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OPEN RECORDS: A guide for municipal officials

September 2007

Josh Jones, Legal Consultant

The University of Tennessee Municipal Technical Advisory Service

In cooperation with the Tennessee Municipal League
“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. Knowledge will forever govern ignorance: And a people who mean to be their own Gover nors, must arm themselves with the power which knowledge gives.”

—James Madison
OPEN RECORDS:
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ACKNOWLEDGEMENTS
The author would like to thank the Reporters’ Committee for Freedom of the Press whose publication Open Government Guide: Access to Public Records and Meetings in Tennessee (Fifth Edition 2006) was instrumental as a primary source. Additionally, the author recognizes that this document would never have materialized without the assistance of editors such as Melissa Ashburn, Frank Gibson, Dennis Huffer, and Armintha Loveday. Thank you all for your efforts.

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The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works, law, ordinance codification, and water and wastewater management. MTAS houses a comprehensive library and publishes scores of documents annually.

MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a $10 charge for additional copies of the “Open Records.”

Photocopying of this publication in small quantities for educational purposes is encouraged. For permission to copy and distribute large quantities, please contact the MTAS Knoxville office at (865) 974-0411.
STATEMENT ON OPEN RECORDS

1. A sound and equitably enforced open records policy is essential to a functioning local government and its citizenry.

2. The public’s right to inspect existing open records is inherent, and local governments should place no barrier in the way of rightful public access.

3. Local governments should broadly construe open records policies so as to provide the fullest possible access.

4. Cities should adopt open records policies that encourage the timely location and release of public records. Never should the release of records be unnecessarily or unreasonably delayed.

5. Maintaining the confidentiality of protected records is of paramount importance to cities and city employees. Nonetheless, confidential information contained in an otherwise open record should not be used to deny citizen access to the whole document. Thus, a uniform and expedient redaction policy should be a part of every city’s open records policy.

6. Access to public records should not be cost prohibitive. To this end, cities should adopt uniform reasonable fees for providing copies of open records to citizens.

7. Requests for records should be denied only where there is a clear showing of confidentiality. When required, cities should provide the requestor a written explanation.

8. Requests, denials, and releases of information should be documented. However, the refusal of a requesting citizen to complete paperwork should not be used by a city to deny access to public records.
# TABLE OF CONTENTS

INTRODUCTION ............................................................................................................. 1

I. APPLICATION ............................................................................................................. 1
   A. Who Is Entitled to Records? ............................................................................. 1
   B. What Materials Are Covered by the Act? ..................................................... 2
   C. Records of Non- or Quasi-Governmental Bodies ........................................ 2
   D. Documents in Electronic and
      Other Non-Paper Formats ............................................................................. 2

II. MUNICIPAL RECORDS CATEGORIES ................................................................. 3
   A. Business and Financial Records and Contracts ......................................... 3
   B. Election Reports ............................................................................................... 3
   C. Personnel Records .......................................................................................... 4
   D. Police Personnel Records ............................................................................. 4
   E. Police Records .................................................................................................. 5
   F. Police Investigative Records ......................................................................... 5
   G. Prison, Probation, and Parole Records ........................................................... 6
   H. School and University Records ...................................................................... 6

III. EXEMPTIONS .......................................................................................................... 6
   A. Confidential Exemptions ............................................................................... 6
   B. Court Created and Other Exemptions ............................................................ 7

IV. POLICIES AND PROCEDURES ........................................................................... 7
   A. Open Records Procedures for Municipalities .............................................. 8
   B. Fees and Copying ............................................................................................. 8
   C. Requests for Records ..................................................................................... 9
   D. Maintaining the Integrity of Records ............................................................ 10
   E. Redaction Process .......................................................................................... 10
   F. When Requests for Records Are Denied ..................................................... 11

CONCLUSION .............................................................................................................. 11

APPENDIX A: SAMPLE OPEN RECORDS POLICY ................................................. 12
APPENDIX B. SAMPLE PUBLIC RECORDS RESOLUTION ........................................ 16
OPEN RECORDS:
A guide for municipal officials

INTRODUCTION
As so eloquently stated by James Madison in the foreword to this guide, an informed constituency is at the heart of an effective democracy. And still today, some two hundred years later, this proposition remains true.

The public’s inherent right to inspect government records has been officially recognized by the state of Tennessee for more than 100 years. See *State ex rel. Wellford v. Williams*, 110 Tenn. 549 (Tenn. 1902). This right was statutorily adopted in 1957 by the enactment of the Tennessee Public Records Act (hereinafter “the act”). This law has since been amended by both case law and statutory enactments. From inception, the law in this arena has stressed disclosure wherever possible and struck down any avoidable barrier to public access.

This guide summarizes Tennessee’s open records laws as of July 2007. The author recognizes the enormous task undertaken daily by municipal officials and employees who disseminate public records to requesting citizens. Every decision pertaining to open records made by a municipal agent has the potential for significant impact on the workings of the municipality. Contained herein are practical applications for municipal officials and employees who deal with these questions every day.

