Ed Craig
City Manager
City of Shelbyville
201 N. Spring Street
Shelbyville, TN 37260

July 10, 2008

Dear Mr. Craig:

You have requested an opinion from the Office of Open Records on the following issues arising under the Tennessee Public Records Act (Tenn. Code Ann. §§ 10-7-501 et seq.) (hereinafter referred to as "TPRA"):

- What is the degree, if any, of specificity that is required of a request for a public record?
  - Is a request for all files on a computer valid?
  - Is a request for all emails of an employee valid? Of all employees?
  - Is a request for "all revenue and expenses" of an enterprise valid?

- Certain records are maintained only in an electronic format on a computer, and currently there is not a process/program in place to restrict access to certain confidential information contained within the computer records. Can the citizen choose to look at the records on computer in lieu of reviewing printed copies of the records? If so, can the custodian impose reasonable limitations on the amount of time or the time period records can be viewed during the course of a business day?

It appears that the City is not contesting that the types of records requested could constitute public records.

I. Public Records

The Tennessee General Assembly has for over fifty years embraced the concept that absent certain exceptions provided by state law, all governmental records should be open for inspection by citizens of Tennessee. The TPRA provides:

> Except as provided in § 10-7-504(f), all state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Tenn. Code Ann. § 10-7-503(a).

The records that are referred to in the above-cited statutory provision are often called "public records." While the definition of "public record" is currently found within the TPRA effective July 1, 2008[1], Tennessee Courts previously have adopted the same definition of "public records" that is found in Tenn. Code Ann. § 10-7-301(6):

> 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.

All files created or maintained on a computer purchased and owned by the governmental entity are not automatically deemed public records open for access by Tennessee citizens. The same is true for emails sent by public employees using either governmental hardware or email systems. The Tennessee Court of Appeals analyzed the issue with regard to the emails of public employees that were the subject of an open records request in *Brennan v. Giles County Board of Education*, 2005 WL 1996625 (Tenn.Ct.App. August 18, 2005). In *Brennan*, the Court opined that while it was unwilling to set out a bright-line rule that all emails of public employees were public records, all emails would have to be reviewed individually to determine whether or not the email was "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." *Id.* at *5. If an email satisfies the referenced criteria, then it is a public record subject to inspection and copying under the TPRA. This analysis also applies for determining whether a file on a computer would be accessible under the TPRA.

This same issue was discussed in the context of emails of members of the General Assembly in Op. Att'y. Gen. 05-099 (June 30, 2005). Like the Court in *Brennan*, the

[1] Effective July 1, 2008, the TPRA was amended by Public Chapter 1179, Acts of 2008, to contain a definition of "public records" that is identical to the definition found in Tenn. Code Ann. § 10-7-301(6).

Tennessee Attorney General opined that emails sent to individual members of the State General Assembly would have to be reviewed to determine whether or not they satisfy the definition of a "public record."

In addition to reviewing the emails and files to determine whether they satisfy the definition of "public record," there also needs to be a review of the contents of a file or an email to determine whether or not they contain information that should remain confidential under state law and that would have to be redacted prior to providing access to a requestor. To the extent that the confidential information can be redacted, access must be granted for the remainder of the record. *See Eldridge v. Putnam County*, 86 S.W.3d 572 (Tenn. Ct. App. 2001); and Tenn. Code Ann. § 10-7-504(f)(2). This Office has opined on the availability of public employee emails and the review required prior to providing access. *See* http://www.comptroller.state.tn.us/openrecords/DyeOpinion.pdf. This Office has also considered redaction of confidential information from a public record in the context of cell phone records. *See* http://www.comptroller.state.tn.us/openrecords/James,Jonathan.pdf

II. Specificity of Request

The TPRA does not currently specify how a request for access to a public record must be made or what, if any, limitations exist on the scope or size of the request. In *Hickman v. Tennessee Board of Probation and Parole*, the requestor made a request for access and copies to public records under the TPRA. *Hickman v. Tennessee Board of Probation and Parole*, 2003 WL 724474 (Tenn. Ct. App. March 4, 2003). The request asked for information regarding all Tennessee Department of Correction inmates convicted of various classes of felonies who had been certified for parole since a date certain and for various compilations of data relating to such records[2]. *Id*. at *2. The Board of Probation

