



# County Technical Assistance Service

Published on e-Li (<https://eli.ctas.tennessee.edu>)

April 17, 2021

## How Should Access Be Provided?

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Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily 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 e-Li material.

Sincerely,

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## How Should Access Be Provided?

**Reference Number:** CTAS-1155

The law states that records shall be open to inspection “during business hours.” Every effort should be made to provide reasonable accommodation to parties requesting access to records; however, providing this service need not prevent the performance of other duties of the office. A request to see every record of an office and make a photocopy of each of them could obviously bring the entire operation of an office to a halt. For this reason, the official who has custody of the records is also authorized by law to adopt and enforce reasonable rules governing the making of extracts, copies, photographs or photostats of the records.<sup>[1]</sup> These regulations should be reasonable and not interfere with the intent of the legislature to provide broad public access to records. The official with custody of the record should strive to balance the right to access records with his or her responsibility to preserve and protect the records. Regulations should be tailored to accommodate requests in a timely manner while allowing for the continued efficient functioning of the office and for the preservation and security of the records. Regulations that are intended to frustrate the ability of a citizen to access records will likely be found unreasonable and struck down by the courts. The county public records commission may serve as a valuable resource in developing and drafting these regulations.

Although there is little legal authority in this area, the following are some examples of regulations that would likely be found reasonable by a court:

- Establishing that copies of records would be provided within a reasonable time period (for example: the next business day for small requests and within five business days for larger requests);
- Prohibiting the inspection and copying of records by citizens without supervision of the official or an employee of the office; and
- Prohibiting the handling of older bound volumes or other fragile records by anyone other than an employee of the office so long as the information in the records is still provided in a usable format.

Another possible regulation could provide that requests for inspection of a large number of records would be accommodated only by appointment pursuant to a written request. In a 2001 opinion, the attorney general was asked to consider a very similar requirement. In opinion 01-021, the attorney general found that there was no clear answer to the question. While the public records laws are to be interpreted to allow the fullest possible access, this should not lead to absurd results. The attorney general opined that if a citizen challenged a requirement to set an appointment to view records, a court might not find this requirement to be tantamount to a denial of access if the agency could articulate a reasonable basis for requiring the appointment. Absent a legitimate reason, the court may conclude the requirement of an appointment was merely being used to delay access to the records.<sup>[2]</sup> This opinion therefore appears to support the idea that local officials can implement reasonable regulations so long as there is a clear, articulated reason for the regulation that relates to goals of records management. .

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<sup>[1]</sup> T.C.A. § 10-7-506(a).

<sup>[2]</sup> See Op. Tenn. Att’y Gen. No. 01-021 (February 8, 2001).

## Limiting Risks

**Reference Number:** CTAS-1156

Be aware that there is a danger of theft, vandalism, or damage by negligence inherent in allowing a member of the public access to government records. There is a profitable market out there for certain historical manuscripts. Across the country, government records are disappearing from government offices and reappearing for sale in antique stores, flea markets, speciality shops, or Internet auction sites. To prevent theft or vandalism, someone from your office should supervise the person accessing the records or, at a minimum, the person accessing the records should be required to examine them in an open area where abuse of the records or attempted thefts will be noticed. If county records have been lost in the past and are discovered in someone’s possession, the Tennessee Code, in Section 39-16-504, grants statutory authority to counties to initiate judicial proceedings to reclaim lost, stolen, or otherwise misappropriated records.

## Providing Copies of Public Records

**Reference Number:** CTAS-1157

In all cases in which a person has the right to inspect public records, he or she also has the right to take extracts or make copies of the record, or to make photographs or photostats of the record while it remains in the possession, custody, and control of the official who has lawful custody of the record.<sup>[1]</sup> In 1999, the attorney general interpreted this to mean that the Tennessee Public Records Act does not require a public official to make copies and send them to anyone regardless of whether or not they are a citizen of Tennessee.<sup>[2]</sup> However, this opinion is limited by a subsequent court decision. In the case of *Waller v. Bryan*,<sup>[3]</sup> the Tennessee Court of Appeals required public officials to make public records available to members of the public who could not visit the official's office under certain circumstances. In that case, an inmate appealed the ruling of a chancellor that he was not entitled to requested records which were in the possession of a police department. The local government refused to make copies of the requested records and mail them to the inmate. Obviously, his circumstances did not allow him to appear in person to inspect the records and make a copy. The Court of Appeals held that as long as a citizen can sufficiently identify the requested records so that the government office knows which records to copy, the official should comply with the records request. To refuse to do so merely because the citizen could not appear in person would, in the words of the court, "place form over substance and not be consistent with the clear intent of the Legislature."<sup>[4]</sup> The court observed that a requirement to appear in person would not only limit access to records by inmates, but also all those Tennessee citizens who were prevented by health problems or other physical limitations from appearing at the government office.

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<sup>[1]</sup> T.C.A. § 10-7-506(a).

<sup>[2]</sup> Op. Tenn. Att'y Gen. No. 99-067 (March 18, 1999).

<sup>[3]</sup> *Waller v. Bryan*, 16 S.W.3d 770, (Tenn. App. 1999).

<sup>[4]</sup> *Waller*, at 773.

## Charging for Copies

**Reference Number:** CTAS-1158

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(a)(7)(C)(i) 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.

## Records with Commercial Value

**Reference Number:** CTAS-1159

The legislature has recognized that in certain circumstances, a governmental agency may expend a great deal of money developing a record with great commercial value. That record in turn may then be requested by a company who only has to pay a small fee for a reproduction of the information which may be used to generate significant amounts of revenue. Therefore, the legislature in 2000 amended T.C.A. § 10-7-506 to add provisions that protect the investment of government resources specifically in computer generated maps or geographic information systems. These systems are expensive to develop and have numerous profitable commercial applications once the data is developed. Private entities could acquire a copy of the data and regular updates for practically no cost then profit greatly by selling subscriptions to the data. For this reason, the legislature allowed governments to also recover a portion of the actual development and maintenance costs when providing copies of computerized mapping systems or data to persons other than the news media or individuals for non-business use. While this general statute is

limited to electronic geographic records, an additional statute applicable only to court clerks offices in Knox and Shelby counties allows those officials to charge a fee not to exceed \$5 for computer searches for any public record having a commercial value.<sup>[1]</sup>

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<sup>[1]</sup> T.C.A. § 8-21-408.

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