



OPEN RECORDS AD HOC COMMITTEE

Tennessee Coalition for Open Government

WHO IS TCOG?

- Established 2003
- Tracking, research
- Help Line, Newsletter
- Alliance of news media, citizens and civic groups promoting a free flow of information about government issues
- Member of national network, National Freedom of Information Coalition

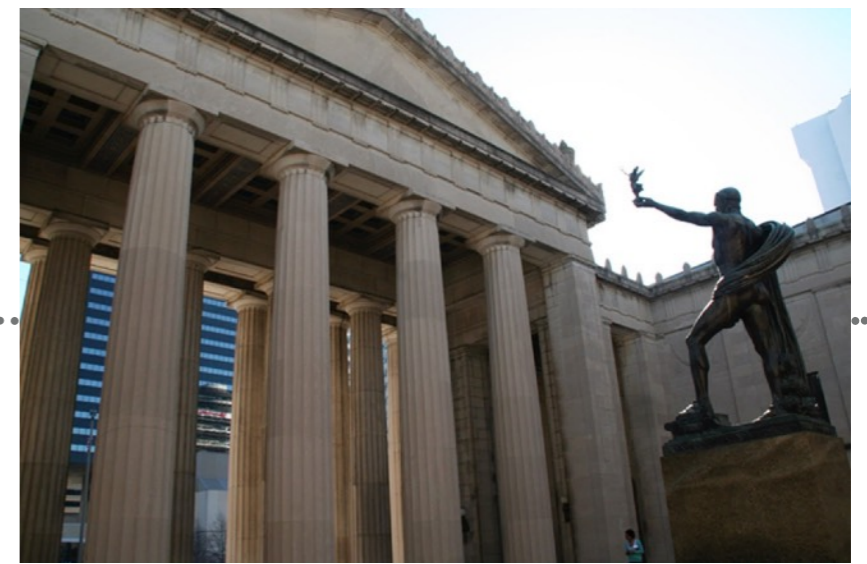


BACKGROUND



- Also called “Right to Know laws” and “Sunshine laws”
- “Sunlight is said to be the best of disinfectants” - Louis Brandeis, 1913
- Citizens need access to information to hold government accountable; understand what government is doing.
- Knowledge and sharing of information can reduce potential for government corruption, cronyism & improve policy decisions.

TENNESSEE PUBLIC RECORDS ACT



- Adopted in 1957
- Records created or received by local or state government as part of transacting government business are open for inspection unless otherwise made confidential by state law.
- Format doesn't matter: Paper, electronic, map, photos, sound recordings, etc...
- 538 exemptions to the Tennessee Public Records Act in statute

EXEMPTIONS - THE PROCESS



- Not always main part of a bill
- Often not captioned to open the Public Records Act (T.C.A. § 10-7-504)
- May or may not note “confidentiality” or “privacy” or “public records act” in the caption.
- Lawmakers may only hear from the entity who wants the exemption.
- No fiscal notes, although some exemptions drive up redaction costs

EXEMPTIONS – THE PROCESS

- How to balance the public interest for transparency with the public purpose for the exemption if lawmakers don't know:
 - What specific records are affected
 - Who the exemption uniquely affects



EXAMPLES



- **UT alternative investment exemption**
 - Stated goal: Shield proprietary analysis by investment firm
 - This year: Used to shield how much paid to investment firm for services
- **Tax information**
 - Goal: Protect a person or company's tax return information
 - Recent years: How much in economic development tax credits are promised companies as part of incentive deal.

EXAMPLES



➤ Trade secrets

- Cost/Benefit Analysis of PILOT, a common public document
- Redacted: Appraised tax value of government land granted to Google
- Couldn't get basic information on COST of government incentive
- IDB attorney: Market value of government land given Google in PILOT redacted because it would provide insight into the company's "operational and investment strategy"

EXAMPLES

- **TBI's "forever" exemption**
 - Unique investigative exemption
 - Even FBI allows access to records after certain time period and subject to certain criteria
- **Government employee private email addresses on public documents**
 - No exception for when these addresses are used to conduct public business
 - Redaction costs not considered



A LITTLE HISTORY

- 2006-2007 Joint Study Committee on Open Government.
- 1 - Procedures for the general assembly to follow for legislation creating new statutory exemptions:
 - Balance public necessity for openness with legitimate privacy concerns
 - Anticipate unintended consequences
 - Try and ensure that exemptions are not broader than necessary



A LITTLE HISTORY (CONT.)



2 - Make new statutory exemptions to the Open Records Law subject to a sunset review

3 - Develop recommendations for a review of current exemptions that are vague, misunderstood or misconstrued with a goal toward making the exemptions as specific as possible to avoid misuse and abuse.

ADVISORY COMMITTEE ON OPEN GOVERNMENT

- 14 members
 - 7 government
 - 7 “public interest”
 - House State Gov / Senate S & L
- Appointed by Comptroller
- Statutory responsibilities:
 - Advise the Office of Open Records Counsel
 - Produce reports and respond to requests from General Assembly
 - 2018: Law updated to provide more functionality



Lee Pope, Office
of Open Records
Counsel



WHY TACKLE BROAD EXEMPTIONS



- Will help assure adequate access to government information for oversight and understanding.
- Will help with enforcement, particularly with exemptions subject to misinterpretation and dispute.
- Will reduce costs associated with legal disputes over broad, undefined or vague language.
- Will clarify legislative intent.
- Promotes a culture of transparency, maintaining confidence and trust in government and a free flow of information.

WHAT A SUNSET PROCESS COULD PROVIDE

- Systematic review of exemptions
- Consistent criteria
- Allows check-in opportunity to clarify misunderstood or misapplied exemptions
- Allows adjustments when context has changed (ex.: body cameras, technology)
- Puts a continuing focus on access to government information
- Creates an opportunity for stakeholders to share information; find solutions



SUNSET REVIEW IN FLORIDA — CRITERIA



1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

SUNSET REVIEW IN FLORIDA – PUBLIC PURPOSES

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.



OTHER STATES



- Washington: Public Records Exemption Accountability Committee. About 500 exemptions.
- Maine: Decade-long review of all exemptions. A committee reviews proposed exemptions before legislature considers them.
- Oregon: Open Government Impact statements (like fiscal impact statements); Oregon Sunshine Committee formed for exemption review.
- Connecticut: All bills impacting FOI must go through Government Administration and Elections Committee.

TENNESSEE RECOMMENDATIONS



- Implement sunset review of all new and/or existing exemptions
- Create criteria for sunset review and process
- Improve process of new exemptions, ensuring opportunity to hear from more than the entity who wants the exemption
- “Transparency note”
- If Ad Hoc Committee chooses to review 538+, organize by agency or topic to assure stakeholder input
- Use of Advisory Committee on Open Government