

IN THE CIRCUIT COURT CRITTENDEN COUNTY

PAM HICKS

PLAINTIFF

v.

CV -12-2012-290

THE WEST MEMPHIS, ARKANSAS,
POLICE DEPARTMENT; THE CITY
OF WEST MEMPHIS, ARKANSAS;
DONALD OAKES, in his Individual
and Official Capacities as Chief of Police
of The West Memphis, Arkansas,
Police Department; and, WILLIAM
H. JOHNSON, in his Individual and
Official Capacities as Mayor of
WEST MEMPHIS, ARKANSAS

DEFENDANTS

PETITION FOR DECLARATORY JUDGMENT AND COMPLAINT FOR
VIOLATION OF THE ARKANSAS FREEDOM OF INFORMATION ACT OF 1967

Comes now the Petitioner, and for her Petition for Declaratory Judgment and Complaint
for Violation of the Arkansas Freedom of Information Act of 1967, states:

I. PARTIES AND JURISDICTION

1. This Petition and Complaint is brought pursuant to Rule 57 of the Arkansas Rules
of Civil Procedure, and Arkansas Code Annotated, Sections 16-90-1114(a), 16-111-101, *et seq.*,
and 25-19-101, *et seq.*, to determine the rights and status of the parties with respect to the right of
the Plaintiff, Pam Hicks to view evidence, if any, currently held by The West Memphis Police
Department.

2. The Plaintiff is a resident of Blytheville, Mississippi County, Arkansas.

3. Defendant, The West Memphis, Arkansas, Police Department, is a state agency
located in Crittenden County, Arkansas, responsible for the retention of evidence gathered in
criminal investigations and prosecutions of criminal activity occurring within the borders of the

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TERRY HARRIS
CLERK
CIRCUIT COURT CLERK
CRITTENDEN COUNTY, AR

City of West Memphis.

4. Defendant, The City of West Memphis, is a Municipal Corporation, organized under the laws of the State of Arkansas and located in Crittenden County, Arkansas. It is responsible for the policies, procedures, and practices implemented through its various agencies, agents, departments, and employees, and for injury occasioned thereby. It was also the public employer of Defendants Chief Oakes, and Mayor Johnson at all times relevant to this Complaint.

5. Defendant, Donald Oakes, is the duly appointed Chief of Police of the Defendant, The West Memphis, Crittenden County, Arkansas, Police Department. Defendant, Oakes, is sued in his individual and official capacities as Chief of Police of the Defendant, The West Memphis, Arkansas, Police Department. He is and has been responsible for the promulgation and implementation of police policies, procedures, and practices in the City of West Memphis, Arkansas.

6. Defendant, William H. Johnson, is the duly elected Mayor of the City of West Memphis, Crittenden County, Arkansas.

7. All facts herein complained of occurred in Crittenden County, Arkansas.

8. The property at issue in this matter is located in Crittenden County, Arkansas.

9. This Court is a court of proper jurisdiction.

10. This Court is a court of proper venue.

II. FACTS

11. Pam Hicks of the mother of Steve E. Branch, deceased.

12. On May 5, 1993, Steve E. Branch, deceased, was murdered in West Memphis, Arkansas.

13. Steve E. Branch, deceased, was eight years old at the time of his murder.

14. Two other eight-year-old children were also murdered at the same place and time.

15. The Defendant, The West Memphis Police Department, investigated the murder of Steve E. Branch, deceased, as well as the two other minors.

16. The Defendant, The West Memphis Police Department, gathered evidence as part of said investigation.

17. On, or about, Saturday, June 9, 2012¹, the Plaintiff, through her below-signed attorney, requested the opportunity to view all said evidence. See, Plaintiff's Exhibit 1, Letter from below-signed attorney to the West Memphis Police Department, attached.

18. Said Letter was received on, or about, June 12, 2012. See, Plaintiff's Exhibit 2, Postal Service Form 3811, 7011 1570 0001 5355 0601, attached.

