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8-24-16

To: Ann Butterworth
Office of Open Records Counsel

From: John Williams, Deborah Fisher
Tennessee Coalition for Open Government

Hi Ann,

On the following pages is a recommendation for language in a model policy, reflecting the suggestions we gave you earlier, as well as our conversation about those on August 15. We hope this is useful in the development of the Model Best Practices and Public Records Policy in a way that can improve transparency and access to government information in the state

Thanks for meeting with us earlier. And thank you very much for your consideration.

Regards,

Deborah Fisher
Executive Director of Tennessee Coalition for Open Government

John Williams
Board member, Tennessee Coalition for Open Government

Section 4 of Public Chapter 722, Acts of 2016, codified as T.C.A. § 10-7-503(g), requires every governmental entity subject to the Tennessee Public Records Act to “establish a written public records policy properly adopted by the appropriate governing authority” no later than July 1, 2017.

Section 7 of Public Chapter 722, Acts of 2016, codified as T.C.A. § 8-4-604(a)(4), requires the Office of Open Records Counsel (OORC) to establish “a model best practices and public records policy for use by a records custodian in compliance with § 10-7-503.”

Section 8 of Public Chapter 722, Acts of 2016, codified as T.C.A. § 8-4-604(d), requires OORC to provide a proposed draft to the Advisory Committee on Open Government (ACOG) for comment. ACOG may meet and provide written comments on this draft policy.

Model Best Practices and Public Records Policy

The following general principles should be included in the written public records policy:

- Records custodians should broadly construe the Tennessee Public Records Act (TRPA) so as to give the fullest possible access to public records.
- Records are presumed to be public unless specifically exempted from the TPRA.
- No fees are charged for the public to inspect records during regular business hours.
- Tennessee law permits but does not require an agency to charge a fee for copies of public records.
- Excessive fees and other rules shall not be used to hinder access to public records.
- The TPRA permits but does not require records custodians to demand proof of Tennessee citizenship from requestors.
- Custodians should communicate with requestors to facilitate and enhance access, including helping to narrow overly broad requests and to direct requestors to the proper custodian agency.

I. Process for Making Requests to Inspect Public Records and Requesting Copies of Public Records.

A. Every governmental entity must have a “public records request coordinator” whose role is to ensure that public records requests are routed to the appropriate records custodian and that requests for public records are fulfilled in accordance with Tennessee law.

B. Every governmental entity must have one or more “records custodians” whose responsibilities include the custody and care of the public records of that governmental entity.

C. The records of every governmental entity shall be open for personal inspection by citizens of Tennessee at all times during regular business hours.

D. The custodian of a public record shall promptly make the requested record available for inspection.

E. Only when it is not practicable to make the records available promptly may a records custodian refuse to provide the requested record promptly. If it is not practicable to make the records available promptly, the custodian must provide to the requestor, within seven (7) days of the request, a completed records request response stating the time reasonably necessary to produce the record. The Office of Open Records Counsel (OORC) response form (Form #CT-0446) must be used.

F. After a records request is received, the records custodian shall quickly determine whether the requested records are readily available or will require a search and shall so inform the requestor. The records custodian should not wait until seven business days have passed to act upon the records request. Speed of response to a public records request is important since production of records is one of the required functions of every governmental entity.

G. The OORC has developed a form for use by citizens in requesting inspection and/or copies of specified public records (Form #CT-0445). Each governmental entity must decide whether to use this form or instead develop its own form for use by those requesting records.

H. A requestor may make an oral request to review a public record. Each governmental entity must accept requests to review public records, whether made in person, by telephone, or in writing. If a government entity regularly uses email to conduct government business, it should allow use of email to receive written records requests and to respond to them.

I. A records custodian may (but is not required to) insist that a request for copies of specified public records be in writing. A records custodian should not limit how those written records requests are received, and should allow a requester to submit written records requests by email if the government entity regularly uses email to conduct other government business.

