PROTECTING STATE SUNSHINE LAWS FROM ANTI-MADISONIAN EXECUTIVE-LEGISLATIVE ALLIANCES

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INTRODUCTION

James Madison famously authored Federalist Paper Number 10, which argued that factions in government would prevent tyranny of any one group. That is not, and has not always been, the case.

Madison wrote:

> By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community . . . .
>
> It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.
>
> The inference to which we are brought is, that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*.
>
> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed . . . .
>
> A republic, by which I mean a government in which the scheme of representation takes place, opens a different

> prospect, and promises the cure for which we are seeking . . . .
>
> The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State. [1]

Madison did not contemplate that when the legislature and executive — particularly within a state, rather than across a nation — align their institutional interests and personal interests of their members, against those of the people his formula for producing good outcomes crumbles. Two examples of this phenomenon can be seen in my home state of Arkansas, where I am actively involved in the enforcement of transparency law, and in New Jersey, which recently gutted its state Freedom of Information Act (FOIA).

This phenomenon is not confined to just one political party. While Arkansas' and New Jersey's legislatures and governorships are controlled by opposing political parties — Arkansas strongly red and New Jersey strongly blue — such decidedly partisan compositions have resulted in attempts to erase transparency laws, reducing oversight on governmental affairs by the press and public.[2] In New Jersey, the Democratic legislature and governor were successful in greatly cabining their law,[3] which they found inconvenient. That has yet to occur in Arkansas, but not for lack of

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[1] THE FEDERALIST NO. 10 (James Madison).

[2] Max Webber, *Essays in Sociology* 233 (H. Gerth & C. Mills eds. 1946), quoted in B. LADD, CRISIS IN CREDIBILITY 216-17 (1968) ("[E]very bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions": in so far as it can it hides its knowledge and action from criticism . . . .The tendency toward secrecy in certain administrative fields follows their material nature: everywhere that the power interests of the domination structure toward the outside are at stake . . . we find secrecy.") (citing and quoting Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 885 (1990)).

[3] Nikita Biryukov, *Despite Outcry, Senate Lawmakers Advance Bill Overhauling New Jersey's Public Records Law*, N.J. MONITOR (May 9, 2024), https://newjerseymonitor.com/2024/05/09/despite-outcry-senate-lawmakers-advance-bill-overhauling-new-jerseys-public-records-law/.

trying — two processes have curtailed Republican efforts to neuter the state's FOIA so far. First, the afore-described practice of the legislature creating advisory bodies to evaluate substantial changes to the FOIA is reflected in the permanent FOIA task force created by the legislature in 2017.[4] The second guardrail is a very active populist-conservative electorate unwilling to allow their own Republican representatives to weaken a law that Arkansans of both parties consider the state's legislative crown jewel.[5] In 2023, Arkansas legislators avoided the FOIA-taskforce with multiple attempts to hobble the state's FOIA, but the legislature was still unable to get passed a groundswell of bipartisan-public opposition efforts, like those that were successful in New Jersey. The result was the defeat of the New Jersey-like proposals and the genesis of a more vigorous effort by citizens to protect transparency in Arkansas by placing protections directly in the state constitution.

This Article examines these recent developments in transparency laws with the hopes of offering solutions to preclude a repeat of what occurred in New Jersey and what, so far, has been narrowly avoided in Arkansas. Accordingly, I discuss in this article: 1) the origins of state and federal FOIAs, 2) the significant weakening of the New Jersey FOIA, 3) the legislative creation of various *ad hoc* FOIA task forces in Arkansas, 4) the legislative creation of a permanent FOIA task force in Arkansas, 5) the attempt to weaken the Arkansas FOIA in 2023 and sideline the permanent FOIA task force, and 6) the grassroots efforts to create a constitutional amendment and initiated act in Arkansas to:

a. embed core-transparency notions in the state constitution,
b. require a supermajority to amend transparency laws,
c. modify the current transparency landscape to restore a base level of openness, and
d. address some persistent deficiencies in the state's FOIA as of today.

I. THE FEDERAL FOIA

The federal FOIA, established in 1966, is grounded in the principle of full agency disclosure and aimed at guaranteeing public access to government information critical for open government.[6] The intent of the federal

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[4] *FOIA Task Force,* THE ARK. TRANSPARENCY IN GOV'T GRP., https://arktigg.com/foia_task_force.html (last visited Dec. 15, 2024).

[5] *Attack on the People's Law*, CONDUIT FOR ACTION, (Aug. 2, 2023) https://conduitnews.com/2023/08/02/attack-on-the-peoples-law/.

[6] 5 U.S.C. § 552; *see also* BENJAMIN BARCZEWKI, CONG. RSCH. SERV., R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW (2024); Epstein v. Resor, 421 F.2d 930, 932 (9th Cir. 1970) ("legislative purpose to make it easier for private citizens to secure government information"); H.R. Rep. No. 1497, 89th Cong., 2d Sess., at 2 (1996) (The FOIA was enacted to, in

act is to foster a transparent government, enable citizens to monitor governance, mitigate corruption, and ensure the disclosure of documents — thereby promoting accountability by allowing the public to participate in democracy.[7] The commitment to openness is underscored by various legislative and judicial references, which collectively emphasize the law's foundational role in piercing the veil of administrative secrecy and exposing agency actions to public scrutiny.[8] While the federal act's overall structure is designed to pursue disclosure, it also incorporates specific exemptions to safeguard privacy, confidentiality, and other competing interests.[9] These exemptions, outlined in 5 U.S.C. §552(b)(1)-(9), are intended to "balance" the need for openness with the protection of sensitive information,[10] albeit the right equipoise is in the eye of the beholder — or requester, in the case of the FOIA.[11]

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part, to "weed of improper secrecy had been permitted to blossom was choking out the basic right to know") (citing Sinito v. United States DOJ, 176 F.3d 512-517, 514 (1999)).

[7] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 49 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.") (citing Freedom of Info. Act Source Book, Subcomm. on Admin. Practice & Proc, Senate Judiciary Comm, S. Doc. No. 93-82, 44 (1974); Sinito v. United States DOJ, 127 F.3d 512, 514 (1999) (quoting same language); John Doe Agency v. John Doe Corp., 493 U.S. 146, 152, (1989) (quoting same language).

[8] Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) ("Congress enacted FOIA in order 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'") (quoting Rose v. Dep't of Air Force, 495 F.2d 261, 263 (2d Cir. 1974)); *see also* Evans v. Fed. Bureau of Prisons, 951 F.3d 578, 584 (2020) (quoting same language); Margaret B. Kwoka, *FOIA, Inc.,* 65 DUKE L.J. 1361, 1373 (2016) ("FOIA was designed to simply open the doors of government agencies and allow the public a front seat view of what is inside.").

[9] DOD v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994) ("The 'core purpose of the FOIA' which is 'contributing significantly to public understanding of the operations or activities of the government.'") (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989)) (each citing and quoting DANIEL SHEFFNER, Cong. Rsch. Serv., R46238, THE FREEDOM OF INFORMATION ACT (2020)).

[10] 5 U.S.C. §552(b)(1)-(9); DANIEL SHEFFNER, Cong. Rsch. Serv., R46238, THE FREEDOM OF INFORMATION ACT (2020); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978) ("the Act is broadly conceived") (quoting EPA v. Mink, 410 U.S. 73, 80 (1973); NLRB v. Robbins Tire & Rubber Co., *supra* note 7, at 220 ("[FOIA's] 'basic policy' is in favor of disclosure") (quoting Dep't of Air Force v. Rose, *supra* note 8 at 361); *see also* Baldrige v. Shapiro, 455 U.S. 345 (1982); FBI v. Abramson, 456 U.S. 615, 621 (1982); Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 884 (D.C. Cir. 1992); CIA v. Sims, 471 U.S. 159, 166 (1985) ("The mandate of the FOIA calls for broad disclosure of Government records.").

[11] 5 U.S.C. § 552(b)(1)-(9); FBI v. Abramson, 456 U.S. 615, 621 (1982) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) ("The Senate Committee

While the federal FOIA is intended to be a tool of the people, allowing checks and balances essential to a functional democracy and preventing the government from operating in the shadows,[12] in reality, the act often falls far short of these goals by secreting information more properly in the hands of the people.[13]

II. NEW JERSEY'S TRANSPARENCY LAW

The New Jersey Open Records Act (OPRA) includes a legislative finding in its introduction declaring it to be the public policy of the state that government records should be readily accessible by the public and construed with broad application.[14] The OPRA emphasizes that any

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described the legislative balancing process: 'It is not an easy task to balance the opposing interests, but it is not an impossible one either . . . Success Lies in providing a workable formula which encompasses balances, and protects all interests, yet places emphasis on the fullest possible disclosure'"); *see also* FLRA v. U.S. Dep't of Veterans Affairs, 958 F.2d 503, 508 (2d Cir. 1992) ("the statute . . . was intended to establish a general philosophy of fully agency disclosure") (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 360-61 (1976); Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 549 F. Supp. 3d 76, 81 (D.D.C. 2021) (quoting Dep't of Air Force v. Rose, 425 U.S. at 361 (1976) ("The statute's nine enumerated exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective."); Pub. Citizen, Inc. v. OMB, 598 F.3d 865, 869 (D.C. Cir. 2009) ("Courts narrowly construe FOIA's exemptions 'in keeping with FOIA's presumption in favor of disclosure.'").

[12] Hunton & Williams v. United States DOJ, 590 F.3d 272, 276 (4th Cir. 2010) ("The Act discourages agencies from keeping in the dark actions that might not withstand the light of day. For that reason, 'disclosure, not secrecy, is the dominant purpose of the Act.'") (quoting DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 15 (2001)); *see also* Spencer Willems, *Tape Don't Lie*, 67 DRAKE L. REV. 797, 827 (2019) ("Arkansas FOI law is a vital part of public life in Arkansas and one that is baked into the culture and commands a sense of pride and devotion.").

[13] Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2210 (2018) ("FOIA essentially requires a collateral proceeding, in which members of the public may have to file an administrative appeal or even a lawsuit to enforce their rights to access records. They may not have the resources to pursue an additional dispute with the agency and thus may never obtain full access."); *see also* Benjamin W. Cramer, *Old Love for New Snoops: How Exemption 3 of the Freedom of Information Act Enables an Irrebuttable Presumption of Surveillance Secrecy*, 23 COMM. L. & POL'Y 91, 92-95 (2018) ("Exemption 3 is often used by agencies that are involved in traditional national security practices and the controversial modern techniques of pervasive electronic surveillance, as a justification for keeping information on those practices secret . . . the various [FOIA] exemptions were possibly written by Congress to allow flexibility, but the language is often vague enough to enable overinterpretation by secretive federal agencies, allowing them withhold documents for specious reasons."). For discussion of the weaknesses of the federal FOIA, pages 18-21 and surrounding texts.

[14] N.J. STAT. ANN. § 47:1A-1 (2024).

restrictions on access should favor the public's right to know,[15] and all government records are subject to public access unless specifically exempted by the statute itself.[16] Balancing the OPRA's protection of the people's right to know about government activity is the statute's mandate that government agencies must protect citizens' personal information when its disclosure would violate their reasonable expectations of privacy.[17]

One pertinent aspect of the OPRA is that custodians have seven days to respond to requests,[18] either denying or granting, and if a request is denied, citizens can appeal through the courts or file a complaint with the Government Records Council (GRC).[19] The job of the GRC is to receive, hear, review, and adjudicate the complaint to make a determination whether the requestor must be given access to the record.[20] Additionally, custodians who knowingly and willfully deny access face civil penalties implemented by the court, starting at $1,000 and increasing for subsequent violations.[21]

The OPRA was recently weakened through a major reconstruction offered through Senate bill 2930 , which was met with bipartisan — but ultimately unsuccessful — opposition from transparency advocates, journalists, press associations, and the public.[22] For instance, Sarah Fajardo, policy director for the American Civil Liberties Union, described the legislative effort as one "that would severely limit the public's ability to access information — information that belongs to the people and is fundamental to holding government officials accountable."[23] The New Jersey Press Association described the bill as "deeply flawed," and stated that "[m]any records that are now available to the public will be cloaked in secrecy or otherwise made more difficult to obtain if the bill is enacted. And wrongful denials will be impossible for many to challenge."[24] Former

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[15] *Id.*

[16] *Id*.

