

**TRANSPARENCY IN GOVERNMENT:
PUBLIC RECORDS ACT & OPEN MEETINGS ACT**

**Utility Technology Association
October 12, 2022**

Maria Bush, Open Records Counsel



ABOUT THE OORC

Office of Open Records Counsel

- Created in 2008
- Helps citizens and government officials better understand Tennessee's laws on public records and open meetings.
 - Respond to questions and concerns
 - Educational outreach
 - Develop forms, schedules and policies for public record requests
 - Post resources on its website



OFFICE OF OPEN RECORDS COUNSEL

Policies and Guidelines

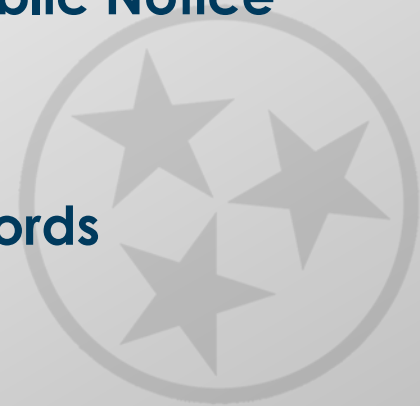
- 🌟 Best Practices
- 🌟 Model Public Records Policy
- 🌟 Schedule of Reasonable Charges
- 🌟 Charges for Frequent Requests
- 🌟 Safe Harbor Policy
- 🌟 Informal Advisory Opinions
- 🌟 Mediation of Records Disputes
- 🌟 Records Request Form, Records Response Form
- 🌟 Internet Forum Approval



OFFICE OF OPEN RECORDS COUNSEL

Advisory Opinions

- 21-01 Basis for Denial
- 19-01 Emails b/w Members of Governing Body and Access to Public Meetings
- 18-01 Copying Records During Inspection
- 14-03 Charging for Electronic Copies of Records
- 15-01/12-04 Requests from Corporations
- 12-02 Calculating Labor Costs
- 12-01 Amending Meeting Agendas/Adequate Public Notice
- 09-05 Computing 7 Business Days
- 08-14 Attorney Client Privilege
- 08-05 Access to Public Employee Cell Phone Records
- 08-12 Specificity of Record Requests



OFFICE OF OPEN RECORDS COUNSEL

Benefits of Utilizing OORC

- **Determination of “Willfulness”**
 - **No Attorney Fees**
- **Schedule of Reasonable Charges**
 - **Charges Presumed Reasonable**
- **Familiarity with Records/Meetings Issues**
- **Neutral Intermediary**
- **We’re FREE**



OFFICE OF OPEN RECORDS COUNSEL

OORC Website

TENNESSEE COMPTROLLER OF THE TREASURY | **Open Records Counsel**

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Read More

- Provide education
- Issue informal advisory opinions
- Mediate requests
- Develop formal guidelines and

Tenn. Code §§ 8-

TENNESSEE COMPTROLLER

Common Form

Reports, Policies and Updates

- Policies, Guidelines & Forms
- Advisory Opinions
- Annual Report

Resources

- Frequently Asked Questions
- Sunshine Laws
- Contacts for Public Record Requests

Submit an Inquiry

Transparency in Government: Tennessee Public Records Act and Open Meeting Act

TENNESSEE PUBLIC RECORDS ACT

Symbol of Transparency

“Facilitating access to governmental records promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee.”

- *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007).



TENNESSEE PUBLIC RECORDS ACT

Tenn. Code Ann. § 10-7-503

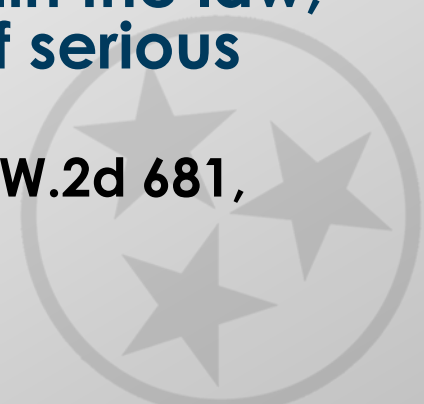
- ⊙ All public records shall,
- ⊙ during business hours,
- ⊙ be open to inspection,
- ⊙ to any Tennessee citizen,
- ⊙ unless otherwise provided by state law.

