

**Questions and Answers
Open Records Lunch and Learn
August 14, 2008**

All answers are from the Tennessee Office of Open Records Counsel unless otherwise noted.

1. What do we do on requests for real time traffic or park videos under TPRP?

“Public records” are defined as follows:

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.

Unless there is an exception for these types of records within state law, the video records have to be released if a public records request is made for them.

2. Can counties convert personnel documents to electronic media and destroy the hard copies of records that are at least 3 years old?

The Office of Open Records only advises on providing access to records. The Office recommends that any questions relative to conversion of records and/or destruction of records be directed to MTAS, CTAS, or the appropriate county public records commission.

3. Citizen comes in to look at record (example: site plans) and no one is available to assist. What should we do?

PC 1179, Acts of 2008, requires a records custodian to make non-exempt records available as promptly as possible, and if it is not practicable to make the records promptly available, the custodian has to within seven (7) business days either; (1) make the records available; (2) deny the request in writing with the legal basis for the denial included; or (3) furnish the requestor a completed records production letter created by the Office of Open Records Counsel that states the time reasonably necessary to produce the requested records.

Based upon the above cited legislative provision, if there is no one available to produce a record when it is requested or if the record is not ready to be produced (i.e. it requires review or redaction), the custodian has seven (7) business days to take one of above mentioned actions.

4. What does redacting mean?

According to several dictionaries, the word “redact” means to make editorial changes. When used with reference to public records, redaction occurs when a copy of a document is made, a black marker is used to strike through or obscure confidential information within the copy, and then a second copy is made of the newly redacted document.

5. What advice do you have in methods to respond to large email or telephone records requests?

Answered by CJE: CJ Enterprises is currently developing a package of services and technologies designed to assist local governments in complying with the requirements of the Tennessee Public Records Law. We would be happy to discuss your specific requirements.

6. Are personal emails checked on a city computer, on a personal email address public records?

According to the Tennessee Court of Appeals in *Brennan v. Giles County Board of Education*, there is no bright line rule as to whether or not private emails made or received on government computers are “public records.” See *Brennan v. Giles County Board of Education*, 2005 WL1996625 (Aug.18, 2005). The Court opined that if the email, in whole or in part, meets the definition of public record, it would be subject to inspection or copying in accordance with the Tennessee Public Records Act.

To the extent that confidential information is included in an email that has been requested, that information (such as employee home phone numbers) must be redacted.

7. Where can the 250 exceptions be found?

It should first be noted that there is no exhaustive list of all of the exceptions to the Tennessee Public Records Act which are either codified in statute, common law, court decisions, court rules, administrative rules, rules of civil and criminal procedure, and federal law. There is an extensive list of statutory exceptions in Tenn. Code Ann. §§10-7-503 and 504, and Tenn. Code Ann. § 10-7-504 contains a cross-reference list of all of the statutory exceptions to the Tennessee Public Records Act.

8. When will you provide a fee schedule and what input will cities have in fees that are imposed?

The Schedule of Reasonable Fees that the Office of Open Records Counsel is required to establish in accordance with Public Chapter 1179, Acts of 2008, is scheduled for release on October 1, 2008 with an effective date of October 15, 2008. A public hearing is scheduled for September 5, 2008, at 9:00 a.m. CST

in room 16 of Legislative Plaza, to be videostreamed over the General Assembly's website. The purpose of the hearing is to give both citizens and government officials the opportunity to comment on fees for public records.

9. Can we ask citizens to make an appointment to view records later within 7 days?

As stated in response to question #3, PC 1179, Acts of 2008, requires a records custodian to make non-exempt records available as promptly as possible, and if it is not practicable to make the records promptly available, the custodian has to within seven (7) business days either: (1) make the records available; (2) deny the request in writing with the legal basis for the denial included; or (3) furnish the requestor a completed records production letter created by the Office of Open Records Counsel that states the time reasonably necessary to produce the requested records.

With regard to requiring a requestor to make an appointment, the Tennessee Attorney General has opined as follows on this issue:

No statute expressly requires a citizen to make an appointment in order to inspect public records. If an agency required a citizen to make an appointment for this purpose, and the citizen challenged such requirement in court, the court might not view the requirement as tantamount to a denial of access to public records if the agency could articulate a reasonable basis for the appointment requirement. Absent a reasonable basis for the requirement, a court could conclude that the agency was merely using it to delay access.

Op. Att'y Gen. 01-021 (February 8, 2001).

