County Technical Assistance Service

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Other Issues Relative to Electronic Records

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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Other Issues Relative to Electronic Records

Reference Number: CTAS-1206

Remote Electronic Access to County Records

Each county official has the authority to provide computer access and remote electronic access for inquiry only to information contained in the records of the office that are maintained on computer storage media in that office, during and after regular business hours. However, remote electronic access to confidential records is prohibited. The official may charge a fee to users of information provided through remote electronic access, but the fees must be in a reasonable amount determined to recover the cost of providing this service and no more. The cost to be recovered must not include the cost of electronic storage or maintenance of the records. Any such fee must be uniformly applied. The official offering remote electronic access must file with the comptroller of the treasury a statement describing the equipment, software, and procedures used to ensure that this access will not allow a user to alter or impair the records. This statement must be filed 30 days before offering the service unless the official has implemented such a system before June 28, 1997. T.C.A. § 10-7-123.

Records Management and E-Mail

Reference Number: CTAS-1207

Many county officials have raised questions about how to handle e-mail or how long e-mail should be kept. You will not find an entry in the retention schedules specifically for e-mail. E-mail is more of a format for records than a type of record itself. An inter-office memorandum may be typed and distributed on paper or it may be sent to all staff via e-mail. Either way, the retention period or procedures for managing the record should be determined based on the content of the memo, not its method of delivery. Much of the volume of e-mail that passes through our computers does not reach the level of an official "record." Recall the general definition of "public record."

> Public record ... 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.[1]

This general definition is not as specific as the definition of county public records,[2] but it highlights the fact that the record may take many different forms. The definition also makes clear that a public record is something created pursuant to law or in connection with the transaction of official business. E-mails that say "Send me a copy of that report when you get it finished;" " By the way, George is out at a doctor's appointment this afternoon;" or "Don't forget the staff meeting this afternoon at 2:00" would not be a public record. These communications are more in the nature of working papers, something which becomes obsolete immediately after use. They should be disposed of in accordance with your general policy for working papers. But suppose you send someone a notice of a promotion solely via e-mail. According to the listing in the retention schedule for Promotion Records of Notices (see item 16-031), this record should be kept for one year from the date the record is made or the action is taken, whichever is later. A copy of this e-mail should therefore be retained at least that long.

Network administrators or information technology specialists will tell you that it is highly complex or expensive to manage electronic correspondence on an individual e-mail basis. Some e-mail programs have archiving features or a means of designating for preservation. But most likely, your office has a policy of backing up all the data in an e-mail server for a limited period of time. Eventually, the back up tapes or disks will be discarded or over-written. Many e-mails will be deleted by the person receiving them and possibly never make it to a back-up tape. Of course, every copy of a public record does not have to be kept. If you have electronic correspondence that would be considered a public record based on its content, it is recommended that you print that out and preserve it as a paper record or that you institute some means of designating certain e-mail files for preservation. You may want to particularly keep this in mind for e-mails which consist of correspondence with members of the public regarding the official business of your office. The retention schedule entry for Correspondence Files (see entry 15-010) recommends keeping correspondence with citizens or government officials regarding policy and procedures

or program administration for five years. This standard should apply whether the correspondence is by traditional “snail mail” or e-mail.

E-Mail and Privacy

If your office uses e-mail and the Internet, hopefully you have some policy in place stating whether or not personal use of e-mail or the Internet is allowed and whether or not all e-mail correspondence remains the property of the county. Such policies at least put employees on notice as to whether or not they have any expectation of privacy in their e-mails. If it has not happened yet in your county, you may expect that at some point in the future you will receive a public records request from the media or from citizens to get a copy of e-mail correspondence of the office. At the time this was written there were no reported appellate cases to date in Tennessee regarding e-mail as a public record, however there have been cases considering this issue in other jurisdictions. In the Florida case of *Times Publishing Company v. City of Clearwater*[3] a newspaper reporter demanded copies of all e-mail of two city employees. The city allowed the employees to segregate their e-mail into two classes: public and personal. The city turned over the public e-mails, but refused to release the personal e-mails pending a determination by the court. Ultimately, the court ruled that personal e-mails which were not created or received in connection with the official business of the city did not qualify as “public records” subject to disclosure under Florida law and that it was proper for the city to remove them from the e-mails which were released.[4] Whether or not a Tennessee court would reach the same conclusion under our public records statutes is unknown at this time. What is relatively clear is that the e-mails which related to the business of the city were considered public records and were subject to disclosure. Any county offices using e-mail correspondence to conduct the business of the office should keep this in mind.

