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Opinion No. 07-170

Loudon County Economic Development Agency

QUESTIONS

1. Whether the Tennessee Public Records Act applies to the records of the Loudon County Economic Development Agency?

2. If the records of the Loudon County Economic Development Agency are subject to the Act, is there any exception that would allow marketing information, capital plans and other sensitive information received from companies that are being recruited to be kept confidential?

OPINIONS

1. Based upon the definition of "governmental function" adopted in *Allen v. Day* and the factors outlined by the Tennessee Supreme Court in the *Memphis Publishing Co.* case, we think a court would likely find that that the Loudon County Economic Development Agency is the functional equivalent of a government agency and, therefore, that its records would be subject to inspection under the Public Records Act.

2. If the Loudon County Economic Development Agency's records are subject to the Act, we are not aware of any provision of state law that would make marketing information, capital plans and other sensitive information received by the Agency from companies it is attempting to recruit confidential and not subject to inspection under the Public Records Act.

ANALYSIS

1. You have raised an issue with respect to the openness of the records of the Loudon County Economic Development Agency. Tenn. Code Ann. § 10-7-503(a) 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:

(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

(F) In addition to any other information required by the comptroller of the treasury, each audit shall also contain:

(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;

(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.

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;
> (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.

You have asked whether the records of the Loudon County Economic Development Agency ("LCEDA") are subject to the Public Records Act in light of these statutory provisions. According to the information provided, the LCEDA is a non-profit corporation that was originally chartered in 1967 as the Loudon County Industrial Committee of 100 for the purposes of advancing economic and industrial development in Loudon County. In 2000, the organization changed to its current name and expended its role such that it has been certified as a Joint Economic and Community Development Board under Tenn. Code Ann. § 6-58-114. The LCEDA is governed by a board of directors consisting of officials representing Loudon County and the cities of Loudon and Lenoir City, an individual representing greenbelt property owners, as well as individuals representing various utility boards and chambers of commerce. LCEDA receives the majority of its funding from governmental entities, including Loudon County and the cities of Loudon and Lenoir City. LCEDA

has a staff of two full-time employees, consisting of a President and an Assistant Director, and also employs an Office Manager on a part-time basis.

Based upon the information provided, it would appear that the LCEDA is an "association or nonprofit corporation described in § 8-44-102(b)(1)(E)(i)." It would further appear that, based upon the plain language of Tenn. Code Ann. § 10-7-504(d)(1)(F), the Public Records Act would not otherwise apply to the LCEDA, as it employs two or less full-time employees. However, the Tennessee Court of Appeals has recently held that "in light of our duty to construe the Tennessee Public Records Act liberally in favor of the fullest possible public access to public records and the guidance provided by our Supreme Court in *Memphis Publishing Co.*," the records of a nonprofit corporation that has complied with the exception in Tenn. Code Ann. § 10-7-504(d)(1) are still accessible to the public if the corporation is the functional equivalent of a governmental agency. *See Fodness v. Newport and Cocke County Economic Development Commission, Inc.*, 2005 WL 607964, slip op at 6 (March 16, 2005).

While the opinion in *Fodness* is an unpublished opinion and, therefore, not controlling authority, it is considered persuasive authority. *See* Tenn.Sup.Ct.R. 4(H). As such, we think that a court would engage in an analysis of the factors set forth in the *Memphis Publishing Co*. case to determine whether LCEDA is the functional equivalent of a governmental agency, even if it otherwise meets the statutory exception contained in Tenn. Code Ann. § 10-7-504(d)(1)(F). In making that determination, the Tennessee Supreme Court has stated that courts should look to the totality of the circumstances in each given case, and no single factor will be dispositive.

> The cornerstone of this analysis, of course, is whether and to what extent the entity performs a governmental or public function, for we intend by our holding to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibility to a private entity. Beyond this consideration, additional factors relevant to the analysis include, but are not limited to, (1) the level of government funding of the entity; (2) the extent of government involvement with, regulation of, or control over the entity; and (3) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.

Memphis Publishing Co. v. Cherokee Children & Family Services, Inc., 87 S.W.3d 67, 79 (Tenn. 2002).