19. Also on June 12, 2012, the City of West Memphis responded in a letter to the below-signed attorney. See, Plaintiff's Exhibit 3, Letter from West Memphis Police Department to below-signed attorney, attached.

20. In said response, the City of Memphis, on behalf of all Defendants, denied the Plaintiff's request to view the evidence gathered as part of the investigation of the murders of May 5, 1993, in West Memphis, Arkansas.

21. As is shown below, said denial was in violation of Arkansas Law.

III. VIOLATION OF THE FREEDOM OF INFORMATION ACT OF 1967

22. In its Response Letter, the City of West Memphis states that the Rights of Victims of Crime Act "is not applicable to the physical evidence retained by a law enforcement agency

¹ The Letter is dated June 8, 2012, but was actually mailed on June 9, 2012.

following a conviction for a violent offense. In accordance with A.C.A. §12-12-104(b), following any conviction for a violent offense, the physical evidence is required to be permanently impounded and securely retained by the law enforcement agency.” *Id.*

23. The Defendants err in the above-stated position.

a. **THE RIGHTS OF VICTIMS OF CRIME ACT AND ARKANSAS
CODE ANNOTATED SECTION 12-12-104**

24. The Rights of Victims of Crime Act states that: “The responsible official shall promptly *return* the property to the victim *when it is no longer needed for evidentiary purposes*, unless it is contraband or subject to forfeiture.” Ark. Code Ann. §16-90-1106(b)(emphasis supplied).

25. The Defendants are correct that the law enforcement agency shall permanently retain the property gathered in an investigation of a violent offense. Ark. Code Ann. §12-12-104(b)(2)(A).

26. The Plaintiffs certainly agree that the murder of Steve E. Branch is a violent offense.

27. Therefore, the Plaintiff would agree that there will never be a time when the evidence in said crime “is no longer needed for evidentiary purposes”.

28. Therefore, the Plaintiff agrees that the Rights of Victims of Crime Act would not apply.

29. However, the Plaintiff has not asked that any property be *returned*, which is the remedy or right provided by the Rights of Victims of Crime Act. Ms. Hicks has only asked that she be allowed to view the property.

30. Therefore, the Defendants have created a straw-man argument by saying that the Rights of Victims of Crime Act “is not applicable”. The Plaintiff asserts her standing pursuant to the Rights of Victims of Crime Act as well as the Freedom of Information Act.

31. As is shown below, the actions of the Defendants are in violation of the Arkansas Freedom of Information Act of 1967.

**b. THE FREEDOM OF INFORMATION ACT OF 1967 AND
ARKANSAS CODE ANNOTATED SECTION 12-12-104**

32. As shown above, the Defendants create a false dichotomy between the Rights of Victims of Crime Act (the return of evidence) and the duty of law enforcement to retain evidence of a violent crime permanently.

33. The Plaintiff seeks to view the evidence, not return of the evidence.

34. The Plaintiff is entitled to view the evidence pursuant to the Freedom of Information Act of 1967.

35. The reliance of Defendants on Arkansas Code Annotated Section 12-12-104 is in error.

36. What the statute referred to by the Defendant, The City of West Memphis, actually says is: “After a trial resulting in conviction, the evidence shall be *impounded and securely retained* by a law enforcement agency” (emphasis supplied).

37. Nowhere in the statute does it state that the Freedom of Information Act “is not applicable to the physical evidence retained by a law enforcement agency following a conviction for a violent offense.”

38. On the contrary, the very fact that law enforcement is required to retain evidence

permanently instead of destroying the evidence would presumptively be indicative of the Legislative intent that the evidence should be made available to the public, and nothing in either the statute itself, or in the legislative history of the statute, or in any judicial interpretation of the statute says otherwise.

