

1 State of Arkansas
2 94th General Assembly
3 First Extraordinary Session, 2023
4

A Bill

DRAFT TNL/TNL
HOUSE BILL

5 By: Representatives Ray, M. Shepherd, Barker, Beaty Jr., Bentley, M. Berry, Eubanks, Gramlich, Haak,
6 G. Hodges, Hollowell, Lundstrum, McCollum, B. McKenzie, Pilkington, Richmond, Rose, Tosh,
7 Underwood, Unger, Wardlaw
8 By: Senators Flippo, B. Davis, Gilmore, Hester, Hill, Irvin, B. Johnson
9

For An Act To Be Entitled

11 AN ACT TO AMEND THE FREEDOM OF INFORMATION ACT OF
12 1967; TO EXEMPT CERTAIN RECORDS FROM DISCLOSURE UNDER
13 THE FREEDOM OF INFORMATION ACT OF 1967, INCLUDING
14 CERTAIN SECURITY-RELATED RECORDS, RECORDS THAT REVEAL
15 THE DELIBERATIVE PROCESS OF SPECIFIC STATE ENTITIES,
16 CERTAIN RECORDS PREPARED IN ANTICIPATION OF
17 LITIGATION OR FOR USE IN PENDING LITIGATION, AND
18 RECORDS THAT WOULD BE PRIVILEGED IN CERTAIN
19 CIRCUMSTANCES; TO REQUIRE THAT THE DIVISION OF
20 ARKANSAS STATE POLICE PROVIDE TO THE LEGISLATIVE
21 COUNCIL QUARTERLY REPORTS CATEGORIZING CERTAIN
22 EXPENSES; TO AMEND THE CONDITIONS UNDER WHICH
23 ATTORNEY’S FEES ARE AWARDED UNDER THE FREEDOM OF
24 INFORMATION ACT OF 1967; TO DECLARE AN EMERGENCY; AND
25 FOR OTHER PURPOSES.
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Subtitle

28 TO AMEND THE FREEDOM OF INFORMATION ACT
29 OF 1967; AND TO DECLARE AN EMERGENCY.
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33 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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35 SECTION 1. DO NOT CODIFY. LEGISLATIVE INTENT.

36 (a) It is the intent of the General Assembly to adopt the federal

1 deliberative process exemption as an exemption under the Freedom of
2 Information Act of 1967, § 25-19-101 et seq., as defined in a 7-2 decision
3 authored by United States Supreme Court Justice Barrett in "United States
4 Fish and Wildlife Serv. v. Sierra Club, Inc.," 141 S. Ct. 777 (2021).

5 (b) It is the intent of the General Assembly to adopt and codify the
6 holding in "George v. Ark. Dep't of Human Services," 88 Ark. App. 135 (2004),
7 in which the Arkansas Court of Appeals held that a court may not assess an
8 award of attorney's fees against a state official or state employee in his or
9 her individual capacity in a lawsuit under the Freedom of Information Act of
10 1967.

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

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

22
23 SECTION 3. Arkansas Code § 12-8-108, concerning the security of the
24 Governor, Governor's Mansion, and State Capitol building and grounds provided
25 by the Division of Arkansas State Police, is amended to add an additional
26 subsection to read as follows:

27 (d)(1) Except as provided under subdivision (d)(2) of this section,
28 the division shall submit to the Legislative Council, or to the Joint Budget
29 Committee if the General Assembly is in session, a report on a quarterly
30 basis that categorizes the aggregate expenses incurred by the Executive
31 Protection Detail for services provided to the Governor.

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

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36 SECTION 4. Arkansas Code § 25-19-105(b), concerning specific

1 exemptions to the requirements under the Freedom of Information Act of 1967,
 2 is amended to add additional subdivisions to read as follows:

3 (28) Records that reflect the planning or provision of security
 4 services provided to the Governor, the Lieutenant Governor, the Attorney
 5 General, the Secretary of State, the Auditor of State, the Treasurer of
 6 State, the Commissioner of State Lands, members of the General Assembly,
 7 Justices of the Supreme Court, or Judges of the Court of Appeals;

8 (29) Records revealing the deliberative process of state
 9 agencies, boards, or commissions, including:

10 (A) Executive branch state agency inter-agency and intra-
 11 agency memoranda or letters that would not be available by law to a party
 12 other than in the course of litigation; and

13 (B) Inter-agency and intra-agency memoranda and letters,
 14 including:

15 (i) Communications and documents reflecting advisory
 16 opinions;

17 (ii) Recommendations; and

18 (iii) Deliberations that comprise part of the
 19 process by which governmental decisions and policies are formulated;

20 (30) Records prepared by an attorney representing an elected or
 21 appointed state officer, a state employee, or a state agency, board, or
 22 commission in anticipation of litigation or for use in pending litigation;
 23 and

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

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

33 (d)(1) In any action to enforce the rights granted by this chapter, or
 34 in any appeal therefrom, ~~the a court shall~~ may assess against ~~the a~~ a defendant
 35 reasonable attorney’s fees and other litigation expenses reasonably incurred
 36 by a plaintiff ~~who, after filing suit, has obtained from the defendant a~~

1 ~~significant or material portion of the public information he or she~~
 2 ~~requested, unless the court finds that the position of the defendant was~~
 3 ~~substantially justified~~ only if the court finds that the:

- 4 (A) Plaintiff substantially prevailed; and
- 5 (B) Position of the defendant was arbitrary or in bad
 6 faith.

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

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

- 14 (A) The State of Arkansas or a department, agency, or
 15 institution of the state; or
- 16 (B) An elected or appointed state officer or a state
 17 employee acting within the scope of his or her employment.

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

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

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 30 SECTION 6. RETROACTIVITY.

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

32 (b) Section 25-19-105(b)(28), created in Section 4 of this act, is
 33 retroactive to January 1, 2022.

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 35 SECTION 7. EMERGENCY CLAUSE. It is found and determined by the
 36 General Assembly of the State of Arkansas that the safety and security of the

1 Governor and other state constitutional officers is of paramount importance
2 to the peace, health, and safety of individuals in the State of Arkansas;
3 that recent threats to certain state constitutional officers and their
4 families illustrate the need for enhanced protection of records pertaining to
5 the security of certain state constitutional officers and their families in
6 order to protect the public peace, health, and safety; that in order to
7 ensure the continuity of state operations and preserve the secure nature of
8 services provided to the Governor and other state constitutional officers,
9 certain records pertaining to the safety and security of the Governor and
10 other state constitutional officers must be confidential; that this act is
11 immediately necessary because making public certain records concerning the
12 safety and security of the Governor and other state constitutional officers
13 would place the lives and security of the Governor and other state
14 constitutional officers at a greater risk, thereby risking the peace, health,
15 and safety afforded to Arkansans; that the public peace, health, and safety
16 of the State of Arkansas is adversely impacted by preventing state agencies,
17 boards, and commissions from formulating policies and making decisions
18 critical to the operation of the state in an efficient manner; and that this
19 act is immediately necessary to enable state government officials to
20 effectively communicate during the deliberative process in order to make
21 decisions that serve the best interests of the State of Arkansas in an
22 efficient and secure manner. Therefore, an emergency is declared to exist,
23 and this act being immediately necessary for the preservation of the public
24 peace, health, and safety shall become effective on:

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

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

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

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