STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
OFFICE OF OPEN RECORDS COUNSEL
James K. Polk State Office Building
505 Deaderick Street, Suite 1600
Nashville, Tennessee 37243-1402

Justin P. Wilson
Comptroller

September 3, 2010

Mr. Andrew Clarke
6250 Poplar Avenue
Second Floor
Memphis, Tennessee 38119

You have requested an opinion from this office that addresses the following issue:

> Can a fee be assessed for the labor associated with gathering records responsive to a public records request when the requestor only wants to inspect the records?

I. Background

Your request for an opinion is based upon correspondence that you received from an attorney who represents Corrections Corporation of America (hereinafter "CCA"). In April 2007, Alex Friedmann made a public records request to CCA for a variety of records related primarily to lawsuits and settlements involving CCA and certain contracts between CCA and Tennessee state and local governmental entities. *Friedmann v. Corrections Corporation of America*, 310 S.W. 3d 366, 369-370 (Tenn. Ct. App. 2009). Mr. Friedmann subsequently filed a public records lawsuit due to the fact that CCA denied his request based upon the corporations belief that:

> (1) that it was a private corporation and not subject to the Public Records Act; (2) CCA was not operating as the functional equivalent of a governmental agency; (3) even if CCA was subject to the Public Records Act, many of the requested documents nevertheless exceeded the scope of the Public Records Act because they were protected by the attorney work product doctrine or sealed by order of a court; (4) many of the requested documents were obtainable by Plaintiff either through the applicable court clerk's office or the governmental agency with which CCA had contracted; and (5) gathering all of the requested documents would be overly burdensome.

Id.

The trial court held that " . . . Corrections Corporation of America (hereafter CCA) contracted with the State of Tennessee to build and operate some of its prisons . . . for purposes of the Tennessee Public Records Act, CCA is operating as the functional equivalent of a state agency." *Id.* at 371. Certain records maintained by CCA were held to open to public inspection. *Id.* An appeal was filed and on September 16, 2009, the Tennessee Court of Appeals released the *Friedmann v. Corrections Corporation of America* opinion.[1] The court affirmed the lower courts ruling with regard to the functional equivalency issue and again determined that certain records maintained by CCA are to be

[1] The Court of Appeals originally released an opinion in this case on August 5, 2009. However, the Court granted Mr. Friedmann's Petition to Rehear and as a result, withdrew its original opinion and addressed the new arguments made in the opinion released September 16, 2009. *Id.* at 368.

open to inspection. *Id*. at 380. The case was remanded to the lower court for a determination as to whether or not any of the requested records do not constitute "public records" and whether or not any of the requested records are confidential because they constitute attorney-client privilege communications or attorney work product. *Id*. at 381.

Based upon the correspondence between the attorney representing Mr. Friedmann and the attorney representing CCA (Attached "Exhibit 1" and "Exhibit 2"), it appears that significant discussion has taken place regarding Mr. Friedmann's ability to inspect certain of the requested records; however, it also appears that CCA is taking the position that it will only make those records available for Mr. Friedmann's inspection if he agrees "to cover CCA's production costs in excess of one hour."[2]

II. Analysis

When the Tennessee Public Records Act (hereinafter referred to as the "TPRA") was amended in 2008 with the passage of Public Chapter 1179, Acts of 2008 (Attached "Exhibit 3"), several significant changes were made. First, the General Assembly declared through language that is clear and unambiguous that "A records custodian may not . . . assess a charge to view a public record unless otherwise required by law." Tenn. Code Ann. Section 10-7-503(a)(2)(7)(A). Additionally, this office was established pursuant to Tenn. Code Ann. Section 8-4-601 et. seq. Tenn. Code Ann. Section 8-4-604 directed the office to establish the Schedule of Reasonable Charges. The provision reads in part:

> (a) The office of open records counsel shall establish:
> (1) A schedule of reasonable charges which a records custodian may use as a guideline to charge a citizen requesting copies of public records pursuant to Title 10, Chapter 7, Part 5.

Tenn. Code Ann. Section 8-4-604. As is clearly indicated by the language of this provision, the Schedule of Reasonable Charges is only applicable when copies or duplicates or records are requested.

Tenn. Code Ann. Section 10-7-503 was amended to address how fees for copies of records could be assessed until the Schedule of Reasonable Charges was developed. When passed, Tenn. Code Ann. Section 10-7-503(a)(2)(C) read:

> (i) Until the office of open records counsel develops a schedule of reasonable charges in accordance with § 8-4-604(a), a records custodian may require a requestor to pay the custodian's actual costs incurred in producing the requested material; provided that no charge shall accrue for the first five (5) hours incurred by the records custodian in producing the requested material. Such actual costs shall include but not be limited to:
> (*a*) The making of extracts, copies, photographs or photostats; and
> (*b*) The hourly wage of employee(s) reasonably necessary to produce the requested information.
> (ii) When such schedule of reasonable charges is developed, the provisions of subsection (a)(7)(C)(1) shall become effective.
> (iii) Following the development of the schedule of reasonable charges by the office of open records counsel, the office of open records counsel shall notify the Tennessee Code Commission and when the code commission receives such notice this subdivision (C) shall no longer apply and the language in this subdivision (C) shall be repealed and deleted by the code commission as volumes are replaced or supplements are published.[3]

[2] In the letter attached as Exhibit 2, the attorney for CCA discusses the fact that Mr. Friedmann has agreed, within the context of another public records request, that CCA can assess him a fee for the production costs associated with producing records responsive to his request to inspect. Even if Mr. Friedmann has made such an assertion, CCA has no legal authority to assess a fee for "collection and production costs (in excess of one hour)" based upon several statutory provisions that are discussed later in the opinion as well as the language of the Schedule of Reasonable Charges.

