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## INTRODUCTION

City governments and all the secondary offices, boards, committees and commissions of a city are creations of the law. They find their origin in either the Tennessee Constitution or statutory law. It is a long-established principle in Tennessee law that municipalities can do only those things that the law authorizes them to do. Therefore, it is vitally important to any operation of city government to know what the laws are that authorize the city to perform a function and to know what the laws are that place limitations around that authority. There are laws that require cities and all local governments to keep records and laws that govern how a city manages its records. Both of these topics are examined in this section.

### LAWS THAT REQUIRE RECORDS TO BE KEPT

Not every record in a government office has a corresponding statute or regulation requiring that it be kept. Many records are generated simply in the ordinary course of business without any formal legal authority mandating their creation. But the creation and preservation of certain other records are required by specific laws. Since these laws affecting individual records are referenced in the retention schedules at the end of this manual, this chapter will discuss the sources of those laws more generally.

#### Federal Laws and Regulations

Municipal officials should be aware that federal laws and regulations require them to keep certain records. This is particularly true of payroll information and other employment-related records. Most of the laws regarding how we hire, fire, compensate and treat employees are generated at the federal level. The Family and Medical Leave Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act are just a few of the acts that place certain burdens on employers to keep records regarding their employees. These statutes also generate another layer of federal regulations that govern the implementation and enforcement of the acts. In addition to personnel issues, federal laws and regulations also touch topics as diverse as student records and wastewater management. Laws passed by the U.S. Congress are codified in the United States Code (U.S.C. or U.S.C.A. for United States Code Annotated). The massive amounts of rules and regulations generated by the different federal agencies are found primarily in the Code of Federal Regulations (C.F.R.).

#### State Laws and Regulations

Since municipal governments are instrumentalities of the state, some of the laws addressing what records need to be kept by city offices and how those records should be managed are found in the Tennessee Code Annotated (T.C.A.). As with the federal government, the state of Tennessee also has a set of rules and regulations promulgated by state agencies, boards and commissions, which are published by the secretary of state, and known as the Official Compilation — Rules and Regulations of the State of Tennessee.

The duties of many city officials are set forth in Title 8 and in the general law charters in Title 6 of the T.C.A.. Other duties and responsibilities are found in private act charters. For many offices, there are requirements included in the duties of the office to

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2 *Barnes vs. City of Dayton*, 216 Tenn. 400, 392 S.W.2d 813 (1965).

3 For more detail on these requirements see the retention schedule for Personnel Records in Part Four of this manual.

4 See the section in this part on Student Records.
keep and preserve specific types of records. Certain city officers and employees, such as the city recorder, human resources manager and court clerk have a major record keeping function. The proper and efficient performance of these duties is necessary not only for the continued operation of city government, but also for the preservation of order in our society. Even offices without a primary record keeping function are required to keep records.

Even though city officials may change with every election, the offices themselves must maintain a level of continuity. To ensure this, the responsibility for keeping and turning over the records of city offices was specifically addressed in the statutes requiring officials to be bonded. A part of what is insured by the bond of an official is the fulfillment of a duty to “...faithfully and safely keep all records required in such principal’s official capacity, and at the expiration of the term, or in the case of resignation or removal from office, ... turn over to the successor all records and property which have come into such principal’s hands...” 5 Failure to do so can result in recovery against the insurance company or sureties on the bond who may, in turn, proceed against the official in his or her individual capacity for subrogation of the claim.

**Basic Record Keeping Statutes**

Both older state laws and their more modern counterparts are found primarily in Title 10, Chapter 7 of the *T.C.A.* Parts 1 and 2 of that chapter contain a number of statutes governing preserving, transcribing and indexing records. Most of these laws are specifically for counties and county offices; however, some also apply to municipalities. For instance, one statute allows government officials to keep required government records on computer or on removable computer storage media instead of on paper. 6 However, this statute conditions the use of electronic media on a number of safeguards and restrictions. More information on this statute and other laws regarding electronic records can be found in detail in Part Three of this manual in the chapter on Alternative Storage Formats.

