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Opinion No. 05-099

E-mail of Legislator

QUESTION

Are e-mails sent to a state legislator subject to public inspection?

OPINION

Whether an e-mail sent to a state legislator is subject to public inspection depends, first, on whether the e-mail is a public record within the meaning of the state Public Records Act. As a general matter, material made or received in connection with the transaction of official business by any governmental agency is a public record subject to public inspection. Any e-mail that meets this definition, therefore, would be a public record subject to public inspection under the statute, unless otherwise provided by state law.

State law provides several exceptions to this provision for legislative records. For example, under Tenn. Code Ann. § 3-12-106, materials, including proposed bills and amendments, analyses, opinions, and memoranda prepared by an attorney within the Office of Legal Services are not public records or subject to the provisions of Title 10, Chapter 7, Part 5, except as otherwise provided by the rules of either house of the General Assembly or when released by the member for whom the material was prepared. This provision would apply to this material in e-mail form even if it is kept in the office of a member of the General Assembly. Further, under Tenn. Code Ann. § 3-14-109, Office of Program Evaluation work papers and correspondence with a committee or member of the General Assembly or information supplied to a committee or a member of the General Assembly by an individual who requests confidentiality are not public records to which public access is required under Tenn. Code Ann. § 10-7-503. Whether these or other provisions are applicable to any e-mail maintained by a member of the General Assembly would depend on particular facts and circumstances. The e-mail could also be confidential under some other provision of a Tennessee statute or common law privilege.

Finally, a court could refuse to require public access to particular records of the General Assembly on constitutional grounds. Whether a court would reach this conclusion would depend on the particular records and the circumstances under which they were developed and held.

ANALYSIS

This opinion addresses whether e-mails sent to a state legislator are subject to public inspection. The Public Records Act generally requires that all state records are public and must be made available to inspection by the public. 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*.

Tenn. Code Ann. § 10-7-503(a) (emphasis added). Under Tenn. Code Ann. § 10-7-505, a citizen denied access to public records may seek review in Chancery Court, and the person making the denial has the burden of showing it was lawful. If the court determines it was not, the court may order that the records be made available. In making this determination, the court must construe the Public Records Act broadly in favor of public access. Tenn. Code Ann. § 10-7-505(d); *see generally Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986). The question, then, becomes whether e-mail sent to a state legislator and in the custody of the legislator or a legislative employee is a public record within the meaning of this act. The proper test in determining whether material is a public record is whether it was 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, 924 (Tenn. 1991). Application of this test requires an examination of the totality of the circumstances. *Id.*

An argument can be made that, as a result of an amendment to statutes dealing with the Public Records Commission in 2001, records of the General Assembly are no longer "public records" within the meaning of the Public Records Act. This argument is based upon the Tennessee Supreme Court's reasoning in *Griffin*. In that case, the Tennessee Supreme Court relied upon the definition of the term "public record" in Tenn. Code Ann. § 10-7-301(6), part of the statutory scheme dealing with the Public Records Commission, to outline the scope of public access under the Public Records Act. For the purposes of the statutes regarding the Public Records Commission, "public record" is defined as follows:

> As used in this part, unless the context otherwise requires:
>
> * * * *
>
> (6) "Public record or records" or "state 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.

The Court noted that the statutory definition, by its terms, provided that it was to apply only for the purposes of Part 3 dealing with the Public Records Commission, but the Court still applied the definition to determine the scope of documents available for inspection under Tenn. Code Ann. §§ 10-7-501, *et seq.* The Court reasoned that Tenn. Code Ann. §§ 10-7-101, *et seq.*, including the statutory scheme regarding the Public Records Commission, is an "all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity and whether intended to be retained temporarily or retained and preserved permanently." 821 S.W.2d at 923, *quoting Board of Education v. Memphis Publishing Co*., 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979). The Court found that the definition in the statute, therefore, could appropriately be used to determine records open for public inspection.

