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8-15-16

To: Ann Butterworth
Office of Open Records Counsel

From: Deborah Fisher, John Williams
Tennessee Coalition for Open Government

Dear Ann,

Thank you for the opportunity to make recommendations for the model best practices and public records policy that is newly required by T.C.A. § 8-4-604 (a)(4). The Tennessee Coalition for Open Government formed a committee of board members who have experience with and have studied access to public records to study this question. We surveyed our membership to gather ideas for improving the process of accessing records. We also relied on information from our Help Line, which we've operated since 2003. We also had conversations with numerous users of public records, including leaders at media and civic nonprofit organizations.

Preserving access to government is crucial for citizens in a democracy and for a free press to fulfill its role in our society. Many nonprofit groups rely on access to government information to enable them to participate effectively in the public policy process.

On the following pages are our recommendations:

RECOMMENDATIONS

1- Provide a preamble as part of the model public records policy, including basic points about the TRPA:

- Records custodians should broadly construe the Act so as to give the fullest possible access to public records.
- Records are presumed to be public unless specifically exempted from the TPRA.
- No fees are charged for the public to inspect records during regular business hours.
- Tennessee law permits but does not require a fee for copies of public records.
- Excessive fees and other rules shall not be used to hinder access to non-exempt, public records.
- The TPRA permits but does not require records custodians to demand proof of Tennessee citizenship from requestors.
- Custodians should communicate with requestors to facilitate and enhance access, including helping to narrow overly broad requests and to direct requestors to the proper custodian agency.

2 – Include as a part of the model policy commentary or instructions, apart from the language of a model policy, that explains and educates public records custodians about what may and may not, and should and should not, be included in a policy. Your mandate clearly authorizes your office to prepare and publish not only language that might be adopted by a public records custodian as a public records policy, but also to include, as a part of the publication, commentary explaining, for example, what options the custodian has in adopting a policy. For example, the model policy might well include a provision for reasonable charges for copies of records, but it might also include a second language option providing that the records custodian will not charge for such copies, plus association language explaining the alternative language. The purposes of a model policy it to educate and intelligently assist governing bodies public records custodians in making choices in adopting policies, and Tennessee is a state where no possible one-size-fits-all public records policy could be drafted, nor should it be. The model policy should be used as a teaching tool to educate governing bodies and public records custodians about their options, and to encourage the greatest possible government transparency, as the Tennessee Public Records Act mandates.

3 - Improve speed of response to requests, particularly for readily available documents, through stated policy. We believe that too often the statute is misinterpreted by records custodians and others to allow seven business days to respond to a request. Wording in a model policy should make clear that records should be made available promptly; and the law allows seven days only when it is not practicable to make the records available promptly. It should also encourage custodians to quickly determine whether the requested records are readily available or require a search or compilation. If it is determined that a request requires more time to fulfill, custodians should explain to the requester the reason for not providing the records promptly. Speed of response is the No. 1 complaint that we hear from public records requestors, with many also reporting that they are left in the dark as to why a request is taking a long time to fulfill. Some

complain they never hear back about a public records request until they follow up on the request weeks later. This conduct clearly violates the law, and any model policy should make this clear.

4- Receive and respond to requests in the most economical and efficient manner possible. This should include accepting written records requests by email and inspection requests by phone when email and phone are otherwise commonly used for other government business, and providing public records by email if the records are available in digital form. In a survey by TCOG earlier this year of school districts, some had adopted a policy not to receive records requests by email or phone. This is inefficient and more often viewed by the public as an unreasonable obstacle in making a records request. When government and government officials routinely do business by email or phone, they should be willing to receive and respond to public records request by email or phone, unless this is impossible for some reason. Willingness of government records custodians to communicate with citizens about records in multiple media, at the election of the citizen, where possible, is an important attribute of open government.

5 - Produce records in the most economical and efficient method, including electronically when possible, and produce data in machine-readable data format when it available in that format. A model policy should include providing data in available machine-readable format. Too often, public records custodians refuse to produce electronic data maintained by the government, including email, spreadsheets, and word-processing documents, in the same format in which it is available to the government (i.e., its “native format”). This is a common complaint among journalists who seek government data to analyze. Too often, they are provided “data” in a PDF that is untranslatable into common spreadsheet software (such as Excel) and must be retyped. It does not make sense for government to utilize technology that allows government to store, sort and analyze data, while preventing the public from the benefit of doing the same. Data must be released in formats that lend themselves to easy and efficient reuse via technology. (See the Sunlight Foundation for recommendations on Open Data policy: <http://sunlightfoundation.com/opendataguidelines/>. It also includes proactively releasing government information online and building on the values, goals and mission of the government and community.) We believe that Tennessee law says that, if a government agency has an email or a spreadsheet in electronic format, then that email or spreadsheet, in its native electronic format, is a public record, and should be available to citizens in that format. See, e.g., *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998).