**The State Public Records Commission**

Part 3 of Chapter 7 of the *T.C.A.*, Title 10, establishes the State Public Records Commission and designates the Records Management Division of the Department of General Services as the primary records manager for all state government records. 7 Currently, these entities do not take jurisdiction over local government records, but they can be looked to as examples for proper records management and preservation.

**Public Access**

The Freedom of Information Act (FOIA) 8 was passed by Congress in 1966 and amended in 1974. FOIA creates procedures that allow members of the public to obtain records of federal government agencies. 9

The Freedom of Information Act does NOT apply to city governments, nor does it apply to state or other local governments. It applies only to certain federal departments and agencies of the United States government. But you should be aware of the FOIA in the event that citizens try to assert their rights to municipal government records under that act. Different policies and procedures apply to offices under the Freedom of Information Act that are not included in the Tennessee public records statutes that apply to your office(s). Under the FOIA, citizens may request a federal agency covered by the act to perform searches of its records to locate certain information and then disclose the

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5 *T.C.A.* 8-19-111.  
6 *T.C.A.* 10-7-121.  
7 See *T.C.A.* 10-7-301 et seq.  
information, providing copies to the person making the request (subject to certain fees). As will be seen, Tennessee statutes allow broad access to public records, but they do not require local officials to perform searches or create new reports or responses to requests if those reports are not already a part of the office records.

**Tennessee Public Records Statutes**
The public records statutes that do apply to city offices are found in Title 10, Chapter 7, Part 5 of the T.C.A. The starting point for a discussion of the law in this area is the declaration found in T.C.A. 10-7-503 that government records are open to public inspection. It reads as follows:

> All state, county and municipal records and all records maintained by the Tennessee Performing Arts Center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with [T.C.A.] 10-7-404, 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 law.

This statute has been construed broadly by both the state attorney general and the Tennessee judiciary. The legislature made it clear that its intent in passing this law was to “... give the fullest possible public access to public records,” and it instructed the courts to exercise whatever remedies are necessary to ensure that purpose is fulfilled. The courts have ruled that a “presumption of openness” exists with government documents. That is not to say, however, that public access is totally without limitation.

**Who Has Access?**
The statute states that records must be open for inspection by any “citizen” of Tennessee. In keeping with the legislative intent to provide for liberal public access to government records, the Tennessee Supreme Court has determined that the word “citizen” includes convicted felons incarcerated as inmates within the Tennessee prison system. Although certain rights are stripped from individuals when they are convicted of a felony (i.e., voting, ability to hold public office), the court concluded that neither the Tennessee Public Records Act nor any other statute prevented a convicted felon from seeking access to public records. Neither should access be denied to anyone else who appears to be a citizen of this state.

The law is not as generous with non-residents, however. Since the statute states that it grants public access to “any citizen of Tennessee,” the Tennessee Attorney General has opined that public officials may deny requests for copies of public records based on the lack of state citizenship. Since there is no fundamental federal right to access of government records and since Tennessee’s laws provide access only to state citizens, the attorney general reached the conclusion that it is not a violation of the privileges and immunities clause of the United States Constitution to deny access to people making requests from other states for Tennessee records. Keep in mind that although the act does not affirmatively require disclosure of public records to non-citizens, neither does it prohibit the release of public records to non-citizens.
within the discretion of the official who has custody of the records to determine whether or not access will be provided to non-citizens. Offices should develop a written policy on that subject and enforce it consistently.

**How Should Access Be Provided?**

The law states that records shall be open to inspection “during business hours.” Additionally, in all cases where a person has the right to inspect public records, he or she also has the right to take extracts or make copies of the record, or to make photographs or photostats of the record while it remains in the possession, custody and control of the official who has lawful custody of the record. Every effort should be made to provide reasonable accommodation to parties requesting access to records; however, providing this service need not prevent the performance of other duties of the office.