I. APPLICATION
The Tennessee Public Records Act is a statutory creation of broad scope and application. The legislature has stated that the act “shall be broadly construed so as to give the fullest possible public access to public records.” T.C.A. § 10-7-705 (d). The act requires that all state, county, and municipal records be open for public inspection during normal business hours unless the records are confidential.

A. Who Is Entitled to Records?
Any citizen of the state of Tennessee is entitled to make requests for access to any public records. The attorney general opined in 2001 that persons who are not citizens of Tennessee may be denied access to public records. See Op. Tenn. Att’y Gen. 01-132 (Aug. 22, 2001). Other courts, however, specifically a federal district court, have found identification requirements to be improper impedances to public records. See *Lee v. Minner*, 369 F. Supp. 527 (Del. 2005). The only instance where cities can confidently require a requesting person to prove citizenship through identification is when the citizen is seeking to inspect law enforcement personnel records for a clearly identified business or other official purpose.

For purposes of the act the term “citizen” is given a broad scope. Even a citizen with a felonious criminal record is entitled to make open records requests under the act. *Cole v. Campbell*, 968 S.W. 2d 274 (Tenn. 1998). Likewise, corporations and other conglomerations of persons are also considered citizens under the act and are entitled to request and receive public records in the same manner as individuals.

Municipalities may not deny access to public records based upon the requesting citizen’s use or intended use of the records. Requesters cannot be required to provide an explanation of their intended use of the records. Custodians of records should not inquire deeply into a requester’s purpose for requesting...
the records. Intensive questioning could be seen as an attempt to discourage citizens from seeking materials that they are legally entitled to inspect.

B. What Materials Are Covered by the Act?
Almost every record created, maintained, or received by a municipal government is covered by the act.

The act defines “public record” as:
...all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. T.C.A. § 10-7-301(6).

Hence, to determine whether a document is a public record, one often must determine if the document was “received in connection with the transaction of official business by any governmental agency.” This determination should be made by considering the totality of circumstances.

It is important to note that just because a record is covered by the act it is not necessarily open to public inspection. Many records covered are confidential and protected from disclosure.

C. Records of Nongovernmental and Quasi-governmental Bodies
The act has been construed to cover the records of nongovernmental and quasi-governmental bodies in receipt of public monies as well as the boards of these bodies. To determine if the body is subject, the Supreme Court offers a “functional equivalency” test. Memphis Publishing Co. v. Cherokee Child & Family Services, 87 S.W. 3d. 67 (Tenn. 2002). If the body is acting as the functional equivalent of government, its records are covered by the act. Here, too, one must consider the totality of circumstances; however, three factors mentioned as specifically relevant are:
1. The level of governmental funding;
2. The extent of governmental involvement or control; and
3. Whether the entity was created by the government.

Nongovernmental bodies found to be covered by the act include a sports authority pursuant to legislation, Op. Att’y. Gen. No. 96-011 (Feb. 6, 1996); and sublessees of municipally owned property, Creative Restaurants Inc. v. Memphis, 795 S.W. 2d. 672 (Tenn. Ct. of App., 1990).

D. Documents in Electronic and Other Nonpaper Formats
As the quantity of records produced by municipalities expands, the use of technology becomes increasingly necessary to process and store them. The act covers a multitude of formats included as public records including “electronic data.” The act does not, however, suggest that the requester has the right to choose in what format a requested record may be produced. The Tennessee Supreme Court has stated that if records are stored on an electronic database the producing municipality is required to provide the public information in the format requested. Hence, if a citizen requests a hard copy of a computerized spreadsheet or word processing document, it is the duty of the municipality to provide the hard copy. The Tennessean v. Electric Power Board of Nashville, 979 S.W. 2d 297 (Tenn. 1998). This opinion additionally suggests that municipalities have the duty to perform reasonable searches for specific information contained within a more comprehensive electronic database if the requesting party is willing to pay the cost.

The legislative language defining public records is intentionally broad. The language of T.C.A. § 10-7-121 provides that electronically stored
records must, like their paper counterparts, be made available for public inspection. This, coupled with case law solidifies the notion that regardless of format, a public record is open to the public during municipal business hours. T.C.A. §§ 47-10-101 et seq. allow cities to conduct business by electronic means and to determine the extent to which they will send, accept, and rely on electronic records and electronic signatures. T.C.A. § 47-10-112 provides that electronic records may be retained and have the same status as original records. Electronic records are subject to open records and retention requirements just like other records.

T.C.A. § 10-7-512 explicitly states that municipalities “shall adopt a written policy on any monitoring of electronic mail communications and the circumstances under which it will be conducted.” E-mail communications seem clearly subject to the act, but there is still question as to the openness of personal e-mails sent from government computers. It is best to assume that these, too, are open.

