Issues of pervasive importancepage 9

 Three-pronged testpage 9

Methods for noticepage 10

Minutes and secret votespage 11

Violations of the Open Meetings Actpage 12

 Curing a violationpage 13

Electronic participation in meetings.....page 13

Electronic communication - Internet relay chat.....page 15

Labor negotiationspage 16

Chapter 2 - Exceptions to the Open Meetings Actpage 17

 Chance meetings and informal assemblages.....page 17

Attorney-client privilegepage 18

 Anticipated lawsuitspage 20

Other exceptionspage 20

Chapter 3 - Office of Open Records Counselpage 23

The role of the OORC in disputespage 24

 Open Meetings complaint formpage 24

OORC advisory opinions and letterspage 25

OORC website.	page 26
Chapter 4 - Tennessee Public Records Act.	page 27
What is a public record?.....	page 28
The law on how government must respond to requests.	page 29
Getting the legal basis for denial	page 30
Who is subject to the public records law?.....	page 30
Private, non-government entities	page 31
Others subject to the law	page 31
Records specifically listed as open	page 33
Chapter 5 - Exemptions to the Public Records Act	page 35
Exemptions passed by the Legislature.	page 35
Some email correspondence	page 36
Other laws that can exempt records.	page 37
Rule 16(a)(2) and criminal prosecutions	page 37
Redactions.	page 39
Chapter 6 - Making a Public Records Request	page 41
Response deadlines	page 42
No charge to inspect	page 42
“May” and “Shall”	page 43
Copy fees: “Schedule of Reasonable Charges”.....	page 44
Electronic records and other tech questions	page 45
Self-service copies	page 48
What if records are denied?	page 48
What are the penalties for wrongly denying access?	page 50
About TCOG	page 51

Introduction

The general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret.

(Tennessee Code Annotated 8-44-101)

That opening statement in the Tennessee Open Meetings Act, popularly known as the “sunshine law,” underscores that Tennesseans have a legal presumption of open government in their Constitution and separate open meetings and public records laws. Since that presumption has not been universally accepted by everyone in government, the burden of enforcing the letter, intent, and spirit of all three often falls on the shoulders of the public and press.

Keys to Open Government is a guide we hope will enhance the ability of journalists, citizens, and people in government to understand the rights of access to government information. This guide is not intended to be legal advice. Its purpose is to spread knowledge that can make navigating the law less frustrating.

The law governing access is found in the state Constitution, two main statutes (the Open Meetings Act and Public Records Act) and decades of judicial decisions.

Despite legal challenges to the open meetings and public records acts, the strong presumption of openness in the state Constitution has enabled the courts to preserve the principles of both.

Tennessee’s Constitution runs parallel to the U.S. Constitution, particularly in the Bill of Rights and Tennessee’s Declaration of Rights.

The First Amendment in the Bill of Rights sets out five freedoms: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.”

Those five freedoms are found throughout Article 1 of Tennessee's Constitution, and two are in Section 19:

That the printing press shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

This constitutional foundation for Tennessee's open government laws is considered stronger than the First Amendment by many First Amendment experts. The General Assembly included the same presumption of openness in the Public Records Act (T.C.A. 10-7-503 et seq.) enacted in 1957 when it admonished the courts that it "shall be broadly construed so as to give the fullest possible public access to public records." The Open Meetings Act, similar in its principles, came along in 1974 in the shadows of the Watergate scandal and was challenged immediately by local governments. The City of Memphis argued that parts were so vague as to render it unconstitutional because officials would not know how to avoid violations. Metro-Nashville's school board tested it in another lawsuit, arguing that the term "to deliberate" was not defined. Both challenges failed, but it was the Nashville case -- *Dorrier v. Dark* (1976) -- that the Tennessee Supreme Court was emphatic in writing:

...in the first two sentences of [Article 1, Section 19], the Constitution provides freedom of the press, open government and freedom of speech. Clearly, the Open Meetings Act implements the constitutional requirement of open government.

An open records compliance audit by the Tennessee Coalition for Open Government (TCOG) and hundreds of calls to its hotline through the years has emphasized the need for training and information for citizens, journalists and people inside government.

This sunshine guide was made possible by grants from the Tennessee Press Association Foundation, the John S. and James L. Knight Foundation, the National Freedom of Information Coalition, with support from the Scripps and Gannett newspaper foundations.

Education is the key for citizens wanting to participate in their democratic republic, for journalists performing their watchdog role, and for public officials with a sincere desire to be transparent in performance of their duties. We hope “Keys” serves all three goals.

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Chapter 1

Tennessee Open Meetings Act

The purpose of the Tennessee Open Meetings Act is laid out clearly and strongly in its first statement:

The general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret. (T.C.A. 8-44-101)

The law itself consists of 10 parts (T.C.A. 8-44-101 to 8-44-111) that cover the definition of a governing body, how meetings should be conducted and minutes recorded, public notification about upcoming meetings, and the process for enforcing compliance.

The most contentious and controversial parts of the law reside in the second part (T.C.A. 8-44-102) — the heart of the law — that outlines who is a governing body and what constitutes a meeting. Judicial opinions have given more definition to those questions.

Courts have also provided guidance about the law's requirement for adequate notice of meetings when citizens filed lawsuits complaining governing bodies had met without giving the public enough information beforehand.

Who is subject to the Open Meetings law

T.C.A. 8-44-102

All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee. (T.C.A. 8-44-102(a))

After that declaration, the law provides this crucial definition of a governing body:

The members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration...

[T.C.A. 8-44-102(b)(1A)]

The Tennessee Supreme Court looked at the legislative history of the statute in the 1976 case of *Dorrier v. Dark* and gave a more comprehensive definition:

“(T)he Legislature intended to include any board, commission, committee, agency, authority, or any other body, by whatever name, whose origin and authority may be traced to state, city, or county legislative action and whose members have authority to make decisions or recommendations on policy and administration affecting the conduct of the business of the people in the governmental sector.”

Examples of governing bodies subject to the Open Meetings Act

- *County commissions, city councils, boards of mayor and aldermen*
 - *Committees of governing bodies, such as a county commission finance committee*
 - *Public hospitals boards*
 - *Industrial Development Boards*
 - *Public utility boards*
 - *School boards and public charter school boards*
 - *Economic and community development boards and committees*
-

Here’s a simple way to distinguish between a body that falls under the law and one that does not. A committee established by the mayor to recommend City Hall landscaping improvements to the city executive would not be subject to the sunshine law. The same committee created by and reporting to the City Council would fall under the law.

The Legislature exemption: The statute’s language “except as provided by the Constitution of Tennessee” took special significance after a 2001 decision by the state Court of Appeals in *Mayhew vs. Wilder*.

Before the case, the state legislature was presumed to fall under the sunshine law. But the court noted that the legislature does not trace its origins to any legislative ac-

tion and cited two provisions of the state Constitution to conclude the law does not apply to the House and Senate. Article II, Section 22, says the doors of the General Assembly shall be open except when the “business shall be such as ought to be kept secret.” Article II, Section 12, lets each chamber “determine the rules of its proceedings.” And, the court said, one two-year session of the General Assembly cannot bind the next.

Though criticized in editorials for “exempting themselves” from the sunshine law, both houses of the General Assembly have had rules that say the doors can be closed only for state and national security matters and certain impeachment proceedings unless it’s a member being impeached.

What constitutes a meeting?

T.C.A. 8-44-102

The law states that a meeting occurs when a governing body of a public body convenes “to make a decision or to deliberate toward a decision on any matter.” Some gatherings would not be considered a meeting under the law.

For example, it says that a “meeting does not include any on-site inspection of any project or program.” It also says that a “chance meeting of two or more members of a public body” is not considered a meeting as defined by the law. But in very strong language that echoes the principles underlying the law, it makes clear that:

...no such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.

[T.C.A. 8-44-102(c)]

This section of the law has been among the most contentious, but guidance by the courts and the state’s Attorney General has been helpful in laying out the boundaries.

For example, attorneys for the Metro Nashville board of education argued in the Dorrier case that the law was defective because the legislature did not clearly define what it means “to deliberate.” Thus, they argued, members of governing bodies might

violate the law without intending to do so.

The Supreme Court said that was unlikely to pose a problem:

...(I)t is our opinion that members of public bodies will face very few situations, if any, in which they cannot be aware of the existence or non-existence of a quorum and whether or not they are in the course of deliberation toward a decision on policy or administration...

