

Lamar Orr
328 Crestview Road
Farragut, Tennessee 37934

June 23, 2008

Dear Mr. Orr:

You have requested an opinion from the Office of Open Records that specifically addresses a Tennessee citizen's right to inspect public records and how timely the right to inspect should be in order to be in compliance with the law. You additionally requested that this Office review the recently amended section of the Farragut Municipal Code, which deals with a citizen's right to inspect and copy public records, and address its compliance with the Tennessee Public Records Act (hereinafter referred to as "TPRA"). It is important to note that if SB3280/HB3637 is signed into law, effective July 1, 2008, the Tennessee Public Records Act will be significantly amended and as such, the provisions within the Farragut Municipal Code that address inspecting and copying public records will also need to be amended.

You represented to this Office that, on multiple occasions, both you and a number of other residents of the Town of Farragut (hereinafter referred to as the "Town") have requested to inspect certain public records, and specifically site plans submitted by the First Baptist Church of Concord to the Town for review. On multiple occasions, the requests were delayed for a week or more, even though the Town had the plans in its possession. On at least one occasion, residents were told the morning they made their initial request that they could inspect previously submitted plans later in the afternoon; but upon returning that afternoon, the residents were told they could not inspect the plans and they were to leave a name and a phone number where they could be reached. The next day, the residents were contacted and told that they would not be able to inspect the records for another eight days. On another occasion, the Associate Town Administrator acknowledged that the plans had been submitted to the Town, but delayed access to the records because it was going to "take some time for the Staff to review them so we won't have distributable information for a bit." You have attempted on multiple occasions to bring to the attention of the local governing officials the problems with regard to access

to the requested public records, but you and others still continue to experience delays in accessing records.

Additionally, on May 22, 2008, the Board of Mayor and Alderman adopted language that upon becoming final amends Section 1-307 of the Farragut Municipal Code that addresses a Tennessee citizen's right to inspect and copy public records.

1. Right to Inspect Public Records

In looking at these issues, one must begin with the language of the TPRA and any statute that relates to the TPRA. Note, during the recent legislative session, the Tennessee General Assembly adopted several changes to the TPRA, some of which are currently effective and some of which will be effective July 1, 2008 (assuming SB3280 becomes law); this opinion answers your questions based upon current law but will indicate when there are proposed changes in the law that could be effective July 1, 2008.

Tenn. Code Ann. § 10-7-503(a) says the following:

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.

While the definition of "public record" is currently not found within the TPRA, Tennessee Courts have adopted the definition of public records that is found in Tenn. Code Ann. § 10-7-301(6) which defines public records 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.¹

Based upon the above cited statutory provisions, all governmental records regardless of form that were made or received pursuant to law or ordinance or in connection with the transaction of government business are to be open for inspection by any citizen of Tennessee during business hours, unless state law provides otherwise.

¹ If SB3280 is signed into law, effective July 1, 2008, the TPRA will contain a definition of "public records" that is identical to the definition found in Tenn. Code Ann. § 10-7-301(6).

II. Timely Response to Open Records Request

With regard to the issue of timely responses to open records requests for either inspection or copies, Courts look at each situation on a case by case basis. More often than not, even if the Court finds that an entity should have provided access to certain records, the Court still allows the entity time to review the records for any confidential information that would need to be redacted before providing access. *See Eldridge v. Putnam County*, 86 S.W. 3d 572 (Tenn. Ct. App. 2001) and *Schneider v. City of Jackson*, 226 S.W. 3d 332, 346 (Tenn. 2007). Additionally, the Tennessee Attorney General, in looking at Tenn. Code Ann. § 10-7-503(a) and the issue of immediate access recently opined the following:

A literal construction of this statute would require the Authority, or any other records custodian, to make any requested records immediately available for inspection during normal business hours, regardless of the age, size, and nature of the records requested. While courts are to construe the Public Records Act broadly so as to give the fullest possible public access to public records, they are also 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). For example, where a request requires a review of records for confidential and privileged information, it would be absurd to require the governmental agency to make such records immediately available for inspection. A similar absurd result would follow from a request for immediate inspection of electronic records that would require the records custodian to write a new computer program to extract the requested records. *See Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998). Thus, depending upon the specific facts and circumstances, a court could find an agency's failure to immediately make records available for public inspection not to be a denial in whole or in part of the public records request.

Op. Tenn. Atty. Gen. 08-64 (March 24, 2008).