[3] Once the Schedule of Reasonable Charges was developed, the Codes Commission was contacted and Tenn. Code Ann. Section 10-7-503(a)(2)(C) was deleted in its entirety.

While the language in the abovementioned provisions addressed how fees relative to copies or duplicates of public records were to be established and how the fees were to be assessed prior to the development of the Schedule of Reasonable Charges, the language in Tenn. Code Ann. Section 10-7-503(a)(7)(C)(1) addresses how fees are to be assessed now that the Schedule of Reasonable Charges has been developed. The provision reads "A records custodian may require a requestor to pay the custodian's reasonable costs incurred in producing the requested material and to assess the reasonable costs in the manner established by the office of open records counsel pursuant to § 8-4-604." Tenn. Code Ann. Section 10-7-503(a)(7)(C)(1).

On October 1, 2008, this office released the instructions for use of the Schedule of Reasonable Charges (Attached "Exhibit 4") and the Schedule of Reasonable Charges (Attached "Exhibit 5"). The introductory language to the instructions reads:

> . . . Public Chapter 1179, Acts of 2008, required the OORC to establish the schedule which a records custodian may use as a guideline to charge a citizen requesting copies of public records pursuant to the Tennessee Public Records Act, T.C.A. Sections 10-7-501 et seq.
>
> T.C.A. Section 10-7-503(a) as amended by Public Chapter 1179, Acts of 2008, effective July 1, 2008, specifically states in (7)(A) that a records custodian may not charge for inspection of public records unless otherwise required by law. Until the development of the schedule, Section 10-7-503(a)(2)(C) allowed a records custodian to charge a requestor the actual costs incurred in producing a copy or duplication, which can include any labor incurred after five (5) hours is spent producing the requested material. With the development of the schedule, a records custodian is authorized by TCA Section 10-7-503(a)(7)(C)(1) to charge reasonable costs assessed in a manner consistent with the schedule.

The introductory language of the Schedule of Reasonable Charges reads:

> Section 6 of Public Chapter 1179, Acts of 2008 ("Public Chapter 1179") adds T.C.A. Section 8-4-604(a)(1) which requires the Office of Open Records Counsel ("OORC") to establish a schedule of reasonable charges ("Schedule of Reasonable Charges") which may be used as a guideline in establishing charges or fees, if any, to charge a citizen requesting copies of public records under the Tennessee Public Records Act (T.C.A. Sections 10-7-503, et seq.)("TPRA"). . .
>
> The TPRA grants Tennessee citizens the right to request a copy of a public record to which access is granted under state law. Public Chapter 1179 adds T.C.A. Section 10-7-503(a)(7)(A) which expressly prohibits a records custodian from charging a fee for inspection under the TPRA unless otherwise required by law. However, the TPRA in T.C.A. Section 10-7-506 does permit records custodians to charge for copies or duplication pursuant to properly adopted reasonable rules.

Based upon the above-cited provisions and based upon the fact that this office is unaware of any other provision that would allow CCA to charge a fee for the inspection of the requested records, it is the opinion of this office that CCA cannot assess Mr. Friedmann a fee "to cover CCA's production costs in excess of one hour." As is clearly indicated by the language in the above-cited statutory provisions and the language developed by this office, the Schedule of Reasonable Charges is only applicable when copies or duplicates or records are requested. However, if Mr. Friedmann determines that he wants copies of all the records or a portion thereof after he inspects them, CCA is permitted to assess him the cost of the requested copies, as well as a fee for labor that is proportional to the time that it took to locate, retrieve, review, redact, and copy or duplicate any of the records for which he requests a copy, as long as the fee is calculated in accordance with the Schedule of Reasonable Charges.

Elisha D. Hodge
Open Records Counsel

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August 13, 2010
Via E-Mail

Joseph F. Welborn, III
2300 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219

RE: Friedmann v. CCA

Dear Joe:

After the denial of both Applications for Permission to Appeal to the Supreme Court, we have discussed moving this case forward on remand. Towards that end, I have requested that you produce for inspection the documents that CCA believes should be produced based on the Court of Appeals' opinion.

In June, you indicated that CCA would be willing to produce the documents set forth in paragraph 3 (governmental reports, audits, etc.) and paragraph 6 (contracts with any state or local agency for the operation of a correctional facility). However, you indicated that CCA would not make these documents available for inspection without agreeing to reimburse CCA for the time and expense in gathering these documents. Further, you have indicated that CCA would not produce for inspection the documents requested in paragraphs 1 (complaint/claims where CCA paid more than $500); 2 (verdict forms/releases/settlement agreements for claim set forth in paragraph 1); 4 (court rulings issuing injunctive or declaratory relief); and 5 (spreadsheets or summaries of litigation concluded against CCA).