- ⊙ **Creates a presumption of openness!**
 - Records are open to Tennessee citizens unless state law provides otherwise



INTERPRETED BROADLY

- Courts are to interpret the provisions of the TPRA broadly so as to give the fullest possible public access to public records.
 - Tenn. Code Ann. § 10-7-505(d).
- TPRA expresses a clear legislative mandate favoring disclosure of government records.
 - *State v. Caewood*, 134 S.W.3d 159, 164-5 (Tenn. 2004).
- Unless there is an express exemption within the law, disclosure is required “even in the face of serious countervailing considerations.”
 - *Memphis Publ’g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994).



WHO IS SUBJECT TO THE TPRA?

Government Entities

- State, county and municipal records
- Includes departments, divisions, boards and other separate units of government created by law or pursuant to law.
 - Tenn. Code Ann. § 10-7-503(a)(1) & (2).

“Functional Equivalent”

- “When a private entity’s relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.”
 - *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.* 87 S.W.3d 67, 70 (Tenn. 2002).
- Based on totality of the circumstances.
 - Level of government funding
 - Government involvement and control over entity
 - Whether entity created by legislative act or previously determined by law to be open to public access
- Burden is on the petitioner



WHO CAN ACCESS RECORDS?

- Open for personal inspection *by “any citizen of this state.”*
- May require presentation of photo ID that includes the person’s address or require alternative acceptable forms of ID.
 - Driver License
 - Student ID
 - Utility Bill
 - Proof of Property Ownership
- Proof of citizenship is discretionary
- Should be included in Public Records Policy
- Does not include corporations or other artificial entities



WHAT IS A “PUBLIC RECORD”?

Tenn. Code Ann. § 10-7-503(a)(1)(A)

- Made or received pursuant to law or ordinance; or
- In connection with the transaction of official business.
- Does not include the actual device or equipment.
- Includes draft records.
- “Public Record” determined by substance of the record.



TYPES OF PUBLIC RECORDS

Common “Public Records”

- 🌐 Emails, texts, tweets, FB posts
- 🌐 Video recordings/surveillance
- 🌐 Personnel records/HR Investigations/Applicant Records
- 🌐 Travel/leave information
- 🌐 Meeting agenda and minutes
- 🌐 Contract/bidding documents
- 🌐 Budget records
- 🌐 Financial records



EXCEPTIONS TO THE TPRA

“Unless otherwise provided by state law”

🌟 Tenn. Code Ann. § 10-7-504

- 50+ Exceptions; 700+ elsewhere in Tennessee Code

🌟 “‘State law’ includes statutes, the Tennessee Constitution, the common law, rules of court, and administrative rules and regulations.”

- *Tennessean v. Metro. Gov’t of Nashville and Davidson Cnty.*, 485 S.W.3d 857, 865-66 (Tenn. 2016), citing *Swift v. Campbell*, 159 S.W.3d 565, 571-72 (Tenn. 2004).

🌟 OORC Report on Statutory TPRA Exceptions

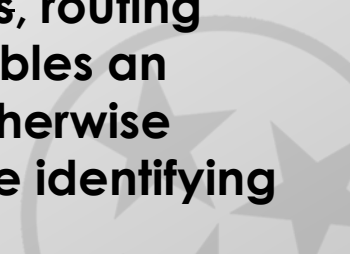
- 560 statutory exceptions identified in Tennessee Code



EXCEPTIONS TO THE TPRA

“Personally Identifying Information”

Tenn. Code Ann. § 10-7-504(a)(29)

- Social security numbers;
 - Official state or government issued driver licenses or identification numbers;
 - Alien registration numbers or passport numbers;
 - Employer or taxpayer identification numbers;
 - Unique biometric data, such as fingerprints, voice prints, retina or iris images, or other unique physical representations; and
 - Unique electronic identification numbers, addresses, routing codes or other personal identifying data which enables an individual to obtain merchandise or service or to otherwise financially encumber the legitimate possessor of the identifying data.
- 

EXCEPTIONS TO THE TPRA

Public Employee Personnel Records

⊕ Unless authorized by employee or provided for other governmental purposes, redact:

- Home phone and cell phone numbers;
- Personal, nongovernment issued email addresses;
- Residential street address for non-state employees;
- Bank account information, health savings account, retirement account, and pension account information;
- Social security number;
- Driver license information, except where driving or operating a vehicle is part of the employee's job description;
- Emergency contact information; and
- Above information for immediate family.

