

OPEN GOVERNMENT

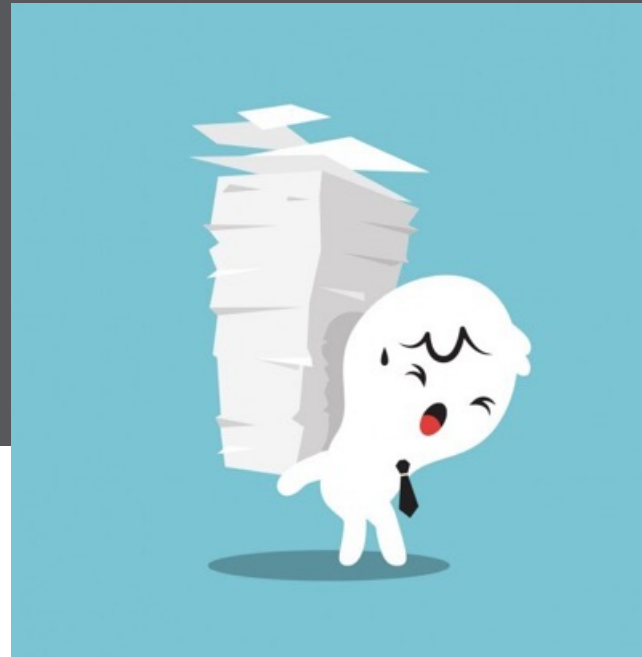


COUNTY OFFICIALS ORIENTATION PROGRAM 2024

August 2024

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MANAGING PUBLIC RECORDS

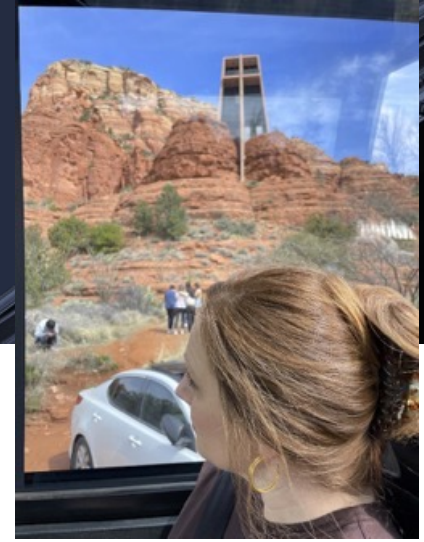


Open Records,
Disposal &
Alternative Storage Formats



OPEN RECORDS

- Records are public property.
- Generally, public has access.
- However, confidentiality of certain specific records also must be guarded.



TENNESSEE PUBLIC RECORDS LAW

T.C.A. § 10-7-503

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.



DEFINITION OF PUBLIC RECORDS

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.



EXAMPLES OF PUBLIC RECORDS

- Employee evaluations
- Contracts with vendors
- Emails
- Phone messages
- Financial or performance audits
- Annual reports
- Fee collection reports
- Meeting agendas/minutes
- Budgets
- Office policies



EXCEPTIONS - CONFIDENTIAL RECORDS

CONFIDENTIAL

- Some exceptions are in T.C.A. 10-7-504, most are elsewhere (other statutes, court rules, under the common law, federal laws, and administrative rules).
- Roughly 600 statutory exceptions.



EXAMPLES OF CONFIDENTIAL RECORDS

- Social security numbers
- Student records
- Much of the information in motor vehicle records
- Credit card numbers of persons doing business with the county and any related PIN numbers or authorization codes
- Adoption records
- Investigative files pertaining to pending or contemplated criminal action



