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Opinion No. 01-021

Providing Access to Public Records

QUESTIONS

1. Do the provisions of Tenn. Code Ann. § 10-7-503(a) permit a local government body to charge a fee to recoup the cost of providing access to public records during business hours?

2. Does Tenn. Code Ann. § 10-7-503(a) or other pertinent portions of the public records statutes permit the charging of a fee by local governments to recoup the costs for researching and/or locating non-current public records for review by a citizen of the State of Tennessee?

3. Would the institution of fees to view records of any type, current or non-current, constitute the refusal of the "right of inspection" clause in Tenn. Code Ann. § 10-7-503(a), thereby preventing a citizen from exercising his right as a resident of the State of Tennessee?

4. Does Tenn. Code Ann. § 10-7-503(a) or other pertinent sections of the statutes permit a local government to require a resident of the State of Tennessee to first schedule an appointment with a local government before he is allowed to inspect a public record maintained by said government?

5. If a local government chooses to store a record in a format accessible only via a computer, videotape player or audiotape player, is it incumbent upon the local government to provide a means of accessing such record on-site at the designated local government office? Would refusal or failure to provide the appropriate device violate Tenn. Code Ann. § 10-7-503 or other pertinent sections of the public records statutes?

6. Aside from specific real estate records, the product of Geographic Information System records and law enforcement records, what portion of the public records statute authorizes the charging of a fee for copying or duplicating routine local government records?

   a. In this instance, said records would include meeting minutes, agendas, resolutions, contracts and contract updates, and other similar public records. If such a fee were deemed permissible, how would the "reasonableness" of the fee be established?

OPINIONS

1. No. Tenn. Code Ann. § 10-7-503(a) does not authorize a local government body to charge a fee for allowing inspection of a public record.

2. We are not aware of any provision in Title 10, Chapter 7 of the Code that would allow a local agency to charge a research and/or location fee *per se*.

3. Conditioning the right inspect a public record upon the payment of a fee unauthorized by state law would be tantamount to denying the right of inspection that is set forth in Tenn. Code Ann. § 10-7-503.

4. 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.

5. We think a court would hold that it would violate the Public Records Act if a record could not be inspected because the records custodian failed or refused to provide a means by which to inspect the record.

6. Tenn. Code Ann. § 10-7-506(a) allows "reasonable rules governing the making of . . . extracts, copies, photographs or photostats." Under this provision, a local government may generally recoup its costs for supplying requested copies.

ANALYSIS

1. This opinion addresses several questions about providing access to public records. The first question is whether the provisions of Tenn. Code Ann. § 10-7-503(a) permit a local government body to charge a fee to recoup the cost of providing access to public records during business hours. The statute provides:

> . . . [A]ll 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 to any citizen, unless otherwise provided by state law.

Under the terms of this statute, the custodian of a public record may not charge a fee for allowing

inspection during business hours, unless some other provision of state law provides otherwise. Thus, a local government body would need to be able to point to a provision of state law other than Tenn. Code Ann. § 10-7-503(a) in order to charge a fee for allowing inspection of a public record. *See generally State v. Darnell*, No. 01-A-01-9406-CH-00294, slip op. (M.S. Tenn. Ct. App. Oct. 26, 1994) (Secretary of State could deny free personal inspection of U.C.C. filings because of the provisions of Tenn. Code Ann. § 47-9-407); *see also* Op. Tenn. Atty. Gen. 80-541 (Nov. 13, 1980) (Criminal Court Clerk may not charge fee for citizens to inspect records in his office).

Depending on the facts and circumstances, a local government may recoup costs under Tenn. Code Ann. § 10-7-506, which provides in part:

> In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or such custodian's authorized deputy; **provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.**

Tenn. Code Ann. § 10-7-506(a) (emphasis added).

The Tennessee Supreme Court has construed this statute in the context of computer records in *The Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998). There, a newspaper requested the names, addresses and telephone numbers of the customers of the Nashville Electric Service ("NES"). NES maintained the information in its computers, but not in the format the newspaper requested. The Court held that NES had to extract the information from its existing records but, under § -506, could require payment for the costs of disclosing the records requested by the newspaper. The Court stated:

> We think the language and meaning of Tenn. Code Ann. § 10-7-506(a) is plain: that an agency may enforce reasonable rules 'governing the making of such extracts, copies, photographs or photostats.' Those actual costs incurred by NES for disclosing the material requested by *The Tennessean* are recoverable under this statute. In contrast, there is no authority under the Act allowing an agency to establish rules that would substantially inhibit disclosure of records. Moreover, limiting an agency to rules that govern only the actual 'making' of the extracts, copies, photographs or photostats is consistent with the legislative policy in favor of the fullest possible public access.