II. MUNICIPAL RECORDS CATEGORIES

A. Business and Financial Records and Contracts

Many of these types of records are confidential as they are covered by statutory exemptions outside of the act. They include:

- Proprietary information acquired by the Department of Economic and Community Development (See T.C.A. § 4-3-712, et seq.);
- Information submitted to or compiled by the Tennessee Competitive Export Corporation pertaining to commercially sensitive information (T.C.A. § 13-27-113);
- Information contained in examinations, reports, applications, credit, investments, financial statements, and balance sheets (T.C.A. § 45-7-216);
- Trade secrets, patentable information, proprietary information, and commercial or financial information used in university research (T.C.A. § 49-7-120);
- Trade secrets and other information disclosed to or obtained by the Department of Labor pursuant to enforcement of occupational safety and health laws (T.C.A. § 50-3-504, 914); and
- Information containing or revealing trade secrets obtained by the commissioner of labor while enforcing the Hazardous Chemical Right to Know Law (T.C.A. § 50-3-2013).

The names and addresses of owners and agents on business licenses are public record; however, other information appearing on business tax returns and license applications is confidential. (T.C.A. § 67-1-1702).

Case law suggests that the disclosure of information that would result in the disclosure of tax return information is protected from disclosure. McClane v. State, 115 S.W. 3d 925 (Tenn. Ct. of App., 2002).

A 1996 Tennessee attorney general opinion stated that unpublished telephone numbers that were confidential under the terms of a contract between a private telecommunications carrier and a municipal utility were nonetheless public record. Furthermore, a municipal contract requiring the confidentiality of these numbers is void against public property. Op. Tenn. Att’y Gen. 96-144.


B. Election Reports

Generally, election reports are open to public inspection. There are, however, statutory limitations. T.C.A. § 2-11-202(a)(5) protects reports of election law violation investigations. Additionally, the court of appeals has stated that these reports are public even where they are
submitted to the Tennessee Bureau of Investigation, so long as the request was made before delivery. In an opinion addressing the confidentiality of such records, the court promotes the notion that general intent and purpose of the act cannot be subverted by submitting otherwise open records to an exempted agency such as the TBI Chattanooga Publ'g Co. v. Hamilton County, Not Reported in S.W. 3d, 2003 WL 22469808 (Tenn. Ct. of App., May 8, 2003).

C. Personnel Records
Personnel records clearly fall under the act’s definition of public record and are thus open to the public. Information including salary, disciplinary records, and employment applications is open for public inspection. Other personal information such as Social Security numbers and bank account and routing numbers, unpublished phone numbers, medical records, and driver’s license information (unless driving is part of the employee’s duties or job description) is confidential and should never be released.

Almost every personnel file contains confidential information. This is why original personnel files should never be released. Instead, even where a citizen requests only inspection, a copy should be made, and all confidential information should be redacted before a citizen is allowed to view the records.

Where a city is a participant in the Drug-Free Workplace Program, employee drug test results generally are protected from disclosure. T.C.A. § 50-9-109 specifically addresses drug test results. The statute explicitly states:

(a) All information, interviews, reports, statements, memoranda and drug or alcohol test results, written or otherwise, received by the covered employer through a drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery or disclosed in any public or private proceedings, except in accordance with this section or in determining compensability under this chapter.

This section goes on to say that this information remains protected until the person tested signs a voluntary consent form or a judicial ruling orders disclosure.

The confidentiality of these records is further cemented by a 1999 Tennessee attorney general opinion (Op. Atty. Gen. No. 99-126, June 29, 1999). In this opinion the attorney general suggests that even where drug test results are kept in an employee’s personnel file pursuant to the Drug-Free Workplace Program, they are nonetheless confidential and not subject to disclosure under the Tennessee Public Records Act. Furthermore, the opinion recommends the practice of maintaining all drug testing records separate from the employee’s personnel file.

D. Police Personnel Records
Some of the most commonly requested personnel records are those of police officers. Law enforcement personnel records are also the most exempted and subsequently litigated personnel records.

When a request is made for the personnel records of a law enforcement officer, the municipality must, within three days, notify the officer whose records were requested. The notice must say that an inspection took place and note the name, address, and telephone number of the person making the inspection; for whom the inspection was made; and the date of the inspection (T.C.A. § 10-7-503 (c)). T.C.A. § 10-7-50d4(g)(1) (A) allows the chief to “segregate” personal information about any undercover police officer or member of his or her immediate family. The chief may refuse to release such information if he or she believes it may endanger the officer or the officer’s family.
In the 2007 legislative session, the procedures for reviewing and releasing law enforcement personnel records were expanded. Now, an officer’s address; home and cell phone numbers; place of employment; names, work addresses, and phone numbers of the officer’s immediate family; and the names, locations, and phone numbers of any educational institution or day-care center where the officer’s spouse or child is enrolled shall be redacted when there is a reason not to disclose the information as determined by the chief of police.

