

State of Arkansas
94th General Assembly
First Extraordinary Session, 2023

A Bill

Call Item 4
SENATE BILL 9

By: Senator Hester
By: Representative Ray

For An Act To Be Entitled

AN ACT TO AMEND THE FREEDOM OF INFORMATION ACT OF 1967; TO EXEMPT CERTAIN RECORDS FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT OF 1967, INCLUDING CERTAIN SECURITY-RELATED RECORDS, RECORDS THAT REFLECT COMMUNICATIONS BETWEEN THE GOVERNOR AND HIS OR HER STAFF AND THE SECRETARY OF A CABINET-LEVEL DEPARTMENT, CERTAIN RECORDS PREPARED BY AN ATTORNEY FOR USE IN LITIGATION THAT IS PENDING OR ANTICIPATED IN LIGHT OF A PLAUSIBLE THREAT OF LITIGATION THAT HAS BEEN DOCUMENTED IN WRITING, AND RECORDS THAT WOULD BE PRIVILEGED IN CERTAIN CIRCUMSTANCES; TO REQUIRE THAT THE DIVISION OF ARKANSAS STATE POLICE PROVIDE TO THE LEGISLATIVE COUNCIL QUARTERLY REPORTS CATEGORIZING CERTAIN EXPENSES; TO AMEND THE CONDITIONS UNDER WHICH ATTORNEY'S FEES ARE AWARDED UNDER THE FREEDOM OF INFORMATION ACT OF 1967; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE FREEDOM OF INFORMATION ACT
OF 1967; AND TO DECLARE AN EMERGENCY.

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

SECTION 1. DO NOT CODIFY. LEGISLATIVE INTENT.

It is the intent of the General Assembly to adopt and codify the



holding in "George v. Ark. Dep't of Human Services," 88 Ark. App. 135 (2004), in which the Arkansas Court of Appeals held that a court may not assess an award of attorney's fees against a state official or state employee in his or her individual capacity in a lawsuit under the Freedom of Information Act of 1967.

SECTION 2. Arkansas Code § 12-8-108(c), concerning information related to the security of the Governor's Mansion and mansion grounds that is not subject to disclosure under the Freedom of Information Act of 1967, is amended to read as follows:

(c) Data, records, communications, surveillance footage, security procedures, emergency plans, and other information compiled or possessed by the division concerning the ~~Governor's Mansion and mansion grounds~~ duties performed by the division as required under subsection (a) of this section are confidential and not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.

SECTION 3. Arkansas Code § 12-8-108, concerning the security of the Governor, Governor's Mansion, and State Capitol building and grounds provided by the Division of Arkansas State Police, is amended to add an additional subsection to read as follows:

(d)(1) Except as provided under subdivision (d)(2) of this section, the division shall submit to the Legislative Council, or to the Joint Budget Committee if the General Assembly is in session, a report on a quarterly basis that identifies by month and budget category the expenses incurred by the Executive Protection Detail for services provided to the Governor.

(2) However, the division shall not include information in the quarterly report required under subdivision (d)(1) of this section if it violates subsection (a) of this section.

SECTION 4. Arkansas Code § 25-19-105(b), concerning specific exemptions to the requirements under the Freedom of Information Act of 1967, is amended to add additional subdivisions to read as follows:

(28) Records that reflect the planning or provision of security services provided to the:

(A) Governor; or

(B) Lieutenant Governor, Attorney General, Secretary of State, Auditor of State, Treasurer of State, Commissioner of State Lands, members of the General Assembly, Justices of the Supreme Court, or Judges of the Court of Appeals;

(29) Records reflecting communications between the Governor or his or her staff and the secretary of a cabinet-level department;

(30) Records prepared by an attorney representing an elected or appointed state officer, a state employee, or a state agency, board, or commission for use in litigation that is:

(A) Pending; or

(B)(i) Anticipated in light of a plausible threat of litigation that has been documented in writing.

(ii) A custodian of records denying a request under this chapter based on subdivision (b)(30)(B)(i) of this section shall provide the requestor the written documentation of the plausible threat of litigation upon which the denial is based.