In July, I contacted the Open Records Commission concerning the applicability of a fee schedule to requests for inspection of documents as opposed to producing documents. Ms. Hodges advised me that no fees could be charged for inspection or redacting documents under the Public Records Act. In particular, the fee schedule notes:

> The TPRA grants Tennessee citizens the right to request a copy of a public record to which access is granted under state law. Public Chapter 1179 adds T.C.A. Section 10-7-503(a)(7)(A) which expressly prohibits a records custodian from charging a fee for inspection under the TPRA unless otherwise required by law. However, the TPRA in T.C.A. Section 10-7-506 does permit records custodians to charge for copies or duplication pursuant to properly adopted reasonable rules.

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On July 7, 2010, I sent you an e-mail requesting that you reconsider your position with respect to charging for the costs for producing documents for inspection that CCA agreed to produce. Please advise if CCA will be willing to produce any documents for inspection without the payment of any fees or costs associated with gathering the requested documents.

In any event, we need to get this matter on track for resolution. Towards that end, I submit that since the Court of Appeals has now determined that CCA is the functional equivalent of a governmental entity, the burden of proof is clearly on CCA to prove that the requested documents are not subject to the Public Records Act. Since the Court of Appeals has determined that CCA is the functional equivalent of a governmental entity, I believe that any argument concerning the internal operation of CCA is now moot. Therefore, the only question to be answered by Chancellor Bonnyman on remand is whether the documents requested were *"made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency."* I submit that there is absolutely no question that the documents requested were made or received by CCA while conducting official business. Therefore, I am requesting that you reconsider your objections to producing all of the documents originally ordered to be produced by Chancellor Bonnyman. If we are forced to continue to litigate this matter, I will be seeking attorney fees pursuant to the PRA.

If you will not reconsider your opinion, I am requesting that you contact me to discuss getting this matter scheduled for hearing. I also enclose a rough draft of a Notice to Take Deposition of 30.02(6) Duces Tecum which I will have to take prior to the hearing. I thank you in advance for your anticipated professional courtesies and attention to this matter.

Sincerely,

S/ Andrew C. Clarke

Andrew C. Clarke

cc: Alex Friedmann

WALKER, TIPPS & MALONE PLC

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August 24, 2010

VIA EMAIL

Andrew C. Clarke
Law Office of Andrew C. Clarke
6250 Poplar Avenue, Second Floor
Memphis, Tennnessee 38119

Re: *Friedmann v. CCA*

Dear Andy:

I am writing in response to your August 13, 2010 letter. As detailed below, the Public Records Act permits CCA to recover its labor costs (in excess of one hour) in collecting and producing the records Alex Friedmann requested and that CCA was agreeable to producing as set forth in my June 10, 2010 email to you. Your argument to the contrary conflicts with the Public Records Act, the Schedule of Reasonable Charges adopted by the Office of Open Records Counsel, and the position Mr. Friedmann has taken with respect to another public records request he recently submitted to CCA. In addition, your characterization of the issues before the trial court on remand is also inconsistent with the Court of Appeals' decision. You ignore that the appellate court only found CCA's operation of certain correctional facilities the functional equivalent of a state agency and also remanded CCA's claim of attorney work product protection for some of the records requested. Finally, while I can work with you on scheduling dates for the trial court hearing and a Rule 30.02(6) deposition of CCA, your draft deposition notice includes several topics that are overbroad and not designed to lead to the discovery of admissible evidence. If we cannot reach an agreement on these topics, CCA will be forced to move for a protective order at the appropriate time.

To begin, there is no question that CCA is permitted to charge Mr. Friedmann for a portion of its labor costs in collecting and producing the records I outlined to you in my June 10, 2010 email. You misstate the issue here in claiming that CCA is impermissibly trying to charge Mr. Friedmann a fee for the right to inspect these documents. CCA is doing no such thing. The charge CCA would impose is not for inspection but instead for its labor costs (in excess of one hour) for collecting and producing the requested records. This is an important distinction and not one without a difference. Indeed, if it takes CCA less than an hour to collect and produce these records, Mr. Friedmann will pay nothing (assuming he does not ask to make copies of any of the records).

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The Public Records Act and the Schedule of Reasonable Charges also recognize this distinction and fully support CCA's position. The Act expressly states that: "A records custodian may require a requestor to pay the custodian's reasonable costs incurred in producing the requested material and to assess the reasonable costs in the manner established by the office of open records counsel pursuant to § 8-4-604." T.C.A. § 10-7-503(a)(7)(C)(i). In turn, the Schedule of Reasonable Charges defines "Labor" as "the time reasonably necessary to produce the requested records and includes the time spent locating, retrieving, reviewing, redacting, and reproducing the records." The Schedule further states that a "records custodian is permitted to charge the hour wage of the employee(s) reasonably necessary to produce the requested records" in excess of the first hour incurred in producing the material.