It is unclear exactly what costs an agency might recover from a requestor under this statute, which the Court has not construed in the context of paper records. But agency rules designed to recover an agency's actual costs in making extracts, copies, photographs or photostats in response to a public records request should be upheld under Tenn. Code Ann. § 10-7-506(a).

2. The second question is whether § 10-7-503(a) or other pertinent portions of the public records statutes permit the charging of a fee by local governments to recoup the costs for researching and/or locating non-current public records for review by a citizen of the State of Tennessee? We are not aware of any provision in Title 10, Chapter 7 of the Code that would allow a local agency to charge a research and/or location fee *per se.* If the agency had rules in place under Tenn. Code Ann. § 10-7-506(a) and could demonstrate that the fee covered part of its costs in making extracts, copies, photographs or photostats in response to a public records request under Tenn. Code Ann. § 10-7-503, then the fee should be upheld.[1]

3. The third question is whether the institution of fees to view records would constitute a refusal of the right to inspect public records that is set forth in Tenn. Code Ann. § 10-7-503. In the *Electric Power Board* case, discussed above, the Court disallowed a fee that NES sought to charge for notifying its customers of the request to inspect information about them. The Court stated:

> Our review is governed solely by the language in the Public Records Act and the clear mandate in favor of disclosure. We do not question the sincerity or intention of NES in making a policy that is, on the surface, in the interests of its customers' privacy or safety. Yet these and any other matters of public policy that may affect the rights of access under the Public Records Act may not be adopted ad hoc by a government agency without action by the legislature.

Thus, as we said in the discussion of Question 1 above, a local government should not charge a fee to view a public record unless some provision of state law allows such fee.

4. The fourth question is whether a local government may require a citizen to schedule an appointment before allowing the citizen to inspect public records. 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

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[1] Case law states that a records custodian also may charge for delivering copies to a requestor who does not appear for personal inspection. The Court stated: "The citizen, to be able to obtain copies of those documents without making a personal inspection, must sufficiently identify those documents so that the records custodian can produce and copy those documents without the requirement of a search by the records custodian. The records custodian can require a charge or fee per copy that will cover both the costs of producing the copies and delivering the copies." *Waller v. Bryan,* 16 S.W.3d 770 (Tenn. Ct. App. 1999), *p.t.a. denied* (2000).

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. As the Court said in *Electric Power Board,* "there is no authority under the Act allowing an agency to establish rules that would substantially inhibit disclosure of records."

5. The fifth question concerns a local government's duty to provide access to information accessible only by computer, videotape player, or audiotape player. If a record is accessible only by one of these devices, the question is whether a local government agency would violate the Public Records Act if it failed or refused to provide the appropriate device for inspecting such record on-site at the designated local government office. As previously set forth, § 10-7-503 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 to any citizen, unless otherwise provided by state law. In determining what is a public record, the courts have used the definition in Tenn. Code Ann. § 10-7-301(6):

> "Public record or records" . . . means 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[.]

Griffin v. City of Knoxville, 821 S.W.2d 921 (Tenn. 1991). Because the definition of public record includes computer data, films and sound recordings, and because § 10-7-503 requires a records custodian to allow inspection of public records, we think a court would hold that it would violate the Public Records Act if a record could not be inspected because the records custodian failed or refused to provide a means by which the record may be inspected.

6. The last question asks what provision of the Public Records Act authorizes a fee to be charged for duplicating routine local government records and how should the reasonableness of such a fee be determined. As discussed above, Tenn. Code Ann. § 10-7-506(a) allows "reasonable rules governing the making of . . . extracts, copies, photographs or photostats." In addition, where applicable, the county records commission has the power to establish charges for and to collect such charges for making and furnishing or enlarging copies of records. Tenn. Code Ann. § 10-7-409.

As previously discussed, the Tennessee Supreme Court has held that the custodian of public records is authorized to charge the *actual costs* it incurs in disclosing a public record in the exact format requested by a member of the public. *Tennessean v. Electric Power Board of Nashville,* 979 S.W.2d 297, 305 (Tenn. 1998). This Office has also concluded that the custodian of records may charge only as much as reasonably approximates the actual cost of copying a public record. Op. Tenn. Atty. Gen. 80-455 (September 19, 1980). The Public Records Act contains a narrow provision allowing fees that reflect the actual development costs of certain maps or geographic data. Tenn. Code Ann. § 10-7-506(c). Outside

of this provision, or some other applicable exception, a local government may generally not charge more than its actual cost to copy public records.

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