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MAKING LOCAL GOVERNMENT MORE ACCESSIBLE: ADMINISTRATION OF TENNESSEE'S PUBLIC RECORDS AND PUBLIC MEETING LAWS BY LOCAL GOVERNMENTAL OFFICIALS

A Thesis

Presented for the

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ABSTRACT

The right of citizens to have access to the official records of their local governing bodies and to the regular and special meetings of those bodies is basic to their ability to make informed judgments about the actions of their elected officials. Tennessee has two very comprehensive statutes, the Open Records Law and the Open Meetings Law, which guarantee to the state's citizens this "right to know."

The effectiveness of such laws, however, is largely dependent on the understanding and compliance of local officials in each municipality and county in the state. A review of reference material on the two laws such officials could use revealed that there is no one-source reference, such as a handbook, available.

The purpose of this study was to develop a handbook on the open meetings and open records laws for use by city and county officials responsible for compliance with the laws, and for the local governments' attorneys who must advise these officials.

In preparing the handbook, the author relied on the statutes themselves, what already has been written about provisions of the laws in Tennessee and about similar laws in other states, and the responses of an informal panel of local government officials and municipal law consultants with the University of Tennessee's Municipal Technical Advisory Service.

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CHAPTER I

PURPOSE AND SIGNIFICANCE

The right of citizens to have access to the official records of their local governing bodies and to the regular and special meetings of these bodies is basic to their ability to make informed judgments about the actions of their elected representatives. This "right to know" is guaranteed to the citizens of Tennessee by two of the most comprehensive statutes on public records and open meetings in the nation.

The effectiveness of these statutes, however, depends heavily on the understanding and compliance of local officials in each municipality and county, and the willingness of citizens, including the news media, to use the remedies provided for in the statutes when rights are denied. The need for local officials to be knowledgeable about the statutory provisions is, therefore, critical, but the depth of this knowledge is questionable. Most of the state's elected local government officials serve part-time, and few have backgrounds in law or public administration.

Even professional administrators often come from other states and are not cognizant of Tennessee law. To compound the problem, the rate of turnover in elected local government officials is very high. In Tennessee's 134 municipalities alone, there were 514 new officials taking office between September 1984 and September 1985 (Changes, 1984-85).

Although both laws are comprehensive, they contain provisions that are vague and open to misinterpretation, especially by those who may wish to deliberately circumvent the law.

Information about the provisions of the Public Records Law and the Open Meetings (or "Sunshine") Law is available to local government officials primarily from three sources: the University of Tennessee's two public service agencies, the County Technical Assistance Service and the Municipal Technical Advisory Service; workshops and seminars presented by the university's training unit, the Center for Government Training; and local attorneys retained, usually on a part-time basis, by cities and counties. These attorneys, in many instances, also are dependent on the two technical assistance agencies and CGT for information. If they are members of the Tennessee Municipal Attorneys Association, city attorneys have another information source, but it, too, is linked to MTAS. The TMAA Newsletter is edited by an MTAS staff attorney, who draws on his own knowledge and reference material plus briefs submitted by TMAA members.

STATEMENT OF THE PROBLEM

One-source reference material on open meetings and open records laws could not be found for any of the 50 states. MTAS has access to the International City Management Association's computerized Local Government Information Network, and this was utilized in the attempt

to locate a handbook or similar publication. Neither a search of the LOGIN data base nor queries to other LOGIN users yielded any information. This in spite of the fact that LOGIN has subscribers in every state.

In Tennessee, no publications or videotapes specifically addressing the provisions of either statute have been prepared or distributed by CTAS or MTAS, although the latter agency recently issued a media relations guide for city officials that contained a short section on the two laws (Kersh, 1985). The latest edition of the Tennessee Municipal Handbook (Hobday, 1984), another MTAS publication, devotes one paragraph to the Open Records Law and a slightly longer paragraph to the Open Meetings Law.

Both MTAS and CTAS have lawyers on their staffs who will respond to specific questions from local government officials. Both agencies also have experienced field people who are in regular contact with local officials. However, they do not have a one-source reference in the area of open meetings and open records.

Both agencies have cooperated with CGT in presenting a number of seminars, for local government officials, on both laws and particularly on compliance with the Open Meetings Law. Attendance at these seminars is voluntary on the part of officials, however. It is doubtful, based on CGT's records, whether a third of those who should have attended actually did so (Gary Mabrey, III, personal conversation, September 10, 1985). Another problem in getting information to officials is the rapid turn-over, especially in municipalities.

Soon after the "sunshine law" was passed in 1974, one of the state's leading authorities in municipal law, Nashville attorney Ogden Stokes, wrote a series of articles explaining provisions of the law (Stokes, 1983). But no survey was done to determine how many municipal officials or their attorneys read or were even aware of the series.

A study of the sources and effectiveness of local government officials' information about the Open Meetings Law was conducted by University of Tennessee master's candidate Sandra K. Cottrell (1983). Although the low rate of return on the questionnaire casts doubt on the data used in the study, the results have some value for this study as an indication of the problem. Cottrell found that 25 per cent of the officials responding to the survey listed CTAS/MTAS publications and briefings as major sources of information (p. 47); 55 per cent of these officials felt the information was not adequate (p. 50).

PURPOSE

The purpose of this study is to develop a handbook on the open meetings and open records statutes for use by city and county officials responsible for compliance with the provisions of the laws, and for the local governments' attorneys who must advise these officials. The author will assume, for purposes of the study, that these officials have little or no knowledge of the statutes or of

other sources of information about them. In other words, the handbook will be a prime simple enough to be an official, new to his or her office, to follow; it will not be a learned treatise for further enlightenment of those knowledgeable of the provisions of the laws and used to dealing with them on a regular basis.

The author believes there is ample justification for taking such a "back to the basics" approach, given the rapid turnover in local officials and the limited information available to them in printed form.

There is no hypothesis to be proved, although one may be implied: local government officials are not, as a group, knowledgeable about the provisions of the state statutes which are of vital concern to them and to the citizens they serve. The author will assume that the handbook will be written in such a way that it can be understood by even the most uninformed official, and that it will, therefore, be useful to those officials who must comply with various provisions of the two laws.

PROPOSED METHODOLOGY

In preparing the handbook, the author will rely on three major sources: the statutes themselves, as they appear in Tennessee Code Annotated, and as they have been interpreted through major judicial decisions and/or opinions of the Tennessee Attorney General; what already has been written about the provisions of the statutes in

Tennessee and similar laws in other states, including publications by MTAS, CTAS, TML, and TMAA; and comments from a selected group of local government officials from across the state. This combination of a literature review and comments by officials should give the author an awareness of what is already known about the subject, although, as stated before, the handbook material will be prepared on the premise that little or nothing is known by those who will use it.

The handbook itself will contain, as a minimum, this information:

1. An explanation of the importance of the two statutes in protecting each citizen's right, stretching back to English common law, to know the actions of his or her government and the reasons for such actions. In other words, why we have such laws on the books in almost every state in the United States, and why it is an obligation of local officials to comply with these laws.
2. An explanation of the provisions of each of the two laws and significant interpretations by the courts or the Tennessee Attorney General. This will include the actual text of the laws, since few officials have ready access to Tennessee Code Annotated or to court decisions other than what they may read or hear through the news media.
3. Suggested ways in which local government officials can assure compliance with the provisions of the laws.

4. Some of the most frequently asked questions about the two statutes, and responses to these questions. Part of the material for this section will be taken from actual queries made by officials to MTAS staff members, and questions raised in contacts by the author with city and county officials.
5. A listing of major sources of information about the statutes should local officials wish to do more reading on the subject.

The handbook will not be all-inclusive. It is intended for use only by local government officials in Tennessee and will deal with provisions of laws in other states only for purposes of background information for these officials. There will be no attempt by the author to pretest the handbook, other than by asking attorneys for MTAS and some selected local government officials to read the manuscript. The author will rely on the informal advisory group of municipal and county elected and appointed officials and her own knowledge of local officials, based on more than 16 years as an MTAS consultant and CGT/TML workshop instructor, in judging the comprehensiveness of the manuscript.

SIGNIFICANCE OF THE STUDY

Citizens have a basic, common law right to know what their government officials are doing in their name and why such actions

were undertaken. Two Tennessee statutes, the Open Meetings Law and the Public Records Law, guarantee them access to such information. However, if the officials who must comply with these statutes lack understanding of the provisions of the laws and how to effectively administer them, access may be denied or impeded.

At present, there is no single source of such information for city and county officials or the attorneys who advise them. The handbook the author proposes to prepare will be useful to local officials in the performance of their duties and should help them to more effectively serve the citizens who elected them to office.

CHAPTER II

REVIEW OF THE LITERATURE

In the "standard" thesis, this chapter would contain a review of the relevant literature.

For this thesis, however, much of the material compiled for the literature review is utilized in the text of the handbook and referenced there. This is particularly true of the handbook's introductory section, which traces the development of open meetings and open records laws in the United States and compares provisions of these laws.

Therefore, what follows is only a brief summation of the literature review (exclusive of material dealing specifically with provisions of the Tennessee laws) which was done in preparation for the writing of the handbook.

DEVELOPMENT OF OPEN RECORDS LAWS

English common law is the basis for the right of citizens to see the official records of their government. The principle was clearly stated in 1961 by the Oregon Supreme Court in MacEwan v. Holm and is quoted by Don Pember in Mass Media Law (1981):

> In determining whether records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of

> government are doing and his proprietary interest in public property against the public interest in having the business of government carried out efficiently and without undue interference (p. 131).

Pember notes that:

> virtually all states have some kind of freedom of information act (but) the laws vary widely and are sometimes ineffectual. Common law rules regarding access still play a large role in many jurisdictions . . . . Why a person wants to see a record is often a key element in the case and normally the burden rests upon the state agency to prove that the record should not be disclosed (pp. 131-2).

"The freedom to publish news and comment is of little value without the corollary freedom to gather news," William F. Swindler wrote in Problems of Law in Journalism (1973). "Access to public information--particularly in the form of public meetings and public records--has always been the practical key to real freedom of the press . . . ." (p. 77).

The issue goes back to the "mother country," England, with the battle by the press to gain access to sessions of Parliament, a right not granted until 1868. The press in this country began to assert the same right to have access to public meetings and public records as soon as the Revolution was over. Understandably, the Continental Congress was a secret body because its members technically were engaged in acts of treason against the Crown. But Swindler (p. 79) describes the "clamor" for open sessions of the Congress. The House was opened to reporters in 1790 and the Senate two years later.

From the second quarter of the 19th Century until the second quarter of the 20th, Swindler (p. 79) says, the press "enjoyed an ever-widening area of newsgathering" as a result of the "generally liberal" findings of state courts in which local questions of access to records were raised. World War I brought some restrictions with the passage of the Espionage and Sedition Acts and the Trading with the Enemy Act, but these were repealed after the Armistice.

In the mid-1940s, Swindler notes a "marked change," probably as a result of World War II and the international unrest which followed it. He says that "responsible public officials stretched the meaning of the laws dealing with national security to cover many unrelated issues as well" (p. 79).

The most restrictive federal policies developed in 1951 and 1953, however. First, President Truman issued a security order described as an effort to establish "minimum standards for identifying and protecting information the safeguarding of which is necessary in order to protect the security of the United States." Four categories of "classified" information were established: Top Secret, Secret, Confidential, and Restricted. Every executive officer was given the authority to determine what records under his jurisdiction should be classified and in what category (Swindler, p. 81).

News media representatives argued that the order made it possible to withdraw practically all public records from public inspection, and compared the order to the British "Official Secrets" acts. As a

result, the Eisenhower Administration undertook a study of the security order and, in late 1953, issued a modified version. The number of categories for classified information was reduced from four to three, the type of material to be classified was more clearly defined, the number of officers authorized to classify material was limited, and the President reserved the right to review all suggestions and complaints from nongovernmental sources (Swindler, p. 81).

During this period, Swindler reports, a study by the American Society of Newspaper Editors found that "school boards, village councils, justice of the peace courts, and even committees of legislatures . . . [were] withholding records or data on a number of grounds. . . . Access to police records . . . afforded another major problem for news media" (p. 82).

Pember points out that "courts have been generally unwilling to read the right of access to information into the First Amendment" (p. 115), leaving the matter primarily to statutory provisions. He cites a 1950 case, Providence Journal Co. et al. v. McCoy et al., to demonstrate this reluctance. The lower court had ruled that the denial of access was an abridgement of freedom of the press and a denial of equal protection under the law. The court of appeals upheld the lower court, but only on the grounds of equal protection.

Pember calls "very weak" the argument that:

> The consequences of establishing such a principle [First Amendment right], it is thought, would be to arm the press with a key which it would use to

> unlock all doors and thereby gain access to material restricted for the welfare and protection of society (p. 115).

A much stronger one, he believes, was advanced by Lynn C. Malmgren (1974) in the Villanova Law Review:

> The reluctance of the courts to recognize distinctly a news-gathering right of the press stems from a valid concern with the administrative problems . . . of making the determination of what constitutes the press for the purposes of constitutional protection. . . . If the press has a special right (different from the public at large), reporters would have access to more areas than the public. The problem then is: Who is a reporter? or What is the press? . . . [the courts] must either delineate what comprises "the press" or be prepared to face the potential onslaught of all the citizenry seeking access to records and meetings. The courts have found it far easier just to refuse to acknowledge that the First Amendment protects the right to gather news (Pember, p. 116).

In 1972, the Supreme Court, in a ruling in Branzburg v. Hayes, a newsman's privilege case, did state: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without such protection for seeking out the news, freedom of the press could be eviscerated" (Pember, p. 116). But by 1980, in Richmond Newspapers v. Virginia, the court had backed away, and Pember says that "nothing in the ruling . . . seemed to overturn the reluctance of the high court to outline a special right of access for (those) engaged in the craft of news gathering" (p. 117).

In a speech at the Yale Law School Sesquicentennial Convocation in 1974, Justice Potter Stewart made this point, as quoted by Pember:

> The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular governmental information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a free press, but the protection is indirect. . . . The Constitution . . . establishes the contest, not its resolution (p. 118).

At the federal level, the Freedom of Information Act, which became effective July 4, 1967, has replaced Section Three of the Administrative Procedures Act. Section Three, according to Francois (1975), had required the person seeking the information to show why the information should be public. The new FOI Act shifted this burden to the bureaucrat. "The new philosophy--backed by the force of law," says Francois, "had become the public's right to know" (p. 142).

In a June 1967 memorandum, U.S. Attorney General Ramsey Clark explained the philosophy and key features of the FOI Act. As quoted by Francois, the foreword stated:

> If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. . . . Never was it more important than in our time of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure (p. 142).

Cited by Clark as the key concerns of the law: that disclosure be the general rule, not exception; that all individuals have equal rights of access; that the burden be on the federal government to justify withholding of documents, not the person requesting them; and that individuals improperly denied access have a right to seek injunctive relief in U.S. District Court (Francois).

According to Francois, the act contains nine categories which exempt information from disclosure: national security, personnel files and practices, internal memoranda, investigatory files, trade secrets, reports on regulations of financial institutions, geological data on oil and gas wells, invasions of privacy (such as creditors seeking information, income tax files), and a general category which permits withholding of data upon a showing of the need for confidentiality.

A question regarding the meaning of "agency records" was resolved by a 1974 amendment. "Agency" was defined to mean:

> Any executive department, military department, government corporation, government controlled corporation or other establishment in the executive branch of government [including the Executive Office of the President], or any independent regulatory agency (Pember, p. 120).

The amendment also set up guidelines for obtaining records.

Pember notes that several federal laws specifically preclude access to government-held information. After briefly citing such statutes as tax and espionage laws, he lists three broad sets of regulations: the General Education Provisions Act, aimed at

"increasing both the parental access and the confidentiality of educational records"; the Federal Privacy Law, designed to "check the misuse of personal data obtained by the federal government" and "to provide access for individuals to records about themselves" and Criminal History Privacy Laws, prompted by concern over misuse of information in the new national computerized record-keeping system (pp. 133-135).

State open record statutes have tended to follow federal regulations. A major problem for journalists and other users (Overbeck and Pullen, 1982) is that "not only do these laws vary from state to state, but they are so often amended that no survey text can long remain accurate for all states" (p. 209).

In 1980, 49 states had comprehensive open records laws. Only Mississippi still lacked a general law, although a number of statutory laws included provisions for public access to records (Overbeck and Pullen).

In general, most state laws define the term "public records" broadly enough to encompass a wide variety of state and local government documents. Such laws also allow general public access to these records without any showing of special interest or "need to know" (Overbeck and Pullen).