The Tennessee Supreme Court did not define what constitutes a governmental or public function, nor is this term defined in the statute. However, in a recent decision, the Tennessee Court of Appeals has adopted the definition of "governmental function" contained in Connecticut's Freedom of Information Act, noting that such act is substantially similar to Tennessee's Public Records Act and that the Supreme Court had relied heavily upon Connecticut law in adopting the

functional equivalency test in the *Memphis Publishing* case. *See Allen v. Day*, 213 S.W. 244, 253 (Tenn.Ct.App.), *p.t.a. denied* (2006). Under that definition, "governmental function" means

> the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person received funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency.

Id. at 253-54.

According to the information provided, the LCEDA has been certified as a Joint Economic and Community Development Board pursuant to Tenn. Code Ann. § 6-58-114. Subsection (b) of that statute requires each county to establish a joint economic and community development board "to foster communication relative to economic and community development between and among governmental entities, industry and private citizens." The board is to be composed of representatives of county and city governments, private citizens and present industries and businesses; however, the activities of the board are to be jointly funded by the participating governments. Tenn. Code Ann. § 6-58-114(c) and (g)(1). The board is required to meet a minimum of four (4) times annually and the executive committee of the board is required to meet a minimum of eight (8) times annually. Furthermore, all meetings of the board and of the executive committee of the board are subject to Tennessee's Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq*. Tenn. Code Ann. § 6-58-114(f).

When applying for a state grant, a city or county must certify its compliance with the requirements of the statute. Tenn. Code Ann. § 6-58-114(i). Under subsection (j), the Local Government Planning Advisory Committee ("LGPAC")[1] may determine that an existing organization within a county may satisfy the requirement for a joint economic and community development board under this statute. Subsection (j) provides:

> If there exists within a county a similar organization on May 19, 1998, that organization may satisfy the requirements of this section. The county executive shall file a petition with the commission which shall make a determination whether the existing organization is sufficiently similar to the requirements of this section.

[1]The Local Government Planning Advisory Committee is created pursuant to statute. *See* Tenn. Code Ann. § 4-3-727.

> When the committee has made its determination, an affected municipality or county may rely upon that status of the existing organization to satisfy the certification requirements of subsection (i).

This Office has previously opined that the designation of an entity as an equivalent of a joint economic and community development board pursuant to this provision converts that entity, at least with respect to meetings where it acts in that capacity, to a "governing body" within the meaning of the Open Meetings Act. *See* Op. Tenn. Atty. Gen. 03-091 (July 24, 2003). Similarly, we think that, with the LCEDA's certification as a joint economic and community development board pursuant to Tenn. Code Ann. § 6-58-114, it is likely to be found to be performing a governmental or public function as defined by the Court of Appeals in *Allen v. Day*. Furthermore, the LCEDA receives the majority of its funding from governmental entities and it is governed by a board of directors which includes officials of those same governmental entities. Accordingly, based upon the definition of "governmental function" and the factors outlined in the *Memphis Publishing Co.* case, we think that the LCEDA would be held to be the functional equivalent of a government agency and, therefore, its records would be subject to inspection under the Public Records Act.

2. Your second question asks if there is any exception that would allow marketing information, capital plans and other sensitive information which the LCEDA receives from companies it is attempting to recruit to be kept confidential, if the LCEDA's records are subject to inspection under the Public Records Act. The Act does not define the term "public record"; however, the Tennessee Supreme Court has stated that the proper test for identifying a "public record" is "whether it 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). Certainly, marketing information, capital plans and other information received by the LCEDA from companies that it is attempting to recruit are records that were received "in connection with the transaction of official business" of the LCEDA and, therefore, would be public records subject to inspection unless there is a state law that provides otherwise.

Tenn. Code Ann. § 4-3-720(f)(1) does provide that company documents or records containing marketing information or capital plans that are provided to the Department of Economic and Community Development with the understanding that they are to be kept confidential "shall remain confidential until such time as the provider thereof no longer requires its confidentiality." The protection contained in this provision applies only to marketing information, capital plans and other sensitive company documents that are received by the Department of Economic and Community Development and does not extend to any such records received by a Joint Economic and Community Development Board, including the LCEDA. We are not aware of any other provision of state law that would make such records received by the LCEDA confidential and not subject to inspection under the Public Records Act.

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