[17] *Id*.

[18] N.J. STAT. ANN. § 47:1A-5 (2024).

[19] N.J. STAT. ANN. § 47:1A-6 (2024).

[20] N.J. STAT. ANN. § 47:1A-7 (2024).

[21] *Id*.

[22] Katie Sobko, *Gov. Muphy Signs Legislation that Dismantles Access to Public Records in NJ,* NORTH JERSEY.COM, (June 5, 2024), https://www.northjersey.com/story/news/new-jersey/2024/06/05/phil-murphy-signs-nj-opra-reform-bill-public-records-access/73740962007/.

[23] Sarah Fajardo & Joe Johnson, *The Choice Facing NJ Lawmakers: Uphold Democracy, or Dismantle It,* ACLU New Jersey, (March 13, 2024), https://www.aclu-nj.org/en/news/choice-facing-nj-lawmakers-uphold-democracy-or-dismantle-it.

[24] New Jersey Press Association, *Statement Opposing S2930 (Sarlo),* (March 7, 2024), https://newjerseymonitor.com/wp-content/uploads/2024/03/NJPA-OPRA-bill.pdf.

Democratic Senator Loretta Weinberg described the bill to be "a complete gut of OPRA."[25]

Despite public resistance, Democratic Governor Murphy signed Senate bill 2930 into law on June 5, 2024, delivering a severe blow to New Jersey's transparency landscape.[26] The amendments represent a massive overhaul of the OPRA, fundamentally eroding the state's commitment to open government.[27] The sweeping overhaul introduced several key changes that alter how public records are accessed and managed in New Jersey.[28]

Amongst the many changes, one included redefining the definition of public policy, allowing custodians now to withhold potentially personal information merely if its disclosure "might reasonably lead to disclosure of a person's personal information"[29] or "when the public agency has reason to believe that disclosure of such personal information may result in harassment, unwanted solicitation, identity theft, or opportunities for other criminal acts."[30] While this adjustment on first blush might seem minor and benign, in fact, they offer custodians immense discretion — in the name of protecting personal information — of cabining public information. The bill also introduced a new definition for commercial purpose, which gives the state far broader discretion to deny requests based on commercial use.[31] Further changes included an expansion of the deliberative-process exemption, now covering draft materials, notes, and documents used in preparing final reports.[32] Access to security-system activity and access reports is now restricted, unless the requester can specify the date, incident, and limited time period of the request.[33]

The law also allows custodians to deny requests if they are not submitted in the custodian's approved form and prevents anonymous

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[25] Dana Difilippo, *Critics Warn Senator's Bill to Amend State's public Records Law Would Gut Transparency*, NEW JERSEY MONITOR, (March 7, 2024), https://newjerseymonitor.com/2024/03/07/critics-warn-senators-bill-to-amend-states-public-records-law-would-gut-transparency/.

[26] S. 2930 *Gen. Assemb., Reg. Sess.* (N.J. 2024).

[27] Nikita Biryukov & Sophie Nieto-Munoz, *Gov. Murphy Signs Bill Revamping Public Records Law, in Blow to Transparency Advocates*, NEW JERSEY MONITOR, (June 5, 2024), https://newjerseymonitor.com/2024/06/05/gov-murphy-signs-bill-revamping-public-records-law-in-blow-to-transparency-advocates/.

[28] New Jersey Press Association, *supra* note 24; *see also* Tim McNicholas, *N.J. Legislature Passes Overhaul of State's Public Record Laws. Here's What it Means*, CBS NEWS, (May 13, 2024), https://www.cbsnews.com/newyork/news/nj-legislature-on-opra-reform-bill/.

[29] S. 2930, *supra* note 26.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

requestors from initiating lawsuits or appeals to the GRC.[34] Moreover, parties involved in legal proceedings are restricted from requesting records that are already subject to court orders or if the request would be unreasonable, oppressive, or duplicative of discovery requests already made during the legal proceeding — thus eviscerating the FOIA as a discovery tool.[35] Additionally, the Act allows custodians to deny requests for records of emails, texts, or correspondence if the requests does not

> identify specific individuals or accounts to be searched and is not confined to a discrete and limited time period and a specific subject matter, or if the custodian determines that the request would require research and the collection of information from the contents of government records and the creation of new government records setting forth that research and information.[36]

The law further revised the standard for attorney's fees, considering whether the public agency knowingly and willfully violated the OPRA or unreasonably denied access to records,.[37] Lastly, it altered the GRC procedures by setting a ninety-day adjudication period for complaints, extendable by thirty days for good cause.[38]

The extensive amendments to OPRA above represent a dramatic departure from the state's longstanding commitment to transparency and public access to information. By imposing these new exemptions and complicating the process for citizens requests, these changes risk undermining the principles of accountability and openness that are essential to democracy.

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[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.

III. THE ARKANSAS FOIA

Arkansas' FOIA, enacted in 1967, is often aptly referred to as one of the strongest information laws in the United States,[39] going so far as to define its objectives — a practice that not all states have implemented.[40]

The Arkansas FOIA has deep roots in promoting an open government for its citizens. Prior to this FOIA's enactment, Arkansas law surrounding citizens' ability to access government records was scattered,[41] with no overarching law permitting the public to inspect documents held by the government.[42] Similarly, citizens' access to open meetings was limited.[43] For instance, if a citizen wanted to participate in shaping state policy by attending legislative hearings, he could have been prevented from doing so simply because "sessions of each house and of committees of the whole shall be open, unless when the business is such as ought to be kept secret."[44] Exceptions like this one, being broad enough to significantly limit transparency, exemplify the historical black box in which the Arkansas government operated prior to the passage of the FOIA.[45] "Even though such restrictions played a role in the movement toward independence, the

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[39] Ark. Code Ann. § 25-19-105 (2024). *See also* Rick Rojas, *Arkansas Governor Tried to Keep More Records Private. The Pushback Was Swift.,* N.Y. TIMES (Sept. 14, 2023), www.nytimes.com/2023/09/14/us/arkansas-foia-huckabee-sanders.html; Will Langhorne, *Arkansas' Attorney General Announces Creation of FOIA Review Working Group*, ARKANSAS DEMOCRAT GAZETTE (June 15, 2023), www.arkansasonline.com/news/2023/jun/15/ag-panel-to-rethink-information-act; Tom Larimer, *Arkansas Freedom of Information Act,* ENCYCLOPEDIA OF ARKANSAS (July 11, 2024), https://encyclopediaofarkansas.net/entries/arkansas-freedom-of-information-act-4599/; *Arkansas Freedom of Information Act,* ARKANSAS ATT'Y GEN. (last accessed February 24, 2024), https://arkansasag.gov/arkansass-lawyer/opinions-department/arkansas-freedom-of-information-act/; Robert Steinbuch, *Transparency: An Inch from Extinction,* ARKANSAS DEMOCRAT GAZETTE (October 9, 2022), https://www.arkansasonline.com/news/2022/oct/09/transparency-an-inch-from-extinction/ ("The Arkansas Freedom of Information Act is the single best check for the public on government behavior.").

[40] ARK. CODE ANN. § 25-19-102 (2023) ("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."); *see also* Willems, *supra* note 12, at 827 (commenting on the Arkansas purpose section of the Arkansas FOIA statute, states that it is "so citizens are aware of the decisions made by those that govern.").

[41] Robert Steinbuch, *§ 1.02 Historical Development, in* THE ARKANSAS FREEDOM OF INFORMATION ACT (9th ed., 2024) (discussing the historical development of the Arkansas FOIA) (citing John J. Watkins, *Access to Public Records Under the Arkansas Freedom of Information Act*, 37 ARK. L. REV. 741 (1984)).

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

Continental Congress and the Constitutional Convention conducted their proceedings in secret, a practice followed by both the House and Senate for several years under the U.S. Constitution."[46] These types of exceptions were and are the antithesis of transparency.[47]

The impetus for Arkansas adopting its FOIA include:

> a campaign by Arkansas journalists; a study by the Legislative Council comparing state access laws with those of other jurisdictions; controversial closed meetings held by various governmental bodies; unfavorable Attorney General opinions interpreting the 1953 statute; organizational efforts by the Republican Party, including successful litigation to obtain access to voting records; the Arkansas Supreme Court's decision in the *Hall* case; and the election of Governor Winthrop Rockefeller, who later said the FOIA was his proudest achievement as the state's chief executive.[48]

In the years leading up to the signing of the FOIA, Arkansas and the United States were advancing through reforms and new political structures.[49] Ten years prior to the 1967 enactment of the Arkansas FOIA, the federal government forcibly desegregated Little Rock's Central High School — referred to as the Little Rock Nine.[50] In 1964, Arkansas abolished the pole tax in the federal registration system,[51] and in 1967, Winthrop Rockefeller became the first Republican governor since 1874 following twenty-nine Democrat governors.[52] (Remember that Abraham Lincoln, and by extension the North during the Civil War, were Republicans. So, the Arkansas polity was not friendly towards Republicans.) This period also saw the emergence of a new age of information, empowering

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[46] Robert Steinbuch, *§ 1.02 Historical Development, in* THE ARKANSAS FREEDOM OF INFORMATION ACT, *supra* note 42.

[47] *Id*; *see* Josie Lenora & Daniel Breen, *Watered-down FOIA Bill Advanced in Arkansas Legislature*, LITTLE ROCK PUBLIC RADIO (Sept. 14, 2023), https://www.ualrpublicradio.org/local-regional-news/2023-09-14/watered-down-foia-bill-advances-in-arkansas-legislature; *see also* Dale Ellis, *Bill to Overhaul Arkansas Freedom of Information Act Fails in House Committee*, ARKANSAS DEMOCRAT GAZETTE (March 29, 2023), https://www.arkansasonline.com/news/2023/mar/29/bill-to-overhaul-arkansas-freedom-of-information-act-fails-in-house-committee/.

[48] Robert Steinbuch, *§ 1.02 Historical Development, in* THE ARKANSAS FREEDOM OF INFORMATION ACT, *supra* note 42.

[49] LARIMER, *supra* note 40.

[50] Lonnie Butch, *The Little Rock Nine,* NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE, https://nmaahc.si.edu/explore/stories/little-rock-nine (last accessed May 24, 2024).

[51] John W. Graves, *Poll Tax*, ENCYCLOPEDIA OF ARKANSAS (Dec. 21, 2023), https://encyclopediaofarkansas.net/entries/poll-tax-5045/.

[52] https://www.nga.org/former-governors/arkansas/.

the citizens of Arkansas to hold their government accountable and prevent tyranny through increased transparency and access to public records.[53] With this enormous historical background, the Arkansas FOIA was created with this clear legislative intent:

> 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. Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.[54]

A. FOIA Task Forces

During the birth of the federal FOIA, representatives foresaw that public information would be wrongfully withheld from citizens and their representatives in the press. So, they noted that "a central purpose of FOIA was to 'provide a court procedure by which citizens and the press may obtain information wrongfully withheld.'"[55] And eight years later in 1972, Congress enacted the Federal Advisory Committee Act, "prompted by the belief of many citizens and Members of Congress that such committees were duplicative, inefficient, and lacked adequate control or oversight."[56] This led in 2014 to the realization by the National Archives and Records Administration that more was needed to protect transparency. So, the administration created the FOIA Advisory Committee "to foster dialogue between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures."[57] The idea was to have a group of experts advising on improving FOIA operations.