Thus, the Tennessee Supreme Court has determined that "public records" as defined in Tenn. Code Ann. § 10-7-301(6) are subject to public inspection. The definition includes any records "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental *agency*." (Emphasis added). Tenn. Code Ann. § 10-7-301(1) contains the following definition of "agency":

> "Agency" means any department, division, board, bureau, commission, or other separate unit of government created by law or pursuant to law, including the legislative branch and the judicial branch; *provided, however, that for purposes of this part only, "agency" does not include the legislative branch.*

Tenn. Code Ann. § 10-7-301(1) (emphasis added). The definition explicitly excludes the legislative branch from the definition of "agency." The above definition, including the italicized language, was passed in 2001. 2001 Tenn. Pub. Acts Ch. 328. Before the amendment, the definition provided:

> "Agency" means any department, division, board, bureau, commission, or other separate unit of government created or established by the constitution, by law or pursuant to law, *including the legislative branch and the judicial branch.*

Tenn. Code Ann. § 10-7-301(1) (1999) (emphasis added). The 2001 amendment, therefore, explicitly excluded the legislative branch from the definition of "agency." Like the definition of "public record," the exclusion provides that it is only for the purposes of Part 3, which concerns the Public Records Commission. But, under the reasoning of the Tennessee Supreme Court in *Griffin*, it can be argued that this definition should be applied to determine the scope of public records available for inspection under Tenn. Code Ann. §§ 10-7-501, *et seq.* The Tennessee Chancery Court agreed with this reasoning in *Adams v. State*, Davidson County Chancery Court No. 04-3013-I (November 9, 2004) (copy attached). The Chancellor's ruling was not appealed and, therefore, is now final.

It is an open question whether another court would adopt the reasoning of this case with regard to the language of the Public Records Act for several reasons. First, the plain language of

the 2001 amendment reiterates the phrase, "for the purposes of this part only." Second, legislative history of the 2001 amendment does not necessarily support applying the change this broadly. Legislative discussions of the act indicate that its purpose was simply to remove legislative records from the jurisdiction of the Public Records Commission. For example, Senator Cooper explained the bill to the Senate as follows:

> What this bill addresses, Mister Speaker and members of the Senate, are the records we keep in our offices. Right now supposedly we're paying a, not supposedly, we are, we're paying a charge to F and A [Department of Finance and Administration] to keep records for us which we really don't keep, what this does is removes our records from the general services act, and that's all it does.

Senate Session S-61(May 17, 2001) (remarks of Senator Cooper). Arguably, therefore, the General Assembly clearly and consciously intended courts to apply the exclusion, as the statute states, "for the purposes of this part — [that is, the Public Records Commission provisions for storing public records] — *only.*" Finally, the Chancellor in *Adams* also relied upon a firm constitutional ground for denying access to the records that were the subject of that case.

The question then becomes whether access to e-mail received by a state legislator that is a public record is limited under any other provision of state law. Certain records of the Office of Legal Services are confidential under state statutes. Tenn. Code Ann. § 3-12-105. This statute arguably would not apply to records of the Office of Legal Services — including an e mail from that office — that are kept by a legislator. But Tenn. Code Ann. § 3-12-106 provides a much broader confidentiality provision for legislative materials. This statute provides:

> (a) The director of the office of legal services and the director's legal staff shall maintain the attorney-client relationship with each member of the general assembly with respect to communications between the member and the attorney, except as otherwise provided by the rules of either house of the general assembly.
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> (b) *All materials arising out of this relationship including, but not limited to, proposed bills and amendments, analyses, opinions, and memoranda prepared by an attorney are not public records nor subject to the provisions of title 10, chapter 7, part 5, except as otherwise provided by the rules of either house of the general assembly or when released by the member for whom the material was prepared.*

Tenn. Code Ann. § 3-12-106 (1994) (emphasis added). Thus, under this statute, materials arising out of the attorney-client relationship between the director or a staff attorney at the Office of Legal Services, including those specifically enumerated in the statute, are not public records to which public access must be granted under Tenn. Code Ann. § 10-7-503, unless otherwise provided by the

rules of either house of the General Assembly or when released by the member for whom the material was prepared. This provision applies to records — including e-mail received by a legislator — regardless of whether they are kept by the Office of Legal Services or in the office of a member of the General Assembly. Whether any individual record falls under this exception will depend on particular facts and circumstances.