PERSONAL INFORMATION OF COUNTY EMPLOYEE

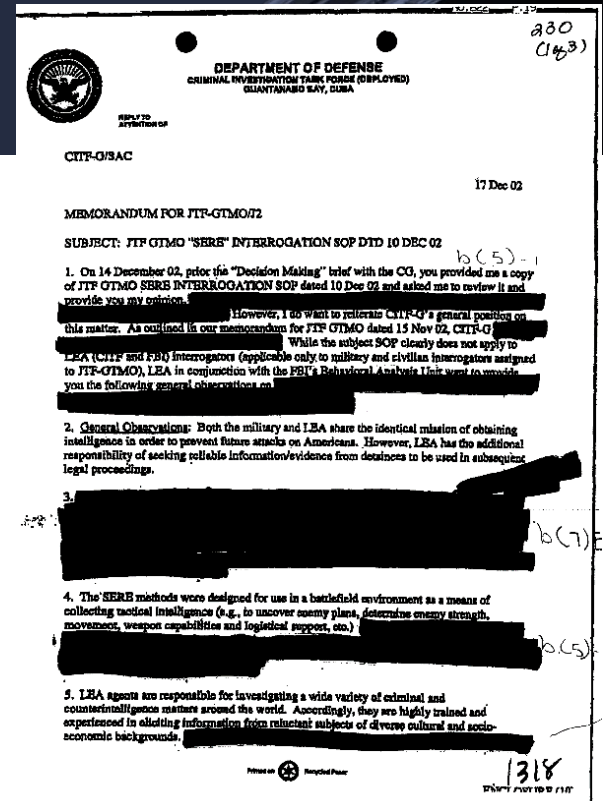
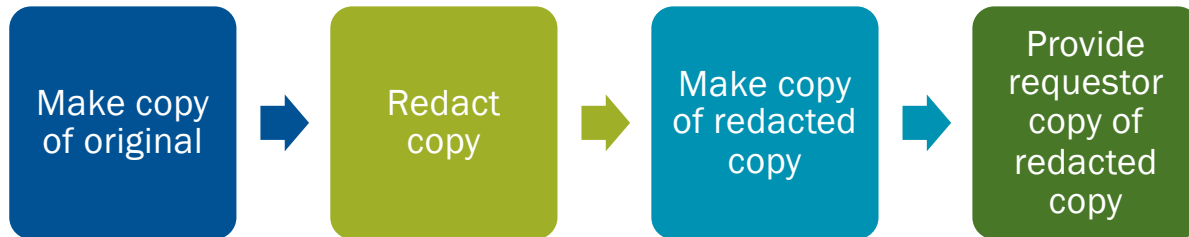


- Most personal (i.e., not job related) information of county employees is confidential
- Phone numbers, residential address, social security number, etc.
- Similar information of family and household members
- Includes information of former employees



REDACTION

- ▶ Record custodian is responsible for redacting confidential information.
- ▶ Redaction process:



OFFICE OF OPEN RECORDS COUNSEL

OORC aids county officials and citizens with specific open records requests.

<https://www.comptroller.tn.gov/openrecords/>

Phone: (615) 401-7891

Fax: (615) 741-1551

Email: open.records@cot.tn.gov

OORC provides advisory opinions, training, forms and best practice guidelines for record custodians.



RECORDS REQUEST PROCESS

A citizen has the right to request during normal business hours.

If practical, must promptly make available for inspection.

If not, must within 7 business days:

- Make the record available to the requestor;
- Deny the request in writing, stating the basis for the denial; or
- Furnish the requestor in writing the time necessary to produce the record.



DENIAL OF ACCESS

- If denied access may sue.
- Burden of proof rests on the county official.
- The court may assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the county official if the court deems the denial "willful."
- Courts interpret "willful" broadly.
- The law requires the court to consider guidance given to the official by the OORC.



CHARGING FOR COPIES



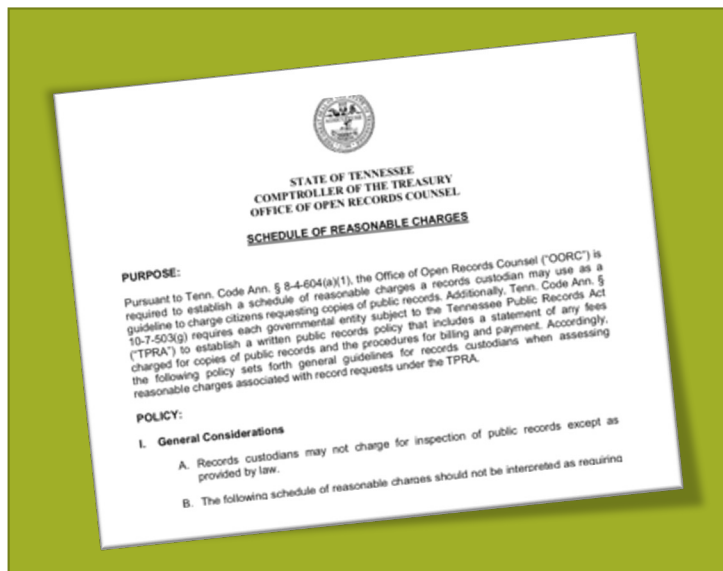
No charge to view records.

