

1 State of Arkansas
2 91st General Assembly
3 Regular Session, 2017
4

As Engrossed: H3/16/17

A Bill

HOUSE BILL 1622

5 By: Representatives Johnson, Lowery, Brown
6 By: Senator J. English
7

For An Act To Be Entitled

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

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18 TO CREATE A PROCEDURE FOR ADDRESSING
19 BURDENSOME REQUESTS FOR DISCLOSURE; TO
20 AMEND THE FREEDOM OF INFORMATION ACT OF
21 1967; TO CREATE AN AFFIRMATIVE DEFENSE;
22 AND TO DECLARE AN EMERGENCY.
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25 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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27 SECTION 1. DO NOT CODIFY. Legislative intent.

28 (a) The General Assembly finds that:

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 (i) Delay;

24 (ii) Cause for the delay; and

25 (iii) Expected date of compliance with the request.

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

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

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

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

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

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

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

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

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

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

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

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

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

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27 SECTION 3. DO NOT CODIFY. Applicability.

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

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

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

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

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

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

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14 /s/Johnson
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