STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 18-07

Powers of Citizen Review Boards

Question 1

Does a citizen review board have the power to issue a subpoena for investigative purposes?

Opinion 1

Whether a particular citizen review board has subpoena power depends on the provisions of the local government charter under which the citizen review board was created. If subpoena power is authorized, such power must be exercised in accordance with the provisions of the charter.

Question 2

Does a citizen review board have the power to access records, training sessions, recordings, and other information, including information related to pending criminal cases?

Opinion 2

A citizen review board's ability to access records, training sessions, recordings, and other information will depend on the scope of the subpoena and the person on whom the subpoena is served because the reach of a subpoena can be circumscribed by constitutional guarantees, statutory provisions, privilege, and other like constraints. As for information related to pending criminal cases, Rule 16 of the Tennessee Rules of Criminal Procedure would most likely prevent a citizen review board from obtaining this information through a subpoena.

ANALYSIS

Citizen review boards oversee local law enforcement agencies. Local governments generally create citizen review boards to independently review allegations of police misconduct and evaluate internal procedures used by local law enforcement personnel. These boards typically exist in the United States' larger cities.[1]

In Tennessee, a citizen review board is created under a local government's charter – not by state statute. Thus, citizen review boards have no independent subpoena power conferred upon them by the General Assembly. Consequently, a citizen review board must look for subpoena

[1] See https://www.policemisconduct.net/explainers/civilian-review-boards/; Peter Finn, Citizen Review of Police: Approaches and Implementation (March 2001).

power in the charter of the local government that created it. *See City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1998) (municipalities may exercise only those express or necessarily implied powers delegated to them by the General Assembly in their charters or under statutes). *See, e.g., Metropolitan Elec. Power Bd. v. Metropolitan Gov't of Nashville*, 309 S.W.3d 474 (Tenn. Ct. App. 2008) (court determined that Metropolitan human rights commission did not have authority under Metro Charter to investigate an employment discrimination complaint filed by a city electric service employee).

For instance, the legislative body of a municipality that operates under a city manager-commission charter has subpoena power, as well as the power to "delegate it to any committee." Tenn. Code Ann. § 6-20-211(b)(1)(A). Other local government charters confine subpoena power to the local government's legislative body. *See, e.g.*, Tenn. Code Ann. § 6-32-109 (modified city manager-council charter). And some local governmental entities have no subpoena power. *See, e.g.*, Tenn. Att'y Gen. Op. 83-462 (Oct. 26, 1983) (opining that counties with a traditional form of government have no subpoena power under Tenn. Code Ann. § 5-5-126 or otherwise).

Accordingly, whether a particular citizen review board has subpoena power depends on the provisions of the charter under which the citizen review board was created. If subpoena power is authorized, such power must be exercised in accordance with the provisions of the charter.[2]

Assuming a citizen review board has subpoena power and properly exercises that power, the citizen review board's ability to access records, training sessions, recordings, and other information will depend on the scope of the subpoena and the person on whom the subpoena is served because the reach of a subpoena can be circumscribed by constitutional guarantees, statutory provisions, privilege, and other like constraints. *See State ex rel. Shriver v. Leech*, 612 S.W.2d 454 (Tenn. 1981) (subpoena tested against several constitutional provisions); *State Dep't of Revenue v. Moore*, 722 S.W.2d 367 (Tenn. 1986) (administrative subpoena subject to provisions of the Financial Records Privacy Act); *State v. Kendrick*, 178 S.W.3d 734 (Tenn. Crim. App. 2005) (media privilege successfully asserted in response to subpoena).

One such constraint is Rule 16 of the Tennessee Rules of Criminal Procedure. As explained below, this rule would most likely prevent a citizen review board from obtaining information related to pending criminal cases, i.e., information generated or gathered by the local law enforcement agency that the citizen review board oversees.

[2] For example, the City of Memphis has created the Civilian Law Enforcement Review Board to investigate allegations of misconduct filed by citizens against City of Memphis police officers. The City of Memphis operates under a home rule charter that provides subpoena power to its legislative body only. *See* City of Memphis Charter Art. 7 § 47. Consequently, Chapter 2-52 of the Memphis City Code, which establishes the Civilian Law Enforcement Review Board, provides that "the board is authorized to request through the Memphis City Council or the Shelby County Commission that when necessary the council or the commission would exercise that body's subpoena powers to effectuate an investigation." City of Memphis Code § 2-52-4.

Since 1978, the Tennessee Rules of Criminal Procedure have governed the procedure in all trial court criminal proceedings.[3] Rule 16 sets forth the limits of discovery. Rule 16(a)(1) identifies the information that the State must disclose upon a defendant's request. Rule 16(a)(2), which is at issue here, provides:

> Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

The Tennessee Supreme Court, on several occasions, has found that Rule 16(a)(2) shields public records from disclosure.[4] While the cases involve record requests under the Public Records Act, as opposed to a subpoena, these cases lead to the conclusion that the vehicle used to seek information related to a pending criminal case is of no import.