In addition, certain books, papers, records, and correspondence pertaining to the work of the Office of Program Evaluation are confidential. The Office of Program Evaluation is created under Tenn. Code Ann. §§ 3-14-101, *et seq.* This Office has the duty to evaluate programs conducted by state government and, where directed by either house of the General Assembly, programs of local government. Tenn. Code Ann. § 3-14-109 provides:

> (a) All books, papers, records, and correspondence *pertaining to the work of the office* [of program evaluation] are public records *except:*
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> (1) Intraoffice memoranda made by the director or the director's staff;
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> (2) Work papers and *correspondence with any committee or member of the general assembly;* and
>
> (3) Any material supplied to the office by a state or local government agency or department which, under applicable law, would remain confidential in the hands of that agency or department.
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> (b) Such papers and correspondence may become public records whenever the speakers shall so order.
>
> (c) The office has the authority to withhold from the public record any information supplied to the office or to a committee of the general assembly or *a member of the general assembly by an individual who requests such confidentiality.*

Tenn. Code Ann. § 3-14-109 (1994) (emphasis added). This statute applies to records maintained in the Office of Program Evaluation, or in the offices of a member of the General Assembly. Thus, under this statute, work papers and correspondence with a committee or member of the General Assembly or information supplied to a committee or a member of the General Assembly by an individual who requests confidentiality are not public records to which public access is required under Tenn. Code Ann. § 10-7-503. Depending on its content or other circumstances, an e-mail could also be confidential under some other provision of Tennessee statute or an applicable common law privilege. *See, e.g.*, Tenn. Code Ann. § 10-7-504. Again, whether a provision of state law provides confidentiality for any particular record, including e-mail, maintained by a member of the General Assembly would depend on facts and circumstances and would require a case-by-case analysis.

Finally, a court could refuse to require access to e-mail to a member of the General Assembly on constitutional grounds. Article II, § 12, of the Tennessee Constitution provides:

> Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the Legislature of a free State.

The Tennessee Court of Appeals has refused to enforce the state Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.*, against the General Assembly for a variety of reasons. *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001), *p.t.a. denied* (2001). Among these reasons, the Court noted that, even if the act applied to the General Assembly, one session of the General Assembly cannot restrict the power of its successor. 46 S.W.3d at 770. The Court also stated that deciding the judiciary must judge when legislative business ought to be kept secret "would greatly diminish the Legislature's granted power to make its own rules, and to exercise 'all the powers necessary for a branch of the Legislature of a free State.' Art. II, § 12." 46 S.W.3d at 773.

It can be argued that, for the reasons cited in *Mayhew*, a court should also refuse to enforce the Public Records Act against a member of the General Assembly. This argument is weaker when applied to an individual legislator's records rather than committee and other meetings where legislative matters are considered. But, depending on the particular records sought, a court could find that Article II, § 12, of the Tennessee Constitution and the principle of Separation of Powers would prevent the court from requiring public access. For example, in *Adams v. State*, discussed above, the Chancery Court for Davidson County refused to order legislative administrators to allow inspection of records pertaining to sexual harassment charges filed against a member of the General Assembly. The Court found that, among other reasons, the records, if any existed, were confidential under a sexual harassment policy adopted by the two Speakers in accordance with state statute. The Court concluded that this policy was a "rule of proceeding" adopted under Article II, § 12, of the Tennessee Constitution and, accordingly, the Court could not constitutionally interfere with its enforcement.

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