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Opinion No. 06-104

Confidentiality of records from reserve audit of governmental pool

QUESTION

Whether documents obtained during a reserve audit of a governmental pool, including attorney-client communications and attorney work product, are subject to inspection under Tennessee's Public Records Act, Tenn. Code Ann. § 10-7-503(a)?

OPINION

To the extent that any of the records made or received by the Department of Commerce and Insurance during the course of a reserve audit of a governmental pool constitute attorney-client communications or attorney work product under the Tennessee Rules of Civil Procedure, such records would be confidential and not subject to inspection under the Public Records Act. However, any other records made or received by the Department during the course of the audit would be public records and subject to inspection.

ANALYSIS

You have asked whether documents obtained during a reserve audit of a governmental pool by the Department of Commerce and Insurance, including any attorney-client communications and attorney work product, are public records subject to inspection under Tennessee's Public Records Act, Tenn. Code Ann. § 10-7-503(a). Tennessee's Public Records Act 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.

Tenn. Code Ann. § 10-7-503(a).

In determining whether a record is a public record for purposes of this Act, the Tennessee Supreme Court has held that the proper test is "whether [the record] was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991). The Supreme Court

further held that courts must look to the totality of the circumstances in making this determination.

Assuming that conducting a reserve audit of a governmental pool is part of the official business of the Department of Commerce and Insurance, then any records received during the course of that audit would be public records and subject to inspection under the Act, unless a state law provides otherwise. We are not aware of any law that, in general, makes the records of a reserve audit of a governmental pool confidential. However, the Tennessee Supreme Court has recognized that the Tennessee Rules of Civil Procedure, which contain both the attorney-client privilege and the attorney work product, are an exception to the Public Records Act.

> In *Appman v. Worthington*, . . . we held that the Public Records Act does not authorize public inspection of documents in a criminal case that are exempt from discovery by Rule 16, Tennessee Rules of Criminal Procedure. We reasoned that the Rules of Criminal Procedure are the law of this State, and therefore, are encompassed within the phrase, "unless otherwise provided by State law." Accordingly, we concluded that materials exempt from discovery by the rules of criminal procedure are not subject to inspection under the Tennessee Public Records Act.
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> ***The same reasoning applies in this case. The Rules of Civil Procedure are the "law" of this state***. (Emphasis added).

Ballard v. Herzke, 924 S.W.2d 652, 662 (Tenn. 1996) (internal citation omitted). *See also Swift v. Campell*, 159 S.W.3d 565, 571-572 (Tenn.Ct.App. 2004), *p.t.a. denied* (2005) and *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 784 (Tenn.Ct.App. 1999).[1]

Accordingly, to the extent that any of the records made or received by the Department of Commerce and Insurance during the course of a reserve audit of a governmental pool constitute attorney-client communications or attorney work product under the Tennessee Rules of Civil Procedure, such records would be confidential and not subject to inspection under the Public Records Act. However, any other records made or received by the Department during the course of the audit would be public records and subject to inspection.

[1]In addition to being provided for in the Tennessee Rules of Civil Procedure, the attorney-client privilege has been codified at Tenn. Code Ann. § 23-3-105.

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