May charge actual cost for providing requested copies.

Must provide estimate of cost.

OORC has developed a schedule of reasonable charges for copies of public records.

OORC SCHEDULE OF CHARGES



- Black & white copies = 15 cents
- Color copies = 50 cents
- May charge hourly wage of employee(s) after the first hour.
- Safe harbor if follow the schedule.
- If don't follow the schedule, must document actual cost.



LIMITS ON RECORD REQUESTS

- Confidential records.
- Only TN citizens.
- Not required to create a document.
- Not required to compile information into a new record.
- Not required to produce a document for which you are not the custodian.
- Doesn't show TWICE.
- Agrees to but doesn't pay for copies.
- Makes SIX request designed to disrupt government operations.



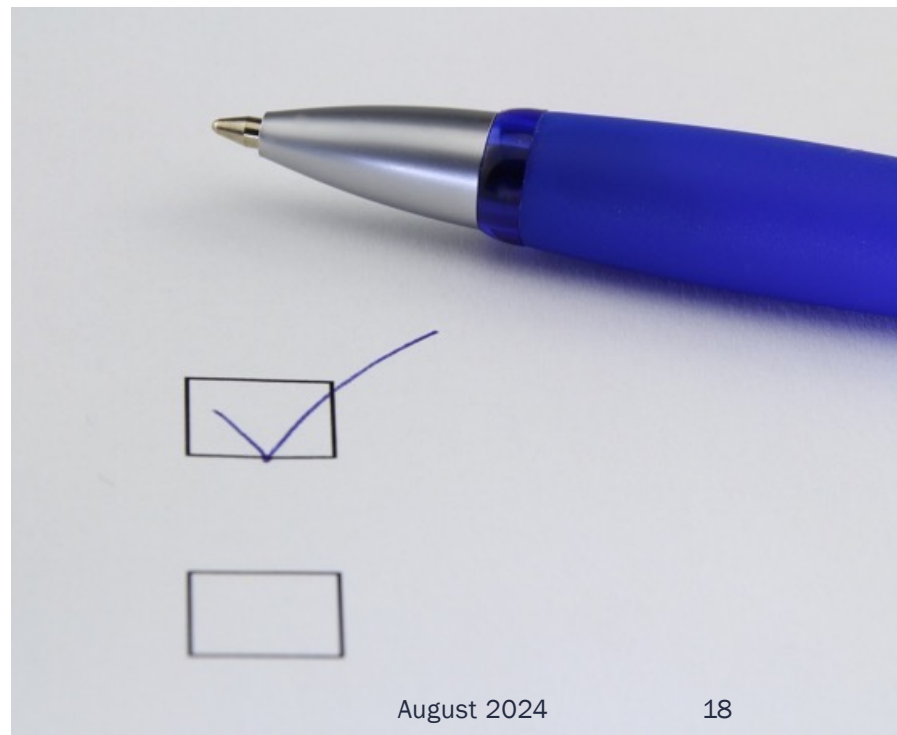
REASONABLE RULES

- TCA 10-7-506(a)
- When a citizen can inspect public records, they also may make copies and make photographs; provided, that the custodian has the right to adopt and enforce reasonable rules governing the making of such copies or photographs.
- OORC Opinion # 18-01
 - Can decided whether to allow citizen to use own device to make copies/photos.
 - Cannot adopt rules that substantially inhibit a citizen's right of access to public records under the statutes.



RECORDS POLICY REQUIRED

- Establish written public records policy.
- Must include:
 - Process for making requests to inspect or receive copies of public records and copy of any required request form;
 - Process for responding to requests and redaction practices;
 - Fees charged for copies of public records and procedures for billing and payment; and
 - Name or title and contact information of individual or individuals designated as public records request coordinator(s).
- OORC has published model policy.
 - CTAS has a model policy completion checklist



DISPOSAL OF PUBLIC RECORDS



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DUTY TO PRESERVE RECORDS

Official bond insures...