If this clear authority were not enough, Mr. Friedmann has already agreed, in the context of another recent public records request, that CCA may charge for its production costs incurred in responding to a request. In July, Mr. Friedmann submitted a Public Records Act request to CCA for some of its policies. When CCA informed Mr. Friedmann that it would produce the records for his inspection only if he would commit to paying CCA's collection and production costs (in excess of one hour), Mr. Friedmann promptly agreed. In a letter to CCA (which is enclosed for your review), Mr. Friedmann stated "I am agreeable to paying reasonable costs for producing the requested records beyond the initial hour of search time, per the public records statute." As result, even Mr. Friedmann agrees that Public Records Act permits CCA to impose a charge for its production costs.

Given all this, CCA's position remains unchanged. It is willing to produce the records previously outlined to you but only if Mr. Friedmann agrees: (1) to cover CCA's production costs in excess of one hour (as he has done previously); and (2) that, in producing these records, CCA is not waiving or conceding any of its arguments that other documents requested by Mr. Friedmann are not subject to the Public Records and that he will not make any such argument. If he is willing to do so, let me know and we can begin to arrange the collection and production of these records.

CCA's position with respect to the other records Mr. Friedmann requested (listed in paragraphs 1, 2, 4, and 5 of his original request) similarly remains unchanged and you again mischaracterize the issues. The Court of Appeals did *not* find CCA, as a corporate entity, the functional equivalent of a state agency. It is also not true that the sole issue pending now before the trial court is whether these other records were made or received by CCA while conducting official business. Instead, there are two separate and wholly independent issues that the Court of Appeals remanded for the trial court to resolve.

The first such issue the Court of Appeals identified for remand is whether these remaining records fit within the statutory definition of public records. As noted in your letter, the Public Records Act defines public records as those "made or received pursuant to law or ordinance or in connection with the transaction of official business by a governmental agency."

T.C.A. § 10-7-301(6). This issue cannot be addressed, however, without careful attention to the appellate court's limited holding on the question of functional equivalency.

That holding is far different and narrower than you characterize in your letter. Instead of holding that CCA, on a corporate level, is acting as the functional equivalent of a government agency, the Court of Appeals focused on CCA's Tennessee state and local facilities. In so doing, the appellate court narrowly held that CCA's Tennessee state and local facilities are being operated as the functional equivalent of a state agency. So, with respect to CCA's South Central Correctional Center, the appellate court held that "CCA is operating that facility as the functional equivalent of a state agency." *Friedmann v. Corrections Corp. of America*, 310 S.W.3d 366, 376 (Tenn. Ct. App. 2009). Similarly, with respect to CCA's other Tennessee state and local facilities, the appellate court held that "these facilities likewise are being operated by CCA as the functional equivalent of a governmental agency." *Id.* at 379.

As a result, under this narrow holding, the question for the trial court regarding the remaining records at issue is did CCA create or receive them as part of the official operation of these state and local facilities. The answer is undoubtedly no. As the Court of Appeals held, Mr. Friedmann "is not entitled to documents that were not made or received pursuant to law or ordinance or in connection with the transaction of official business by [CCA acting as a] governmental agency." *Id.* at 380. The remaining records encompassed by Mr. Friedmann's request are all litigation-related material that CCA's Office of General Counsel created or received. CCA manages litigation in a manner completely detached and separate from its operation of those Tennessee local and state facilities at issue. CCA and its Office of General Counsel also operate similarly unconnected to any governmental agency. No agency is involved in or has any say with respect to how CCA manages, defends, prosecutes or resolves lawsuits filed by or against it. In sum, the Court of Appeals did *not* hold that CCA's defense of lawsuits filed against it is CCA operating as the functional equivalent of a governmental agency. Thus, the remaining documents requested by Mr. Friedmann do not qualify as public records under the Public Records Act as interpreted by the Court of Appeals.

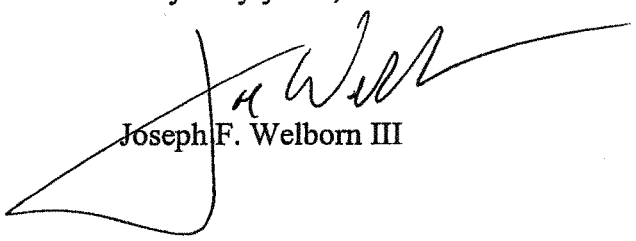
But even if they did (and they do not), a second issue remains for the trial court to resolve. That is whether the spreadsheets or summaries of litigation requested by Mr. Friedmann qualify for protection under the attorney work product doctrine. Your letter makes no mention of this despite the Court of Appeals having expressly included it on remand. CCA has offered evidence showing that these records are protected attorney work product and therefore exempt from disclosure under the Public Records Act.

Finally, given these two issues, several topics in the draft Rule 30.02(6) notice you sent are both overbroad and not reasonably calculated to lead to the discovery of admissible evidence. For example, topics 1 and 2 are overbroad in that they cover records CCA has already agreed to produce. In addition, topic 3 has nothing to do with any of the records remaining at issue and is therefore not reasonably calculated to lead to the discovery of admissible evidence. If we can reach an agreement to eliminate topic 3 and narrow topics 1 and 2 to cover only those records

still in dispute, we can begin to work on potential dates for the deposition. If not, CCA will be forced to file a motion for a protective order at the appropriate time and the parties will need to litigate the proper scope of the deposition.