(iii) Failure to provide the written documentation of the plausible threat of litigation under subdivision (b)(30)(B)(ii) of this section subjects the custodian to the criminal penalties under § 25-19-104 and the assessment of attorney's fees and other litigation expenses under § 25-19-107; and

(31) Records created or received by an elected or appointed state officer, a state employee, or a state agency, board, or commission that would be privileged under Rule 502(b) of the Arkansas Rules of Evidence, as that rule existed on September 1, 2023.

SECTION 5. Arkansas Code § 25-19-107(d) and (e), concerning the conditions under which attorney's fees shall be awarded as a result of an appeal from a denial of rights under the Freedom of Information Act of 1967, are amended to read as follows:

(d)(1) In any action to enforce the rights granted by this chapter, or in any appeal therefrom, ~~the a court shall~~ may assess against ~~the a~~ defendant reasonable attorney's fees and other litigation expenses reasonably incurred by a plaintiff ~~who, after filing suit, has obtained from the defendant a significant or material portion of the public information he or she requested, unless the court finds that the position of the defendant was~~

~~substantially justified only if the court finds that the:~~

(A) Plaintiff substantially prevailed; and

(B) Position of the defendant was arbitrary or in bad

faith.

(2) If ~~the~~ a defendant ~~has~~ substantially ~~prevailed~~ prevails in ~~the~~ an action, ~~the~~ a court may assess expenses against ~~the~~ a plaintiff only upon a finding that the action was initiated primarily for frivolous or dilatory purposes.

(e)(1) Notwithstanding ~~subsection~~ subdivision (d)(1) of this section, ~~the~~ a court shall not assess reasonable attorney’s fees or other litigation expenses reasonably incurred by a plaintiff against ~~the~~ :

(A) The State of Arkansas or a department, agency, or institution of the state; or

(B) An elected or appointed state officer or a state employee acting within the scope of his or her employment.

(2)(A) A plaintiff ~~who substantially prevailed~~ in an action under this section against ~~the State of Arkansas or a department, agency, or institution of the state~~ a defendant under subdivision (e)(1) of this section may file a claim with the Arkansas State Claims Commission to recover reasonable attorney’s fees and other litigation expenses reasonably incurred only if a court made the findings under subdivision (d)(1) of this section.

(B) A claim for reasonable attorney’s fees and litigation expenses reasonably incurred in an action against the State of Arkansas or a department, agency, or institution of the state shall be filed with the commission pursuant to § 19-10-201 et seq. within sixty (60) days of the final disposition of the appeal under subsection (a) of this section.

SECTION 6. RETROACTIVITY.

(a) Section 2 of this act is retroactive to June 1, 2022.

(b) Arkansas Code § 25-19-105(b)(28)(A), created in Section 4 of this act, is retroactive to June 1, 2022.

SECTION 7. DO NOT CODIFY.

This act does not limit the ability of Arkansas Legislative Audit to report information it obtains to the General Assembly.

SECTION 8. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that the safety and security of the Governor and other state constitutional officers is of paramount importance to the peace, health, and safety of individuals in the State of Arkansas; that recent threats to certain state constitutional officers and their families illustrate the need for enhanced protection of records pertaining to the security of certain state constitutional officers and their families in order to protect the public peace, health, and safety; that in order to ensure the continuity of state operations and preserve the secure nature of services provided to the Governor and other state constitutional officers, certain records pertaining to the safety and security of the Governor and other state constitutional officers must be confidential; that this act is immediately necessary because making public certain records concerning the safety and security of the Governor and other state constitutional officers would place the lives and security of the Governor and other state constitutional officers at a greater risk, thereby risking the peace, health, and safety afforded to Arkansans; that the public peace, health, and safety of the State of Arkansas is adversely impacted by inhibiting effective communications between the Governor and his or her staff and the secretaries of cabinet-level departments regarding the formulation of policies and the making of decisions critical to the operation of the state; and that this act is immediately necessary to enable state government officials to effectively communicate in order to make decisions that serve the best interests of the State of Arkansas in an efficient and secure manner. 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.