Almost 40 years after the Dorrier decision, public officials continue to complain the law is too restrictive and vague and that it prevents them from talking with fellow members outside an announced meeting. Those arguments are used repeatedly to push for allowing more business to be conducted in private and to allow more members to meet privately without giving public notice.

Deliberations must be public: In 2012, the Attorney General of Tennessee issued a legal opinion (OP12-60) that offered even more clear guidance that nothing in the law prohibits two members of a governing body from speaking with each other outside a properly announced public meeting. They can even dine together. They simply should refrain from deliberations.

The opinion noted that while a casual gathering might not violate the law, add the element of “deliberating” and the legal complexion could change:

... the private discussion of public business at a meal by any number of members of a governing body would certainly present the potential issue of whether a chance meeting, or informal assemblage, was used to decide or deliberate public business in circumvention of the Open Meetings Act. Whether a violation occurred would depend upon what was said and what transpired during the meeting. Thus, while the case law does not lend itself to hard and fast rules because the decisions are so fact dependent, some cautious advice readily appears. While two or more members may share a

What is deliberation?

“to examine and consult in order to form an opinion.... to weigh arguments for and against a proposed course of action.”

meal together in which public business is discussed, such discussion should not constitute deliberations, which term has been defined to mean to “examine and consult in order to form an opinion” or to “weigh arguments for and against a proposed course of action.” Johnston v. Metropolitan Government...

Notice of public meetings

T.C.A. 8-44-103

The law requires any governmental body that holds a regular meeting or a special called meeting to give “adequate public notice” of the meeting.

Regular meetings are those scheduled or set by statute, local ordinance or resolutions, or by city charters. For example, a school board might meet the second Tuesday of each month. For regular meetings, the law generally does not require the public notice to include an agenda. But a citizens can request an agenda, which is a public record available for inspection as soon as it’s created.

The law about agendas is different for special called meetings. The state Office of Open Records Counsel noted in a 2012 advisory opinion that “... despite the fact that the Act does not require that governing bodies have an agenda published, other statutory provisions and case law have done so” as it relates to special called meetings. She wrote:

County legislative bodies, cities operating under a City Manager-Commission charter, cities operating under a modified City Manager-Council charter, and public school boards operating under a modified City Manager-Council charter all have specific statutory provisions that restrict the issues that can be brought up at a special

Agendas

A recurring problem for citizens is finding out in advance what is on the governing body’s meeting agenda. There is no requirement in the sunshine law for a governing body to publicly post the agenda, but it is obtainable under the Public Records Act. Also, many local governments have initiated their own rules that call for posting an agenda to their website or making it available in other ways to the public before meetings.

called meeting to those items that are specifically set out in the notice. (See T.C.A. 5-5-105, 6-20-208, 6-32-102, and 6-36-106.)

Fairly inform the public: The case that started the 25-year legal journey in which the courts developed principles for determining what makes a notice adequate came just two months after passage of the Tennessee Open Meetings Act in 1974.

In *Memphis Publishing v. City of Memphis*, the city got a local chancellor to rule the law unconstitutional because, the city complained, the term was so vague officials had no way of knowing how to comply. The Tennessee Supreme Court rejected the argument and reversed the local judge's decision. The Court explained it was "impossible to formulate a general rule in regard to what the phrase 'adequate public notice' means" for all types of governing bodies and in all situations.

*However adequate public notice means adequate public notice
under the circumstances, or such notice based on the totality of the
circumstances as would fairly inform the public.
(Tennessee Supreme Court, Memphis Publishing v. City of Memphis, 1974)*

Issues of pervasive importance: In 1990, the state Court of Appeals added another element to the adequate notice formula. In the case of *Neese v. Paris Special School District*, the court said a school board violated the law when it failed to include an issue "of pervasive importance" in its public notice of an out-of-state board retreat. Notices of all special meetings must include all items on the agenda and enough description for the public to know what is being discussed.

Testimony showed the board members spent hours at the retreat discussing plans to rezone children in three K-6 schools. The court found that the school board's meeting notice should have informed the public of its plan to discuss the rezoning proposal "regardless of whether any decision was actually made at the retreat."

Three-pronged test: In 1999, a state Court of Appeals fashioned a "three-pronged test" for special called meeting notices in *Englewood Citizens for Alternate B v. The Town of Englewood*. The case dealt with a town commission meeting in which the

notice was hung on the walls of a bank, at City Hall, and the post office, and faxed to the local newspaper – all within 48 hours of the meeting.

The meeting was to choose a route for a proposed highway bypass in the East Tennessee town, but the posted agenda did not say that. It only said: “1. Letter to State concerning HWY 411”.

The Court voided the action of the town commission and provided criteria to judge future notices of special called meetings.

- Notice must be posted in a location where a member of the community can become aware of such notice.
- The contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken.
- The notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting.

The Court ruled the Town council’s actual notice was “misleading” to the public and that 48 hours notice before a meeting was “not sufficient enough to fairly inform the public under these circumstances.”

“Without meeting all three of these requirements, we fail to see how the Town of Englewood could provide adequate public notice for the purposes of a special meeting,” the court said.

Methods for notice

The method for posting a meeting notice is not addressed in the sunshine law, but other statutes require that some public notices, including for regular and special meetings, be published in newspapers of general circulation. Some examples: public hearings for zoning, budgets, and other potentially controversial items. One statute requires governing bodies to disclose in a public notice advertisement that it is giving money to a particular charitable organization. It must name the group.

An advertisement is the only way to guarantee publication on a particular day. Legal opinions in recent years have said the method of notices must be consistent so the public knows where to find them.

Efforts began in the legislature in 2008 to allow local governments to satisfy the publication requirements by posting notices on local government websites. The state Office of Open Records Counsel has cautioned state and local bodies against that.

In a report to the General Assembly in 2011, Elisha Hodge, then the state open records counsel, reported getting queries on the subject. One asked: “Is it sufficient for a county library board to post notices of its meetings on the library website?”

Her response (though not in a formal, published advisory opinion): “Assuming that the library board is subject to the open meetings act, no, it is not sufficient for the only notice of the meetings to be posted on a website.”

In another, she reported she was asked: “Is it sufficient for the notices for state level board meetings to only be posted on a state website? Answer: “No, because everyone does not have the ability to access a computer and access the website.”

Minutes and secret votes

T.C.A. 8-44-104

The law calls for the minutes of a meeting to be “promptly and fully recorded” and that they be “open to public inspection.” They “shall include, but not be limited to a record of persons present, all motions, proposals and resolutions offered, the results of any votes taken, and a record of individual votes in the event of roll call.” It also says that all votes must be public, and cannot be secret either by secret ballot or secret roll call.

Some administrators or clerks working for governing bodies try to withhold drafts of minutes until they are approved by the body, usually weeks later at the next meeting. Since drafts of minutes are not exempt under the Public Records Act, they are a public record open to inspection. If a governing body audio- or video-records a meeting, those recordings are also a public record from the time created. In fairness, news reporters and others should identify draft minutes as “drafts” since they could be

corrected at the next meeting.

Violations of the Open Meetings Act T.C.A. 8-44-105 and 8-44-106

Enforcement of the Open Meetings Act has been left to citizens and the press through lawsuits in local Chancery and Circuit courts. But the public had no way to get authoritative guidance on the law outside of a lawsuit until 2008, when the Office of Open Records Counsel was created.

The Counsel's office has more authority to deal with local public records issues than with the sunshine law, but the legislature made the office responsible for monitoring local open meetings problems, too. It collects data on inquiries and problems reported by the public and is to "provide educational outreach" on both laws. The OORC website contains an Open Meetings Act Complaint/Inquiry Form that can be used to report suspected violations. The OORC cannot enforce the law, but it has advised local government officials and the public in resolving some reported problems.

The law says that actions taken at a meeting in violation of the Open Meetings Act "shall be void and of no effect...." and it gives the courts jurisdiction to "issue injunctions, impose penalties, and otherwise enforce the purposes" of the Act if a citizen files a lawsuit.

The most notable voided action came in 2007 when a Chancery Court jury found several Knox County commissioners had deliberated in private before voting to fill eight vacancies on the commission and four vacant countywide offices, including sheriff. After a two-week trial, the Knox County judge accepted the jury's verdict and tossed all 12 officials out of office. It was the first such jury trial under the sunshine law. Members of the commission had to testify about their conversations under oath.

