

April 18, 2011

Dear Mayor:

Questions and Answers

You have three questions arising from the fire study done for your City by Mr. Gary West, the former MTAS Fire Consultant:

1. Does the city have legal authority to provide financial support for the operation of the Volunteer Fire Department, presumably including contracting for fire service from that department?
2. Is the city obligated to provide any level of fire services to the city and the residents of the city?
3. Are the records of your Volunteer Fire Department subject to Tennessee's Open Records Law?

The **answer to Question 1** is yes. The basis of that authority is the general law mayor-aldermanic charter under which the city is established. In addition, it probably has the inherent authority to provide fire service to its residents, including by contract. To that end, the city has a contract with the Volunteer Fire Department to provide the city fire service. It also makes a "charitable contribution to the fire department under the authority of Tennessee Code Annotated, § 6-54-111.

The **answer to Question 2** is that the fire department is contractually liable to provide fire service inside the city. In addition, the fire department is covered by the Tennessee Governmental Tort Liability Act, under which it is exempt from liability for its discretionary functions, but is liable for the negligence of its employees in performing its non-discretionary duties, including some aspects of how it responds to and fights fires.

The **answer to Question 3** is yes. The records of the Volunteer Fire Department, notwithstanding the fact that in theory it is a non-governmental, nonprofit organization that purports to be an "independent contractor" with respect to the City, are public records subject to inspection by any citizen of Tennessee. That result derives from a recent Tennessee Supreme Court case that adopted the "functional equivalent to a governmental agency" doctrine. Under that doctrine, the fire department is the "functional equivalent to a government agency"—a *government* fire department. The fire department's financial records are also open to the city under Tennessee Code Annotated, § 6-54-111, and under the contract between the city and the fire department in

which the fire department agrees to provide fire services to the city.

Analysis of Questions and Answers

Analysis of Question 1

Your City is chartered under the general law mayor-aldermanic charter, codified at Tennessee Code Annotated, § 6-1-101 et seq. Nothing in that charter expressly mentions any authority for a city established under that charter to have a fire department or provide fire services. But the power of a city to have a fire department or to provide fire services to its residents is undoubtedly one of the police powers inherent in a municipality without specific mention in its charter. [Penn-Dixie Cement Corporation v. City of Kingsport, 225 S.W.2d 270 (Tenn. 1949)].

Penn-Dixie Cement Corporation is a reflection of Dillon's Rule, which still lives on in Tennessee. Under Dillon's Rule:

It is a general and undisputed proposition of law that a municipal corporation possess and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, *those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable*. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied. [Merriman v. Moody's Executor, 25 Iowa 163, 170 (1868)]. [Emphasis is mine.]

Section 6-2-201(13) of the general law mayor-aldermanic charter provides that among the powers of municipalities established under that charter is the power to:

Make contracts with any person, firm, association or corporation for public utilities *and public services* to be furnished the municipality and those in the municipality. The power to make contracts embraces the power to make exclusive contracts. When an exclusive contract is entered into, it shall be exclusive against any other person, firm, or corporation. These contracts may be entered into for a period of twenty-five (25) years or less, but no longer....

Even if it were not true that the provision of fire service by a municipality is inherent in municipal corporations, under its charter power to make contracts with persons, firms and corporations, your City would still has the power to make such contracts for the provision of fire service. If there were any doubt that Section 6-20-201(13) could be read that way, it was declared

in Southern Contractors v. Loudon County Board of Education, 58 S.W.3d 706 (Tenn. 2001) that while Dillon's Rule is still the law in Tennessee, it is only a rule of statutory construction, and that where the General Assembly has granted local governments "comprehensive governmental powers...without either enumerating the powers or expressly limiting the scope of that authority," that general provision "will be liberally construed." [At 713] The court cited three examples of the General Assembly's grant of such comprehensive general powers. One of those was § 6-2-201(32) of the general law mayor-aldermanic charter in which provides that:

Every municipality incorporated under this charter may [h]ave and exercise all powers that now or hereafter it would be competent for this charter specifically to enumerate, as fully and completely as though these powers were specifically enumerated.

Under that provision of your City's Charter, then, § 6-2-201(13) is liberally construed and would certainly allow the city to contract with the Volunteer Fire Department for fire service, as a "public service."

In addition, in Gray v. City of East Ridge, 641 S.W.2d 204 (Tenn. 1982), under Section 2 of the city's charter, "[s]aid city shall have power by ordinance of its governing authority within said City, ... to provide for the organization, and regulation of a police and a fire department." [At 206] That charter provision, declared the Court, was enough to allow the city to grant a franchise to the East Ridge Fire Department, which was a subscription fire service, and that such fire service satisfied the requirement in Section 2 of the city's charter. In that case, the owner of an apartment complex, a unit of which was destroyed by fire, was denied the right to recover his damages because he had failed to subscribe for fire services from the East Ridge Fire Department.

