

**RULES
OF
TENNESSEE BUREAU OF INVESTIGATION**

**CHAPTER 1395-1-6
TENNESSEE BUREAU OF INVESTIGATION POLICY REGARDING PRODUCTION OF DOCUMENTS
AND TESTIMONY**

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1395-1-6-.01 DEFINITIONS.

The following definitions shall apply to the terms in this chapter:

- (1) Bureau - means the Tennessee Bureau of Investigation or TBI.
- (2) CID - means the Criminal Investigation Division.
- (3) Civil action - means any State or Federal civil judicial proceeding in a court of record, including any proceeding in which a State employee is a party in the employee's official or individual capacity and any proceeding pursuant to 28 U.S.C. § 2254.
- (4) Investigative records - means anything contained in the investigative files of the bureau, which are confidential pursuant to Tenn.Code Ann. §10-7-504(a)(2).
- (5) Criminal action - means any State, Federal, or foreign criminal investigation or prosecution by a law enforcement agency, including any State post-conviction proceeding.
- (6) DID - means the Drug Investigation Division.
- (7) Director - means the director of the bureau.
- (8) FSD - means the Forensic Services Division.
- (9) General counsel - means the chief in-house attorney for the bureau.
- (10) Law enforcement agency - means any State, Federal, or foreign governmental agency having statutory power of arrest whose primary function is that of detection, apprehension, and institution of prosecutions and which allocates more than fifty percent (50%) of its budget to the administration of criminal justice. Law enforcement agency also means the office of any State, Federal, or foreign prosecutor and the Tennessee Attorney General, but not a State, Federal, or foreign public defender.
- (11) Legal process - means any State or Federal subpoena or order in a civil action.
- (12) Legal counsel - means the general counsel or any other lawyer employed as an attorney by the bureau or an attorney with the Office of the Attorney General of Tennessee.
- (13) Official information - means any documents, material or information acquired or created by the bureau as a part of its official duties or acquired by an employee because of the employee's official

(Rule 1395-1-6-.01, continued)

status. This term also includes the testimony of an employee on a matter within the scope of the employee's official duties, or testimony based on knowledge acquired by an employee by virtue of that employee's official status. Official information includes, but is not limited to, "confidential information."

- (14) Request to inspect - means a request to inspect public records pursuant to the Tennessee Public Records Act, Tenn.Code Ann. §10-7-503.
- (15) State - means the State of Tennessee.

Authority: T.C.A. §§4-4-103, 10-7-504(a)(2), and 38-6-101, *United States ex. rel Touhy vs Ragen*, 340 U.S. 462, 71 S. Ct. 416, 95 L. Ed. 417 (1951), *Tenn.R.Civ.P. 26, 30, and 45*; *Fed.R.Civ.P. 26, 30, and 45*. **Administrative History:** Original rule filed November 6, 2001; effective March 30, 2002.

1395-1-6-.02 PURPOSE.

- (1) Due to the inherently intrusive nature of criminal investigations and the sensitive nature of material contained in bureau records, access by the public to records of the bureau is extremely limited and subject to several considerations. The bureau has promulgated this chapter to provide guidance and information to persons who may seek access.
- (2) Pursuant to the Tennessee Public Records Act, Tenn.Code Ann. §10-7-504(a)(2), investigative records of the bureau "shall be treated as confidential and shall not be open to inspection by members of the public." Access to investigative records may be gained only in compliance with process from a court of record, including either a subpoena or a court order. Access to investigative records may not be gained under this statute by using process from an administrative tribunal, a general sessions court, a city court, or other court that is not of record. Accordingly, the director
 - (a) does not produce investigative records pursuant to a request to inspect or pursuant to subpoenas or orders from tribunals that are not courts of record, such as administrative tribunals, general sessions courts, and city courts;
 - (b) opposes any access to investigative records in the absence of a protective order limiting the use of those records, even if records are released pursuant a court of record's subpoena or order; and
 - (c) does not produce investigative records in response to any subpoena or order issuing from a tribunal with no in personam jurisdiction over bureau personnel.
- (3) In addition to the general confidentiality found in Tenn. Code Ann. §10-7-504(a)(2), bureau records are subject to specific restrictions on their release as "otherwise provided by state [and Federal] law." The director resists producing material that is specifically confidential and privileged. For example, the bureau cannot release
 - (a) National Crime Information Center records, pursuant to 28 C.F.R. §20.33;
 - (b) records obtained from the Federal Bureau of Investigation, pursuant to 5 U.S.C. §552(b) and 28 C.F.R. §16.96(g);
 - (c) Social Security Numbers, pursuant to 5 U.S.C. §552a Note, Disclosure of Social Security Numbers;