In addition to invalidating the action, the court can "permanently enjoin any person adjudged by it in violation" from repeating that illegal conduct. As the Supreme Court has noted, the term "impose penalties" in the law means contempt citations against officials who violate the injunction.

The goal is to protect the public from actions taken in circumvention of the policies

and procedures set out in the statute and case law. It is designed to correct those actions, not penalize individual members of governing bodies. They can only be punished for contempt if they violate an injunction, or ultimately at election time.

Curing a violation: In the 1990 Paris Special School District case, the Court of Appeals introduced the idea that a governing body that violates the Open Meetings Act can “cure” that violation by “new and substantial” reconsideration of their actions, essentially doing it over by following the law. Although the court found the school board deliberated on a rezoning plan at a retreat in violation of the Open Meetings Act, it ruled that the school board’s eventual vote was legal. The court reasoned the actions of the school board after the retreat but before a formal vote fixed the violation. The board scheduled a public meeting, gave adequate notice and then allowed a three-hour public question and answer session on the issue. The court said:

...the purpose of the act is satisfied if the ultimate decision is made in accordance with the Public Meetings Act, and if it is a new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue.
(Court of Appeals, *Neese v. Paris Special School District*, 1990)

Electronic participation in meetings

T.C.A 8-44-108

The open meetings law regulates how meetings must be carried out to ensure they meet the purpose of the law, including when members of a body can participate electronically, such as by telephone, videoconference or other web-based media. This part of the statute originally allowed only state boards and commissions to participate by phone because members often lived throughout the state, making it burdensome to travel to a central location. An amendment was added in 2008 to accommodate the City of Belle Meade because one of its three commissioners traveled a lot. Separate language was added later in a different part of the Tennessee State Code to govern how school board members could participate electronically in meetings.

Lawmakers recognized how participation without being physically present could create problems so they set limits. The major condition for boards and commissions of state government is that a member can only participate electronically if a quorum of the governing body is physically present at the location specified in the public notice. If a physical quorum cannot be present, a state body may still allow electronic participation if it determines the matter is urgent and necessary:

Audible meetings:

The law refers specifically to the audibility of a meeting when it outlines requirements for electronic participation by a governing board member. Further, the Office of Open Records Counsel, in response to 59 complaints after a public meeting in Greene County, advised that to comply with the law, a governing body has to ensure citizens can hear official participants.

‘Necessity’ means that the matters to be considered by the governing body at that meeting require timely action by the body, that physical presence by a quorum of the members is not practical within the period of time requiring action, and that participation by a quorum of the members by electronic or other means of communication is necessary...

[T.C.A. 8-44-108 (3)]

The law also makes clear that the public must be able to hear members participating by phone or other electronic means. “Each part of a meeting required to be open shall be audible to the public at the location specified in the notice of the meeting...”

The law governing electronic participation for local school boards can be found at T.C.A. 49-2-203 (c)(1)(A). It contains even more limits. A quorum of members must be physically present at the location of the meeting. A member is allowed to participate electronically no more than two times a year and only if they are out of the county “for work, family emergency or military service.” (Military service is exempt from the two-meeting limit.) The off-site member is required to be visually identifiable by the board chair. And, the board member must give at least five (5) days notice prior to the sched-

uled board meeting.

The law also instructs school boards wishing to allow electronic participation to “develop a policy for conducting such meetings.”

Charter schools boards got one exception to the rules in 2014, allowing members to meet by teleconference or videoconference without a physical quorum at one location. The reason given was that some national charter school boards are governed by members from outside the state.

Electronic communication – Internet relay chat T.C.A. 8-44-109

The “Internet relay chat” was introduced by a state lawmaker from Knoxville in 2008 in the wake of the Knox County Commission sunshine lawsuit. It allows a governing body to have electronic communication by means of an Internet forum with some specific conditions, including accommodating the public.

It was proposed because some elected officials in Knox complained the judge’s decree had precluded any communication between members of elected bodies. It started as a three-year pilot but was made permanent the next year with a requirement that any entity that chose to start such a “relay chat” had to develop a plan that must be then certified by the new Office of Open Records Counsel.

The most significant condition for allowing use of such “relay chat” says the government must provide “reasonable access” to a computer and the Internet “for members of the public to view the forum at the local public library, the building where the governing body meets or other public building.” Only three counties – Blount, Loudon and Williamson – plus City of Knoxville submitted plans to the OORC between 2009 and 2014. Knox County didn’t have to submit plans to operate its Internet chat; it was grandfathered in in 2009. Observers report that some use their forums regularly and others hardly ever.

Labor Negotiations

T.C.A. 8-44-201

Meetings between public employee union representatives and government entities while negotiating a labor agreement or memorandum of understanding are required to be conducted in public. In fact, the law requires both sides to jointly decide and announce the location of those negotiations.

However, it also allows “planning or strategy sessions” of a governmental entity committee to be closed to the public. The law was amended in 2009 to allow the full governing body to meet in closed session to develop strategies, but that amendment did not change the requirement that all agreements be voted on in an open and announced at a public meeting.

Chapter 2

Exceptions to the Open Meetings Act

There are far fewer exceptions to the state's sunshine law than the Tennessee Public Records Act. In passing the open meetings law in 1974, the legislature included only two — for inspection tours by governing bodies and “chance meetings.” It assumed no deliberations would occur during either. Later, rules about closing or conducting closed meetings were added either through judicial opinions or in sections of state law that govern particular government bodies. Some require public notice of intent to close a meeting and some require public votes to close meetings.

Chance meetings or informal assemblages: “Chance meetings” — incidental or unplanned encounters by two or more members — are not considered violations unless they evolve into or are used “to decide or deliberate public business.”

Judges in appeals court cases adopted a law dictionary definition of what it means to deliberate: “to examine and consult in order to form an opinion.... to weigh arguments for and against a proposed course of action.”

Most violations that have led to lawsuits have been when individual members of a governing body worked privately one on one to get other members to make a decision before a meeting, or when members have met as a group without giving any public notice. Some violations have occurred when the public agenda did not include items that were going to be discussed or decided upon, but were taken up anyway without any public notice.

One of the earliest cases, Jackson v. Hensley (1986), the Court of Appeals found that a Roane County commissioner's act of lobbying other commissioners for their votes to the office of county Trustee did not violate the law because once the commis-

sioner was nominated he ceased to be a voting member of the body. There was no evidence any other two members discussed the candidate before the vote.

But, in the 1990 case of *State of Tennessee ex rel Matthews v. Shelby County Board of Commissioners*, a Court of Appeals panel found commissioners had violated the law when three of its 11 members took it upon themselves to recruit a candidate for a commission vacancy and lobbied other commissioners in a series of private conversations.

In that case, the Court of Appeals noted that the legislature did not intend to overly restrict interaction between members of governing bodies, quoting T.C.A. 8-44-102(c): “Nothing in this section shall be construed as to require a chance meeting of two (2) or more members of a public body to be considered a public meeting.” But it noted the General Assembly had recognized that the “chance meeting” exemption could be a loophole and be used “to evade the literal ‘quorum’ and ‘meeting’ requirements of the Act.” To prevent that, the court said, the legislature closed the loophole in the next sentence: “No such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.”

Closed meetings under attorney-client privilege: One of the few times governing bodies can meet privately is to get advice from their attorney on pending or potential litigation. The courts recognized the need to protect communications between members of governing bodies and their lawyers, but that attorney-client exemption is not as broad as some officials and attorneys sometimes assume.

Because it does not appear in the body of the statute it is the most often misunderstood and abused because officials are not fully aware of its limited purpose. It is a legal privilege, not an excuse to close meetings for other purposes. Some bodies have closed meetings under the exemption with no attorney present.

This exemption was created by the Tennessee Supreme Court in a 1984 dispute between the Smith County Board of Education and the Smith County Education Association.

The Supreme Court acknowledged the likelihood of abuse and set specific restrictions and conditions for conducting those closed meetings to protect the legal privilege without damaging the intent of the sunshine law. It made clear no decision of any kind

can be made except in public:

The exception is limited to meetings in which discussions of present and pending litigation takes place. Clients may provide counsel with facts and information regarding the lawsuit and counsel may advise them about the legal ramifications of those facts and the information given to him. However, once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon advice from counsel, whether it be settlement or otherwise, such discussions shall be open to the public and failure to do so shall constitute a clear violation of the Open Meetings Act.

The Supreme Court opinion footnoted that any attorney representing the public body who participates in a meeting where the restrictions are violated could be subject to an ethics complaint under Code of Professional Responsibility.