6 - Post commonly requested records online, such as meeting agendas, agenda packets, and meeting minutes. These documents should be posted in a timely manner. For example, meeting agendas and agenda packets should be posted as soon as they are available to members of the governing body, allowing time for the public to find out about the issues to be decided. We also suggest stronger language in a model public records policy that address a practice we hear about too often of government entities withholding minutes from the public, contending that they are not public records until a governing body has approved them, sometimes a month or more later in a subsequent meeting. This practice is clearly contrary to Tennessee law and governing boards should be educated by a model policy on this point.

7 - Reduce the cost of providing copies of public records through caps or waivers on labor fees. We believe a model public records policy would encourage capping of overall fees, and/or waivers on labor fees. We believe that a model policy would state that attorneys' labor fees to review public records before release will not be charged, since it is these fees that tend to drive up costs and can be most easily abused. Fees, of course, were the subject of public hearings last year. We believe a model policy that included limits would deter inflation of fees among individuals who might be tempted to abuse what is now allowed in law. At the very least, a model policy should include language and optional language for capping or waiving of fees.

Again, a model policy must inform public records custodians that they are not required by law to charge their citizens for copies of public records, and it should, in the interest of the fullest possible government transparency, encourage public records custodians to cap, minimize or eliminate such charges.

8 - If charges are likely, custodians should provide the requester with an itemized estimate beforehand. Too often, custodians do not give the requester an estimate, and specifically, a breakdown on the estimate. If a government entity expects to charge labor fees for copies of public records, a requester should have the ability to review an itemized estimate beforehand. This should include an estimate of labor fees, broken down by job position, labor rate and task.

9 - Provide the legal basis for redactions. Whenever a public record is provided with redactions, a legal basis for each of the redactions should be provided in writing.

10 – If proof of state citizenship is required, accept forms of identification other than driver's license, including a college ID. Sometimes students who live on a Tennessee college campus do not have a Tennessee driver's license.

11 - Incident reports and other police records commonly used by journalists to independently report news to the public should be made available, and only withheld in rare circumstances when releasing such information would clearly jeopardize an investigation or prosecution. Since long before the Public Records Act was enacted in 1957, police incident reports were and have been routinely and quickly available as public records. Their availability has been vital to allowing citizens to know what crimes have been committed in their communities. It is hard to imagine a more vital interest of Tennessee citizens in prompt access to public records that access to information that allows them to protect themselves and their families. While the Tennessee Supreme Court has ruled that Criminal Court Rule 16(a)(2) allows law enforcement to withhold information related to open investigations, no reasonable interpretation of that law authorizes law enforcement authorities to refuse access to the basic who-what-where information contained in police incident reports. We believe a model policy must encourage transparency by local police and sheriff's departments, by setting the bar in favor of transparency over secrecy. This allows adequate access by citizens and, importantly, the press so it can adequately and - independent

from government - provide public safety and crime information as well as fulfill its watchdog function for government accountability.

12 - Routinely provide copies of public records to out-of-state requesters. Unfortunately, too many government entities state they have a policy not to fulfill public records requests of out-of-state requesters, despite the requester's willingness to pay any associated fees. Sometimes the request is for a small number of documents. While the Act does allow public records custodians to not provide access to those who are not Tennessee citizens, the better practice, favoring government transparency, is to allow such access. A model policy would encourage government entities to provide copies to out-of-state requesters when it is possible and feasible to do so. At a minimum, a model policy should inform public records custodians that no Tennessee law prohibits a public records custodian from honoring requests by non-Tennessee citizens.

Ann, again thank you an opportunity to weigh in with suggestions. We also welcome any opportunity to provide any followup information, such as specific language, and/or participate in a future Advisory Committee on Open Government Committee discussing a model policy and best practices.

Sincerely,

Deborah W. Fisher
Executive Director, TCOG

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