- Safely keep all official records; and
- Safely turn over to your successor all official records.

UNLAWFUL REMOVAL OR DESTRUCTION

- TCA 39-16-504
- Class E Felony
- Intentionally and unlawfully destroy, conceal, remove or otherwise impair the availability of a county record.
- Upon notification from any county official having custody of county records, that records have been unlawfully removed from a county office, appropriate legal action may be taken by the county attorney, to obtain a warrant for possession of any records which have been unlawfully removed.



GOALS OF A GOOD RECORDS MANAGEMENT PROGRAM

- Records you need are preserved.
- Records you don't need are destroyed.
- Records are properly catalogued and indexed.
- Proper conditions are maintained for long term preservation of important records.



CHECKS AND BALANCES

The disposal checks and balances include:



Official who has custody of the record



County public records commission



Tennessee State Library and Archives

COUNTY PUBLIC RECORDS COMMISSION

- 3 members appointed by the county mayor
 - County commissioner
 - Judge of a court of record
 - Genealogist
- 3 ex officio members
 - County clerk
 - Register of deeds
 - County historian
- County archivist
- IT director



RECORDS COMMISSION FUNDING

- TCA 10-7-408
- County Commission can provide direct funding to the records commission for furnishing office space, equipment and personnel.
- Establish an archives and records management fee for records filed in county offices.
 - Maximum of \$5
 - Doesn't apply to Register of Deeds.
 - Only once per court case.
 - Only can be used for duplicating, storing, and maintaining records required by law to be permanently kept.



FIRST STEP IN DISPOSAL PROCESS

- Identify and classify the record.
- Three classes of records:
 - Working papers;
 - Temporary records; and
 - Permanent records.
- CTAS' e-Library (e-Li) contains retention schedules for many major types of records found in county offices.



WORKING PAPERS

- Working papers are records created to serve as input for final reporting documents, and those records which become obsolete immediately after agency use or publication.
- May be destroyed in accordance with the rules and regulations adopted by the public records commission.
- These rules and regulations should be liberal, allowing county officials to eliminate these records as easily as possible.