We are aware of the potential misuse of this exception in order to circumvent the scope of the Open Meetings Act. A public body could meet with its attorney for the ostensible purpose of discussing pending litigation and instead conduct public business in violation of the Act. Although the Act imposes only limited sanctions on a public body for such violations, any attorney who participates, or allows himself to be used in a manner that would facilitate such a violation, would be in direct violation of the Code of Professional Responsibility and subject to appropriate disciplinary measures.

There is no record of any complaint being filed against an attorney but there have been occasions where attorneys made it known their clients met without their knowledge. The privilege belongs to the “client.” That means members of the governing body can divulge the subject of the private meeting, but the lawyer cannot without permission.

Anticipated lawsuits: The Smith County case was restricted to situations where there was “pending litigation” and the “public body is a named party in the lawsuit,” but a few years later the Supreme Court expanded the exemption to “pending controversies” – defined as anticipated or threatened lawsuits.

In a 1991 case involving the Putnam County Commission and the local teachers’ association, the Court of Appeals noted the attorney--client privilege “is a very narrow exception.” The court imposed the same restrictions for attorney-client meetings with lawyers to discuss “pending (legal) controversies” where litigation has been threatened or is anticipated:

No discussions and no deliberations can occur and no decisions can be made in the closed meeting, and no other business can be conducted.

Other Exceptions to the Open Meetings Act

Public Official Associations, T.C.A. 8-44-102(a)(E): “The board of directors of any association or nonprofit corporation authorized by the laws of Tennessee that was established for the benefit of local government officials or counties, cities, towns or other local governments or as a municipal bond financing pool... may conduct an executive session to discuss trade secret or proprietary information; provided, that a notice of the executive session is included in the agenda for such meeting.”

Labor negotiations “open” and shut, T.C.A 8-44-201(b): “Nothing contained in this section shall be construed to require that planning or strategy sessions of either the union committee or the governmental entity, meeting separately, to be open to the public.”

But, the statute makes it clear that negotiating sessions where government representatives sit down with the employee union to negotiate “are open and subject to the open meetings act.” Subsection (d) requires “Both sides shall decide jointly and announce in advance of any such labor negotiations where such meetings shall be held.”

Language in section (b) above replaced an earlier reference in 8-44-102 that strategy meetings are open to the public. It is unclear why that was not removed in 2009

when (b) was adopted.

State Audit Committees, T.C.A. 4-35-108: “Except as provided in subsection (b), all meetings of an audit committee created pursuant to this chapter shall abide by the notice requirements adhered to by the state governing board, council, commission, or equivalent body to which the audit committee is attached.

“(b) All meetings of an audit committee created pursuant to this chapter shall be subject to the open meetings provisions of title 8, chapter 44, except that the audit committee may hold confidential, nonpublic executive sessions to discuss:...matters designated as confidential or privileged under this code; litigation; audits or investigations; matters involving information ... where the informant has requested anonymity.” Plans to close the meeting and “general nature of discussions” for the closure shall appear on the public agenda.

Public Hospitals Marketing strategies and strategic plans, T.C.A. 68-11-238: This 2008 amendment was intended to allow hospital boards to close their meetings to discuss and develop marketing strategies and strategic plans and protect that information from their private or non-profit competitors. It has been used and exploited since to hide information about possible mergers, sale of local public hospitals, and executive bonus packages.

Under the statute, before a meeting can be closed, hospital board members have to vote in public on whether it needs to meet in private. A simple majority vote of members in attendance is required. The open meetings law bans secret ballots.

The exemption says nothing else shall be discussed during the closed meeting, and “Action by the board of the hospital adopting a specific strategy or plan shall be subject to the open meetings laws and the adopted strategy or plan, and the studies that were considered in the adoption of the specific strategy or plan, shall then be subject to the public records laws. The records shall be available for public inspection at least seven (7) days before any vote to adopt such strategy.”

Suspension or expulsion of students, T.C.A. 49-6-3401(c)(6): This exemption covers school board meetings when the board is hearing student disciplinary appeals and was passed under the premise that student records under the federal student privacy laws (FERPA) would be used in the proceedings.

If the “board conducts a hearing as a result of a request for review by a student, principal, principal-teacher or assistant principal, then ... the hearing shall be closed to the public, unless the student or student’s parent or guardian requests in writing within five (5) days after receipt of written notice of the hearing that the hearing be conducted as an open meeting. If the board conducts a hearing as a result of a request for review by a student, principal, principal-teacher, or assistant principal that is closed to the public, then the board shall not conduct any business, discuss any subject or take a vote on any matter other than the appeal to be heard.”

School security, T.C.A. 49-6-804: The legislature mandated in 2007 that school districts “adopt a comprehensive district-wide school safety plan and building-level school safety plans regarding crisis intervention, emergency response and emergency management.”

Those plans were adopted routinely and without incident or controversy, but after the Newtown, Conn., school shooting, the state School Boards Association asked the legislature to close records and school board meetings. Controversy arose after one county convened a government-wide committee, including multiple members of the same governing body but only a single school board member, to examine its plans. That led the legislature to adopt this:

Subsection (b) “Any meeting concerning school security, the district-wide school safety plans or the building-level school safety plans shall not be subject to the open meetings laws compiled in title 8, chapter 44.

“Though closed to the general public, reasonable notice shall be provided to the general public prior to such a meeting.

“The board shall not discuss or deliberate on any other issues or subjects during such a meeting.”

Chapter 3

Office of Open Records Counsel

The name, Office of Open Records Counsel, suggests the agency within the state Comptroller's office deals exclusively with public records issues. That is its principal function, but it is not all the Counsel's office does.

The duties and responsibilities of the Office are laid out in T.C.A. 8-4-601:

- Answer questions and provide information to public officials and the public regarding public records. Public includes news media.
- Collect data on open meetings law inquiries and suspected violations.
- Issue informal advisory opinions “as expeditiously as possible” to any person, including local government officials, members of the public and the media.

By law, those advisory opinions are public records and must appear on the agency's website: <https://www.comptroller.tn.gov/openrecords/>

- Informally mediate and assist with the resolution of issues concerning the open records law.
- Work with the Advisory Committee on Open Government on open meetings and open records issues.

The legislature also instructed the Open Records Counsel to provide “educational out-

Office of Open Records Counsel

In early years, the majority of calls to the Counsel came from government agencies. Annual reports to legislature show citizen requests have surpassed all others in some years. Of 1,700 inquiries in 2013, 48% came from citizens, 8% from media, and 44% from government.

Contact information:

Office of Open Records Counsel
Email: open.records@cot.tn.gov
Website: www.comptroller.tn.gov/openrecords/
Phone: (615) 401-7891 or, toll free,
1-866-831-3750
Fax: (615) 741-1551
Address: 505 Deaderick Street, Suite 1700,
James K. Polk Building, Nashville, Tennessee
37243-1402.

reach” to the public and those in government on both the open records and open meetings laws. Public officials are not required to have training on the requirements, but the establishment of the Open Records Counsel provided a specialized resource — beyond the Municipal Technical Advisory Service and the County Technical Assistance Service — for such training if they asked for it.

The sunshine law also now includes a section that says: “The office of open records counsel ... shall establish educational programs and materials regarding open meetings laws in Tennessee, to be made available to the public and to public officials.”

The role of the OORC in disputes

Even though the legislature gave it limited powers, the OORC was created to fill longtime enforcement gaps in the two laws. Its greatest value is to serve as an authoritative third-party resource to provide information and help settle disputes. Previously, the only recourse for citizens was to file lawsuits, causing Tennessee’s laws to be ranked near the bottom in national transparency surveys.

The OORC often responds to inquiries or complaints about open records by contacting agencies to gather information and let them know a complaint has been filed. It does not have authority to order the release of records, but the question of whether an agency sought or followed guidance from the OORC about public records can be used in court to determine if records were knowingly and willfully denied. A finding of “bad faith” can help citizens get legal fees awarded. The OORC can also informally mediate disputes on public records.

Open Meetings complaint form: The legislature also gave the office a role that includes collecting data on “open meetings law inquiries and problems.” That lets the office include reports of alleged sunshine law violations and other problems in its annual reports to the Governor’s Office and the General Assembly.

To help with that, the OORC has a form on its website to make it easier for citizens to file open meeting complaints. Though the office does not have the same authority to deal with open meetings problems as it does open records, it has responded to requests for information on legal requirements of the sunshine law and communicated com-

plaints to the governing bodies involved.

