

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
425 FIFTH AVENUE NORTH  
NASHVILLE, TENNESSEE 37243

January 5, 2005

Opinion No. 05-005

Public Exhibition or Display of Native American Indian Human Remains

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**QUESTIONS**

1. Does the broadcast of video images of Native American Indian human remains as part of news coverage violate Tenn. Code Ann. § 11-6-117?
2. Does the showing of photographic slides of Native American Indian human remains at burial sites for educational purposes in classrooms or in adult education violate Tenn. Code Ann. § 11-6-117?
3. Does the term “public exhibition or display” in Tenn. Code Ann. § 11-6-117 apply only to exhibits or displays of actual human remains as opposed to the display of photographs?
4. Are Native American Indian human remains in the possession of the Division of Archaeology or photographs of such remains taken in the ordinary course of the work done by the Division of Archaeology “public records” within the meaning of Tenn. Code Ann. § 10-7-301?
5. Does the use of actual Native American Indian human remains in a classroom setting constitute “public exhibition or display” within the meaning of Tenn. Code Ann. § 11-6-117?

**OPINIONS**

1. The broadcast of video images of Native American Indian human remains as part of news coverage does not violate Tenn. Code Ann. § 11-6-117.
2. The showing of photographic slides of Native American Indian human remains at burial sites for educational purposes in classrooms or in adult education does not violate Tenn. Code Ann. § 11-6-117.
3. The term “public exhibition or display” as used in Tenn. Code Ann. § 11-6-117 applies to exhibits or displays of actual human remains rather than to photographs of human remains.
4. Native American Indian human remains in the possession of the Division of

Archaeology are not “public records” within the meaning of Tenn. Code Ann. § 10-7-301. Photographs of such remains taken in the ordinary course of work done by the Division of Archaeology are “public records” within the meaning of Tenn. Code Ann. § 10-7-301.

5. The use of actual Native American Indian human remains in a classroom setting constitutes “public exhibition or display” within the meaning of Tenn. Code Ann. § 11-6-117.

### ANALYSIS

This opinion primarily addresses one aspect of the proper treatment of Native American Indian human remains (hereinafter “Indian remains”) in Tennessee. More specifically, the principal focus of this opinion is the statutory prohibition against the public exhibition or display of Indian remains. While question four of the opinion request raises a public records issue, questions one, two, three, and five all delve into exactly what the General Assembly intended in enacting the prohibition against publicly exhibiting or displaying Indian remains.

The prohibition at issue states that “[t]here shall be no public exhibition or display of Native American Indian human remains, except as evidence in a judicial proceeding.” Tenn. Code Ann. § 11-6-117.<sup>1</sup> “Human remains” are defined to mean “the bodies of deceased persons, in whatever stage of decomposition, including, but not limited to, skeletal remains, mummies, or body parts.” Tenn. Code Ann. § 11-6-102(7). The terms “public exhibition or display” are not defined.

In delving into exactly what the General Assembly intended in drafting the prohibition, certain well-established principles guide the inquiry. The most basic principle of statutory construction is to ascertain and give effect to the intention and purpose of the legislature. *Stewart v. State*, 33 S.W.3d 785, 791 (Tenn. 2000); *Sharp v. Richardson*, 937 S.W.2d 846, 850 (Tenn. 1996). We must give effect to the legislative intent without unduly restricting or expanding the statute’s coverage beyond its intended scope. *Poper ex rel. Poper v. Rollins*, 90 S.W.3d 682, 684 (Tenn. 2002). In other words, we must give effect to the statute’s reasonable interpretation in light of the purposes, objectives and spirit of intent of the legislature. *Freeman v. Marco Transp. Co.*, 27 S.W.3d 909, 911 (Tenn. 2000); *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976).