Many state public records laws exempt certain types of records from public disclosure, most often personnel records; law enforcement investigatory records; and records of juvenile courts, adoptions, and parole matters. These laws provide for judicial review when public

access is denied, and approximately two-thirds of the states provide criminal sanctions for officials who improperly deny public access. About one-third of the states cover the attorneys' fees of those who successfully sue for access to public records (Overbeck and Pullen).

As at the federal level, many state public records laws have been reconciled with privacy laws. Overbeck and Pullen note that in 1980:

> about half the states had privacy statutes that limited public access to personal information in data banks. These laws . . . usually forbid state officials to release personal information without the individual's permission. Some go much further . . . in sealing records that otherwise would be open. . . . California, under a voluminous Information Practices Act in 1977 . . . prohibited the release of "disparaging" information about any individual . . . and the problem was only partially solved when the media succeeded in getting the reference to "disparaging" information deleted. . . . (p. 212).

A problem at the state and local levels (Nelson and Teeter, 1978) is what is included in "public records." Many records may be termed "public records" but are not necessarily open to the public. The common law definition referred to the need of government to preserve the documents that described the activities of its officers. This definition, therefore, is that such a record is a "written memorial by an authorized public officer in discharge of a legal duty to make such a memorial to serve as evidence of something written, said, or done" (p. 431). In such a definition, the term "public" does not imply a general right of inspection, and state statutes have included various qualifications in the public's right to view certain documents.

Some statutes may define records in extensive detail, while others use brief and general terms. Pennsylvania's law denies access to personnel files, specifically "any record . . . access to . . . would operate to the prejudice or impairment of a person's reputation or personal security. . . ." (Nelson and Teeter, p. 431).

On the other hand, the 1968 California statute was the first to encompass "all writings containing information relating to the conduct of the public's business" in its definition of public records (Nelson and Teeter, p. 433).

Henrick (1977), in an article in Fordham Law Review, classifies statutory definitions of public records from strict to liberal:

1. A limited class of specifically identifiable documents or a general definition of records but limited for public inspection purposes by specific qualifications (four states). The common factor is that a document "can be a public record only if it is capable of being pegged into an established category" (p. 1115).
2. Records required to be made by law, necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a written memorial of something written, said, or done (eight states). This definition is identical to that used in common law.
3. Records made or received pursuant to law or as a convenient and appropriate mode of discharging the duties of an office (five states). This category is broader than (2), but the

document must have some reference to an existing law or a customary course of conduct.

4. Records made or received in connection with the transaction of public or official business (15 states). All documents made or received by a custodian are declared open, provided the record is made or received in the course of performing public or official duties.

5. Any writing containing information relating to the conduct of the public's business (six states). The document may relate only to public affairs in general; it need not be connected with the official business of the agency.

6. All documentary materials in possession of a public body (seven states). Usually there are only one or two sentence policy declarations without any effective definitions.

Three states, Nevada, North Dakota, and Tennessee, are not included in any of these classifications because they lack both a general definition of public records and case-law providing a definition.

At the local level, the principle of the right to inspect is clearly stated in the "bible" of municipal law, McQuillin's The Law of Municipal Corporations (1981): "Full and complete disclosure of public affairs should be encouraged. Accordingly, public policy favors the right of inspection of public records and documents" (p. 24).

McQuillin adds as a caution:

> It is important to observe . . . that not all records kept by a public officer are public records. What is a public record has been said to be, in the absence of express statute, a question of law; the nature and purpose of the record; and possibly custom and usage must be guides in determining the class to which it belongs. . . . It has been said that the purpose [of inspection] is to prevent corruption and mismanagement in city government, and that the underlying theory is that publicity is a preventative or cure for such evils. . . . On the other hand, the right to inspect public documents and records at common law is not absolute. There may be situations where the harm done to the public interest may outweigh the right of a member of the public to have access to particular documents. . . . There is no right of inspection where it is sought to satisfy a person's mere whim or fancy, to engage in pasttime, to create scandal, to degrade another, to injure public morals, or to further any improper or useless purpose (p. 25-26).

DEVELOPMENT OF OPEN MEETINGS LAWS

Unlike open records laws, the bases for open meetings laws are not common law but constitutional provisions and legislative acts (Gilmor and Barron, 1974). Not until the late 19th Century were debates in Parliament reported in the British press without "attempts at punishment for contempt of the legislature" (p. 551).

Although a body of case law is being developed, those interested in open meetings provisions still must look to state constitutions and statutes. And these vary widely. Only a few states address the issue constitutionally (Tennessee is one of these, at least for the

General Assembly). In the middle of the scale are those that provide, by statute, for open meetings and state general exceptions. At the opposite end are states with very complex laws and many exceptions (Gillmor and Barron).

Pember calls open meeting laws "a relatively new phenomenon" (p. 128). As a result of "strong, forceful pressure from the press" (p. 127), most such laws have developed since 1950. In 1959, only 20 states had any type of open meeting law.

The Florida and California statutes, passed in the 1960s, are considered the earliest comprehensive laws requiring public legislative bodies to do their business in public. The two state laws also have penalties for violations. Christine Becker (1979) calls the enactment of these two laws "the beginning of a trend toward openness on all levels of government and an end to the infamous 'smoke-filled rooms' where the public's business had purportedly been done" (p. 10).

At least 46 states had some type of open meetings statute prior to passage of the federal Government in the Sunshine Act (5 U.S.C. 552b) in 1976. On the federal level, some 50 administrative agencies must conduct some of their meetings in public. The policy-making boards and commissions must meet at announced times and places, with the public generally invited to attend. However, closed sessions still are permitted for 10 different reasons, nine of which closely parallel the exemptions in the Freedom of Information Act. They

include matters of national security, personnel matters, law enforcement investigations, discussions of trade secrets, etc. The 10th subject which may be discussed in a closed meeting is pending litigation and similar adjudicatory matters (Overbeck and Pullen).

Overbeck and Pullen point to a "very large loophole" (p. 208) that began developing in 1980 and 1981. The Office of Management and Budget called on federal agencies to conduct secret meetings whenever legislative or budget matters were to be discussed.

Whenever a federal agency holds a closed meeting, it must first vote to do so in a public session and the vote must be recorded. The agency must then keep accurate and complete records of what transpires. The results of any votes in a closed meeting must be published promptly.

The two writers feel the federal law is "much weaker than many state open meeting laws" because it has "virtually no 'teeth' in it" (p. 209). There are no civil or criminal penalties for violation, and actions taken in illegal meetings may not be invalidated by the courts.

Although the federal law is not a model one, Overbeck and Pullen note that "many of the state open meeting laws were either adopted or extensively revised at about the same time the federal law was enacted. The mid-1970s saw a dramatic growth of such laws all over the United States" (p. 209).

In 1974, the Freedom of Information Foundation at the University of Missouri commissioned a study of open meetings laws by John Adams, a University of North Carolina professor (Murtha, 1974). Dr. Adams used 11 criteria to determine the comprehensiveness of state open meetings laws. His requirements for an ideal law:

1. Includes a statement of public policy in support of openness.
2. Provides for an open legislature.
3. Provides for open legislative committees.
4. Provides for open meetings of state agencies or bodies.
5. Provides for open meetings of agencies and bodies of political subdivisions of the state.
6. Provides for open county boards.
7. Provides for open city councils.
8. Forbids closed executive sessions.
9. Provides legal recourse to halt secrecy.
10. Declares actions taken in meetings which violate the law to be null and void.
11. Provides penalties for those who violate the law.

Adams considered the first criterion, a statement of policy, essential for any open meetings law. He called the ninth, legal recourse to halt secrecy, an important mechanism, but cited the tenth point, nullification, as "the teeth to give meaning to the Open Meeting laws" (Murtha, p. 11). At the time Adams made his study, 14 states had the nullification provision in their laws, and penalties for non-compliance were found in 26 state laws (Murtha).

In their 1980 examination of state laws, Overbeck and Pullen found that most states provided for closed or "executive" sessions, and many spelled out the circumstances under which such meetings should be conducted: matters of national security, personnel matters, discussions of pending lawsuits. A number of state laws provided specific legal remedies for violations, authorized the courts to invalidate any action taken at an unlawful closed meeting, and established criminal sanctions for knowing violations. Perhaps the strongest enforcement provision, the authors said, was in Connecticut, where a state Freedom of Information Commission "serves as a watchdog agency . . . acting against offending government agencies on the basis of citizen complaints" (p. 211).

The statement of intent in an open meeting law, which Adams made his first criterion, also was viewed as critical by a later scholar. Writing in the Mississippi Law Review, William R. Wright II called the most vital provision of an open meeting law "a strong, clear statement by the legislature to open up the deliberations and actions of the government to the people" (Pember, p. 129). With such a statement, Wright argued, a judge considering a challenge to the law might be persuaded that if a section were vague it should be interpreted to grant access rather than to restrict it.

A 1984 study of the states' open meeting laws, conducted by Harlan Cleveland and Sandra Braman of the University of Minnesota's Hubert H. Humphrey Institute of Public Affairs, used 23 criteria,

ranging from a "policy statement that says the sunshine law should be liberally construed" to "labor negotiations must be open" (Jacobson, 1984, p. 18).

Of interest is the reason the 1984 study was commissioned. The Association of Governing Boards of Universities and Colleges, according to Jacobson, was considering "a national effort to help trustees of public colleges and universities gain more leeway for conducting official business behind closed doors" (p. 18). Cleveland, in an address to AGBUC, said openness as a principle of government is "here to stay," but he asked, "How much is enough?" (p. 18). Cleveland argued that state laws should take into account "the right of a public agency to be effective" and "the individual's right to privacy" (p. 18).

CHAPTER III

A SUGGESTED HANDBOOK FOR LOCAL GOVERNMENT OFFICIALS

This chapter contains the text of a suggested handbook for use by county and municipal officials in Tennessee and as a reference for the attorneys advising these local governments.

The handbook is intended as a primer for officials who have little or no knowledge of the two Tennessee laws relating to public records and public meetings. It includes a rationale for such laws, explanations of provisions of the laws, and suggestions for complying with these provisions.

It is the author's hope that the handbook will be published by the two University of Tennessee technical assistance agencies working with local governments, the Municipal Technical Advisory Service (cities) and the County Technical Assistance Service (counties). Utilizing the mailing lists maintained by the university's Institute for Public Service, copies of the handbook would be send initially to all administrative officers of the cities and counties (mayors, county executives, city managers, city administrators) and to the members of the local legislative bodies, as well as to the attorneys retained by each city and county. MTAS also sends a packet of material to each newly elected mayor and governing body member or newly appointed manager or administrator. The handbook should be enclosed with this packet.

The handbook also could serve as the "text" for training programs, presented by the university's Center for Government Training, for elected and appointed officials.

Each MTAS and CTAS consultant should have a copy of the handbook to use as reference in responding to queries from local officials or for advising them on procedures.

THE RIGHT TO KNOW

A HANDBOOK FOR LOCAL GOVERNMENT OFFICIALS ON TENNESSEE'S PUBLIC RECORDS AND OPEN MEETINGS LAWS

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INTRODUCTION

Why do we have open records and open meetings laws? Quite frankly, because some local officials, somewhere in the state, have denied citizens the right of access. Maybe not in your town or any town you know about, and maybe not with the intention of deceiving, but somewhere, for some reason, the right to know was ignored.

This right to know is inherent in our system of government. True, we have a representative democracy. The people elect citizens from among themselves to represent them on governing bodies. This does not make these representatives less accountable to those who chose them; just the reverse. Citizens must have knowledge if they are to judge actions of their representatives fairly and accurately. This need for information, in order to make informed decisions on daily issues and in the voting booth, is one reason we have right to access laws. The other? Government belongs to the citizens. They have a right to know how it is being conducted. They have the right to attend the meetings of governing bodies, to hear issues debated and decisions reached. They have the right to read the records that chronicle these debates or form the basis for decisions.

"Mutually beneficial" is not a phrase often associated with the right of access, but it can be an accurate description of the relationships mandated by the state's access laws. Citizens benefit because they have the opportunity to become more informed about the governmental process. Local government officials can benefit because

citizens better understand the complex issues with which their representatives are dealing and, when called upon to make a decision, have the facts needed for an informed, not an emotional judgment.

In June 1947, in a memorandum explaining the philosophy and key features of the federal Freedom of Information Act, Attorney General Ramsey Clark wrote:

> If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our time of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure (Francoise, p. 142).

Suspicion is not a healthy atmosphere in which to conduct government business, but too many citizens **are** suspicious of the actions of their elected officials. If officials, at any level of government, seek to do their work in secret, these suspicions gain a foot hold. Such secrecy, citizens reason, is being used to shield officials from accountability. Old words like "tyranny" and "oppression" are given meaning for modern people when secrecy pervades government; unfairness, unchecked power, unconcern for human rights and needs, and inefficiency and corruption can thrive in seclusion. The public in a country such as ours has every reason to assume that the major part of the work of their government will be open and available for their inspection.

Such an assumption goes back many generations. Colonial courts were generally open, following the British practice since the mid-17th Century, and the new United States accepted this practice. Understandably, the Revolutionary Continental Congresses were secret bodies because the members were technically engaged in acts of treason against the Crown. Colonial legislatures had been closed bodies. But in the early 1790's, first the House of Representatives and then the Senate opened their doors to the public.

It was during this period that James Madison said, "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both (Henrick, p. 1120).

From the second quarter of the 19th Century until the second quarter of the 20th, generally liberal findings by state courts in questions of access gave the public ever-widening rights. World War I brought some restrictions, including the passage of the Espionage and Sedition Acts and the Trading with the Enemy Act, but these were repealed after the Armistice.

In the 1940's, however, World War II and the international unrest that followed it brought a noticeable change in the right of access. Officials, especially at the federal level, often stretched the meaning of the laws relating to national security to cover other issues as well. This practice reached its zenith in 1951-1953. President Truman issued a security order establishing four categories

of "classified" information: Top Secret, Secret, Confidential, and Restricted. Every executive officer had the authority to determine under which category records within his jurisdiction should be classified.

In late 1953, however, the Eisenhower Administration, after a study of the security order, issued a modified version more clearly defining the nature of classified material and limiting the number of officials with classification authority.

During this same period, a study by the American Society of Newspaper Editors found that "school boards, village councils, justice of the peace courts, and even committees of legislatures . . . [were] withholding records or data on a number of grounds" (Swindler, p. 82).

It was in this historical context that states began passing laws guaranteeing some measure of public access to records and to public meetings.

WHY STATE PUBLIC ACCESS LAWS?

The right of citizens to see the official records of their government is founded in English common law.

The common law principle relating to records was stated clearly in 1961 by the Oregon Supreme Court in MacEwan v. Holm:

> In determining whether records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and his proprietary

> interest in public property against the public interest in having the business of government carried out efficiently and without undue interference (Pember, p. 132).

But open meetings are not part of the common law tradition; not until the 19th Century were debates in Parliament reported in the British press without attempts at punishment for contempt. Therefore, constitutional provisions and legislative acts, not common law, are the bases for determining whether meetings of state and local legislative and administrative bodies should be public.

In Mass Communication Law, Don Pember notes that:

> virtually all states have some kind of freedom of information act [but] . . . the laws vary widely and are sometimes ineffectual. Common law rules regarding access still play a large role in many jurisdictions. . . . Why a person wants to see a record is often a key element in the case and normally the burden rests upon the state agency to prove that the record should not be disclosed (p. 129).

The courts generally have been reluctant to equate right of access to information with the First Amendment to the U. S. Constitution, preferring to leave the matter primarily to statutory provisions. In a speech at the Yale Law School Sesquicentennial Convocation in 1974, Justice Potter Stewart made this point:

> The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular governmental information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a free press, but the protection is indirect. . . . The Constitution . . . establishes the contest, not its resolution (Nelson and Teeter, p. 418).

Only a few state constitutions, Tennessee's among them, have addressed the issue of access. The original Tennessee constitution, in Article I, Section 19 (Article II, Section 22 of the current version) specifically dealt with legislative open sessions: "the doors of each House and committees of the whole shall be open, unless when the business shall be such as ought to be kept secret." There is no reference to other governmental bodies. New Mexico has a similar requirement: "All sessions of each house shall be public" (NM Const., Art. IV, 12). No exceptions are stated. Its public meeting law is just as simple:

> The governing bodies of all municipalities, boards of county commissioners, boards of public instruction and all other governmental boards and commissions of the state or its subdivisions, supported by public funds, shall make all final decisions at meetings open to the public (Gilmor and Barron, 1974, p. 526).

Only grand jury sessions are exempted.

The middle ground is occupied by states whose constitutions or statutes provide for open meetings and list some general exceptions. Both the Texas and New York constitutions provide that sessions of the legislature shall be open except where the public welfare requires secrecy.

At the opposite end are states with very complex laws stating many exceptions (Gilmor and Barron).

Without strong support from the U.S. Constitution, the right of access, particularly for the news media, is determined primarily by federal and state statutes.

