

1 **State of Arkansas**  
2 **79th General Assembly**  
3 **Regular Session, 1993**  
4 **By: Representative Argue**

# A Bill

**HOUSE BILL 1357**

## For An Act To Be Entitled

8 "AN ACT TO AMEND ARKANSAS CODE ANNOTATED § 25-19-105 TO  
9 AUTHORIZE A TEMPORARY DELAY IN PUBLIC DISCLOSURE OF FILES  
10 OF WORKING ATTORNEYS UNDER THE FREEDOM OF INFORMATION ACT;  
11 AND TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES."

## Subtitle

14 "TO AUTHORIZE A TEMPORARY DELAY IN PUBLIC DISCLOSURE OF  
15 FILES OF WORKING ATTORNEYS UNDER THE FREEDOM OF  
16 INFORMATION ACT."

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

20 SECTION 1. Arkansas Code § 25-19-105 is hereby amended to read as  
21 follows:

22 "25-19-105. Examination and copying of public records.

23 (a) Except as otherwise specifically provided by this section or by  
24 laws specifically enacted to provide otherwise, all public records shall be  
25 open to inspection and copying by any citizen of the State of Arkansas during  
26 the regular business hours of the custodian of the records.

27 (b) It is the specific intent of this section that the following shall  
28 not be deemed to be made open to the public under the provisions of this  
29 chapter:

- 30 (1) State income tax records;
- 31 (2) Medical records, scholastic records, and adoption records;
- 32 (3) The site files and records maintained by the Arkansas  
33 Historic Preservation Program and the Arkansas Archeological Survey;
- 34 (4) Grand jury minutes;
- 35 (5) Unpublished drafts of judicial or quasi-judicial opinions and

1 decisions;

2           (6) Undisclosed investigations by law enforcement agencies of  
3 suspected criminal activity;

4           (7) Unpublished memoranda, working papers, and correspondence of  
5 the Governor, members of the General Assembly, Supreme Court Justices, and the  
6 Attorney General;

7           (8) Documents which are protected from disclosure by order or  
8 rule of court;

9           (9) (A) Files which, if disclosed, would give advantage to  
10 competitors or bidders; and

11                   (B) Records maintained by the Arkansas Industrial  
12 Development Commission related to any business entity's planning, site  
13 location, expansion, operations, or product development/marketing, unless  
14 approval for release of such records is granted by the business entity;  
15 provided, however, this exemption shall not be applicable to any records of  
16 expenditures or grants made or administered by the Arkansas Industrial  
17 Development Commission and otherwise disclosable under the provisions of this  
18 chapter; and

19           (10) Personnel records to the extent that disclosure would  
20 constitute clearly unwarranted invasion of personal privacy.

21           (c) (1) However, all employee evaluation or job performance records,  
22 including preliminary notes and other materials, shall be open to public  
23 inspection only upon final administrative resolution of any suspension or  
24 termination proceeding at which the records form a basis for the decision to  
25 suspend or terminate the employee and if there is a compelling public interest  
26 in their disclosure.

27           (2) Any personnel or evaluation records exempt from disclosure  
28 under this chapter shall nonetheless be made available to the person about  
29 whom the records are maintained or to that person's designated representative.

30           (3) (A) Upon receiving a request for the examination or copying of  
31 personnel or evaluation records, the custodian of the records shall, within  
32 twenty-four (24) hours of the receipt of the request, determine whether the  
33 records are exempt from disclosure and make efforts to the fullest extent  
34 possible to notify the person making the request and the subject of the  
35 records of that decision.

1 (B) If the subject of the records cannot be contacted in  
2 person or by telephone within the twenty-four hour period, the custodian shall  
3 send written notice via overnight mail to the subject of the records at his  
4 last known address. Either the custodian, requester, or the subject of the  
5 records may immediately seek an opinion from the Attorney General who, within  
6 three (3) working days of receipt of the request, shall issue an opinion  
7 stating whether the decision is consistent with this chapter. In the event of  
8 a review by the Attorney General, the custodian shall not disclose the records  
9 until the Attorney General has issued his opinion.

10 (C) However, nothing in this subsection shall be construed  
11 to prevent the requester or the subject of the records from seeking judicial  
12 review of the custodian's decision or the decision of the Attorney General.

13 (d) (1) Notes, memoranda, correspondence, working papers, and other  
14 records prepared or obtained by an attorney in the course of his  
15 representation of any entity subject to the provisions of this chapter shall  
16 be made available for public inspection and copying within three (3) working  
17 days of a request pursuant to subsection (a) unless the entity seeks a  
18 temporary protective order during that period in accordance with this  
19 subsection. Such a protective order shall be granted if:

20 (A) The records were prepared or obtained by the attorney,  
21 or at his express direction, in anticipation of or for use in any legal  
22 proceeding, whether civil, criminal, or administrative, by or against the  
23 entity represented by the attorney;

24 (B) The records reflect the mental impressions,  
25 conclusions, legal theories, litigation strategies, or trial, hearing, or  
26 discovery notes (including statements of witnesses) of the attorney or the  
27 person acting at his direction in preparing or obtaining them; and

28 (C) The legal proceeding for which the records were  
29 prepared or obtained has not been finally concluded or, if not yet pending, is  
30 reasonably anticipated.