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- (d) information protected by the holding in *Kallstrom vs City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998);
 - (e) medical information protected by the holding in *Stenson vs City of Knoxville*, E.D.Tenn.No. 3-98-cv-142 (Memorandum and Order, R. 27, August 26, 1998);
 - (f) information protected by the informer's privilege, and
 - (g) information protected by the attorney work product doctrine, Tenn.R.Crim.P. 16.
- (4) Accordingly, this chapter is designed to:
- (a) Assist courts of record by establishing written procedures to govern the production of investigative records in response to legal process;
 - (b) Ensure timely and complete responses by the bureau to legal process;
 - (c) Protect against the release of privileged or confidential information as otherwise provided by State and Federal law; and
 - (d) Provide for review of legal process by legal counsel and by the Tennessee Attorney General to determine whether:
 - 1. the demand is procedurally and legally correct;
 - 2. the appropriate employee has been designated to supply the required documents or testimony; and
 - 3. any legal defense should be asserted against compliance with legal process.

Authority: T.C.A. §§4-4-103, 10-7-504(a)(2), and 38-6-101, *United States ex. rel Touhy vs Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951), *Tenn.R.Civ.P. 26, 30, and 45*; *Fed.R.Civ.P. 26, 30, and 45*; *Page vs Turncott*, 179 Tenn. 491, 167 S.W.2d 350 (1943). **Administrative History:** Original rule filed November 6, 2001; effective March 30, 2002.

1395-1-6-.03 SCOPE.

- (1) This chapter applies to every civil action.
- (2) This chapter does not apply to any criminal action, with this exception:
 - (a) The bureau may resist legal process against which there is any ground for resistance, including that the legal process appears to be irregular in form, to be an attempt to subvert the normal discovery process, or to be an attempt to extend discovery beyond that provided by Tenn.R.Civ.P. 16 or its counterparts in other jurisdictions, or to make bureau personnel or facilities available for use by defense counsel or defense experts.
- (3) This chapter does not create any right or benefit, substantive or procedural, enforceable against the bureau or the State.
- (4) This chapter does not restrict the ability of the bureau to cooperate in any way with another law enforcement agency.

Authority: T.C.A. §§4-4-103, 10-7-504(a)(2), and 38-6-101, *United States ex. rel Touhy vs Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951), *Tenn.R.Civ.P.* 26, 30, and 45; *Fed.R.Civ.P.* 26, 30, and 45. **Administrative History:** Original rule filed November 6, 2001; effective March 30, 2002.

1395-1-6-.04 CIVIL ACTIONS.

- (1) The bureau's records, employees, and property shall not be made available unless legal process conforms to the requirements of this rule.
- (2) Other than the general counsel, no bureau employee or former employee is authorized to accept service of legal process for any attempt to reach the bureau's records, employees, or property. The general counsel may be served in person or by facsimile transmission as follows:

General Counsel
Tennessee Bureau of Investigation
901 R.S. Gass Boulevard
Nashville, TN 37216-2639

Voice: 615.744.4000
Fax: 615.744.4500

- (3) The bureau shall have at least 20 days within which to comply.
- (4) The legal process must describe with reasonable particularity the matters upon which examination or document production is requested. Records are maintained by two different custodians, one for the FSD and another for the CID and DID.
- (5) In addition, the general counsel may require a written statement setting forth a summary of the testimony, documents, material or information sought and their relevance to the civil action. Any authorization for production or testimony may be limited to the scope of the written statement.
- (6) The general counsel may authorize the appropriate custodian to make production or may authorize the appropriate employee or former employee to give testimony. Due to resource limitations, an employee will not be authorized to testify for in excess of four hours plus travel time without the express consent of the general counsel. The deposition of designated custodians shall take place at the office of the custodian.
- (7) The bureau may object in whole or in part to the legal process by raising objections in accordance with the law. Foremost, investigative records are confidential and will not be released absent entry of a protective order limiting their use. The following additional objections are typically made:
 - (a) relevance;
 - (b) privilege;
 - (c) confidentiality; and
 - (d) whether the bureau should be protected from "annoyance, embarrassment, oppression or undue burden or expense" or "unreasonable or oppressive" legal process.

Authority: T.C.A. §§4-4-103, 10-7-504(a)(2), and 38-6-101, *United States ex. rel Touhy vs Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951), *Tenn.R.Civ.P.* 26, 30, and 45; *Fed.R.Civ.P.* 26, 30, and 45. **Administrative History:** Original rule filed November 6, 2001; effective March 30, 2002.

(Rule 1395-1-6-.05, continued)

1395-1-6-.05 REGULATORY AGENCIES.