[2] Specifically, the request for information asked for the following:

> I. I would like to be provided the names and TDOC numbers of all of those concerned in section III; and be provided computer access for the information sought. In the alternative, if such access is denied, then it would become the BOP's burden of providing copies with all the information sought.
>
> II. I would further ask that I be provided a *current* copy of the ATS (Average Time Served) chart as utilized by the Board of Paroles; and, a copy of the "Policy Guidelines" as provided to the citizenry upon request.
>
> III. Information sought:
>
> A. All class A, class B, and class C felonies where the inmate has been "certified eligible" for parole from 1-1-92 through the present time.
>
> B. Risk factor (points) calculation for all inmates in "A" above.
>
> C. The record of institutional conduct for all inmates in "A" above.
>
> D. The type of crime (and any prior crimes) of the inmates in "A" above.
>
> E. Whether the inmates in "A" above have been previously paroled, and if so, whether paroled on the same crime.
>
> F. The number of inmates in "A" above that were denied parole as "High Risk."
>
> G. The number of inmates in "A" above that were denied parole for "seriousness of the offense."
>
> H. the number and type of "violent" crimes in "A" above.
>
> I. The number and type of "non-violent" crimes in "A" above.
>
> J. For those inmates in "A" above, the percent of the sentence complete at the time of release violent and non-violent).

and Parole denied the request in part stating that the Mr. Hickman would have to identify with particularity the records being requested. *Id.* at *11. In response, the Tennessee Court of Appeals stated the following:

> We do not disagree that a request should identify the records which the requestor wants copies of. We cannot determine, however, exactly what fatal lack of specificity exists in Mr. Hickman's request. The Board has not told us or the trial court that it is unable to identify the records requested. Mr. Hickman's request is generally phrased in terms of information he seeks rather than specific documents, and he asks for information regarding a described class of inmates rather than identifying each inmate. Based on the record before us, however, we are not convinced, that this generality provides a sufficient justification for denial of access.

Id. at *11.

Although we can find no statute or case law directly on point, a Court asked to opine on whether or not a request for access to all employee emails and all revenues and expense of an enterprise had to be granted would focus on whether or not the governmental agency was able to identify the records requested, based on the particular facts and circumstances. With respect to the request for all files on all computers, a Court might consider: how many computers, are the computers connected to a network, how many types of files, and then how many files of each type. The Court would then likely consider the time that would be required to retrieve, review, redact, and present the records for inspection and whether an undue hardship would be placed upon the office in responding to such a broad request. However, even in looking at all of these factors,

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(footnote 2 continued)

> K. For those inmates in "A" above that were denied, the reason for denial, as stated on their "written decision."
> L. The number of "first time offenders" for those inmates in "A" above.
> M. The specific inmates that were "first time offenders" who were denied parole because they were a: judge, attorney, doctor, gay, black, female, or any other "social status" criteria.
> N. Specifically the names and TDOC numbers of all persons convicted of theft over $10,000 and theft over $60,000 between 1-1-92 and the present, where:
> 1. They were first time offenders.
> 2. Their Risk points were 14 or less.
> 3. Where their institutional conduct consisted of two "A" offenses, two "B" offenses, or three "C" offenses or less, in the year immediately preceding their parole hearing.
> 4. The specific crime, and the sentence imposed.
> 5. Their prior record, if any.
> 6. Their prior release(s) on parole, if any.
> 7. Their SED date, and date of parole.
> 8. If they were denied for parole, the reason for denial, how long they were "put off," and those required to "flatten" and any particular reason stated. *Id.* at *6-7.

unless a reasonable basis could be articulated as to why the entity is unable to provide the requested records or information, it is likely a court would require public access.[3]

III. Access for Inspection Via Computer

The TPRA provides that public records "shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection." Tenn. Code Ann. §10-7-503(a).