In 1959, 20 states had some type of open meetings law. The Florida and California statutes, passed in the 1960's, are considered the earliest comprehensive laws requiring public legislative bodies to do their business in public. Hence the name, "Sunshine Law."

Christine Becker, author of Living in the Sunshine, calls the enactment of these laws "the beginning of a trend toward openness on all levels of government and an end to the infamous 'smoke-filled rooms' where the public's business had purportedly been done (p. 10).

Both state open meetings and open records laws have tended to follow federal legislation. The national Freedom of Information Act became effective in July 1967, bringing with it a new philosopy of "the public's right to know," backed by the force of law.

As at the federal level, there has been a conflict between state public records laws and privacy laws. By 1980, approximately half the states had privacy statutes that limited public access to personal information in data banks. These laws usually forbid state officials from releasing personal information without the individual's permission. Some go much further in sealing records that would otherwise be open.

California, under a voluminous Information Practices Act in 1977, prohibited the release of "disparaging" information about any individual.

In 1974, the Freedom of Information Foundation at the University of Missouri commissioned a study of open meetings laws by John Adams, a University of North Carolina professor. Dr. Adams used 11 criteria

to determine the comprehensiveness of state open meetings laws:

1. Includes a statement of public policy in support of openness.
2. Provides for an open legislature.
3. Provides for open legislative committees.
4. Provides for open meetings of state agencies or bodies.
5. Provides for open meetings of agencies and bodies of political subdivisions of the state.
6. Provides for open county boards.
7. Provides for open city councils.
9. Provides legal recourse for secrecy.
10. Declares actions taken in meetings which violate the law to be null and void.
11. Provides penalties for those who violate the law.

Adams considered the first factor, a statement of policy, essential for any open meetings law. He called the ninth criterion, legal recourse to halt secrecy, an important mechanism, but cited the tenth point, nullification of action and penalties for non-compliance, as "teeth to give meaning to the open meeting laws" (Gilmor and Barron, p. 551). At the time Adams made his study, 14 states had the nullification provision in their laws and penalties for non-compliance were found in 26 states' statutes (Gilmor and Barron).

A 1980 examination of state laws determined that most states provided for closed or "executive" sessions, and many spelled out the circumstances under which such meetings should be conducted: matters

of national security, personnel matters, and discussions of pending lawsuits. A number of states provided specific legal remedies for violations, authorized the courts to invalidate any action taken at an unlawful closed meeting, and established criminal sanctions for knowing violations (Overbeck and Pullen).

The statement of intent in an open meetings law, which Adams made his first criterion, also was viewed as critical by a later scholar. Writing in Mississippi Law Review, William R. Wright, II, called the most vital provision of an open meetings law "a strong, clear statement by the legislature to open up the deliberations and actions of the government to the people" (Pember, p. 130). With such a statement, Wright argued, a judge considering a challenge to the law might be persuaded that if a section were vague it should be interpreted to grant access rather than to restrict it (Pember). A 1984 study of the states' open meetings laws, conducted by Harlan Cleveland and Sandra Braman of the University of Minnesota's Hubert H. Humphrey Institute of Public Affairs, used 23 criteria, ranging from "a policy statement saying the sunshine law should be liberally construed" to "labor negotiations must be open" (Jacobson, p. 18).

Of interest is why the 1984 study was commissioned. The Association of Governing Boards of Universities and Colleges was considering "a national effort to help trustees of public colleges and universities gain more leeway for conducting official business behind closed doors" (p. 18). Prof. Cleveland, in an address to AGBUC, said openness as a principle of government is "here to stay,"

but he asked, "How much is enough?" Cleveland argued that state laws should take into account "the right of a public agency to be effective" and "the individual's right to privacy" (p. 18).

HOW TENNESSEE'S LAWS COMPARE WITH OTHER STATES'

Words such as "comprehensive," "model law," and "very broad" are used to describe Tennessee's open meetings and open records laws. How do these statutes compare with other states'?

One of the first scholars to present a comprehensive report on access problems, Harold Cross, in 1953 listed four issues or questions common to every case of access:

1. **Is the particular record or proceeding public**? Many records and meetings kept or conducted by public officers in public offices are not really public at all. Much of the work of the police, although they are public officers and work in public buildings, is not open to public scrutiny.
2. **Is public material public in the sense that records are open to public inspection and sessions are open to public attendance**? Hearings in juvenile courts are considered public hearings for purposes of the law, but they are rarely open to the public.
3. **Who can view the records and who can attend the meetings open to the public**? Many records, for example, might be open to specific segments of the public, but not to all

segments. Automobile accident reports by police departments are open to insurance company adjusters and lawyers, but such records are not usually open to the general public.

4. **When records and meetings are open to the general public and the press, will the courts provide legal remedy for citizens and reporters if access is denied? (Pember).**

In evaluating how "strict" a state law should be, these points still deserve consideration.

Alabama pioneered open meetings legislation with a statute passed in 1915. It stated, in part:

> No executive or secret session shall be held by any of the following named boards, commissions or courts of Alabama, namely: The Alabama public service commission, school commissions of Alabama, board of adjustment, state or county tax commissions, any court of county commissioners or board of revenue, any city commission or municipal council, or any other body or commission in the state charged with the duty of disbursing any funds belonging to the state, county or municipality, or board, body or commission to which is delegated any legislative or judicial function; except that executive or secret sessions may be held by any of the above named boards or commissions when the character or good name of a woman or man is involved (Hilliard, 1978, p. 5).

Early statutes passed by states since that time have tended to follow the Alabama model. Tennessee was rather slow to join the national movement toward such laws; its statute was passed in February 1974, after several unsuccessful attempts. It became effective in May of the same year.

In July 1974 Dr. Adams published his comparison of state laws (detailed earlier), and Tennessee's gained immediate fame as a "model law." Of the 11 criteria Dr. Adams felt were essential for a comprehensive act only one state, Tennessee, had "systematic coverage of all . . . in law-form" (Hilliard, p. 68). Colorado, Kentucky, and Arizona were just behind, with 10, but Arizona and Kentucky did not forbid executive sessions, and Colorado's law provided no penalties. Doctoral candidate Jerry Lee Hilliard, who studied all the laws, concluded that "all three laws are significantly weaker than Tennessee's despite finishing only one point behind" (p. 68).

In the other nationally published study, prepared in 1984 by Professors Cleveland and Braman, Tennessee, with Florida, was ranked as the "most open" state: its law met 21 of the 23 criteria. The only provisions the Tennessee law lacked: it did not say that advisory board meetings must be open, and it did not provide for the levying of criminal penalties for violations. (See Appendix D for complete listing of various state provisions.)

State open records statutes have tended to follow federal legislation. In 1980, 49 states had comprehensive open records laws. Only Mississippi lacked a general law, and even there a number of statutes include provisions for public access to records (Overbeck and Pullen).

There are no easy-to-follow rankings of records laws, but scholars studying this area of statutory law note some common

provisions. Most state laws define the term "public records" broadly enough to encompass a wide variety of state and local government documents. Such laws also allow general public access to these records without any showing of special interest or "need to know."

Many state public records laws exempt certain types of records from public disclosure: personnel records; law enforcement investigatory records; and records of juvenile courts, adoptions, and parole matters. The laws provide for judicial review when public access is denied. Approximately two-thirds of the states provide criminal sanctions for officials who improperly deny public access. About one-third of the states cover the attorneys' fees of those who successfully sue for access to public records (Overbeck and Pullen).

A problem at the state and local levels is what is included in "public records." Many records may be termed "public records" but are not necessarily open to the general public. The common law definition referred to the need of government to preserve the documents that described the activities of its officers. This definition, therefore, is that such a record is "a written memorial by an authorized public officer in discharge of a legal duty to make such a memorial to serve as evidence of something written, said, or done" (Nelson and Teeter, p. 431). In such a definition, the term "public" does not imply a general right of inspection, and state statutes have included various qualifications in the public's right to view certain documents.

Some statutes define records in extensive detail, while others use brief and general terms. Pennsylvania's law denies access to personnel files, specifically "any record . . . access to . . . would operate to the prejudice or impairment of a person's reputation or personal security" (Pember, p. 133). On the other hand, California's 1968 statute was the first to encompass "all writings containing information relating to the conduct of the public's business" (p. 133) in its definition of public records.

New York did not follow the Freedom of Information Act model, but instead lists the kinds of records which must be available for public inspection: final opinions on and concurring and dissenting opinions in litigation; policy statements and supporting factual data; minutes of meetings and hearings; audits and supporting data; staff instructions and manuals; name, address, title, and salary of government officials, except law enforcement officers; and final determinations and dissenting opinions of governing bodies. The New York law also establishes a Committee on Public Access to Records, with wide authority to issue regulations for use of records and implementation of the statute. Three of the seven members must be government officials, and four are appointed by the governor, two of whom must be from the media. The committee advises agencies and local governments on access questions through guidelines, opinions, and regulations. It also has the job of ensuring that the right of privacy of citizens is protected.

Connecticut has a similar independent commission to handle citizens' appeals on denial of information requests. One writer views such committees as a step toward making state laws "more meaningful and useful. . . . By providing guidelines and rules for local communities, a committee . . . immediately breathes life into an access law" (Pember, p. 133).

SECTION I

THE TENNESSEE PUBLIC RECORDS LAW

Asked to describe the Tennessee Public Records Law, Eugene Puett, municipal law consultant for the University of Tennessee's Municipal Technical Advisory Service, uses just two words: "very broad."

The Public Records Law is codified as Chapter 7 of Title 10 of Tennessee Code Annotated, but the relevant provisions are in Sections 10-7-503 through 10-7-505.

DEFINING PUBLIC RECORDS

Defining just what constitutes a public record has been a problem from the time the first statutes were written. The principle of the right to inspect is clearly stated in the "bible" of municipal law, The Law of Municipal Corporations (1981), by Eugene McQuillin: "Full and complete disclosure of public affairs should be encouraged. Accordingly, public policy favors the right of inspection of public records and documents" (pp. 24-25).

McQuillin adds a caution, however:

> It is important to observe . . . that not all records kept by a public officer are public records. What is a public record has been said to be, in the absence of express statute, a question of law; the nature and purpose of the record, and possibly custom and usage must be guides in determining the class to which it

> belongs. . . . It has been said that the purpose [of inspection] is to prevent corruption and mismanagement in city government, and that the underlying theory is that publicity is a preventative or cure for such evils. . . . On the other hand, the right to inspect public documents and records at common law is not absolute. There may be situations where the harm done to the public interest outweighs the right of a member of the public to have access to particular documents. . . . There is no right of inspection where it is sought to satisfy a person's mere whim or fancy, to engage in past time, to create scandal, to degrade another, to injure public morals, or to further any improper or useless purpose (pp. 24-25).

Tennessee is one of only three states (the others are Nevada and North Dakota) without a clear definition of "public record" in the body of the law (Henrick). The definition of a public record in Tennessee actually involves several parts of the state law, according to an Appeals Court judge in a 1979 opinion. The first deals with those records which historically have been termed "public records": court and land records. This section of the law dates back to 1805 when, as the judge notes, the state was in its infancy. But by 1871, records were piling up unsystem-atically in courthouse basements. The second section of the law was adopted to require records custodians to index material in an orderly way. The third section, adopted in 1947, refers to records other than those dealt with in the first two sections.

A STATEMENT OF PRINCIPLE

The intent of the law is stated clearly in Section 10-7-503:

> All state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state statutes.

POINT TO REMEMBER - 1: NO RECORD IS CONFIDENTIAL UNLESS THE GENERAL ASSEMBLY (OR THE COURTS) SPECIFICALLY SAYS IT IS.

For a legal definition of both a public and a confidential record, read two subsections of Section 10-7-301 (which primarily deals with the state Public Records Commission):

> (b) "Public record(s)" or "state record(s)" shall mean any 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.
>
> (c) "Permanent records" shall mean those records which have permanent administrative, fiscal, historical or legal value.
>
> (k) "Essential records" shall mean any public records essential to the resumption or continuation of operations, to the re-creation of the legal and financial status of government in the state or to the protection and fulfillment of obligations to citizens of the state.
>
> (m) "Confidential public record" means **any public record which has been designated confidential by statute** (emphasis added) and includes information or matters or records considered to be privileged and any aspect of which access by the general public has been generally denied.

Section 10-7-503 includes the first listing of records which, by statute, are confidential:

> Provided, however, that the head of a governmental entity may promulgate rules in accordance with the Uniform Administrative Procedures Act . . . . to maintain the confidentiality of records concerning adoption proceedings or records required to be kept confidential by federal statute or regulation as a condition for the receipt of federal funds or for participation in a federally funded program.

Exempted from public inspection under this section are:

1. Records of adoption proceedings.

2. Records required to be kept confidential by federal statute or regulation as a condition for the receipt of federal funds or for participation in a federally-funded program.

Section 10-7-504 contains another list of records which are to be considered confidential:

1. Medical records of patients in state hospitals and medical facilities;

2. Medical records of persons receiving medical treatment, in whole or in part, at the expense of the state;

3. All investigative records of the Tennessee Bureau of Investigation and certain investigation files of the Motor Vehicle Division (Note: information in such records may be disclosed to the public in compliance with a subpoena or an order of a court of record, and to elected members of the General Assembly when inspection is directed by a resolution of either house or a standing or joint committee of either house. The records are not available to the executive branch except for the governor and those persons directly involved in an investigation by the TBI);

4. Records, documents, and papers in the possession of the military department which involve the security of the United States and/or the State of Tennessee, including National Guard personnel records, staff studies, and investigations;

5. Records of students in public educational institutions except for certain statistical information and limited information on individual students (the statistical information cannot be identified with a particular student; personal information can include only a student's name, age, address, dates of attendance, grade levels completed, class placement, and academic degrees awarded);

6. A broad range of books, records, communications, work products, and other material in the possession of the Attorney General's Office; and

7. State agency records containing opinions of value of real and personal property intended to be acquired for public purposes (this information would be available to the public after acquisition had been finalized).

The 1985 General Assembly amended Section 504 to add three other groups of records which will not be immediately open to public inspection:

8. Proposals received pursuant to personal service, professional service, and consultant service contract regulations and related records (evaluations and memoranda) may be inspected by the public only after the contract is fully executed.

9. Sealed bids for the purchase of goods and services, leases of real property, and individual purchase records and related records (evaluations and memoranda) will be open only after formal award of the contract or lease.

10. Records of the Department of Economic and Community Development pertaining to proprietary information of industrial and commercial enterprises are not open to the public if the commissioner, after consultation with the attorney general, believes them to be of a confidential and sensitive nature.

Section 10-7-504 places a time limit on the confidentiality of some of the records it lists:

> Notwithstanding any provision of the law to the contrary, any confidential public record in existence more than seventy (70) years shall be open for public inspection by any person unless disclosure of the record is specifically prohibited or restricted by federal law or unless the record is a record of services for a person for mental illness or retardation. Provided, however, the provisions of this section shall not apply to a record concerning an adoption or a record maintained by the Department of Health and Environment's Office of Vital Records or by the Tennessee Bureau of Investigation.

It is important to note that although this section does make some now confidential records eventually available to the public, certain records will remain closed indefinitely. These include:

1. Records of adoption proceedings;
2. Mental health services records; and
3. Records maintained by the Office of Vital Records and the TBI.

Two points are clear from even a cursory reading of the sections above:

1. **There are few municipal or county records that are not open to the public.**

2. **Only those records declared by the legislature to be confidential, and so listed in the statutes, can be closed to public scrutiny.**

The second point is made even more forceful when the statement of policy is considered. It plainly says that all records not exempted by legislative statute shall be open to the public. The exemptions are few.

Tennessee does, indeed, have a very broad law.

POINT TO REMEMBER - 2: PUBLIC RECORDS OF COUNTY AND MUNICIPAL GOVERNMENTS ARE COVERED BY THE PUBLIC RECORDS LAW.

What governing bodies are affected by the law?

The statement of purpose (10-7-503) says "all state, county and municipal records . . . shall . . . be open. . . ." The "Definitions" section of the law (10-7-301) defines "public records" as those "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." "Agency" is defined as "any department, division, board, bureau, commission, or other separate unit of government created or established by the constitution, by law or pursuant to law, including the legislative branch and the judicial branch."

Section 10-7-505 makes the affected bodies even clearer: "Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record . . . shall be entitled to petition for access. . . ."

There can be no doubt that official records of local governments are covered by the Public Records Law. Through court decisions and opinions of the State Attorney General, the above statements now are understood to include records held by most subdivisions or agencies of local government. These decisions will be discussed later in this handbook.

POINT TO REMEMBER - 3: ANY CITIZEN OF TENNESSEE HAS ACCESS TO PUBLIC RECORDS.