Tenn. Code Ann. § 10-7-504(f)



EXCEPTIONS TO THE TPRA

Bidding/RFP Exceptions

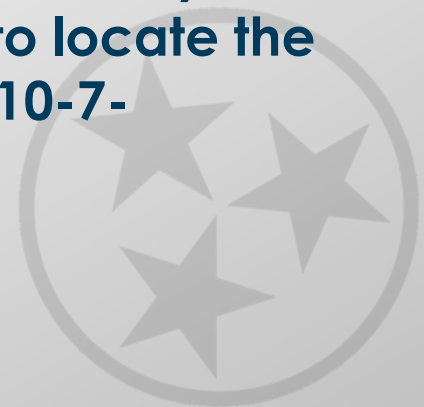
- ④ **12-3-1207(f)**
 - Competitive sealed proposals until intent to award
- ④ **12-3-1208(d)**
 - Competitive bids until awarded
- ④ **6-54-142**
 - ECD contracts until made available to governing body
- ④ **7-54-107**
 - Trade secrets in proposals for energy production facilities
- ④ **7-59-306(d)**
 - Documents submitted with cable/video franchise fees



EXCEPTIONS TO THE TPRA

“Identifying Information” in Orders of Protection

- If an individual presents a current order of protection and requests ID info to be confidential, utility must maintain the protection documents in alphabetical order in a separate file and redact all identifying information.
- “Identifying information” means the home and work addresses and telephone numbers, social security number, and any other information that could reasonably be used to locate the whereabouts of an individual. Tenn. Code Ann. § 10-7-504(a)(15)(A)(i).
- Tenn. Code Ann. § 10-7-504(a)(15)



EXCEPTIONS TO THE TPRA

“Private Records” of Utilities

- 🌐 "Private records" include:
 - Credit card number;
 - Social security number;
 - Tax identification number;
 - Financial institution account number;
 - Burglar alarm codes, security codes, access codes; and
 - Consumer specific energy and water usage data except for aggregate monthly billing information.
- 🌐 Requestor shall pay all reasonable costs related to redaction of private records.
- 🌐 Tenn. Code Ann. § 10-7-504(a)(20)



EXCEPTIONS TO THE TPRA

Structural or Operational Vulnerability

- ⊙ Records that would allow a person to identify areas of structural or operational vulnerability of a utility service provider or permit disruption to the services provided.
- ⊙ All contingency plans of a governmental entity prepared to respond to or prevent any violent incident (bomb threat, terrorist incident, weapon of mass destruction).
 - Records related to costs of plan are not confidential.
- ⊙ Tenn. Code Ann. § 10-7-504(a)(21)



EXCEPTIONS TO THE TPRA

Protection of “Government Property”

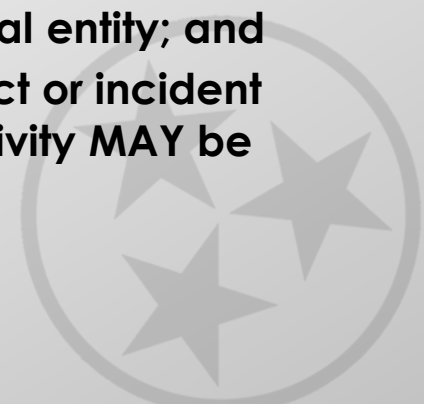
- ❁ Information that would allow a person to obtain unauthorized access to confidential information or to government property
- ❁ Includes
 - electronic information processing systems, telecommunication systems, plans, security codes, passwords, combinations, or computer programs used to protect electronic information and government property;
 - Information that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity;
 - Information that could be used to disrupt, interfere with, or gain unauthorized access to electronic information or government property.
- ❁ **Tenn. Code Ann. § 10-7-504(a)(21)**



EXCEPTIONS TO THE TPRA

Building Security

- ④ Information and records that are directly related to the security of any government building (owned, leased, or controlled by a governmental entity).
 - Information and records about alarm and security systems;
 - Security plans, including contingency planning and emergency response plans;
 - Assessments of security vulnerability;
 - Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity; and
 - Surveillance recordings, except segments including an act or incident involving public safety or security or possible criminal activity MAY be made public.
- ④ **Tenn. Code Ann. § 10-7-504(m)**