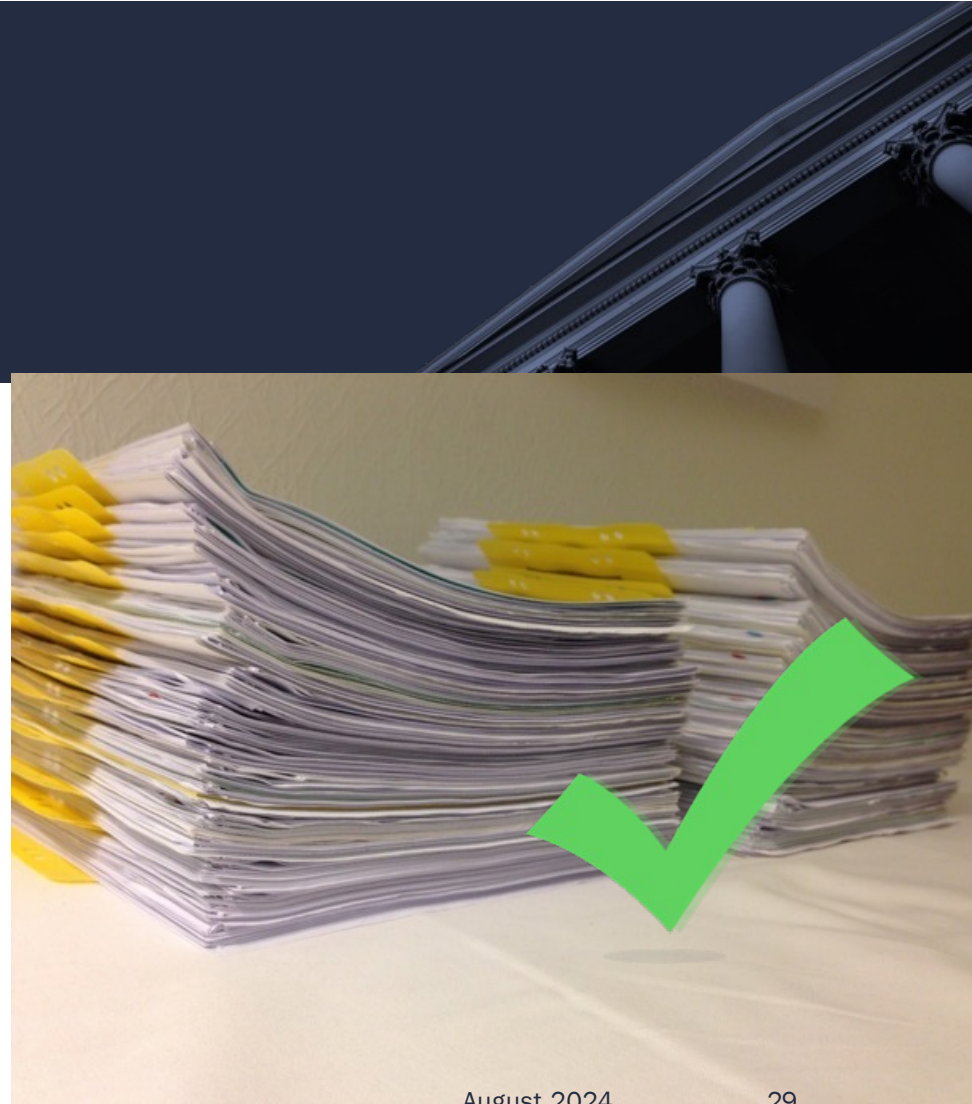
TEMPORARY RECORDS

- If a record needs to be kept around for some reason after its initial use, then it is at least a temporary record.
- Once retained for its useful term, then it may be destroyed.
- The rules of the records commission should require the official wishing to destroy temporary records to notify the commission of the kind of record to be destroyed and the basis for its destruction.



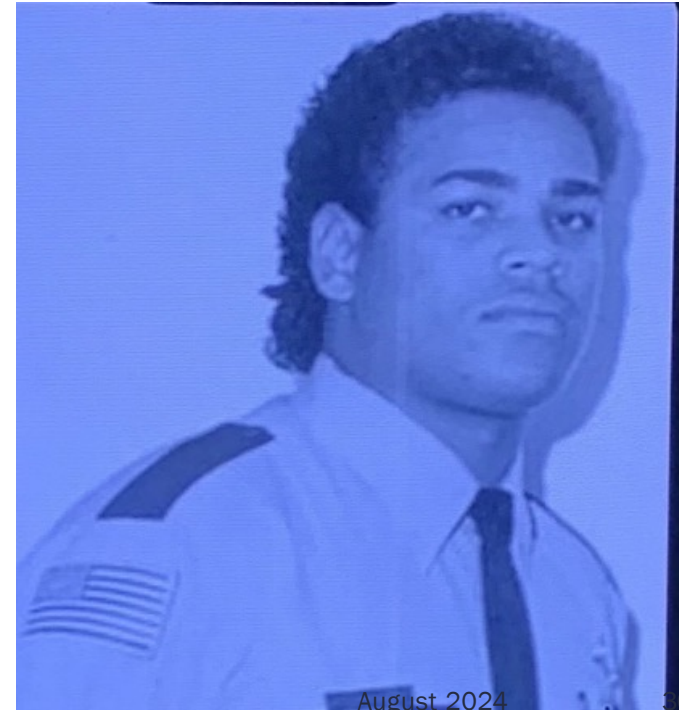
CONTINUING AUTHORIZATION

- Record commissions can provide “continuing authorization” to destroy temporary records.
- When possible, it is recommended officials request continuing authorization.
- Once granted, officials only need to notify the commission when records are being destroyed in compliance with the schedule, identifying the type, age and quantity of the records.



PERMANENT RECORDS

- Permanent Records are records that are required by law or by their importance to be kept permanently.
- If you can safely and successfully convert paper records into another permanent media that is easier to store, the original paper version of the records can be destroyed.
- No original permanent public record may be destroyed unless a majority of the records commission agrees.
- Must give 90-days notice to the State Library and Archives prior to destruction.