The public had no general right of inspection under early common law rules because the rules were based on evidentiary considerations. However, any member of the public had the right to inspect specific government documents if he could show that he had an interest in the documents related to litigation in which he was involved, and that the documents were among those required to be kept by the government (Hemsley, 1985).

The nature of the required interest gradually became less personal: acting on behalf of a broader public interest, such as investigating official misconduct or a taxpayer's interest in a city's or county's financial condition, was sufficient. Some states eliminated or ignored the interest requirement entirely (Henrick).

Tennessee law includes no requirement that the person requesting the document have any special interest in it. Section 10-7-503 states:

"All . . . records . . . shall . . . be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen. . . ."

There are no Tennessee court cases interpreting the term "any citizen," but cases from other states having similar open records law provisions have held that the term applies to corporations, partnerships, citizens groups, and other associations as well as individual persons.

TWO AREAS OF CONCERN: POLICE AND PERSONNEL RECORDS

Although the scope of disclosure exemptions vary from state to state, two such exemptions frequently found in state laws do not appear in the Tennessee statute: personnel and police records.

The federal Freedom of Information Act tried to balance the public's right to know with the right of privacy. To safeguard the privacy rights of individuals, Congress in 1974 amended the original act to provide for the deletion of confidential data from otherwise non-confidential documents.

A Senate report at that time noted: "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it

is necessary to protect certain equally important rights of privacy with respect to certain information in Government files such as medical and personnel records" (Bruns, 1983, p. 366).

Such a provision is conspicuously absent in TCA Section 10-7-504, which lists most exemptions to the law. Personnel and medical records and similar information are not dealt with except in narrow terms: only records of patients in state hospitals and medical facilities and records of patients receiving medical treatment at state expense are exempt. The exemption leaves out medical records, filed elsewhere in state and local agencies, which do not meet the strict definition of 10-7-504. However, any public or private mental hospital records which directly or indirectly identify a patient or former patient are to be kept confidential (T.C.A. 33-3-104 [10]).

The law enforcement information disclosure exemptions contained in TCA 10-7-504 are restricted to the Tennessee Bureau of Investigation and the Office of the Attorney General.

POINT TO REMEMBER - 4: LOCAL GOVERNMENT PERSONNEL AND MOST POLICE RECORDS ARE "OPEN" RECORDS.

A case now on appeal to the state supreme court directly addresses the issue of police records. In February 1985, a chancery court in Shelby County held that investigative records of the Memphis Police Department in a specific case were not confidential and should be open to the public (Memphis Publishing Co. v. John D. Holt, et

al.). In arguing to keep the records closed, the City of Memphis cited the expungement statutes (TCA 40-15-106 and 40-32-101): ". . . public records, for the purpose of expunction only, shall not include . . . investigative reports . . . of law enforcement agencies . . . that are maintained as confidential records for law enforcement purposes and are not open for inspection by members of the public."

The case was appealed. In late August 1985, the Court of Appeals in Jackson ruled that the police department must open its investigative files in the case in question. The appeals panel said the records are not confidential because the state's Public Records Law does not specifically exclude them from inspection, as it does the investigative files of the TBI and the records of the Attorney General. Judge Nearn, who wrote the majority opinion, added:

> We too share the fears of counsel regarding the results of our holding but we can reach no other decision. The statutes speak clearly and unequivocally as to that which constitutes a record open to inspection. Likewise, the statutes speak just as clearly as to the exceptions to be applied and municipal police investigative records are conspicuously absent from these legislatively listed exceptions. . . . This Court may not constitutionally amend and add more exceptions to the legislative act. The credit, fault or remedy in this matter lies with the legislature. . . . We will not hold that any law passed by the legislature is contrary to public policy no matter how ill advised we may think it to be (p. 7).

In a sharply worded dissenting opinion, Judge J. Tomlin argued that:

> Public policy requires that the protection of confidential sources, confidential information, confidential investigative techniques, and the safety of law enforcement personnel and their families should take precedence over the open access of such information (p. 7).

The City of Memphis immediately indicated it would appeal to the Tennessee Supreme Court (Risher and Silberman, 1985).

In its examination of the arguments in the cast, the appeals court did note that reports, memoranda, or other documents made by law enforcement officers in a pending criminal proceeding would not be subject to public access under Rule 16, Tennessee Rules of Criminal Procedure. The Memphis case did not, however, involve pending criminal proceedings.

Several states have enacted right of privacy statutes that raise barriers against public disclosure of some records held by state, county, and municipal agencies, particularly records that contain personal information typically found in medical and personnel records (Chinn, 1978). There is no such statute in Tennessee.

The U. S. Supreme Court has found a right of privacy in the U. S. Constitution. However, this right so far has not been extended to protect against public disclosure of records held by state, county, and municipal governments. The U.S. constitutional right of privacy appears to be limited to issues involving marriage, contraception, child bearing and child rearing, education, and similar issues (Paul, 1976).

However, at least one state court, in Florida, has addressed the question of personnel records, which are not specifically exempted from inspection in the Florida Open Records Act. Holding that such records were exempted from disclosure on public policy grounds, the appellate court said:

> The right to know must occasionally be circumscribed when the potential damages far outweigh the possible benefits. In our opinion, to require public disclosure of personnel files of governmental employees could result in irreparable harm to the public interest and would be against the public policy. . . . While personnel records are not exempt . . . . by the specific language (of the law), we believe that public policy clearly dictates that they be deemed confidential. In the absence of more specific language to the contrary, we do not believe . . . the legislature contemplated that the personnel records of government employees should be open for public disclosure by any citizen of this state (Hemsley, p. 7).

It is impossible to predict how Tennessee courts might react if confronted with a case in which the release of clearly personal information was at issue.

POINT TO REMEMBER - 5: TENNESSEE COURTS HAVE INTERPRETED THE STATE'S STATUTE VERY BROADLY.

The body of Tennessee case law relating to the Public Records Law is small. The provisions of the law have generated a number of questions regarding their applicability to local governments, but there has been surprisingly little litigation. However, two Court of Appeals decisions, which the Tennessee Supreme Court refused to review, are significant, both for the specific areas of the law with

which they deal and as a strong indication of a tendency by the courts to interpret the statute very broadly.

THE ISSUE OF PERSONNEL FILES: MEMPHIS BOARD OF EDUCATION V. MEMPHIS PUBLISHING COMPANY

The first case arose out of the selection process for a superintendent of schools in Memphis. The Board of Education had established a search committee, composed of private citizens, and charged it with screening applicants and making recommendations to the board.

Reporters for the Memphis Commercial Appeal and the Memphis Press-Scimitar sought access to the search committee meetings and records, the latter consisting primarily of the applications of those seeking the superintendent position. They were refused. The Board of Education then filed suit against Memphis Publishing Company and the editors of the two papers to determine whether the Open Meetings Law and the Open Records Law applied to personnel files of applicants in the hands of the committee.

When the chancellor found that the Open Meetings Law applied but that the personnel files were not public records within the meaning of the Public Records Law, the publishing company appealed. The Court of Appeals of Tennessee, Western Section, held in 1979 that the Public Records Law did apply. In deciding that personnel files of applicants to the position of superintendent are open records, the court declared:

> Were it not for the exclusion of Section 305 [now TCA 10-7-504], state patient medical records would be included under Section 304 [now Section 10-7-503] as records "open to public inspection." Although such records are not "Public Records" under the sense of Chapter 1 and 2, they are nonetheless records of public bodies and open to public inspection but for the exceptions granted by Section 305. Although we are not here dealing with state hospital records, the analogy is proper. If state patient hospital records would be open to public inspection but for Section 305, how can it be said that applications for municipal school Superintendent are closed to public inspection without a specific exemption statute?

The court noted that the records in question were in the hands of a public body; the applicants sought employment by a public body; the applications were received by that body in its official capacity; therefore, the applications were a part of that body's records. The case was appealed to the Tennessee Supreme Court, which refused to hear it.

From the finding in this case, it is clear that any public records not specifically declared "confidential" by statute are to be considered open to the public.

REASSERTING THE LEGISLATIVE PREROGATIVE: CLEVELAND NEWSPAPERS V. BRADLEY COUNTY MEMORIAL HOSPITAL

The second significant case had its beginning when reporters for The Cleveland Banner asked to inspect the county hospital's payroll records and were refused. The publishing company sought a declaratory judgment against the hospital.

The Bradley County Chancellor held that the records were exempt from inspection; the paper appealed.

In reversing the lower court, the Court of Appeals, Eastern Section, in 1981 used language similar to that in the Memphis case:

> We read the Act and the Code as now codified to say that those records which have been declared by the legislature to be confidential shall be so granted by agencies maintaining them. . . . We also read the statute to provide that only the legislature can declare certain records to be confidential.

The hospital had argued that not only was it not a state, county, or municipality, as named in the statute, but that the board of directors had the power to designate their personnel records as confidential under TCA 10-7-504(c). The chancellor had upheld this argument, citing Section 10-7-504(c): "Any records designated 'confidential' shall be so treated. . . ." The appeals court rejected this assertion, holding that the statute applied to the hospital because it was a public hospital and an agency of the county; and because only the legislature can create exemptions from the law; ". . . they [the hospital board] cannot avoid the provisions of the Code by so designating their personnel records."

The appeals court specifically cited 10-7-503, the broad statement that "all . . . records . . . shall at all times . . . be open for personal inspection by the citizens of Tennessee . . . unless otherwise provided by state statutes."

LOCAL OFFICIALS' RESPONSIBILITIES UNDER THE LAW

The Tennessee Public Records Law (Section 10-7-503) places a definite responsibility on those local government officials designated as the "keepers" of public records:

> All state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state statutes.

Beyond this requirement for accessibility, however, the law itself provides little guidance for those charged with administering it. All the law says is that the records must be available:

(1) **During regular business hours of the department or agency having custody of the records.**

(2) **To any citizen of the state wishing to see them.**

As noted earlier, the Tennessee law allows no inquiry into the requester's reason for seeing the record. State courts have been hostile to access limitations based on the purpose for a request. A Louisiana court has held that as long as the requester's purpose in seeking disclosure of documents is legal, the custodian of the records may not inquire into the requester's motives.

As to the phrase "any citizen," courts have generally interpreted "any citizen" broadly to include corporations, partnerships, firms, citizens' groups, and associations.

POINT TO REMEMBER - 6: PUBLIC RECORDS MUST BE AVAILABLE FOR INSPECTION BY CITIZENS DURING REGULAR BUSINESS HOURS.

For further assistance in meeting the requirements of the law, record custodians must look to interpretations of the Tennessee law specifically and open records laws in general.

What records should be open for inspection? The law says "all state, county and municipal records" except those specifically exempted by legislative action. The exemptions have been outlined earlier in this handbook. The term "all . . . records" also has been expanded, through court interpretation, to include records of agencies, commissions, and other quasigovernmental bodies established by state or local government. Courts in other states have even extended the right of inspection to records of nongovernmental entities receiving public funds, such as consultants, attorneys retained by public funds, and a state automobile insurance fund. The key factor in bringing such bodies within the coverage of the state law nearly always is state or local funding of the entity.

Various rulings by the state Attorney General indicate just how broadly the "all records" provision has been interpreted:

1. Records of a utility division, including the names of occupants of residential units paying utility bills, are not confidential, and a board of utility commissioners does not have the power to prohibit citizens from reviewing such records during regular business hours. There is no statute

making public utility records confidential (Leech, Jan. 31, 1984).

2. A county election commission must make available to the public a list of election officials employed to work at the polls, if such a list is available and in possession of the commission. The courts have determined that "all public records that have not been explicitly declared confidential by the legislature are open for public inspection" (Leech, Sept. 2, 1983).
3. Documents submitted to the Tennessee Peace Officer Standards and Training Commission by a sheriff's department in support of its request for decertification of a deputy are public records and must be made available to citizens. Tenn. R. Crim. P.16(a)(2) makes such records exempt from the Public Records Law if they are transmitted for the purpose of furthering a criminal prosecution, but a decertification proceeding is not such an action (Cody, April 2, 1985).
4. Police offense reports regarding burglaries, robberies, traffic accidents, vandalism, etc., which are not juvenile records and do not involve ongoing investigations, are public records that should be made available for inspection by any citizen (Cody, May 6, 1985).

It appears that only when another statute makes a certain action confidential does the Public Records Law not apply:

1. The Public Records Law does not apply to employment contracts of individual persons employed by utilities, or to work sheets or "working papers" of the Tennessee Public Service Commission staff. Why? Because another statute (TCA 65-3-109) prohibits the commission from giving publicity to "any contracts, leases, or engagements obtained by them in their official capacity, if the interests of any company would thereby be injuriously affected." Work-sheets are not usually introduced into the record and "are likely to contain more detailed information about individual salaries than the final document" (Leech, July 27, 1982).
2. The court clerk must enter indictments, required to be kept confidential under TCA 40-13-111, in the minutes of the court, but these minutes must be kept confidential until the defendants named in the indictments are arrested. It is not illegal for the news media to publish any information concerning indictments even though the information should have been kept confidential under TCA 40-13-111 and 112 (Cody, June 27, 1985).

May those requesting a record make copies of it? Yes. Section 10-7-505 states that:

> 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 to 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 his authorized deputy; provided, however, 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.

Courts in other states have upheld this right to copy (McQuillin). The only limitations on inspection and copying concern questions of reasonableness, such as the size of the request and the potential damage to the document(s). A New Jersey court has held that even an extreme burden on the agency staff workload is not by itself a sufficient reason to deny inspection or copying. In virtually all instances, the agency performs the copying.

May a charge be made for copying? Section 10-7-507, which deals with records of traffic convictions and other such violations, permits the copying of such documents "upon the payment of a reasonable charge or fee therefor. [The official having custody] is authorized to fix a charge or fee per copy that would reasonably defray the cost of producing and delivering such copy or copies." As long as the charge is reasonable (at least equal to the actual costs involved in making the copy), it would appear that it also could be required for other records.

In establishing procedures for handling requests for records, local governments might look at the agency process used for the federal Freedom of Information Act. It requires that disclosure requests reasonably describe the records sought.

WHEN ACCESS IS REFUSED

POINT TO REMEMBER - 7: THE LAW IS TO BE INTERPRETED BROADLY IN ORDER TO GIVE THE FULLEST POSSIBLE PUBLIC ACCESS TO PUBLIC RECORDS.

What happens if a request for inspection of a record is denied? In Section 10-7-505, the Tennessee Public Records Law establishes a procedure for judicial review of the denial:

1. The person making the request may petition for access to any such record and ". . . obtain judicial review of the actions taken to deny the access."
2. The petition is made to the chancery court for the county in which the records are located, if they are county or municipal records. If they are state records, the petition is filed with the Chancery Court of Davidson County, the court of the county where the record is located, or the proper court in the petitioner's county of residence.
3. When the petition is filed, the court will issue a show-cause order. In other words, the official denying access must appear and "show cause" why the petition should not be granted. The law states that a written response to the order is not required "and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings."

4. The court may direct that the records being sought be submitted "under seal" (in private) for court review alone.
5. The decision of the court on the merits of the petition is final.
6. The burden of proof for justifying nondisclosure is on the official responsible for the records. The justification must be shown "by a preponderance of the evidence." The Public Records Law does not spell out whether this evidence the chancellor can consider includes public policy interest in favor of nondisclosure of the records in question, but the cases interpreting the law seem to support the conclusion that the chancellor is limited to considering only whether the record falls inside or outside the disclosure exemptions contained in the law itself.
7. The court will prepare a written finding of fact and "is empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section."
8. The language in this section of the law "shall be broadly construed so as to give the fullest possible public access to public records."
9. If the court decides in favor of the petitioner, it will order that the records be made available unless:

   (a) A notice of appeal is filed, and

   (b) The court certifies that a "substantial legal issue" exists which must be resolved by an appellate court.

Is there any penalty for having failed to allow access? None is provided in the Public Records Law. Once the court finds in favor of the requester, the record must be made available unless an appeal is to be made to a higher court. Failure to obey the court order would place an official in contempt of court, and there is a penalty for such action.

Can a local government official be held liable for complying with a court order for access? The law provides for this:

> Any public official required to produce records pursuant to this part shall not be found criminally or civilly liable for the release of such records nor shall a public official required to release records in his custody or under his control be found responsible for any damages caused, directly or indirectly, by the release of such information (10-7-505[f]).

SECTION II

THE TENNESSEE OPEN MEETINGS LAW

Better known as the "Sunshine Law," the Tennessee Open Meetings Law, codified as TCA 8-44-101-106, is recognized as one of the most comprehensive in the nation. Although under frequent legal attack for lack of clarity since its passage in 1974, the law has won national acclaim as a "model" piece of legislation.