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[1] T.C.A. § 10-7-301.

[2] See T.C.A. § 10-7-403.

[3] *Times Publishing Company v. City of Clearwater*, 830 So.2d 844 (District Court of Appeal of Florida, Second District, 2002).

[4] Times Publishing Company, at 847.

Electronic Signatures and Transactions

Reference Number: CTAS-1208

County officials should also be aware of recent state and federal laws which have been passed to authorize and encourage electronic transactions and the acceptance of electronic signatures. In 2000, the U.S. Congress passed the Electronic Signatures in Global and National Commerce Act (“E-Sign”).[1] That same year, Tennessee passed its own Electronic Commerce Act of 2000. This law was superceded and replaced the next year, when the Tennessee General Assembly then enacted the Uniform Electronic Transactions Act (UETA),[2] which was a model law crafted by the National Conference of Commissioners on Uniform State Laws in 1999 and adopted by many states. These laws were all intended to facilitate and validate electronic transactions, but they do not replace existing laws or require the use of electronic signatures.

Electronic Signatures in Global and National Commerce Act (E-Sign)

The E-Sign Act did not amend or pre-empt existing laws specifically, but provided that notwithstanding any statute, regulation, or other rule of law, with respect to any transaction in or affecting interstate or foreign commerce (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.[3] Therefore, if a state law requires a transaction or signature to be “in writing,” the federal E-Sign Act requires that you interpret the term “in writing” to include electronic files and signatures. E-Sign specifically exempts certain transactions from its provisions, including—

1. a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts;

2. a state statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or
3. the Uniform Commercial Code, as in effect in any state, other than sections 1-107 and 1-206 and Articles 2 and 2A.[4]

Additionally, E-Sign does not apply to—

1. court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;
2. any notice of the following—
   -Cancellation or termination of utility services (including water, heat, and power);
   -Default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;
   -Cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or
   -Recall of a product, or material failure of a product, that risks endangering health or safety; or
3. any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials, wills, family law matters, court orders, most matters governed by the Uniform Commercial Code, notices of cancellation of utilities and notices of foreclosure.[5]

Uniform Electronic Transactions Act (UETA)

As with E-Sign, this act does not require a record or signature to be created or sent in electronic format and only applies to transactions where all parties have agreed to conduct the transaction electronically but it does provide broad authorization for the use of electronic records and signatures. It also more directly controls the creation or receipt of such records and signatures by state and local government offices. The act provides that if the law requires a record or signature to be in writing, an electronic record or signature satisfies the requirement; however, the law also provides that if a law other than this act requires a record to be posted or displayed in a certain manner, to be sent, communicated or transmitted by a specified method, or to contain information that is formatted in a certain manner, then the record must be posted, displayed, sent, communicated or transmitted in accordance with that law. Similarly, if a law requires a record to be retained, the requirement is satisfied by keeping it electronically if the electronic record accurately reflects the information in the record and if the electronic record remains accessible for later reference. One provision of the act notably states however that the act does not preclude a governmental agency of this state (which is defined to include county governments) from specifying additional requirements for the retention of a record subject to the agency's jurisdiction. Therefore, even though two parties to a transaction may agree to perform that transaction electronically, if a county office must receive and retain a copy of that transaction, the county could require that copy to be in paper format.

Another section of the UETA specifically governs the creation and retention of electronic records and the conversion of written records to electronic form by governmental agencies in Tennessee. It provides for the Information Systems Council (ISC) to determine whether and the extent to which the state or any of its agencies create and retain electronic records and convert written records to electronic records. Officials of counties and municipalities and other political subdivisions are authorized to determine for themselves whether they will create and retain electronic records and convert written records to electronic records. Those officials can also determine whether the governmental agency will send and accept electronic records and signatures to and from other persons. To the extent that any governmental agency chooses to do this, the Information Systems Council may establish certain rules and regulations governing the process. Local government officials that choose to send and receive electronic records that contain electronic signatures, must file certain documentation with the comptroller prior to offering such service as well as providing a post-implementation review.

