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Opinion No. 03-082

Providing the Telephone Numbers Contained in the Tennessee Do-Not-Call Register to the Federal Trade Commission.

QUESTION

Do the provisions of Tenn. Code Ann. §§ 65-4-405(c) and (e) prohibit the Tennessee Regulatory Authority from making the telephone numbers contained in the Tennessee Do-Not-Call Register available to the Federal Trade Commission for use in a National Do Not Call Registry?

OPINION

No. The Tennessee Regulatory Authority may, if it chooses, provide the telephone numbers contained in the Tennessee Do-Not-Call Register to the Federal Trade Commission for inclusion in the similar federal registry without violating Tennessee's confidentiality laws.

ANALYSIS

The Tennessee Regulatory Authority ("TRA") has requested a formal opinion from this Office on whether the provisions of Tenn. Code Ann. §§ 65-4-405(c) and (e) prohibit the TRA from making telephone numbers contained in the Tennessee Do-Not-Call Register, which is maintained by the TRA pursuant to Tenn. Code Ann. § 65-4-405, available to the Federal Trade Commission ("FTC") for inclusion in a National Do Not Call Registry to be maintained by the FTC. With its request, the TRA provided excerpts from a transcript of a special TRA conference held on June 23, 2003, which contains the explanatory remarks of the program manager for the FTC's Do Not Call Registry.

The Tennessee Do-Not-Call Register contains the telephone numbers of residential telephone customers who have submitted their numbers to the TRA to prevent unwanted telephone solicitation. Tenn. Code Ann. § 65-4-405 requires telephone solicitors to register with the TRA and prohibits such solicitors from making telephone solicitations to numbers contained in the Tennessee Do-Not-Call Register. The FTC program works similarly, except that the FTC plans to initiate its national register by combining lists of numbers provided to the FTC by those states that have do-not-call programs. The FTC has requested that the TRA provide the telephone numbers contained in the Tennessee Do-Not-Call Register to the FTC for this one-time, initial purpose.

Tenn. Code Ann. § 65-4-405(c) states:

> If, pursuant to 47 U.S.C. § 227(c)(3), the federal communications commission, establishes a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, the authority shall include the part of such single national database that relates to Tennessee in the database established under this part.

This subsection appears to have no bearing on the issue of the TRA's providing the telephone numbers in the Tennessee Do-Not-Call Register to the FTC. It provides only for use by the TRA of part of a national database in the event the Federal Communications Commission, a separate federal agency from the FTC, creates a national database. It does not expressly address a reciprocal arrangement between the TRA and the FTC or prohibit any action by the TRA with regard to the Tennessee Do-Not-Call Register. It does indicate, nevertheless, that the General Assembly did envision some coordination with a federal program designed to achieve the same goals.

Tenn. Code Ann. § 65-4-405(e) states:

> Information contained in the database established under this part shall not be subject to public inspection or disclosure under title 10, chapter 7. Such information shall be used only for the purpose of compliance with this part or in a proceeding or action under this part.

Although it refers to Tennessee's Public Records Act, Tenn. Code Ann. § 10-7-101 *et seq.*, this subsection does not bar the TRA from providing the telephone numbers contained in the Tennessee Do-Not-Call Register to the FTC.

The Public Records Act, at Tenn. Code Ann. § 10-7-503(a), states:

> Except as provided in § 10-7-504(f), 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 § 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.

The presumption under the Public Records Act is that all state records are open to inspection by the public unless covered by a specific exception. *Memphis Publishing Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994) (Public Records Act creates a "presumption of openness").

Under the Public Records Act, the public is entitled to gain access to state records through requests for those records to the agencies that maintain them. Exceptions can only be created by the legislature. *Cleveland Newspapers, Inc. v. Bradley County Mem'l Hosp. Bd. of Directors*, 621 S.W.2d 763, 765 (Tenn. App. 1981). Tenn. Code Ann. § 10-7-504, entitled "Confidential records," enumerates several categories of confidential state records. The language of the individual provisions of Tenn. Code Ann. § 10-7-504 varies, but a consistent pattern is evident with regard to the records declared confidential in that section. Subsection (3) is illustrative:

> The records, documents and papers in the possession of the military department which involve the security of the United States and/or the state of Tennessee, including, but not restricted to, national guard personnel records, staff studies and investigations, **shall be treated as confidential and shall not be open for inspection by members of the public.** (Emphasis provided).

When declaring a particular category of record confidential, the legislature in fact does two things. It specifically states that that type of record is confidential, and it states that that type of record is not available for public inspection. The first action entails a particular treatment of the record, under Tenn. Code Ann. § 10-7-504(b), for example, by the agency that maintains it. The term "confidential" implies that the agency is prohibited from disclosing the record so designated to anyone except as specifically provided in the Public Records Act. The second action removes the record from the presumptive availability to the public through a Public Records Act request. Comparison with the first sentence of Tenn. Code Ann.§ 65-4-405(e) shows that the legislature did not declare the information contained in the Tennessee Do-Not-Call Register to be a confidential record. That subsection speaks only to the second type of action typically found in a public records exception, removal of the availability of the record to the public through a Public Records Act request.

The practical reason for this statement in subsection (e) is evident from the other provisions of Tenn. Code Ann. § 65-4-405. Subsection (d)(1) requires a telephone solicitor to register with the TRA and pay a fee of $500.00, at which time the Do-Not-Call Register is provided to the telephone solicitor for its use. If the information contained in the Do-Not-Call Register were available upon public request under the Public Records Act, this fee requirement would potentially be rendered ineffective. The obvious purpose of the denial of access through a Public Records Act request in subsection (e) is to prevent telephone solicitors from circumventing the registration and fee requirement.

The fact that Tenn. Code Ann.§ 65-4-405(d)(1) makes the Do-Not-Call Register available to telephone solicitors upon registration and payment of a fee further indicates that the legislature did not intend that the information contained therein be treated as confidential. This provision makes the Tennessee Do-Not-Call Register available to a wide range of persons—persons unknown to those residential telephone customers who submit their numbers to the TRA, and persons not necessarily

even located in Tennessee—an action plainly inconsistent with an intent to declare a particular record confidential.

In sum, the first sentence of Tenn. Code Ann. § 65-4-405(e) does not prohibit the TRA from releasing the Do-Not-Call Register to the FTC. This provision, together with Tenn. Code Ann. § 65-4-405(d)(1), merely serves to channel public access to the register.

Nor does the second sentence of subsection (e) prohibit the TRA from providing the requested information to the FTC, if that sentence even has any bearing on this situation at all. The principal purpose of the second sentence is to emphasize that the register is not available to the public through a Public Records Act request but is only to be used for the purpose of the Do-Not-Call provisions of Tenn. Code Ann. § 65-4-405. It is doubtful, therefore, whether this sentence even applies to the situation presented here, which does not involve a request from the public but rather from an agency of the federal government. If this sentence does apply, however, it can reasonably be argued that the use of the information by the FTC, which appears to be quite similar to that of the Tennessee Do-Not-Call Register, would satisfy the requirement that the information in the register "shall be used only for the purpose of compliance with this part or in a proceeding or action under this part." Both programs are designed to prevent unwanted telephone solicitation and are narrowly crafted to achieve that limited purpose. The FTC program, moreover, is designed to and can be expected to protect Tennessee telephone customers, just as the Tennessee program does. The second sentence of Tenn. Code Ann. § 65-4-405(e), if applicable in this situation, appears not to be violated by the requested provision of the information to the FTC.

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