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CC: A&P Commission

FROM: Kit Williams, City Attorney

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DATE: July 1, 2015

RE: Exemptions to FOi: Mandatory?

Attorney General Leslie Rutledge opined following our request for an opinion submitted by Representative David Whitaker: "Exemptions under the FOIA are mandatory. That is, if a record is exempt under the FOIA, the agency holding the record may not disclose it even if it wishes to. Accordingly, the custodian does not have discretion to make available to the public those records that fall within an exemption." Attorney General Opinion No. 2015-056.

To address our concerns about our City Prosecutor's efforts to collect overdue Hotel, Motel, and Restaurant taxes from named individuals in Court, she agrees "That it seems likely that some officials will require access to exempt information in order to pursue collections." (page 3) It is not just "likely", but certain that the City Prosecutor's Office must have information about restaurant managers/ owners who have failed to pay their HMR taxes in order to prosecute them for violating our HMR ordinances.

What concerns me is her comment: "it bears noting that those who access exempt information when pursuing collections as agents of a county or city will be bound by the FOIA's nondisclosure requirements. Regarding cases conducted in court, however, it is not immediately apparent to me that pursuing collections in court is tantamount to opening records to the public."

She concludes by stating "While I am therefore uncertain whether the concerns mentioned in this regard are legitimate concerns under the FOIA, the county or city should consult local counsel for specific advice in connection with collection efforts." Can you say "Pass the buck?"

I remain unconvinced by the Attorney General's interpretation of A.C.A. § 35-19-105 (b) that the Legislature meant records requested within the following list of documents "shall be denied" rather than are exempted from the duty to disclose set forth in (a) of the FOIA.

"(a) (1) (A) Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen . . ."

A noted authority of the FOIA, Professor John Watkins, in his book The Arkansas Freedom of Information Act states on page 61:

"Finally, the FOIA's exemptions provisions appear to be mandatory rather than permissive. Section 25-19-105 (b) expressly states that "(i)t is the specific intent of this section that the [enumerated records] shall not be deemed to be open to the public" Therefore, the custodian does not have discretion to make available to the public records that fall within an exemption."

In a footnote to this statement, Professor Watkins notes: "However, at least one Attorney General's opinion suggests that exemptions are discretionary rather than mandatory." It is also important to note for

statutory interpretation and construction purposes that both Professor Watkins and Attorney General Rutledge failed to include all of § 25-19-105 (b) when quoting it. They both omitted the qualifying clause: "under the provision of this chapter," which ended the sentence.

As I have pointed out many times in my memos to you, the Arkansas Supreme Court has consistently and repeatedly held: "**We construe that statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible.**" *Citifinancial Mortgage Co., Inc. v. Matthews*, 372 Ark. 167, 271 S.W. 3d 501, 506 (2008). The entire beginning of the exceptions or exemptions subsection (b) states:

"It is the specific intent of this section that the following shall not be deemed to be made open to the public **under provisions of this chapter.**" (emphasis added).

A fair interpretation of this entire provision would be that the duty to disclose public records in subsection (a) shall not apply or would be exempted from the requirements of the FOIA for the category of documents listed in (b). Thus, a citizen could not force a city or county to provide documents "under provisions of this chapter (the FOIA)." **This exemption from having to provide documents is not the same thing as making all such documents secret** and preventing the government from voluntarily releasing information that it believes the public should know and that does not violate legitimate privacy rights.

The Legislature knows how to prohibit the release of public documents when that is its true intent. Release of a business's sales tax records is expressly prohibited in the Sales and Use Tax Chapter. The Legislature could have, but did not pass a similar prohibition to release Hotel, Motel and Restaurant tax information in the A&P Commission Chapter which authorizes Hotel, Motel and Restaurant taxes. In § 25-19-105 **Examination and copying of public records** (a) (1) (B), the Legislature used very clear language "However, access to inspect and copy public records **shall be denied** to: (a prisoner convicted of a felony)."

The Legislature could have worded § 25-19-105 (b) "the following shall not be released:" rather than "the following shall not be deemed made open for the public under provisions of this chapter." If the Legislature really intended the FOIA to promote secrecy and the withholding of the listed documents, why not use the clear "shall not be released" language?

What was the Legislature's intent by enacting the FOIA? The Legislature spelled it out for us.

"25-19-102. 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."

How has the Arkansas Supreme Court interpreted the FOIA and specifically the exceptions or exemptions of subsection (b)?

"We liberally interpret the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner. Furthermore, this court broadly construes the Act in favor of disclosure.

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(T)he FOIA should be **broadly construed in favor of disclosure and exceptions construed narrowly** in order to counterbalance the self-protective interests of the governmental bureaucracy . . ." *Pulaski County v. Arkansas Democrat-Gazette*, 370 Ark. 435, 439-440, 206 S.W. 3d 718, 721 (2007) (emphasis added, citations omitted).

So has the Arkansas Attorney General interpreted the FOIA as required by the Arkansas Supreme Court: "broadly construed in favor of disclosure and exceptions construed narrowly"? I respectfully think not, although I recognize that many previous Attorney General Opinions have also concluded that the FOIA's exceptions are mandatory. Since this issue has yet to be considered and decided by the Arkansas Supreme Court, there is no clear and final answer to this question.

CONCLUSION

Because someone who violates the FOIA (including failing to properly apply an exception or exemption) could be prosecuted for a misdemeanor (A.C.A. § 25-19-104 **Penalty**), my advice to the City's Accounting Department is to follow Arkansas Attorney General Rutledge's Opinion and do not release further Hotel, Motel and Restaurant tax reports. My advice to our City Prosecutor's Office is to continue their good work which has recovered over \$800,000.00 in overdue HMR taxes since 2001 for the A&P Commission and City Parks and Recreation Department. However, the usual monthly report to the A&P Commission should no longer include the names of any defendant, manager or business, but only include the monthly total of overdue HMR taxes collected and number of ongoing prosecutions.

The City's Billing and Collection Division and Water Department should also treat the new exemptions of water customer records as mandatory although release of such addresses to the Fayetteville Police Department when necessary for law enforcement and emergency situations should continue to be done. I stand ready to defend such action especially if the safety of our citizens or police officers would otherwise be threatened.