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Oct. 3, 2017

Adam Yeomans

Vice President, Tennessee Coalition for Open Government

Representative, Advisory Committee on Open Government

Regional Director South, The Associated Press

1207 18th Avenue South

Nashville, TN 37212

Lee Pope

Office of Open Records Counsel

505 Deaderick Street, Suite 1700

James K. Polk Building

Nashville, TN 37243-1402

Dear Lee,

I am writing to you on behalf of Tennessee Coalition for Open Government with deep concerns about the Office of Open Records Counsel's Model Public Records Policy effective Jan. 20, 2017 and amended Aug. 16, 2017.

We believe the Model Policy and guidance from the office is leading to adoption of unreasonable rules that are hindering citizen access to non-exempt public records and preventing the free flow of information to citizens about what government is doing in Tennessee.

Specifically, we have noted an increasing number of government entities have adopted language in their public records policies that states: "A requestor will not be allowed to make copies of records with personal equipment;" or something similar.

The effect of this wording, which was patterned from language in the Office of Open Records Counsel Model Public Records Policy, has resulted in citizens being banned from taking photographs with their

Tennessee Coalition for Open Government

P.O. Box 22248, Nashville TN 37202

(615) 602-4080 | www.tcog.info

"To preserve and improve access to public information"

cell phones or using other personal scanner or copy equipment when inspecting public records.

The Office of Open Records Counsel has stated, with no legal basis provided, that “(t)he TPRA authorizes a governmental entity to determine...whether to permit requestors to make copies or duplicates using their own devices, such as a cell phone camera.” We believe this statement conflicts with the Tennessee Public Records Act, as no such language allowing government entities to ban photography exists in the law.

State law requires the Tennessee Public Records Act “be broadly construed so as to give the fullest possible public access to public records.”

It also says that government entities may not adopt policies that are more burdensome than state law allows.

The one part of the law that addresses the right of government entities to adopt rules surrounding photography of public records is directed toward public records having commercial value. And even here, the government entity is not given authority to make *any rule*, but must meet some standard of reasonableness.

10-7-506. Right to inspect public records -- Public records having commercial value.

(a) In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or such custodian's authorized deputy; provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.

We understand there may be legitimate reasons to prevent a citizen from using their own copy machine to make copies, such as if the records are fragile or a personal machine is in such disrepair as to risk tearing a document. But we believe these present separate and narrow reasons, and restrictions should only be considered when there is a true risk of harm to a record.

We have heard of no reason for prohibiting photography. Someone doesn't even have to touch a record to take a picture, or handle it any more than they would handle it by simply looking through the record.

As I'm sure you are aware, state Sen. Mike Bell, chairman of the Joint Government Operations Committee, and others on that committee expressed alarm that state agencies have adopted language prohibiting all photographs of public records in their control. Sen. Bell asked the three specific agencies that were before the committee on Sept. 20 to review their policy language to allow photography and the use of technology.



But this problem is not limited to three state agencies. It is an issue that is multiplying quickly across the state.

Many people use their cell phones or other technology as a way to take notes. It is fast and cost-effective. It does not require someone to laboriously hand-copy information into a notebook. It is precise and helps to assure that the requester accurately records information from the documents — a value that is very important should the requester wish to disseminate the information found in the public records later to others.

It also provides an alternative for a citizen in the face of what can be an excessive fee structure when a citizen asks the government entity to make copies. Taking a picture allows a citizen who can't afford fees an alternative way to quickly, safely and efficiently memorialize what is in a public record.

The factor of potentially burdensome fees and delays while waiting for a government worker to make copies is anticipated in part by T.C.A. 8-4-604 (a)(1)(ii)(e) in instructions to the Office of Open Records Counsel. It instructs the Office to consider principles presented by a legislative study committee that:

“when large-volume requests are involved, information shall be provided in the most efficient and cost-effective manner, including but not limited to permitting the requestor to provide copying equipment or an electronic scanner;...”

Additionally, several states have already addressed this issue. They have correctly recognized that prohibiting someone from taking a photograph or making their own copy of a record in a way that does not threaten the integrity of the record is bad public policy. Many also recognize that such restrictive policies conflict with their state laws that call for the fullest possible public access to public records — as does Tennessee law.

Kentucky, Virginia, Georgia, Maine, Iowa, Florida, Washington, Texas, Arizona and Louisiana are just some states that allow photography and use of personal equipment to make copies of non-exempt public records. If there are restrictions, they are narrow and limited to when there is a credible threat of damage or tearing.

We think this is the correct course for Tennessee as well.

We urge the Office of Open Records Counsel to take action quickly. These restrictive and unreasonable policies are being newly adopted and employed throughout the state, putting government entities at risk of violating the Tennessee Public Records Act.

We ask that your Office update its Model Policy, offer new guidance and proactively make contact with government entities and representative associations of government entities in an effort to promote the “fullest possible public access to public records.”



Sincerely,

A handwritten signature in black ink, appearing to read 'Adam', followed by a stylized flourish that extends to the right.

Adam Yeomans
Vice President, Tennessee Coalition for Open Government
Representative on Advisory Committee on Open Government
Regional Director South, The Associated Press

cc:

Advisory Committee on Open Government

Jack McElroy, Tennessee Press Association
Maya Siggers, Tennessee Municipal League
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Debbie Shedden, Tennessee School Board Association
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Blake Farmer, Society of Professional Journalists
Jerry Vastbinder, Tennessee Sheriffs' Association

The Honorable State Sen. Mike Bell