EXCEPTIONS TO THE TPRA

Other Common Exceptions

- Security/Surveillance of Gov't Buildings
- TBI Files
- Medical Information – HIPAA
- Student Information – FERPA
- Proprietary Information/Trade Secrets
- Expunged Records
- Tax information
- Attorney, Physician or Therapist Privileges
- Mental Health & Substance Abuse information



EXCEPTIONS TO THE TPRA

New Exceptions

- 🌟 **2022 OORC Legislative Update**
- 🌟 **Acceptable forms of requestor's residency – P.C. 721**
- 🌟 **Body cam footage containing minors – P.C. 916**
- 🌟 **Personal information of public employees – P.C. 989**
- 🌟 **Photographs of deceased minors and victims of fatal motor vehicle accidents – P.C. 1064**
- 🌟 **Law enforcement related-deaths record retention – P.C. 850**
- 🌟 **County Legislative Body Meeting Notice – P.C. 830**
- 🌟 **Adoption records after 100 years – P.C. 937**
- 🌟 **Display of Property Owner Name in Property Assessor Online Searchable Databases – P.C. 996**



PUBLIC RECORDS POLICY

Tenn. Code Ann. § 10-7-503(g)

Every Gov't Entity must have a policy that includes:

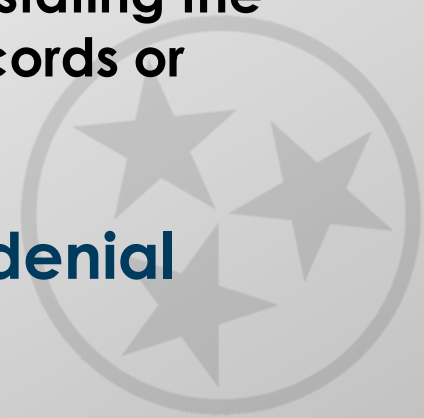
- 🌟 **Process for making requests, including any required forms;**
- 🌟 **Process for responding to requests;**
- 🌟 **Statement of fees and billing/payment procedures; and**
- 🌟 **Contact information for the Public Records Request Coordinator (“PRRC”).**
- 🌟 **OORC Model Policy released January 2017**



RESPONDING TO TPRA REQUESTS

Tenn. Code Ann. § 10-7-503(a)(2)(B)

- 🌐 Records custodian shall promptly make records available
- 🌐 If not practicable to make promptly available, must do one of the following within 7 business days:
 - Make the information available;
 - Deny the request in writing with the basis for denial; or
 - Furnish a completed record request response stating the time reasonably necessary to produce the records or information.
- 🌐 Failure to respond as indicated above = denial



RECEIVING TPRA REQUESTS

Inspection vs. Copies

- 🇺🇸 **Requests for only inspection:**
 - Cannot require the request to be in writing
 - Cannot assess a charge (even for labor)
 - Except under Tenn. Code Ann. § 10-7-504(a)(20) for redaction of “private records” of a utility

- 🇺🇸 **Requests for copies:**
 - Can require to be in writing or on a form
 - Can charge reasonable costs incurred to produce the requested records.



RECEIVING TPRA REQUESTS

Tenn. Code Ann. § 10-7-503(a)(7)

- ❁ Requests for only inspection do not have to be in writing and may be made:
 - In person, telephone, fax, mail, email (if used) or internet portal (if used).
- ❁ Requests for copies can be required to be in writing or on a form developed by OORC and may be made:
 - In person, mail, email (if used) or internet portal (if used).
- ❁ Any required forms should be included in policy and must be made readily available to requestors

RESPONDING TO TPRA REQUESTS

Tenn. Code Ann. § 10-7-503(a)(4)

- ⊙ Not required to sort through files and compile information to create or recreate records that do not already exist; and
 - Do have to compile information stored electronically
- ⊙ Requests must sufficiently identify the records.
- ⊙ Can deny general requests for information and overly broad/vague requests.