Arkansas undertook a somewhat similar approach to the federal FOIA Advisory Committee in addressing major changes to its FOIA by creating *ad-hoc* task force of experts to assist in revising its transparency law.[58] This action reflected a general consensus that the FOIA was special and

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[53] *Id*; Robert Steinbuch, Opinion, *An FOIA History Lesson*, ARKANSAS DEMOCRAT GAZETTE (July 23, 2023), https://www.arkansasonline.com/news/2023/jul/23/an-foia-history-lesson/.

[54] ARK. CODE ANN. § 25-19-102 (2023).

[55] Kwoka, *supra* note 9, at 1368 (citing S. REP. NO. 88-1219, at 8 (1964)).

[56] Wendy Ginsberg, CONG. RSCH. SURV., R4281, FEDERAL ADVISORY COMMITTEES: AN OVERVIEW (2009).

[57] National Archives - Office of Government Information Services*, Freedom of Information Act (FOIA) Advisory Committee – 2022-2024 Term* (last accessed June 15, 2024), https://www.archives.gov/ogis/foia-advisory-committee/2022-2024-term#:~:text=The%20National%20Archives%20and%20Records,for%20improving%20FOIA%20administration%20and.

[58] Steinbuch, *supra* note 53.

deserved a significantly deliberative process if it was to be altered. In 1999, for instance, the legislature created the Electronic Records Study Commission (ERSC) to evaluate the FOIA concerning electronic records and recommend updates to the Arkansas FOIA accordingly.[59] The legislature tasked the ERSC with studying public access to electronic records and then developing recommendations for amendments to the FOIA.[60] The ERSC played a significant role in advancing proposals for making records online to enhance public access, while engaging in a delicate balance between safeguarding privacy and ensuring transparency in the realm of electronic records.[61] One of the goals of the commission was to "reduce the burden of [those entities] in responding to FOIA requests."[62] In 2000, the ERSC developed ten proposals with a clear focus on transparency and public access.[63] Nine of these recommendations were aimed specifically at expanding public access to government records.[64] The remaining recommendation, however, highlighted a critical point: any future limitation on access should only be implemented to protect individuals' privacy when their personal information is included in government records, not to reduce the public's access to records related to government action.[65] The purpose behind these recommendations was to ensure that future revisions of the FOIA would expand public access rather than diminish it.[66] Another principal developed by the ERSC that still that rings true today is that the "[c]osts of government documents should not be a barrier to access, regardless of whether government records are available from private information providers,"[67] reinforcing the idea that financial constraints should not prevent citizens from accessing records — a core value that continues to support the transparency and accountability of government.

Similarly, Act 1477 of 2009 created another ERSC to study bulk-commercial requests of electronic or computerized records under the FOIA and make recommendations regarding changes to the FOIA.[68] This commission expired on July 1, 2011.[69] And Act 963 of 2019 created the Undercover Law Enforcement Officer Public Records Protection Study to evaluate and make recommendations concerning changes to the FOIA to better protect against the disclosure of personal information of active-

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[59] *Id*.

[60] REPORT OF ELECTRONIC RECORDS STUDY COMM'N 21 (2000).

[61] Robert Steinbuch, *§ 10.04 Privacy and "Practical Obscurity", in* THE ARKANSAS FREEDOM OF INFORMATION ACT, *supra* note 42.

[62] Robert Steinbuch, *§ 6.11 Affirmative Publication Requirement, in* THE ARKANSAS FREEDOM OF INFORMATION ACT, *supra* note 42 (citing REPORT OF ELECTRONIC RECORDS STUDY COMM'N 21 (2000)).

[63] Steinbuch, *supra* note 53.

[64] *Id.*

[65] REPORT OF ELECTRONIC RECORDS STUDY COMM'N 21 (2000) at 11-12.

[66] Steinbuch, *supra* note 61.

[67] REPORT OF ELECTRONIC RECORDS STUDY COMM'N 21 (2000) at 11.

[68] Act 1477, 87th Gen. Assemb., Reg. Sess. (Ark. 2009).

[69] *Id*.

undercover law-enforcement officers.[70] The group charged with conducting this study and making the related recommendations expired on May 1, 2020.[71]

The Arkansas FOIA evolved through various legislative amendments, many through the commissions discussed above, and judicial interpretations since its enactment in 1967.[72] In 2017, in response to an onslaught of *ad hoc* proposed changes to the FOIA, the Arkansas legislature created a permanent FOIA Taskforce for the "purpose of reviewing, evaluating, and approving proposed amendments" to the state's FOIA.[73] The task force is commanded with evaluating proposed exemptions to the FOIA and report any recommendations to the legislator.[74] I serve on the task force. Unfortunately, the task force's usefulness to some in the legislature that created it has proved relatively short lived. In 2023, the FOIA faced significant legislative assault, resulting in popular concerns about the erosion of the public's access to information.[75]

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[70] Act 963, 92d Gen. Assemb., Reg. Sess. (Ark. 2019).

[71] *Id*.

[72] Robert Steinbuch, *FOIA: Friend or Foe?,* ARK. DEMOCRAT GAZETTE (Nov. 24, 2023, 2:50 AM), https://www.arkansasonline.com/news/2023/nov/24/robert-steinbuch-foia-friend-or-foe/; *see also* Beryl Lipton, *Here's Why Arkansas' New Anti-Transparency Law Should Piss You Off*, DAILY BEAST (Sept. 15, 2023, 3:35 AM), https://www.thedailybeast.com/arkansas-new-anti-transparency-law-should-piss-you-off; Rick Rojas, *Arkansas Governor Tried to Keep More Records Private: The Pushback Was Swift*, N.Y. TIMES (Sept. 14, 2023) https://www.nytimes.com/2023/09/14/us/arkansas-foia-huckabee-sanders.html.

[73] ARK. CODE ANN. § 25-19-111(1); *see also* Robert Steinbuch, *Arkansas citizens deserve transparency,* ARK. DEMOCRAT GAZETTE (Oct. 1, 2023, 1:51 AM) ("Those pushing to reduce public oversight, in contrast, introduced new FOIA-exemptions legislation without first vetting it with the public, the legislatively created FOIA Taskforce, or transparency advocates."), https://www.arkansasonline.com/news/2023/oct/01/arkansas-citizens-deserve-transparency/.

[74] ARK. CODE ANN. § 25-19-111(2)(A)-(B).

[75] Neal Earley & Michael R. Wickline, *Sanders scales back plans to amend state's Freedom of Information Act to records about security detail*, ARK. DEMOCRAT GAZETTE, (Sept. 13, 2023, 7:26 AM), https://www.arkansasonline.com/news/2023/sep/13/sanders-scales-back-plans-to-amend-states-freedom; *see also* Mary Hennigan, *WTF is going on with FOIA? Here's a rundown of what could change,* ARK. TIMES, (Sept. 8, 2023, 3:57 PM), https://www.arktimes.com/news/2023/09/08/wtf-is-going-on-with-foia-heres-a-rundown-of-what-could-change; Neal Earley, *Ray's bill would amend Freedom of Information Act to exempt broad classes of government documents,* ARK. DEMOCRAT GAZETTE, (March 28, 2023), https://www.arkansasonline.com/news/2023/mar/28/rays-bill-would-amend-freedom-of-information-act; Bill Bowden, *FOIA Task Force opposes bills to weaken the Arkansas law*, ARK. DEMOCRAT GAZETTE, (Mar., 29 2023, 5:06 AM), https://www.arkansasonline.com/news/2023/mar/29/foi-task-force-opposes-bills-to-weaken-the; Bill Bowden, *Arkansas House bill would define 'meeting' as quorum in FOI law*,

B. 2023 Legislative Attack

In 2023, the general consensus within the legislature on maintaining a vibrant FOIA collapsed. The primary changes were proposed by Republican Representative David Ray, who introduced House Bill 1726 during the regular session. That bill died in committee. Thereafter, Ray proposed House Bill 1003 during the subsequent special session, designed to resurrect his failed effort to hobble the FOIA.[76] Before HB1726 died in the House Committee on May 1, 2023,[77] FOIA advocates and citizens expressed significant concerns that the bill was pushed quickly, proposing numerous exceptions to the FOIA, without it first being vetted by the public, the aforedescribed legislatively created FOIA task force, and transparency advocates.[78] As previously noted, "legislators . . . [were] challenged to learn the intricacies of a complex area of law in three days."[79] This was widely covered by the media, transparency advocates, and others in real-time, and the attention it garnered went beyond the borders of Arkansas.[80] HB1003 followed a more tortured path during the special session called by the governor only a few months later.[81] Ultimately, virtually all its provisions also failed to pass.

ARK. DEMOCRAT GAZETTE, (March, 14 2023, 5:20 AM), https://www.arkansasonline.com/news/2023/mar/14/arkansas-house-bill-would-define-meeting-as; Neal Earley, *Proposed ballot language for act to strengthen FOI rejected again by attorney general*, ARK. DEMOCRAT GAZETTE, (Jan. 9, 2024, 4:57 PM), https://www.arkansasonline.com/news/2024/jan/09/proposed-ballot-language-for-act-to-strengthen.

[76] H.B. 1726, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (failed); *see also* H.B. 1003, 94th Gen. Assemb., First Extraordinary Sess. (Ark. 2023) (withdrawn).

[77] H.B. 1726, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (failed).

[78] Robert Steinbuch, *Arkansas citizens deserve transparency*, ARK. DEMOCRAT GAZETTE (October 1, 2023, 1:51 AM) ("Time and again, FOIA foes misleadingly maligned our envied transparency regime as old, inefficient, and misused without ever examining government's frequent efforts to evade the existing law, no less a further enfeebled one."), https://www.arkansasonline.com/news/2023/oct/01/arkansas-citizens-deserve-transparency/.

[79] *Id*.

[80] *Id*.; Rick Rojas, *More Records Private. The Pushback Was Swift*, N.Y. TIMES (Sept 14, 2023), https://www.nytimes.com/2023/09/14/us/arkansas-foia-huckabee-sanders.html.; *see also* Joyce Ajayi, *Arkansas' FOIA is The People's Law, not government officials' law,* ARKANSAS ADVOCATE, (Sept. 11, 2023 7:00AM), https://arkansasadvocate.com/2023/09/11/arkansas-foia-is-the-peoples-law-not-government-officials-law/.

[81] The Arkansas legislature meets for general lawmaking only about three months every other year. *See* Ark. Const. Art. 5, § 5. The governor, however, may call a special session for any reason at any time and charge the legislature to address an issue or issues. *See* Ark. Const. Art. 6, §19. Of course, the legislature need not produce any legislation in response, although governors typically only call a special session if they believe they have the support to pass the legislation they seek. Their predictions don't always prove accurate.

Both bills aimed to amend the Arkansas FOIA with a broad brush in a move strongly arcing towards less transparent government for the citizens of Arkansas.[82] Both proposals included provisions for limiting who could be subject to FOIA, a deliberative-process exemption, and redefined exemptions from public disclosure for ongoing law-enforcement investigations and communications between public servants and their government attorneys.[83] The bills also set out detailed conditions and fees for public-records requests, limited open-public meetings, and reduced conditions for executive sessions.[84] One critic pointed to a real-world example in Huntsville, Arkansas to highlight the proposals' potential negative implications. In early 2021, the Madison County Record, using the FOIA, exposed a sexual-abuse case in a school-locker room that the school board had tried to cover up.[85] Victims' parents were only able to discover the truth thanks to FOIA, demonstrating the act's importance in ensuring

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[82] *An Act To Amend The Law Concerning The Freedom Of Information Act Of 1967; To Amend The Law Concerning Definitions Used In The Freedom Of Information Act Of 1967; To Add Public Records Exemptions; To Amend Public Meetings Requirements; To Amend Requirements Related To Custodians Processing Public Records Requests; And For Other Purposes: Hearing on H.B. 1726 Before the H. Comm. on State Agencies and Governmental Affs.*, 94th Gen. Assemb., 2023 Reg. Sess. (2023); *see also* Neal Earley, *Ray's bill would amend Freedom of Information Act to exempt broad classes of government documents*, ARK. DEMOCRAT GAZETTE (March. 28, 2023, 5:13 AM), https://www.arkansasonline.com/news/2023/mar/28/rays-bill-would-amend-freedom-of-information-act/; Robert Steinbuch, *Be Afraid of the Darkness*, ARK. DEMOCRAT GAZETTE (June 4, 2024, 2:11 AM) (quoting that "Rep. Richard Womack brilliantly captured the situation: 'Literally everybody that testified in favor of this bill stands to potentially benefit from keeping sunshine out.'"), https://www.arkansasonline.com/news/2023/jun/04/be-afraid-of-the-darkness/; Robert Steinbuch, *More FOIA opinions*, ARK. DEMOCRAT GAZETTE, (Nov. 17, 2023, 3:20 AM) (The Attorney General "assert[ed] that because the FOIA already has exemptions, further exemptions don't weaken it. Really? Does [the Attorney General] believe drug laws wouldn't be weakened through recreational pot, even though there's an exemption for medical marijuana?"), https://www.arkansasonline.com/news/2023/nov/17/more-foia-opinions/.