If some other parts of the law are open to misinterpretation, the intent of the legislature is clear: "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 should not be conducted in secret" (Section 8-44-101).

POINT TO REMEMBER - 1: THE TERM "GOVERNING BODY" HAS BEEN BROADLY INTERPRETED TO INCLUDE VIRTUALLY ANY PUBLIC GROUP IN THE PROCESS OF ARRIVING AT DECISIONS LEADING TO ACTION OR MAKING RECOMMENDATIONS TO FORMAL PUBLIC BODIES.

Definitions of terms used in the law are important, even though some of them have been sources of controversy. They follow as they appear in the text of the law.

Section 102 states: "All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution."

GOVERNING BODY - ". . . the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration."

Several recent court decisions and opinions by the State Attorney General indicate the broad interpretation given this section. For an example, the State Attorney General held that city and county beer boards are subject to the state Sunshine Law. Why? They owe their authority to state statute and, in discharging their functions under this statute, they "are making decisions on policy or administration affecting the conduct of the people's business" in the governmental sector (Cody, Aug. 9, 1984).

A clear statement of the appplicability of the Open Meetings Law to committee sessions is found in the decision of the Court of Appeals, Middle Section, in a 1985 case, Standard Publishing Company vs. City of McMinnville. Several standing committees, each consisting of three aldermen, and a special committee, also composed of three aldermen, had alledgedly met and "deliberated toward a decision" (p. 3) on various matters. The Chancellor had held that the plaintiffs had failed to prove that "any committee here had the requirements of a quorum" and there was no proof that the committees came under the Public Meetings Act. Judge Samuel L. Lewis, who wrote the Court of Appeals' opinion, held that:

> The Board of the City of McMinnville may not act, either intentionally or unintentionally, through its committees in a manner prohibited to the Board itself. In other words, the Board may

> not create committees that hold hearings and make recommendations to the Board, and then be allowed to circumvent the Public Meetings Act simply by failing to provide that it is necessary that a quorum be present for the committee to act . . . in the absence of a statute or ordinance to the contrary, it will be presumed that a majority of the members of the committee constitutes a quorum, and that it will be presumed further that a quorum is present when the committee transacts business (p. 4).

In May 1985, the Attorney General ruled that the board of commissioners of a utility district is a governing body within the meaning of the Open Meetings Law because it was created under a state act and has the statutory authority to make decisions for the utility district (Cody, May 16, 1985).

In November 1984, the Attorney General ruled that the Sunshine Law applies to county councils on aging, senior citizen center boards, and committees of these bodies. Why? The Tennessee Supreme Court has held that the definition of a governing body includes "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. . . ." (Dorrier v. Dark, 1976). The area agencies on aging are administrative bodies established by federal regulations and designated by various state agencies. Therefore, "the origin and authority of these agencies may be traced to the State. Further, the function of the county councils is to make recommendations on policy and administration to the area agencies. Thus, these are 'governing bodies'. . . . The same reasoning applies to senior citizen center boards" (Cody, Nov. 19, 1984).

The Sunshine Law applies to committees of a hospital owned and operated by a county, according to a January 1983, Attorney General's opinion. The committees, composed of members of the board of directors of the hospital, make recommendations to a "public body," the hospital's board of directors. There is one exception: when the committees exercise the function of "medical review committees" (Leech, Jan. 28, 1983). Such activity is confidential under TCA 63-6-219(a).

MEETINGS - ". . . the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. Meeting does not include any on site inspection of any project or program. . . . Nothing in this section shall be construed as to require a chance meeting of two or more members of a public body to be considered a public meeting. No such chance meetings, informal assemblages, or electronic communication shall be used to decide or to deliberate public business in circumvention of the spirit or requirements of this Act."

A meeting or conference for the purpose of informing the members or of hearing reports and results of studies does not appear to be prohibited. The law refers only to meetings "to decide or to deliberate public business." However, in Standard Publishing Co. v. City of McMinnville (1985), the Appeals Court held that a governing board may not hold hearings and make recommendations to the board and then attempt to circumvent the law "by failing to provide that it is

necessary that a quorum be present for the committee to act." The court also notes that in the absence of a quorum, a governing body cannot act, "but it will be presumed that a quorum was present when the council transacts business."

There are some very narrow distinctions in determining what is and is not a meeting under the law. An Attorney General's opinion emphasizes this. In January 1983, the Attorney General held that the Open Meetings Law was violated when three of five city councilmen discussed and agreed to an item in advance of a city council meeting. The city charter defined a quorum as a majority of the five councilmen; this met the "quorum" test of the law. The council definitely is a governing body under the law. And the three discussed the item "and agreed thereto in advance of the meeting. It is the opinion of this office that they violated the Open Meetings Act. This is so even if they met by chance or talked informally. . . . Informal discussions are not forbidden, but they may not be used to evade the requirements of the . . . Act" (Leech, Jan. 24, 1983).

There is only one provision in the law for executive sessions by local governing bodies; it relates to labor negotiations between public employees unions and the state or local governments. Although the negotiating sessions themselves are open to the public, planning or strategy sessions either of the union committee or the governmental entity committee, meeting separately, are closed.

When a 1985 act extending the Open Meetings Law to boards of non-profit organizations receiving at least 30 per cent of their

total annual income from community grant funds was codified, a second section of the act was codified in such a way as to make it appear that "confidential doctor-patient relationships, personnel matters" and other such matters would be excepted from the law. However, a reading of the original act makes it apparent that the act was not properly codified. The exemption for personnel matters, etc., was intended to apply only to the non-profit corporation board meetings.

The only other exceptions stated in the law are those permitted the General Assembly by the Tennessee Constitution: "The door of each House and committees of the whole shall be open, unless when the business shall be such as ought to be kept secret" (Art. 1, sec. 19).

A recent court ruling has permitted one other exception for local governments, however--discussions with attorneys about pending litigation. This will be discussed in more detail later.

Chance meetings are not prohibited since those meeting have no control over the situation. They do, however, have control over what is discussed. Members of governing bodies also have control over what is discussed in informal gatherings such as parties, or in phone conversations. The law states that chance meetings, informal gatherings, and electronic communication must not be used to violate the spirit of the open meeting concept (Hilliard).

ADEQUATE PUBLIC NOTICE - This has been one of the most troublesome sections of the law because there is no explanation of the term "adequate." Section 103 states: ". . . Any such governmental body

which holds a meeting previously scheduled by statute, ordinance, or resolution, shall give adequate public notice of such meeting." "Adequate notice" also is required for special meetings "not previously scheduled by statute, ordinance, or resolution." The notices required by this section ". . . are in addition to, and not in substitution of, any other notice required by law." Laws in many other states go into lengthy descriptions of what is considered "adequate"; the Tennessee law is silent.

The wording is sufficently broad to require adequate notice of any type of meeting conducted by a governing body (Hilliard).

Two cases have been helpful in clarifying what some have called vague areas in the law; a third has provided a break in the no-executive-sessions barrier in the law.

THE FIRST TEST: MEMPHIS PUBLISHING COMPANY V. CITY OF MEMPHIS

This case was the first major legal test of the new law, instituted 12 days before the law actually took effect. It arose out of a suit filed by the City of Memphis and Shelby County, seeking to have the law declared unconstitutional because of vagueness. Named as defendants were the Memphis Publishing Company and Attorney General David Pack. The chancellor found a distinct problem with the term "adequate public notice" and expressed fear that the courts might void actions of governing bodies at meetings for which those bodies had believed they had given proper notice. He determined that

the term was so unclear "that a Court might easily reach a different decision as to what would constitute adequate notice under the particular circumstances than did the government officials even upon advice of skilled and learned counsel." He also called too imprecise the law's use of "governing bodies," "public body," "meeting," and "informal gatherings."

The publishing company appealed the decision, naming the city as defendant. Attorneys for the company argued that Tennessee courts had historically interpreted "remedial statutes" (lacking in penal sanctions) liberally.

On July 29, 1974, the Tennessee Supreme Court overruled the lower court and unanimously found that the Open Meetings Law was not unconstitutional. The court held that "it is impossible to formulate a general rule in regard to what the phrase 'adequate public notice' means . . . . [It] means adequate public notice under the circumstances."

POINT TO REMEMBER - 2: ADEQUATE PUBLIC NOTICE IS WHAT IS ADEQUATE FOR EACH SITUATION AND CIRCUMSTANCE. THERE IS NO SPECIFIC RULE TO FOLLOW.

NO QUESTION OF UNCONSTITUTIONALITY: DORRIER V. DARK

One of the most often-cited Tennessee Supreme Court rulings on the Open Meetings Law grew out of a personnel matter involving the

Metropolitan Board of Education in Nashville and a teacher, James Dark. The school system first suspended and then dismissed Dark on charges of neglect of duty. Dark asked for a judicial review by the Davidson County Chancery Court, accusing the school board of having reached its decision to fire him in a closed meeting.

The chancellor ruled that the board had violated the Open Meetings Law and its action was voided. The school board appealed to the Tennessee Supreme Court on the grounds that the Open Meeting Law was unconstitutional. Cited were four reasons:

1. The law was too vague.
2. The law abridged freedom of speech.
3. The law's provisions were broader than its caption.
4. The law was unreasonable and arbitrary because it (then) permitted no executive sessions.

In a unanimous decision announced Feb. 17, 1976, the Supreme Court upheld the law's constitutionality. The opinion, written by Chief Justice William H.D. Fones, denied the court's authority and power to define every term of the Open Meetings Law and to give its opinion of the "precise scope and coverage with respect to every conceivable body in existence in the state."

Turning to the arguments that the terms "governing body" and "public body" were too vague, the court examined the law as a whole to "ascertain the intentions of the Legislature." It concluded that:

> The 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 or administration affecting the conduct of the business of the people.

The court rejected the charge that the requirements of the law infringed on free speech, saying that the law clearly was designed to facilitate the constitutional guarantee of open government. If there was any limiting effect on free speech, it added, ". . . it is at most a subjective matter with the individual member of a covered body and is limited to a chilling effect upon free expression." The public, through elected legislators, had indicated a willingness to risk this effect in order to achieve more openness in government, the court concluded.

The court gave no credence to either of the other two objections. In regard to the prohibition against executive sessions, the court noted that a number of other states have laws with the same provision.

In summarizing its findings that there were no defects in the law of "constitutional proportions," the court concluded:

> We are aware that the Open Meetings Act has far reaching implications, and that there are many well informed persons in addition to appellant who insist that in certain respects it is detrimental to the public interest that closed meetings cannot be held for certain deliberations and decisions.

> If any experience should prove that the public interest is adversely affected by open meetings involving pending or prospective litigation, disciplinary hearings, promotion or demotion decisions, prospective land purchases, labor negotiations, etc., it is the Legislature, not the Judiciary, that must balance the benefits and detriments and make such changes as will serve the people and express their will.

POINT TO REMEMBER - 3: IF ANY COMMITTEE, AGENCY, ETC., OWES ITS ORIGIN AND AUTHORITY TO ANY STATE, COUNTY, OR MUNICIPAL LEGISLATIVE ACTION, IT PROBABLY IS SUBJECT TO THE PUBLIC MEETINGS LAW.

With these two cases, the constitutionality of the statute was established. Subsequent litigation has dealt primarily with the facts surrounding each case (Hilliard).

CONSIDER THE SUBSTANCE: SELFE V. BELLAH

In trying to define terms used in the law, one other case is helpful. Selfe v. Bellah involved both a telephone conversation and a pre-meeting casual gathering between councilmembers. The Court of Appeals, Eastern Section, ruled in 1981 that "(the court must) **look to the substance of the meeting, rather than its form,** (emphasis added) keeping in mind that the statute is to be construed so as to frustrate all evasive devices." The court examined the conversations to see if they constituted deliberations toward a decision and held that they did not because councilmembers had not "weighed and considered the reasons for or against the matter with a view to making a choice or determination."

POINT TO REMEMBER - 4: THE SUBSTANCE OF A TELEPHONE CONVERSATION OR CASUAL MEETING, NOT THE FORM, DETERMINES WHETHER THE PROVISIONS OF THE OPEN MEETINGS LAW APPLY.

ANOTHER EXCEPTION: SMITH COUNTY EDUCATION ASSOCIATION V. ANDERSON

A 1982 study of state open meetings laws determined that "virtually all . . . provide for closed or 'executive' sessions. Most state laws spell out the circumstances under which these closed sessions are permitted, authorizing private meetings for matters affecting national security, personnel matters, discussions of pending law suits. . . . (Overbeck and Pullen, pp. 209-10).

There is only one such provision in the Tennessee law -- relating to labor negotiations. Section 8-44-104 states specifically that "all meetings of any governing body are declared to be public at all times, except as provided by the Tennessee Constitution." Section 8-44-201, on labor negotiations, provides that:

> Nothing contained in this section shall be construed to require that planning or strategy sessions of either the union committee or the governmental entity committee, meeting separately, be open to the public.

A 1984 Tennessee Supreme Court ruling has created a second exception: attorney-client conferences.

Smith County Education Association v. Joe K. Anderson, Superintendent of Schools for Smith County, et al., raised the question of attorney-client privilege, an issue not directly addressed in the law.

The case grew out of unsuccessful collective bargaining negotiations between the Smith County Education Association and the county's school board. During the course of the negotiations, the school board stopped paying insurance premiums for the teachers, and SCEA sued to have the premiums reinstated. On two occasions after the complaint was filed, the school board met in private, without notice, with its attorney.

The allegations of Sunshine Law violations were brought to the chancellor's attention in a supplemental complaint. At the defendants' request, the case was heard by a judge and a jury. The chancellor treated the jury's findings as advisory and entered a final decree in favor of the school board on all issues. He dismissed the complaint.

Among the issues on which SCEA appealed was one of concern to local governing bodies: does a public body engaged in litigation have the right to meet in private with its attorney?

The Tennessee Supreme Court noted in its analysis of the open meetings issue that there is no exception in the Public Meetings Law permitting a public body to meet privately with its attorneys. However, the court pointed out that a majority of courts of other states have fashioned such an exemption to their open meetings laws to permit private attorney-client consultation on pending legal matters.

The court noted that the Tennessee law provides that all meetings shall be public "except as provided by the Tennessee Constitution." Since the licensing and regulation of attorneys practicing law in Tennessee is within the inherent authority of the judicial branch of government, and since the Constitution provides that one branch cannot usurp authority of the other, "The Legislature . . . is without authority to enact laws which impair the attorney's ability to fulfill his ethical duties as an officer of the Court." The court concluded that the legislature did not intend that the Open Meetings Law apply to meetings of public bodies and their attorneys to discuss pending litigation in which the public body is a named party.

The court took note of the potential for misuse of this new exception and reminded attorneys that they would be in jeopardy if violations occurred. Attorneys were warned that "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."

The exception, Dennis Huffer, MTAS attorney and intergovernmental affairs consultant, notes, "is a narrow one and applies only to those situations in which the public body is a named party in the lawsuit." He does consider the decision, however, a "significant holding for local governments" (p. 2).

Don W. Ownby (1984), also a MTAS attorney, wrote in Tennessee Municipal Attorneys Newsletter that:

> 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 members of the public body regarding what action to take based upon advice from counsel, whether it be settlement or otherwise, such discussion shall be open to the public and failure to do so shall constitute a clear violation of the Open Meetings Act (1984, p. 3).

POINT TO REMEMBER - 5: EXECUTIVE SESSIONS ARE PERMITTED FOR MEETINGS BETWEEN GOVERNING BODIES AND THEIR ATTORNEYS ONLY FOR THE PURPOSE OF DISCUSSING PENDING LITIGATION IN WHICH THE GOVERNING BODY IS A NAMED PARTY.

LOCAL OFFICIALS' RESPONSIBILITIES UNDER THE LAW

The obvious responsibility all public officials bear under the law is compliance with its provisions. This means fully understanding:

(1) What governmental bodies are covered by the law;

(2) What constitutes a meeting under the law;

(3) What few exceptions to the law (or interpretations of the law) permit closed sessions; and

(4) What constitutes proper notice to the public of regular and special meetings.

Earlier material in this section of the handbook should help public officials better understand the scope of the law and any exceptions. However, these officials have specific responsibilities relating to certain portions of the law.

NOTICE OF REGULAR MEETINGS - Section 8-44-103 requires that for regular meetings "any such governmental body which holds a meeting previously scheduled by statute, ordinance, or resolution, shall give adequate notice of such meeting."

As noted earlier, there has been nothing definitive from legal sources regarding "adequate notice." One Attorney General's opinion (Leech, March 21, 1983) dealt with the question: What is the length of public notice required for a special meeting of the city council? In response, the Attorney General looked first at the city's charter, which required 24 hours notice for a special meeting. Second, he noted that the law is not specific and advised that adequate notice "depends not only upon the length of public notice, but also the manner in which the public notice is given." The purpose of the notice, he explained, is to "fairly inform the public," and each situation must be handled on an individual basis.