Specifically, Public Chapter 425 requires the chief or the chief's designee to make a determination “when a request to inspect includes such personal information and the request is for a professional, business, or official purpose” (emphasis added). However, under Tennessee law, a requesting citizen does not have to state his or her purpose for requesting records. This being the case, municipalities should have the police chief make the determination every time a request is made for personal information in a law enforcement personnel file. Considering a totality of the circumstances, the chief will decide what of the personal information should be redacted and what should be released.

If the chief decides to withhold any information, he or she must give specific justification in writing to the requester within two days and release the redacted file. If the chief decides there is no justification for keeping the personal information confidential, the officer must be notified and given reasonable opportunity to oppose release. When the request is from a business entity, it must also include the name and contact information for a supervisor for verification.

E. Police Records
In 2007, the Tennessee Supreme Court ruled in Schneider v. City of Jackson that the law enforcement privilege has never been adopted as a common law privilege in this state. Hence, the law enforcement privilege is not an exception to the Public Records Act, and many of these records are open to public inspection.

While police records generally are open to public inspection, some protections have been enacted to safeguard ongoing investigations. Police records open to the public include:

- **Accident reports.** The legislature has recently amended the act to open all vehicle accident reports to the general public. Insurance information in the report, however, is still exempt from disclosure.
- **Arrest records.** Some juvenile arrest records remain confidential. See T.C.A. 37-1-154.

F. Police Investigative Records
The primary factor in determining the openness of a police investigative file is whether or not it is part of an active investigation. Records contained in an active investigation generally are closed. Tenn. R. Crim. P. 16. This is an obvious measure established to protect the law enforcement officers involved and to ensure that criminal participants remain unaware of police surveillance.

Once an investigation is closed, however, the justifications for the exception disappear. For an in-depth discussion on the confidentiality of closed investigative files see Schneider v. City of Jackson, 2007 WL 1514957 (Tenn.).

In part, Schneider dealt with police officer field interview cards requested by a citizen. The case held, among other things, that these field interview cards are not protected from disclosure by the act. The case, in part, was remanded to the lower court to allow for redaction of information directly related to ongoing police investigations. This court explicitly opined that a common law privilege has never been formally adopted by Tennessee
law and is not available for the protection of law enforcement records.

This case suggests that the confidentiality of other common law privileges (such as attorney-client privilege and attorney work product) may also be in question.

**G. Prison, Probation, and Parole Records**

Where the release of prison, probation, or parole records would result in jeopardizing the safety of inmates or correctional officers, the commissioner of correction may restrict access to these records. T.C.A. § 4-6-140(c). Other Department of Correction records are likewise protected. These include certain juvenile records and all investigative records of its internal affairs department. §§ T.C.A. 37-1-154 & 10-7-504 (a)(8). The Department of Correction is permitted to promulgate rules regarding the protection and distribution of its records. T.C.A. § 4-6-140(c). These rules, however, are public record. *Taylor v. Campbell*, LEXIS 85 (Tenn. Ct. of App., 2001).

**H. School and University Records**

Records of students currently enrolled in public schools, including academic, financial, and medical records, are closed. However, statistical information not identified with a particular student may be released. Additionally, 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. T.C.A. § 10-7-504 (a) (4).

Other public school records are open. These include athletic and trustee records so far as they do not disclose otherwise confidential information.

**III. EXEMPTIONS**

**A. Confidential Exemptions**

T.C.A. § 10-7-504 provides an extensive list of government records that are exempted from disclosure, and this statute is amended regularly. Following is a list of the most common exemptions for municipal records:

- Medical records of patients in state, county, and municipal hospitals and medical facilities and 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, 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 officers;
- Records, documents, and papers in the possession of the military department that involve national or state security;
- Records of students in public educational institutions; however, statistical data not identified with a particular student may be released; 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;
- 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;
- State agency records containing opinions of value of real and personal property intended to be acquired for a public purpose. These records become open once the acquisition is final;
- 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 Tennessee Board of Regents or the University of Tennessee when the owner or donor requires that the records are kept confidential. This exception does not apply to any records prepared or received in the course of operating state or local governments;
• Personal information contained in motor vehicle records;
• All memoranda, work notes or products, 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, or firefighters. This privilege may be waived;
• 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 personal information of undercover police officers and their immediate family and household members;
• Identifying information, such as unlisted telephone numbers, in the possession of a private or public utility service provider that could be used to locate an individual when the 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 executing a sentence of death;
• Contingency plans of law enforcement agencies to deal with bomb threats, terrorist acts, and other acts of violence;
• Credit card numbers, Social Security numbers, account numbers, security codes, and other identifying information in the hands of a utility;
• Records of a utility that would identify areas of vulnerability or allow disruption of utility service; and
• Any confidential public record in existence more than 70 years is open 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 with mental illness or mental retardation.