[83] H.B. 1726, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (failed); H.B. 1003, 94th Gen. Assemb., First Extraordinary Sess. (Ark. 2023) (withdrawn).

[84] H.B. 1726, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (failed).

[85] *An Act To Amend The Law Concerning The Freedom Of Information Act Of 1967; To Amend The Law Concerning Definitions Used In The Freedom Of Information Act Of 1967; To Add Public Records Exemptions; To Amend Public Meetings Requirements; To Amend Requirements Related To Custodians Processing Public Records Requests; And For Other Purposes: Hearing on H.B. 1726 Before the H. Comm. on State Agencies and Governmental Affs*., 94th Gen. Assemb., 2023 Reg. Sess. (2023); *see* Nelle *ex rel.* B.N. v. Huntsville Sch. Dist., No. 5:21-CV-05158, 2021 U.S. Dist. LEXIS 247566 (W.D. Ark. Dec. 29, 2021).

accountability and transparency.[86] Another opponent of the suggested-sweeping changes, Dean Travinski, Assistant News Director at KA5K in Fox 16, highlighted the reluctance of states to release information with similar terms as this bill was proposing, stressing that the bill on which he was testifying would impair the media's ability to stay informed. He contrasted the lack of information released in Uvalde, which left families in the dark for three months, against Nashville, where information was released in two days. He shared his personal success from Arkansas, where FOIA was instrumental in exposing a judge's disrespectful behavior towards a deaf, elderly woman.[87]

Furthermore, the proposed attorney-client privilege exemption presented in these bills posed serious concerns for the citizens of Arkansas. An expansion of confidentiality through attorney-client privilege, such as the one proposed, not only cloaks the inner workings of government but also places a significant amount of power in the hands of unelected officials.[88] Bureaucrats would be able to make decisions with an unprecedented level of secrecy.[89] This leap towards secrecy would leave Arkansas

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[86] Dale Ellis, *Bill to overhaul Arkansas Freedom of Information Act Fails in House Committee*, ARK. DEMOCRAT GAZETTE, (March, 29 2023, 10:00 PM), https://www.arkansasonline.com/news/2023/mar/29/bill-to-overhaul-arkansas-freedom-of-information-act-fails-in-house-committee/; *see also* Ron Wood, *Madison County paper argues lawsuit over student sexual abuse in Huntsville should remain open to the public*, NW. ARK. DEMOCRAT GAZETTE (October 28, 2021, 7:40 AM), https://www.nwaonline.com/news/2021/oct/28/madison-county-paper-argues-lawsuit-over-student-n/.

[87] *An Act To Amend The Law Concerning The Freedom Of Information Act Of 1967; To Amend The Law Concerning Definitions Used In The Freedom Of Information Act Of 1967; To Add Public Records Exemptions; To Amend Public Meetings Requirements; To Amend Requirements Related To Custodians Processing Public Records Requests; And For Other Purposes: Hearing on H.B. 1726 Before the H. Comm. on State Agencies and Governmental Affs.*, 94th Gen. Assemb., 2023 Reg. Sess. (2023) (statement of Dean Travinski); *see also* Barry Sullivan, *Executive Secrecy: Congress, the People, and the Courts*, 72 EMORY L.J. 1301, 1348 (2023) ("[I]t is not enough that legislators should have access to executive information. Clearly, our legislators have a special need for information, but that does not mean that the rest of us have none.").

[88] *Cf.* Deborah L. Rhode, *Symposium: The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 669-70 (1994) ("noting that "[i]mbalances in representation, information, and resources" can be "exploited" by partisan practices to "obstruct the search for truth . . . opposing parties may never become privy to the facts that would allow them to successfully challenge the frivolous claims.") (citing & quoting Maura I. Strassberg, *Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid. Frivolous Claims of Attorney-Client Privilege*, 37 SETON HALL L. REV. 416 (2007)).

[89] Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT § 1.03 ("Sunlight is said. to be the best of disinfectants.") (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933)); *see also* Sonny Albarado, *Secrecy added to Arkansas public records law serves only those with Secrets*, ARKANSAS ADVOCATE,

citizens wondering how and why decisions that are affecting their lives are made.[90]

The problems with these proposals were myriad:

1. Confusing FOIA with New Definitions

HB1726 attempted to introduce new definitions for terms such as governmental agency, public appointee, public employee, public official, and public servant within the Arkansas Freedom of Information Act.[91] By redefining these terms, HB1726 sought to narrow the scope of government entities covered by the state's FOIA.

2. Blocking Access to Active Investigations

HB1726 sought to expand the exemption for ongoing-criminal investigations by law enforcement, as well as any evidence or materials likely to be used by law enforcement in criminal prosecutions.[92] While the exemption for "undisclosed or ongoing investigations"[93] by law enforcement was redundant, as it had already been established in law by the Supreme Court over twenty years ago,[94] the second part of the proposed exception exempted "any evidence or materials likely to be used by law enforcement in a criminal prosecution,"[95] effectively exempting records evidencing all

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(Sept. 15, 2023, 4:44 PM) https://arkansasadvocate.com/2023/09/15/secrecy-added-to-arkansas-public-records-law-serves-only-those-with-secrets/.

[90] *See* Maura I. Strassberg, *Privilege Can Be Abused: Exploring the Ethical Obligation to Avoid Frivolous Claims of Attorney-Client Privilege*, 37 SETON HALL L. REV. 413, 414-18 (2007) (Explaining a multitude of cases that reveal instances where organizations or governments conceal information through abusive discovery tactics and ill-founded privilege assertions, often hoarding documents not entitled to privilege.); *see also* Bryan S. Gowdy, *Should the Federal Government Have an Attorney-Client Privilege*, 51 FLA. L. REV. 695, 720 ("The attorney-client privilege just does not fit a government client.").

[91] H.B. 1726, 94th Gen. Assemb., Reg. Sess. § 1 (Ark. 2023) (failed).

[92] *Id.* at § 2.

[93] ARK. CODE ANN. § 25-19-105(b)(6) ("[U]ndisclosed investigations by law enforcement agencies of suspected criminal activity.").

[94] Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT § 3.04 ("[T]he exemption applies to all records of 'ongoing' criminal investigations.") (citing *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990)); *see also* Willems, *supra* note 12, at 828 ("[Arkansas] law's approach to personnel records (which allows disclosure of documentation that resulted in suspensions or terminations) favors transparency and is often used by the media to expose how public entities are managed.") (citing Spencer Willems, *Officer Off Job 6 Times in 5 Years,* ARK. DEMOCRAT GAZETTE (Sept. 4, 2012, 1:11 AM) (noting that a problematic Little Rock officer who would weeks later be charged with manslaughter in the killing of a 15-year-old routinely broke policies and that his mental stability was a concern of supervisors)).

[95] H.B. 1726, 94th Gen. Assemb., Reg. Sess. § 2 (Ark. 2023) (failed).

potential governmental wrongdoing.[96] This seemingly unintentional aspect of the bill was illogical, as it created a loophole enabling government agencies to evade transparency by citing potential prosecution.[97] Exempting any evidence or material potentially used in criminal prosecutions would allow wrongdoers to withhold evidence of their very own wrongdoing.[98] In the case of the police, for instance, if the state police could claim that releasing information under FOIA might implicate themselves in a crime (such as misusing funds), they could simply reject the request, thus further undermining the very basis of the FOIA.[99] Luke Story,

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[96] Frank Canavan, *Whose Line Is It Anyway: Differing Interpretations of the Law Enforcement Exception of the Freedom of Information Act,* 7 NAT'L SEC. L.J. 296, 319 (2021) (explaining the broad application of Exemption 7 as it undermines public trust by allowing law enforcement to withhold details on their procedures thereby fostering a culture of secrecy and potential misuse, eroding accountability); *see also* Willems, *supra* note 12, at 820 ("The Iowa Supreme Court has ruled the disclosure of witness statements, in the context of crash reports, would not impair 'official confidence' because those statements routinely became available. Law enforcement cannot merely hide information because of some theoretical threat to future investigations") (citing Shannon *ex rel.* Shannon v. Hansen, 469 N.W.2d 412, 415 (Iowa 1991)).

[97] Elizabeth Figueroa, *Transparency in Administrative Courts: From the Outside Looking In*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 7 (2015) ("simply making information available is not sufficient transparency"); s*ee also id.* at 8 ("transparency reduces government corruption"); *see also* Willems, *supra* note 12, at 830 ("Police and prosecutors should not be permitted to apply this exemption as a matter of course until conviction or acquittal, or indefinitely until a charge is brought, if there is no genuine interest in enduring secrecy. To do so would excessively insulate the government against legitimate probes by the public and media into the performance of law enforcement functions, even apart from the disadvantage to criminal defendants.") (citing *Dep't of Ark. State Police v. Keech,* 516 S.W.3d 265, 268 (quoting JOHN J. WATKINS, RICHARD PELTZ-STEELE, ROBERT STEINBUCH, THE ARKANSAS FREEDOM OF INFORMATION ACT 148 (6th ed. 2017)); Willems*, supra* note 12, at 822-23 ("Routine reports on the pursuit and the officer's use of force, which typically involve no witness statement or internal detective deliberations, were also exempted. Even more impactful is the finding that dash-camera video, which preceded any actual investigation was an investigative report.").

[98] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs,* 2023 Leg., 94th Gen. Sess. (Ark. 2023) (statement of Robert Steinbuch).

[99] Willems, *supra* note 12, at 830 ("Arkansas State Police resisted turning over an unsolved homicide file to the family of the victim who sought the materials more than 50 years after the crime. The Arkansas high court rejected the state police's arguments that the investigation was still ongoing and thus beyond release under the undisclosed investigation exemption. In a unanimous opinion, the court noted since there was no action on the investigation in nearly 50 years, the family was entitled to the materials in order to evaluate how investigators performed their job, a central tenant of the Arkansas FOI statute."); *see* also Las Vegas Review-Journal, Inc. v. Las Vegas Metro. Police Dep't, 526 P.3d 724, 36-37, 39 (Nev. 2023) (This case explained that it is the public's right to scrutinize

President of the Arkansas Broadcasters Association, similarly expressed concerns over the exemption for "any evidence likely to be used by law enforcement," arguing that its vagueness will lead to widespread corruption.[100]

3. Concealing Government in Attorney-Client Privilege

Both HB1726 and HB1003 proposed to adopt attorney-client privilege exceptions into the state's FOIA. HB 1726 proposed exempting communications between public servants, acting within their official duties or scope of employment, and their government attorneys, as well as between attorneys of different government agencies.[101] The bill's sponsor argued that private citizens have protected legal advice, but government agencies do not enjoy similar confidentiality.[102] Ray's concern was that without such an exception, the state's legal strategies and communications with attorneys are left exposed to the public.[103] Witnesses largely opposed this

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Metro's investigation, particularly regarding whether the Metro handled the investigation property or the potential leniency towards the officer, is paramount. The court highlighted concerns about public safety and the need for officer accountability, emphasizing that the public is not required to unquestioningly accept Metro's claims of lawful conduct as per the NPRA. The court reasoned that the public shouldn't blindly accept Metro's assertions of legality and propriety without access to investigative records.); WP Co. LLC v. District of Columbia, at 16 2023 D.C. Super. LEXIS 14 ("Disclosure would serve the core purpose of FOIA in revealing to the public how the MPD handled a high-profile officer with many instances of misconduct over the years.").