Section 6-2-201(13) of the general law mayor-aldermanic charter, which we have already considered above, also authorizes the city to grant "exclusive contracts" for city services which authority undoubtedly contemplates the granting of exclusive franchises for fire services.

I have not been asked to pass upon the validity of the contract between the city and the fire department for latter to provide to the former fire services, nor the validity of the "charitable contribution the city makes to the fire department under Resolution 06-09. I assume that both are valid agreements. In fact, I have no reason to argue otherwise. However, I will briefly outline those agreements below because they are pertinent to the analysis of all three questions.

Your City has a contract, last executed July 23, 1993, for the Volunteer Fire Department, to provide fire service "to all areas and locations within the municipal boundary of Your City, Tennessee." Under that contract, the Volunteer Fire Department purports to be "organized pursuant to the authority of T.C.A. 7-38-101 et seq., which permits individuals to form private Departments for firefighting purposes." That contract provides for the payment by the City of \$32,000 a year to the Fire Department. However, it is my understanding that the city

appropriates approximately \$90,000 a year to that fire department, which includes, but is not limited to, payments toward the cost of an addition to the fire department's building inside the city. The city's payments for the addition to the fire department's building are being made under Resolution 06-09 adopted on what appears to be September 7, 2006, in which the city agreed to finance 50% of the cost of the construction of an addition to the Fire Department, which is expected to cost \$441,000.

The statutory authority for Resolution 06-09 is Tennessee Code Annotated, § 6-54-111, which authorizes municipalities to make contributions to "nonprofit charitable organizations," and to nonprofit civic organizations. The Volunteer Fire Department was chartered in 1977 by the Tennessee Secretary of State as a "Non-Profit Corporation." [Tennessee Secretary of State's website.], even though it was originally established under Tennessee Code Annotated, § 7-38-101. Under Tennessee Code Annotated, § 7-38-101:

Any number of persons, resident within a municipality, may form themselves into a company for the purpose of extinguishing fires, by having their names and objective recorded in the register's office of the county.

That statute is the product of an 1831 act that has changed little since then. As far as I can determine, there are no cases interpreting that statute. It is clear that fire companies organized under that statute are "private fire companies," [although the word "private" never appeared in the heading of that statute until recent times]. They have the right to "make rules and regulations for their government, to impose fines for nonattendance or other delinquencies," [Tennessee Code Annotated, § 7-38-102], and to "procure fire engines, buckets, hooks and ladders ... and may hold property, real and personal, for its purposes..." [Tennessee Code Annotated, § 7-38-104]. It is not clear whether that statute contemplated that fire companies could be profit and nonprofit companies. Whatever the case there, given the history of fire service in America, most of them were probably volunteer companies, although some of them may have provided service on a subscription basis. In any event, because the Volunteer Fire Department was incorporated as a nonprofit public benefit corporation in 1977, presumably it meets the definition of "charitable organization" contained in Tennessee Code Annotated, § 6-54-111.

Analysis of Question 2

The contract between the City and the Volunteer Fire Department obligates the latter "to provide firefighting services to all areas and locations within the municipal boundaries of Your City, Tennessee," which under the contract includes a wide variety of firefighting and fire safety services. [Paragraph 3] The city has also agreed in that contract "not to compete by establishing or by funding a municipal fire department so long as the Department is fulfilling its responsibility under this agreement." [Paragraph 7]

The city has a contractual expectation that the fire department will provide the city fire services during the term of the contract, and the failure of the fire department to perform that service would be actionable on the part of the city. Of course, the fire department has a contractual expectation that the city will live up to its obligations under the contract.

But the fire department is also liable under the Tennessee Governmental Tort Liability Act (TGTLA) to perform fire services commensurate with that Act. The contract provides that “The express intent of both these parties is that the Department will be an independent contractor.” But Tennessee Code Annotated, § 29-20-102(3) defines “Governmental entity” as

any political subdivision of the state of Tennessee, including, but not limited to, any municipality, metropolitan government, county, utility district, school district, *nonprofit volunteer fire department receiving funds appropriated by a county legislative body or a legislative body of a municipality.*

The same statute, subsection (2) defines “Employee” as:

Means and includes any official (whether elected or appointed), officer, employee or servant ... or any officer, employee or servant thereof, of a governmental entity, ... *and, further including regular members or voluntary or auxiliary firefighting, police or emergency assistance organizations.*

Tennessee Code Annotated, § 29-20-107(a) provides that “Any person who is not an elected or appointed official or a member of a board agency or commission shall not be considered an employee of a governmental entity for purposes of this chapter unless the court specifically finds that all of the following elements exist:”.... [There follows a list of requirements that a member of a volunteer fire department could not meet]. Subsection (c) of the same statute provides that, “No governmental entity may extend the immunity granted by its chapter to independent contractors, or other persons or entities by contract, agreement or other means...” But Subsection (d) of that statute declares that “A regular member of a voluntary or auxiliary firefighting, police, or emergency assistance organization of a governmental entity shall be considered to be an employee of that governmental entity for purposes of this chapter without regard to the elements set forth in subsection (a).”