Feel free to contact me if you have any questions regarding the above or when you are ready to discuss how the case should proceed.

Very truly yours,



Joseph F. Welborn III

JFW/pkg
Enclosure

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Direct Dial: 802-257-1342
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W. Brattleboro, VT 05303

July 21, 2010

SENT VIA FAX ONLY

Mr. Joseph F. Welborn III
2300 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219

RE: Public Records Request for CCA-MDCDF Policies

Dear Mr. Welborn:

Thank you for your letter of July 15 concerning my public records request for certain CCA policies.

I would question whether it takes up to three hours to produce the requested records, as presumably CCA knows where its policies are located, the policies are available in electronic format, and producing them should not be a time-consuming task.

That being said, I am agreeable to paying reasonable costs for producing the requested records beyond the initial hour of search time, per the public records statute, so long as the person performing the search is a clerical office employee and not, for example, an attorney who bills at hundreds of dollars per hour. If we are agreed on that point, then please have CCA gather the requested records, which I will inspect at your office. I do reserve the right to challenge fees for inspection of documents in the future.

I am available to inspect the documents from July 29 through August 2. Please contact me by email or phone to confirm when I may review the records.

Thank you for your time and attention in this regard;

Sincerely,

Alex Friedmann
Associate Editor, PLN

PUBLIC CHAPTER NO. 1179

SENATE BILL NO. 3280

By McNally, Haynes, Burchett, Tracy, Williams, Watson

Substituted for: House Bill No. 3637

By McDaniel, Eldridge, DuBois

AN ACT to amend Tennessee Code Annotated, Title 8, Chapter 4; Title 8, Chapter 44 and Title 10, Chapter 7, relative to open government.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 10-7-503, is amended by deleting subsection (a) in its entirety and substituting instead the following:

(a)(1) As used in this part and Title 8, Chapter 4, Part 6, "public record or records" or "state record or records" means 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.

(2)(A) All state, county and municipal records shall at all times, during business hours, which for public hospitals shall be during the business hours of their administrative offices, 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.

(B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall within seven (7) business days:

(i) Make such information available to the requestor;

(ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or

(iii) Furnish the requestor a completed records request response form developed by the office of open

EXHIBIT 3

records counsel stating the time reasonably necessary to produce such record or information.

(C)(i) Until the office of open records counsel develops a schedule of reasonable charges in accordance with § 8-4-604(a), a records custodian may require a requestor to pay the custodian's actual costs incurred in producing the requested material; provided that no charge shall accrue for the first five (5) hours incurred by the records custodian in producing the requested material. Such actual costs shall include but not be limited to:

(*a*) The making of extracts, copies, photographs or photostats; and

(*b*) The hourly wage of employee(s) reasonably necessary to produce the requested information.

(ii) When such schedule of reasonable charges is developed, the provisions of subsection (a)(7)(C)(1) shall become effective.

(iii) Following the development of the schedule of reasonable charges by the office of open records counsel, the office of open records counsel shall notify the Tennessee Code Commission and when the code commission receives such notice this subdivision (C) shall no longer apply and the language in this subdivision (C) shall be repealed and deleted by the code commission as volumes are replaced or supplements are published.

(3) Failure to respond to the request as described in subdivision (a)(2) shall constitute a denial and the person making the request shall have the right to bring an action as provided in § 10-7-505.

(4) This section shall not be construed as requiring a governmental entity or public official to sort through files to compile information; however a person requesting such information shall be allowed to inspect the non-exempt records.

(5) This section shall not be construed as requiring a governmental entity or public official to create a record that does not exist; however the redaction of confidential information from a public record or electronic database shall not constitute a new record.

(6) A governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.

(7)(A) A records custodian may not require a written request or assess a charge to view a public record unless otherwise required

by law. However, a records custodian may require a request for copies of public records to be in writing or that such request be made on a form developed by the office of open records counsel. Such custodian may also require any citizen making a request to view a public record or to make a copy of a public record to present a photo identification, if the person possesses a photo identification, issued by a governmental entity, which includes the person's address. If a person does not possess a photo identification, the records custodian may require other forms of identification acceptable to the records custodian.

(B) Any request for inspection or copying of a public record shall be sufficiently detailed to enable the records custodian to identify the specific records to be located or copied.

(C)(1) A records custodian may require a requestor to pay the custodian's reasonable costs incurred in producing the requested material and to assess such reasonable costs in the manner established by the office of open records counsel pursuant to § 8-4-604.

(2) The records custodian shall provide a requestor an estimate of such reasonable costs to provide copies of the requested material.

SECTION 2. Tennessee Code Annotated, Section 10-7-505(b), is amended by adding the language "or circuit court" immediately after the language "chancery court" in the first sentence.

SECTION 3. Tennessee Code Annotated, Section 10-7-505(b), is further amended by adding the language "or circuit court" after the language "chancery court" every time it appears in the second sentence.