[100] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023) (statement of Luke Story).

[101] ARK. CODE ANN. §25-19-105(b); *see also* H.B. 1726.

[102] *See* 1:19:10/3:33:07 at https://www.youtube.com/watch?v=dDhe5O4lalI; Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT § 5.01 ("It is up to the legislature to fashion additional exemptions to cover the attorney-client privilege or attorney work product . . . the attorney-client privilege and the work-product rule, though neither of those doctrines, standing alone, is an exception to the FOIA . . . a government attorney lives in something of a glass house as far as his or her work product and client communications are concerned."); *see also* Willems, *supra* note 12, at 820 ("[T]he government cannot rely on what harm might occur as a result of disclosure when it seeks to prevent public access to public materials.").

[103] Gowdy, *supra* note 90, at 718-22 ("Using the attorney-client privilege to serve the government's needs for secrecy is like hammering a square peg into a round hole . . . [c]ourts do need to balance the government's need for secrecy with the policy of open government, but developing other privileges, rather than distorting the common law attorney-client privilege, is a more suitable means for balancing these competing policies . . . courts simply accept the assumption, without analysis, that the privilege will encourage 'full and frank discussion' between the government attorney and client . . . [f]irst, the possibility that the privilege encourages public officials to consult with counsel is too speculative. Second, the privilege is an inappropriate means for balancing the competing policies of open

view, fearing that allowing such a privilege for government officials could be catastrophic. One long-time FOIA advocate and litigator criticized the exemptions during his testimony as "large enough to drive a Mack truck through."[104] The fear was that allowing the government to invoke attorney-client privilege would enable government officials to routinely avoid FOIA requests,[105] because, unlike in private settings, government attorneys are regularly enmeshed in government actions and policy decisions — potentially creating a near-universal FOIA shield.

HB1003 also attempted to exempt any records prepared by any attorney who represented state officers, employees, or agencies, either in anticipation of or during litigation. Similar to HB1726, the proposed exemption in HB1003 created the risk that government officials could wholesale circumvent FOIA requirements merely by having their embedded-government attorneys involved.[106]

4. Obscuring Deliberative Process

HB1726 and HB1003 proposed adopting what's known as "the deliberative-process privilege."[107] HB1726 would exempt records of a government agency in which "opinions are expressed, or policies and actions are

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government and government secrecy. Additionally, the legislative history of FOIA and Exemption 5 does not mandate a governmental attorney-client privilege . . . [p]rivileges are indirect conflict with open government . . . [w]hile the government may have legitimate needs for confidentiality and secrecy, the rationale of the attorney-client privilege is not an appropriate method for achieving those needs.").

[104] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023) (statement of Joey McCutchen).

[105] Vaughn v. Rosen, 484 F.2d 820, 824 (U.S. App. D.C. 1973) ("[L]ack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution."); *see also* Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179, 183 (E.D. Cal. 1991) (noting that when documents are withheld as privileged, but specific information is not provided to justify the claim, the opposing party cannot know whether "the documents withheld under a blanket privilege objection were withheld correctly, incorrectly, or maliciously").

[106] H.B. 1726 § 3(30); H.B. 1003 §§ 30-31. One scholar finds that the rationale behind the attorney-client privilege fails when applied to the federal government, arguing that its invocation to conceal evidence is unjustified because the government, unlike a corporation, operates in a realm of public service where the differences necessitate rejecting the privilege. *See* Gowdy, *supra* note 90, at 721 ("Courts do need to balance the government's need for secrecy with the policy of open government, but developing other privileges, rather than distorting the common law attorney-client privilege, is a more suitable means for balancing these competing policies.").

[107] H.B. 1726 § 3(30); H.B. 1003 § 1(a).

formulated."[108] This exemption would cover drafts, notes, recommendations, memoranda, correspondence, and other records related to an agency's policy or action determination created or received by an agency.[109] HB1003 aimed to incorporate the federal deliberative-process exemption into the state's FOIA. As such, the deliberative-process proposal was a variation of HB1726, albeit in a different form.[110]HB1726 proposed an exemption for records revealing the deliberative process of state agencies, boards, or commissions.[111] This encompassed the internal memoranda, documents reflecting advisory opinions, recommendations, letters, and other parts of deliberation that comprise part of the process by which governmental decisions and policies are formulated.[112]

Critics aptly feared an undermining of public trust, hindering of investigative journalism, limiting of public participation in governance, and paving the way for a weakened era of FOIA laws.[113] Arkansas already has

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[108] H.B. 1726 § 30; *see also* 5 U.S.C. § 552(b)(5); N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (explaining the purpose of the deliberative process exemption is to prevent injury to the quality of government decisions); STEINBUCH, THE ARKANSAS FREEDOM OF INFORMATION ACT § 5.01 ("[O]ther jurisdictions sweep more broadly to protect intra-agency memoranda and other preliminary materials that reflect the deliberative process, but a strong argument can be made that the Arkansas FOI act strikes the appropriate balance.").

[109] H.B. 1726 § 3(30)(A)-(F); *see also* State of Mo. ex rel Shorr v. Army Corps of Engineers, 147 F.3d 708, 710 (8th Cir. 1998) ("engage in internal debates without fear of public scrutiny"); Nat'l Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process."); Redland Soccer Club, Inc. v. Dep't of the Army of U.S., 55 F.3d 827, 856 (3d Cir. 1995) ("[T]he deliberative process privilege, like other executive privileges, should be narrowly construed.").

[110] H.B. 1003.

[111] H.B. 1726 §3(30).

[112] *Id*. One scholar explains that courts have interpreted the federal deliberative-process exemption in a manner contrary to its plain text, extending protections not only to records that are absolutely privileged but also to those subject to a qualified privilege, and have further expanded the exemption to include documents that do not genuinely qualify as "inter-agency" or "intra-agency" records, such as memoranda from outside consultants to agencies, ultimately leading to the widespread failure of agencies to meet the FOIA's foundational promise of open government. Kyle Singhal, *Disclosure, Eventually: A Proposal to Limit the Indefinite Exemption of Federal Agency Memoranda from Release under the Freedom of Information Act*, 84 GEO. WASH. L. REV. 1388, 1391 (2016) ("This is a vague but often-cited exemption.").

[113] Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media's Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 990 (2012) ("Citizens depend on news media to provide information about their government, and media often depend on open records acts to get that information. One study showed that nearly 97% of journalists believe that open records laws are important for doing their jobs. The media government

a limited version of a deliberative-process privilege in its exemption for "working papers" of certain constitutional figures.[114] And the Arkansas Supreme Court extended this limited exemption beyond the individuals named in the statute to all employees of the named official.[115] So, for example, while the FOIA names the attorney general, the Court held that all employees of the office of the attorney general are covered.[116]

The sponsor of the bills argued that the law should extend deliberative process to bureaucrats in *every* executive agency.[117] As a result, the bill would limit Arkansas citizens' access to the process by which rules affecting them are made.[118] This would dampen the right to observe both the final outcome of government actions and the process leading to those outcomes.[119] Rusty Turner, editor of the Northwest Arkansas Democrat Gazette and previous President of the Arkansas Press Association Board of

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relationship can be seen as a two-way street: government provides information to media to reach the people, and media provide a check on government power."); Jay A. Wagner, and David. Cuillier*, To Fee or Not to Fee: Requester Attitudes Toward Freedom of Information Charges,* 40 GOV'T INFO. Q. 1, 2 (2023) ("Previous research indicates that for every U.S. dollar spent on records-based investigative reporting, society benefits $287."); Gowdy, *supra* note 90, at 720 ("Government lawyers need confidentiality when preparing strategies for upcoming litigation. The work product privilege serves this need by protecting an attorney's mental impressions."); Kwoka, *supra* note 8, at 1371 ("FOIA was thus designed largely by journalists, for journalists, and with the particular goal in mind that journalists would use access to government information to provide knowledge to the public, which would, in turn, facilitate the public's effective participation in democratic governance.").

[114] Ark. Code Ann.§25-19-105(b)(7); *see also* 5 U.S.C. § 552a(b)(5); *Equal Employment Opportunity Comm'n v. Los Alamos Constructors, Inc*., 382 F. Supp. 1373, 1375 (E.D.N.M. 1974) ("[B]ureaucrats cannot hide behind a privilege claim unless . . . an overwhelming public interest demands [secrecy] . . . . [A] recognition of governmental privilege is the rare exception, while full disclosure is the almost universal rule.").

[115] *Id*.

[116] Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT § 5.01[9][c] (noting that the Supreme Court of Arkansas extended the working-papering exemption to include "the memoranda, working papers, and correspondence of the staff and private consultants of persons listed in [ARK. CODE ANN. §25-19-105(b)(7)]") (citing *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869).

[117] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023).

[118] Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 852 (1990) (protecting evidence of governmental wrongdoing does not enhance the effectiveness of government and is therefore not within the scope of the general deliberative privilege; "an element of unfairness would enter" if government could conceal evidence "behind the screen" of privilege) (citing *In re Franklin Nat. Bank Securities Litigation*, 478 F. Supp 577, 582, 587 (E.D.N.Y. 1997)).

[119] ARK. CODE ANN. § 25-19-105(b)(5); Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT § 5.01 (2024).

Directors, highlighted that HB1726 would rip governmental operations away from the public eye, making it easier for the government to conduct business without the oversight of "pesky taxpayers."[120] Turner further discussed the critical role of sunlight or public scrutiny in ensuring government accountability, warning that the bill's proposals would allow decisions to be made in the dark.[121]

This concern is wholly consistent with the scholarly criticism of the federal deliberative-process privilege.[122] Wetlaufer, for instance, argues that the privilege significantly disadvantages individuals in disputes with the government by reducing their chances of success in litigation, increasing litigation costs, and diminishing the overall fairness of the entire judicial process.[123] Moreover, Imwinkelried highlights that broadening the scope of the privilege enables the government to withhold a vast number of investigate reports of matters of significant public interest, even those reports of governmental misconduct.[124] This pervasive use of the privilege not only impedes transparency but also represents a systemic barrier to accountability.

5. Hiding Propriety Information

HB1726 proposed that data, records, or information produced or collected by faculty, staff, students, or contractors of higher education institutions, governmental agencies, or public or private entities involved in research, including agricultural, medical, commercial, scientific,

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[120] 1:51:17/3:33/07 - https://www.youtube.com/watch?v=dDhe5O4lalI; *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023) (statement of Rusty Turner).

[121] *Id.; see also* Wetlaufer *supra* note 2, at 892 ("The effects that the [deliberative] privilege is likely to have on individual litigants include: a diminished likelihood that the individual will win a case that, absent the privilege, would have been decided in her favor; a diminished likelihood that she will secure a settlement consistent with the true strength of her claim; an increase in the cost of the litigation; and, in the event that she loses, a diminished sense that she has been treated fairly by the system."); Edward J. Imwinkelried, *The Government Misconduct Exception to the Deliberative Process Privilege: Bringing Clarity to the Most Important Exception to the Most Frequently Invoked Government Evidentiary Privilege*, 65 S.D. L. REV. 76, 85-101 (2020) ("[E]xpansions of the privilege's scope enable the government to suppress a vast number of investigative reports relating to issues of great public importance, including investigations into serious alleged government misconduct. . . [w]hen citizens attempt to gain such access either in litigation or under the FOIA, the government often attempts to deny them access by asserting the deliberative process evidentiary privilege . . . [the deliberative process privilege] has become the government's first line of defense against citizens' requests for information in the government's possession . . . [and is now] the most frequently invoked government evidentiary privilege.").