In this instance, the legislative history of the provision is quite instructive. Section 11-6-117 was part of a larger set of statutory amendments adopted by the General Assembly in 1990 to provide protection to Indian remains and grave sites. See 1990 Tenn. Pub. Acts ch. 852. A primary goal of the 1990 amendments was to set up a system to ensure proper reburial of Indian remains

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<sup>1</sup> There is similar language in the statutory provisions governing the care and availability of excavated artifacts held by the Tennessee Department of Environment and Conservation, Division of Archaeology. See Tenn. Code Ann. § 11-6-104(b).

upon their discovery and excavation.<sup>2</sup> In fact, the caption of the 1990 amendments reads, in pertinent part, that it is “an act relative to the discovery, excavation, and disposition of certain remains . . . .” 1990 Tenn. Pub. Acts ch. 852. This goal was stressed by the Senate sponsor of the 1990 amendments during committee hearings. *An Act Relative to the discovery, excavation, and disposition of certain remains and to amend Tennessee Code Annotated, Title 11, Chapter 6: Hearings on S.B. 2350 Before the Comm. on Gov’t Operations and the Comm. on State and Local Gov’t*, 96th General Assembly, 2d Reg. Sess. (February 28, 1990, and March 13, 1990) (Statements of Sen. Henry). Additionally, during final consideration on the Senate floor, Senator Henry reiterated the goal of ensuring that disinterred Indian remains were treated in a respectful manner by properly reburying the remains. *An Act Relative to the discovery, excavation, and disposition of certain remains and to amend Tennessee Code Annotated, Title 11, Chapter 6: Hearing on S.B. 2350 Before the Senate*, 96th General Assembly, 2d Reg. Sess. (March 29, 1990) (Statement of Sen. Henry).

Apart from discussion of the broad goal of the proposed legislation, the legislative history also reveals discussion specifically concerning the prohibition against the public exhibition or display of Indian remains. This discussion confirmed the understanding that the 1990 amendments prohibited exhibition of “bones, skulls and so forth.” *Hearing on S.B. 2350 Before the Comm. on Gov’t Operations*, *supra* (Statement of Sen. Hicks). In testing the limits of the prohibition, a question arose as to whether the 1990 amendments would prohibit exhibition of skeletal remains “wrapped like a mummy,” apparently out of concern that the Tennessee State Museum exhibited a mummy of some kind. *Hearing on S.B. 2350 Before the Comm. on Gov’t Operations*, *supra* (Statement of Sen. Hicks). Senator Henry responded that the bill was intended to prohibit such a display.<sup>3</sup> *Hearing on S.B. 2350 Before the Comm. on Gov’t Operations*, *supra* (Statement of Sen. Henry). Similarly, questions arose as to how the prohibition would impact certain archaeological sites throughout the state, including Pinson Mounds State Park and the Chucalissa Archaeological Museum. *Hearing on S.B. 2350 Before the Comm. on State and Local Gov’t*, *supra* (Statements of Sen. Cohen and Sen. McKnight). State Archaeologist Nick Fielder spoke to these questions, indicating that there were no longer any human remains exhibited at these locations. *Hearing on S.B. 2350 Before the Comm. on State and Local Gov’t*, *supra* (Statement of Nick Fielder). Furthermore, during final consideration in the Senate, the extent of the prohibition was specifically questioned, with direct reference to potential discoveries of archaeological significance that could merit display. *Hearing on S.B. 2350 Before the Senate*, *supra* (Statement of Sen. Albright). Senator Henry responded simply that while the 1990 amendments allowed for the display of some objects other than human remains, the intent as to Indian remains was that they were not to be displayed but

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<sup>2</sup> It was acknowledged that, as more and more land in Tennessee is developed, grave sites would inevitably be disturbed and could, under certain circumstances, be moved. *An Act Relative to the discovery, excavation, and disposition of certain remains and to amend Tennessee Code Annotated, Title 11, Chapter 6: Hearing on H.B. 2129 Before the Comm. on Calendar and Rules*, 96th General Assembly, 2d Reg. Sess. (March 21, 1990) (Statements of Rep. Clark and Rep. Odom); *see also* Tenn. Code Ann. § 46-4-101 *et seq.*

<sup>3</sup> A distinction was eventually made clear during the Senate committee meetings that the prohibition would not impact the display of non-Indian remains such as an historical Egyptian mummy, with specific mention of a traveling “Ramses” exhibition that had occurred in Memphis.

were instead to be reburied in a proper manner. *Hearing on S.B. 2350 Before the Senate, supra* (Statement of Sen. Henry). Noticeably absent throughout the legislative discussion of the prohibition is any reference to photographs or video images.