RESPONDING TO TPRA REQUESTS

Electronic Records

- ❁ Not required to convert paper records into electronic format, BUT required to produce records electronically if records held electronically
- ❁ Must produce records in format in which they are typically held or other unaltered format
 - Requestor cannot dictate electronic format
- ❁ Only charge for copies if electronic copy must be printed – usually only have labor charges



RESPONDING TO TPRA REQUESTS

Grounds for Denying Requests

- ❁ Not the custodian of the records
- ❁ Cannot identify responsive records
 - Seek clarification, if possible
- ❁ Records do not exist
- ❁ Proof of citizenship
- ❁ Not a Tennessee citizen
- ❁ Has not paid for copies
- ❁ State law makes the records confidential



CHARGING FOR PUBLIC RECORDS

OORC Schedule of Reasonable Charges

- 🇺🇸 **Schedule sets forth reasonable charges for copies and labor**
 - Can charge for copies and labor
 - \$.15 per page/\$.50 per page for color
 - Use lowest possible labor
 - One-hour labor threshold
 - Can charge for redaction of copies
 - Can only charge for labor related to providing electronic copies unless physical copies are printed
- 🇺🇸 **Must provide estimate of costs**
- 🇺🇸 **Cannot charge if only inspecting records**



CHARGING FOR PUBLIC RECORDS

OORC Schedule of Reasonable Charges

- ⊛ For those records custodians who choose not to adopt the schedule, any charges assessed for copies or duplication of public records must reflect the actual cost to the entity producing the requested material.
- ⊛ A records custodian can assess less than the charges reflected in the schedule and/or have a higher labor threshold and not have to provide justification for those charges.
- ⊛ The schedule also provides that any or all of the charges provided for in the schedule can be waived but should be waived in accordance with local public records policy.



CHARGING FOR PUBLIC RECORDS

Additional Production Charges

- ⊙ Presumed that records will be delivered at the records custodian's office. If a requestor is unable to physically appear in person, the records custodian can charge the requestor the actual cost incurred in mailing the records.
 - Only required to deliver records via USPS
 - Can deliver records by other means
 - Only required to provide records electronically if they are maintained electronically
- ⊙ Can assess charges associated with utilizing a third-party vendor.
 - Records held in archives
 - No internal IT staff



CHARGING FOR PUBLIC RECORDS

Charges for Multiple Requests

- ⊙ If a requestor, or group of requestors, makes four 4 or more requests within in a calendar month, arecords custodian no longer is required to waive the first hour of labor or waive any other fees that would normally be waived in accordance with the local public records policy.
- ⊙ This policy does not allow a records custodian to aggregate requests when the requests are for certain types of routinely released and readily accessible documents.



PUBLIC RECORDS POLICY

Recent Policy Issues

- ❁ Requiring forms for inspection
- ❁ Not including forms
- ❁ Improper charges/fees
 - Charging for redaction under 504(a)(20)(C) for utilities
- ❁ Charging for labor re electronic copies
- ❁ No contact information for PRRC
- ❁ Improper response times – Prompt requirement
- ❁ Forms of ID for citizenship



TPRA PENALTIES

Tenn. Code Ann. § 10-7-503(a)(7)(A)(vii)

Failure to Inspect

- 2 or more requests to inspect in 6 months
- Fails to view records within 15 days of being notified that records are available to view
- No TPRA requests for 6 months, unless failure to view was for “good cause.”

Failure to Pay for Copies

- Government entity provides estimate of costs
- Requestor agrees to pay estimated costs
- Requestor fails to pay for copies after they are produced
- No more TPRA requests until requestor pays costs



PETITIONING FOR ACCESS

Tenn. Code Ann. § 10-7-505

🇺🇸 Denial Required

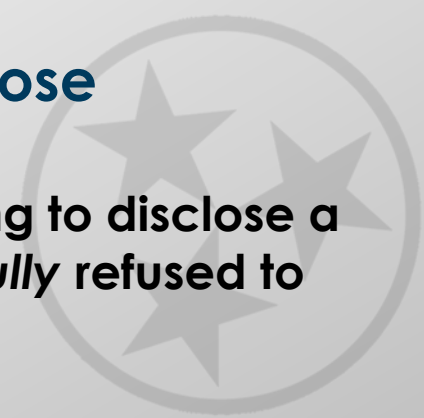
- Failure to respond in accordance with 503 = denial
- Imposition of unreasonable fee = denial

🇺🇸 Petition filed in chancery or circuit court

🇺🇸 Burden is on governmental entity to prove denial was justified

🇺🇸 Court orders access to records and may impose attorney's fees if it finds denial was "willful."

