

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
91st General Assembly
Regular Session, 2017

As Engrossed: H3/16/17
A Bill

HOUSE BILL 1622

By: Representatives Johnson, Lowery, Brown

By: Senator J. English

For An Act To Be Entitled

AN ACT TO CREATE A PROCEDURE FOR ADDRESSING UNDULY BURDENSOME REQUESTS FOR DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT OF 1967; TO AMEND THE FREEDOM OF INFORMATION ACT OF 1967; TO CREATE AN AFFIRMATIVE DEFENSE; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE A PROCEDURE FOR ADDRESSING BURDENSOME REQUESTS FOR DISCLOSURE; TO AMEND THE FREEDOM OF INFORMATION ACT OF 1967; TO CREATE AN AFFIRMATIVE DEFENSE; AND TO DECLARE AN EMERGENCY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. DO NOT CODIFY. Legislative intent.

(a) The General Assembly finds that:

(1) It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy;

(2) The right of a citizen to make a request for records under the Freedom of Information Act of 1967, § 25-19-101 et seq., should not be limited or infringed;

(3) In the case of certain large or complicated requests for



public records, the maximum three (3) days for compliance with the Freedom of Information Act of 1967, § 25-19-101 et seq., is insufficient to locate, review, redact, and produce the requested documents;

(4) In the case of certain large or complicated requests for public records, compliance within three (3) days may be impracticable and require additional staff and resources for which a government entity does not have funds;

(5) Under current law, there is no defense to prosecution if a custodian is unable to comply in a timely manner with a request for public records despite his or her best efforts made in good faith to follow the law;

(6) If a custodian does not act in good faith to make his or her best efforts to comply with a request for public records, he or she should remain criminally liable under § 25-19-104; and

(7) If a government entity does not act in good faith to make its best efforts to comply with a request for public records, the government entity should remain civilly liable under § 25-19-107.

(b) Therefore, it is the intent of the General Assembly to:

(1) Allow additional time for a government entity to comply with a request for public records that is unduly burdensome;

(2) Prevent the custodian or the government entity from being held criminally or civilly liable for late production of public records when the public records are produced within a reasonable amount of time given the circumstances; and

(3) Protect the public's ability to compel compliance with the Freedom of Information Act of 1967, § 25-19-101 et seq., through the courts.

(c) It is not the intent of the General Assembly to:

(1) Allow the custodian or government entity to abuse its discretion to determine whether or not a request is unduly burdensome;

(2) Allow the custodian or government entity to act in bad faith to avoid transparency; or

(3) Place an unreasonable burden on the custodian or government entity in the case of large or complicated requests for public records.

SECTION 2. Arkansas Code § 25-19-105(e), concerning the time for compliance with a request for public records, is amended to read as follows:

(e)(1) If Except as provided in subdivision (e)(2) of this section, if

a public record is in active use or storage and therefore not available at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter.

(2)(A)(i) If production of the requested record within the time provided under this section would be unduly burdensome to the government entity maintaining the public record, the government entity may take a reasonable amount of additional time not to exceed fifteen (15) business days to produce the record.

(ii)(a) The inability of a custodian to comply with a request within fifteen (15) business days under subdivision (e)(2)(A)(i) of this section shall be an affirmative defense that may be considered by a court.

(b) The custodian making the affirmative defense under subdivision (e)(2)(A)(ii)(a) of this section shall bear the burden of proof.

(c) A court may consider the factors under subdivision (e)(2)(C)(ii) of this section in making a determination as to the ability of a custodian to comply with a request for public records.

(B) Before the time for compliance with this section expires, the government entity shall notify the requestor in writing of the:

(i) Delay;

(ii) Cause for the delay; and

(iii) Expected date of compliance with the request.

(C)(i) As used in this subsection, "unduly burdensome" means production of a public record within three (3) days would substantially and unreasonably divert the resources of the government entity compelled to disclose the public record from the other duties and obligations of the government entity.

(ii) In determining whether a public record is unduly burdensome the following factors shall be considered:

(a) The number and volume of the public records requested;

(b) Whether the request requires an extensive search for the public records requested;

(c) Whether the public records are stored at a location other than that of the government entity;

(d) Whether production of the records requires additional staff, resources, security, or other measures in order to comply with the request in a timely manner and *without significantly interfering* with the operations of the government entity;

(e) Whether the government entity is required to consult with another government entity that has a substantial interest in the subject matter of the request;

(f) Whether the requested records require examination and evaluation by one (1) or more persons having the necessary competence and discretion to determine if the public records are exempt from disclosure or may be revealed only with appropriate deletions;

(g) Whether the request requires substantial redaction of exempt information;

(h) Whether the request has previously been complied with in full or in part for any person;

(i) Whether the requested public records could have been located by the requestor in the course of a routine search of records available by other means;

(j) Any other factor which indicates the ease or difficulty of compliance with the request; and

(k) Any other factor which indicates whether the government entity is making good faith efforts to comply with the request.

SECTION 3. DO NOT CODIFY. Applicability.

This act does not apply to a request for a public record that is received by the government entity before the effective date of this act.

SECTION 4. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that government entities are being overwhelmed by voluminous requests for production of public records under the Freedom of Information Act of 1967, § 25-19-101 et seq.; that timely compliance with *certain* requests comes at a great expense to the taxpayers; and that this act is immediately necessary to protect custodians and

government entities from potential criminal and civil liability for violations of the Freedom of Information Act of 1967, § 25-19-101 et seq., that cannot be prevented by their good faith efforts to comply. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.

/s/Johnson