

TENNESSEE'S PUBLIC RECORDS ACT

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Tenn. Code Ann. § 10-7-503(a)(2)(A)

- ▶ 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**.

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What is a Public Record?

- ▶ "Public record" is defined as "all documents . . . 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."

▶ Tenn. Code Ann. § 10-7-503(a)(1)(A)

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Who Can Request a Public Record?

Only a Tennessee citizen, which includes prisoners and businesses. See *McBurney v. Young*, 133 S.Ct. 1709 (2013).

However, an agency is not precluded from providing public records to non-citizens.



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Exceptions - the “otherwise provided by state law”:

- ▶ State and Federal Constitutions
- ▶ Tenn. Code Ann. §§ 10-7-503 and 504 - but note that neither of these contains an exhaustive list
- ▶ Other state statutes
- ▶ Tennessee Supreme Court Rules (Rules 8 and 34), Tennessee Rules of Civil and Criminal Procedure
- ▶ Common law
- ▶ Federal statute (e.g. HIPAA)
- ▶ NOTE: Ongoing litigation with the requesting party is NOT an exception. See *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 360-61 (Tenn. 2008).

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What should you do if you get a Public Records Request?

- A. Ignore it.
- B. Ask the requestor why they want the records and if they give you a good enough reason, then provide the records.
- C. Immediately stop everything that you are doing and provide the records.
- D. Immediately deny the request.
- E. None of the above.

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What you really should do if you get a public records request:

IMMEDIATELY contact Legal Counsel with the AOC

AOC@tncourts.gov
AOCPublicRecords@tncourts.gov



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WHY?

- ▶ Public Records Act requires that within seven business days of receiving a request, you must:
 - ▶ Make the records available to the requestor, if they are practicably available;
 - ▶ Deny the request in writing and include the basis for the denial; or
 - ▶ Provide a response with an estimate of the time reasonably necessary to produce the requested records and the estimated cost (if applicable)

▶ Tenn. Code Ann. § 10-7-503(a)(2)(B)






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What is the Requestor required to provide:

- A. Their first-born child.
- B. The reason for requesting the records.
- C. A signed statement that the individual is a Tennessee citizen witnessed by two individuals.
- D. The requestor's date of birth, social security number and credit card number.
- E. None of the above.

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What a Requestor is actually required to provide:

-  A sufficiently detailed request;
-  A request in writing IF the request is for copies of records;
-  Contact information if the request is to inspect;
-  A government issued photo ID with a TN address or some alternative form of identification acceptable to the agency;
-  Payment for the cost of copies, labor and delivery of copies - in advance.

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After receiving a request and contacting AOC Legal Counsel, you should:

- ▶ 1. Promptly forget about the request.
- ▶ 2. Immediately destroy all responsive records.
- ▶ 3. Ignore all emails and phone calls from AOC Legal Counsel.
- ▶ 4. None of the above.



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What you should do . . .


1. Respond as promptly as possible to requests for information and/or documents from the AOC Legal Counsel.

2. Do not destroy any potentially responsive documents, including letting emails "roll off the system."

Tenn. Code Ann. § 10-7-503(h) imposes a fine of up to \$500 on any governmental entity that authorizes the destruction of public records subject to disclosure under the Act if the governmental entity knows the records are subject to a pending public records request.

This provision does not prohibit a records custodian from disposing of public records in accordance with an established RDA or retention policy as part of the ordinary course of business IF the records custodian is without knowledge that the records are subject to a pending public records request.

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Failure to Inspect/Pay for Copies:

- ▶ If person makes 2 or more requests to inspect within 6-month time period and for each request fails to inspect within 15 days of notification that records are available; then governmental entity is not required to comply with any request from the person for 6-month period from the date of the second request, unless the governmental entity determines that the failure to inspect was for good cause.
- ▶ If person makes request for copies, and after copies are produced, fails to pay for the copies, government entity is not required to comply with any further requests from that person until they have paid for the copies; PROVIDED that governmental entity provided person with an estimate of the costs and the person agreed to pay the estimated costs.

Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)

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- ▶ Statutory procedure is set forth in Tenn. Code Ann. § 10-7-505
- ▶ Can be filed in chancery or circuit court in the county where the records are located or where the plaintiff is located
- ▶ Defendant (governmental entity) is not required to file an answer to Petition for Judicial Review/Show Cause
- ▶ Show cause hearing - burden of proof is on the governmental entity who must demonstrate by a preponderance of evidence
- ▶ Discovery is not authorized/permitted
- ▶ Court is required to make written findings of fact and conclusions of law
- ▶ No civil or criminal liability for any official required to produce records as a result of court order

Public Records Act Lawsuit

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Tenn. Sup. Ct. Rule 34


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COURT RECORDS

- ▶ Record includes any record defined as a "public record" in Tenn. Code Ann. § 10-7-503(a)(1)(A).
- ▶ Establishes three categories of Court Records:
 - ▶ Case Records
 - ▶ Administrative Records
 - ▶ Judicial Records

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CASE RECORD

"[A]ny record created, collected, received, or maintained by the courts as part of the official court file in connection with a particular case."

