

# **Report of the Joint Study Committee on Open Government**

The following are recommendations that were favorably adopted by the Joint Study Committee on Open Government on November 27-28, 2007:

## **PART I. Statutory Changes**

**SECTION 1.** Tennessee Code Annotated, Section 8-44-101 is amended by deleting subsection (a) and substituting instead the following:

(a) Because openness in government supports and enhances public confidence, discourages abuse, and allows citizens to participate equally in decisions affecting their lives, 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.

**SECTION 2.** Tennessee Code Annotated, Section 8-44-102(b), is amended by deleting subdivision (2) in its entirety and substituting instead the following:

(2) “Meeting” means more than three (3) members or a majority of members of a governing body, whichever is less, is present and public business within the jurisdiction of that governing body is being deliberated or decided. Meeting does not include any on-site inspection of any project or program.

**SECTION 3.** Tennessee Code Annotated, Section 8-44-102, is amended by deleting subsection (c) in its entirety and substituting instead the following language:

(c) A governing body shall not hold a series of gatherings with less than the required number of members present as described in (b)(2) where the purpose of the gatherings is to avoid compliance with this chapter.

(d) This section shall not be construed as prohibiting discussions or the mere communication of factual information between individual members of a governing body where the purpose is to educate members on specific issues.

(e) Nothing in this section shall be construed as to require a chance meeting of more than three (3) members or a majority of members of a governing body, whichever is less, to be considered a public meeting. 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.

**SECTION 4.** Tennessee Code Annotated, Section 8-44-106 is amended by adding the following as a new subsection thereto:

(e) If the plaintiff substantially prevails on any part of the claim against the governing body, the court, in its discretion, may award reasonable attorneys' fees against the governing body.

**SECTION 5.** Tennessee Code Annotated, Title 8 Chapter 44 , Part 1 is amended by adding the following as a new section thereto:

§ 8-44-109

(a) The municipal technical advisory service (MTAS) for municipalities and the county technical assistance service (CTAS) for counties, in order to provide guidance and direction, shall develop a program for educating their respective public officials about the Open Meetings Law and how to remain in compliance with such law. MTAS shall also develop such a program for members of local planning commissions created by municipalities. CTAS shall also develop such a program for members of local planning commissions created by counties and regional planning commissions.

(b) The Tennessee School Board Association shall develop a program for educating elected school board members about the Open Meetings Law and how to remain in compliance with such law.

(c) The utility management review board shall develop a program for board members of water, wastewater and gas authorities created by private act or under the

general law and of utility districts in order to educate such board members about the Open Meetings Law and how to remain in compliance with such law.

(d) The state emergency communications board created by § 7-86-302 shall develop a program for educating emergency communications district board members about the Open Meetings Law and how to remain in compliance with such law.

**SECTION 6.** Tennessee Code Annotated, Title 8, Chapter 44, Part 1, is amended by adding the following as a new section thereto:

§ 8-44-110. (a) Executive sessions are not required by this part, but may be held by a governing body for the following purposes:

(1) To discuss the general reputation and character, physical condition, professional competence, or mental health of individuals, or, subject to the limitations set out herein, to discuss the job performance of certain public employees. However, except as provided elsewhere in this section, discussions of the job performance of specific public officials or specific public employees may not be discussed in executive session if the person is an elected or appointed public official, an appointed member of a state or local board or commission, or a public employee who is one of the classification of public employees required to file a disclosure statement of conflict of interests with the Tennessee Ethics Commission pursuant to § 8-50-501. Except as provided elsewhere in this section, the salary, compensation, and job benefits of specific public officials or specific public employees may not be discussed in executive session.

(2) When expressly allowed by federal law or state law, to consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee.

(3) To discuss the consideration the governing body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property.

Provided, however, that the material terms of any contract to purchase, exchange, or lease real property shall be disclosed in the public portion of a meeting prior to the execution of

the contract. If an executive session is utilized pursuant to this exception in addition to the members of the governing body, only persons representing the interests of the governing body in the transaction may be present during the executive session. This real property discussion exception shall not apply if:

(A) Any member of the governing body involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property.

(B) A condemnation action has been filed to acquire the real property involved in the discussion.

(4) To discuss strategy in preparation for negotiations between the governing body and a group of public employees.

(5) To discuss and evaluate the job performance of the director of schools with a written evaluation from the discussion that would be made public.

(b) Hospitals subject to the Open Meetings Law or the Open Records Law, may discuss and develop marketing strategies and strategic plans in closed meetings. Action by the board of the hospital adopting such a specific strategy or plan shall be openly discussed before the board votes.