As we saw above, the definition of “governmental entity” in Tennessee Code Annotated, § 29-20-102(3)(A) includes a “nonprofit volunteer fire department receiving funds appropriated by a...legislative body of a municipality....” Those definitions contained in the TGTLA do not distinguish between volunteer fire departments that are municipal agencies and volunteer fire departments that are so-called “independent contractors.”

Under that Act, fire departments are not liable for discretionary duties. In Harper v. City of Milan, 825 S.W.2d 92 (Tenn. Ct. App. 1992), the City of Milan had a rural fire service contract with the Harpers to respond to structural fires within 3-1/2 miles from the city limits, under certain requirements, which the Harpers met. The city responded to a fire at the Harper's home with a pick-up truck equipped with a 250 gallon tank. The Harpers argued that action was inadequate both under the TGTLA and under their contract with the city.

As to the TGTLA claim, the Court held that

Determining the amount and type of equipment to deploy in response to a particular call is one such discretionary decision....The Harpers do not raise an issue of fact regarding the proficiency or skill of the fireman. Any injury to the Harpers that may have resulted from the alleged negligence of the City of Milan in responding to the Harper's fire arose out of the exercise or performance of a discretionary function.... [At 95]

But not all decisions of a fire department are discretionary, declared the Court. It pointed to the earlier case of Gordon v. City of Henderson, 766 S.W.2d 784 (Tenn. 1989), in which four persons died in a fire. The plaintiff alleged the city was negligent for (1) the city's "firemen being absent from their regular duty station, had to be located by the Henderson Police Department"; (2) the "response time of the firemen was at least fifteen minutes when the proper response time considering the location of the fire and the fire house should be less than five minutes"; (3) "some of the firemen responding to the fire 'had the smell of liquor on their breath and were unable to respond as trained and professional firemen'"; and (4) "the firemen incorrectly placed their equipment in operation." [At 94] The Court declared that, "we find it difficult to characterize the apparent intoxication of firemen as a 'discretionary function,' nor, without an explanation by defendants, the absence of firemen from their duty station and the resultant undue delay in response time." [At 95]

That case led the Harper v. City of Milan Court to declare that, "The courts have held that it is not a question of the exercise of discretion when it is a matter involving the proficiency of the department." [At 95] But "The Harpers do not allege any delay in the response by the City of Milan nor that the firemen did not act in a skillful manner....The Harpers do not allege any lack of proficiency on the part of the City of Milan," said the court. [At 95]

As to their contractual claim, the Court, pointing to the contract between the City of Milan and the Harpers, held that "the Harpers have clearly stated a cause of action for a breach of contract." [at 96] But the Court also dismissed that claim, reasoning that:

There is no dispute that the City of Milan did respond to the call regarding the Harpers' fire. The contract makes no promise or guarantee as to the adequacy of the response made by the City of Milan. The only promise made by the City of Milan to the Harpers is that the City could respond to their call and there is no evidence in the record that there was any breach of that promise. [At 96]

Under those cases, the Volunteer Fire Department has both a contractual obligation to respond to fires within the City, and under the TGTLA is liable for negligence in performing its non-discretionary duties, one of which is to respond to fires in a manner that does not reflect a negligent response.

Analysis of Question 3

It appears that this question is settled by the Tennessee Supreme Court's application of the Open Records Law in the case of Memphis Publishing Company v. Cherokee Children & Family Services, 87 S.W3d 67 (Tenn. 2002). In that case, the Court considered the history of the privatization of governmental functions through independent contractors and non-profit government benefit agencies and other non-governmental entities, and adopted a "functional equivalent of a governmental agency" test for determining whether the records of such agencies and contractors was subject to Tennessee's Open Records Law. In holding that the records of the Cherokee Children & Family Services, a non-profit public benefit corporation, were open records the Court declared that:

Our review of authority from other jurisdictions persuades us that the functional equivalency approach described above provides a superior means for applying public records laws to private entities which perform "contracted out" governmental services. As the facts of these cases demonstrate, private entities that perform public services on behalf of a government often do so as independent contractors. Nevertheless, the public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor. 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. [At 79]

In applying the "functional equivalency" test against the character and functions of the Cherokee Children & Services, the Court reasoned that:

- Child care services for indigent families, and supervising child care placement under TDHS guidelines, were “undeniably public in nature.”

