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Opinion No. 06-069

Records Custodian's Duties Under Public Records Act

QUESTIONS

1. What are the duties and responsibilities of a records custodian responding to a request for information pursuant to Tennessee's Public Records Act?

2. What are the penalties for failure to comply with the Public Records Act?

OPINIONS

1. In general, Tennessee's Public Records Act requires that a records custodian make any public records in his or her custody available for inspection during normal business hours, unless a state law provides otherwise with respect to the openness of such records.

2. The Act does not provide for any penalties, per se, against a records custodian for failure to comply with the Act. However, a court may assess against a nondisclosing governmental entity reasonable litigation costs, including attorneys' fees, if the court finds that the entity or its agent knew records were public and willfully refused to disclose them.

ANALYSIS

1. You have asked what the duties and responsibilities are of a records custodian under Tennessee's Public Records Act ("the Act"). The 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, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a).

Tennessee courts have recognized that state law includes state statutes (*e.g.*, Tenn. Code Ann. § 10-7-504); the Tennessee Rules of Civil and Criminal Procedure (*see Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 2000); *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987)); the Supreme Court Rules (*Coats v. Smyrna/Rutherford County Airport Authority*, 2001 WL 1589117 (Tenn. Ct. App. Dec. 13, 2001)); and, the common law (*see Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2005)). In addition, Tennessee courts have recognized that federal law can provide exceptions to Tennessee's Public Records Act by virtue of the Supremacy Clause of the United States Constitution. *See Seaton v. Johnson*, 898 S.W.2d 232 (Tenn. Ct. App.), *p.t.a.*

denied (1995). *See also, Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1988). To the extent that any such state law provides otherwise with respect to the openness of a record, then the Public Records Act does not require the records custodian to make records available for public inspection. If a record is otherwise a public record but contains confidential information that can be redacted, the records custodian is required to make such record available for inspection with the confidential information redacted. *See Eldridge v. Putnam County*, 86 S.W.3d 572 (Tenn. Ct. App. 2001), *p.t.a. denied* (2002); Tenn. Code Ann. § 10-7-504(f)(2).

The Public Records Act also provides:

> In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or such custodian's authorized deputy; provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.

Tenn. Code Ann. § 10-7-506(a). Thus, if requested, copies of any public records must be provided; however, the records custodian may require a charge or fee per copy that will cover the costs of producing such copies. *See Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1999), *p.t.a. denied* (2000). Furthermore, Tennessee courts have held that a citizen's personal presence is not required in order to request copies of a public record, if such citizen can sufficiently identify the documents that he or she wishes to obtain copies of, so as to enable the records custodian to know which documents are to be copied. *Id*. However, Tennessee courts have also held with respect to paper records that the:

> Public Records Act does not require a governmental entity to manually sort through records and compile information gained from those records. A Public Records Act request is not a discovery request pursuant to litigation. . . . While the inability to appear in person does not relieve the agency from the obligation to provide requested records, there is nothing in the Act which would shift to the agency the burden of manually compiling information from thousands of separate records into a new record. An agency has an obligation, upon payment of reasonable costs, to copy and provide to a nonappearing requestor, those documents or records that are sufficiently identified by the requestor, but has no obligation "to review and search their records pursuant to a Public Records Act request," or to "compile or collect statistics."

Hickman v. Tennessee Board of Probation and Parole, 2003 WL 724474 (Tenn. Ct. App. March 4, 2003) (citations omitted).

Tennessee courts have established a different standard with respect to electronic records, determining that once information is entered into a computer, any distinction between information and "record" diminishes. Accordingly, the Tennessee Supreme Court has held that where information exists electronically and can be extracted in the format requested by writing a computer program, the records custodian must produce the information as requested, provided the requestor is willing to pay the costs incurred in disclosing the information. *See Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998).

You have also asked what are the penalties for failure to comply with the Public Records Act. The Act does not provide any penalties, per se, for failure to comply with the Act. Rather, the Act provides that a citizen of Tennessee, who has requested the right of personal inspection of a record and whose request has been denied in whole or in part, may petition for access to such record and to obtain judicial review of the denial of access in Chancery Court. Tenn. Code Ann. § 10-7-505. "If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court, may in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity." Courts have construed "willful" as requiring evidence or demonstration that the governmental entity or agent thereof acted with bad faith, *Arnold v. City of Chattanooga, supra*, or where the controlling case law was not complex and/or unclear. *Tennessean v. City of Lebanon*, 2004 WL 290705 (Tenn. Ct. App. Feb. 13, 2004).

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