According to the information you provided this Office, on multiple occasions the Town has delayed requests to inspect site plans for extended periods of time. The Town has not represented that the site plans are exempt from inspection under the TRPA, because access is granted after varying periods of time. However, it does appear that the Town believes that although these records are in its possession when a request is made, it is allowed to delay public inspection until "Staff" has time to review the plans. Being unaware of any confidential information that might be on a site plan that would need to be redacted, it is the opinion of this Office that a court could construe a delay in access to site plans in order to allow prior "Staff review" as unreasonable.

III. Amended Section 1-307 of the Farragut Municipal Code

Farragut Municipal Code Section II, Part A. Proof of Citizenship says, "The Tennessee Public Records Act only applies to citizens of Tennessee. A person seeking

access to public records of the Town must provide proper identification to establish Tennessee citizenship.” The Town should consider being more specific in establishing what type of identification is “proper” (i.e. photo identification if available) to establish citizenship. This section is extremely subjective and could lead to an unnecessary delay in records being accessed because the requestor fails to provide identification that is deemed “proper” to establish citizenship by the records custodian.²

Paragraph 8 of Farragut Municipal Code Section I, Part B. Records Not Open to Public Access provides for the confidentiality of certain personal information about Town employees. As the paragraph currently reads, this information only includes “unpublished telephone numbers, bank account information, social security number, and driver license information (unless driving a vehicle is a part of the employee’s job duties. TCA § 10-7-504(f)(1)” Until May 1, 2008, this language was appropriate. However, on May 1, 2008, the Governor signed into law Public Chapter Number 853 which amends Tenn. Code Ann. § 10-7-504(f)(1) by making home telephone numbers and personal cell phone numbers, as well as residential street addresses for any municipal employee confidential. This section needs to be amended to encompass the information made confidential by the recently passed legislation.

Farragut Municipal Code Section II, Part D. Limitations on Disclosure of Confidential Information says in part, “If it is necessary to redact confidential information from a record, the requestor must pay the Town’s cost associated with redacting the records as provided in by this ordinance.” According to Tenn. Code Ann. § 10-7-506(a) when a person has the right to inspect a public record, the person also has the right to obtain extracts, copies, photographs or photostats thereof and the records custodian is allowed to charge a fee for “the making of such extracts, copies, photographs or photostats” so long as reasonable rules are in place. The plain language of the statute allows for a fee to be charged for the making of the copy, not for redacting the copy. Furthermore, the Tennessee Court of Appeals in *Allen v. Day* said that records custodians:

do have the clear obligation to produce...records for inspection, unless otherwise provided by state law, and to provide a copy or copies of any such record requested by such citizen, upon the payment of a reasonable charge or fee therefor.

Allen v. Day, 213 S.W. 3d 244, 249 (Tenn. Ct. App. 2006).

Again, the language of the Court refers to the cost of producing the copy only. Additionally, the Tennessee Supreme Court said the following regarding fees in *The Tennessean v. Electric Power Board of Nashville*:

² If SB3280 is signed into law, a records custodian may require a citizen making a request for inspection or copies of public records to present photo identification issued by a governmental entity that contains an address, if the requestor possesses such identification, and if the requestor does not possess photo identification, the custodian may require other forms of identification.

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.” ... 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.

The Tennessean v. Electric Power Board of Nashville, 979 S.W. 2d 297, 304 (Tenn. 1998).

The only statutory provision making it permissible to charge a requestor for the staff time associated with redaction is found in Tenn. Code Ann. § 10-7-503(c)(2) which deals with law enforcement personnel records, and it specifically says the following:

Information made confidential by this chapter shall be redacted whenever possible, but the costs associated with redacting records or information, including the cost of copies and staff time to provide redacted copies, shall be borne as provided by current law.

Based upon the above cited statutory authority and case law, it is this Office’s opinion that charging a requestor for redacting information is not permissible under current state law, except when law enforcement personnel records are the records that have been requested and require redaction.

Farragut Municipal Code Section II, Part E.’s heading reads **Costs of Inspection**. This heading is problematic and misleading in and of itself due to the fact that Tennessee Attorney General has opined that charging a citizen a fee to inspect public records violates the Tennessee Public Records Act. *See* Op.Atty.Gen. No. 01-021, Feb. 8, 2001. While this section is entitled “Costs of Inspection”, it appears to be addressing the issues that were litigated in the above-cited *Tennessean* case. The *Tennessean* was not merely seeking to inspect records held by the Electric Power Board of Nashville; it was seeking an extract of information in a format that the governmental entity did not maintain.

