

## MEMORANDUM

TO: Ron Woody, CTAS County Government Consultant  
FROM: David Connor, CTAS Legal Consultant  
DATE: 2/23/2007  
RE: Loudon County Proposed Public Records Policy

I'm going to point out issues where there may be problems in the order as they come up through the draft resolution.

I should first state that the Tennessee Public Records Act has been construed broadly by the both the state attorney general and the Tennessee judiciary. See generally, *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986). The legislature made it clear that its intent in passing this law was to "...give the fullest possible public access to public records" and it instructed the courts to exercise whatever remedies are necessary to ensure that purpose is fulfilled. Tenn. Code. Ann. § 10-7-505(d). The courts have ruled that a "presumption of openness" exists with government documents. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991). Because of these guidelines for interpreting the public records laws, county governments should be careful to tailor narrowly any regulations that may infringe upon or limit the public's ability to access open government records. My analysis of this draft resolution is written from the perspective that Tennessee courts will strike down local regulations that appear to have the intent or effect of hindering public access to records.

### Authority

The first problem I see with this resolution deals with the authority to adopt such a resolution. This draft appears to be a policy the county legislative body is adopting for the county mayor's office and appointed department heads under the direction of the county mayor. I know of two places in the Tennessee Code that provide authority to adopt rules and regulations regarding copying public records. The first is found in Tenn. Code Ann. § 10-7-411 where the county public records commission is granted authority to adopt such rules and regulations. The second is found in Tenn. Code Ann. § 10-7-506(a) where the lawful custodian of the records is granted authority to adopt and enforce reasonable rules governing making copies of public records. I am not aware of any statute giving the county legislative body authority to adopt such rules or regulations for the offices of other county officials or employees.

### **Section 1. SCOPE**

Under part B regarding confidential records I would suggest some additions and clarifications.

Under number 6, the county is also governed by provisions of the Americans with Disabilities Act which makes employee medical records confidential. The

reference to Tenn. Code Ann. § 10-7-504(d) specifically relates only to records of an “employee assistance program.”

Under number 7 regarding persons with a valid protection document, the provisions in Tenn. Code Ann. § 10-7-504(a)(15) only apply to utility service providers. The provisions in Tenn. Code Ann. § 10-7-504(a)(16) may apply in county offices, but are permissive. Utility service providers are required to maintain these records in a confidential manner under Tenn. Code Ann. § 10-7-504(a)(15)(E), but county officials are not required to accept such requests under Tenn. Code Ann. § 10-7-504(a)(16)(E).

Under number 8, the provisions regarding confidential information of county employees (social security numbers, bank account numbers, etc.) should also include similar information regarding family members of the employee.

## **Section II Rules for Access to Public Records**

### **A. Proof of Citizenship**

Under part A of this draft, citizens are required to show proof of Tennessee citizenship in order to get access to public records. The Attorney General has opined that a person who is not a citizen of Tennessee may be denied access. *See* Op. Tenn. Att’y Gen. 01-132 (Aug. 22, 2001). However, these types of requirements to prove citizenship have been criticized as an attempt to intimidate or frustrate access to records. In addition, there has been a federal district court decision in the state of Delaware that held that a citizens only restriction on access to public documents under Delaware Freedom of Information Act violated the Privileges and Immunities Clause of the U.S. Constitution. *See, Lee v. Minner*, 369 F.Supp. 527 (Del. 2005).

Under Tenn. Code Ann. § 10-7-503(c), a person who requests to inspect law enforcement personnel records is required to provide certain identifying information. That is the only provision of the Tennessee Code where some disclosure is required in order to have access to public records. The requirement of proof of citizenship in this draft policy may be struck down by courts since it is only clearly authorized for law enforcement personnel records.

### **B. Requests for Records**

This part of the draft resolution requires all requests for public records to be made in writing. The Tennessee Court of Appeals has opined that the Tennessee Public Records Act does not allow an official to deny access to a public record because the citizen requesting the record refuses to fill out a form or make the request in writing. *See Wharton v. Wells*, 2005 WL 3309651. While this is an unreported case, I think it demonstrates the posture of Tennessee courts toward unnecessary paperwork as an obstacle to hinder access to public records.

## **D. Limitations on Disclosure of Confidential Records**

This section includes a requirement that the person requesting access to a record that includes confidential information pay the costs of redacting the confidential information. This is not clearly authorized anywhere in the law. In fact, under Tenn. Code Ann. § 10-7-504(f)(2) [this is the provision that relates to confidential information in county employee personnel files], the law expressly provides that when a record includes confidential personal information, it should be redacted wherever possible and the fact that confidential information was in the record should not be used to limit or deny access. In my opinion, charging the public for the costs of redacting confidential information in order to allow access to public information would likely be struck down by a court.

## **F. Custody of Records & G. Procedures for Copying Public Records**

These sections discuss the release of public records to commercial copying services. Our agency would strongly recommend against releasing records in this manner. The custodian of the records is responsible for safekeeping these records and should not place original public records in jeopardy by sending them out to commercial copying facilities. The county needs to provide a means for the public to get a copy of a public record while it remains in the custody of the official responsible for the record.

### **1. Cost of Copies.**

The draft includes a provision for recovering costs associated with making copies. These costs are at a rate of \$0.07/per page plus a charge to recover costs of employee time at a rate of \$23.47/per hour. Tenn. Code Ann. § 10-7-506 (a) authorizes a custodian of records to adopt and enforce reasonable rules governing making copies of public records. This has been interpreted by courts and the Attorney General to allow recovery of “actual costs.” This term is not clearly defined. However, the Attorney General has opined that “actual costs” may include personnel time, computer use, materials and other incidental costs. Op. Tenn. Atty Gen. 80-455. However, that opinion clearly states that the county may only charge a fee that reasonably incorporates the actual costs of copying. While it appears an effort was made to document costs, my impression is that the rates listed in this policy are excessive. Perhaps that is because the rates for reimbursement of employee time include social security, insurance and benefits. I would suggest that the county attempt to keep these costs as low as possible in order not to invite a legal challenge to the fees. I was asked in addition to address whether the county could charge for putting records into a requested alternative format. I am assuming this relates to electronic formats. Under the case of *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998), a person requesting records may be charged for costs associated with programming that is necessary to convert records into a requested format.

### **2. Records With Commercial Value**

Provisions are included in the draft for records with commercial value. Under state law, a premium may only be charged for records with commercial value if the records include a computer generated map or similar geographic data developed with public funds. See Tenn. Code Ann. § 10-7-506(c)(1).

## **Summary**

As I stated initially, the county legislative body is without authority to pass such a broad resolution regarding county records as these duties usually fall within the purview of the individual county officials who are the custodians of the records. Furthermore, I would not recommend that individual county officials in Loudon County adopt rules that are as burdensome as those in this draft. The amount of procedures and the level of fees in this policy seem excessive and contrary to the legislative intent of the General Assembly as expressed in the Tennessee Public Records Act. There is an entire chapter in our publication *Records Management for County Government* which discusses public access to records. It specifically addresses fees and includes references to additional Attorney General's Opinions that interpret local government authority to regulate access to and to charge fees for copies of public records.