[122] Wetlaufer *supra* note 2, at 892.

[123] *Id*.

[124] Imwinkelried *supra* note 121, at 85.

technical, scholarly, institutional, or artistic fields, would be exempt from FOIA.[125] This exemption would also apply to information revealing the identity of research participants or private entities, contributions from research participants, and details like research notes, data, discoveries, methodologies, protocols, and creative works.[126]

Ray justified his position that the exception is necessary to protect the rights created by universities and state agencies, arguing that without it, there could be a compromise of new technologies.[127] However, the FOIA already contains a similar (but more retrained) exemption covering competitive advantage in Arkansas which exempts "files which, if disclosed[,] would give advantage to competitors or bidders."[128] And the Arkansas Supreme Court has already recognized "confidential business information as

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[125] H.B. 1726 § 3(31)(A)(ii); *see also* Kevin E. O'Reilly, *The Impact of Information Acquisitions through the Freedom of Information Act to Generate Competitive Advantages within Academia*, 40 RSCH. HIGHER ED. J. 1, 38 (2021) ("[T]he evidence does suggest that FOIA activity is a healthy contributor in elevating faculty productivity associated with publishing and is a prominent contributor to a higher educational institutions' prestige and excellence. Institutions that engage in information acquisitions behaviors possess more robust libraries, healthy student enrollments, and more extensive master's and doctoral programs over institutions that do not engage in information acquisition activities.").

[126] Rachel Levinson-Waldman*,* ACADEMIC FREEDOM AND THE PUBLIC'S RIGHT TO KNOW: HOW TO COUNTER THE CHILLING EFFECT OF FOIA REQUESTS ON SCHOLARSHIP, 8 (2011) (citing Sweezy v. New Hampshire, 354 U.S. 234 (1957)) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die."); *see also* Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society.").

[127] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023) (statement of David. Ray); *see also* Waldman, *supra* note 128, at 9 (citing *Keyishian v. Board of Regents*, 386 U.S. 589 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.").

[128] ARK. CODE ANN. §25-19-105(b)(9)(A).

property,"[129] and ruled that "a state 'may not transform private property into public property without compensation.'"[130]

HB1726 tried to impose fees and labor costs on citizens if fulfilling the request took over eight hours.[131] This change was not included in HB1003, the similar bill introduced in the special session after HB1726 failed during the general session. HB1726 also proposed that if the time spent by the government to provide the records exceeds eight hours, any additional time may be charged at a rate not exceeding the salary or hourly pay of the lowest-paid employee or — critically — the cost of a contractor, at the custodian's discretion.[132] (Representative Ray omitted mentioning in his testimony that the requests could be outsourced to contractors.[133])

Ray compared this new charge to a service fee like the cost to file a lawsuit. But the cost of about $170 to file a lawsuit provides a judge, a bailiff, a jury, and hours of work. In contrast, under this bill, the government could charge citizens an hourly rate for requests, and that hourly rate would be determined by the person assigned to do the work or the contractor he hired at his sole discretion (so that he didn't have to perform the task himself).[134] The costs routinely would be many multiples of the analogized filing fee. These concerns regarding unbridled charges highlight that FOIA principles of public access and fee regulation extend to contactors, ensuring that costs are maintained and controlled.[135] These fundamental principles reinforce the policy that fees should be limited to actual

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[129] Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT 5.01(11)(a).

[130] *Id*.

[131] H.B. 1726, at 4.

[132] *Id.* at 4-5.

[133] Tiffany A. Stedman, *Outsourcing Openness: Problems with the Private Processing of Freedom of Information Act Request*, 35 PUB. CONT. L.J. 133, 151 (2005) (discussing the pitfalls of allowing contractors to manage Freedom of Information Act processes highlights concerns about transparency and trust. Scholars argue that information requests should be fulfilled by the agencies themselves, to whom the accountability for the information belongs. The fear is that information handled by external entities might be perceived as compromised or less credible by requesters, regardless of whether the content of the response is identical.); *id.* at 151 ("Would we want a contractor to have the discretion to decide what information should be released to the public in a situation in which its involvement raised such concerns? Could a contractor's motives in withholding such records be based solely on the Act's exemptions, interpreted narrowly? Or might a contractor read the exemptions a bit more broadly if its own integrity was at stake?"); *see also* Alasdair S. Roberts, *Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law*, 60 PUB. ADMIN. REV. 308, 315 (2000) ("The disclosure of information may also be obstructed by statutory rules that give contractors the right to protest governmental decisions to release information relating to their contracts.").

[134] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs,* 2023 Leg., 94th Gen. Sess. (2023) (statement of Robert Steinbuch).

[135] Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT §10.01.

costs excluding already-paid-for government labor — and not based on profit-seeking commercial-contractor rates.

Furthermore, the bill offered the opportunity for different charges for requests primarily for noncommercial purposes.[136] This requires requestors to disclose their motives. The difficulty with this approach is that it conflicts with the principle that "FOIA statutes generally do not permit custodian inquiries into the requestor's motive for obtaining the records,"[137] the "requester's motive is immaterial,"[138] and "Arkansas FOIA imposes no responsibility on a records requester to state why he or she wants a record."[139]

Ray defended his approach, asserting that FOIA requests significantly strain public resources.[140] Critics, however, raised concerns about who would determine if a request required eight hours of work, and they questioned how to monitor custodian misconduct and potential abuses that could readily arise from this proposal.[141] Critics convincingly argued that this bill disproportionately affected disadvantaged requesters who might not be able to afford the cost of accessing vital information, effectively transforming FOIA into a tool available only to the wealthy.[142] A financial

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[136] Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT §3.02.

[137] *Id*.; *see also* Kwoka *supra* note 8, at 1378 ("[T]he practice of commercial FOIA requesting has never been given in-depth academic treatment. We have very little understanding how corporations are using FOIA, what they are requesting, how they are profiting from that information, and at what cost the government is serving commercial interests in information.").

[138] Steinbuch, THE ARKANSAS FREEDOM OF INFORMATION ACT §3.02.

[139] *Id*.

[140] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023); *see also* Jeremy Horpedahl, *Citizen's Guide—Poverty*, ARK. CTR. FOR RSCH, ECON., https://uca.edu/acre/citizens-guide-poverty/ (last accessed March 10, 2024) (Arkansas is ranked as having the 7th highest poverty rate in the United States.).

[141] Mike Sheaff, *Constructing Accounts of Organisational Failure: Policy, Power and Concealment*, 37 CRIT. SOC. POL'Y 520, 536 (2016) (discussing potential abuses that arise at lower levels in government involves examining the complex interplay of networks and power relationships, often veiled in secrecy); *see also* Alex Luscombe, Kevin Walby & Randy K. Lippert, *Brokering Access Beyond the Border and in the Wild: Comparing Freedom of Information Law and Policy in Canada and the United States*, 39 L. & POL'Y 259, 259-79 (2017) (explaining that for the barriers to FOIA access, the key obstacles include: political control over information, leading to restricted access to essential documents; arbitrary time delays and fees designed to deter disclosure; insufficient depth of disclosure paired with ineffective document retrieval processes, often due to inadequate resource allocation; excessive redaction under the guise of FOI legislation; and the lack of effective oversight, with FOIA bodies understaffed and lacking the necessary powers to enforce accountability).

[142] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023) (Joey McCutchen); *see also* Darren Cunningham, *Rochester parents invoiced up to 8 figures for public records tied to district 'snooping,'*

barrier to the public that gatekeeps access to government resources in one of the poorest states in the country was not well received.[143] If fees were high or ambiguous — especially given the outsourcing opportunities to contractors — this would fundamentally change the nature of FOIA from a broad public service to a narrow one. Furthermore, the fee and labor cost proposal was seen as a strategy to double charge taxpayers for FOIA requests, who already fund these processes through their taxes.[144] Other concerns included that the proposal could also allow the government to

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WXYZ Detroit (May 16, 2022), https://www.wxyz.com/news/rochester-parents-invoiced-up-to-8-figures-for-public-records-tied-to-district-snooping (A parent raised issues with remote learning's effect on students' preparedness and highlights the school district's imposition of prohibitive fees for public records requests, with amounts ranging from $173,000 to eight figures, suggesting a deterrent against parental inquiries); Alex Ingrams, Wesley Kaufmann & Daan Jacobs, *Citizen Requests and the Price of Public Information: An Experimental Test*, 28 Info. Polity 239, 242 (March 30, 2023) ("Public choice economics would lead us to believe that individuals are less likely to pay for a service that does not serve their self-interest" and therefore "individuals are proportionately less willing to pay for a service as the cost increases.").

[143] Robert Steinbuch, *A commission for We the People*, ARKANSAS DEMOCRAT-GAZETTE (Dec. 8, 2023), https://www.arkansasonline.com/news/2023/dec/08/robert-steinbuch-a-commission-for-we-the-people/ ("In virtually all of my FOIA cases, I'm guaranteed to get paid zero.").

[144] Zachary Pall, *The High Costs of Costs: Fees as Barriers to Access within the United States and Canadian Freedom of Information Regimes*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 599, 599-632 (2009) (discussing the right citizens have to access their government and that the cost of obtaining those records could potentially prohibit citizens from exercising that right); *see also* Kwoka, *supra* note 8, at 1373 ("Other than differential fees charged, however, there are no limits to access based on the identity of the requester or the purpose of the request."); *Id*. at 1416 ("[S]tate agencies often charge such high fees that open records laws are, as a practical matter, inaccessible for average citizens and the news media."); Michael Felberbaum, *Big fees to view public documents discourage public access,* MCCLATCHY DC (June 17, 2015), https://www.mcclatchydc.com/news/politics-government/article24781396.html (citing and quoting Kwoka *supra* note 8, at 1416); Jay Wagner & David Cuillier*, To Fee or Not to Fee: Requester Attitudes Toward Freedom of Information Charges,* 40 GOV'T INFO. Q. 101879, 1, 3 (Oct. 23, 2023) ("Some states, like Wyoming, Indiana, and Hawaii, grant fee-setting responsibilities to a state office or authority which allows for flexibility and potentially more responsiveness to the climate than a fixed statute. Oklahoma explicitly prohibits the use of fees as a deterrent to requesters or as an obstacle to release of information. In Florida, the attorney general produced a memorandum strictly forbidding the use of FOI as a revenue-generating operation . . . . Oregon's attorney general also allowed the charging of fees even if no responsive records are located, a rarity . . . . Oklahoma, Illinois, and Ohio have provisions on how to confront what is deemed to be excessive, and Ohio limits the number of requests to 10 per month. While less frequently discussed, a primary and enduring purpose of FOI fees is an ability to manage requesters.").

sidestep inconvenient requests or create a corrupt scheme of kickbacks to contractors.[145]

6. Delaying FOIA Response Time

Section 5 of HB1726, proposed new procedures for handling public record requests that was not included in HB1003.[146] Under HB1726, if

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[145] Stedman, *supra* note 133, at 150 ("We have to keep in mind that there are certain things that you can privatize, but there is one thing that you can never privatize. You can never privatize the duty of loyalty to the greater good. The duty of loyalty to the collective best interest of all, rather than the narrow interest of a few: that is what public service is all about; that is what public servants are all about.") (quoting David Walker, Comptroller General of the United States); *id.* at 150 (explaining further the increased risk of conflicts of interest when government contractors handle tasks such as FOIA requests, compared to government employees. While both parties might be reluctant to share negative information about their employers, the job security of government employees mitigates potential conflicts. However, contractors, driven by the need to maintain contracts and uphold their company's reputation for future opportunities, face a heightened conflict of interest, complicating the transparency and trust in the process); *see also Competition for Commercial Activities in the Federal Government: Testimony Before the Senate Subcomm. on Oversight of Gov't Mgmt., Restructuring & the Dist. of Columbia*, 105th Cong. (1998) (statement of J. Christopher Mihm, Acting Associate Director, Federal Management & Workforce Issues, General Accounting Office) (discussing the plethora of issues, including challenges in contract administration, the oversight of contract auditing, attention to contractors, and the accountability mechanisms for contract management); Joe Davidson, *Contractors who flout labor laws also often fail to deliver services. That's a warning for Biden's infrastructure plan,* WASH. POST (Jan. 21, 2022), https://www.washingtonpost.com/politics/2022/01/21/government-contractors-labor-law-violations-center-american-progress/ (discussing the findings of a report from the Center for American Progress Action Fund, noting that despite regulatory efforts to ensure fair labor practices, the U.S. government often contracts with companies known for violating workplace laws, and further explaining that this trend not only undermines workers' rights to fair wages and safe working conditions but also frequently leads to subpar federal contract performance and wasteful spending of public resources).