Additionally, this Office finds it problematic that a requestor will be charged not only the hourly pay rate of the employees creating the “special computer program”, but also the “social security, insurance and other benefits” of the employees creating the program. First, in looking at Tenn. Code Ann. § 10-7-506(c)(2) which is the only portion of the statute that contemplates a requestor being assessed an additional fee for labor costs, that assessment relates only to the production of records having commercial value, such as maps or geographical data. However, the *Tennessean* opinion does seem to allow the costs of labor to be assessed in situations where programs have to be created in order for the requestor to obtain the information in a format not maintained by the governmental entity. *See The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 304 (Tenn. 1998).

But, even in interpreting the opinion to allow for labor to be charged in those very specific situations mentioned above, there is nothing in statute nor case law that permits the requestor to be assessed a fee that includes the “social security, insurance and other benefits” of the employees creating the program.³

Farragut Municipal Code Section III, Part 1(a) Town’s Equipment and Labor Costs says in part that citizen’s requesting copies of public records will be charged not only for “ink, toner, paper, copier lease, cost of media (diskette, cd, dvd, etc.)” but will also be charged for “the time and labor of Town employees based upon an average hourly rate for the Town’s clerical employees, including insurance and other benefits and/or Town’s subcontractor costs.” It is the opinion of this Office that this provision is contrary to both the letter and spirit of the TPRA. The Tennessee Attorney General’s Office opined that “custodians of records may charge only as much as reasonably approximates the actual cost of copying a public record.” Op.Atty.Gen. No. 02-065, May 17, 2002. In the same opinion, when addressing whether a city could charge more than its actual cost when copying a public record, the Attorney General said “Absent a specific statute...a city may not charge a copying fee that is greater than the actual costs of copying the record.” *Id.* Again, as cited above, the Tennessee Court of Appeals in *Allen v. Day* said that a records custodian was obligated “to provide a copy or copies of any such record requested by such citizen, upon the payment of a reasonable charge or fee therefor.” It is the opinion of this Office that this language does not contemplate a requestor being charged for anything other than the charge of the copy itself. *Allen v. Day*, 213 S.W. 3d 244, 249 (Tenn. Ct. App. 2006).⁴

³ If SB3280 is signed into law, record custodians, up until such times as the Office of Open Records Counsel establishes a schedule of reasonable charges, will be able to charge a requestor the “actual costs” of producing the requested material including but not limited to the cost of making extracts, copies, etc., and the hourly wage of the employee requesting the information.. The “actual cost” of making the copies can continue to be assessed as long as there is a reasonable rule in place for doing so pursuant to Tenn. Code Ann. § 10-7-506(a), but the “actual cost” of the staff time required to produce the request cannot be assessed for the first five (5) hours a record custodian works to produce the requested material. In establishing the schedule of reasonable charges, the Office of Open Records Counsel, shall consider population, complexity of request, man hours involved in retrieving document, redacting document, any other cost involved in preparing the document, the cost of duplicating the document, the cost of mailing the document if mailing is required, and any other cost this Office deems appropriate.

⁴ This Office acknowledges the footnote found in *Hickman v. Tennessee Board of Probation and Parole* that says, “Obviously, the time and effort involved in making copies is additional to that required to retrieve files. The copy cost charged to citizens making a request for access in person, as well as a citizen making a request by mail, presumably includes this additional cost.” *Hickman v. Tennessee Board of Probation and Parole*, 2003 WL 724474 at *11 (Tenn. Ct. App. 2003). However, the Office is unwilling to say that labor/staff fees can be assessed against a requestor based upon a footnote in an unpublished opinion. While respecting the opinion of the Court, the Court itself does not definitively opine that labor/staff time can be assessed; instead, the Court says that “presumably” this “additional fee” can be assessed. *Id.* Again, when looking at the language of the TPRA, additional fees that could include labor are only expressly permitted when certain records having commercial value are being reproduced. The Office is also aware of a Chancery Court ruling from Loudon County that upheld a copying policy that charges for the labor associated with producing requested records. The policy that was at issue in Loudon County is almost identical to the policy that was adopted by the Town of Farragut with regard to charging for the labor associated with producing requested records. Again, while respecting the Loudon County Chancellor’s ruling, this Office is compelled to rely upon the opinions issued by the higher courts of this State as well as