B. Court Created and Other Exemptions
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 can also make a specific record confidential. The following is a nonexhaustive 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.);
• 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));
• Many records regarding juveniles (T.C.A. §§ 37-1-153, 37-1-154, 37-1-155, 37-1-409, 37-1-612, 37-1-615, 37-2-408);
• Law enforcement photographs and recordings of juveniles (Pub. Ch. No. 134, 2007);
• Mental health intervention techniques for municipal correction officers and dispatchers (Pub. Ch. No. 178, 2007);
• 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;
• Whistleblowing reports of violations of the Education Trust in Reporting Act (T.C.A. § 49-50-1408);
• Certain records of an employer’s drug testing program (T.C.A. § 50-9-109. See Op. Tenn. Att’y Gen. 99-126);
• 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 and regional health departments (T.C.A. § 68-11-305); and
• 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. The Tennessean v. Tennessee Dept.’ of Personnel, No. M2005-02578-COA-R3-CV, (Tenn. Ct. of App., April 27, 2007). This ruling, however, may be in doubt in light of Schneider v. City of Jackson. Supra.

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.

IV. POLICIES AND PROCEDURES
A. Open Records Procedures for Municipalities
Tennessee law allows for municipalities to adopt reasonable rules and regulations for providing copies of public records. Every municipality should adopt an open records policy. Such a policy will not only make records custodians clear on the procedures for providing records to constituents but will also alleviate citizen concerns about access. A municipality’s open records policy must, as a whole, harmoniously balance the municipality’s need to preserve and maintain records with the public’s right to inspect those records.

A sample open records policy is attached at the end of this document.

B. Fees and Copying
As previously stated, municipal records must be open to the public during regular business hours. A municipality has no legal authority to charge any fee for viewing and inspecting public records. T.C.A. §10-7-123. If a citizen wants to merely read a public document, no fee can be assessed.

More often, however, the citizen will want a copy of the requested materials. The right to inspect public records includes the right to make copies. T.C.A. § 10-7-506(a). Municipalities may adopt and
enforce reasonable rules governing the making of copies of public records. *Id.* This has been interpreted to mean “actual costs.” Op. Tenn. Att’y Gen. 01-021. Determining the actual cost of making a copy, however, can be a murky endeavor. Attorney general opinions and case law provide little guidance.

If your municipality can accurately gauge the cost of a single copy, the formula for this determination should be recorded, adopted, and implemented. Oftentimes, the multitude of factors (copy machines, maintenance, toner, etc.) make such a determination impossible. In such situations, a safe rule of thumb is to align a municipality’s pricing with that of local providers of copy services. Libraries, post offices, and private copy businesses all provide copy services, and if a municipality is charging a fee approximate to that of local businesses, it is unlikely that a court would find this to be improper.

In some instances, especially with voluminous records requests, labor costs associated with locating, copying, and redacting will be significant. Nonetheless, there is no authorization under Tennessee law to charge for these costs. It is inherent in the job of records custodian to provide these services, which should be viewed by cities as an operating expense.

In fact, T.C.A. § 10-7-504(f) suggests that confidential personnel information should be redacted wherever possible, and the fact that confidential information exists in the requested record cannot be used in any way to limit or deny access. This legislative statement further solidifies the notion that fees for redaction are improper.

Likewise, the attorney general specifically stated in Opinion 01-021 that fees for researching, locating, and retrieving public records are not proper *per se.* A municipality has the authority to waive costs for copying records when they are requested by a public official. MTAS suggests a policy of assessing no copying charges for requests made by public officials where the total cost, as prescribed for the general public, would not exceed $25. For larger requests, where costs are above the limit, department heads should have the option to waive these fees when it is in the best interest of the municipality.

If a requesting party is not physically present and the requested records must be physically sent to the requester, case law states that cities may recover actual costs associated with delivery of the records. *Waller v. Bryan,* 16 S.W. 3d 770 (Tenn. Ct. of App., 1999).

**C. Requests for Records**

The Tennessee Court of Appeals opined that municipal officials cannot deny a citizen access to records based upon a refusal to make a request in writing. See *Wharton v. Wells,* 2005 WL 3309651. Nonetheless, to ensure accuracy of the records provided and to keep a record of what was requested and provided, the records custodian should keep written documentation. If the requesting citizen refuses to complete a written form, the records custodian or attending clerk should complete the form for the requester. A sample Request for Records form is provided at the end of this document.

Municipalities should make every reasonable effort to produce requested records immediately. Requests for voluminous or archival records will understandably require additional time. Even with voluminous requests, however, public records should be produced without unnecessary delay.

While the requesting citizen should make his or her request for public records to the department likely to house the records in question, most requests will probably be received by the records custodian. When
requests made to the records custodian are for information housed in the files of specific departments, the records custodian should take these requests directly to the department head. Each department head should be responsible for producing the requested documents within a reasonable amount of time.

