

LEGAL OPINION NO. 2000-02

TO: David Manning
DATE: November 27, 2000

You have requested a legal opinion from the Metropolitan Department of Law on the following question:

QUESTION

Are draft reports "public records" pursuant to the Public Records Act, Tennessee Code Annotated §10-7-101 et seq. and, if so, does the Public Records Act require draft reports be provided to the public?

ANSWER

Yes. Draft reports are public records subject to disclosure.

ANALYSIS

This question is governed by T.C.A. §10-7-101 et al., the Public Records Act. Section 10-7-503 of the Act states that "all state, county and municipal records . . . shall be open for inspection . . . unless provided by state statutes." Record is defined as "any material made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. The legislature has mandated that the Act shall be construed as broadly as possible to ensure public access to governmental records. T.C.A. § 10-7-505(d).

ARE THE DRAFT REPORTS PUBLIC RECORDS SUBJECT TO PUBLIC REVIEW?

The Public Records Act has been interpreted broadly to permit public review of documents. Although some exceptions to the Public Records Act, such as school records, exist, draft reports are not one of the exceptions provided.

DRAFT REPORTS

The draft reports in question should be available to the public under the Public Records Act. No other cases in Tennessee discuss draft reports. However, four cases from other states, i.e., Missouri, Ohio and Texas, hold that draft reports are subject to public disclosure. In Missouri Protection and Advocacy Services v. Allan, 787 S.W.2d 291(Mo. Ct. App. 1990), a non profit corporation sought disclosure of a draft report provided by the Federal Department of Education. The Missouri court found that the draft report was a public record within the meaning of the State Open Meetings Act and, therefore, was subject to disclosure. Similarly, in State ex rel. Gannett Satellite Info. Network v. Petro, 685 N.E. 2d 1223 (Ohio 1997) the Ohio Supreme Court found that audits, audit drafts, working papers and notes relating to audits of public offices are public records that are subject to disclosure. The Ohio Supreme Court addressed this issue again and held that a written draft of a tentative verbal agreement that city officials thought they had reached with a union was a public record subject to disclosure. State ex rel. Calvary v. City of Upper Arlington, 729 N.E.2d 1882 (Ohio 2000) Finally, in City of Garland v. The Dallas Morning News, 22 S.W.3d 351 (Texas 2000) the Texas Supreme Court held that a document, even if labeled "draft," is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by or for a governmental body. These cases state a clear preference for disclosure of all government documents.

In contrast to the cases above, the Florida Supreme Court, in Shevin v. Byro, 379 So.2d 633 (Fla. 1980), held that materials prepared as drafts or notes, constitute mere precursors of governmental records and are not, in themselves, intended as final evidence of the knowledge to be recorded under the Florida Public Records Act. The Shevin court found that rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation are not public records. Id. at 640. Although this Florida decision supports Metro's position, it is the only case which takes this position. Moreover, Tennessee's courts have not been willing to create implied exceptions to the Open Records Act. See Combined Communications, Inc. v. The Solid Waste Region Board, 1994 WL 123831 (Ct. App. Tenn. 1994)(finding that no Open Records Act exception existed for letters from a Metro attorney to members of an administrative board); Memphis Publishing Company v.

City of Memphis, 871 S.W.2d 681 (Tenn. 1994)(noting that work product of metropolitan government attorneys is not excepted from the Open Records Act but encouraging the legislature to do so). Thus, Tennessee's courts appear unlikely to adopt the Florida court's holding.

ATTORNEY FEES, COSTS & INJUNCTIVE RELIEF

If a member of the public files an action to compel Metro's release of the draft report and Metro loses, the Metropolitan Government could be forced to pay the opponent's attorney fees and costs. T.C.A. §10-7-5-505(g) states:

If the court finds that the governmental entity, or agent thereof, refusing to disclose a record knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees against the nondisclosing governmental entity.

This award of attorney fees is not automatic, the purpose of this section is to discourage wrongful refusals to disclose public documents. Therefore, the section does not apply if a governmental entity's unsuccessful attempt to protect a public record from disclosure is "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Rule 11, Tenn.R.Civ.P; Abernathy v. Whitley, 838 S.W.2d 211 (Tenn. Ct. App. 1992)(Defendant's refusal of access was not "willful" within the meaning to this section); Memphis Publishing Co. v. City of Memphis, 871 S.W.2d 681 (Tenn. 1994)(Where there was question whether transcripts of depositions taken by attorney for county and city in bankruptcy proceedings were "records" under the Public Records Act, it could not be said that city and county willfully refused to disclose them, making them liable for attorneys' fees and costs pursuant to §10-7-505(g)). If Metro's arguments are unsuccessful, Metro can argue that the law and facts of the case, i.e., the Florida Supreme Court case and the lack of Tennessee case law, support Metro's position.

In addition to the attorney fees provision, T.C.A. §10-7-505 states:

The court, in ruling upon the petition of any party proceeding hereunder . . . shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section, and this section shall be broadly construed so as to give the fullest possible public access to public records.

Therefore, if an action is filed, a court could enjoin Metro from not providing public documents in the future. This injunction would dictate Metro's delivery of documents and set penalties for not complying with the Open Records Act, including the possibility of being held in contempt of court.

CONCLUSION

Because most case from other jurisdictions consider draft reports are public records subject to disclosure, because the purpose of the Public Records Act is to give the fullest possible public access to public records and because of the significant penalties should Metro's refusal be considered willful, it is our opinion that the draft reports should be provided for public review

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

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/Tdc

cc: Mayor Bill Purcell