DOCUMENTS SUBJECT TO A RECORDS REQUEST

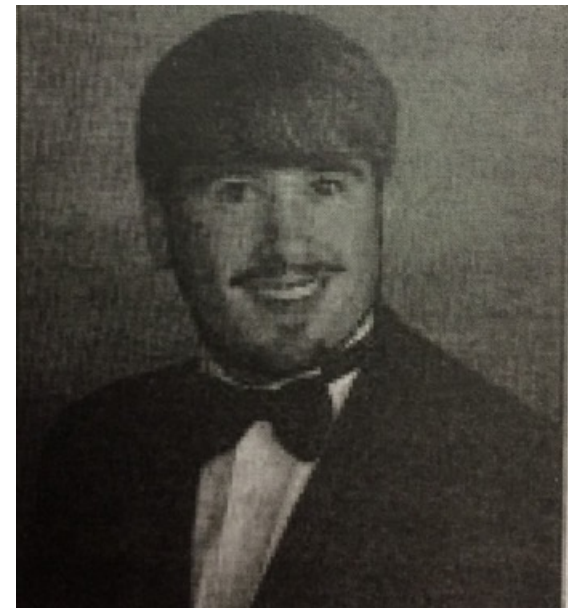
TCA § 10-7-503(h).

Don't destroy documents subject to a records request.

Contact the public records request coordinator to confirm.

\$500 fine.

Keep request documents for twelve months.



METHODS OF DESTRUCTION



For many working papers and some temporary records of an office, tossing them in the trash or recycling bin is appropriate.



If there is a possibility that confidential information is included in the records, they must be disposed of in a manner that obliterates this information, such as shredding.



ALTERNATIVES TO DESTRUCTION

- The records may be transferred to a local or regional public library, a local, regional or state college library, or a county or regional historical society, to be preserved for historical purposes.
- Additionally, a county may establish its own archives or enter into an interlocal agreement with other local governments for the creation of a regional archives.



ALTERNATIVE STORAGE FORMATS FOR PUBLIC RECORDS



MICROFILMING

- Trusted process over 150 years old
- Advantages:
 - Space savings (98% reduction in storage space over paper records)
 - Archival quality (suitable for long term retention)
- Disadvantages:
 - Expensive
 - Labor intensive
 - Requires expertise



MICROFILM AND THE TSLA

- The TSLA may be able to provide some level of microfilming services.
- TSLA is an excellent source of objective advice about microfilming if you have any questions.



ELECTRONIC STORAGE

- Computers are being used both as a format for creating and maintaining records originally as well as for reproducing existing paper records onto other electronic storage media.
- Issues:
 - Security
 - Access
 - Preservation



ELECTRONIC RECORDS STANDARDS

Records may be maintained in an electronic format under TCA 10-7-121 if the following standards are met:

The information must be available for public inspection, unless confidential;

The record must be retained for the entire retention period;

All data must be copied to storage media daily and back-ups that are more than one week old must be stored off-site; and

Official must be able to provide a paper copy upon request.

SCANNING RECORDS

- TCA 10-7-404 (c) and (d)
- Scan paper records and destroy original.
- Records commission approval.
- Advertise destruction in newspaper.
- Maintain created electronic records per TCA 10-7-121.
- Now includes permanent records.
- No SL&A exception for permanent.



ELECTRONIC RECORDS: ADVANTAGES & DISADVANTAGES

ADVANTAGES



- Incredible reduction of storage space
- Speed of access and retrievability

DISADVANTAGES



- Fragile
- Storage and operating systems change frequently

TSLA states that it does not consider any existing format for electronic records to be of permanent archival quality.

DUAL SYSTEMS

- Many officials are, through scanning or imaging, creating electronic duplicates of the record which are primarily used by the office during the active life of the record.
- The paper version serves as a security copy which can be stored off-site.



RECORDS MANAGEMENT DO'S AND DON'TS

DO

- Respect the right of the public to access records.
- Find out which records are confidential and protect them.
- Make sure you have proper backups and duplicates of any records kept in electronic format.
- Plan for ways to preserve records that must be “permanently” retained.