For most requests, same-day production should be feasible, but certain factors can make same-day production impossible. These factors include the kind, amount, and nature of the records requested; uncertainty as to what records are requested; the location of the records requested; the format in which the records are requested; the extent of the department head’s resources to locate the records at the time the request is made; intervening emergencies, problems, and other events that might reasonably delay the delivery of the records for inspection; and the propensity of the request to create undue disruption of other essential department functions. When records cannot be produced on the same day, the records custodian should notify the requesting party and provide the reason for the delay and the anticipated date of production. Regardless of the production time required, a municipality should take every precaution to not unnecessarily delay the delivery of requested records.

For records existing solely in electronic format, requesters have the right to access the information via the municipality’s computer system so long as this does not reveal confidential information. If the electronic records contain confidential information, the only viable option may be to print a paper copy of the records and redact the confidential information. A requesting citizen always has the right to opt for access to the computer records or to request paper records.

It is the paramount duty of the records custodian to oversee the inspection and at all times ensure the protection of municipal records. Under no circumstances should a requesting citizen be left unattended while inspecting records. Likewise, when municipal records are to be copied, they should always be copied by municipal employees using municipal copying equipment. When circumstances prevent the use of municipal copying equipment, commercial copying services may be used. In this situation, the records custodian should receive a quote from the commercial copy service to be used. The quote should then be forwarded to the requester along with an explanation of the need to use the commercial service and a timeframe for completion. Finally, the requester should be given an opportunity to proceed with the commercial service or to withdraw the request. However, strict precautions must be taken to ensure the integrity of the records. Ideally, a municipal employee should physically oversee the commercial copy process. If this is not feasible, a detailed inventory should be taken of the original records before they are delivered to the commercial entity, and the inventory should be thoroughly cross referenced with the materials upon return.

D. Maintaining the Integrity of Records
As a municipality’s records serve as the legal foundation for all of its actions, preserving these records is of paramount importance. At no time should original records leave the physical custody of the records custodian.

For exhaustive coverage of records maintenance, see the MTAS publication Records Management for Municipal Governments by Dennis Huffer. This document is available at http://www.mtas.tennessee.edu.

E. Redaction Process
The question of the necessity for redaction is often difficult. Otherwise public documents often contain smaller fragments of confidential information, which does not negate the openness of the rest of
the document. It is the duty of the municipality, wherever possible, to redact the confidential information before providing the remaining public information to the requester.

While there is no specific timeframe for completing redaction, it should be undertaken as quickly as possible without any unnecessary delay in public access. In most cases, the records custodian can determine what information to release. In cases of voluminous requests or uncertainty, the city recorder and/or the city attorney may need to be consulted. When the determination as to release cannot be made within one working day, the requester should be notified in writing of the specific reason for delay and the approximate timeframe for completion.

F. When Requests for Records Are Denied
When a municipality denies a request for records, the act guarantees the requester’s right to petition for access to the records denied and to “obtain judicial review of the actions taken to deny access.” T.C.A. § 10-7-505(a). At trial a denying governmental agency has the burden of proving confidentiality by a preponderance of the evidence. T.C.A. § 10-7-505(c). A court must then weigh this with the court’s duty to construe the act “to give the fullest possible access to public records.” T.C.A. § 10-7-505(d).

CONCLUSION
It is hoped that the preceding materials have shed light upon the state of open records laws in Tennessee, and more importantly, your municipality’s role in the process. A well-informed and equitably implemented open records policy will lead to a more informed public and, consequently, a more responsive local government.

The following appendices consist of a sample open records policy and open records resolution. Before adopting either of these policies for your municipality, it would be wise to consult your city attorney or this office.
APPENDIX A
Sample Open Records Policy

CITY OF __________________, TENNESSEE

POLICY FOR THE INSPECTION AND COPYING OF PUBLIC RECORDS UNDER THE TENNESSEE OPEN RECORDS LAW (T.C.A. 10-7-504 ET SEQ.)

General Policy.
It is the policy and intent of the city to:

(1) Comply with Tennessee's Open Records Law (T.C.A. § 10-7-504 et seq.) by permitting the inspection and copying of the public records of the city.

(2) Provide access to the city's public records, and copies of those records, to public officials charged with legislative and administrative duties under the city's charter or municipal code, and other county, state and federal officials.

Each department head shall be responsible for carrying out this policy. Requests for the inspection and copying of public records of the city shall be handled by each department head of the city as expeditiously as possible. However, each department head shall also have the responsibility to:

(1) Preserve the confidentiality of public records that are confidential under the Tennessee Open Records Law (T.C.A. 10-7-504 et seq.).

(2) Protect public records from damage or disorganization.

(3) Balance the allocation of personnel to records inspection and copying duty against the prevention of excessive interference with other essential functions of the city.