SECTION 4. Tennessee Code Annotated, Section 10-7-505(g), is amended by adding the following language at the end of the subsection:

In determining whether the action was willful the court may consider any guidance provided to the records custodian by the office of open records counsel as created in Title 8, Chapter 4.

SECTION 5. Tennessee Code Annotated, Title 8, Chapter 44, Part 1, is amended by adding the following as a new section thereto:

§ 8-44-109.

(a) The municipal technical advisory service (MTAS) for municipalities and the county technical assistance service (CTAS) for counties, in order to provide guidance and direction, shall develop a program for educating their respective public officials about the open meetings laws codified in this chapter, and how to remain in compliance with such laws.

(b) The Tennessee School Board Association shall develop a program for educating elected school board members about the open meetings laws and how to remain in compliance with such laws.

(c) The utility management review board shall develop a program for board members of water, wastewater and gas authorities created by private act or under the general law and of utility districts in order to educate such board members about the open meetings laws and how to remain in compliance with such laws.

(d) The state emergency communications board created by § 7-86-302 shall develop a program for educating emergency communications district board members about the open meetings laws and how to remain in compliance with such laws.

(e) The office of open records counsel established in Title 8, Chapter 4, shall establish educational programs and materials regarding open meetings laws in Tennessee, to be made available to the public and to public officials.

SECTION 6. Tennessee Code Annotated, Title 8, Chapter 4, is amended by adding the following sections as a new part thereto:

8-4-601.

(a) There is created the office of open records counsel to answer questions and provide information to public officials and the public regarding public records. The role of such office shall also include collecting data on open meetings law inquiries and problems and providing educational outreach on the open records laws codified in Title 10, Chapter 7, and the open meetings laws codified in Title 8, Chapter 44.

(b) The office of open records counsel shall answer questions and issue informal advisory opinions as expeditiously as possible to any person including local government officials, members of the public and the media. State officials shall continue to consult with the office of the attorney general and reporter for such opinions. Any opinion issued by the office of open records counsel shall by posted on the office's Web site.

(c) The office of open records counsel is hereby authorized to informally mediate and assist with the resolution of issues concerning the open records laws codified in Title 10, Chapter 7.

8-4-602.

(a) There is created an advisory committee on open government to provide guidance and advice for the office of open records counsel.

(b)(1) The advisory committee shall consist of ten (10) members to be appointed for a term of four (4) years; provided that the four (4) members listed in subdivisions (b)(1)(A)-(E) shall be appointed for an initial term of four (4) years and the four (4) members listed in subdivisions (b)(1)(F)-(J)

shall be appointed for an initial term of two (2) years. The advisory committee shall be made up of one (1) member from each of the following groups who will be appointed by the comptroller from a list of three (3) nominees submitted from each group:

(A) One (1) member from the Tennessee Coalition for Open Government;

(B) One (1) member from the Tennessee Press Association;

(C) One (1) member from the Tennessee Municipal League;

(D) One (1) member from either the Tennessee County Services Association or the County Officials Association of Tennessee;

(E) One (1) member from the Tennessee School Boards Association;

(F) One (1) member from Common Cause;

(G) One (1) member from the League of Women Voters;

(H) One (1) member from public hospitals submitted by the Tennessee Hospital Association;

(I) One (1) member from the Tennessee Association of Broadcasters; and

(J) One (1) member representing the Tennessee board of regents or the University of Tennessee.

(2) The advisory committee shall also consist of the chairs of the House and Senate State and Local Government Committees and the attorney general or the attorney general's designee.

(c) The non-legislative members shall not receive compensation for serving on the committee but shall be reimbursed for attendance at meetings in accordance with the comprehensive travel regulations promulgated by the Commissioner of Finance and Administration and approved by the attorney general.

8-4-603.

(a) The advisory committee, with the guidance and assistance of the office of open records counsel, may review and provide written comments on any proposed legislation regarding the open meetings laws codified in Title 8, Chapter 44, and the open records laws codified in Title 10, Chapter 7.

(b) The office of open records counsel and the advisory committee shall provide a report to the general assembly and to the governor by March 1 of each year.

8-4-604.

(a) The office of open records counsel shall establish:

(1) A schedule of reasonable charges which a records custodian may use as a guideline to charge a citizen requesting copies of public records pursuant to Title 10, Chapter 7, Part 5. In establishing such a schedule, the office of open records counsel shall consider:

(A) Such factors as the size, by population, of the county or municipality; the complexity of the request; the number of man hours involved in retrieving the documents, redacting confidential information from the documents, and any other costs involved in preparing the documents for duplication; the costs of duplication; the costs of mailing such documents if the requestor is not returning to retrieve the requested documents; and any other costs which the office of open records counsel deems appropriate to include in such charge; and

(B) The principles presented by the study committee created by Chapter 887 of the Public Acts of 2006:

(i) The state policies and guidelines shall reflect the policy that providing information to the public is an essential function of a representative government and an integral part of the routine duties and responsibilities of public officers and employees;

(ii) That excessive fees and other rules shall not be used to hinder access to non-exempt, public information;

(iii) That, in accordance with § 10-7-503(a)(7)(A), no charge shall be assessed to view a public record unless otherwise required by law;

(iv) That the requestor be given the option of receiving information in any format in which it is maintained by the agency, including electronic format consistent with Title 10, Chapter 7, Part 1; and

(v) That when large-volume requests are involved, information shall be provided in the most efficient and cost-effective manner, including but not limited to permitting the requestor to provide copying equipment or an electronic scanner.