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ADMINISTRATIVE RECORD

"[A]ny record created, collected, received, or maintained by the courts pertaining to the administration of the courts and not associated with a particular case."



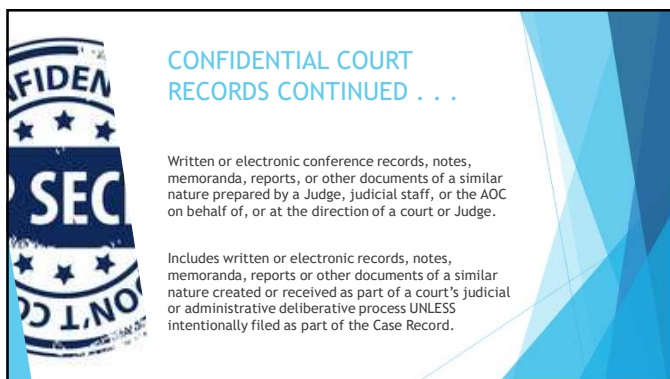
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CONFIDENTIAL COURT RECORDS CONTINUED . . .

- ▶ All internal case management information except for information concerning composition of appellate case panels assigned to consider a particular case
- ▶ Information maintained by individual judges with regard to their recusal from particular cases UNLESS:
 - ▶ Information is intentionally filed as part of the Case Record
 - ▶ Information is subject to disclosure pursuant to Tenn. Code Ann. § 8-50-501
 - ▶ Information is subject to disclosure pursuant to Tenn. S. Ct. R. 10



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CONFIDENTIAL COURT RECORDS - CATCHALL

- ▶ "Any other written or electronic record the disclosure of which would frustrate or interfere with the judicial function of the courts or potentially undermine the inherent constitutional powers granted the courts, in addition to the powers recognized in Tenn. Code Ann. 16-3-501 through 16-3-504."



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First Case applying Rule 34

- ▶ *State ex rel. Wilson v. Gentry*, No. M2019-02201-COA-R3-CV, 2020 WL 5240388 (Tenn. Ct. App. Sept. 2, 2020)

Trial court denied request for copies of audio recordings of post-conviction proceedings because:

-Local Rule provided that access to audio-visual recordings limited to Judges, Chancellors and full-time court staff

-recordings potentially included private conversations occurring at counsels' table, as well as the bench

Court of Appeals affirmed finding that audio recordings of post-conviction proceedings were confidential and not subject to disclosure pursuant to Rule 34 (2)(C)(v) and (viii).




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SECOND CASE APPLYING RULE 34

► *Waggoner v. State*, 666 S.w.3d 384 (Tenn. Ct. App. 2022)

Trial Court found that audio recordings of post-conviction proceedings were confidential and not subject to disclosure pursuant to Rule 34 (c)(v) and (viii).

Court of Appeals reversed finding that audio recordings of criminal trial constituted the "verbatim record" of the proceeding required by TCA 40-14-307, and because that statute requires court reporter to file "verbatim record" with the clerk of the court "who shall preserve them as part of the records of the trial," the recordings were public records subject to disclosure under Rule 34.



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Lessons Learned from Gentry and Waggoner

- Cannot use Local Rules to make a record confidential - comments to Rule 34 state that the reference in (2)(C)(ii) to "rule of court" "is not intended to and does not include local rules of the trial courts."
- No statutory requirement to make "verbatim record" of post-conviction proceedings that is filed with clerk of court - so exception in (2)(C)(v) can still apply to audio recordings of post-conviction proceedings
- Don't keep audio recordings of criminal trial proceedings in your possession - TCA 40-14-307 requires that they be filed with the clerk of the court.
- If going to rely on exception in (2)(C)(viii) - disclosure would frustrate or interfere with judicial function of the court or undermine their powers - need to sufficiently articulate how disclosure would frustrate/interfere and support with proof (usually affidavit)

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Public Records Policy

► Appellate Courts Public Records Policy found here: <https://tncourts.gov/courts/appellate-court-clerks-office/public-records-policy>

► Trial court required to promulgate similar policy pursuant to Tenn. Code Ann. § 10-7-503(g).

► Must include:

- Process for making requests to inspect or copies and copy of any required request form (or link if available on your website)
- Process for responding to requests, including redaction practices
- Statement of any fees charged and procedures for billing and payment
- Name or title and contact information of individual(s) designated as public records request coordinator



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