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Opinion No. 01-069

Public Records - Tennessee School Boards Association

QUESTIONS

1. Would applications, credentials, letters of recommendation, resumes and similar material submitted directly to and held by the Tennessee School Boards Association on behalf of a local board of education as part of a process of assisting a board of education in hiring a director of schools be open for public inspection where these documents would otherwise be sent directly to the board of education?

2. If the answer to question number 1 is yes, would this legislation (HB 1437) then be necessary to ensure such public records are open for inspection when held by an association?

OPINIONS

1. For purposes of this opinion, we are assuming that the Tennessee School Boards Association (TSBA) is a private non-profit association as described in Tenn. Code Ann. § 8-44-102(b)(1)(E)(i) and that it has more than two full-time staff members, thus making the provisions of § 10-7-503(d)(1) applicable. Tenn. Code Ann. § 10-7-503(d)(1) states that all records of any association or nonprofit corporation described in § 8-44-102(b)(1)(E)(i) are open for inspection, unless the organization has complied with the audit requirements of subsections (A)-(F). Clearly, if TSBA has not complied with the audit requirements of § 10-7-503(d)(1)(A)-(F), then such documents would be public records and open to inspection. However, if the TSBA has complied with the audit requirements, then it is not entirely clear whether the documents in question would be public records. Assuming that the TSBA has complied with these audit requirements, a court of competent jurisdiction could find that § 10-7-503(d)(1) is a state law that provides otherwise with respect to ***all records*** of the TSBA, including applications, credentials, letters of recommendation, resumes and other similar material submitted to and held by the TSBA on behalf of a local board of education as part of a process of assisting that board in hiring a director of schools.

2. In light of the uncertainty resulting from the specific language of Tenn. Code Ann. § 10-7-503(d)(1), it is our opinion that the proposed legislation (HB 1437) would still be necessary if the General Assembly intends that such documents remain public records open for inspection under such circumstances, i.e., where records that are otherwise public records are being held by an association or nonprofit

corporation as described in § 8-44-102(b)(1)(E)(i) that has more than two full-time staff members and that has complied with the audit requirements of § 10-7-503(d)(1)(A)-(F).

ANALYSIS

1. Tenn. Code Ann. § 10-7-503 provides 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, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." Subsection (d)(1) of this statute is a state law that provides otherwise with respect to certain associations and nonprofit corporations. Specifically, it provides that:

> All records of any association or nonprofit corporation described in § 8-44-102(b)(1)(E)(i) shall be open for inspection as provided in subsection (a); provided, that any such organization shall not be subject to the requirements of this subsection so long as it complies with the following requirements:
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> (A) The board of directors of the organization shall cause an annual audit to be made of the financial affairs of the organization, including all receipts from every source and every expenditure or disbursement of the money of the organization, made by a disinterested person skilled in such work. Each audit shall cover the period extending back to the date of the last preceding audit and it shall be paid out of the funds of the organization;
> (B) Each audit shall be conducted in accordance with the standards established by the comptroller of the treasury pursuant to § 4-3-304(9) for local governments;
> (C) The comptroller of the treasury, through the department of audit, shall be responsible for ensuring that the audits are prepared in accordance with generally accepted governmental auditing standards, and determining whether the audits meet minimum audit standards which shall be prescribed by the comptroller of the treasury. No audit may be accepted as meeting the requirements of this section until such audit has been approved by the comptroller of the treasury;
> (D) The audits may be prepared by a certified public accountant, a public accountant or by the department of audit. If the governing body of the municipality fails or refuses to have the audit prepared, the comptroller of the treasury may appoint a certified public accountant or public accountant or direct the department to prepare the audit. The cost of such audit shall be paid by the organization;
> (E) Each such audit shall be completed as soon as practicable after the end of the fiscal year of the organization. One (1) copy of each audit

> shall be furnished to the organization and one (1) copy shall be filed with the comptroller of the treasury. The copy of the comptroller of the treasury shall be available for public inspection. Copies of each audit shall also be made available to the press; and
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> (F) In addition to any other information required by the comptroller of the treasury, each audit shall also contain:
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> (i) A listing, by name of the recipient, of all compensation, fees or other remuneration paid by the organization during the audit year to, or accrued on behalf of, the organization's directors and officers;
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> (ii) A listing, by name of recipient, of all compensation and any other remuneration paid by the organization during the audit year to, or accrued on behalf of, any employee of the organization who receives more than twenty-five thousand dollars ($25,000) in remuneration for such year;
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> (iii) A listing, by name of beneficiary, of any deferred compensation, salary continuation, retirement or other fringe benefit plan or program (excluding qualified health and life insurance plans available to all employees of the organization on a nondiscriminatory basis) established or maintained by the organization for the benefit of any of the organization's directors, officers or employees, and the amount of any funds paid or accrued to such plan or program during the audit year; and
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> (iv) A listing, by name of recipient, of all fees paid by the organization during the audit year to any contractor, professional advisor or other personal services provider, which exceeds two thousand five hundred dollars ($2,500) for such year. Such listing shall also include a statement as to the general effect of each contract, but not the amount paid or payable thereunder.
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> The provisions of this subsection shall not apply to any association or nonprofit corporation described in § 8-44-102(b)(1)(E)(i), that employs no more than two (2) full-time staff members.