In 1987, the Court first held that Rule 16 prevented the disclosure of an open investigative file in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987). The issue before the Court was whether investigative records regarding the death of an inmate at a state correctional facility were available for inspection by two fellow inmates – one who was charged with the inmate's murder and another who was charged as an accessory after the fact. *Id*. at 165. The Court observed that the requested records were the product of the investigation by Internal Affairs of the Department of Correction and related to the prosecution of these two defendants, plus two other defendants who were charged with the inmate's murder. *Id*. at 166-167. Consequently, the Court found that the records, under Rule 16(a)(2), were not subject to inspection because the criminal cases were ongoing.[5] *Id*.

In 2007, the Court revisited *Appman* when it addressed the City of Jackson's refusal to allow newspaper reporters to access field interview cards generated by its police officers. *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007). The City maintained that the field interview cards were exempt from disclosure because the common law includes a law enforcement investigative privilege. *Id*. at 334. The Court held that there was no such privilege in Tennessee, *id*. at 334, 342-244, but remanded the case to the trial court to determine whether any of the police department records were part of a pending, open, or ongoing criminal investigation. *Id*. at 334, 345-346. The Court explained that the remand was necessary because "the City's failure even to

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[3] *See* Tenn. R. Crim. P. 59, Advisory Comm'n Cmt. Tennessee Rule of Criminal of Procedure 1(a) provides that the rules apply to criminal proceedings in all courts of record.

[4] The Tennessee Public Records Act provides that governmental records shall be open for inspection and that the right of inspection shall not be denied "unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A). The Tennessee Rules of Criminal Procedure, including Rule 16, are encompassed within this exception. *Tennessean v. Metropolitan Gov't of Nashville*, 485 S.W.3d 857, 865-866 (Tenn. 2016).

[5] In so finding, the Court distinguished its prior decision in *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986) wherein the Court held that Rule 16 did not shield a *closed* investigative police file that was not relevant to any pending or contemplated criminal action. *Appman*, 746 S.W.2d at 166.

review the field interview cards for the purpose of identifying those cards or portions of cards containing information relevant to an ongoing criminal investigation [was] inexplicable, given that these cards would clearly have been exempt from disclosure under Rule 16(a)(2) and this Court's decision in *Appman*." *Id*. at 345.

Most recently, the Tennessee Supreme Court addressed whether a coalition of media groups and a citizen association could have access to records accumulated and maintained by a police department in the course of its investigation and prosecution of an alleged rape in a college campus dormitory. *Tennessean v. Metropolitan Gov't of Nashville*, 485 S.W.3d 857 (Tenn. 2016). The specific issue before the Court was whether the Public Records Act "applies to allow public access to investigative records that arise out of and are part of a criminal investigation resulting in a pending prosecution, are not the work product of law enforcement under Rule 16(a)(2), were gathered by law enforcement from other sources in their investigation of the case, and are requested by entities that are not parties to the pending criminal case." *Id*. at 870.

The Court held that Rule 16(a)(2) shielded the requested investigative records. *Id*. at 859. The Court initially observed that there is no provision in Rule 16 for release of discovery materials to the public. *Id*. at 871. Then, the Court noted the case before it presented the same concerns that counseled in favor of remand to the trial court in *Schneider* – the "harmful and irreversible consequences [that] could potentially result from disclosing files that are involved in a pending criminal investigation." *Id*. (quoting *Schneider*, 226 S.W.3d at 345-346). The Court explained that the criminal discovery process involves the reciprocal exchange of material which includes information that may or may not submitted as evidence. Disclosure of this information to the public could implicate the fair trial rights of the defendant. *Id*. Moreover, the Court noted that the privacy interests of witnesses, investigators, and victims could be potentially implicated because discovery records often contain personal information. *Id*.

Importantly, the Court further explained that if Rule 16 did not function as an exception to the Public Records Act, a defendant would have no reason to seek discovery under Rule 16. The defendant would simply file a public records request and obtain an entire police investigative file, which would include more information than the defendant could obtain under Rule 16. *Id*. Similarly, the Court reasoned that if the media could make a public records request and obtain the investigative file, the defendant and potential jurors could learn about the State's case against the defendant by reading a newspaper or watching a television news broadcast. Accordingly, the Court determined that "[t]his absurd result was not intended by the Legislature and would have a negative impact on a police department's ability to investigate criminal activity and a defendant's ability to obtain a fair trial." *Id*.

Based on this rationale, Rule 16 should also shield information related to a pending criminal case that is sought through a subpoena. A defendant would have no reason to seek discovery under Rule 16 if he could simply subpoena an entire police investigative file. And the same "harmful and irreversible consequences" exist: a defendant's right to a fair trial could be jeopardized and the privacy interests of others could be implicated if information related to a pending criminal case could be subpoenaed by a third-party. Accordingly, Rule 16 would most likely prevent a citizen review board from using a subpoena to obtain information related to a pending criminal case.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

LAURA T. KIDWELL
Senior Counsel

Requested by:

The Honorable Brenda Gilmore
State Representative
420 Cordell Hull Building
Nashville, Tennessee 37243