The schedule established pursuant to this subsection(a) shall be revised at least annually.

(2) A separate policy related to reasonable charges which a records custodian may charge for frequent and multiple requests for public records.

(3) A safe harbor policy for a records custodian who adheres to such policies and guidelines established by the office of open records counsel.

(b) The office of open records counsel shall make such policies and guidelines available on the Internet.

(c) Such policies and guidelines shall not be deemed to be rules under the provisions of Title 4, Chapter 5.

SECTION 7. This act shall take effect July 1, 2008, the public welfare requiring it.

PASSED: May 20, 2008

RON RAMSEY
SPEAKER OF THE SENATE

JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 19th day of June 2008

PHIL BREDESEN, GOVERNOR

Instructions for Records Custodians Regarding the Schedule of Reasonable Charges for Copies of Public Records

The Office of Open Records Counsel (OORC) released its schedule of reasonable charges (schedule) for copies of public records, available for download at www.comptroller.state.tn.us/openrecords. Public Chapter 1179, Acts of 2008, required the OORC to establish the schedule which a records custodian may use as a guideline to charge a citizen requesting copies of public records pursuant to the Tennessee Public Records Act, T.C.A. Sections 10-7-501 et seq.

T.C.A. Section 10-7-503(a) as amended by Public Chapter 1179, Acts of 2008, effective July 1, 2008, specifically states in (7)(A) that a records custodian may not charge for inspection of public records unless otherwise required by law. Until the development of the schedule, Section 10-7-503(a)(2)(C) allowed a records custodian to charge a requestor the actual costs incurred in producing a copy or duplication, which can include any labor incurred after five (5) hours is spent producing the requested material. With the development of the schedule, a records custodian is authorized by TCA Section 10-7-503(a)(7)(C)(1) to charge reasonable costs assessed in a manner consistent with the schedule. The schedule has a development date of October 1, 2008. On October 31, 2008, the OORC will notify the Tennessee Code Commission of the development of the schedule and thereafter T.C.A. Section 10-7-503(a)(2)(C) will no longer apply and that statutory language will be repealed and deleted.

All governmental entities must comply with T.C.A. Section 10-7-506(a) in order to charge for copies or duplication of public records requested pursuant to the Tennessee Public Records Act. Any governmental entity desiring to charge for copies or duplication in accordance with the schedule developed by the OORC should consult with legal counsel in order to ensure compliance with T.C.A. Section 10-7-506(a). Additionally, any governmental entity that desires to assess charges higher than those in the schedule for paper copies or duplication of public records or to charge for copies or duplication using a medium other than 8 ½ x11 or 8 ½ x14 paper is permitted to do so as long as the entity can verify the charges represent its actual cost in producing the request and the charges are assessed in a manner consistent with OORC's schedule. Charges established under separate legal authority are not governed by this schedule, and are not to be added to or combined with charges authorized under this schedule.

The schedule sets as reasonable charges fifteen ($0.15) cents for black and white photocopies on 8 ½ x11 or 8 ½ x14 paper and fifty cents ($0.50) for color photocopies on 8 ½ x11 or 8 ½ x14 paper. No standard fee is established for copies produced on medium other than that mentioned above, although guidance is given as to the components to be considered in establishing such copying or duplication charges. The schedule provides that a charge for labor may be assessed after one (1) hour is incurred producing the requested material and is in addition to the per page or medium charge.

For questions about the schedule or to find out more about the Office of Open Records Counsel, please visit www.comptroller.state.tn.us/openrecords or call (615) 401-7891 or 1-866-831-3750.

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SCHEDULE OF REASONABLE CHARGES FOR COPIES OF PUBLIC RECORDS

Section 6 of Public Chapter 1179, Acts of 2008 ("Public Chapter 1179") adds T.C.A. Section 8-4-604(a)(1) which requires the Office of Open Records Counsel ("OORC") to establish a schedule of reasonable charges ("Schedule of Reasonable Charges") which may be used as a guideline in establishing charges or fees, if any, to charge a citizen requesting copies of public records under the Tennessee Public Records Act (T.C.A. Sections 10-7-503, et seq.)("TPRA"). The development date of the Schedule of Reasonable Charges is October 1, 2008, and notification of the development will be given to the Tennessee Code Commission on October 31, 2008. This Schedule of Reasonable Charges will be reviewed at least annually by the OORC.

The TPRA grants Tennessee citizens the right to request a copy of a public record to which access is granted under state law. Public Chapter 1179 adds T.C.A. Section 10-7-503(a)(7)(A) which expressly prohibits a records custodian from charging a fee for inspection under the TPRA unless otherwise required by law. However, the TPRA in T.C.A. Section 10-7-506 does permit records custodians to charge for copies or duplication pursuant to properly adopted reasonable rules.