- “Cherokee’s involvement in providing these services was extensive, with all of its employees performing services under contracts with TDHS.”

- Under its charter, Cherokee’s business activities were dedicated exclusively to the services of TDHS contracts. For that reason, “all of its records relate to state business.”

- Over ninety-nine percent of Cherokee’s operations came from state funds.

- [“A] significant level of governmental control” over Cherokee was exercised by TDHS.
[79-80]

The Court also declared that:

While it is true that (1) Cherokee was privately incorporated rather than created by the legislature; (2) the contracts disavowed any agency relationship between Cherokee and the State; and (3) the parties asserted that the State incurred no tort liability for Cherokee’s activities, these considerations are outweighed by the other factors listed above. Accordingly, we conclude that Cherokee served as the functional equivalent of a governmental agency, and so we hold that the records in Cherokee’s possession are subject to the public access pursuant to the terms of the Tennessee Public Records Act.... [At 80]

While the fit of the Volunteer Fire Department with Cherokee is not exact, it is not required to be exact under the “functional equivalent” test; the fit is far more than close enough. A large part of the fire department’s operations, if not all of them, are “public in nature.” Undoubtedly, all or most of the personnel in the fire department, be they volunteer or paid personnel, are dedicated to performing fire services under contracts with the City, and with the county. While I do not know how much funding the fire department receives from the county, it receives at least \$90,000 a year from the city, including payments towards the charitable contribution the city made to the fire department under Tennessee Code Annotated, § 6-54-111. It is also my understanding that the fire department has received various grants from public agencies and entities for its firefighting functions. The fire department also falls under the definition of a “governmental entity,” and its volunteer firefighters under the definition of s “governmental employees,” under the TGTLA, and both receive extensive immunities thereunder. A significant amount of government control is exercised over the fire department’s firefighting functions, including the requirement of state recognition under Tennessee Code Annotated, § 68-102-108(c), and Chapter 0780-2-20 issued by the Tennessee Department of Commerce and Insurance, Division of Fire

Prevention. Control is also exercised by the City under its contract with the fire department (and perhaps similarly, by the county).

But your Fire Department also has broad governmental powers under the contract between the city and the fire department. Under Paragraph 6 of the contract, “Any ordinance adopted by the Town for fire protection or fire prevention will be adhered to by the Department. *The Department will also be authorized to enforce all such ordinances or Town regulations.*” [Emphasis is mine.] It is difficult to find stronger evidence of the “functional equivalency” of a governmental agency than that close link between the city and the fire department that allows the fire department to enforce the city’s ordinances.

Neither the fire department’s status as a non-profit organization, nor the fact that the city and the fire department characterize the fire department as an “independent contractor” in their contract for fire service to the city, lift the fire department over the “functional equivalent” test. It seems abundantly clear that under all the facts and circumstances the Volunteer Fire Department is the “functional equivalent” to a government.

In addition, Paragraph 4 of the 2003 contract between the City and the Volunteer Fire Department provides that:

The Volunteer Fire department will provide to the Town a copy of their proposed budget on an annual basis in time to allow the Town to consider this information in constructing the Town’s budget. The Volunteer Fire department will provide the Town with a quarterly revenues and expense statement and an annual revenues and expense statement at the end of the Volunteer Fire department’s fiscal year...

That is an “open records” contractual agreement on the part of your City Volunteer Fire Department toward your City. The above language in paragraph 4 is not restricted to the revenues and expenses related only to your City, but the fire department’s total budget.

But even if that were not so, the City’s Resolution 06-09, in which it gives to the Volunteer Fire Department 50% of \$441,000 under Tennessee Code Annotated, § 6-54-111 brings it entirely under that statute, including subsection (c), which provides that:

Any nonprofit organization that desires financial assistance from a municipality shall file with the city clerk a copy of an annual report of its business affairs and transactions, which includes, but is not limited to, a copy of an annual audit, a description of the programs that serve the municipality and the proposed use of the municipal

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assistance. Such report will be open for public inspection during regular business hours of the city clerk's office.

That provision appears to include a general annual report and audit, not ones related only to the nonprofit organization's business affairs with the city.

However, the most important entrance to the fire department's records is not through the provisions in the contract between the city and the fire department nor the disclosure requirements in Tennessee Code Annotated, § 6-54-111, but Tennessee's Open Records Law, found at Tennessee Code Annotated, § 10-7-501 et seq. which generally opens to public inspection most records of *all* local governments, during their business hours, which, under the "functional equivalent" test includes the Volunteer Fire Department.

Sincerely,

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Senior Law Consultant

SDH/