[146] "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." ARK. CODE ANN. § 25-19-105(e). The Arkansas FOIA requires the records to be "immediately provided to the requestor any responsive records not in active use or storage." ARK. CODE ANN. 25-19-105(a)(6). Arkansas law provides three working days for seeking an opinion from the Attorney General regarding decisions related to personnel or evaluation records. ARK. CODE ANN. § 25-19-105(c)(3)(B)(i). Similar statutes are found in other states as well, including New Mexico, Kansas, Missouri, Louisiana, and Georgia, among others, where there is also a requirement for a response within three working days. *FOIA request response times by state*, BALLOTPEDIA,

records were not immediately available, the custodian would have had to notify the requester in writing and provide a specific date and time within ten working days for the requested records to become available.[147] If unable to fulfill the request within this timeframe, the custodian could have explained the delay, offered a new availability date, and estimated the time and cost to complete the request. This mimics the federal system that has effectively abandoned statutory time limits.

While the rationale behind the proposal was to manage the burden of processing large FOIA requests on government officials,[148] extending the response time would have led to delays in public access to information and enabled government entities to defer responses to sensitive or merely inconvenient requests.[149] Donnie Scroggins, Director of Data and Analytics at Arkansas Voter Integrity Initiative, who is a frequent user of FOIA, spoke against the bill. He pointed out that even simple requests already often take two weeks or more for a reply, far beyond the required three days. He was aptly not sanguine that extending the response time would lead to improved governmental efforts.[150] Another citizen opposing the bill, Scott Grey, representing the Saline County Republican Committee, emphasized that taxpayers already fund clerk positions, suggesting that it

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https://ballotpedia.org/FOIA_request_response_times_by_state (last accessed March 18, 2024).

[147] H.B. 1726; *see also Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023); Stedman, *supra* note 133, at 142 ("FOIA requester's only remedy for noncompliance is seeking enforcement of the Act's provisions through the judicial process.").

[148] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023); *see also* Robert Steinbuch, *Praise for the power of inefficiency*, ARK. DEMOCRAT GAZETTE (July 2, 2023), https://www.arkansasonline.com/news/2023/jul/02/praise-for-the-power-of-inefficiency/ (explaining that modern technology increases the burden of record requests is unfounded and that electronic records actually streamlines FOIA compliance and enhanced transparency, rather than complicating it).

[149] *See* Charles J. Wichmann II, *Ridding FOIA of Those Unanticipated Consequences: Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213, 1242 (1998) ("The current time limits in the FOIA are a joke. Few agencies actually respond to FOIA requests within the 10-day limit required in the law. Such routine failure to comply with the statutory time limits is bad for morale in the agencies and breeds contempt by citizens who expect government officials to abide by, not routinely break, the law."); *see also* Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 DUKE L.J. 1249, 1254 (1996) ("[T]he 10-day time limits imposed by [the 1974] Congress no longer have any significance."); *see also* Michael Herz*, Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 583 (2009) (discussing the major delays encountered by FOIA requestors as a chief problem, noting that "in the real world, these firm and strikingly short deadlines are routinely exceeded").

[150] *Id.*

should not be a burden to produce documents already owned by the public.[151]

7. Imposing Stricter Conditions for Attorney Fees

Section 5 of HB1003, unlike HB1726, introduced more stringent conditions for awarding attorney's fees in FOIA cases.[152] The proposal sought to change the words "the court shall" to "a court may," shifting to a more discretionary basis.[153] Under current law, fees are to be awarded if the plaintiff obtained a significant or material portion of the requested information after filing suit, unless the defendant's position was substantially justified.[154] Moreover, under the proposed changes, attorney's fees could *only* be awarded if the court finds that the defendant's position was arbitrary or in bad faith.[155] Both changes would further disincentivize the very limited FOIA bar from pursuing FOIA cases on a contingency basis. Of course, the result is that only well-funded plaintiffs would have ready access to judicial enforcement of their FOIA rights.

C. Senate Bill 7 and Senate Bill 9

Ultimately, HB1003 failed due to remarkable citizen resistance. In the end, a far more limited bill, Senate Bill 10, discussed below, prevailed with the approval of virtually all of the objectors. Prior thereto, however, two more bills were considered before the compromise was reached. These bills were Senate Bill 7 and Senate Bill 9.[156]

1. Deliberative Process Exemption

Section 1 of SB7 attempted to adopt the federal deliberative-process exemption as seen in HB1003,[157] while SB9 removed the federal-deliberative process exemption.[158] Section 4 of SB7 also proposed the same deliberative-process exemption proposed in HB1003, which exempted records revealing the processes of state agencies, boards, or commissions, including inter-agency and intra-agency communications, advisory opinions, recommendations, and deliberations.[159] Interestingly, however, while SB9 removed the federal deliberative-process exemption, Section 4 of SB9 proposed an exception for any records reflecting communications

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[151] *Hearing on H.B. 1726 Before the H. Comm. on Gov. Affairs*, 2023 Leg., 94th Gen. Sess. (2023).

[152] H.B. 1003.

[153] H.B. 1003, at 3-4.

[154] *Id.*; *see also* ARK. CODE ANN. § 25-19-107(d)(1)-(2).

[155] H.B. 1003, at 3-4.

[156] S.B. 7, 94th Gen. Assemb., First Extraordinary Sess. (Ark. 2023); ARK. CODE ANN. §25-19-101.

[157] S.B. 7, at 2.

[158] S.B. 9, 94th Gen. Assemb., First Extraordinary Sess., at 2 (Ark. 2023).

[159] *Id*.

between the Governor or her staff and the secretary of a cabinet-level department.[160] The difference is significant, as SB9 provided a narrow exemption for high-level communications, while SB7 offered a broader exemption aimed at protecting the deliberative process across nearly all state entities,[161] covering a broad range of records and communications involved in both policy and decision making. Neither version passed.

2. Concealing Government in Attorney-Client Privilege

Section 1 of SB7 again proposed the attorney-client privilege covering records prepared by an attorney representing elected or appointed states officers, agencies, boards, or commissions in anticipation of litigation or for use in pending litigation.[162] In comparison, SB9 introduced a more stringent condition on the attorney-client privilege exception related to anticipated litigation by requiring a documented, plausible threat by the custodian upon which denial is based,[163] making the exemption much narrower than SB7, which covered any records prepared in anticipation of litigation without the need for specific written documentation.[164] Lastly, SB7 and SB9 proposed exempting records created or received by state officials or agencies that would be privileged under Rule 502(b) of the Arkansas Rules of Evidence.[165] Neither version passed.

3. Imposing Strict Conditions for Attorney's Fees

SB7 and SB9 also proposed changes to the way attorney's fees are awarded in FOIA litigation similar to the previous bills.[166] Neither version passed.

In response to mounting dissatisfaction and calls for a resolution, the Arkansas legislature proposed Senate Bill 10 as a compromise measure, which it enacted into law as Act 7.

D. Senate Bill 10: Now Act 7

Senate Bill 10 (the compromise) broadened the exemption for the security of the Governor.[167] The compromise added a mandate that the division responsible for overseeing the executive-protection detail must submit a report every quarter to the legislative council.[168] Or if the General Assembly is in session, the report should be submitted to the joint-budget committee instead. The Act requires the report to detail the expenses

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[160] *Id*. at 2-3; *see also* ARK. CODE ANN. §25-19-105(b).
[161] S.B. 7, at 2.
[162] *Id.* at 3.
[163] S.B. 9, at 3.
[164] S.B. 7 at 2.
[165] *Id.*
[166] *Id*. at 3-4; *see also* ARK. CODE ANN. §25-19-107.
[167] *See generally* S.B. 10; *see also* ARK. CODE ANN. § 12-8-108(c).
[168] S.B. 10 at 2.

incurred by the governor's executive-protection detail on a quarterly basis.[169] The compromise also added an exemption that establishes that records concerning the planning or provision of security services for high-ranking officials are exempt from disclosure under FOIA.[170] The officials included in the compromise are the Governor, the Lieutenant Governor, the Attorney General, the Secretary of State, the Auditor of State, the Treasurer of State, the Commissioner of State Lands, members of the General Assembly, Justices of the Supreme Court, Judges of the Court of Appeals.[171]

E. Protecting the FOIA

Since these events, a growing sense among citizens and advocacy groups developed to reverse measures that have eroded government transparency in Arkansas and protect the FOIA from future assault, creating a call for action to fortify the sunshine that has been threatened.[172] These sentiments reflect a commitment to upholding the foundational principles of democracy and ensuring that the citizens of Arkansas have the information and transparency necessary to hold their government accountable.[173] These proposals ultimately lead to the creation of an advocacy group, Arkansas Citizens for Transparency (ACT), which sough changes both through proposing an initiated act and a constitutional amendment. The proposals sought to both repeal, change, and clarify.[174]

The Arkansas General Assembly and the citizens of Arkansas both have the authority to propose constitutional amendments.[175] Under Article 19, Section 22 of the Arkansas Constitution, either branch of the General Assembly at a regular session may propose constitutional amendments.[176]

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[169] *Id.*; *see also* ARK. CODE ANN. § 12-8-108(d)(1).

[170] S.B. 10 at 3; *see also* ARK. CODE ANN. § 25-19-105(b)(28).

[171] S.B. 10 at 3.

[172] Robert Steinbuch, *FOIA Transparency,* ARK. DEMOCRAT GAZETTE (Dec. 22, 2023); *see also* Beryl Lipton, *Here's Why Arkansas' New Anti-Transparency Law Should Piss You Off*, Daily Beast (Sept. 15, 2023); *see also* Rick Rojas, *Arkansas Governor Tried to Keep More Records Private*, N.Y. TIMES (Sept. 14, 2023); *see also* Robert Steinbuch, *Protecting the People's Law*, ARK. DEMOCRAT GAZETTE, (Nov. 5, 2023).

[173] Robert Steinbuch, *Arkansas Citizens Deserve Transparency,* ARK. DEMOCRAT GAZETTE (Oct. 1, 2023) https://www.arkansasonline.com/news/2023/oct/01/arkansas-citizens-deserve-transparency/ ("If you can't see what your government is doing, it's impossible to undercover wrongdoing, which I've repeatedly done using the FOIA.").

[174] ARK. CONST. art. XIX, § 22; *see also* Robert Steinbuch, *Upholding Values,* ARK. DEMOCRAT GAZETTE (Feb. 16, 2024) ("It took us three tries to get our government-disclosure amendment past Griffin — approval occurring just after we filed suit — and four for the statute.")

[175] *See, e.g.,* Forrester v. Martin, 2011 Ark. 383 S.W.3d 375, 379 (2011) (quoting ARK. CONST. art. XIX, § 22).

[176] *Id*. at 379.

If a majority vote in each house is obtained, the amendments will be published six months immediately before the next general election and then submitted to the voters of the state for approval or rejection.[177] And if a majority of the voters at the election approve the amendments, then they are adopted into the Arkansas Constitution.