OORC advisory opinions and letters

The ability to render advisory opinions, publish them on a public website, and send letters to the appropriate official provides knowledge and leverage citizens never had before.

Most of advisory opinions deal with public records issues. But the OORC has helped deal with some persistent sunshine law problems, sometimes through opinions and sometimes through letters. For example, the office has provided guidance to public officials on proper meeting notices and on conducting business via secret ballots.

All of the OORC's opinions are on its website, and can be printed out and shared with local officials or others. The advisory opinions address specific situations, but they can be useful to others.

In a 2010 opinion (#10-05), the office addressed the question of when meeting materials become a public record. Another dealt with the often-repeated problem of manipulation of meeting agendas. In Opinion #12-01, the OORC said that under Tennessee case law, governing bodies cannot add items to the agenda during the course of a special called meeting because that would mean the public wasn't given adequate notice. That rule does not necessarily apply to agendas for regularly scheduled meetings, the OORC said, but from the perspective of "best practices," items should also not be added to an agenda during regular meetings. "Other members have not had an opportunity to consider or research" the matters, then-Open Records Counsel Elisha Hodge wrote. And, officials should not add items when "the governing body knows that there is significant public interest and knows that if the item had been on the agenda that was originally published for the meeting, there would have been increased public interest and attendance at the meeting."

The office cautioned such actions might invite lawsuits because "a citizen has the right to file an open meetings lawsuit asserting that a change in an agenda during the course of a meeting violates the notice requirements of the Act."

The OORC received almost 60 complaints when the chairman of a local industrial

development board ordered a citizen ejected from a meeting after he asked members to speak louder so the audience could hear. The OORC said to comply with the open meetings act, a governing body's proceedings must be audible to those attending.

OORC website: In addition to dozens of advisory opinions, the OORC's website is full of useful information, including a schedule of reasonable fees for copying and other recommended policies, several years of annual reports to the legislature and Governor, and an FAQ.

The site includes a list of "Best Practices" that recommends, among other things, that local public records policies be written down and available to the public, that records be produced electronically "whenever feasible" as more "economical and efficient" than on paper, and that citizens be given the specific legal basis for redacting every piece of information.

In the same 2008 legislation that created the OORC, the General Assembly said various associations of public officials and local government advisory services "shall develop" programs "for educating their respective public officials" about the open meetings laws and how to comply.

This part of the Open Meetings Act applies to the Municipal Technical Advisory Service (MTAS), the County Technical Assistance Service (CTAS), the Tennessee School Board Association (TSBA), the public Utility Management Review Board, and the state Emergency Communications Board.

Chapter 4

Tennessee Public Records Act

Tennessee's Public Records Act, adopted in 1957, looks somewhat like an after-thought in comparison to the "sunshine in government" or freedom of information laws in other states. The core of the law begins in T.C.A. 10-7-503 under Title 10, "Public Libraries, Archives and Records," and the heading "Miscellaneous Provisions." But the key underlying phrase is powerful:

All state, county and municipal records shall, at all times during business hours...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...
[T.C.A. 10-7-503 (a)(2)(A)]

Despite its obscure location, the simple, strong wording of the statute mirrors the forceful intent later expressed in the Open Meetings Act and earlier in Article 1, Section 19, of the state Constitution that "no law shall ever be made to restrain the right" of the press "to examine the proceedings of the Legislature; or of any branch or officer of the government."

In fact, in the enforcement section of the Public Records Act, the legislature instructed that the law be construed "so as to give the fullest possible public access to public records." [T.C.A. 10-7-505 (d)].

The courts have consistently done this, even as the Legislature through the years has added confidentiality exemptions for more than 350 types of records. Some of these exclusions are meant to protect non-newsworthy information about private individuals (such as medical information, Social Security numbers or home addresses), but others

were enacted under the belief that certain information must remain secret for government to work efficiently.

Still, the Tennessee Public Records Act remains a powerful gateway for informed and timely participation by citizens in their government and with elected officials.

Records as routine as meeting agendas and packets sent to all members of a governing body allow citizens to know about important issues like land use zoning, property annexations, budgets and taxation before governing bodies act. Minutes let citizens know what their representatives did.

The broad array of records documenting government activities is critical to helping citizens understand how government actions impact them. Protecting access to those records is a citizen endeavor.

What is a “public record?”

T.C.A. 10-7-503 (a)1-6

In a nutshell, all records created or received by local or state government as part of transacting official business are open for inspection unless they are otherwise made confidential by “state law.”

...”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.

[T.C.A 10-7-503 (a)(1)]

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

[T.C.A. 10-7-503 (a)(2)(A)]

The format doesn't matter. Whether on paper or in electronic form, it's still a public record. The caveat "unless otherwise provided by state law" is the trickiest part because the term "state law" has come to mean more than statutes created by the Legislature. It can refer to the Constitution of Tennessee, common law, the rules of court, including some rules of civil and criminal procedure, and administrative rules and regulations.

The law on how government must respond to requests

T.C.A. 10-7-503 (a)(2)(B)

Before 2008, when the first major changes in 25 years were adopted, it was not unusual for government officials to tell journalists or citizens to "show me where the law says I have to give you that."

Requests could languish for weeks. A citizen would have to file a lawsuit before the agency could be compelled to follow the law.

Now the law requires a governing entity to explain why it is denying access and sets a deadline for producing information or explaining why not. Doing nothing about a records request constitutes denial without justification and gives the public more leverage in and out of court. The law is specific in its instructions in T.C.A. 10-7-503(a)(2)(B):

(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 the 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 the record or information.*

Getting the legal basis for denial

Getting the specific legal basis for denial, as required in 503(a)(2)(B)(ii), is a critical step for journalists and citizens because it gives them a way to verify whether officials are using a valid exemption.

Elisha Hodge, the state's former Open Records Counsel, explained what should constitute a "basis for the denial" to the local newspaper in Cleveland this way:

In Tennessee, in order for the public to be denied access to a record that exists, the record has to be confidential pursuant to a provision within the law. The records custodian has an obligation to provide the requestor with the specific provision within the law that makes the requested record confidential.

Sometimes, reminding an official that a basis for denial is required will shake loose a record when the official realizes no legal excuse exists. When a dispute arises, the Office of Open Records Counsel can also assist by providing information about the law.

Who is subject to the public records law?

The two sections of statute that define "public records" also identify who must provide access, and the legislature added another category in 2008 when it succinctly acknowledged a landmark 2002 state Supreme Court decision applying the law to certain private businesses and nonprofit entities.

The first section of the statute, T.C.A. 10-7-503(a), identifies "any governmental agency" in control of records involved in the "transaction of official business" as being subject to the open records law. The Office of Open Records Counsel has defined "governmental entity or agency" to include, but not be limited to "the state, any political subdivision, agency, institution, county, municipality, city or sub-entity. Note, certain associations, non-profits, and private entities are also subject to the TPRA."

The second section lists "all state, county and municipal records..."

Private, non-government entities: The legislature added language in the sixth section in 2008 to apply the law to private or non-profit entities which provide public services:

A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.
[T.C.A. 10-7-503(a)(6)]

That was a shorthand codification of the “functional equivalent” doctrine established in *Memphis Publishing Co. v. Cherokee Children and Family Services*. Cherokee, which had been contracted by the Department of Human Services to connect parents with publicly subsidized daycare, had refused a request by The Commercial Appeal (and oddly enough the state Comptroller’s office) for records of their operations.

The court found that the public records act “serves a crucial role in promoting accountability in government through public oversight of governmental activity” and added that Cherokee provided a service that traditionally was a government function. The determination of whether an entity falls under the “functional equivalent” doctrine hinges on “whether and to what extent the entity performs a public function.” The Court said “we intend by our holding to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligation under the act by contractually delegating its responsibilities to a private entity.” Factors the Court said would be used to analyze who might be covered included “the totality of circumstances” but included four considerations:

1. Whether and to what extent it provides a public or government function;
2. The level of government funding;
3. The extent of government’s involvement, regulation of or control over the entity; and
4. Whether it was created by the legislature or had been found earlier to be open to public access.

Since the Cherokee decision in 2002, courts have applied the “functional equivalent doctrine” to groups like the TSSAA (Tennessee Secondary Schools Athletic Associa-

tion), CCA (Corrections Corporation of America, a prison management firm), and a private firm that has a contract to manage Nashville's Bridgestone Arena.