- (1) Unless otherwise provided by State or Federal law, upon written request by an authorized person of a State governmental agency, the general counsel may authorize disclosure to the requesting agency of criminal histories, records and data from bureau files, and the files of other states and Federal agencies for the limited purpose of determining whether a license or permit should be issued to any person engaged in an authorized activity affecting the rights, property or interests of the public.
- (2) Unless otherwise provided by State or Federal law, when an investigation by the bureau uncovers information pertinent to the status of a person holding or applying for a license from any governmental agency, the general counsel may authorize release of that information for use by the agency in its regulatory function.
- (3) At the discretion of the general counsel, a custody and receipt agreement may be required to limit use of confidential information.

Authority: T.C.A. §§4-4-103, 10-7-504(a)(2), and 38-6-101, *United States ex. rel Touhy vs Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951), *Tenn.R.Civ.P.* 26, 30, and 45; *Fed.R.Civ.P.* 26, 30, and 45. **Administrative History:** Original rule filed November 6, 2001; effective March 30, 2002.

1395-1-6-.06 EXPENSES.

- (1) At the discretion of the general counsel, the bureau may seek to recover costs for compliance with legal process, including an attorney's fee for litigated matters.
- (2) Fees for compiling documents and materials, copying charges, and fees for expert and other testimony shall be charged at the level set in TBI Policy §7-2-004 (Fees for Production of Documents and Testimony).
 - (a) Unless otherwise authorized by statute or regulations, the fee charged shall be equal to the rated adopted by the United States Internal Revenue Service in the Internal Revenue Code, IRS Regulation § 301.7610-1(2)(i) & (ii). The charge shall be a per-copy fee and an hourly rate for all time spent collecting and reproducing the records.
 - (b) If there is not agreement on payment of costs, then the bureau may move the court for costs, including attorney's fees for the time spent litigating the costs.
- (3) When bureau employees are subpoenaed as witnesses in civil cases as a result of work performed in their official capacities as employees of the State, the employee shall be considered on State business and the State shall be compensated for their time away from their primary duties. The employee must submit a memorandum to the appropriate supervisor itemizing expenses including the employee's salaried hourly rate, plus benefits and mileage at the State mileage rate, plus lodging, meals and incidentals, per State rates for overnight travel, and attach a copy of the subpoena to the memorandum. The name and address of the attorney shall be identified in the memorandum. Any remuneration relative to the serving of a subpoena or witness fee shall be forwarded to Fiscal Services for deposit in the General Fund for the State.

Authority: T.C.A. §§4-4-103, 10-7-504(a)(2), and 38-6-101, *United States ex. rel Touhy vs Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951), *Tenn.R.Civ.P.* 26, 30, and 45; *Fed.R.Civ.P.* 26, 30, and 45. **Administrative History:** Original rule filed November 6, 2001; effective March 30, 2002.

(Rule 1395-1-6-.07, continued)

1395-1-1-.07 CERTIFICATION OF RECORDS.

- (1) Whenever official attestation, sealing, and certification of records, reports, documents, and actions are required by law, certification does not create any greater or additional certification than authorized by law.
- (2) Every report of the FSD rendered or administered in connection with any case in a criminal, juvenile, or municipal court, or when otherwise required by law, or dealing with alcohol or drug content of blood, breath or urine shall bear the following certification:

Certification:

I certify and attest that this document is the proper record it purports to be.

/s/ _____
Designated Representative of TBI Director

- (3) The following persons shall be responsible for the certification of any FSD report prepared at a bureau facility under their supervision:
 - (a) the assistant director for forensic services; or
 - (b) any crime laboratory regional supervisor.
- (4) The certification of criminal histories, when required by law, shall bear the certification in (2) above, and shall also contain the following certification:

I hereby attest that the above is a true and accurate xerographic representation of the fingerprints of: _____ as maintained by the State Central Repository of Criminal History Records by the Records and Identification Unit of the Tennessee Bureau of Investigation. I further attest that I am the Supervisor of the Records and Identification Unit and Official Custodian of Records for the Tennessee Bureau of Investigation.

Signature of Custodian of Records
Typed or Printed Name

Date

- (5) The attestation, scaling and certification of records, reports, documents, and actions other than those listed above, including the bureau personnel with the public shall be executed by the director, information systems director, as appropriate to the material authentication of identification of and internal documents of the bureau, deputy director, assistant director, personnel director, or general counsel, certified.
- (6) All certification shall contain the official bureau seal as follows:



(Rule 1395-1-6-.07, continued)

When the seal is used, it may be affixed by being printed or impressed.

Authority: T.C.A. §§4-4-103, 10-7-504(a)(2), and 38-6-101, *United States ex. rel Touhy vs Ragen*, 340 U.S. 462, 71 S. Ct. 416, 95 L. Ed. 417 (1951), *Tenn.R.Civ.P.* 26, 30, and 45; *Fed.R.Civ.P.* 26, 30, and 45. **Administrative History:** Original rule filed November 6, 2001; effective March 30, 2002.