If a governing body or other agency covered by the law does not already have a schedule for regular meetings, i.e., every first Monday, the first step would be to establish one, by ordinance or resolution. The ordinance or resolution should specify the dates, time, and place of regular meetings and that such meetings are open

to the public. It would also be desirable to indicate when, how, and where notices of special (non-regular) and emergency meetings will be given. If the time of the meeting varies with daylight savings time, this should be stated.

The law does not require that agendas of regular meetings be published. However, if it is reasonably possible, a copy of the agenda should be available to the public in advance of a meeting. The mechanics for doing this should be stated in the ordinance or resolution.

All of the above information should be published at least annually in a general circulation newspaper (although the law does not specify this). Copies should be distributed to all other media representatives serving the county or municipality. A notice should be posted at the court house or municipal building and other locations generally used for providing notice of public functions on a permanent basis, such as a utility district bulletin board or a notice board in the lobby of the community center (Stokes and McGammon, 1983).

When the notice is published, do not specify such small sized type that it will be buried. The notice should be large enough to attract attention readily.

Cities selecting a newspaper for publication should be aware of the Attorney General's definition of a "newspaper of general circulation." In a 1982 opinion, Attorney General Leech referred to TCA 2-1-104(12), a portion of the election code, which provides

that:

> "Newspaper of general circulation" means a publication bearing a title or name, regularly issued at least as frequently as once a week for a definite price, having a second-class mailing privilege, being not less than four (4) pages, published continuously during the immediately preceding one-year period, which is published for the dissemination of news of general interest and is circulated generally in the political subdivision in which it is published and in which notice is to be given. A newspaper . . . which is primarily engaged in the distribution of news of interest to a particular group of citizens, is not a newspaper of general circulation (Leech, Oct. 12, 1982).

Leech noted that this description would also rule out an advertising paper, citing Shoppers Guide Pub. Co. v. Woods (547 SW 2d 561, Tenn. 1977).

"Adequate notice" is generally accepted as including:

1. Public and continuous posting of the dates, times, and places at the principal office of the governing body, or if no such office exists, at the building where meetings are usually conducted, at least seven days before the first regular meeting of the year;
2. Publishing the schedule in a newspaper of general circulation in the territorial limitations of the governing body at least seven days before the first regular meeting of the year;
3. Mailing copies of the schedule to all local news media at least seven days before the first meeting of the year, and advising the media that notices of special and reconvened meetings will be mailed upon request;

4. Making copies of the schedule available to the public at the regular meeting place at least 24 hours prior to each meeting; and
5. Repeating the procedure above if the regular meeting schedule changes (Stokes and McGammon).

NOTICES OF SPECIAL MEETINGS - For special meetings, the law provides that "any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate notice of such meeting." To meet this requirement, it is generally acceptable to:

1. At least seven days before the meeting, post a notice of the date, hour, purpose, and place of meeting at the principal office of the governing body or at the building where meetings are held;
2. At least seven days before the meeting, publish the notice in a general circulation newspaper;
3. At least seven days before the meeting, mail notices, as requested, to the news media; and
4. At least 24 hours before the meeting, make copies of the notice available to the public at the meeting place.

For reconvened meetings:

1. Follow the same procedure as for special meetings except with 24-hour notice, unless the meeting is to be held within 24 hours of adjournment and no new questions are to be considered; and

2. Announce the time and place at the meeting from which it was adjourned.

To be on the safe side, include notices of committee meetings, especially when a quorum is required by local ordinance or by a state or federal regulation.

Occasionally a governing body must meet in emergency session. Unless a city's charter makes some provision for notice of this type of meeting, an honest effort to notify the public should be sufficient. This could mean contacting the electronic news media (radio and/or television) and requesting an announcement, plus posting a notice at the regular meeting place. All news media representatives should, of course, be notified at once.

To guide local government officials in preparing notices of regular and special meetings, samples are given in Appendix C.

MINUTES OF MEETINGS -- Section 8-44-104 of the law requires:

> The minutes of a meeting of any . . . governmental body shall be promptly and fully recorded, shall be open for public inspection, and shall include but not be limited to a record of persons present, all motions, proposals and resolutions offered, the result of any votes taken, and a record of individual votes in the event of roll call.

This section provides another guarantee of public access to the actions of public bodies. Although it appears clear on first reading, there have been some questions concerning the meaning of "promptly" and "fully." Some of the specific language also is open to criticism. What is meant by "a record of persons present"? This could be interpreted to mean all members of the governing body or it

could, if taken literally, include everyone at a meeting, even those in the audience. There has been no litigation in regard to this section to serve as a guide. If a governing body makes a reasonable effort to comply with the provisions, that should be sufficient. Certainly all members of the governing body present should be recorded, as should those from the audience who formally participate in discussions or address the governing body.

VOTING DURING MEETINGS -- The second part of 8-44-104 states that:

> All votes of any governmental body shall be by public vote or public ballot or public roll call. No secret votes, or secret ballots, or secret roll calls shall be allowed. As used in this chapter, "public vote" shall mean a vote in which the "aye" faction vocally expresses its will in unison and in which the "nay" faction, subsequently, vocally expresses its will in unison.

As with the section on minutes, this portion of the law seems clear. It even goes so far as to define what is mean by a public vote. Governing bodies and other groups to which the law applies should have no problem with this section if voice votes for and against are taken separately and registered distinctly. As called for in the first portion of 8-44-104, any roll call vote should be recorded in the minutes. The minutes also should reflect in what form any vote was taken: voice, roll call, show of hands, etc.

WHEN ACCESS IS DENIED

The Tennessee Open Meetings Law has sharp teeth. Two separate sections make this plain.

Section 8-44-105 states that: "Any action taken at a meeting in violation of this part shall be void and of no effect, provided that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned."

By voiding actions taken in secret meetings, the law forces the offending group to act again in a properly conducted session. It does not forbid the previously decided upon action from being taken again, but requires that it be done at a public meeting.

The exception to the "null and void" rule was included in the law to prevent financial obligations incurred during illegally closed meetings from being voided. This places the obligation for properly conducting a meeting on the governmental body and not on organizations with whom funding arrangements are made (Hilliard).

POINT TO REMEMBER - 6: IF A PUBLIC BODY MEETS WITHOUT GIVING ADEQUATE NOTICE, OR WITHOUT THE MEETING BEING CONDUCTED IN PUBLIC, ALL RESULTS OF THE SESSION ARE NULL AND VOID.

The judicial process is detailed in Section 8-44-106:

1. Circuit courts, chancery courts, and other courts "which have equity jurisdiction" may issue injunctions, impose penalties, "and otherwise enforce the purposes" of the law "upon application of any citizen of this state."

This means that judicial action is limited to civil penalties, and the harsher penalties required under criminal statutes will not apply. No specific penalties are stated in the law; this is left to the courts to decide.

2. In each suit brought under the law, the court is to file written findings of fact "and conclusions of law and final judgments, which shall also be recorded in the minutes of the body involved."

The Tennessee law is unique among states' Sunshine Laws in its requirement that findings in cases of violations be entered in the minutes of groups that have committed the violations (Hilliard).

3. Any person found by the court to be in violation of the law shall be permanently enjoined from further violations.

4. Each separate occurence of meetings found in violation of the law will constitute a separate violation.

5. The court will retain jurisdiction over the persons and subject matter involved for a period of one year from entry of the final judgment or decree. During this period, the defendants must report, in writing, semiannually to the court of their compliance with the law.

This section gives the courts a powerful means for controlling future violations.

In spite of some of the problems inherent in the law, the Tennessee Open Meetings Law can be the basis for a good relationship with the public and with the news media if local officials:

1. Meet with representatives of the media serving their city or county and establish a workable method of implementing the "adequate notice" provisions of the law.

2. Establish a continuing means of keeping citizens informed of when various agencies of local government will meet and what will be discussed. Officials should not depend entirely on the news media as a communications channel to the public.

3. Make sure that advisory boards and commissions also comply with the "adequate notice" provision.

4. Remember that what happens at public meetings is the public's business. Citizens have the right to attend, listen, and be heard.

SECTION III

MOST-ASKED QUESTIONS AND ANSWERS

The information in this section can be found in the first two sections of the handbook. However, when something is needed quickly, it is sometimes easier to find it when it is in question/answer form.

THE PUBLIC RECORDS LAW

1. **WHAT ARE "PUBLIC RECORDS" IN TENNESSEE?**

   Basically, any state, county, or municipal record and the records of any agency created and/or funded by one of these levels of government.

2. **WHAT RECORDS ARE OPEN TO THE PUBLIC FOR INSPECTION?**

   Any of the above records except those specifically declared confidential by the General Assembly.

3. **WHAT RECORDS ARE NOT OPEN TO THE PUBLIC?**

   Those specifically listed in the law. They include records of adoption proceedings; records made confidential by federal statutes or regulations; medical records of patients in state hospitals and other state medical facilities, and in public and private mental hospitals, and of persons receiving treatment at state expense; investigative records of the Tennessee Bureau of

Investigation; military department records involving national or state security; records of students in public schools; records in the possession of the Attorney General; and, for limited periods of time, sealed bids, leases of real property, individual purchase records, and proposals submitted for the performance of personal, professional, and consulting services. This last group of records is open once the contract or lease has been awarded.

4. **WHAT ABOUT PERSONNEL AND POLICE RECORDS? AREN'T THEY CLOSED?**

In most cases, no. Tennessee law makes no exemptions for such records, except those of the Tennessee Bureau of Investigation, certain records in the hands of the state Attorney General, and law enforcement records in pending criminal proceedings.

5. **CAN THE RECORD CUSTODIAN DO ANYTHING TO HELP INSURE THE RECORD WILL NOT BE MISCONSTRUED OR MISREPRESENTED?**

Yes. Many public records are difficult to understand or interpret correctly. Offer to explain the background of the record, any unusual terms, etc. The custodian could even suggest other records that might place the requested record in proper context.

6. **MAY PUBLIC RECORDS BE COPIED? IF SO, WHO MAKES THE COPIES? CAN A FEE BE CHARGED FOR THE SERVICE?**

The law specifically states that records can be copied. To insure careful handling of the document(s), the custodian should make the copies. A reasonable fee, to cover the actual costs of the service, can be charged.

7. WHAT IF ACCESS MUST BE REFUSED?

Explain why. If the record is specifically excluded by the law, the custodian should say so in a courteous manner. For example, say something like, "I'm sorry, but I can't show you that record. Section 10-7-504 of Tennessee Code Annotated had designated that record as confidential because it related to an adoption procedure. If you feel I'm mistaken, you can go immediately to the Chancery Court." If there is a legitimate reason to deny access, be sure to state the reason and the legal authority.

8. WHAT HAPPENS WHEN ACCESS IS DENIED?

The person requesting the record may petition the chancery court to grant access. The decision of the court is final. If the court finds for the requester, the record must be made available, unless an appeal to a higher court is to be made.

9. IS THERE SOME PENALTY FOR FAILING TO GRANT ACCESS?

No, unless the custodian still refuses after a court has ruled in favor of the requester. In such a case, the custodian would be in contempt of court, an offense which does carry a penalty.

THE OPEN MEETINGS LAW

1. WHAT GOVERNMENTAL BODIES ARE COVERED BY THE OPEN MEETINGS LAW?

Practically any public group, of two or more members, which has the authority to make decisions for, or recommendations to, a public body. This includes not only county and municipal elected bodies but many appointed groups.

2. **WHAT IF SEVERAL MEMBERS OF A GOVERNING BODY MEET CASUALLY? IS THAT A PUBLIC MEETING UNDER THE TERMS OF THE LAW?**

   It depends upon the content of the discussion. Was a decision reached on any matter? In deciding whether or not such meetings are covered, the courts have recognized that phone calls and casual meetings between governing body members cannot be avoided. But the content of the conversation can be controlled.

3. **WHAT CONSTITUTES "ADEQUATE" NOTICE OF A MEETING?**

   The law isn't specific. The courts have said that circumstances determine what is "adequate." Some suggestions for complying with this section of the law are included in Section II of this handbook.

4. **MANY INSTRUCTIONS RELATING TO MEETING NOTICES INCLUDE REFERENCES TO "A NEWSPAPER OF GENERAL CIRCULATION." WHAT DOES THIS MEAN?**

   The election code defines it as a regularly issued paper (at least once a week) which is published primarily for the dissemination of general interest news. Special interest papers and advertising papers would not qualify under this definition. Note that the Open Meetings Law does not specify how notice should be given.

5. **DOES THE LAW ALLOW ANY CLOSED MEETINGS?**

   Just for two purposes: conferences between the client governing body and its attorney on pending litigation to which the governing body is a party; and planning or strategy sessions during labor negotiations.

6. **WHAT IF A GOVERNING BODY VIOLATES THE LAW?**

First, any actions taken at the meeting are nullified and must be considered again at a "legal" meeting. Second, the governing body is enjoined for a period of one year from again violating the law. It must report, in writing, to the court twice during the year on compliance with the law. Third, the court's findings in cases of violations must be entered in the minutes of the body which committed the violations.

7. **WHERE CAN GOVERNING BODY MEMBERS GET MORE INFORMATION ABOUT VARIOUS PROVISIONS OF THESE LAWS?**

Each of the two University of Tennessee technical assistance agencies, the Municipal Technical Advisory Service and the County Technical Assistance Service, have qualified staff lawyers who can assist local government officials or their attorneys. The UT Center for Government Training frequently offers seminars on the subject, as does the Tennessee Municipal Attorneys Association. MTAS, CTAS, and TMAA issue informational bulletins when there are changes in or new interpretations of the laws.

SECTION IV

SUMMARY

Historically, people in a democracy have wanted to know more about the governing of their society. In our country, a variety of state laws dictate the process by which citizens gain access to information. It is incumbent upon any public official to know and to understand the mandates of these laws in his or her state. Citizens also should know their rights and obligations under these laws.

This handbook provides background and a comparison of the Tennessee state laws relating to public access to records and meetings of local governing bodies. Relevant court cases are cited to indicate how the laws have been interpreted, and references are provided for further information.

The material has been organized according to the sections of the two laws. Certain "Points to Remember" emphasize major provisions:

Public Records

POINT 1 - No record is confidential unless the General Assembly (or the courts) specifically says it is.

POINT 2 - Public records of county and municipal governments are covered by the Public Records Law.

POINT 3 - Any citizen of Tennessee has access to public records.

POINT 4 - Most local government personnel and police records are "open" records.

POINT 5 - Tennessee courts have interpreted the state's statute very broadly.

POINT 6 - Public records must be available for inspection by citizens during regular business hours.

POINT 7 - The law is to be interpreted broadly in order to give the fullest possible public access to public records.

Public Meetings

POINT 1 - The term "governing body" has been broadly interpreted to include virtually any group in the process of arriving at decisions leading to action by or making recommendations to formal public bodies.

POINT 2 - Adequate public notice is what is adequate for each situation and circumstance. There is no specific rule to follow.

POINT 3 - If any committee, agency, etc., owes its origin and authority to any state, county, or municipal legislative action, it probably is subject to the Public Meetings Law.

POINT 4 - The substance of a telephone conversation or casual meeting, not the form, determines whether the provisions of the Open Meeting Law apply.

POINT 5 - Executive sessions are permitted for meetings between governing bodies and their attorneys for the purpose of discussing pending litigation in which the governing body is a named party.

POINT 6 - If a public body meets without giving adequate notice, or without the meeting being conducted in public, all results of the session are null and void.

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APPENDIXES

APPENDIX A

THE PUBLIC RECORDS LAW -- TENNESSEE CODE ANNOTATED 10-7-503--508 (as amended 1985)

10-7-503. Records open to public inspection -- Exceptions (Effective July 1, 1985). All state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state statutes. Provided, however, that the head of a governmental entity may promulgate rules in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, to maintain the confidentiality of records concerning adoption proceedings or records required to be kept confidential by federal statute or regulation as a condition for the receipt of federal funds or for participation in a federally funded program. (Acts 1957, ch. 285, § 1; T.C.A., § 15-304; Acts 1981, ch. 376, § 1; 1984, ch. 929, §§ 1,3.)

10-7-504. Confidential records (Effective January 1, 1985).

(a) (1) The medical records of patients in state hospitals and medical facilities, and the medical records of persons receiving medical treatment, in whole or in part, at the expense of the state, shall be treated as confidential and shall not be open for inspection by members of the public.