As noted above, the only section of the TPRA that specifically allows for labor costs to be assessed is found in Tenn. Code Ann. § 10-7-506(c)(1). This statutory provision is specific to records having commercial value and the additional fees that may be assessed which include labor costs must relate to the actual development cost of the information having the commercial value. Tenn. Code Ann. § 10-7-506(c)(1) says the following:

(c)(1) If a request is made for a copy of a public record that has commercial value, and such request requires the reproduction of all or a portion of a computer generated map or other similar geographic data that was developed with public funds, a state department or agency or a political subdivision of the state having primary responsibility for the data or system may establish and impose reasonable fees for the reproduction of such record, in addition to any fees or charges that may lawfully be imposed pursuant to this section. The additional fees authorized by this subsection may not be assessed against individuals who request copies of records for themselves or when the record requested does not have commercial value. State departments and agencies and political subdivisions of the state may charge a reasonable fee (cost of reproduction only) for information requested by the news media for news gathering purposes (broadcast or publication).

(2) The additional fees authorized by this subsection shall relate to the actual development costs of such maps or geographic data and may include:

(A) Labor costs...

It is the opinion of this Office that had the General Assembly intended for labor/staff time to be included when producing all public records, not only those having commercial value, that authority would have been expressly granted; however, as the current law stands the express authority to assess a fee for labor/staff time is specific to records having commercial value. As such, charging for the staff time that it takes to produce a public records request seems to violate the TPRA.

With regard to the charge for redacting, see the above discussion in **Section II, Part D. Limitations on Disclosure of Confidential Information.**

Based upon all of the above cited case law and all of the above cited Attorney General opinions, it is this Office's opinion that the Fee Schedule also violates both the letter and spirit of the current law. The fee schedule provision is as follows:

Fee Schedule

Seven cents (.7¢) per page, plus the cost of the Town employee's time to make the copies based on the following rate:

the actually statutory language adopted by the General Assembly relative to what can be charged when producing copies. It is important to note that this Office was unable to discern the basis upon which the Chancellor was relying in rendering his opinion due to the fact that he cited no case law or statutory authority when the ruling was made.

1 to 6 minutes.....	\$2.34
7 to 12 minutes.....	\$4.69
13 to 18 minutes.....	\$7.02
19 to 24 minutes.....	\$9.36
25 to 30 minutes.....	\$11.70
31 to 36 minutes.....	\$14.04
37 to 42 minutes.....	\$16.38
43 to 48 minutes.....	\$18.72
49 to 54 minutes.....	\$21.06
55 to 60 minutes.....	\$23.47

Absent some reasonable basis for assessing requestors these types of fees when it is clear that the actual cost of the copy is seven cents (.7¢), it is possible that a Court could interpret this fee schedule as both unreasonable and a means to “substantially inhibit disclosure of records.” *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 304 (Tenn. 1998).

Farragut Municipal Code Section III, Part B. Commercial Equipment requires a requestor who decides to use commercial equipment to generate copies when the Town’s equipment is “incapable” of making the requested copies or “inoperative” to “pay the estimated cost of the copies, plus 50% of the estimated cost.” There is no rationale provided in this provision to explain why a requestor would be required to pay approximately one hundred fifty percent of the estimated cost of producing a record. Again, absent a reasonable basis for assessing such a charge, it is possible that a Court would look at this provision as a means used to “substantially inhibit disclosure of records.” *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 2d 297, 304 (Tenn. 1998).

IV. Conclusion

Tennessee Courts construe the Tennessee Public Records Act broadly “so as to give the fullest possible public access to public records.” Tenn. Code Ann. § 10-7-505(d). Governmental entities should also seek to give the fullest possible access to public records. Absent a clear exception to the TPRA, any and 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” must be open for public inspection and copying by any Tennessee citizen. *Griffin v. City of Knoxville*, 821 S.W. 2d. 921, 924 (Tenn. 1991). Additionally, any rules that are adopted by a governmental entity relative to inspecting and copying public records must be “reasonable” and must not serve as a means to block access to public records. Based upon the representation you made to this Office and after review of the recently amended code section addressing access to public records, it is this Office’s opinion that a Court could find both the practice and policies of the Town of Farragut in violation of the TPRA.

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

Sincerely,

Elisha D. Hodge
Open Records Specialist