This Schedule of Reasonable Charges should not be interpreted as requiring a records custodian to impose charges for copies or duplication of public records. If a records custodian determines to charge for copies or duplication of public records, such determination and schedule of charges must be pursuant to a properly adopted rule and evidenced by a written policy authorized by the governmental entity's governing authority. Application of an adopted schedule of charges shall not be arbitrary. Additionally, excessive fees and other rules shall not be used to hinder access to non-exempt, public records. A records custodian may reduce or waive, in whole or in part, any charge only in accordance with the governmental entity's properly adopted written policy. Pursuant to Tennessee case law, a records custodian may also require payment for the requested copies or duplication prior to the production of the copies or duplication.

Copy Charges

- A records custodian may assess a charge of 15 cents per page for each standard 8 ½ x11 or 8 ½ x14 black and white copy produced. A records custodian may assess a requestor a charge for a duplex copy that is the equivalent of the charge for two (2) separate copies.

- If a public record is maintained in color, the records custodian shall advise the requestor that the record can be produced in color if the requestor is willing to pay a charge higher than that of a black and white copy. If the requestor then requests a color copy, a records custodian may assess a charge of 50 cents per page for each 8 ½ x11 or 8 ½ x14 color copy produced.

- If a records custodian's actual costs are higher than those reflected above or if the requested records are being produced on a medium other than 8 ½ x11 or 8 ½ x14

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paper, the records custodian may develop its own charges. The records custodian must establish a schedule of charges documenting "actual cost" and state the calculation and reasoning for its charges in a properly adopted policy. A records custodian may charge less than those charges reflected above. Charges greater than 15 cents for black and white, and 50 cents for color, can be assessed or collected only with documented analysis of the fact that the higher charges actually represent such governmental entity's cost of producing such material; unless there exists another basis in law for such charges.

- The TPRA does not distinguish requests for inspection of records based on intended use, be it for research, personal, or commercial purposes. Likewise, this Schedule of Reasonable Charges does not make a distinction in the charges assessed an individual requesting records under the TPRA for various purposes. Other statutory provisions, such as T.C.A. Section 10-7-506(c), enumerate fees that may be assessed when specific documents are requested for a specific use. Any distinctions made, or waiver of charges permitted, must be expressly permitted in the adopted policy.

Additional Production Charges

- A records custodian shall utilize the most cost efficient method of producing the requested records.

- Delivery of copies of records to a requestor is anticipated to be by hand delivery when the requestor returns to the custodian's office to retrieve the requested records. If the requestor chooses not to return to the records custodian's office to retrieve the copies, the records custodian may deliver the copies through means of the United States Postal Service and the cost incurred in delivering the copies may be assessed in addition to any other permitted charge. It is within the discretion of a records custodian to deliver copies of records through other means, including electronically, and to assess the costs related to such delivery.

- If a records custodian utilizes an outside vendor to produce copies of requested records because the custodian is legitimately unable to produce the copies in his/her office, the cost assessed by the vendor to the governmental entity may be recovered from the requestor.

- If the records custodian is assessed a charge to retrieve requested records from archives or any other entity having possession of requested records, the records custodian may assess the requestor the cost assessed the governmental entity for retrieval of the records.

Labor Charges

- "Labor" is defined as the time reasonably necessary to produce the requested records and includes the time spent locating, retrieving, reviewing, redacting, and reproducing the records.

- "Labor threshold" is defined as the labor of the employee(s) reasonably necessary to produce requested material for the **first hour** incurred by the records custodian in producing the material. A records custodian is not required to charge for labor or may adopt a labor threshold higher than the one reflected above.

- A records custodian is permitted to charge the hourly wage of the employee(s) reasonably necessary to produce the requested records above the "labor threshold." The hourly wage is based upon the base salary of the employee(s) and does not include benefits. If an employee is not paid on an hourly basis, the hourly wage shall be determined by dividing the employee's annual salary by the required hours to be worked per year. For example, an employee who is expected to work a 37.5 hour work week and receives $39,000 in salary on an annual basis will be deemed to be paid $20 per hour. Again, a records custodian shall utilize the most cost efficient method of producing the requested records.

- In calculating the charge for labor, a records custodian shall determine the number of hours each employee spent producing a request. The records custodian shall then subtract the one (1) hour threshold from the number of hours the highest paid employee(s) spent producing the request. The records custodian will then multiply the total number of hours to be charged for the labor of each employee by that employee's hourly wage. Finally, the records custodian will add together the totals for all the employees involved in the request and that will be the total amount of labor that can be charged.

- Example:
  The hourly wage of Employee #1 is $15.00. The hourly wage of Employee #2 is $20.00. Employee #1 spends 2 hours on a request. Employee #2 spends 2 hours on the same request. Because employee # 2 is the highest paid employee, subtract the one hour threshold from the hours employee #2 spent producing the request. Multiply the number of hours each employee is able to charge for producing the request by that employee's hourly wage and then add the amounts together for the total amount of labor that can be charged (i.e. (2x15)+(1x20)= $50.00). For this request, $50.00 could be assessed for labor.

  Questions regarding this Schedule of Reasonable Charges should be addressed to OORC.

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