39. The right to such viewing is provided by the Freedom of Information Act of 1967. Ark. Code Ann. §25-19-101, *et seq.*

40. Specifically, “Except as otherwise *specifically* provided by *this section* or bylaws *specifically enacted to provide otherwise*, 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 the records.” Ark. Code Ann. §25-19-105(a)(1)(emphasis supplied).

41. There is nothing, specific or otherwise, in Arkansas Code Annotated Section 12-12-104 that exempts it from the Freedom of Information Act of 1967. On the contrary, the passage of 12-12-104 had nothing at all to do with whether evidence involving a violent crime could viewed by the public. The preamble to 12-12-104 states: “An act to provide for an alternate means of satisfaction of the statute of limitations for prosecutions based on DNA and other scientific evidence; for post-conviction appeals based on DNA and other scientific evidence; for chain of custody protection and other scientific evidence; and for other purposes.” Act 1780 of 2001, General Session, preamble. There is not a single word indicating that the legislature intended 12-12-104 to prohibit the public from viewing evidence involving a violent crime. *Cf.*, Ark. Code Ann. §25-19-110(a).²

² “Beginning July 1, 2009, in order to be effective, a law that enacts a new exemption to the requirements of this chapter or that substantially amends an existing exemption to the requirements of this chapter shall state that the record or meeting is exempt from the Freedom of Information Act of 1967, § 25-19-101 *et seq.*”

42. Because the Arkansas Freedom of Information Act of 1967 requires any exemption of the Act to be specific, whenever the legislature fails to specify that any records in the public domain are to be excluded from inspection, or is less than clear, the court must find in favor of the right to inspect. The burden of confidentiality rests on the statute itself, and if the intention is doubtful, the court must order disclosure. *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986).

43. Moreover, exemptions to the Freedom of Information Act of 1967 should be narrowly construed, and when the scope of the exemption is unclear or ambiguous, the court must rule in favor of disclosure. *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992); *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

44. Words are given their usually accepted meaning in common language. *King v. Ochoa*, 373 Ark. 600, 601-02 (2008). Statutory language must be construed “so that no word is left void or superfluous and in such a way that meaning and effect is given to every word wherein, if possible.” *Nationsbank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 443-444, 36 S.W.3d 291, 295 (2001).

45. Moreover, “even seemingly conflicting statutes should be read in a harmonious manner where possible. In addition, this court will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent.” *Wright v. Centerpoint Energy Resources Corp.*, 276 S.W.3d 253 (2008).

46. Plaintiff submits that The Freedom of Information Act of 1967 and Arkansas Code Annotated Section 12-12-104 are not contradictory, as there is nothing in Section 12-12-104 that prohibits the viewing of evidence, and therefore, the statutes should be read

harmoniously.

47. To the extent that the Acts can be read to be in contradiction, such a result would lead to an absurd result, as the very point of retaining evidence is that it may be viewed.

c. **THE FREEDOM OF INFORMATION ACT OF 1967 AND
JUDICIAL INTERPRETATION**

48. The Defendants next rely upon *Nolan v. Little*, 196 S.W.3d 1(2004). This too is in error.

49. To understand why the Defendants are in error, first it must be understood how the Court interprets the Freedom of Information Act of 1967.

50. Upon passage of the Freedom of Information Act of 1967, the General Assembly found that “the proper functioning of a democratic society is dependent upon the public being informed at all times with respect to the operations of government, and public officials shall at all times be held accountable for their public actions and conduct”. Emergency Clause of the Freedom of Information Act of 1967.

51. The General Assembly further found that: “the immediate passage of [the Freedom of Information Act of 1967] is necessary . . . to secure to the public their proper right of access to public records”. *Id.*

52. Therefore, unless otherwise specifically provided, “all public records shall be open to inspection and copying by any citizen of the State of Arkansas”. Ark. Code Ann. §25-19-105(a)(1).