31 (2) If the legal proceeding for which the records were prepared  
32 or obtained is pending in a circuit, chancery, or probate court of the State  
33 of Arkansas, the Arkansas Court of Appeals, or the Arkansas Supreme Court, the  
34 entity shall file a motion for protective order in the court in which the  
35 proceeding is pending. The person seeking access to the records pursuant to

1 subsection (a) shall be permitted to intervene, if he is not a party, for the  
2 limited purpose of opposing the protective order. If the legal proceeding is  
3 pending in any other court, an administrative agency, or any other body in  
4 this state or in another jurisdiction, or if the legal proceeding is  
5 anticipated but not yet pending, the entity shall file an independent action  
6 for a protective order in the circuit court of the judicial district in which  
7 it maintains its principal office. The person seeking access to the records  
8 pursuant to subsection (a) shall be named a defendant in such an independent  
9 action.

10           (3) In considering a request for a protective order, the court  
11 shall examine in camera all records claimed to meet the requirements of  
12 (d)(1). The entity seeking a protective order shall file all such records  
13 under seal with the court, which shall decide the matter within seven (7)  
14 working days of the date on which the motion or independent action was filed.  
15 If the court determines that all or some of the records meet the requirements  
16 of subsection (d)(1), it shall enter a protective order directing that public  
17 disclosure of all or some of the records be delayed until the pending or  
18 anticipated legal proceeding for which the records have been prepared or  
19 obtained has been finally concluded. If the court determines that none of the  
20 records meet the requirements of subsection (d)(1), it shall enter an order to  
21 that effect. An order entered pursuant to this subsection shall be deemed  
22 final for purposes of appellate review.

23           (4) If the request for a protective order is denied in whole or  
24 in part, all records not shielded by the court must be disclosed within three  
25 (3) working days of entry of the court\_s order unless the entity during that  
26 period seeks a stay of the order pending appeal. The records shall be  
27 disclosed within twenty-four (24) hours of an order denying or dissolving a  
28 stay, or within twenty-four (24) hours of the issuance of the mandate by the  
29 appellate court, unless issuance of the mandate is stayed to permit further  
30 appellate review.

31           (5) In any action in which a protective order is sought under  
32 this paragraph *and the person requesting access to the records substantially*  
33 *prevails*, the court *shall assess against the entity seeking the protective*  
34 *order reasonable attorney fees and other litigation expenses reasonably*  
35 *incurred by the person requesting access, unless the court finds that the*

1 position of the entity was substantially justified or that other circumstances  
2 make an award of these expenses unjust. However, no expenses shall be  
3 assessed against the State of Arkansas or any of its agencies or departments.  
4 If the entity seeking a protective order substantially prevails, the court  
5 may assess expenses against the person requesting the records only upon a  
6 finding that the person knew that the request was made in bad faith or  
7 primarily for frivolous purposes.

8 (e) Reasonable access to public records and reasonable comforts and  
9 facilities for the full exercise of the right to inspect and copy those  
10 records shall not be denied to any citizen.

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

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17 SECTION 2. All provisions of this act of a general and permanent nature  
18 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code  
19 Revision Commission shall incorporate the same in the Code.

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21 SECTION 3. If any provision of this act or the application thereof to  
22 any person or circumstance is held invalid, such invalidity shall not affect  
23 other provisions or applications of the act which can be given effect without  
24 the invalid provision or application, and to this end the provisions of this  
25 act are declared to be severable.

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27 SECTION 4. All laws and parts of laws in conflict with this act are  
28 hereby repealed.

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30 SECTION 5. EMERGENCY. It is hereby found and determined by the  
31 Seventy-Ninth General Assembly that as a result of recent decisions by the  
32 Arkansas Supreme Court, opposing counsel in adversarial proceedings involving  
33 state agencies, counties, local governments, and other entities subject to the  
34 Freedom of Information Act can use the act to obtain litigation files and  
35 similar records of lawyers representing those entities; that disclosure of

1 this information could easily prove an unfair advantage to opposing counsel  
2 and his client and, in the process, jeopardize the rights and financial well-  
3 being of the citizens of Arkansas; that because the Freedom of Information Act  
4 operates independently of the Arkansas Rules of Civil Procedure and other  
5 rules governing the conduct of litigation and adversarial proceedings, those  
6 attorneys who represent entities to which the act applies are unable to  
7 prevent or delay disclosure of this information by using the normal avenues  
8 provided by those rules; that the immediate effectiveness of this act will be  
9 more fair and will provide a uniform approach to the disposition of matters  
10 involving entities subject to the Freedom of Information Act. Therefore, an  
11 emergency is hereby declared to exist and this act being necessary for the  
12 preservation of the public peace, health and safety shall be in full force and  
13 effect from and after its passage and approval.

14 */s/Rep. Argue*

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