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January 26, 2000

Opinion No. 00-014

Publication of criminal case dispositions on the Internet.

QUESTION

May criminal case dispositions, including dispositions through diversion, be made available for public inspection over the Internet?

OPINION

Yes. Criminal case dispositions, including dispositions through diversion, as well as all records, documents, and pleadings filed with the court clerk, are public records that may be made available for public inspection over the Internet pursuant to Tenn. Code Ann. §10-7-123.

ANALYSIS

The Public Records Act, codified as Tenn. Code Ann. § 10-7-101, *et seq*., allows for public inspection of a broad range of state, county, and municipal records. Section 10-7-503 states that "[a]ll state, county, and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee."

Section 10-7-121 allows "any information required to be kept as a record by any government official" to be "maintained on a computer or removable computer storage media ... instead of bound books or paper records." To do so, the following standards must be met: (A) the information must be available for public inspection and must be other than confidential records; (B) due care must be taken to maintain the information during the time required by law for retention; (C) new information must be copied to a computer storage media daily and, if more than one week old, must be stored at a location other than the building where the original is maintained; and (D) the official must be able to provide a paper copy of the information when needed and requested by a member of the public. Tenn. Code Ann. §10-7-121(a)(1)(A)-(D).

If an official decides to maintain public records on a computer, the official "may provide remote electronic access for inquiry only" to those records, both during and after regular business

hours. Tenn. Code Ann. §10-7-123(a)(1). If an official decides to provide remote electronic access, the official "shall implement procedures and utilize a system (equipment and software) that does not allow records of that office which may be viewed through remote electronic means to be altered, deleted, or impaired in any manner." Tenn. Code Ann. §10-7-123(a)(1). Once remote electronic access to public records is allowed, it must be given to all members of the public who desire such access. Tenn. Code Ann. §10-7-123(a)(4). Remote electronic access shall not be allowed for confidential records. Tenn. Code Ann. §10-7-123(b).

It is the opinion of this office that the Internet is a means of "remote electronic access" within the contemplation of Section 10-7-123 of the Public Records Act and that access to public records may be provided over the Internet. Accordingly, whether criminal dispositions may be made available over the Internet depends upon whether criminal dispositions are public records available for public inspection.

Section 10-7-101 defines "records" as "any records of ... circuit, criminal, or chancery court, ... and all other public records, required by law to be kept in the several courts of this state." The test for determining whether certain material is a public record is whether it was made or received pursuant to law or ordinance with the transaction of official business by any governmental agency. This test is evaluated according to the totality of the circumstances. *Griffin v. City of Knoxville,* 821 S.W. 2d 921, 924 (Tenn. 1991); Tenn. Code Ann. §10-7-301.

Section 10-7-507 applies specifically to records of convictions. This section states, in pertinent part,

> Any public official having charge or custody of or control over any public records of convictions of traffic violations or any other state, county or municipal public offenses shall make available to any citizen, upon request, during regular office hours, a copy or copies of any such record requested by such citizen.

Furthermore, Section 10-7-403 defines "public records" as including "(2) [t]he pleadings, documents, and other papers filed with the clerks of all courts, including the courts of record, general sessions courts, and former courts of justices of the peace, and the minute books and other records of these courts." These definitions include virtually every record maintained, received or created by any court.

It is the opinion of this office that criminal dispositions are public records that are available for public inspection. However, Section 10-7-503(a) of the Act, which sets forth the general rule of openness, states that state, county and municipal records are open for public inspection "unless otherwise provided by state law." Accordingly, whether dispositions involving a grant of diversion may be published on the Internet depends upon whether there is an exception to the Public Records Act that applies.

Pre-trial diversion as provided for in Tenn. Code Ann. §40-15-101, *et seq*., allows the court to defer any pending prosecution so that pretrial diversion may be pursued. Tenn. Code Ann. §40-15-103. This statute permits the defendant and the prosecution to enter into a Memorandum of Understanding regarding the deferral of a pending prosecution provided the defendant abides by certain requirements. This memorandum must be approved by the court and filed with the court clerk. Upon successful completion of the deferral period, the criminal charges will be dismissed. After the charges are dismissed the defendant may seek an order of expungement pursuant to Tenn. Code Ann. §40-32-101.

Post-trial or judicial diversion as provided by Tenn. Code Ann. §40-35-313, allows the trial court to defer further proceedings against a qualified criminal defendant and place them on probation. Upon successful completion of probation, the court then discharges the defendant, even after a conviction has occurred, and dismisses the proceedings. After discharge and dismissal, the defendant may apply to the court for an order of expungement pursuant to Tenn. Code Ann. §40-35-313(b).

Tenn. Code Ann. §40-32-101 governs the destruction and release of criminal records. Subsection (a) (1) states, in pertinent part:

> All public records of a person who has been charged with a misdemeanor or a felony, and *which charge has been dismissed ... shall, upon petition by that person to the court having jurisdiction in such previous action, be removed and destroyed* ... provided, that the records of a person who successfully completes a diversion program pursuant to §§ 40-15-102 - 40-15-105 shall not be removed and destroyed pursuant to this section if the offense for which prosecution was suspended was a sexual offense as defined by § 40-39-102(3). (emphasis added).

This section creates an exception to the Public Records Act for records that have been expunged. However, there is no exception to the Public Records Act for records, pleadings, documents and other papers filed with the court clerk regarding diversion until the entry of an order of expungement. After the order of expungement is entered, the individual has a right to privacy and a statutory right prohibiting publication of records ordered expunged. See *Fann v. City of Fairview*, 905 S.W. 2d 167 (Tenn. App. 1994).[1]

Accordingly, it is the opinion of this office that criminal case dispositions are public records

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[1]In *Fann v. City of Fairview*, 905 S.W. 2d 167 (Tenn. App. 1994) the plaintiff was seeking to recover for damages arising from the disclosure and publication of arrest records ordered expunged. The Court of Appeals held that there can be no invasion of the right to privacy by publishing information which is already a matter of public record. *Id.* at 171. However, the Court held that a claim for invasion of privacy could be supported by the disclosure of information ordered expunged. *Id.* at 174.

that may be made available over the Internet pursuant to Tenn. Code Ann. §10-7-123. It is the opinion of this office that all records, pleadings and documents filed with the court clerk concerning the disposition of a criminal case through diversion are public records available for public inspection that may be made available over the Internet until such time as an order of expungement is entered removing said information from the realm of public records.

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