In the TSSAA case, the Court of Appeals quoted Cherokee:

The functional equivalent doctrine, however, "is not intended to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies. A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government. But when an entity assumes responsibility for providing public functions to such an extent that it becomes the functional equivalent of a governmental agency, the Tennessee Public Records Act guarantees that the entity is held accountable to the public for its performance of those functions."

Others subject to the law: An inventory contained in training materials used by the OORC includes more entities whose activities fall under the TPRA:

Search firm or any public or private entity hired in connection with search for director of schools or any chief administrative officer. T.C.A. 10-7-102(b)

Regional airport authorities if either a governmental agency or a private entity operating as the "functional equivalent" of a governmental agency. Attorney General Opinion 2008-064.

Records of some local economic development groups -- private or quasi-public -- are public records if they have received or qualified to receive state ECD grants.

The statute also includes: "The board of directors of any association or nonprofit corporation authorized by the laws of Tennessee that: Was established for the benefit of local government officials or counties, cities, towns or other local governments or as a municipal bond financing pool; Receives dues, service fees or any other income from local government officials or such local governments that constitute at least thirty percent (30%) of its total annual income; and Was authorized as of January 1, 1998, under state law to obtain coverage for its employees in the Tennessee consolidated retirement system." [T.C.A. 8-44-102(b)(1)(E)(i)]"

T.C.A. 10-7-503 (d)(1) contains the exemption. Those associations can remain exempt by providing an annual audit to the state comptroller.

Records specifically listed as open

In some instances, the Legislature has made clear that certain records are public without question. These can be helpful particularly if a dispute arises about an exemption. Examples include:

Minutes of a meeting: The open meetings law at TCA 8-44-104 (a) mandates that minutes of a meeting shall be “promptly and fully recorded” and “shall be open to public inspection.” It even lists what information “shall” be reported, including all votes because “No secret votes, or secret ballots, or secret roll calls shall be allowed.” The state open records counsel has said that applies to individual school board member notes on their evaluation of the director of schools. They were “created” and used in transacting official business.

Applications for top public jobs: Under T.C.A. 10-7-503 (f), “all records, employment applications, credentials and similar documents obtained by any person in conjunction with an employment search for a director of schools or any chief public administrative officer shall at all times, during business hours, be open for personal inspection...unless otherwise provided by state law.” “Any person” is defined in the statute as private entities retained to conduct the official search. Higher education officials are allowed to close information on applicants for heads of an institution, but only until the list is narrowed to finalists. At that point all information is to be made public before the final selection is made.

Certain juvenile crime records: T.C.A. 37-1-153 (b): Most records in juvenile courts are off limits, but in the wake of a crisis in violent crime in Tennessee’s metro areas the legislature opened up certain information. Arrest petitions and orders of juvenile court involving delinquents are open if the accused was at least 14 years old at the time of the alleged act; and the juvenile petition alleges conduct that if “committed by an adult” would constitute one of the 11 most violent felonies, including various categories of murder, rape, aggravated robbery, and kidnapping. Any other records

in the file, including medical report, psychological evaluation or any other document “shall remain confidential.”

Certain educational records: T.C.A. 10-7-504 (a)(4)(A) Occasionally school officials wrongly say they cannot confirm whether a student attends a particular school because of the Family Educational Rights and Privacy Act (FERPA). There is a general state exemption that covers “records of students in public educational institutions.” It lists academic performance, financial status of a student and the student’s parent or guardian, medical or psychological treatment or testing. But the last sentence explains “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.”

Chapter 5

Exemptions to the Public Records Act

A plethora of exemptions spread throughout state statutes and in “laws” outside the Tennessee Code makes it exceedingly difficult for citizens to know whether information in a document is public or private. This chapter seeks to outline the most common exemptions to the Tennessee Public Records Act.

Because there is no exhaustive, comprehensive official list of exemptions it is important to ask custodians to specify exemptions they are relying on to deny a request and where to find that exemption. The law requires them to cite the basis for denial, and this often can be the most important step for citizens or reporters in determining whether an agency can legally withhold information.

A once-popular adage of journalism says “When in doubt, check it out.” In that spirit, once a citizen has been given a reason they can’t see certain records, they can and should verify there is such an exemption.

Exemptions passed by the Legislature

The original 1957 Tennessee Public Records Act exempted two categories of records - medical records of patients in public hospitals and state and federal security information in hands of the state military department.

Now there are more than 350 statutory exemptions in the Tennessee Code. Unfortunately, they aren’t all listed anywhere. The TPRA has been amended in such ad hoc and cavalier fashion and is so poorly organized that some exemptions appear in Section 503 (“Records open to public inspection”) instead of in Section 504 (“Confidential records - Exceptions”). Further complicating matters, more than 300 statutory exemptions appear outside the body of the TPRA (T.C.A. 10-7-503-516), scattered across

hundreds of “chapters” and thousands of sections of the Tennessee Code. A cross index at the end of Section 504 references about 100 exemptions, but it would take a decoder to find them in the state Code. If an exemption can’t be found in Sections 503-504, the Tennessee Attorney General’s office has suggested looking through statutes governing the state or local agency or the subject matter in question. The AG cannot answer legal questions from the public.

The most common exemptions in the statute include:

- All investigative files of the TBI
- Health and medical information in government hands
- Adoption records
- Certain student records
- Records regarding contemplated legal or administrative actions of the state Attorney General
- Personally identifying information of government employees and their families (addresses, all phone numbers, drivers license information, unless driving is part of their duties)
- Law enforcement and school emergency contingency plans
- Library checkout records of individuals
- Most personal or company tax information held by the state revenue department.

Some email correspondence: Several exemptions would not appear on any list. All emails of the director of schools, for example, would not be a public record because the law doesn’t extend to personal emails unless the appropriate body has adopted rules restricting use of publicly owned computer systems. Those emails made or received “pursuant to law or ordinance” are public records.

In 1999, the legislature adopted T.C.A. 10-7-512 that said the state or any agency, institution, or political subdivision that has an electronic mail communications system shall adopt a written policy on any monitoring of electronic mail communications and the circumstances under which it will be conducted. Subsection (b) states: The policy shall include a statement that correspondence of the employee in the form of electronic mail may be a public record under the public records law and may be subject to public inspection.”

The Court of Appeals in *Brennan v. Giles County Board of Education* (2005) said it doesn't matter that the correspondence is on a government computer, inside a public building, or received and sent on government time; it has to be "made or received" in connection with the transaction of official business. The appellate panel said: "The determining factor is the nature of the record, not its physical location."

Conversely, emails on private email accounts are public if they deal with discussion or transaction of public business.

Other "law" that can exempt records

"State law" is not limited to state statute because the courts have construed "law" to be significantly broader than statutes. The Court of Appeals in *Gretchen Swift v. John Campbell, et al*, (2004) said "law" can include:

...the Constitution of Tennessee, the common law, the rules of court and administrative rules and regulations because each of these has the force and effect of law in Tennessee.

Rules of court refers to the Rules of Criminal Procedure and Rules of Civil Procedure. Both sets are adopted by the Tennessee Supreme Court to apply to all state courts. Changes are usually sent to the General Assembly for routine review and ratification. The Tennessee Court of Appeals in *Coats v. Smyrna/Rutherford County Airport Authority* held that rules of court are "laws of the state."