II. Process for Responding to Requests, Including Redaction Practices.

A. A records custodian shall respond to a public records request in the most economic and efficient manner available. For example, if the requested records are available in digital form, they may be provided to the requestor in digital form. A government entity also should respond to an emailed records request by email as a way of responding promptly and efficiently.

B. If public records are maintained by the governmental entity in machine-readable format, the records shall be provided to the requestor in that format, i.e., the “native” format. For example, if a spreadsheet is maintained by a government agency in Excel format, the spreadsheet shall be provided to the requestor in that format, rather than creating a PDF document which is less useful to the requestor and deprives citizens of the benefit of their government’s investment in technology.

C. The governmental entity shall post on its website, in a timely manner, commonly requested public records, such as meeting agendas, agenda packets, and meeting minutes. Meeting minutes, and draft minutes, shall be made available to requestors as soon as they have been prepared (whether or not the draft minutes have been approved yet by the governmental entity).

D. If any portion of a public record is redacted by the governmental entity on the basis that it is confidential, the governmental entity shall inform the requestor of the legal basis for the redaction at the time the record is provided. A legal basis should be provided for each redaction.

E. If the governmental entity denies a request for inspection of a public record, the records custodian must inform the requestor of the basis for denial of the request. The OORC has developed a form for use by a governmental entity (Form #CT-0447) when the entity believes that denial of a request is the appropriate response.

III. Process for Charging and Collecting Fees for Public Records.

A. The governmental entity may require a requestor to pay a reasonable per-page charge for copies of public records provided to the requestor. The governmental entity shall establish the amount of this charge and inform the requestor of this charge before making copies of the records.

B. The governmental entity is not required to charge a requestor for copies of public records. The governmental entity may decide, for example, to provide up to a certain maximum number of pages without charge and then charge a per-page amount for each page after that amount. The number of pages provided without charge and the per-page charge shall be established in advance and shall be applied uniformly to all requests.

C. The OORC has established and posted on its website a Safe Harbor Policy and a Schedule of Reasonable Charges for Copies of Public Records. The governmental entity shall either adopt this Schedule or develop its own Schedule of Reasonable Charge and provide the Schedule to those who request copies of public records.

D. The governmental entity may require a requestor to pay the entity's "reasonable costs incurred in producing the requested material." The governmental entity is not required to impose such a "labor" charge. However, if the entity chooses to do so, the methodology for calculating the labor charge shall be established in advance of complying with all public records requests and shall address all issues which are addressed in the OORC's Schedule of Reasonable Charges. The governmental entity may choose to establish an upper limit or "cap" on the amount which may be charged a requestor for labor, or a "cap" on the per-hour labor cost that it will charge citizens.

E. If a labor charge is determined by the governmental entity to be likely in order to comply with a particular public records request, the entity shall provide the requestor, in advance, the estimated charge for the copies, including the estimated labor charge. The requestor shall be allowed to review the itemized estimate so that the requestor may understand how the estimated charge was calculated.

F. The governmental entity may collect any charged fees at the time the records are provided to the requestor or (especially with frequent requestors such as journalists) may allow payment of several charges at the same time (often at the end of a certain period, such as at the end of the month).

IV. Records Custodians.

Following is the contact information for the records custodian(s) for this governmental entity:

V. Citizenship of Requestors.

A. T.C.A. § 10-7-503(a)(2)(A) states that public records shall be open for inspection “by any citizen of this state.” Tennessee law is silent as to whether public records shall be open for inspection by a citizen of another state. Thus, it is permissible for a governmental entity to provide copies of public records to requestors who are not citizens of this state. In the interests of transparency, the government entity shall provide public records requested by a citizen of another state unless the request poses an undue burden on the entity.

B. If the governmental entity requires the requestor to provide proof of citizenship, the form of identification provided by the requestor shall simply show the requestor’s address. The form of permissible identification shall not be limited to a Tennessee driver’s license and may include other forms of identification, such as college ID card that identifies the requester as a student in a Tennessee college.