53. That Court will recall, as shown above, that when determining whether a public record is exempt the exempting statute must be specific and unambiguous. So it is that when

interpreting what is a “public record” the Freedom of Information Act of 1967 is to be liberally interpreted to accomplish the Act’s laudable purposes. See, e.g., *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977); *Sebastian County Chapter of Am. Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993); and, *Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004). Therefore, the presumption, both in interpreting an exemption or determining whether the information requested is a public record, is the same: that there is no exemption and the information requested is a public record as defined by the Act. Stated another way, the presumption is that the public should have access to the information requested.

54. In contrast, the plaintiff in *Nolan* (the case relied upon by the Defendants) requested to take seeds held by the State Plant Board and destroy the seeds through testing.

55. The Court in *Nolan* held that a “seed sample does not meet the definition of a ‘public record,’ because it cannot be said to be an object ‘on which records and information may be stored or represented.’”

56. The Court in *Nolan* held that the seeds themselves were therefore not public records, but instead, only “the documents relating to the testing of a seed sample” are public records.

57. The testing of seeds is to be distinguished from evidence in a criminal prosecution. In a criminal prosecution, it is the evidence itself, not documents about the evidence, that are presented to the jury.

58. Therefore, unlike the seeds in *Nolan*, the evidence in a criminal case here does directly present information to the public, and therefore is an object ‘on which . . . information may be stored or represented.’”

59. Contrary to the position of the Defendants, the Plaintiff's situation is much more similar to a request to view crime scene photographs and pathologist photographs. Such information are also objects "on which . . . information may be stored or represented." Therefore, such evidence is subject to the Freedom of Information Act of 1967. See, *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). There simply is no exemption to the Freedom of Information Act of 1967 of evidence in a criminal prosecution.

60. Moreover, here, unlike the plaintiff in *Nolan*, Ms. Hicks does not wish to take anything, but merely view the evidence.

61. In *Nolan*, there was a relatively low level of public interest in the testing of the seeds. On the contrary, here, where the evidence sought to be viewed involved the triple-homicide of three young boys, it is difficult to imagine a higher level of public interest.

62. Certainly the Court would be wise to use a common sense approach when distinguishing these two fact-patterns - one involving the destruction of seeds held by an administrative agency with relatively low level of public interest in such testing and the other involving simple viewing of evidence in a criminal case with a very high level of public interest.

63. In fact, it is exactly the plea to "common sense" that the Court in *Nolan* required. ("This court has said that we will balance the interests between disclosure and non-disclosure using a common sense approach.")

IV. CONCLUSION

64. Therefore, the Defendants' reliance on Arkansas Code Annotated 12-12-104 and *Nolan* is in error.

65. Nothing in Arkansas Code Annotated 12-12-104 specifically exempts physical

evidence in a criminal case. Therefore the information is subject to the Freedom of Information Act of 1967.

66. The information sought, as all evidence presented to a jury, is a medium that stores information. Ms. Hicks does not want to destroy the product, but seeks only to view and examine it, and it is of high public interest, unlike the seeds in *Nolan* that conveyed no information to the public in and of themselves, were sought to be destroyed, and were of low public interest.

WHEREFORE, Plaintiff prays for an order from this Court granting her Petition and Complaint against the Defendants, for an order to the Defendants requiring them to allow her to view and examine all evidence gathered in the investigation of the murders that occurred in West Memphis on May 5, 1993, and for all other proper relief.

Respectfully Submitted,



Ken Swindle
Ark. Bar #97234
619 West Walnut Street
Rogers AR 72756
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Fax (479) 621-0838

SWINDLE LAW FIRM

KEN SWINDLE, Esq.
619 W. Persimmon Street
Rogers AR 72756

Phone: (479) 621-0120 Fax: (479) 621-0838

June 8, 2012

West Memphis Police Department
626 East Broadway Street
West Memphis AR 72301

Via Certified Mail:
7011 1570 0001 5355 0601

Re: Freedom of Information Act Request

Dear Sir or Madam:

Please be advised that I represent Pam Hicks, the mother of Stevie Branch, who was murdered on May 5, 1993, in West Memphis. I am writing to you to formally request Ms. Hicks, accompanied by my agent, Danny Owens, to be allowed to view **all property** owned by Ms. Hicks, or, alternatively, owned by her minor son Stevie Branch at the time of his death, as well as all other physical evidence relating to the triple homicide investigation of May 5, 1993, that is currently held by the West Memphis Police Department. This evidence includes, but is not limited to, any bicycle and any clothing and personal effects of any of the three victims, including any shoes of any of the victims.