- "[T]he governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and *willfully* refused to disclose it." Tenn. Code Ann. § 10-7-505(g).



RECORDS RETENTION

Municipal Records – MTAS

- **Tenn. Code Ann. § 10-7-702** authorizes the **Municipal Technical Advisory Service** to compile and print a records retention manual for municipalities.
- <http://mtasresource.mtas.tennessee.edu/reference/retention-schedules>

County Records - CTAS

- **Tenn. Code Ann. § 10-7-404** authorizes the **County Technical Assistance Service** to compile and print a records retention manual for counties.
- <http://eli.ctas.tennessee.edu/reference/current-retention-schedules>



CONTACT INFORMATION

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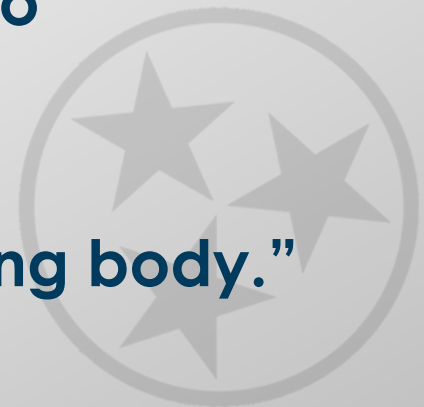
<http://www.comptroller.tn.gov/openrecords>



TENNESSEE OPEN MEETINGS ACT

Tenn. Code Ann. § 8-44-101, *et. seq*

- The formation of public policy and decisions is public business and shall not be conducted in secret.
- Construed broadly in favor of the public.
- Provides the right to attend, not the right to participate.
- Applies to all “meetings” of any “governing body.”



TENNESSEE OPEN MEETINGS ACT

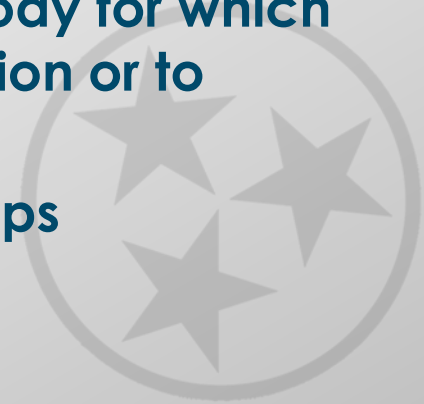
What is a meeting of a governing body?

“Governing Body”

- Members of a public body of 2 or more members with authority to make decisions for or recommendations to a public body on policy or administration.
- Includes certain non-profits

“Meeting”

- Convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision.
- Doesn't include executive sessions or workshops



TENNESSEE OPEN MEETINGS ACT

TOMA Requirements

- 🇺🇸 **“Meetings” must be open to the public**
- 🇺🇸 **“Adequate Public Notice”**
- 🇺🇸 **Meeting Minutes**
 - **Persons present**
 - **Motions, proposals and resolutions offered**
 - **Results of any votes**
- 🇺🇸 **All votes by public vote, public ballot or public roll call**



TENNESSEE OPEN MEETINGS ACT

“Adequate Public Notice”

- ④ **Under the totality of the circumstances, does notice give interested citizens a reasonable opportunity to exercise their right to attend?**

- ④ **Regular Meeting: Only Time & Place of Meeting**

- ④ **Special Meeting:**
 - **Reasonably describe proposed actions to be taken or decisions to be made**
 - **Cannot discuss other matters during the meeting**



TENNESSEE OPEN MEETINGS ACT

“Executive Sessions”

- 🌐 **Meeting with Attorney**
- 🌐 **Informational Sessions/Workshops**
- 🌐 **Hospital Boards**
- 🌐 **School Safety Planning**
- 🌐 **Government Audit Committees**



TENNESSEE OPEN MEETINGS ACT

TOMA OOPS!

- ❁ **What if a governing body violates TOMA?**
- ❁ **Any action taken in violation of TOMA is null and void, except commitments affecting public debt.**
 - **Tenn. Code Ann. § 8-44-105**
- ❁ **Court has broad jurisdiction to issue injunctions, impose penalties and otherwise enforce purpose of TOMA.**
 - **Tenn. Code Ann. § 8-44-106**
 - **Court retains jurisdiction and governing body must report to the court semi-annually re TOMA compliance**