(c) Nothing in this section requires that a governing body hold a meeting or any portion of a meeting in closed session.

(d) Before any meeting shall be closed under this section:

(1) A quorum of the governing body shall convene in public. The presiding officer, or in the case of attorney-client meetings, counsel shall explain to the members and public assembled the specific statutory or legal exemption for closing the meeting.

(2) Members of the governing body shall vote by roll call in the public portion of the meeting on whether the closing is necessary. A majority vote shall be required to go into executive session.

(3) The presiding officer or counsel representing the governing body shall explain to the members of the governing body and any members of the public present that no other business shall be discussed during the closed session.

(4) Any meeting or portion of a meeting to be closed pursuant to the pending litigation or pending controversy exemption shall be conducted by the lawyer for the governing body who shall:

(A) Advise the members that the meeting is between the lawyer and the client;

(B) Explain that the meeting is being held for the sole purpose of relaying confidential client communication and legal advice regarding pending or anticipated litigation; and

(C) Explain that all comments from the members shall be directed to the lawyer.

**SECTION 7.** Tennessee Code Annotated, Section 10-7-503, is amended by deleting subsection (a) in its entirety and substituting instead the following:

(a) (1) All state, county and municipal records shall at all times, during business hours, be open for personal inspection by any person, and those in charge of such records shall not refuse such right of inspection, unless otherwise provided by state law.

(2) The custodian of a public record or the custodian's designee shall promptly make available for inspection and copying any public record not specifically exempt from disclosure. In the event that is not practicable for the record to be promptly available for inspection and copying, the custodian shall within four (4) business days:

(A) Make such information available to the requestor;

(B) Deny the request in writing by citing the specific legal exemption; or

(C) Furnish a written acknowledgement of the request and a statement of the time reasonably necessary to produce such information or to determine whether the request shall be granted or denied.

Failure to respond to the request as described above shall constitute a denial and the person making the request shall have the right to bring an action as provided in § 10-7-505.

- (3) This section shall not be construed as requiring a governmental entity or public official to sort through files to compile information; however a person requesting such information shall be allowed to inspect the records and retrieve the information.
- (4) This section shall not be construed as requiring a governmental entity or public official to create a record that does not exist; however the redaction of confidential information from a public record or electronic database shall not constitute a new record.
- (5) A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility of inspecting and copying records to a private entity.
- (6) A governmental entity or public official shall not require a request for a public record to be in writing or on a specific form unless such request is reasonably considered to be complicated and the entity or official reasonably determines it may be necessary to contact the requestor for further information.
- (7) Identification shall only be required in retrieving a public record if such record is reasonably determined to involve personal security by the entity or official retrieving such record.
- (8) “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.

**SECTION 8.** Tennessee Code Annotated, Section 10-7-504, is amended by adding the following as a new subsection thereto:

(j) Hospitals subject to the open records Laws, may treat marketing strategies and strategic plans including feasibility studies, as confidential and not subject to public inspection. The marketing strategies and strategic plans including feasibility studies, shall become open to public inspection when the board of the hospital places the adoption of a specific strategy or plan on its agenda for open discussion.

**SECTION 9.** Tennessee Code Annotated, Section 10-7-505, is amended by deleting the language “citizen of Tennessee” in subsection (a) and substituting instead the language “person”.

**SECTION 10.** Tennessee Code Annotated, Section 10-7-505(b), is amended by adding the language “or circuit court” immediately after the language “chancery court” in the first sentence.

**SECTION 11.** Tennessee Code Annotated, Section 10-7-505(b), is further amended by adding the language “or circuit court” after the language “chancery court every time it appears in the second sentence.

## **PART II. Creation of the office of ombudsperson by statute**

A. The Office of Ombudsperson shall be created by statute within the Office of the Comptroller of the Treasury. The role of the Ombudsperson shall be to answer questions and provide information to public officials and the public, to collect data on sunshine law inquiries and problems, and provide educational outreach on both the Open Meetings and Open Records Laws.

An Advisory Committee on Open Government shall be created to provide guidance and advice for the Ombudsperson. The Advisory Committee shall consist of representatives from the public, including the press, and state and local government.

The Ombudsperson shall answer questions and issue informal advisory opinions as expeditiously as possible to any person, including local government officials, the general public and the media. State officials may continue to consult the Attorney General for such opinions. Any opinion issued by the Ombudsperson shall be a public record and shall be posted on a dedicated website.

B. The Ombudsperson shall be authorized to informally mediate and assist the resolution of issues concerning the open records law, and to collect data, where feasible, on issues concerning the open meetings act.