Additionally, Tenn. Code Ann. §10-7-121(a) says, "any information required to be kept as a record by any government official *may* be maintained on a computer or removable computer storage media (in lieu of paper records) if certain standards are met, including information remains available for public inspection and "[t]he official can provide a paper copy of the information . . . when requested by a member of the public." (emphasis added)

Prior to providing access for inspection via a computer, a custodian must determine that confidential information cannot be accessed. If access to confidential information can not be restricted while a citizen is inspecting a public record via computer, then a records custodian fulfills his or her obligation to provide access to the requested records by printing and subsequently providing copies of the records to the requestor with the confidential information redacted.

You have indicated to our Office that access to confidential information currently cannot be restricted when inspecting or viewing the requested records on your computers. Therefore, as long as you can produce a paper copy of the requested information, you are not obligated to develop or purchase a software program to restrict the confidential information. Providing the requestor with access to printed copies of the requested records with the confidential information redacted or removed will satisfy your obligations under the TPRA. Note, as the records custodian, you may not charge the requestor for the costs of production of the redacted printed copies if the requestor inspects the records in your offices. If the requestor asks to keep the copies or if the requestor asks to have them delivered a certain location, then you may charge for the copies.[4]

IV. Appointment to View Public Records

In responding to whether or not a records custodian may require a citizen to schedule an appointment for inspection of records, the Tennessee Attorney General opined:

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[3] This opinion was requested prior to July 1, 2008, the effective date of Public Chapter 1179, Acts of 2008. Now, the Act specifically requires a request for inspection or copies to be sufficiently detailed to enable the records custodian to identify the specific records to be located or copied.

[4] Since July 1, 2008 and until this Office establishes a schedule of reasonable charges, you may charge for actual costs, including the hourly wage of employee reasonably necessary to produce the copy for time that exceeds five (5) hours; *see* Section 1 of Public Chapter 1179.

> There is no clear answer to this question. Read literally, Tenn. Code Ann. § 10-7-503(a) provides that "all state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection . . .." Further, the Public Records Act is broadly construed to give the fullest possible public access to public records. Tenn. Code Ann. §10-7-505(d). But courts also are bound to interpret statutes so as not to lead to absurd results in specific factual situations. *Business Brokerage Ctr. v. Dixon,* 874 S.W.2d 1, 5 (Tenn. 1994). If an agency required a citizen to make an appointment to view public records, 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).

Again, we can find no case law directly on point. However, we believe a Court, when considering whether a scheduled appointment for viewing or inspecting a public record is reasonable or constitutes a denial of access, would consider factors such as the available staff members, the workload of the office, the volume of the requested records, and, when accessing original records, the preservation of the integrity of the records. It is not clear from your request whether these are factors that you are considering. [5]

IV. Conclusion

It is the opinion of this Office based upon the above-cited law that if a records custodian has the ability to identify the information and/or records being requested, then access must be granted under the TPRA despite the fact that the request lacks a high degree of specificity.[6] Also, as long as a custodian provides the information to the requestor in a manner that does not distort or inhibit access to the information or records, the record may be produced in a paper format as opposed to an electronic one, especially given the lack of capability to redact any confidential information in the electronic format. Finally, it is reasonable to believe that a Court would uphold the scheduling of an appointment for inspection of the requested records as long as there is a reasonable basis for requiring such.

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[5] Public Chapter 1179 provides that a record custodian has within seven (7) business days to respond to a request under the TPRA. A permitted response is a statement as to the time reasonably necessary to produce the record or information, and by implication the ability to set the time when the record or information will be available for inspection. It is our Office's recommendation that when a requested record is readily available, access be granted "promptly" and a records custodian should be prudent in the use of the permitted seven (7) business days.

[6] *See* Footnote 3 above.

Please feel free to contact either me or Elisha Hodge upon receipt of this opinion if you have anything further that you would like to discuss.

Sincerely,

Ann V. Butterworth
Director, Office of Open Records Counsel