(2) All investigative records of the Tennessee bureau of investigation, all criminal investigative files of the motor vehicle enforcement division of the department of safety relating to stolen vehicles or parts, and all files of the drivers' license issuance division of the department of safety relating to bogus drivers' licenses issued to undercover law enforcement agents shall be treated as confidential and shall not be open to inspection by members of the public. The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record, however, such investigative records of the Tennessee bureau of investigation shall be open to inspection by elected members of the general assembly if such inspection is directed by a duly adopted resolution of either house or of a standing or joint committee of either house. Records shall not be available to any member of the executive branch except those directly involved in the investigation in the Tennessee bureau of investigation itself and the governor himself. Provided that the bureau, upon written request by an authorized person of a state

governmental agency, is authorized to furnish and disclose to the requesting agency the criminal history, records and data from its files, and the files of the federal government and other states to which it may have access, for the limited purpose of determining whether a license or permit should be issued to any person, corporation, partnership or other entity, to engage in an authorized activity affecting the rights, property or interests of the public or segments thereof.

(3) The records, documents and papers in the possession of the military department which involve the security of the United States and/or the state of Tennessee, including but not restricted to national guard personnel records, staff studies and investigations, shall be treated as confidential and shall not be open for inspection by members of the public.

(4) The records of students in public educational institutions shall be treated as confidential. Information in such records relating to academic performance, financial status of a student or his parent or guardian, medical or psychological treatment or testing shall not be made available to unauthorized personnel of the institution or to the public or any agency, except those agencies authorized by the educational institution to conduct specific research or otherwise authorized by the governing board of the institution, without the consent of the student involved or the parent or guardian of a minor student attending any institution of elementary or secondary education, except as otherwise provided by law or regulation pursuant thereto and except in consequence of due legal process or in cases when the safety of persons or property is involved. The governing board of the institution, the state department of education, and the Tennessee higher education commission shall have access on a confidential basis to such records as are required to fulfill their lawful functions. Statistical information not identified with a particular student may be released to any person, agency, or the public, and information relating only to an individual student's name, age, address, dates of attendance, grade levels completed, class placement and academic degrees awarded may likewise be disclosed.

(5)(A) The following books, records and other materials in the possession of the office of the attorney general and reporter which relate to any pending or contemplated legal or administrative proceeding in which the office of the attorney general and reporter may be involved shall not be open for public inspection:

(i) Books, records or other materials which are confidential or privileged by state law;

(ii) Books, records or other materials relating to investigations conducted by federal law enforcement or federal regulatory agencies, which are confidential or privileged under federal law;

(iii) The work product of the attorney general and reporter or any attorney working under his supervision and control;

(iv) Communications made to or by the attorney general and reporter or any attorney working under his supervision and control in the context of the attorney-client relationship; or

(v) Books, records and other materials in the possession of other departments and agencies which are available for public inspection and copying pursuant to §§ 10-7-503 and 10-7-506. It is the intent of this section to leave subject to public inspection and copying pursuant to §§ 10-7-503 and 10-7-506 such books, records and other materials in the possession of other departments even though copies of the same books, records and other materials which are also in the possession of the attorney general's office are not subject to inspection or copying in the office of the attorney general, provided such records, books and materials are available for copying and inspection in such other departments.

(B) Books, records and other materials made confidential by this subsection which are in the possession of the office of the attorney general and reporter shall be open to inspection by the elected members of the general assembly if such inspection is directed by a duly adopted resolution of either house or of a standing or joint committee of either house and is required for the conduct of legislative business.

(C) Except for the provisions of subdivision (B) hereof, the books, records, and materials made confidential or privileged by this subdivision shall be disclosed to the public only in the discharge of the duties of the office of the attorney general.

(6) State agency records containing opinions of value of real and personal property intended to be acquired for a public purpose shall not be open for public inspection until the acquisition thereof has been finalized. This shall not prohibit any party to a condemnation action from making discovery relative to values pursuant to the Rules of Civil Procedure as prescribed by law.

(7) Proposals received pursuant to personal service, professional service, and consultant service contract regulations, and related records, including evaluations and memoranda, shall be available for public inspection only after a contract is fully executed. Sealed bids for the purchase of goods and services, and leases of real property, and individual purchase records, including evaluations and memoranda relating to the same, shall be available for public inspection only after the formal award of the contract or lease.

(8) Records of the department of economic and community development pertaining to proprietary information of industrial and commercial enterprises shall not be subject to public review if such records are deemed by the commissioner, after consultation with the attorney general, to be of a confidential and sensitive nature.

(b) Any record designated "confidential" shall be so treated by agencies in the maintenance, storage and disposition of such confidential records. These records shall be destroyed in such a manner that they cannot be read, interpreted, or reconstructed. The destruction shall be in accordance with an approved records disposition authorization from the public records commission.

(c) Notwithstanding any provision of the law to the contrary, any confidential public record in existence more than seventy (70) years shall be open for public inspection by any person unless disclosure of the record is specifically prohibited or restricted by federal law or unless the record is a record of services for a person for mental illness or mental retardation. Provided, however, the provisions of this section shall not apply to a record concerning an adoption or a record maintained by the department of health and environment's office of vital records or by the Tennessee bureau of investigation. For the purpose of providing an orderly schedule of availability for access to such confidential public records for public inspection, all records created and designated as confidential prior to January 1, 1901, shall be open for public inspection on January 1, 1985. All other public records created and designated as confidential after January 1, 1901, and which are seventy (70) years old on January 1, 1985, shall be open for public inspection on January 1, 1986; thereafter all such records shall be open for public inspection pursuant to this part after seventy (70) years of the creation date of such records. (Acts 1957, ch. 285, § 2; 1970, (Adj. S.), ch. 531, §§ 1,2; 1973, ch. 99, § 1; 1975, ch. 127, § 1; 1976 (Adj. S.), ch. 552, § 1; 1976 (Adj. S.), ch. 777, § 1; 1977, ch. 152, § 3; 1978 (Adj. S.), ch. 544, § 1; 1978 (Adj. S.), ch. 890, § 2; T.C.A., § 15-305; Acts 1983, ch. 211, § 1; 1984, ch. 947, § 2; 1985, ch. 421, §§ 1-4).

10-7-505. Denial of access -- Procedures of obtaining access —Court orders -- Injunctions -- Appeals -- Liability for non-disclosure. (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

(b) Such petition shall be made to the chancery court for the county in which the county or municipal records sought are situated or to any other court of that county having equity jurisdiction. In the case of records in the custody and control of any state department, agency or instrumentality, uch petition shall be filed in the Chancery Court of Davidson County; or in the chancery court of the county in which the state records are situated if different from

Davidson County, or in any other court of that county having equity jurisdiction; or in the chancery court in the county of the petitioner's residence, or in any other court of that county having equity jurisdiction.

Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party or parties to immediately appear and show cause, if any they have, why the petition should not be granted. A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings. The court may direct that the records being sought be submitted under the seal for review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.

(c) The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence.

(d) The court, in ruling upon the petition of any party proceeding hereunder, shall render written findings of fact and conclusions of law and shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section and this section shall be broadly construed so as to give the fullest possible public access to public records.

(e) Upon a judgment in favor of the petitioner, the court shall order that the records be made available to the petitioner unless:

(1) There is a timely filing of notice of appeal; and

(2) The court certifies that there exists a substantial legal issue with respect to the disclosure of the documents which ought to be resolved by the appellate courts.

(f) Any public official required to produce records pursuant to this part shall not be found criminally or civilly liable for the release of such records nor shall a public official required to release records in his custody or under his control be found responsible for any damages caused, directly or indirectly, by the release of such information. (Acts 1957, ch. 285, § 3; 1975, ch. 127, § 2; 1977, ch. 152, § 4; T.C.A., § 15-306; Acts 1984, ch. 929, §§ 2,4; 1985, ch. 342, § 1.)

10-7-506. Right to make copies of public records. 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 makes copies thereof, and to make photo-graphs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof, or his authorized deputy; provided, however, 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. (Acts 1957, ch. 285,, § 4; T.C.A., § 15-307.)

10-7-507. Records of convictions of traffic and other violations --Availability. Any public official having charge or custody of or control over any public records of convictions of traffic violations or any other state, county or municipal public offenses shall make available to any citizen, upon request, during regular office hours, a copy or copies of any such record requested by such citizens, upon the payment of a reason-able charge or fee therefor. Such official is authorized to fix a charge or fee per copy that would reasonably defray the cost of producing and delivering such copy or copies. (Acts 1974 (Adj. S.), ch. 581, § 1; T.C.A., § 15-308.)

10-7-508. Access to records -- Records of archival value --Retention or disposal of records. (a) The director of the records management division, the state librarian and archivist, and the comptroller of the treasury or his designated representative for purposes of audit, shall be accorded access to and may examine and receive any public records or writings, whether or not they are subject to public inspection. They shall maintain inviolate any privileged or confidential information so acquired and any record writing so defined by law.

(b) The state librarian and archivist or an archivist designated by the state librarian and archivist and the director of records management or a records analyst designated by the director of records management shall be accorded access to and may examine any confidential public records for the purpose of determining, in consultation with the agency head or a representative of the agency which has title to the records, whether such records are records of archival value or whether such records are properly filed or designated as confidential. If the state librarian and archivist or such representative, the director of records management or such representative and the agency head or such representative should determine that certain administrative or otherwise open public records have been inappropriately filed and designated as confidential public records, then such records shall be removed from the designation of confidential and filed within the appropriate level of access designation. Such access to appraise the archival value of such confidential records shall be provided for in the scheduling of retention periods through appropriate records disposition authorizations which are reviewed and approved by the public records commission.

(c) Records determined to be of archival value shall be retained as provided in rules and regulations for records management of records of archival value of the public records commission and those confidential records determined not to be of archival value shall be disposed of by authorized means and in accordance with approved records disposition authorizations. (Acts 1978 (Adj. S.), ch. 544, § 2; T.C.A., § 15-309; Acts 1984, ch. 947, § 3.)

APPENDIX B

THE TENNESSEE PUBLIC MEETINGS LAW --

TENNESSEE CODE ANNOTATED 8-44-101--201

(as amended 1985)

8-44-101. Policy -- Construction. (a) 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.

(b) This part shall not be construed to limit any of the rights and privileges contained in Article I, § 19, of the constitution of the state of Tennessee. (Acts 1974 (Adj. S.), ch. 442, §§ 1,8; T.C.A., § 8-4401.)

8-44-102. Open meetings -- "Governing body" defined - "Meeting" defined.

(a) All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution.

(b) "Governing body" means the members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommen-dations to a public body on policy or administration and also means a community action agency which administers community action programs under the provisions of 42 U.S.C. § 2790. Any governing body so defined by this section shall remain so defined, notwithstanding the fact that such governing body may have designated itself as a negotiation committee for collective bargaining purposes, and strategy sessions of a governing body under such circumstances shall be open to the public at all times. "Governing body" shall also mean the board of directors of any nonprofit corporation which contracts with a state agency to receive community grant funds in consideration for rendering specified services to the public, provided community grant funds comprise at least thirty percent (30%) of the total annual income of such corporation.

(c) "Meeting" means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. Meeting does not include any on-site inspection of any project or program.

(d) (1) 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. 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.

(2) Except such meetings that are called solely to discuss matters involving confidential doctor-patient relationships, personnel matters or matters required to be kept confidential by federal or state law or federal or state regulation shall not be covered under the provisions of this chapter, and no other matter shall be discussed at such meetings.* (Acts 1974 (Adj. S.), ch. 442, § 2; 1979, ch. 411, §§ 1,2; T.C.A., § 8-4402; Acts 1985, ch. 290, §§ 1, 2).

8-44-103. Notice of public meetings. (a) Notice of Regular Meetings. Any such governmental body which holds a meeting previously scheduled by statute, ordinance, or resolution, shall give adequate public notice of such meeting.

(b) Notice of Special Meetings. Any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate public notice of such meeting.

8-44-104. Minutes recorded and open to public -- Secret votes prohibited. (a) The minutes of a meeting of any such governmental body shall be promptly and fully recorded, shall be open to public inspection, and shall include but not be limited to a record of persons present, all motions, proposals and resolutions offered, the result of any votes taken, and a record of individual votes in the event of roll call.

(b) All votes of any such governmental body shall be by public vote or public ballot or public roll call. No secret votes, or secret ballots, or secret roll calls shall be allowed. As used in this chapter, "public vote" shall mean a vote in which the "aye" faction vocally expresses its will in unison and in which the "nay" faction, subseq-uently, vocally expresses its will in unison. (Acts 1974 (Adj. S.), ch. 442, § 4; T.C.A., § 8-4404; Acts 1980 (Adj. S.), ch. 800, § 1.)

8-44-105. Action nullified -- Exception. Any action taken at a meeting in violation of this part shall be void and of no effect, provided that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned. (Acts 1974, (Adj. S.), ch. 442, § 5; T.C.A., § 8-4405.)

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*The author believes this portion of the act was improperly codified. A reading of the original act (Chapter 290) would indicate that it was intended only to apply to meetings of boards of directors of "certain nonprofit corporations."

8-44-106. Enforcement -- Jurisdiction. (a) The circuit courts, chancery courts, and other courts which have equity jurisdiction, shall have jurisdiction to issue injunctions, impose penalties, and otherwise enforce the purposes of this part upon application of any citizen of this state.

(b) In each suit brought under this part, the court shall file written findings of fact and conclusions of law and final judgments, which shall also be recorded in the minutes of the body involved.

(c) The court shall permanently enjoin any person adjudged by it in violation of this part from further violation of this part. Each separate occurrence of such meetings not held in accordance with this part shall constitute a separate violation.

(d) The final judgment or decree in each suit shall state that the court retains jurisdiction over the parties and subject matter for a period of one (1) year from date of entry and the court shall order the defendants to report in writing semiannually to the court of their compliance with this part. (Acts 1974 (Adj. S.), ch. 442, § 6; T.C.A., § 8-4406.)

8-44-107. Board of directors of performing arts center management corporation. The board of directors of the Tennessee performing arts center management corporation shall be subject to, and shall in all respects comply with, all of the provisions made applicable to governing bodies by this chapter. (Acts 1981, ch. 375, § 1.)

8-44-201. Labor negotiations between public employee union and state or local government. (a) Notwithstanding any other provision of Tennessee law to the contrary, labor negotiations between representatives of public employee unions or associations and representatives of a state or local governmental entity shall be open to the public whether or not the negotiations by the state or local governmental entity are under the direction of the legislative, executive or judicial branch of government.

(b) Nothing contained in this section shall be construed to require that planning or strategy sessions either the union committee or the governmental entity committee, meeting separately, be open to the public.

(c) Nothing contained in this section shall be construed to grant recognition rights of any sort.

(d) Both sides shall decide jointly and announce in advance of any such labor negotiations where such meetings shall be held. (Acts 1979, ch. 41, § 1; T.C.A., § 8-4421.)

APPENDIX C

EXAMPLE OF MEETING NOTICE FOR A REGULARLY SCHEDULED MEETING

The Board of Mayor and Aldermen of the City of XX will hold regular monthly meetings on the first Thursday of every month at 7:00 o'clock p.m., local time, at the Board Room in City Hall, 100 Main Street, XX, Tennessee, to consider any and all business which may properly come before it.

The agenda for each meeting will, if reasonably possible, be made available 48 hours in advance of the meeting at the Office of the City Recorder and will be posted at _____ and _____.

(Optional) During the months of May, June, July, August, and September, the regular meetings of the Board will begin at 8:00 p.m. rather than 7:00 p.m.

Notice of special meetings of the Board will be given, if possible, by publication in _____ newspaper. Notice of special meetings will also be given by posting a notice at the Office of the City Recorder and at _____, _____. All meetings of the Board are open to the public.

FOR A SPECIAL MEETING

The Board of Mayor and Aldermen of the City of XX will hold a special meeting on February 17, 1983, beginning at 7:00 p.m., local time, at the Board Room in City Hall, XX, Tennessee, to consider final reading of Ordinance 82-3 which provides for the comprehensive regulation of vehicular traffic and parking in the City of XX and all business which may properly come before the Board at that time, including, but not necessarily limited to, the final reading. The agenda for the meeting will be available at the Office of the City Recorder and will be posted at _____ and _____ 48 hours in advance of the meeting, if reasonably possible. The meeting is open to the public.

APPENDIX D

CHARACTERISTICS OF "SUNSHINE LAWS" IN THE 50 STATES

1. A policy statement says the sunshine law should be liberally construed.
2. No governmental bodies are explicitly exempted.
3. Where closed (executive) sessions are allowed, all final action must be taken in open meetings.
4. Discussions, in addition to actual decision making, must be held in open meetings.
5. Information gathering must be held in the open.
6. Committee meetings must be open.
7. Advisory-board meetings must be open.
8. Information meetings (including, in some states, telephonic or other electronic communication) must be open.
9. Quasi-judicial meetings must be open.
10. Meetings of local entities must be open.
11. Meetings must be open even if there is no quorum.
12. When the law permits closed meetings, the parties involved may request that they be open.
13. Minutes of closed meetings must be kept, although in most cases the records may remain confidential.
14. Injunctive relief or other remedial action is provided if the law is violated.
15. Criminal penalties--usually including a fine, a jail term, or both--may be levied if the law is violated.
16. No exemptions to open-meetings provisions are allowed unless they are specified in the law.
17. Discussions that may affect a person's character or reputation must be open.
18. Discussions on general personnel matters, including employment or appointment, must be open.
19. Discussions surrounding property transactions must be open.
20. There is no provision for discussing investments, donations, or other financial matters in executive session.
21. Discussions of a public body with its legal counsel must be open.
22. Strategy sessions to prepare for labor negotiations must be open.
23. Labor negotiations must be open.