10. Why are phone numbers in business license info confidential?

Tenn. Code Ann. § 67-4-722(d) states that only the name and address of the present or former owner or operator of a business is open for public inspection. By not expressly including phone numbers in the list of those items which are public, the General Assembly has restricted access to phone numbers. The Tennessee Attorney General has opined as follows on this issue:

All statements of a taxpayer, which include any information stated on a business license application or on any other form completed for business tax purposes, are confidential pursuant to Tenn. Code Ann. § 67-4-722(c)(1)...Section 67-4-722(d) specifically exempts the "name and address of any present or former owner or operator" appearing on a business license application from other confidentiality requirements. Section 67-4-722(d) provides that this exemption controls "notwithstanding any other provision of law to the contrary." That declaration clearly removes the information exempted in § 67-4-722(d) from the

confidentiality provisions of both Tenn. Code Ann. § 67-4-722(c)(1) and Tenn. Code Ann. § 67-1-1702 and makes such information a public record open for public inspection. Thus, all information provided on a business license application is confidential unless specifically exempted under Tenn. Code Ann. § 67-4-722.

Therefore, the business name, the business owner's name, and the business address obtained as information on a business license application routinely made to a County Clerk or a municipal tax collector may be released as public information pursuant to Tenn. Code Ann. § 67-4-722(d). Although the business name is not specifically mentioned under Tenn. Code Ann. § 67-4-722(d), such information cannot constitute public information since releasing the business name would be necessary to reference the correct business record. Any telephone number or numbers listed by an applicant on a business license application do not become public information because they are not exempted from the confidentiality provisions of Tenn. Code Ann. § 67-4-722(c) by Tenn. Code Ann. § 67-4-722(d).

Op. Att'y Gen. 01-165 (September 15, 2001).

11. Hypothetical: A requestor asks to inspect 10,000 documents and it takes 1,000 hours to locate and produce them to the requestor. No charges can be made. Is this correct? The requestor then looks at the 10,000 documents and asks for a copy of 1,000 of them. Are the only charges that can be imposed the time and expense required to make the 1000 copies? Is remedial legislation being contemplated to fix this situation?

According to Public Chapter 1179, Acts of 2008, a records custodian cannot assess a requestor a fee to view a public record. No; If the records custodian has kept track of the time it took to locate and produce the 10,000 documents and can specifically account for the time it took to locate and produce the 1,000 documents for which copies are now being requested, the records custodian is permitted to charge for the initial time it took to locate and produce the records, the hourly wage of the employees reasonably necessary to make the copies, the cost of the copies themselves, and any other actual cost of producing the requested material, minus the five (5) hours of non-billable labor specified by the statute.

12. Before issuing an opinion on an Open Records Act issue, will the Office of Open Records Counsel obtain “guidance” from the Advisory Committee? If not, what type of Advisory Committee “guidance” is contemplated? If so, will the Advisory Committee be going back and reviewing previous opinions issued by the Office of Open Records Counsel?

It is possible that a member of the Committee might be consulted during the research phase of preparing an opinion if the member has expertise in a subject area covered by the opinion, but in general, the Office has not and will not consult with the Advisory Committee on Open Government (hereinafter “ACOG”) before issuing an opinion. The type of “guidance” and “advice” that the ACOG gives is relative to the fee schedule we are developing, the educational outreach programs we are to create, and the policies that are to be established in accordance with PC1179, Acts of 2008.

13. Will the Office of Open Records Counsel issue opinions to the media concerning a State records issue?

Section 6 of PC 1179 adds Tenn. Code Ann. § 8-4-601 which says in part:

- (a) There is created the office of open records counsel to answer questions and provide information to public officials and the public regarding public records. . . .
(b) The office of open records counsel shall answer questions and issue informal advisory opinions as expeditiously as possible to any person including local government officials, members of the public and the media. State officials shall continue to consult with the office of the attorney general and reporter for such opinions.

Based upon this language, as well as the legislative intent that is the basis for this language, the Office of Open Records Counsel mediates and issues informal advisory opinions only on public records disputes or issues that arise between citizens and/or media and local governments. However, the Office will answer questions and provide information on the TPRA in general.

14. Will your office be adopting standard records response policies for cities in TN?

The Office of Open Records in consultation with the ACOG will be establishing a “best practices” policy for records custodians.

15. Will the Office of Open Records Counsel bring suit on behalf of citizens to enforce provisions of TCA 10-7-505?

No, the Office of Open Records Counsel has no statutory authority to bring suit on behalf of citizens.

16. Do you have a sample policy on your website?

At this time, there is no sample policy on the website. However, the Office is willing to consult with any governmental entity on a proposed policy.

The Office's website does however provide access to various presentations that both me and Ann Butterworth, Director of the Office of Open Records Counsel, have given, access to the Tennessee Public Records Act, access to the opinions issued by the Office, and access to various forms and instructions created by the Office in accordance with PC 1179, Acts of 2008.

The Office's website can be accessed by visiting <http://comptroller.state.tn.us/openrecords/index.htm>.