Rule 16(a)(2) and criminal prosecutions

The exemption most often encountered by journalists, and the most controversial, is Rule 16(a)(2) of the Rules of Criminal Procedure. Titled "Discovery and Inspection,"

the rule has been misused for years by law enforcement to withhold access to information never intended to be covered by the Rule. The rule is designed to protect personal notes of investigators and prosecutors, internal memos of the District Attorney's office, and witness statements – things that might give the defense or the prosecution an unfair advantage. It does not exempt documents such as crime incident reports, arrest records, and materials gathered from other sources, as some officials have claimed. It states:

Rule 16: Discovery and Inspection. (a) (2) Information Not Subject to Disclosure. ...this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

Other often-cited exemptions that are sourced to laws outside state statute include:

- Attorney-client privilege or the attorney work product doctrine, but only in particular situations. Correspondence between the county attorney and the county commission chairman or mayor are not automatically exempt and would be private only as it involves pending litigation or possibly an anticipated legal action. The Tennessee Court of Criminal Appeals in 1992 said “the privilege does not extend to communications from an attorney to a client when they contain advice solely based upon public information rather than confidential information.” (Bryan v. State of Tennessee) The client can waive the attorney-client confidentiality privilege.
- Work product doctrine. To qualify for this exemption, the custodian of the document has to show three elements: “(1) that the material sought is tangible, (2) that the documents were prepared in anticipation of litigation or trial, and (3) that the documents were prepared by or for legal counsel.” Court of Appeals in *The Tennessean v. Tennessee Dept. of Personnel* (2007)

- Records protected by “protective orders.” These are usually issued by a judge in connection with materials filed in a pending case, and the court doesn’t want it made public until later. These are overused and abused, particularly in personal injury and product liability lawsuits.
- Records protected by specific federal statutes, including the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPPA). It’s important to remember that these acts only apply to items Congress has specified in the law. They do not apply to every record related to health information or education. HIPPA usually covers information in the hands of health providers who will send a bill to the patient involved and perhaps from ambulance service paramedics, but not police and fire incident reports. Too often, FERPA and HIPPA are cited as broad exemptions when in fact they don’t apply. For example, a county attorney in 2014 claimed video footage of a high school basketball game was confidential under FERPA even though it was in the hands of the local sheriff and was the visual evidence that two girls basketball coaches had conspired with players to throw a ball at a former player in retaliation for heckling. Such game tapes are routinely broadcast on public channels. FERPA does not prohibit showing game tapes. FERPA only governs an educational institution’s release of records. It does not govern the release of records in the hands of police.

Redactions

The ability to inspect all public records at the time a request was made began to change in the late 1990s when the concept of redaction was introduced in Tennessee.

Redaction was introduced in the law because the presence of confidential information was being used to deny access to other parts of the record not deemed confidential. Suddenly, government officials could take an unspecified amount of time to review records to see if anything needed to be redacted.

The statute includes this language: “Information made confidential ... shall be

redacted wherever possible and nothing ... shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information.”

Chapter 6

Making a public records request

T.C.A. 10-7-503(a)(2)(B and C)

For five decades, state law contained no instructions for processing public records requests. For example, agencies could stall or ignore them because there were no deadlines for responding. Sometimes it took a lawsuit to get routine records.

In 2007, a study committee of state legislators and representatives of local government, media and good government groups recommended changes to address that and other problems. The General Assembly, recovering from the recent Tennessee Waltz ethics scandal, adopted some of the committee's recommendations, but it did not fix everything.

Significant developments included creation of the Office of Open Records Counsel and requiring that records custodians provide a valid legal basis for denying a request. The Counsel's office was placed under the Comptroller of the Treasury, the state agency responsible for auditing hundreds of public agencies, including whether they are complying with state laws.

Though the Counsel's powers are limited, it is a valuable resource for the public and public agencies. It cannot order the release of records, for example, but for the first time there is a third-party authority to help settle disputes without expensive lawsuits.

The 2008 changes set limits on what the government can require of citizens who want to inspect or get copies of records. They made it clear the government cannot charge a fee to inspect records and established deadlines for responding to requests for information. (See "The law on how government must respond to requests" Chapter 4, Page 29). The amendments also set out what government must do when it denies a request and attempted to limit discretionary charges for copies.

On the flip side, the legislature authorized the Counsel's office to approve a new fee for labor to produce copies – something that was never discussed nor recommended by

the study committee. It also approved some limits on persons making requests, limits that had been previously recognized by the courts.

Response deadlines

The new language provides government seven business days to produce records, or say how long it would take, but only “in the event it is not practicable for the record to be promptly available for inspection.” The seven days were meant to allow more time and effort because certain records might need to be redacted or because a large volume of records was requested. Some requesters complain that the seven days is used as a way to delay all records responses even when records are readily available. “Promptly” was meant to apply to routine or regularly requested records. And the OORC advises in its best practices on its website: “A records custodian should make requested records available as promptly as possible in accordance with Tenn. Code Ann. Section 10-7-503.”

Probably the most critical change was addition of the language that says when a request for records is not granted “the response shall include the basis for the denial.” The study committee verbiage was more direct: “Deny the request in writing by citing the specific legal exemption.”

Former Open Records Counsel Elisha Hodge deferred to the study committee’s intent in response to questions from the Cleveland Daily Banner after an attorney for the Bradley County Board of Education denied board members’ records about the school director’s performance review.

“The records custodian has an obligation to provide the requestor with the specific provision within the law that makes the record confidential,” Hodge explained. She said the board’s attorney had relied on an exemption that did not exist.

No charge to inspect T.C.A. 10-7-503(a)(7)(A)

The law makes it clear that unless a records custodian can show the law allows it,

an entity “may not ... assess a charge to view a public record...” That means that as of the publication date of this manual anyone in control of records (except public utility customer information) cannot charge to prepare and produce records for inspection, including to review and redact confidential information. The same rule says an agency cannot require a request to inspect to be in writing, though printed forms on the OORC website makes that process convenient. The law requires requests for copies of records to be in writing.

While the statute and the Schedule of Reasonable Charges (on the OORC website) make it clear that agencies cannot charge to inspect, some officials continue to push to collect. The state’s public utilities argue they are allowed to charge for time spent reviewing and redacting “private” customer information in their files. They cite a 2002 amendment (now T.C.A. 10-7-504 (a)(20)) which states: “For purposes of this section only, it shall be presumed that redaction of such information is possible. The entity requesting the records shall pay all reasonable costs associated with redaction of materials.”

“May” and “shall”

The statute is chock full of limits that government can impose on requestors, but many are not required. They are permissive and leave their implementation to the official’s discretion. The Open Records Counsel recommends public record policies enacted by governing bodies include those preferences, even the discretionary ones. There also are requirements on requestors.

A records custodian “may require” payment of “the reasonable cost” of providing copies, but it is not required. All or part of a fee can be waived. The state Comptroller waives the first \$25 charge because the expense of accounting for the payment would cost more.

Since the law is construed to require officials to provide records only to “citizens” of the state, officials “may require” photo identification” as proof of residence. Both of those are discretionary to the official and can be imposed or waived.

A governmental entity is not required to sort through files to compile information

because it cannot be required to create a record that does not exist; but, the law says the person requesting the information shall be allowed to inspect those files.

Any request for inspection or copying of a public record shall be “sufficiently detailed” to enable the records custodian to identify the specific records to be located or copied. Even though the law does not require inspection requests to be in writing, it is a good idea to put complex requests in writing so the custodian knows exactly what is being requested. It also creates a paper trail if litigation ensues. To save delays and expense, it is good make requests no broader and no larger than needed.

Copy fees: “Schedule of Reasonable Charges”

Citizens have the right to get copies of any records they have a right to see, but the government has “the right to adopt and enforce reasonable rules governing” the process. The term “reasonable rules” had been interpreted to mean “reasonable fee” but had never been defined in statute. While a state agency in Nashville charged 15 cents a page, a city agency six blocks away demanded \$1.50 a page.

In creating the OORC, the legislature instructed it to develop a “schedule of reasonable charges” to provide copies. It said schedule could include labor fees but suggested schedule makers should consider some principles: that “excessive fees and other rules shall not be used to hinder access” and “providing information to the public is an essential function of a representative government and an integral part of the routine duties and responsibilities of public officers and employees.”

The law requires the custodian to provide an estimate of the costs to provide copies” of records -- to help citizens avoid surprises.

The “Schedule of Reasonable Charges” can be found on the OORC website <https://www.comptroller.tn.gov/openrecords/>. The website also includes a list of “best practices” for records custodians.

Developed by the OORC and the Advisory Committee on Open Government, the schedule states it may be used as a guideline “if a records custodian determines to charge for copies or duplication of public records.” If the agency plans to impose such charges, they must be “a properly adopted written policy.” It must be approved by the

appropriate governing authority (e.g. city council, county commission, school board.)

The schedule recommends 15 cents per page for standard black and white letter-sized copies, 50 cents for color. Higher rates “can be assessed or collected only with documented analysis that the higher charges represent such governmental entity’s actual cost.”

The schedule allows a charge for “labor” -- after a one-hour threshold -- for “time reasonably necessary to produce the requested records and includes the time spent locating, retrieving, reviewing, redacting, and reproducing the records.”

“A records custodian is not required to charge for labor and may adopt a labor threshold higher than the one reflected above,” the schedule states.

The schedule reiterates that copy fees are not required and can be waived, but fees shall not be applied arbitrarily. The schedule admonishes that records custodians “shall utilize the most economical and efficient method of producing requested records.” It also gives discretion to agencies “to deliver copies of records through other means, including electronically” and authorized them to “assess the costs related to such delivery.”