A request to see every record of an office and make a photocopy of each of them could obviously bring the entire operation of an office to a halt. For this reason, the official who has custody of the records is also authorized by law to adopt and enforce reasonable policies governing the making of extracts, copies, photographs or photostats of the records. These regulations should be reasonable and not interfere with the intent of the legislature to provide broad public access to records. The official with custody of the record should strive to balance the right of access to records with his or her responsibility to preserve and protect the records. Regulations should be tailored to accommodate requests in a timely manner while allowing for the continued efficient functioning of the office and for the preservation and security of the records. Regulations that are intended to frustrate the ability of a citizen to access records will likely be found unreasonable and struck down by the courts.

Examples of reasonable regulations might include:

- Providing that requests for inspection of a large number of records would be accommodated only by appointment pursuant to a written request;
- Establishing a policy that copies of records would be provided within a reasonable time period (for example, the next business day for small requests and within five business days for larger requests);
- Prohibiting the inspection and copying of records by citizens without supervision of the official or an employee of the office; and
- Prohibiting the handling of older bound volumes or other fragile records by anyone other than an employee of the office so long as the information in the records is still provided in a usable format.

Be aware that there is a danger of theft, vandalism or damage by negligence inherent in allowing a member of the public access to government records. There is a profitable market for certain historical manuscripts. Across the country, government records are disappearing from government offices and reappearing for sale in antique stores, flea markets and specialty shops. To prevent theft or vandalism, someone from your office should supervise the person accessing the records, or, at a minimum, the person accessing the records should be required to examine them in an open area.

**Denial of Access: Liability**

Any citizen of Tennessee who is denied the right to personal inspection of a public record in whole or in part is entitled to petition the court to review the actions that were taken to deny access to the record. Petitions may be filed in the chancery court for the county where the records are located or in any other court exercising equity jurisdiction in the county. Upon the filing of the petition, the court

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17 T.C.A. 10-7-506(a).
18 T.C.A. 10-7-506(a).
19 T.C.A. 10-7-505(a).
20 T.C.A. 10-7-505(b).
shall, at the request of the petitioning party, issue an
order requiring the defendant to appear and show
cause why the petitioner should not be granted
access to the record. No formal written response to
the petition is required. The burden of proof rests on
the person having custody of the records to show
why public access should not be allowed.\textsuperscript{21}

If the court determines that the petitioner has a right
to inspect the records, they shall be made available
unless the defendant timely files for appeal or the
court certifies a question with respect to disclosure
of the records to an appellate court.\textsuperscript{22} If a public
official is required to disclose records pursuant to
these procedures, he or she cannot be held civilly
or criminally liable under state law for any damages
caused by the release of the information.\textsuperscript{23} If
the court determines that the government entity
knowingly and willfully refused to disclose a public
record, it may, at the discretion of the judge,
assess all reasonable costs involved in obtaining
the record, including attorney’s fees, against the
governmental entity.\textsuperscript{24}

\textbf{WHICH RECORDS MAY BE SUBJECT TO PUBLIC ACCESS?}

It has already been noted that the legislature
intended the fullest possible public access to public
records. But what are public records? Generally
speaking, the courts have ruled that “[i]n those
instances where documents have been made or
received in connection with the transaction of official
business by any governmental agency, then a
presumption of openess exists, and the documents
are public records within the meaning of
[\textit{T.C.A.}] 10-7-503.”\textsuperscript{25} However, this presumption
of openess is overcome wherever state law
provides that a record shall be kept confidential.

\textbf{Confidential Records}

Another statute in the Tennessee Public Records
Act provides a long list of government records that
must be kept confidential.\textsuperscript{26} This statute is amended
and added to on a regular basis by the Tennessee
General Assembly. The following list reflects
the records designated as confidential by
\textit{T.C.A.} 10-7-504 at the time of publication
(current through the 2000 legislative session).

