STATE OF TENNESSEE
# OFFICE OF THE ATTORNEY GENERAL

August 26, 2016

Opinion No. 16-33

Public Records - Tennessee State Museum Foundation

## Question

Whether the identity of donors and the amounts of donations made to the Tennessee State Museum Foundation are required to be disclosed under the Tennessee Public Records Act.

## Opinion 1

No.

## ANALYSIS

The Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503(a)(2)(A), provides that "[a]ll state, county and municipal records" are open for personal inspection by any citizen of Tennessee unless otherwise provided by state law. A "public record" is defined as "all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-503(a)(1)(A) (emphasis added).

The Tennessee State Museum Foundation (the "Foundation") is a Tennessee nonprofit public benefit corporation originally incorporated as the Tennessee State Museum Association, Inc., in October 1975. The name was changed to the Tennessee State Museum Foundation in 1988. The Foundation was established to support the activities of the Tennessee State Museum and, among other things, is empowered to solicit and to receive donations, to establish fundraising projects, and to accept loans, bequests, and devises of property. In 1976, the Internal Revenue Service issued a determination letter recognizing the Foundation as exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. The Foundation is also classified as a public charity under sections 509(a)(1) and 170(b)(1)(A)(vi) of the Internal Revenue Code.

Since the Foundation is a Tennessee nonprofit public benefit corporation and not a governmental agency, its records, including records identifying donors and donation amounts, would not be subject to disclosure under the Public Records Act, absent some exception applicable to the Foundation. For the reasons explained below, neither of the two possibly applicable exceptions appears to apply to the Foundation.

First, the Public Records Act does make its disclosure requirements applicable to "[a]ll records of any association or nonprofit corporation described in § 8-44-102(b)(1)(E)(i)." Tenn. Code Ann. § 10-7-503(d)(1). However, Tenn. Code Ann. § 10-7-503(d)(3) specifically provides

that subsection (d) "shall not apply to any association, organization or corporation that was exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code . . . as of January 1, 1998, and which makes available to the public its federal return of organization exempt from income tax (Form 990) in accordance with the Internal Revenue Code and related regulations." The Foundation was determined to be tax-exempt under § 501(c)(3) in 1976 and the Foundation's Form 990 is publicly available.[1] Thus, even if the Foundation were a "nonprofit corporation described in § 8-44-102(b)(1)(E)," it would still be exempt from application of the Public Records Act pursuant to Tenn. Code Ann. § 10-7-503(d)(3).

Second, the Tennessee Supreme Court has recognized that, in some instances, a private entity may be the functional equivalent of a governmental agency, in which case its records may be subject to disclosure under the Public Records Act. *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67 (Tenn. 2002). In making such a determination, courts look to the totality of the circumstances in each given case, and no single factor is 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 at 79.

The Tennessee Supreme Court did not define "governmental or public function," nor is this term defined in the Act. However, in *Allen v. Day*, 213 S.W.3d 244 (Tenn. Ct. App. 2006), the Tennessee Court of Appeals adopted the definition of "governmental function" contained in Connecticut's Freedom of Information Act, noting that Connecticut's 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. *Id.* at 253.

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

[1] Both the Foundation's Form 990 and its Audit documents are available to the public on several different websites, including GivingMatters.com.

> 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. "Governmental function" shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.

*Id*. at 253-54 (quoting Conn. Gen. Stat. Ann. § 1-200(11)). In applying this definition, the Connecticut courts have held that the "key to determining whether an entity is a government agency or merely a contractor with the government 'is whether the government is really involved in the core of the program.'" *Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission*, 704 A.2d 827, 832 (App. Ct. 1998).

The first prong of the functional equivalent test is whether the private entity performs a governmental function. Traditionally, state and local governments have provided fire prevention, police protection, sanitation, public health, and parks and recreation "in discharging their dual functions of administering the public law and furnishing public services." *National League of Cities v. Usery*, 426 U.S. 833, 851, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976), overruled on other grounds by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). The Foundation does not perform any traditional governmental function. Rather, the purpose of the Foundation is to support the activities of the Tennessee State Museum primarily through the solicitation of donations and other fundraising projects, which is generally recognized as a private-sector function, not a governmental function.

The second prong of the functional equivalent test focuses on the level of government funding. The most recent Form 990 filed by the Foundation with the Internal Revenue Service reflects that the Foundation does not receive any governmental funding.

The third prong focuses on the extent of government involvement with, regulation of, or control over, the private entity. The Foundation is governed by a board of eighteen Trustees. By-Laws, Art. VI, Sec. 1. These Trustees serve staggered terms of three years each. By-Laws, Art. VI, Sec. 2. Every two years a member of the Senate and the House, respectively, is appointed to serve a two-year term as a member of the Board of Trustees. Additionally, one member of the Board is appointed by the Governor to serve a four-year term, concurrent with the Governor's term of office. By-Laws, Art. VI, Sec. 1. The By-Laws also provide that a quorum consists of twelve Trustees. Thus, the government involvement with the Foundation is very limited, and the government does not regulate or control the Foundation.

The fourth and final prong of the functional equivalency test considers the way in which the private entity was formed. The Foundation was not created by any sort of governmental action,

but was incorporated as a non-profit public benefit corporation in 1975 and has been recognized as a § 501(c)(3) tax-exempt organization since 1976.

Thus, none of the factors identified by the Supreme Court in the *Memphis Publishing* case would appear to support a determination that the Foundation is the functional equivalent of a governmental entity. Accordingly, since neither of the two potential exceptions applies to bring the Foundation within the scope of the Tennessee Public Records Act, the records of the Foundation, including records identifying donors and donation amounts, are not required to be disclosed under the Act.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JANET M. KLEINFELTER
Deputy Attorney General

Requested by:

The Honorable Steve K. McDaniel
Deputy Speaker
18 Legislative Plaza
Nashville, TN 37243