Questions one, two and three all revolve around the issue of whether the prohibition against the public exhibition or display of Indian remains applies only to actual human remains or extends to photographs and video images. As detailed above, the legislative history indicates a focus on actual human remains. In discussing the prohibition, Senate members explicitly referred to bones, skulls and mummified skeletal remains. In contrast, legislative discussions of the prohibition contain no references to displays of photographs or video images. Moreover, as previously indicated, one of the primary purposes of the statutory amendments was to provide for the proper reburial of disinterred Indian remains. Evaluating the prohibition in light of this legislative purpose, it is reasonable to conclude that the prohibition is aimed at the exhibition or display of actual human remains because such a prohibition goes hand in hand with providing for the reburial of disinterred Indian remains. On the other hand, prohibiting the exhibition or display of photographs or video images of Indian remains does not inherently serve the legislative purpose of providing for the reburial of disinterred Indian remains.

In summary, there is no indication from the specific legislative discussion of the prohibition or the general tenor of the 1990 amendments that the General Assembly intended the prohibition to include the exhibition or display of photographs or video images. Accordingly, it is the opinion of this Office that the prohibition against the public exhibition or display of Indian remains applies to the physical exhibition or display of actual human remains. As such, the broadcast of video images of Indian remains as part of news coverage or the showing of photographic slides of Indian remains for educational purposes does not contravene the dictates of section 11-6-117.

There is likewise nothing in the plain language or the legislative history of section 11-6-117 to suggest the existence of some type of “educational purpose” or “classroom setting” exception to the prohibition against exhibiting or displaying Indian remains. With regard to legislative history, as mentioned above, Senator Henry indicated as much in response to questions from Senator Albright during final consideration of the 1990 amendments in the Senate. *Hearing on S.B. 2350 Before the Senate, supra* (Statement of Sen. Henry). Furthermore, the plain language of the prohibition specifically makes only one exception, namely use as evidence in a judicial proceeding. Tenn. Code Ann. § 11-6-117. It is therefore the opinion of this Office that the use of actual human remains in a classroom setting does contravene the dictates of section 11-6-117.

The remaining question posed in the opinion request focuses on whether Indian remains in the possession of the Division of Archaeology (hereinafter “the Division”) and photographs taken in the ordinary course of work done by Division personnel qualify as public records within the meaning of section 10-7-301. Section 10-7-301 defines public records to include “all documents, papers, letters, maps, books, photographs, microfilms, electronic data and 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.” Tenn. Code Ann. § 10-7-301(6). The central inquiry into

whether the listed materials qualify as public records is whether they were made or received pursuant to law or in connection with official governmental business. *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004). This inquiry requires an examination of the totality of the circumstances surrounding the creation or receipt of the materials. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991).

Photographs are specifically mentioned in the definition of public records. Tenn. Code Ann. § 10-7-301(6). Photographs taken in the ordinary course of work done by Division personnel qualify as having been made pursuant to law or in connection with official governmental business. As a result, such photographs are public records within the meaning of section 10-7-301.

The question of whether Indian remains in the possession of the Division are themselves public records is more difficult. The Division is charged by statute with the authority to excavate historic sites, ruins and mounds for the purpose of securing data and objects relating to the history of inhabitation of Tennessee. Tenn. Code Ann. § 11-6-101(b)(2). All artifacts and other materials excavated, discovered, donated or otherwise acquired by the Division in pursuance of the program are deemed property of the State and shall be placed under the custodianship of the Division. Tenn. Code Ann. §§ 11-6-101(b)(6), 11-6-104(a).