For purposes of this opinion, we are assuming that the Tennessee School Boards Association (TSBA) is a private non-profit association as described in Tenn. Code Ann. § 8-44-102(b)(1)(E)(i) and that it has more than two full-time staff members, thus making the provisions of § 10-7-503(d)(1) applicable.[1] You have asked whether applications, credentials, letters of recommendation, resumes and

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[1]An association or nonprofit corporation under Tenn. Code Ann. § 8-44-102(b)(1)(E)(i) is one whose board of directors was authorized by the laws of Tennessee and that:

> (a) was established for the benefit of local government officials or counties, cities, towns or other local governments or as a municipal bond financing pool;

other similar material submitted to and held by the TSBA on behalf of a local board of education as part of a process of assisting that board in hiring a director of schools would be public records open to inspection under the provisions of Tenn. Code Ann. § 10-7-503(a).

Certainly if these documents had been sent directly to and were held by the local board of education they would be public records and open to inspection under § 10-7-503(a). *See Board of Educ. v. Memphis Publishing Co.*, 585 S.W.2d 629 (Tenn.Ct.App. 1979). However, as discussed above, Tenn. Code Ann. § 10-7-503(d)(1) states that all records of any association or nonprofit corporation described in § 8-44-102(b)(1)(E)(i) are open for inspection, unless such organization has complied with the audit requirements of subsections (A)-(F). Clearly, if TSBA has not complied with the audit requirements of § 10-7-503(d)(1)(A) - (F), then such documents would be public records and open to inspection. However, if the TSBA has complied with the audit requirements, then it is not as certain that the documents in question would be public records.

There is some authority in Tennessee caselaw for the proposition that these records are public records even in the hands of the TSBA. For example, in the case of *Board of Educ. v. Memphis Publishing Co.*, the Memphis City Board of Education established a Search Committee composed of private citizens to screen applicants for the position of Superintendent of City Schools and to refer a number of selected candidates to the Board. Memphis Publishing Company sought access to the records of the Search Committee, which consisted primarily of the applications of those seeking the position of School Superintendent. 585 S.W.2d at 629. The Court of Appeals held that these records were public records even though they were in the hands of the Search Committee. *Id.* at 631.

Similarly, in *Creative Restaurants, Inc. v. City of Memphis*, Memphis Publishing Co. sought access to certain subleases in the possession of Beale Street Management, a private entity, as well as subleases in the possession of a part-time City Attorney. 795 S.W.2d 672 (Tenn.Ct.App.), *p.t.a. denied* (1990). The Court of Appeals held that the subleases in the possession of the private corporation were public records subject to inspection because the private corporation had been acting as the leasing agent for the City of Memphis, relying upon the *Board of Education* case cited above, as well as *Memphis Publishing Co. v. Memphis State University*, 6 Media L.Rep. (BNA) § 2405 (Dec. 15, 1980) (report filed with university and prepared by ad hoc committee appointed by president of university, but financed solely by private funds, was public record open to inspection) and *Cleveland Newspapers, Inc. v. Bradley County Memorial Hospital Board of Directors*, 621 S.W.2d 763 (Tenn.Ct.App. 1981) (hospital payroll records of not-for-profit hospital created by private act were public records). 795

(b) receives dues, service fees or any other income from local government officials or such local governments that constitute at least thirty percent (30%) of its total annual income; and
(c) was authorized as of January 1, 1998, under state law to obtain coverage for its employees in the Tennessee consolidated retirement system.

S.W.2d at 678. The Court of Appeals further held that the subleases in the possession of the part-time City Attorney were also public records, because he was acting as the agent of his client, the City of Memphis, and, therefore, was holding public records in a public capacity. *Id*. at 679.

However, the language of Tenn. Code Ann. § 10-7-503(d)(1) must be balanced against these court decisions. That subsection specifically provides that ***all records*** of an association or nonprofit corporation as described in § 8-44-102(b)(1)(E)(i) are not public and open for inspection if the organization has complied with the audit requirements of the statute. Accordingly, assuming that the TSBA has complied with these audit requirements, a court of competent jurisdiction could find that § 10-7-503(d)(1) is a state law that provides otherwise with respect to ***all records*** of the TSBA, including applications, credentials, letters of recommendation, resumes and other similar material submitted to and held by the TSBA on behalf of a local board of education as part of a process of assisting that board in hiring a director of schools.

In answer to your second question, in light of this uncertainty resulting from the specific language of Tenn. Code Ann. § 10-7-503(d)(1), it is our opinion that the proposed legislation (HB 1437) would still be necessary if the General Assembly intends that such documents remain public records open for inspection under such circumstances, i.e., where records that are otherwise public records are being held by an association or nonprofit corporation as described in § 8-44-102(b)(1)(E)(i) that has more than two full-time staff members and that has complied with the audit requirements of § 10-7-503(d)(1)(A) - (F).

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