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Legal Issues

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Legal Issues

Reference Number: CTAS-212

County governments, and all the secondary offices, boards, committees, and commissions in a county, are creations of the law. They find their origin in either the Tennessee Constitution or statutory law. It is a long established principal in Tennessee law that counties can only do those things that the law authorizes them to do. Therefore it is vitally important to any operation of county government to know what the laws are that authorize the county to perform a function and to know what the laws are that place limitations around that authority. There are laws that require counties and county officials to keep records, and there are laws that govern how a county manages its records.

Laws that Require Records to Be Kept

Reference Number: CTAS-1144

Not every record in a government office has a corresponding statute or regulation requiring that record be kept. Many records are generated simply as an ordinary course of business without any legal authority mandating their creation. But the creation and preservation of certain other records are required by specific laws. The laws affecting individual records are referenced in the retention schedules.

Federal Laws and Regulations

County officials should be aware that federal laws and regulations require them to keep certain records. This is particularly true of payroll information and other employment-related records. Most of the laws regarding how we hire, fire, compensate, and treat employees are generated at the federal level. The Family and Medical Leave Act, the Fair Labor Standards Act, the Occupational Safety and Health Act are just a few of the laws that place certain burdens on employers to keep records regarding their employees. These statutes also generate a whole other layer of federal regulations that govern the implementation and enforcement of the acts. In addition to personnel issues, federal laws and regulations also touch such diverse topics as student records and voter registration. Laws passed by the U.S. Congress are codified in the United States Code (U.S.C. or U.S.C.A. for United States Code Annotated). The massive amounts of rules and regulations generated by the different federal agencies are primarily found in the Code of Federal Regulations (C.F.R.).

State Laws and Regulations

Since county governments are instrumentalities of the state, most of the laws regarding what records need to be kept by county offices and how those records should be managed are found in the Tennessee Code Annotated (T.C.A.). As with the federal government, the state of Tennessee also has a set of rules and regulations promulgated by state agencies, boards, and commissions which are published by the secretary of state and known as the Official Compilation Rules and Regulations of the State of Tennessee.

The duties of most county officials can be found spelled out in Title 8 of the Tennessee Code Annotated. For most offices, a requirement is included in the duties of the office to keep and preserve specific types of records. Certain county offices, such as the register of deeds, the clerks of the various courts of the county, and the county clerk, have a primary function of record keeping. The proper and efficient performance of these duties is necessary not only for the continued operation of the county government, but also for the preservation of order in our society. Without them, our criminal justice system, our civil courts, and our rights of property ownership would be thrown into chaos. But even offices without a primary record keeping function are required to keep records.

Even though county officials may change with every election, the offices themselves must maintain a level of continuity. To ensure this, the responsibility for keeping and turning over the records of county offices was specifically addressed in the statutes requiring county officials to be bonded. Part of what is insured by the bond of an official is the fulfillment of a duty to "...faithfully and safely keep all records required in such principal's official capacity, and at the expiration of the term... turn over to the successor all records and property which have come into such principal's hands..."^[1] Failure to do so can result in recovery against the insurance company or sureties on the bond who may in turn proceed against the official in his or her individual capacity for subrogation of the claim. It is the solemn obligation of each county official to act as the legal custodian of the records of that office, to provide for their security and care, and to turn

them over in good order to his or her successor.

[1] Bayless v. Knox County, 286 S.W.2d 597 (Tenn. 1955).

Laws that Govern How You Manage Your Records

Reference Number: CTAS-1145

Good Record Keeping as a Bedrock of Law and Government

If you ever thought the way we do things seems to have come from the dark ages, you were right. Some practices of record keeping in government offices, particularly certain local government offices, are literally ancient. The importance of keeping accurate records of property transactions and legal proceedings is a bedrock of English law and goes back a thousand years. Laws that require the recording of documents in "well bound books," the necessity of having a written record to show property ownership, the creation of specific offices to keep these records all go back to the Middle Ages. Up until the advent of the computer, we had been doing things pretty much the same way they had been done since the 13th century. Even today, some of the laws in our Tennessee code regarding the records of the register's office and the offices of the clerks of court retain elements of this language from more than 700 years ago. Something does not last that long without there being a good reason. Basic rights that we take for granted, such as the rule of law and the sanctity of private property, are impossible without a good, durable record keeping system. All this should impress the Tennessee county official that he or she is the inheritor of a great and solemn tradition of responsible record keeping. Generations of clerks, registers, and officials before them have discharged this public trust and, hopefully, passed the records on to you in good shape.