With particular reference to human remains, the 1990 amendments establish a general procedure to be followed upon the disturbance or disinterment of human remains on public or private lands, whether accomplished accidentally or otherwise.<sup>4</sup> More specifically, upon disturbance or disinterment of human remains, the statutory procedure calls for notification of the coroner or medical examiner and the local law enforcement agency. Tenn. Code Ann. § 11-6-107(d)(1)(B). The coroner or medical examiner must determine whether further investigation within the scope of his or her official duties is merited. Tenn. Code Ann. § 11-6-107(d)(2). If the coroner or medical examiner has no forensic or criminal concerns, he or she must notify the Division. Tenn. Code Ann. § 11-6-107(d)(3). Thereafter, custody of the remains rests temporarily with the Division. Tenn. Code Ann. § 11-6-107(d)(5). The remains are ordinarily to be reburied within six months in accordance with appropriate Native American Indian traditions.<sup>5</sup> Tenn. Code Ann. § 11-6-119. There are provisions allowing for limited access to the remains for scientific or medical research pending reburial. Tenn. Code Ann. §§ 11-6-104, 11-6-119.

Clearly, then, the Division may from time to time receive custody, albeit temporary, of Indian remains pursuant to law. Tenn. Code Ann. § 11-6-107(d)(4); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 752 (Tenn. Ct. App. 2001). Given that the definition of public records set forth at section 10-7-301(6) includes materials received pursuant to law regardless of physical form or characteristics, a cursory reading of the Public Records Act

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<sup>4</sup> There are limited exclusions for discoveries made during certain activities, namely normal farming activity and surface collecting of artifacts. Tenn. Code Ann. § 11-6-107(d)(6).

<sup>5</sup> Under certain circumstances, the deadline may be extended for another six-month period. Tenn. Code Ann. § 11-6-119.

would appear to include Indian remains in the possession of the Division as public records.

Well-settled principles of statutory construction, however, provide that words are known by the company they keep. *Medicine Bird*, 63 S.W.3d at 754-55 (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 694, 115 S.Ct. 2407, 2411, 132 L.Ed.2d 597 (1995)). In other words, it is improper to take a few words from a statute and, with them isolated, attempt to determine their meaning. *Steele v. Industrial Dev. Bd.*, 950 S.W.2d 345, 348 (Tenn. 1997). Rather, the construction of statutory language must be ascertained in the context of the entire statute and in light of the statute's general purpose. *State v. Goodman*, 90 S.W.3d 557, 564 (Tenn. 2002).

It is therefore necessary to consider the phrase "other material, regardless of physical form or characteristics," in light of the surrounding statutory language and the general purpose of the Public Records Act. The language immediately surrounding the phrase includes as public records "documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, [and] sound recordings." Tenn. Code Ann. § 10-7-301(6). These materials all have the purpose of transmitting information. It is also useful to consider the related definition of "records creation." "Records creation" is defined as "the recording of information on paper, printed forms, punched cards, tape, disk, or any information transmitting media." Tenn. Code Ann. § 10-7-301(7). Again, this language exhibits materials whose primary purpose is to transmit information. Lastly, with reference to a general purpose behind the statutory language, Tennessee courts have stated that the public records statutes are an "all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity." *Griffin*, 821 S.W.2d at 923 (Tenn. 1991) (quoting *Board of Educ. v. Memphis Publishing Co.*, 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979)).

Considering the entire statutory context, it becomes clear that Indian remains are qualitatively different from the materials specifically described as public records in section 10-7-301. Indian remains are not printed or other informational matter. Moreover, examining the totality of circumstances surrounding receipt of Indian remains by the Division underscores that such remains differ significantly from typical public records. In particular, the Division maintains custody of Indian remains only temporarily. As mentioned above, one of the principal purposes of the 1990 amendments is that the Division ensure reburial of Indian remains, not that the Division maintain custody of such remains indefinitely. Additionally, there are limitations on access to Indian remains even while the Division has custody of them. These provisions serve to distinguish Indian remains from public records, which ordinarily have broad provisions ensuring preservation and access. Accordingly, considering all of these circumstances, it is the opinion of this Office that Indian remains in the possession of the Division are not public records within the meaning of section 10-7-301. To conclude otherwise would expand the scope of the Public Records Act beyond the application intended by the General Assembly.

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PAUL G. SUMMERS  
Attorney General

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MICHAEL E. MOORE  
Solicitor General

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R. STEPHEN JOBE  
Assistant Attorney General

Requested by:

Betsy L. Child, Commissioner  
Department of Environment and Conservation  
L&C Tower, 21st Floor  
401 Church Street  
Nashville, Tennessee 37243-0435