In contrast, Amendment 7 to the Arkansas constitution governs how the public proposes constitutional amendments.[178]

> Amendment 7 of the Arkansas Constitution reserves the legislative powers to the people on both the state and municipal levels. Broadly defined, the power of initiative is the citizens' power to place a measure on the ballot by collecting signatures on petitions favoring placement of the proposal on the ballot. Conversely, the referendum power involves similar petitioning action which results in having a measure placed on the ballot for the purpose of repealing it. In pertinent part, amendment 7 reads as follows: "The . . . referendum powers of the people are hereby further reserved to the local voters of each municipality. . . as to all local, special and municipal legislation of every character in and for their respective municipalities. The referendum power is invoked when "fifteen per cent of the legal voters shall petition for [a] special election" on an ordinance.[179]

The members of ACT[180] undertook drafting a constitutional amendment and proposing several statutory changes to the FOIA. The group

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[177] *Id*.

[178] ARK. CONST. art. V, §1; *see also* Arkansas Secretary of State John Thurston, *2024 Initiatives and Referenda Handbook* (2024), https://www.sos.arkansas.gov/uploads/elections/2023-2024_I__R_Handbook_-_October_2023.pdf (last accessed June 15, 2024) (explaining the procedural requirements for citizens to propose initiated acts or constitutional amendments).

[179] Victor A. Fleming, *Amendment 7 Referendum*: *Power to the People*, 2 U. ARK. LITTLE ROCK L. REV. 65, 65 n.2 (1979).

[180] The members of ACT were Senator Clark Tucker, former House Representative Nate Bell, attorney and public policy advocate David Couch, attorney Jennifer Waymack Standerfer, attorney John E. Tull, III, Executive Director of the Arkansas Press Association Ashley K. Wimberley, and me. Together, these members exemplified a shared commitment to fostering an open and accountable government, contributing their diverse expertise from bipartisan perspective to the drafting and proposals of amendments that aim to enhance the democratic process in Arkansas. *See generally* Mary Hennigan, *Arkansas Press Association forms committee to support government transparency,* ARKANSAS ADVOCATE, (May 7, 2024) https://arkansasadvocate.com/2024/05/07/arkansas-press-association-forms-committee-to-support-government-transparency/.

Senator Clarke Tucker was a Democratic member of the Arkansas Senate since November 2020 and previously in the Arkansas House of Representatives

contained members from various professional backgrounds and political parties, each bringing a diverse experience and dedication to the cause of enhancing transparency in the Arkansas FOIA.

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from 2015 to 2019. *See* Senator Clark Tucker, BALLOTPEDIA, https://ballotpedia.org/Clarke_Tucker (last visited Dec. 15, 2024); *see also* Senator Clark Tucker, CSG JUSTICE CENTER, https://csgjusticecenter.org/people/senator-clark-tucker/ (last visited Dec. 15, 2024).

Nate Bell, who served as a member of the Arkansas House of Representatives from 2011 to 2017, was initially elected as a Republican and is known for his active engagement in legislative matters in the state of Arkansas. *See* Nate Bell, BALLOTPEDIA, https://ballotpedia.org/Nate_Bell (last visited Dec. 15, 2024); *see also* Nate Bell, WIKIPEDIA, https://en.wikipedia.org/wiki/Nate_Bell, (last visited Dec. 15, 2024).

David Couch, an attorney and public-policy advocate, has played a pivotal role in authoring and supporting numerous ballot measures aimed at progressive reforms. His efforts have contributed to legalizing medical marijuana, raising the minimum wage, modernizing the state's prohibition reform, and assisting with campaign finance and ethics reforms in Arkansas. *See* Biographical Information of David Couch, DAVID COUCH LAW, https://www.davidcouchlaw.com/about (last visited Dec. 15, 2024); *see also* Griffin Coop, *A marijuana post-mortem with David Couch*, ARK. TIMES, (Nov. 28, 2022) https://arktimes.com/news/cannabiz/2022/11/28/a-marijuana-post-mortem-with-david-couch.

Jennifer Standerfer is an Arkansas attorney who has been involved in governmental relations in Arkansas. Standerfer has advocated for transparent and fair legal processes in elections, highlighting her dedication to justice and transparency. *See* Biographical Information of Jennifer Standerfer, WAYSTAND LAW, https://waystandlaw.com/about, (last visited Dec. 15, 2024).

John Tull, III, an attorney with a broad range of expertise in business litigation, personal injury, media and advertising law, has been instrumental in promoting transparency and freedom of information in Arkansas. He is a founding member of Quattlebaum, Grooms & Tull PLLC, and through his role as general counsel for the Arkansas Press Association, he has protected media rights in Arkansas. His dedication to promoting transparency and freedom of information has been recognized with awards such as the Distinguished Service Award (2006) and the Freedom of Information Award (2018) from the Arkansas Press Association. *See* John E. Tull III, FEDERALIST SOC'Y, https://fedsoc.org/contributors/john-tull, (last visited Dec. 15, 2024); *see also* Mary Hennigan, *Arkansas Press Association forms committee to support government transparency,* ARK. ADVOCATE, (May 7, 2024) https://arkansasadvocate.com/2024/05/07/arkansas-press-association-forms-committee-to-support-government-transparency/.

Ashley K. Wimberley, serving as the Executive Director of the Arkansas Press Association, plays a crucial role in advancing journalism and press freedom in Arkansas. Her active involvement in initiatives aimed at promoting transparency and freedom of information, including participation in the FOIA Review Working Group, demonstrates her leadership and commitment to modernizing the state's approach to FOIA. *See* Mary Hennigan, Arkansas Press Association forms committee to support government transparency, ARK. ADVOCATE (May 7, 2024) https://arkansasadvocate.com/2024/05/07/arkansas-press-association-forms-committee-to-support-government-transparency/.

The Arkansas Attorney General, Tim Griffin, approved the title of the proposed amendment aimed at statutory reform and incorporating FOIA principles into the state constitution, but this action came after significant pressure from ACT. The proposal had been previously rejected twice by the Attorney General's office, which cited reasons such as the proposal being inadequate, misleading, or vague.[181] It was not until ACT took the step of filing a lawsuit against Griffin, urging the Arkansas Supreme Court to compel the AG either to certify or to rewrite the ballot language for the Arkansas Citizens for Transparency proposal, that approval was finally granted on the third attempt.[182] Thereafter, the process required collecting slightly over 90,000 signatures to put the amendment on the ballot.[183]

The approved proposal amendment contained key provisions to enhance government transparency and accountability for the State of Arkansas.[184] The key points in the proposals were as follows:

1. Requiring future changes to transparency law receive super-majority legislative support *and* citizen ratification.[185]
2. Requiring public meetings be conducted in a manner that allows the public to attend and fully hear officials' meaningful discussion and deliberations on government business.[186]
3. Establishing the Arkansas Government Transparency Commission[187] to assist citizens in obtaining compliance, issue opinions, and sanction violations of government transparency laws and setting its procedures, funding, authority, and functions.[188] The commission

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[181] Tess Vrbin. *Arkansas AG rejects proposed ballot measure meant to add clarity to Freedom of Information Act*, ARK. ADVOCATE (Dec. 18, 2023) https://arkansasadvocate.com/2023/12/18/arkansas-ag-rejects-proposed-ballot-measure-meant-to-add-clarity-to-freedom-of-information-act/; *see also* Benjamin Hardy, and Matt Campbell. *Attorney General rejects first try at FOIA constitutional amendment,* ARK. TIMES (Dec. 11, 2023) https://arktimes.com/arkansas-blog/2023/12/11/attorney-general-rejects-first-try-at-foia-constitutional-amendment.

[182] Tess Vrbin. *Government transparency group sues Arkansas AG over rejection of proposed amendment,* ARK. ADVOCATE (Jan. 23, 2024) https://arkansasadvocate.com/2024/01/23/government-transparency-group-sues-arkansas-ag-over-rejection-of-proposed-amendment/.

[183] Tess Vrbin. *Arkansas AG approves proposed FOIA changes; supporters plan to start gathering signatures soon,* ARK. ADVOCATE (Jan. 29, 2024) https://arkansasadvocate.com/2024/01/29/arkansas-ag-approves-proposed-foia-changes-supporters-plan-to-start-gathering-signatures-soon/.

[184] *See generally* Ark. Op. Att'y Gen. No. 2024-020.

[185] *Id*.

[186] *Id*.

[187] *Id.*

[188] *Id*.

would have five members appointed by the President Pro Tempore of the Senate, the Speaker of the house of Representatives, the Minority Leader of the State, the Minority Leader of the House of Representatives, and the Lieutenant Governor.[189] This proposed commission is similar to what a few other states have already implemented.[190] For instance, Illinois provides citizens with a Public Access Counselor "whose responsibility is to ensure compliance with FOIA."[191] And in Texas, government bodies must make a request to the attorney general for a decision before withholding information requested by citizens.[192]

4. Repealing the provision that allows school boards, superintendents, and their attorneys to hold meetings outside public observation to discuss pre-litigation, litigation, settlement, contract disputes, and real property.
5. Clarifying that public records must be disclosed within three days of a request, with the custodian required to explain any reasons for nondisclosure and specify a compliance date and time.[193]
6. Requiring that communications between two or more members of a governing body for exercising official duties must be open to the public and available for public attendance.[194]
7. Mandating the recovery of attorney's fees, expenses, and costs by a plaintiff who substantially prevails in

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[189] *Id*.

[190] Robert Steinbuch, *A Commission for We the People,* ARK. DEMOCRAT-GAZETTE (Dec. 8, 2023) https://www.arkansasonline.com/news/2023/dec/08/robert-steinbuch-a-commission-for-we-the-people/.

[191] *E.g.,* Illinois Attorney General's Office, *Illinois [FOIA] Frequently Asked Questions for Government* (2017), https://foiapac.ilag.gov/content/pdf/FAQ_FOIA_Government.pdf; (noting the PAC has the authority to determine violations, issues binding opinions in FOIA disputes, enforce opinions, issue advisory opinions to public bodies, and creates mandatory annual training for FOIA officers.).

[192] Texas Attorney General's Office, *Public Information Handbook*, at 36 (2024), https://texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/publicinfo_hb.pdf; *see also* Robert Steinbuch, *A commission for We the People*, ARK. DEMOCRAT-GAZETTE (Dec. 8, 2023) https://www.arkansasonline.com/news/2023/dec/08/robert-steinbuch-a-commission-for-we-the-people/.

[193] Ark. Op. Att'y Gen. No. 2024-020.

[194] *Id.*

an action for a violation of government transparency laws.[195]

8. Creating a civil penalty with personal liability for anyone who violates the FOIA.[196]
9. Requiring the disclosure of public records more than three months old that reflect the planning or provision of security services to constitutional officers and their families, the Governor's Mansion, and the State Capitol newly exempted under Act 7, unless the aforementioned commission finds that confidentiality is essential to ongoing security service.[197] Moreover, the proposal outlines the qualifications, procedures, funding, authority, and functions of the Arkansas Government Transparency Commission.[198] It establishes the commission with five members appointed by the President Pro Tempore of the Senate, the Speaker of the house of Representatives, the Minority Leader of the State, the Minority Leader of the House of Representatives, and the Lieutenant Governor.[199] Lastly, the proposal provides an appellate process for reviewing decisions made by the Arkansas Government Transparency Commission.

Unfortunately, ACT fell short of collecting sufficient signatures to get its proposals on the 2024 ballot. A new ballot-question committee established during the signature-gathering process has already received approval from the attorney general to collect signatures to include the same provisions on the 2026 ballot. And so, the process begins again.

CONCLUSION

Achieving accountability requires more than just reforming transparency laws; it involves a fundamental shift in how oversight is conducted. Effective oversight must be carried out by the people themselves through independent committees, task forces, and watchdog organizations that operate without ulterior motives or vested interests in the institutions they scrutinize.

By integrating unbiased review bodies, we align more closely with Madison's version of a government that isn't fractured but remains transparent and cohesive. As we navigate these future reforms, it is time to return to the simplest of ideas: allowing the people to oversee and check their government decisions.

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[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id*.
[199] *Id*.

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