PROVISION NUMBER:	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	TOTAL
Alabama	x	x	x	x	x	x		x	x	x				x	x	x		x	x	x	x	x	x	18
Alaska	x		x	x		x	x					x		x		x		x	x		x	x	x	13
Arizona	x		x	x		x	x		x	x		x		x	x	x			x	x				13
Arkansas	x	x	x			x		x	x	x				x	x	x			x	x		x	x	14
California	x		x			x	x			x		x	x	x	x	x			x					11
Colorado	x	x	x	x				x	x		x			x	x	x				x			x	12
Connecticut	x					x			x	x		x	x	x	x	x				x				10
Delaware				x		x	x		x	x		x	x	x		x							x	10
Florida			x	x	x	x	x	x	x	x		x	x	x	x	x	x	x	x	x	x	x	x	20
Georgia			x	x					x	x		x		x		x						x	x	9
Hawaii	x		x	x		x				x		x		x		x				x				9
Idaho	x		x	x		x				x			x	x		x								8
Illinois	x		x	x	x	x	x	x	x	x	x			x	x	x								13
Indiana	x	x	x	x	x	x	x		x	x				x		x								11
Iowa	x	x		x		x		x		x		x	x	x		x								10
Kansas	x		x	x		x	x	x		x	x	x		x		x							x	12
Kentucky			x	x	x	x	x	x		x		x	x	x	x	x								12
Louisiana	x		x	x		x	x		x	x		x		x		x		x						11
Maine	x	x	x			x			x	x		x		x	x	x				x				11
Maryland	x		x	x		x	x	x		x			x	x		x								10
Massachusetts			x	x		x						x	x	x		x		x		x				9
Michigan			x	x	x	x		x	x	x				x	x	x		x		x				12
Minnesota				x	x	x		x		x	x	x		x		x		x	x	x				12
Mississippi	x					x			x	x			x	x		x						x	x	9
Missouri		x		x	x	x	x	x	x	x				x						x			x	11
Montana	x	x		x	x	x	x		x	x		x		x		x		x	x	x	x		x	16
Nebraska	x		x	x	x	x	x	x	x	x		x	x	x	x			x		x			x	16
Nevada	x		x	x		x	x		x	x			x	x	x	x		x	x	x	x	x	x	17
New Hampshire	x			x		x	x		x	x		x	x	x						x	x	x	x	13
New Jersey	x			x	x	x			x	x		x	x	x		x								10
New Mexico	x	x	x	x	x	x			x	x		x		x	x	x								12

APPENDIX D (Cont.)

1. A policy statement says the sunshine law should be liberally construed.
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PROVISION NUMBER:	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	TOTAL
New York	x			x	x	x	x	x		x				x		x								9
North Carolina	x			x	x	x	x	x		x			x	x									x	10
North Dakota			x	x	x	x		x	x	x				x	x				x	x		x	x	13
Ohio	x	x	x	x		x			x	x	x	x		x		x								11
Oklahoma	x		x	x	x	x	x	x	x	x				x	x	x			x	x				14
Oregon	x		x	x	x	x	x	x	x	x		x	x	x		x								13
Pennsylvania		x				x			x	x														4
Rhode Island	x			x		x			x	x		x	x	x		x		x						10
South Carolina		x	x	x				x	x	x		x		x	x					x			x	11
South Dakota		x	x	x					x	x					x				x	x			x	9
Tennessee	x	x	x	x	x	x		x	x	x	x	x	x	x		x	x	x	x	x	x	x	x	21
Texas			x	x		x		x	x					x	x	x				x			x	9
Utah	x	x	x	x		x	x		x	x				x		x				x			x	13
Vermont	x		x	x	x	x				x					x	x				x	x			10
Virginia	x	x	x	x		x		x		x	x			x		x						x	x	12
Washington	x		x			x				x		x		x	x					x	x		x	9
West Virginia	x		x	x		x	x		x	x		x		x	x	x					x	x	x	14
Wisconsin	x		x	x		x			x	x		x		x										8
Wyoming	x		x			x				x		x		x		x				x				8
TOTAL	37	16	37	42	19	46	22	21	34	46	8	29	18	47	21	40	2	13	13	25	10	12	25	

NOTE: From "Trustees' Group Weighs Plan to Press for Closed Meetings" by Robert L. Jacobson. October 10, 1984, The Chronicle of Higher Education, 45: p. 18.

APPENDIX E

SUMMARY OF STATE OPEN RECORDS ACTS

	REMEDIES			PENALTIES		EXEMPTIONS											
	Administrative Review	Judicial Review	Attorneys Fees Paid	Fine	Jail	Juvenile, adoption, parole, medical, mental	Litigation involving public body	Land acquisition, disposition, appraisals	Licensing exam data	Personnel, school files	Arrest records (if no conviction)	Tax return information	Trade secrets	Investigatory information	Inter-dept. memos and preliminary documents	Invasion of privacy	Geological information
Alabama				X													
Alaska		X				X											
Arizona		X	X	X													
Arkansas		X		X	X	X				X		X					
California		X	X		X	X	X	X	X	X		X	X	X	X	X	X
Colorado	X	X	X	X	X	X		X	X	X			X	X			X
Connecticut	X	X		X		X	X	X	X	X		X	X	X	X	X	
Delaware		X				X	X			X			X	X		X	
D.C.*	X														X	X	
Florida		X	X	X	X	X			X								
Georgia						X										X	
Hawaii		X					X									X	
Idaho																	
Illinois				X	X												
Indiana		X		X	X												
Iowa		X		X		X	X	X		X			X	X			
Kansas				X		X				X							
Kentucky	X	X	X	X				X	X					X	X	X	X
Louisiana		X		X	X	X						X		X			
Maine		X		X	X										X		
Maryland	X	X		X		X		X	X	X			X	X	X		X
Massachusetts		X				X		X		X			X	X	X	X	
Michigan		X		X	X								X	X	X	X	
Minnesota																	
Mississippi						** no statute **											
Missouri				X	X												
Montana						X											
Nebraska		X		X	X												
Nevada				X													
New Hampshire		X	X			X				X						X	
New Jersey		X												X			
New Mexico		X		X	X	X				X							
New York	X	X				X				X			X	X		X	
North Carolina		X		X	X		X										
North Dakota																	
Ohio				X		X											
Oklahoma												X					
Oregon	X	X	X			X	X	X	X				X	X	X	X	
Pennsylvania		X												X	X		
Rhode Island						** no statute **											
South Carolina	X	X		X	X	X				X							
South Dakota																	
Tennessee				X	X	X				X		X		X			

APPENDIX E (Cont.)

	REMEDIES			PENALTIES		EXEMPTIONS											
	Administrative Review	Judicial Review	Attorneys Fees Paid	Fine	Jail	Juvenile, adoption, parole, medical, mental	Litigation involving public body	Land acquisition, disposition, appraisals	Licensing exam data	Personnel, school files	Arrest records (if no conviction)	Tax return information	Trade secrets	Investigatory information	Inter-dept. memos and preliminary documents	Invasion of privacy	Geological information
Texas	x	x		x	x		x	x		x			x	x	x	x	x
Utah																	
Vermont	x	x	x		x		x	x	x	x		x	x	x		x	
Virginia		x	x	x		x	x			x		x		x	x		
Washington	x	x	x			x		x	x	x		x	x	x	x	x	
West Virginia																	
Wisconsin				x													
Wyoming		x		x		x		x	x	x			x	x	x		x

NOTE: From "Public Inspection of State and Municipal Executive Documents: 'Everybody, Practically Everything, Anytime, Except..." by William Randolph Henrick, 1977, Fordham Law Review 45, pp. 1151-1152.

CHAPTER IV

SUMMARY AND CONCLUSIONS

Tennessee has two very comprehensive and very broad statutes governing public access to local government records and meetings. In spite of the fact that the Open Meetings Law has been termed "model" legislation, both it and the Public Records Law have many sections that are open to misinter-pretation by the public officials who must administer them.

In Tennessee, there is no single-source reference publication on the two access laws available to municipal and county governing bodies or the attorneys who must advise them. The stated purpose of this thesis was to develop such a publication.

The resulting handbook, which comprises Chapter III of this thesis, is intended by the author as a "primer" for local government officials who have little or no knowledge of the Public Records and Open Meetings Laws. The informational material included in it is drawn from the Tennessee statutes and other reference sources, many of which are not readily available to the intended handbook readers. The author also has drawn on her own experience as a consultant to municipal governments for more than 16 years to determine the level of knowledge officials already have and what information is needed.

To "test" the accuracy of the author's interpretation of local government officials' needs, the handbook was submitted to a panel of

municipal and county officials, Municipal Technical Advisory Service field consultants, and MTAS attorneys. The panelists were asked, first, whether such a handbook is needed; and, second, if there is a need, whether the information in the handbook is adequate. They also were asked to point out any need for changes and/or additions the author should make in the text.

Selected for the informal panel were Mayor William R. Brakebill, Athens; City Manager T. Randy Williams, Paris; City Recorder R.A. Abernathy, Pulaski; Councilwoman Elaine Trauger, Oak Ridge; Community Relations Director Kaye Palmer, Hendersonville; County Commissioner Bee DeSelm, Knox County; MTAS Municipal Management Consultant (retired) E.W. Meisenhelder, III; MTAS Intergovernmental Relations Consultant Dennis Huffer (who is also an attorney); and MTAS Municipal Law Consultants Eugene Puett and Sidney W. Hemsley. All responded to the review request, some in more depth than others.

All of the panelists agreed that a handbook is needed and the information included in this particular text was sufficiently comprehensive. In fact, one panelist suggested that the material be condensed for legislative members of local governing bodies and that the material be separated into two booklets, one each on records and meetings. The other panelists approved the present format. Several asked for a copy of the final text to use as reference if the published version is not soon available.

The only suggested additional information concerned a recent court decision that was rendered after the draft was mailed to the panelists. The implications of this decision are included in the final draft. Changes panelists made in the text were minor.

With the handbook complete, the author is more convinced than ever that it is needed. The laws are complicated, and many sections are open to misinterpretation.

AREAS FOR FURTHER STUDY

Research into a particular area usually will raise other questions that are beyond the specific scope of the current study. The author found this to be true, particularly in the area of public access versus individual privacy. The Tennessee laws, unlike those in many other states, do not, in general, exempt personnel records or other personal records from disclosure. The increasing recognition of the individual's right of privacy and the public's right of access to governmental information has brought these fundamental rights into conflict (Kailer, 1977). How to reconcile this conflict and protect both interests is a matter that urgently needs study and resolution. It should be noted that Tennessee has no privacy act. Such an act would not supplant the Public Records Law; both are needed (Chinn, 1978).

A model privacy law, drafted by a Memphis State University Law Review writer, includes some points worth consideration. Intended as

companion legislation to the Public Records Law, it defines records as "any item, collection, or grouping of information about an individual's education, finances, medical or emotional condition or history, criminal history, and family and personal relationships, reputation, or character which because of his name, identifying number, mark, or description can be readily associated with a particular individual" (Chinn, p. 801). Such records could be disclosed by "no agency, or any of its employees" to "any person or to a local, state or federal agency without prior consent of the individual named in the record" unless employees of the agency need the record in the performance of their official duties, there is danger of imminent physical injury by the person to himself or others and release of the record would reduce this risk, disclosure is permitted by statute, or the person already is aware that the record will be used only for statistical research and is not identifiable.

The draft law also provides that an individual must be informed whether he is the subject of a record and, on his request, informed of the contents and shown the record, but "nothing in this section shall allow an individual access to any record compiled in reasonable anticipation of a civil action or proceeding" (p. 801). The person has the right to contest the accuracy, relevance, and completeness of the record.

Research for this thesis also revealed that although Tennessee has a so-called "model" Open Meetings Law, its law governing records

does not fit into this category. Tennessee is one of only three states whose law lacks a clear definition, in the law, of what constitutes a public record (Henrick).

During a panel discussion of the Public Records Law at the 1985 Tennessee Municipal League Annual Conference, Executive Director Joseph Sweat noted that "we need clarification and legislation on what a record is. I'm not sure I can define a record. What is a work record? Is it something written on an envelope? There are serious gray areas that need to be addressed by the legislature."

How the law could be made more comprehensible to those who must administer it is another area for future study.

An article in the Fordham Law Review (1977) includes a draft model open records law. Much of the text also is contained in the Tennessee law, but there are some sections that should be noted. For example, "public body" is clearly defined as:

> every state or local officer, agency, department, division, bureau, board, commission and authority; every legislative board, committee, commission and officer; every county, city and municipal governing body, council, school district board, special district board, municipal corporation and any board, department, commission, committee, subcommittee, ad hoc committee, council or agency thereof; and any other body which is created by state or local authority in the executive or legislative branches of government, or which derives at least twenty-five per cent (25%) of its funds from state or local authority (Henrick, p. 1144).

This certainly is clearer than the definition in the Tennessee law.

"Public record" is defined as:

> Any book, writing, paper, map, photograph, card, tape, disc, sound recording, drawing, film or

> documentary or information-containing material, data or recording, regardless of physical form or characteristics, which has been prepared, owned, used, retained by or is in possession of a public body (p. 1144).

Such a definition is lacking in the Tennessee law.

The model law exempts from disclosure "public records containing information of a purely personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" (p. 1145); and investigatory files or records of law enforcement agencies "if disclosure of the information would harm the public body by revealing the identity of informants not otherwise known outside the government, or by prematurely releasing information to be used in a prospective law enforcement action or administrative adjudication" (p. 1146). A qualification is added: "This subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by this Act" (p. 1146).

This law is worthy of careful reading by those interested in changes in the Tennessee law. Tennessee Press Association Executive Director Don R. McNeil indicated in a telephone conversation with the author (October 17, 1985) that TPA has no plans to seek legislation affecting either the Open Meetings or the Public Records Laws in the 1986 General Assembly. However, a bill backed by the Tennessee Municipal League in the 1985 session is pending for the 1986 session. It would extend the same confidentiality to investigative records of local law enforcement agencies as now exists for TBI records (Police, p. 1).

The Tennessee law on public records excludes from public access "records required to be kept confidential by federal statute or regulation as a condition for the receipt of federal funds or for participation in a federally-funded program." But which rule prevails if there are conflicting provisions in state and federal regulations? This is another area that should be studied.

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APPENDIX

APPENDIX

LETTER TO PANELISTS

(letter was on MTAS stationery)

Dear (panelist's name):

I need a favor.

As a master's thesis, I'm developing a handbook for local government officials (mayor, governing body members, managers, attorneys) on the open records and open meetings laws. I think I'm generally aware of what information officials want, and the questions they will raise, but I need some potential users of the handbook to look it over and give me some reactions. Is there a need for something like this? If so, does this do the job or is more information needed? Are there some deletions that can be made?

Would you do such a review for me? A rough draft of the handbook is enclosed. Just make notes in the margins, or we can discuss more detailed things by phone. I'd appreciate having the marked copy back by October 1 so that I can stay on schedule for the completed thesis. Thanks in advance for your help.

Sincerely,

Jacqueline Kersh
Special Projects Consultant

Enclosure

VITA

Miss Kersh was born January 19, 1932, in Jacksonville, Florida. She grew up in Florida and was graduated from Mainland High School in Daytona Beach. She received the bachelor of science in journalism degree from the University of Tennessee in Knoxville in June 1953.

She began her professional career as a reporter for the Daytona Beach, Florida, News-Journal and edited a weekly newspaper in central Florida. Since that time, she has been active in public relations, with the Methodist Television, Radio and Film Commission in Nashville, Tennessee; next with the Methodist Board of Social Concerns in Washington, DC; as news secretary for the Hillsborough County, Florida, School System, and as publications coordinator for the Florida Department of Education.

She joined the staff of the University of Tennessee's Municipal Technical Advisory Service in November 1968 as municipal information consultant, and for the past 17 years has provided public relations assistance to the 335 incorporated cities in the state. She is the author of several manuals, in the public information field, for Tennessee municipal officials and is technical editor of the Tennessee Municipal League's semi-monthly publication, Tennessee Town & City.