In 2003, the General Assembly amended state law to clarify that the Tennessee Uniform Electronic Transactions Act does not supersede the federal E-Sign Act in regard to the following: (1) The consumer disclosure requirement (when a written record of contract terms is required by law an electronic record can be used instead, if the consumer consents to such); (2) The accuracy and accessibility requirement (when a law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record); and (3) Denial of electronic record requirement (if an electronic record is not in a form that can be retained and accurately reproduced for later reference by all parties, such electronic record's legal effect, validity, or enforceability may be denied). This legislature also clarified that the Uniform Electronic Transactions Act does not authorize the electronic delivery of any of the following (consistent with the E-Sign Act):

1. Court orders or notices or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;
2. Any notice of: cancellation or termination of utility services; default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual; the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or recall of a product, or material failure of a product, that risks endangering health or safety; or
3. Any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

So far, the impact of these laws on the daily operation of local government offices has not been significantly burdensome. However, they are a clear indication that in the future local government offices will have to adapt to a private sector that is moving further and further away from traditional paper transactions and relying more on electronic commerce and communications.

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[1] 15 U.S.C. §§ 7001,*et seq.*

[2] 2001 Public Chapter 72, codified primarily in T.C.A. §§ 47-10-101, *et seq.*

[3] 15 U.S.C. § 7001(a)(1) and (2).

[4] 15 U.S.C.A. § 7003(a).

[5] 15 U.S.C.A. § 7003(b).

Geographic Information Systems Records

Reference Number: CTAS-1215

In 2000, the General Assembly also passed Public Chapter 868 to authorize counties to charge increased fees to people purchasing copies of a certain type of record for commercial purposes. Under the new law all state and local governments maintaining geographic information systems (GIS) are authorized to charge enhanced fees for reproductions of public records that have commercial value and include a computer generated map or similar geographic data. Prior to the passage of this act, local governments could charge only for the actual costs of reproduction of such data (usually a minimal charge for the costs of the computer disk or other copying media) unless they were in one (1) of five (5) counties designated by narrow population classes that had specific authorization to charge higher fees under the law. Under T.C.A. § 10-7- 506(c), local government entities that have the primary responsibility for maintaining a GIS can also include annual maintenance costs and a portion of the overall development costs of the GIS in the fees charged to users who want to purchase a copy of the information for commercial use. If the system is maintained by the county, the county legislative body establishes the fees. If GIS is maintained by a utility, the board of directors establishes the fees. Two groups are exempt from the higher fees: individuals who request a copy of the information for nonbusiness purposes and members of the news media who request the information for news-gathering purposes. These exempt parties will be charged only the actual costs for reproducing the data. Development costs that may be recovered by the fees charged to commercial users are capped at ten percent (10%) of the total development costs unless some additional steps are taken. For local governments, the local legislative body and the state ISC must approve a business plan that explains and justifies the need for additional cost recovery above ten percent (10%). Even with the approval of such a plan, development cost recovery cannot exceed twenty percent (20%). However, these limits do not apply to annual maintenance costs, which may be fully recovered in the fees charged to commercial users. The recovery of development costs of a system is subject to audit by the comptroller of the treasury. Once the allowable portion of the development costs of the system have been recovered by the additional fees charged to commercial users, then the fees must be reduced to cover only the costs of maintaining the data and ensuring that it is accurate, complete, and current for the life of the system.

Identity Theft and Unauthorized Access to Electronic Records

Reference Number: CTAS-1209

Faced with growing concerns about identify theft, the General Assembly has begun to take steps to protect consumer information in business and government data bases that could be used for fraudulent pur-

poses. Effective July 1, 2005, new provisions enacted in Title 47, Chapter 18, Part 21 of the *Tennessee Code Annotated* by 2005 Public Chapter 473 require county governments to notify affected parties when there has been unauthorized access to certain personal consumer information in the county's computers. The law applies broadly to any business doing business in the state of Tennessee and all agencies of the state of Tennessee and its political subdivisions. These entities must disclose, to any residents whose information has been compromised, any breach of a computer system which allows unauthorized disclosure of an individual's name in combination with any of the following: social security number, driver license number, financial account numbers, or credit or debit card numbers. Personal information does not include publicly available information lawfully made available to the general public from federal, state, or local government records. Notice may be provided by written notice or electronic notice. Substitute notice is allowed if the cost of providing notice would exceed $250,000 or requires notice to more than 500,000 individuals. Substitute notice is defined to consist of e-mail notice if the information holder has e-mails for the affected parties, conspicuous posting of the notice on any internet page of the information holder, and notice to major statewide media. If circumstances require notification to more than 1,000 persons at one time, notice to all consumer reporting agencies and credit bureaus of the breach is also required. Any person injured by a violation of this act may bring a civil action against business entities to recover damages or enjoin the violator from further actions violating these requirements; however, state agencies and political subdivisions are exempt from the civil damages provisions of the act.