- Medical records of patients in state, county and
  municipal hospitals and medical facilities;
- Any records concerning the source of body parts
  for transplantation or any information concerning
  persons donating body parts;
- All investigative records of the Tennessee Bureau
  of Investigation (T.B.I.), all criminal investigative
  files of the Motor Vehicle Enforcement Division of
  the Department of Safety relating to stolen
  vehicles or parts, all files of the Driver’s License
  Issuance Division and the Handgun Carry Permit
  Division of the Department of Safety relating to
  bogus driver’s licenses and handgun carry permits
  issued to undercover law enforcement agents;
- Records, documents and papers in the possession
  of the Military Department that involve national or
  state security;
- Records of students in public educational
  institutions. (For more discussion of these records,
  see the following chapter on Student Records.);
- Certain books, records and other materials in the
  possession of the office of the attorney general
  relating to any pending or contemplated legal or
  administrative proceeding;

\begin{itemize}
  \item \textsuperscript{21} \textit{T.C.A.} 10-7-505 (c).
  \item \textsuperscript{22} \textit{T.C.A.} 10-7-505(c).
  \item \textsuperscript{23} \textit{T.C.A.} 10-7-505 (f).
  \item \textsuperscript{24} \textit{T.C.A.} 10-7-505(g).
  \item \textsuperscript{25} \textit{Griffin vs. City of Knoxville}, 821 S.W. 2d 921, 924
    (January 25, 1999).
  \item \textsuperscript{26} \textit{T.C.A.} 10-7-504.
\end{itemize}
* State agency records containing opinions of value of real and personal property intended to be acquired for a public purpose;
* Proposals received pursuant to personal service, professional service and consultant service contract regulations, and related records before the state has finished its complete evaluation;
* Investigative records and reports of the Internal Affairs Division of the Department of Correction or the Department of Children’s Services;
* Official health certificates, collected and maintained by the state veterinarian;
* Capital plans, marketing information, proprietary information and trade secrets submitted to the Tennessee Venture Capital Network;
* Records of historical research value that are given or sold to public archival institutions, public libraries, or libraries of a unit of the board of regents or the University of Tennessee, when the owner or donor wishes to require that the records are kept confidential;
* Personal information contained in motor vehicle records;
* All memoranda, work products or notes and case files and communications related to mental health intervention techniques conducted by professionals in a group setting to provide job-related critical incident counseling and therapy to law enforcement officers, EMTs, paramedics and firefighters;
* All riot, escape and emergency transport plans incorporated in a policy and procedures manual of county jails and workhouses or prisons operated by the Department of Correction or under private contract;
* Records of any employee’s identity, diagnosis, treatment or referral for treatment by a state or local government employee assistance program;
* Unpublished telephone numbers in the possession of emergency communications districts;

* Employment records of state, county, municipal or other public employees that contain unpublished telephone numbers, bank account information, social security numbers, or driver’s license information (except where driving or operating a vehicle is part of the employee’s job duties) of the employee or an immediate family or household member [NOTE: Under the law, this information in employment records should be redacted whenever possible and not be used to limit or deny access to otherwise public information.];
* Certain personnel information of undercover police officers and their immediate family or household members.
* Identifying information, such as unlisted telephone numbers, in the possession of a private and public utility service provider that could be used to locate an individual, when such utility has been provided with a copy of a valid protection document and confidentiality has been requested.
* Those parts of a record identifying an individual as a person who has been or may in the future be directly involved in the process of executing a sentence of death. 

This list of confidential records found in T.C.A. 10-7-504 is not exclusive, however, and many other statutes, rules and the common law dealing with a subject matter can also make a specific record confidential. The following is a non-exhaustive list of statutes that designate certain records as confidential.

* All memoranda, work products or notes and case files of victim-offender mediation centers. (T.C.A. 16-20-103)
* Adoption records and related records. (T.C.A. 36-1-102 et seq.)