Definitions.
In the interpretation and application of this policy, the following terms have the meanings indicated:

(1) “Confidential record” is any record, or part of a record, which is defined by the Tennessee Open Records Law, or other state and federal laws, as being exempt from public inspection, including, but not limited to, those records listed in T.C.A., § 10-7-504.

(2) “Department head” means the city recorder, treasurer, police chief, fire chief, the director of public works, the personnel director, and any other person designated a department head by the city charter or the municipal code, or his or her designee or designees.

(3) “Public official” means any elected or appointed city official who has legislative or administrative duties prescribed by the city’s charter, the city’s municipal code, or any ordinance or resolution of the city. It
also includes any county, state or federal official who makes a request for the city’s records on behalf of the government he or she represents.

(4) “Public record” means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance in connection with the transaction of official business by the city.

**Procedure for Inspection of Records.**

**Request-general public and public officials.** Persons and public officials wishing to inspect or copy city records shall make a request for inspection to the department of the city that maintains the records. If the requester does not know which department maintains the records, the request shall be made to the city recorder, who will direct the requester to the appropriate department. The request shall be made upon the form prescribed. If the person requesting copies of records or inspection fails or refuses to complete the form, the city employee handling the request shall complete the form with information provided by the requesting party, and shall note that the person requesting the record refused to complete the form.

**Assistance in location and delivery of records for inspection-general public and public officials.**

The department head shall provide the requester with the necessary assistance to help the requester find the record. To the extent possible, the records requested shall be provided immediately. For one of the reasons listed below, if the records cannot be provided immediately, the department head shall, for records requests made before 11:00 A.M., make a determined effort to provide them by the end of the working day. However, the department head has the discretion to delay the delivery of the records for inspection, that discretion to be governed and limited by such reasonable variables as: the kind, amount, and nature of the records requested; uncertainty as to what records are requested; the location of the records requested; the format in which the records are requested; the extent of the department head’s resources to locate the records at the time the request is made; intervening emergencies, problems, and other events that might reasonably delay the delivery of the records for inspection; and the propensity of the request to create undue disruption of other essential department functions. The department head shall never unnecessarily delay the delivery of records for inspection. If by the end of the second working day after the request for records is made the records are not provided to the requester, the department head shall notify the requester, and note on the records request the reason for the delay and the approximate date the records will be ready for inspection.

**The special case of electronic records-general public and public officials.**

Some public records that are stored, contained or available as data or information within the memory or storage facilities of computer or electronic equipment, might be subject to inspection (and copying) only through the services of city employees familiar with the operation of equipment that facilitates the inspection (or copying). The department head shall make a reasonable effort to ensure that the records are available for inspection under the same rules governing inspection above. However, where these records create special problems of determining confidentiality of all or some of their parts before they are viewed, or if the requester wants the records in a format different from that contained in the computer, additional delays
in the delivery of the records not typical of paper copies of records may occur. The department head shall keep these delays to a minimum. The department head shall notify the requester of the approximate length of delay in the delivery of the records for inspection, and enter it on the request for records.

Unless confidential information cannot be obscured from view, the requester may view the information on the city’s computer screen. Otherwise, the requester may have the records transferred to a diskette or other compatible storage medium, or request paper copies of such records.

**Limitations on disclosure of confidential records—general public and public officials.** Upon receiving a request to inspect a copy of a public record, the department head shall grant the request unless he or she determines that the record requested is confidential, in whole or in part, under the Tennessee Open Records Law and/or any other applicable law. In cases of records that are confidential in part, the department head shall deliver for inspection that part of the record not confidential. Where the department head is uncertain whether a requested record is confidential, he or she shall as expeditiously as possible consult with the city recorder. If after consultation with the recorder, uncertainty still exists, the department head and the city recorder shall as expeditiously as possible consult with the city attorney. The department head shall inform the requester that uncertainty exists as to the confidentiality of the record, and on the request indicate the reason for the uncertainty with as much specificity as possible, and the approximate date the uncertainty will be resolved.

If the department head determines that the record is confidential, he or she shall notify the requester, and specifically supply him with a rejection of the request, noting the reason that the record is confidential and citing, if possible, the statute supporting the confidentiality.

**Costs of inspection—general public and public officials.** Generally, there is no charge for the inspection of public records.

However, where the public records requested are electronic records, and the records are not in the format requested by the requester and special computer programs must be created to retrieve the records in the requested format, the department head shall estimate the cost of creating the programs, including the time and labor of city employees based upon their hourly pay rate, but not counting Social Security, insurance, and other benefits. The requester shall pay to the city the estimated cost of the special programs before the records are compiled in the requested format. If the cost of the special program exceeds the amount previously paid by the requester, he or she shall pay the balance to the city prior to the inspection of the records in the requested format. If the cost of the special programs is less than the amount previously paid by the requester, the city shall refund to the requester the difference upon the delivery of the records for inspection.