Basic Record Keeping Statutes

Both the older state laws on records management and their more modern counterparts are found primarily in Title 10, Chapter 7 of the Tennessee Code Annotated. Parts 1 and 2 of that chapter contain a number of statutes about preserving, transcribing, and indexing records. The statutes require the county to "procure for the register's office well-bound books for the purpose of registering therein such instruments of writing as are required by law to be registered..."^[1] Among other things, the laws direct how to transcribe information from books that have been "damaged or mutilated by fire or otherwise,"^[2] require the county to appropriate money to rebind books when necessary,^[3] and designate how the clerks of courts and the register are to properly index the books.^[4] As was discussed earlier, the county official can be held liable for failure to safely keep the records of his or her office. An exemption is granted here relieving an official of liability during the time record books are out of the custody of the county clerk, clerk and master, circuit court clerk, or register for the purpose of having books rebound.^[5]

Not all of our records statutes are steeped in the past. Although many of the laws found in these parts seem headed the way of the dinosaur, there are some that point to the future. One of these newer, more progressive statutes authorizes maintaining any information required to be kept by a government official on a computer or on removable computer storage media instead of bound books or paper if certain standards are met.^[6] Another authorizes county officials to provide computer access and remote electronic access to information maintained on computer media in the office.^[7] A third authorizes the register to maintain all indices required of the office on a computer instead of index books.^[8] When granting new authority to adapt to modern technology, our state legislature has been cautious. All of these statutes condition the use of electronic media on a number of safeguards and restrictions.

The State Public Records Commission

Part 3 of Chapter 7 of the Tennessee Code, Title 10, establishes the State Public Records Commission and designates the Records Management Division of the Department of General Services as the primary records manager for all state government records.^[9] Currently, these entities do not take jurisdiction over county government records, but they can be looked to as examples for proper records management and preservation. There are similarities between the responsibilities and powers of the State Public Records Commission and the county public records commissions that have jurisdiction over county records. The county public records commission is vital to any records management program for county governments.

[1] T.C.A. § 10-7-102.

- [2] T.C.A. § 10-7-104
- [3] T.C.A. § 10-7-105.
- [4] T.C.A. § 10-7-201, et seq.
- [5] T.C.A. § 10-7-120.
- [6] T.C.A. § 10-7-121.
- [7] T.C.A. § 10-7-123.
- [8] T.C.A. § 10-7-202
- [9] T.C.A. § 10-7-301, et seq.

Open Records Requirement

Reference Number: CTAS-1214

All county records must be open for personal inspection by any citizen of Tennessee during business hours of the various county offices. County officials in charge of these records may not refuse the right of any citizen to inspect them unless another statute specifically provides otherwise (T.C.A. § 10-7-503) or they are included in the list of specific records that are to be kept confidential under T.C.A. § 10-7-504 or some other legal authority. Information made confidential by Title 10, Chapter 7 must be redacted whenever possible. T.C.A. § 10-7-503. In the event it is not practicable for a requested record to be promptly made available for inspection, the records custodian shall within seven business days: (i) make the record available; (ii) deny the request in writing stating the basis for the denial; or (iii) furnish the requestor a response form stating the time reasonably necessary to produce such record. T.C.A. § 10-7- 503.

The Office of Open Records Counsel, created in 2008, was charged with developing a 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. On October 1, 2008, the Office of Open Records Counsel issued its Schedule of Reasonable Charges for Copies of Public Records. Records custodians are authorized by T.C.A. § 10-7-503 to charge reasonable costs consistent with the schedule. The schedule, together with instructions for records custodians, can be found on the website of the Office of Open Records Counsel. Charges established under separate legal authority are not governed by the schedule, and are not to be added to or combined with charges authorized under the schedule. Questions regarding the schedule should be directed to the Office of Open Records Counsel website.

A citizen denied access to a public record is entitled to file a petition for inspection in the circuit court or the chancery court of the county in which the records are located, or in any other court of that county having equity jurisdiction. The county official denying access to the record has the burden of proof to justify the reason for nondisclosure. If the court directs disclosure, the county official shall not be held criminally or civilly liable for the release of the records, nor shall he or she be responsible for any damages caused by the release of the information. If the refusal to disclose the record is willful, the court may assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the county official. T.C.A. § 10-7-505.

In addition to creating a schedule of charges for records requests, the Office of Open Records Counsel has been charged with the duty to answer questions from and issue advisory opinions to public officials regarding public records. T.C.A. § 8-4-601. This office should be a valuable resource for questions on open records.

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