



QUATTLEBAUM, GROOMS & TULL PLLC

[www.QGTLaw.com](http://www.QGTLaw.com)

## **The Attorney General Issues Opinion Regarding Timing of Release of Electronic Records Requested Under Freedom Of Information Act<sup>1</sup>**

*December 2015*

*By: Brandon B. Cate and Lindsey C. Pesek*

Contact:

Brandon B. Cate  
479.444.5205  
[bcate@QGTlaw.com](mailto:bcate@QGTlaw.com)

Lindsey C. Pesek  
501.379.1728  
[lpesek@QGTlaw.com](mailto:lpesek@QGTlaw.com)

When Arkansas enacted its version of the Freedom of Information Act (the “FOIA”) in the 1960s, the General Assembly deemed it “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.” Ark. Code Ann. § 25-19-102. Since its passage, the FOIA has been used for many noble purposes. Through review of public records and admission to public meetings, Arkansas citizens—including members of the press and attorneys—have used the FOIA to monitor the performance of public officials as well as to access the public decision-making process. In November 2015, however, in response to an inquiry of State Senator Jeremy Hutchinson,

---

<sup>1</sup> A version of this article was published in the *Arkansas Democrat-Gazette* and the *Northwest Arkansas Democrat-Gazette* on December 11, 2015. See Brandon B. Cate & Lindsey C. Pesek, *Opinion In Error: FOI Interpretation Incorrect*, Ark. Dem.-Gaz., Dec. 11, 2015, at B7, available at <http://www.arkansasonline.com/news/2015/dec/11/opinion-in-error-20151211/>; Brandon B. Cate & Lindsey C. Pesek, *Opinion In Error: FOI Interpretation Incorrect*, N.W. Ark. Dem.-Gaz., Dec. 11, 2015, at B7, available at <http://www.nwaonline.com/news/2015/dec/11/opinion-in-error-20151211/?opinion>.

Arkansas Attorney General Leslie Rutledge issued an opinion that incorrectly interprets the FOIA and may result in Arkansas citizens receiving delayed responses to FOIA requests for certain public records. *See* Ark. Op. Att’y Gen. No. 2015-095.

The FOIA says that “all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of records.” Ark. Code Ann. § 25-19-105(a)(1)(A). Arkansas law professors John Watkins and Richard Peltz—who jointly authored the seminal treatise on the FOIA—as well as an Attorney General opinion from the 1990s make clear that this statutory language means that, when a citizen makes a request for records, the records shall be produced immediately. *See* John J. Watkins & Richard J. Peltz, *The Arkansas Freedom of Information Act*, 273 (Arkansas Law Press, 5th ed. 2009); Ark. Op. Att’y Gen. No. 94-225. The only exception to this rule is for those records that are in “active use or storage and therefore not available at the time a citizen asks to examine it.” *See id.*; *see also* Ark. Code Ann. § 25-19-105(e). In this circumstance, the custodian of the record has up to three business days in which to produce the requested record. *See* Ark. Code Ann. § 25-19-105(e).

Mr. Hutchinson’s inquiry of Ms. Rutledge asked whether electronic files on a computer or smart phone, including voice-mail messages, should be produced immediately upon a FOIA request or if they qualified as records in use or storage, thus adding three additional days for their production. *See* Ark. Op. Att’y Gen. No. 2015-095. Ms. Rutledge opined generally that “most records are in active use or storage” and then referenced dictionary definitions of the term *storage* in support of her conclusion that custodians have three business days to disclose electronic files because they are stored on a computer or smart phone. *Id.*

Ms. Rutledge's opinion is at odds with the directives of the FOIA. While Ms. Rutledge looked to dictionary definitions, she ignored a prior opinion from Attorney General Winston Bryant determining that the FOIA's use of the term *storage* means only "those records which at the time of the FOIA request are located in a place which makes immediate access impossible or impractical." Ark. Op. Att'y Gen. No. 94-225. Indeed, the FOIA provides that the storage exception applies only to those records that are "not available at the time a citizen asks to examine it." Ark. Code Ann. § 25-19-105(e). In this modern world of instant access due to the rapid evolution of technology, it is doubtful that immediate access to most electronic files would be "impossible or impractical." This is particularly true considering the General Assembly's technology directives in the FOIA.

The FOIA contemplates requests for electronic files and directs that "[a]ny computer hardware or software acquired [after 2001] shall be in full compliance with the requirements of [the FOIA] and shall not impede public access to records in electronic form." Ark. Code Ann. § 25-19-105(g). A "citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian's existing software." Ark. Code Ann. § 25-19-105(d)(2)(B). Further, the FOIA directs that "[r]easonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy those records shall not be denied to any citizen." Ark. Code Ann. § 25-19-105(d)(1). The upshot of these three statutory requirements is that electronic files shall not be kept by the custodian in a manner that would make their retrieval impossible or impractical. Rather, custodians shall keep electronic records in a manner allowing immediate access to citizens, citizens may request a copy of the electronic file in any medium that is readily available or in any format to which it is readily convertible, and citizens shall be afforded

reasonable access and reasonable comforts and facilities in which to review or copy the electronic file. In view of these FOIA dictates from the General Assembly, Ms. Rutledge's conclusion that custodians have three business days to disclose electronic files merely because they are located on a computer or smart phone is contrary to Arkansas law and should be rejected by Arkansas courts.

Moreover, the Supreme Court of Arkansas holds that the FOIA is to be "liberally" construed in order "to accomplish its broad and laudable purpose that public business be performed in an open and public manner." *Thomas v. Hall*, 2012 Ark. 66, 4-5, 399 S.W.3d 387, 390. Exceptions to the FOIA's requirements—such as the three-day extension—are narrowly construed and, when there is doubt, the exception "will be interpreted in a manner favoring disclosure." *Id.* Accordingly, even if there is any doubt in the language of the FOIA regarding the timing of the release of electronic files—and there should not be—Arkansas courts should determine that such records be released immediately upon request.