DON'T

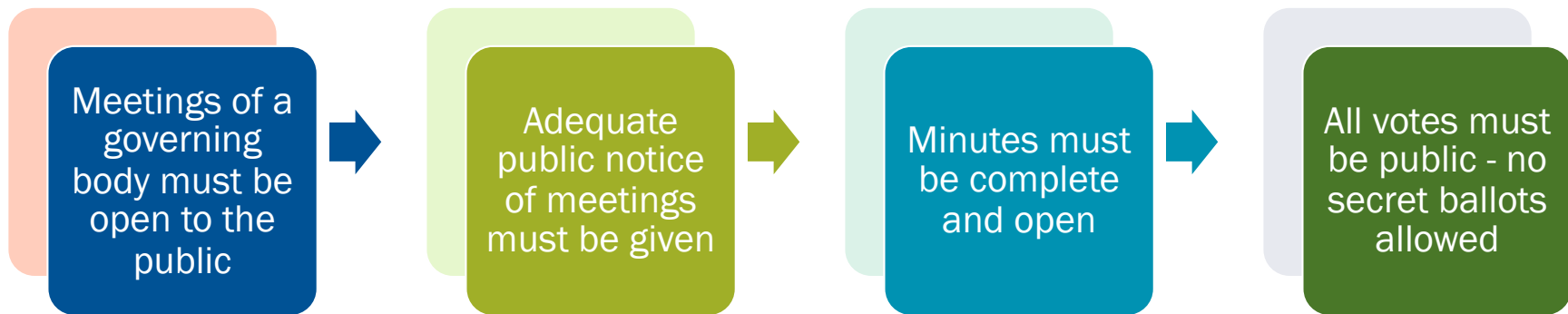
- Don't destroy county records without proper authorization to do so (i.e., get permission from the Public Records Commission).

OPEN MEETINGS

T.C.A. § 8-44-101

The formation of public policy and decisions is public business and shall not be conducted in secret.

FOUR REQUIREMENTS OF THE OPEN MEETINGS ACT



FIRST REQUIREMENT

All “meetings” of a “governing body” must be open.

Definitions

- Meeting: the convening of a governing body of a public body to make a decision or to deliberate toward a decision
- Governing body: any public body consisting of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration

FIRST REQUIREMENT – CONT.

Two-part test:

Whether the body's origin and authority may be traced to state, city or county legislative action.

Whether its members have authority to make decisions or recommendations on policy or administration affecting the conduct of public business.

EXAMPLES OF MEETINGS SUBJECT TO THE SUNSHINE LAW

- County commission meetings
- School board meetings
- Highway commission meetings
- County public records commission meetings



SECOND REQUIREMENT

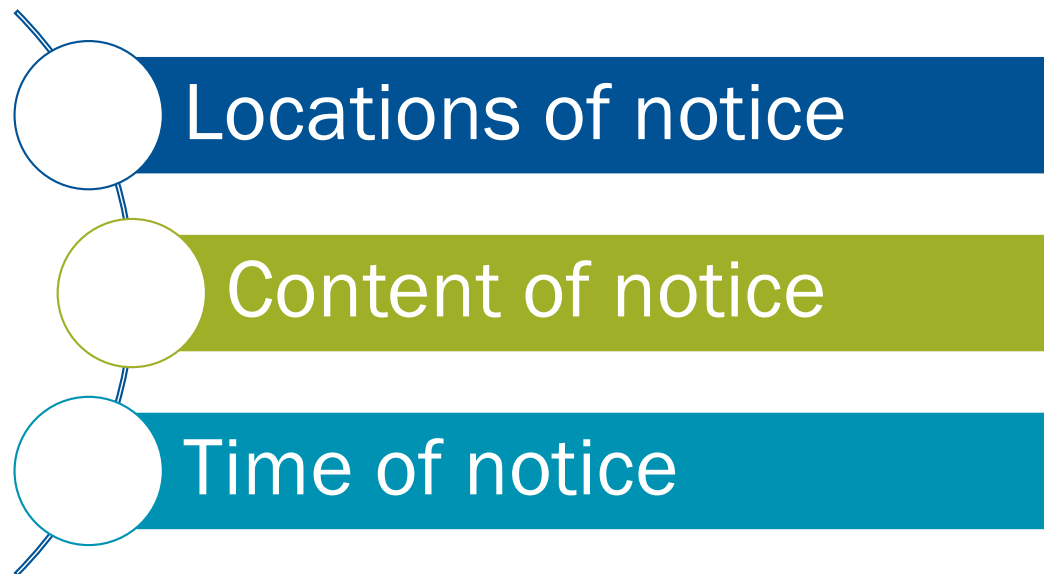
Adequate public notice must be given for all meetings.

What's adequate?