If the requester is a public official, the city council may waive the costs of creating special programs.

**Custody of records.** The city’s records shall remain in the physical custody of the department head, and on the department’s premises, at all times.
Procedure for Copying Public Records.

**Generally—general public and public officials.** Any requester who has submitted to the city a request for records is entitled to a copy of any record open for inspection. To the extent possible copies shall be made on the city's copying equipment. Where the equipment does not exist, is inoperative, is not designed to copy the records requested, or the requester wants the copies in a format the city's equipment cannot duplicate, the copies may be made on commercial copying equipment.

**Cost of copies—city’s equipment.**

**General public.** Requester must pay a per page cost for copies of records. Payment for the cost of copies shall be made by the requester before the copies are made. The payment shall be based on the approximate number of copies requested. If the actual cost of the copies exceeds the amount previously paid by the requester, the balance shall be paid by the requester before the delivery of the copies. If the previous payment made by the requester exceeds the cost of the copies, the excess shall be refunded to the requester upon the delivery of the copies. Department heads have discretion to waive payment of costs if the requesting party is indigent or if fewer than three pages of copy are requested.

**Public officials.** Public officials shall not be charged for copies of records where the total cost prescribed for copies of public records for the general public does not exceed $25. For records that exceed that cost, public officials shall pay the same costs for public records required to be paid by the general public. The department head may waive this requirement where the waiver appears in the interest of the city. However, the department head’s authority to make a waiver does not exceed an additional $30, for a total cost of $50, for the records. All requests for copies of public records by a public official made within a ten (10) day period shall be treated as a single request for the purpose of calculating the cost of $25, or $50 in the case of department heads. The city council may make cost waivers it deems advisable.

**Cost of copies—commercial equipment.**

**General public.** Where the city’s copying equipment is incapable of reproducing copies of the records requested, or its copying equipment is inoperative, the department head shall notify the requester. If the requester decides that he or she wants a commercially made copy of the records, he or she shall notify the department head, who shall determine the estimated cost of the copies. If the requester desires to obtain the commercial copies, he or she shall pay the estimated cost of the copies. If the actual cost of the copies exceeds the amount previously paid by the requester, the balance shall be paid by the requester before the delivery of the copies. If the previous payment made by the requester exceeds the cost of the copies, the excess will be refunded to the requester upon the delivery of the copies.

**Public officials.** Public officials shall be charged for copies of commercially copied records under the same procedure prescribed for commercially copied records provided for the general public. The city council may make cost waivers it deems advisable.
APPENDIX B
Sample Public Records Resolution

RESOLUTION NO. ______

A RESOLUTION PROVIDING FOR THE MAINTENANCE, PRESERVATION, AND PROTECTION OF PUBLIC RECORDS, AND ESTABLISHING PROCEDURES FOR ACCESSING AND COPYING PUBLIC RECORDS

Be it resolved by the governing body of the City/Town of __________________, Tennessee,

Section 1. Procedures regarding access to and inspection of public records:
A. Consistent with the Public Records Act of Tennessee, personnel of the City/Town of __________________ shall provide full access and assistance in a timely and efficient manner to persons who request access to open public records.
B. Employees of the City/Town of __________________ shall protect the integrity and organization of public records with respect to the manner in which the records are inspected and copied. All inspections of records must be performed under the supervision of employees of the City/Town. All copying of public records must be performed by employees of the City/Town.
C. To prevent excessive disruptions of the work, essential functions, and duties of employees of the City/Town, persons requesting inspection and/or copying of public records shall complete a records request form to be furnished by the City/Town. If the requesting party refuses to complete a request form, a city/town employee shall complete the form with the information provided by the requesting party. Persons requesting access to open public records shall describe the records with particularity so that the records may be located and copied by employees.
D. When voluminous records are requested in writing using the designated form, the person requesting access shall make an appointment with the records supervisor or his designee of the department holding the records. Appointments for inspection of records may be for no longer than two (2) hours in one day per request. If further inspection is needed by the requesting party, another appointment may be scheduled. The purpose of this policy is to prevent monopolization of working hours of City/Town employees and interference with their work duties. Employees shall make every effort to schedule appointments and copying of records so as to provide full access to the requesting party.
E. Persons may further request that copies be made of open public records. The charge for copies shall be _____ per page. Payment of copying fees is due when the copies are received by the requesting party. If voluminous copies are requested, the City/Town reserves the right to take 48 hours, during the work week, to prepare the copies. No open public records may be removed from City/Town office for the purpose of copying.
F. If the public records requested are frail due to age or other conditions, and copying of the records will cause damage to the original records, the requesting party may be required to make an appointment for inspection as provided in paragraph D.

ADOPTED BY THE CITY/TOWN OF __________________, TENNESSEE
ON THIS THE ________ DAY OF __________________, 200______.

MAYOR: _________________________________________________
CITY RECORDER: ___________________________________________