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27 T.C.A. 10-7-504.
• Certain information divulged in paternity proceedings that might be used to locate a victim or an alleged victim of domestic violence. *(T.C.A. 36-2-311(e))*


• Certain records regarding the granting of consent to abortion for a minor and other records regarding abortion. *(T.C.A. 37-10-304, 39-15-201)*

• Certain student information. (See next chapter.)

• Whistleblowing reports of violations of the Education Trust in Reporting Act. *(T.C.A. 49-50-1408)*


• Tax returns, audits, letter rulings and other taxpayer identifying information. *(T.C.A. 67-1-1702)*

• Business tax statements, reports, audits and returns. *(T.C.A. 67-4-722)*

• Information or records held by a local health department regarding sexually transmitted diseases. *(T.C.A. 68-10-113)*

• Patient medical records of hospitals and local or regional health departments. *(T.C.A. 68-11-305)*

• Nursing home patient records. *(T.C.A. 68-11-804)*

Please note that this list highlights only some of the other provisions of the *T.C.A.* that make records confidential. Additionally, the Tennessee Court of Appeals recently held that municipal attorney work product is confidential.29 Also, the Tennessee Supreme Court has ruled that sources of legal authority other than statutes may make a record confidential. For example, the Tennessee Supreme Court has ruled that the Tennessee Rules of Criminal Procedure and Civil Procedure may also designate certain records as confidential.30 If you have a question regarding the confidentiality of a specific record not listed above, contact your city attorney or MTAS management consultant.

### Maintenance of Confidentiality

Any record that is designated as confidential must be treated as confidential by the agency with custody of the record throughout the maintenance, storage and disposition of the record. This includes destroying the record (if it is eligible for destruction) in such a manner that the record cannot be read, interpreted or reconstructed.31 Once a confidential record has been in existence more than 70 years, it 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 mental illness or retardation. This “70 year rule” does not apply to adoption records, records maintained by the office of vital records, and records of the T.B.I. that are confidential.32

### Other Issues

In addition to this large group of records made strictly confidential by state laws, there is another class of records that may be made confidential by a 1999 law. Chapter 344 of the Public Acts of 1999 amends *T.C.A. 10-7-504* to allow people who have obtained a “valid protection document” to request certain information that could be used to locate them be kept confidential. Protection documents are defined by the act and include orders of protection and affidavits of directors of rape crisis centers or domestic violence shelters. If the individual desiring confidentiality presents one of these documents to the records custodian for the governmental entity and

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30See *Appman vs. Worthington*, 746 S.W. 2d 165, 166 (Tenn. 1987) and *Ballard vs. Herzke*, 924 S.W. 2d 652, 662 (Tenn. 1996).

31*T.C.A. 10-7-504(b).*

32*T.C.A. 10-7-504(c).*
requests confidentiality, the custodian of the records may choose to comply with the request or reject it. If the request is rejected, the custodian must state the reason for denying the request. If the request is granted, the records custodian must place a copy of the protection document in a separate confidential file with any other similar requests, indexed alphabetically by the names of the persons requesting confidentiality. From that point on, until the custodian is notified otherwise, any time someone requests to see records of the office, the records custodian must consult the file and ensure that any identifying information about anyone covered by a protection document filed with the office is kept confidential before allowing any record to be open for public inspection. “Identifying information” includes any record of the home and work addresses, telephone numbers, social security number and “any other information” regarding the person that could reasonably be used to locate an individual. That information must be redacted from the records of the office before anyone can be allowed to inspect the records of the office. Unless you are certain your office can redact all identifying information regarding an individual from all files of your office you should probably reject such requests for confidentiality, citing the administrative difficulty in redacting the records. It is not mandatory for your office to comply with these requests. However, if you do comply and then fail to protect all identifying information, you may create liability for your office.

**Student Records**

Access to student records is governed by state and federal laws. The main purpose of these laws is to protect the confidentiality of these records. If your city has a municipal school system and you would like detailed information about the legal requirements affecting student records, contact your MTAS management consultant.

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33 T.C.A. 10-7-504; and 20 U.S.C. 1232 et seq.