- Adequate notice: Depends on the importance of the meeting to the public – the more important to the public the meeting is the greater the public notice burden.

SECOND REQUIREMENT – CONT.

Three Prong Test



THIRD REQUIREMENT

- The minutes of meetings must be recorded and open to public inspection.
- Record of persons present, motions, and votes.
- Strict compliance required.



FOURTH REQUIREMENT



- All votes must be by public vote, public ballot or public roll call.
- The law defines a “public vote” as a vote in which the “aye” faction vocally expresses its will in unison and in which the “nay” faction, subsequently, vocally expresses its will in unison.
- No secret votes whatsoever.

EXCEPTIONS

On-site
inspections

Chance
meetings

Single public
official is
decision-maker

Executive
session



EXCEPTIONS – ATTORNEY/CLIENT DISCUSSIONS

- Limited exception for meeting with attorney.
- Must concern litigation already filed or likely to be filed.
- No discussion may take place between members of the public body.



EXCEPTIONS – ELECTRONIC COMMUNICATIONS

- Limited exception for communications over an internet forum open to the public
- Only for county commissions and school boards
- Numerous requirements
- Cannot substitute for a meeting
- Separate authority from any Executive Order issued by the Governor



AGENDAS



- County legislative body required to make meeting agendas accessible to the public at least 48 hours prior to the meeting.
- Can post on official county website.
- May consider matters not specifically listed on agenda if otherwise compliant with law.

PUBLIC COMMENT PERIOD



- All bodies subject to open meetings law are required to reserve time for public comment.
- Must give public opportunity to speak on matters germane to agenda items.
- Must take “all practicable steps” to allow representation of opposing views.
- Allowed to place reasonable restrictions:
 - Length of comment period
 - Number of speakers allowed
 - Time limit for each speaker
 - Requiring prior notice (must provide instructions on this in meeting notice)

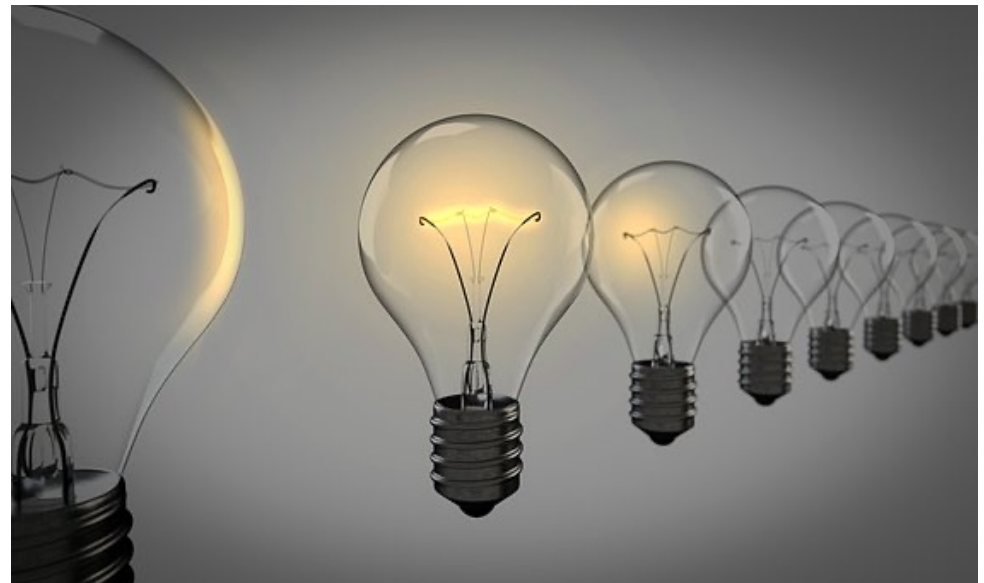
PENALTIES AND REMEDIES FOR NONCOMPLIANCE



- Courts are given broad authority to issue injunctions and impose penalties
- Action taken is void
- Cannot “rubber stamp” prior action
- ATTORNEYS’ FEES \$\$\$
- Embarrassment and stigma

ADDITIONAL SOURCES OF ASSISTANCE

- The Office of Open Records Counsel
 - Open Meetings
 - Open Records
- The Tennessee State Library and Archives
- Local Historical and Genealogical Societies
- Private firms and contractors



BYE Y'ALL!!

