

**STATE OF TENNESSEE**

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Opinion No. 05-155

Public Records: Access to Recordings of 911 Calls and Law Enforcement Radio Transmissions

**QUESTIONS**

1. Are the recordings made by 911 telephone operators public records?
2. Under what circumstances may a state governmental agency deny or delay access by private citizens to recordings made by 911 telephone operators?
3. Is a criminal defendant entitled to obtain a copy of 911 telephone operator recordings prior to his or her preliminary hearing?
4. Are recordings made of law enforcement radio transmissions public records?
5. Under what circumstances may a governmental agency deny or delay access by private citizens to recordings made of law enforcement radio transmissions?
6. Is a criminal defendant entitled to obtain a copy of law enforcement radio transmissions prior to his or her preliminary hearing?

**OPINIONS**

1. As a general rule, recordings made by 911 telephone operators are public records. Exceptions to this rule exist, however, and a private citizen's or a criminal defendant's access to the recordings must be evaluated on a case-by-case basis.
2. A state governmental agency may deny or may delay access by private citizens to recordings made by 911 telephone operators when state law limits or prohibits disclosure. For example, a private citizen would not have a right to inspect or copy 911 recordings relevant to a pending criminal investigation or prosecution.
3. No. Tenn. R. Crim. P. 16 ("Rule 16") governs disclosure of records in criminal cases, and the criminal defendant does not have a right under Rule 16 to inspect or copy 911 recordings prior to his preliminary hearing.
4. As a general rule, recordings of law enforcement radio transmissions are public

records. Exceptions to this rule exist, however, and the private citizen's and the criminal defendant's access to the recordings must be evaluated on a case-by-case basis.

5. A governmental agency may deny or may delay access by private citizens to recordings of law enforcement radio transmissions when state law limits or prohibits disclosure. For example, a private citizen would not have a right to inspect or copy any records relevant to a pending criminal investigation or prosecution.

6. No. Tenn. R. Crim. P. 16 governs disclosure of records in criminal cases, and the criminal defendant does not have a right under Rule 16 to inspect or copy law enforcement radio transmission recordings prior to his preliminary hearing.

### **ANALYSIS**

The Public Records Act provides that "all state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee ... unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a). Public records statutes should be construed broadly so as to give the fullest possible public access to public records. *See, e.g., Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. App. 2005). Normally, the first question is whether the requested material is a public record. *Coats v. Smyrna/Rutherford County Airport Authority*, 2001 WL 1589117, \*4, No. M2000-00234-COA-R3-CV (Tenn. App. December 13, 2001). The proper test in determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with a government agency's transaction of official business. Tenn. Code Ann. § 10-7-301; *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991).

This Office has previously opined that, under *Griffin*, a 911 tape made or received by a state or local government agency in connection with the transaction of its official business would be a "public record" open for inspection under Tenn. Code Ann. § 10-7-503 and copying under Tenn. Code Ann. § 10-7-506, unless otherwise provided by state law. Op. Tenn. Att'y Gen. 93-65 (November 29, 1993). The definition of a public record expressly includes sound recordings such as a 911 tape. Tenn. Code Ann. §10-7-301(6). We have found no indication that law enforcement transmission recordings would be treated differently from 911 tapes under the Public Records Act. *See, e.g., State v. Kelly*, 697 S.W.2d 355, 358 (Tenn. Cr. App. 1985). This conclusion does not, however, end the inquiry.

Not all public records are open to inspection. *Coats*, 2001 WL 1589117 at \*4. In Tenn. Code Ann. § 10-7-503 and -504, the General Assembly has provided exceptions to the availability of public records. For example, if a tape is part of an investigative record of the Tennessee Bureau of Investigation (TBI), Tenn. Code Ann. § 10-7-504(a)(2) requires that the "information in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." No specific exception for 911 tapes or recordings of radio transmissions of law enforcement personnel appears in these statutory provisions. The exceptions in Tenn. Code Ann. § 10-7-503 and -504 are not exclusive, however, and other statutes, rules and the common law also must be examined to determine whether 911 tapes and recordings of law enforcement radio

transmissions are available for public inspection and copying.

Tenn. R. Crim. P. 16<sup>1</sup> governs disclosure of evidence in active criminal cases.<sup>2</sup> *Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987). In *Appman*, the Tennessee Supreme Court held that the Tennessee Rules of Criminal Procedure have the force and effect of state law. *Id.* at 166; *see also Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996) (applying same holding to the Tennessee Rules of Civil Procedure). The Court in *Appman* held that documents in an active criminal case that would not be subject to discovery under Tenn. R. Crim. P. 16 are not subject to inspection under the Public Records Act. *Appman*, 746 S.W.2d at 166. The Court reasoned that Rule 16's protection of certain material from disclosure constituted an exception to the Public Records Act. *Id.* Thus, if a 911 tape or a tape of radio transmissions is relevant to an active criminal case, the Tennessee Rules of Criminal Procedure will impact whether and to whom a record may be disclosed.

Prior to trial, a criminal defendant may be able to inspect and copy 911 or law enforcement radio transmission tapes under Rule 16. *See* Tenn. R. Crim. Proc. 16 (a)(1)(C). For the defendant to obtain access to such recordings, the defendant must show that the recordings are (1) material to the preparation of the defendant's defense, or (2) intended for use by the State as evidence in chief at the trial, or (3) material obtained from or belonging to the defendant. Tenn. R. Crim. P. 16(a)(1)(C). Clearly, this assessment would have to be made on a case-by-case basis.

The stage at which discovery will be available is not, however, before the preliminary hearing. Rule 16 does not apply to preliminary hearings. *See State v. Willoughby*, 594 S.W.2d 388, 390-91 (Tenn. 1980). “[A] preliminary hearing is simply a forum for determining (1) whether an offense has been committed, (2) whether there is reasonable ground to believe that the defendant is guilty of its commission and (3) whether and how much bail should be set.” *McKeldin v. State*, 516 S.W.2d 82, 85 (Tenn. 1974). “The purpose of the [preliminary] hearing is to adjudicate the existence or absence of probable cause, and not to discover the State's case.” *See* Tenn. R. Crim. P. 5.1, Committee Comment.

In brief, our conclusions are as follows:

1. As a general rule, recordings made by 911 operators are public records.
2. As a general rule, recordings of law enforcement transmissions are public records.
3. These materials are open to public inspection and copying unless they are excepted from disclosure under state statutes, rules or the common law.
4. These materials are not available to the public for inspection and copying when they are relevant to an active criminal case.
5. Rule 16 does not apply to preliminary hearings. Therefore, the materials are not open

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<sup>1</sup> Rule 16 is not the exclusive procedure for a criminal defendant to obtain access to documents, records and other materials held by the State. *See* Rule 16 Committee Comment for discovery under laws other than Rule 16.

<sup>2</sup> Tenn. Code Ann. § 10-7-503 may not be used to widen the scope of permissible discovery or otherwise circumvent the rules of procedure. *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 361 (Tenn. Cr. App. 1998).

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for inspection and copying by the criminal defendant at this stage of the criminal case.

6. Prior to trial, these materials may be available to a criminal defendant for inspection and copying if they meet the criteria of Rule 16(a)(1)(C).

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