C. Any written comments or advisory opinions issued by the Ombudsperson may be admissible in a court of law.

D. The Ombudsperson and the Advisory Committee may review and provide written comments on any proposed legislation regarding the Open Meetings Laws or Open Records Laws.

E. The Ombudsperson and the Advisory Committee shall report their activities annually to the General Assembly and the Governor.

**PART III. Issues to be sent to the office of ombudsperson and the advisory committee for further study and review:**

A. Whether or not a statutory change should be made regarding imposing civil penalties upon a violation of the Open Meetings Law:

SECTION \_\_. Tennessee Code Annotated, Title 8 "Title, Chapter 44, Part 1 is amended by adding the following as a new section thereto:

§ 8-44-1 \_\_. For each meeting proven to be held in violation of this part for one or more reasons, the court may impose a civil penalty on any defendant who knowingly and willfully violated this part. The maximum penalty for each meeting per defendant shall not exceed one thousand dollars (\$1,000).

B. Whether or not the attorney-client privilege exception to the Open Meetings Law as described in Smith County Education Assoc. v. Anderson, 676 S.W.2d 328, (Tenn. 1984) should be placed in statute to reinforce the law as defined by the Supreme Court at this time.

**C. With regard to § 10-7-504 whether or not to:**

1. Require all new exemptions to the Open Records Law be placed in the body of this statute and move all current statutory exemptions, including those listed in §10-7-503, into this section;
2. Add an index that describes exemptions recognized by the Tennessee Supreme Court where the information in question can be specifically identified, such as law enforcement



records pertaining to a specific “pending investigation” that would be discoverable (e.g. an incident or arrest reports);

3. Consider and develop procedures for the general assembly to follow for legislation creating new statutory exemptions. The procedures would balance the public necessity for openness with legitimate privacy concerns; anticipate unintended consequences and try and ensure that exemptions are not broader than necessary;
4. Make new statutory exemptions to the Open Records Law subject to a sunset review; and
5. Develop recommendations for a review of current exemptions that are vague, misunderstood or misconstrued with a goal toward making the exemptions as specific as possible to avoid misuse and abuse.

**D. With regard to § 10-7-506 whether or not to:**

1. Define “reasonable rules” as it relates to fees for copies of public records or providing public information that is stored in electronic form;
2. Give the person requesting an electronic copy of public information the option of choosing to receive it in any format in which it is maintained by the agency;
3. Make it clear that fees cannot be excessive nor can they be used to hinder access to public information and the statute should explain that “open to inspection” means the public cannot be charged to inspect;
4. Define “actual cost” as any actual and direct expense wherein an agency had to go outside for an Information Technology person to program a computer because some agencies have recently started to charge “actual cost” to inspect and copy public records, including full salary, benefits and Social Security;
5. Amend the statute to clarify that agencies cannot charge to redact information as part of routine requests to inspect public information with a different standard possibly for time-consuming, large volume requests;
6. Amend the statute to further explain and enforce §10-7-121 wherein the legislature gave agencies authority to store information “on computer or removable storage media...

if the following standards are met: (A) Such information is available for public inspection, unless it is a confidential record according to law.” The statute should be clear that if information is in a computer and the agency cannot allow public access through a computer terminal in a read-only format or because it contains exempt information it cannot charge to have an employee sit and retrieve the information from a computer solely to be inspected. The information should be otherwise provided in whatever format the requester asks, assuming it is maintained in that format, and without charge;

7. Require all purchases of computer hardware and software to include a provision that will make it easy and inexpensive to redact exempt information; and

8. Permit a requester to provide his or her own equipment to scan or copy public records.

**E. With regard to § 10-7-121 & § 10-7-506(a) whether or not to:**

1. Clarify language dealing with electronic records. The Supreme Court has noted that the use of electronic storage of records has diminished the difference between public records on paper and public information in a computer. The law should place both on the same footing by allowing a person to request and be given records in any format, including any searchable format if the records are kept in that format;

2. Adopt the Supreme Court’s logic and rationale (see *Tennessean v. Electric Power Board*, 979 S.W.2d 297 (Tenn. 1998) that it does not make sense to store information in a computer for economy and efficiency of taxpayers and then charge the public extra to “extract” that information. The public should enjoy the same economies and efficiencies the government enjoys;

3. Require agencies to consider any cheaper alternative when asked to produce electronic records, including “data dumps” but could charge “actual direct cost” if they have to hire someone to do computer work; and

4. Review §10-7-121 that states an agency shall provide ability to inspect electronically-stored records and should not be allowed to charge for any method of inspection if they don’t provide access.