The legislation instructed the Counsel’s office to develop a “safe harbor policy” for entities who adhere to the policies and guidelines established by the OORC. That suggests that any agency that does not follow the OORC guidelines could be disadvantaged in litigation.

The legislature also instructed the OORC to develop a separate policy dealing with charges for “frequent and multiple requests” for public records. Some officials perceive they are being harassed by some individuals or groups.

Electronic records and other tech questions

The legal definition of public record includes: “electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics...” It is clear that information stored in a government computer is a public record. It is not as clear that citizens have an absolute right to get digital copies of information even if the custodian agency maintains records that way.

The statute has no clear, affirmative mandate, and there is not a Tennessee court case directly on point, but language in a 1998 state Supreme Court decision said the public should be able to specify an electronic format if the requesting party is willing to pay. That indicates the issue may be ripe for litigation. For now, the short answer is that it's left to the discretion of records custodians, who are not required to produce records that way but aren't prohibited.

In 2005, the state Court of Appeals said the legal requirement of access is satisfied with the production of paper records. In *Wells v. A.C. Wharton*, the court said allowing a records custodians to choose the way they prefer "is not unreasonable so long as that manner does not distort the record or inhibit access to that record."

Access to information in electronic form is among the least developed areas of government transparency, confusing citizens who have beaten most government agencies to the 21st century. Part of the problem can be traced back two decades when public officials first asked to begin keeping records on "computer or removable computer storage media." Open government advocates were concerned computerization could be used to restrict access by making it prohibitively expensive to retrieve the information. To accommodate those concerns, language was inserted in the legislation imposing certain conditions:

*Such information is available for public inspection, unless it
is a confidential record according to law.
The official can provide a paper copy of the information when
needed or when requested by a member of the public.
(T.C.A. 10-7-121)*

True to form, agencies began charging large fees to pay computer programmers to pull out the information. One public utility tried to charge \$7,200 for 2,500 tree-trimming complaints. Others insisted on converting records to paper form and charging high fees to provide copies.

Fulfilling the first condition is often the primary obstacle to getting many records in electronic format because custodians say they are unable to review records and redact

confidential information electronically. That means the record is printed out and exempt information is redacted on the hard copy. The OORC has reminded record custodians: "... you may not charge the requestor for the costs of production of the redacted printed copies if the requestor inspects the records in your offices. If the requestor asks to keep the copies or if the requestor asks to have them delivered a certain location, then you may charge for the copies."

Various authorities have encouraged public agencies to provide more information electronically because it would be more efficient and less expensive for the public and the agency. In *Tennessean v. Electric Power Board of Nashville*, the state Supreme Court in 1998 ridiculed the notion that government agencies would not want to provide records electronically:

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.

An analysis of that 1998 decision by the state Attorney General noted that the Tennessee Supreme Court: "has held that where information exists electronically and can be extracted in the format requested by writing a computer program, the records custodian must produce the information as requested, provided the requestor is willing to pay the costs incurred in disclosing the information."

Efforts to modernize the law on technological issues were hampered when the legislative study committee ran out of time in 2007 and deferred them for further study. Because they are so complicated, the committee in its final report referred them to the new OORC and an Advisory Committee on Open Government. Those resolutions have not been pursued, but in a set of "Best Practices" for records custodians, the OORC suggests: "To the extent possible, when records are maintained electronically, records custodians should produce records request electronically" as a more "economical and efficient" method.

The OORC also recommends "if a governmental entity maintains a website, records custodians should post as many records, and particularly records such as agendas and

minutes from meetings, on the website whenever it is possible to do so.”

The legislature instructed the OORC to “consider” other principles adopted by the study committee when it developed the Schedule of Reasonable Charges. In Chapter 1179, Public Acts of 2008, included: “That the requestor be given the option of receiving information in any format in which it is maintained by the agency, including electronic format.”

Self-service copies?

The study committee also failed to resolve another issue raised by members of the study committee. It did not deal with the use of modern technology to save citizens money by allowing them to use personal camera phones to photograph records or to bring their own scanners.

Former Open Records Counsel Elisha Hodge has said the TPRA does not prohibit self-copying but the law does not require it. The current statute seems to support the proposition. Section 506 states: “Where any person has the right to inspect public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same...”

Some records custodians and their advisers point to language in Section 506 that says copies must be made “while such records are in the possession, custody and control of the lawful custodian.” They argue they are responsible for protecting the records and thus must use caution to avoid the risk records being damaged.

What if records are denied?

Before July 1, 2008, a national survey of state public records laws ranked Tennessee 44th because the enforcement provisions were weak and there was not adequate government accountability. Changes the legislature made in 2008 moved it to 24, but the most recent analysis by the same national good government group had it at 38.

Most of the enforcement language is in T.C.A. 10-7-505 under a 6-part title: “Denial of access -- Procedures for obtaining access -- Court orders -- Injunctions -- Appeals --

Liability for nondisclosure.”

It says: “Any citizen of Tennessee” whose request for records has been denied “in whole or in part” has the right to go into local Chancery, Circuit or other court of equity in the county “to petition for access and to obtain judicial review of the actions taken to deny the access.”

There are other steps that can be taken before going to court because there are more ways to be “denied” than simply being told “No.” Ask the custodian to cite the specific legal exemption being relied on. Keep in mind that subsection (c) of the statute stipulates that in court “the burden of proof for justification of non-disclosure of records sought shall be upon the official.”

That makes it possible to verify the existence of the legal basis being cited. As the state Attorney General has suggested, look at the list of exemptions in sections 503 or 504 of the records law or look at the section of state law that governs that particular state agency or local entity.

Contact the Office of Open Records Counsel or go to the OORC website to see if there is an advisory opinion posted there on that particular question. The office can informally mediate disputes.

If there is no response to your request – “promptly” or within 7 business days – or records are not delivered, the custodian needs to understand that subsection 503(a)(3) says “Failure to respond to the request as described in subdivision (a)(2) shall constitute a denial and the person making the request shall have the right to bring” legal action.

Previously, custodians could wait until the first hearing in court to turn over records and then ask the judge to “moot” the lawsuit. If a decision is made to go to court, the statute allows for “expeditious hearings” where a “show cause” hearing can be requested. To expedite the process, answers to the legal complaint can be skipped to speed up the process. Unlike other lawsuits, “A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply.”

If the judge sets a show cause hearing, the custodian has to show the court the legal basis for the action. The court can review the records en camera (privately) if asked to do so.

What are the penalties for wrongfully denying access?

There are no penalties for a governmental entity violating the public records act except for the possibility of having to pay legal expenses, including “reasonable” attorney fees, of the citizen who sued to get them. Getting legal expenses paid can be a high hurdle for citizens because the law says the court has to find that the governmental entity “knew that such record was public and willfully refused to disclose it.” The dual standard of “willful” and “knowing” can be hard to meet. A 2006 legal opinion of the state attorney general summarized it this way: “Courts have construed ‘willful’ as requiring evidence or demonstration that the governmental entity or agent thereof acted with bad faith, *Arnold v. City of Chattanooga*, or where the controlling case law was not complex and/or unclear. *Tennessean v. City of Lebanon*, 2004 WL 290705 (Tenn. Ct. App. Feb. 13, 2004)”

The 2008 amendments added language to encourage custodians to get qualified legal advice before making decisions. “In determining whether the action was willful, the court may consider any guidance provided to the records custodian” by the OORC.

The OORC is not the entity’s lawyer, but it can tell the agency’s leaders that they need a valid reason to deny a records request, to delay or to charge higher than routine fees to produce the records.

Failure to follow that “guidance” then contributes to the knowing and willful standard when the plaintiff seeks legal fees.

About Tennessee Coalition for Open Government

Tennessee Coalition for Open Government seeks to preserve, protect and improve citizen access to public documents and government meetings in Tennessee through an alliance of citizens, journalists and civic groups. Our focus is research and education because we believe knowledgeable citizens are the best way to protect the free flow of information.

Since its inception in 2003, TCOG has provided training and presentations to more than 2,400 citizens in Tennessee. TCOG has offered on-the-spot guidance through its hotline to more than 1,200 citizens and journalists. It has conducted research into open government issues, providing information about access to citizens, journalists, lawmakers and government officials.

TCOG's mission rests on the belief that access to government information, through public records and public meetings, is crucial in allowing informed citizen participation in a democratic society.

More information can be found at the website www.tcog.info.

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