

Scope and Application

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Table of Contents

Scope and Application	3
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Scope and Application

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The Tennessee Public Records Act (hereinafter referred to as the "Act") is a statutory creation of broad scope and application. The legislature has stated that the Act "shall be broadly construed so as to give the fullest possible public access to public records." T.C.A. § 10-7-505(d). The Act requires that all state, county, and municipal records be open for public inspection during normal business hours unless the records are confidential. The overarching provision of the Act is found at T.C.A. § 10-7-503(a)(2)(A) and reads:

All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

A: Who is Entitled to Access Public Records?

Pursuant to the Act, only citizens of Tennessee have the statutory right to access requested public records. The term "citizen" is broadly construed, for purposes of the Act. Each municipality's public records request coordinator (hereinafter "PRRC") may, pursuant to the language in the municipality's public records policy, require a requestor making a request to view and/or receive copies of public records to present a valid government-issued photo identification which includes the individual's address. If a requestor does not possess a valid government-issued photo identification that includes an address, the PRRC may accept other forms of identification. As long as a requestor can produce a valid government-issued photo identification that includes a Tennessee address or some other acceptable identification, the requestor must be provided access to requested records that are not otherwise confidential. *Friedmann v. Marshall County, TN*, 471 S.W. 3d 427 (Tenn. Ct. App. 2015). This is true even if the requestor is incarcerated or has a felonious criminal record. *Cole v. Campbell*, 968 S.W. 2d 274 (Tenn. 1998).

While only citizens of Tennessee have the statutory right to access requested public records, municipalities are not statutorily required to deny access to individuals who are not citizens of Tennessee. Each municipality's public records policy should address who has the right to access municipal records.

Also, municipalities may not deny access to public records based upon the requestor's use or intended use of the records. Except in very limited circumstances, a requestor cannot be required to provide an explanation of his or her intended use of the records and a PRRC should not inquire into a requestor's purpose for requesting the records. Questioning could be interpreted as an attempt to discourage requestors from requesting access to records that they are legally entitled to access.

B. What Materials are Covered by the Act?

Almost every record created, maintained, or received by a municipal government is covered by the Act.

The Act defines "public record" 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.

T.C.A. § 10-7-503(a)(1)(A).

Hence, to determine whether a document is a public record, it must first be determined if the document was made or received in connection with the transaction of official business by any governmental agency. This determination should be made by considering the totality of circumstances.

It is important to note that just because a record is covered by the Act, it is not necessarily open to

public inspection. Many records covered are confidential and not accessible to the public.

C. Records of Nongovernmental and Quasi-governmental Bodies

The courts in Tennessee have held that some nongovernmental and quasi-governmental entities, as well as the boards of these bodies, are subject to the Act. To determine if the body is subject, the courts in Tennessee use the “functional equivalency” test analysis. *Memphis Publishing Co. v. Cherokee Child & Family Services*, 87 S.W. 3d. 67 (Tenn. 2002). If the body is acting as the functional equivalent of government, its records are covered by the Act. Here, too, one must consider the totality of circumstances; however, the four (4) factors that the courts have expressly set out as part of the functional equivalency analysis are:

1. Whether the entity is performing a traditional governmental function;
2. The level of governmental funding;
3. The extent of governmental involvement or control; and
4. Whether the entity was created by the government.

Nongovernmental entities found to be covered by the Act include a sports authority, *Op. Tenn. Atty. Gen. No. 96-011* (Feb 6, 1996); sublessees of municipally owned property, *Creative Restaurants Inc. v. Memphis*, 795 S.W. 2d. 672 (Tenn. Ct. App. 1990); and a private prison corporation contracted with the State to house inmates, *Friedmann v. Corrections Corporation of America*, 310 S.W. 3d 366 (Tenn. Ct. App. 2009).

D. Documents in Electronic and Other Non-paper Formats

As the quantity of records produced by municipalities expands, the use of technology becomes increasingly necessary to process and store the records. As this technology is implemented into the public sphere, municipalities must ensure that electronic storage does not fetter public access.

The legislative language defining what records are accessible to the public is intentionally broad. Electronic records are subject to public records and retention requirements just like all other records. The language of T.C.A. § 10-7-121 provides that electronically stored records must, like their paper counterparts, be made available for public inspection. This, coupled with case law, solidifies the notion that regardless of format, public records are accessible to the public during municipal business hours.

The Tennessee Supreme Court addressed the issue of access to electronically maintained records and information in *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297 (Tenn. 1998). In that case, specific categories of electronically stored information were requested. In order for the requested information to be provided to the requestor, a program had to be created to extract the information. The Court held that the information was public information and the governmental entity was required to create a program or have a program created to extract the requested information.

The court also addressed electronically stored records and information in *Lance v. York*, 359 S.W. 3d 197 (Tenn. Ct. App. 2011). While there is no language in the Act that explicitly states that a requestor has the right to choose the format in which a requested record is produced, the court in *York* did state that when records are maintained in electronic format and are requested in that format, the records should be provided electronically. *Id.* at 203.

Email communications, voicemails and text messages that are sent or received as part of municipal business are also subject to the Act, whether sent or received on personal equipment or equipment owned by a municipality. As is the case with all other municipal records, municipal employees and officials are required to retain electronic records based upon the content of the records. As such, employees and officials should be familiar with the municipality’s adopted retention policy to determine what, if any emails, text messages and voicemails are required to be retained.

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