This letter is made pursuant to the Rights of Victims of Crime Act, and the Arkansas Freedom of Information Act. See, Ark. Code Ann. §§16-90-1106, 1114-1115, and 25-19-101, *et seq.* As you know, the Freedom of Information Act provides that any person who negligently violates its provisions shall be guilty of a misdemeanor and punished by a fine or jail time, or both, or a sentence of public service or education, or both. If the evidence requested is in active use or storage and therefore not available at this time for examination, then the custodian of that evidence shall certify this fact in writing to the applicant and set a date and hour within **three working days**, at which time the records will be available. Any citizen denied the rights granted to him by the Arkansas FOIA may appeal immediately from the denial to the Pulaski County Circuit Court or to some other appropriate Circuit Court for relief. The petition shall be heard within 7 days of the application of the petitioner and those who refuse to comply with the orders of the court shall be found guilty of contempt of court.

In any action to enforce the rights granted by the Arkansas FOIA, or in any appeal therefrom, the Court shall assess against the defendant reasonable attorneys fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed, unless the court finds that the position of the defendant was substantially justified, or that other circumstances make an award of those expenses unjust.

Would you kindly let me know what arrangements are necessary for my client, Pam Hicks, accompanied by my agent, Danny Owens, to gain access to the file and review the evidence requested? Thank you, and I look forward to working with you in this matter.

Sincerely,


Ken Swindle



SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p><i>[Signature]</i></p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p><i>Brenda Bury 6/14/12</i></p>
<p>1. Article Addressed to:</p> <p>WEST MEMPHIS POLICE DEPARTMENT 626 EAST BROADWAY STREET WEST MEMPHIS AR 72301</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>2. Article Number (Transfer from service label)</p>	<p>7011 1570 0001 5355 0601</p>
<p>PS Form 3811, February 2004</p>	<p>Domestic Return Receipt HICKS 102595-02-M-1540</p>

Blumenthal No. 0113
PLAINTIFF'S EXHIBIT
2



CITY OF WEST MEMPHIS

205 S. Redding • P.O. Box 1728 • West Memphis, AR 72303-1728 • (870) 732-7500

DAVID C. PEEPLES
CITY ATTORNEY

(870) 732-7515

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June 12, 2012

Mr. Ken Swindle
Attorney at Law
619 W. Persimmon Street
Rogers, AR 72756

Re: Freedom of Information Request

Dear Mr. Swindle:

Your Freedom of Information request dated June 9, 2012, directed to the West Memphis Police Department has been referred to this office for a response. Initially, I note that you have referenced the Rights of Victims of Crime Act, however, that Act is not applicable to the physical evidence retained by a law enforcement agency following a conviction for a violent offense. In accordance with A.C.A. §12-12-104(b), following any conviction for a violent offense, the physical evidence is required to be permanently impounded and securely retained by the law enforcement agency. Any request under the Rights of Victims of Crime Act to review the physical evidence referenced in your letter is denied.

Additionally, the Arkansas Freedom of Information Act is not applicable to the physical evidence referenced in your letter and which is retained by the West Memphis Police Department. A.C.A. §25-19-103((5)(A) defines "public records" as "writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds." In *Nolan v. Little*, 359 Ark. 161, 196 S.W. 3d 1 (2004), the Arkansas Supreme Court determined that the Freedom of Information Act does not apply to physical objects that are not "mediums" on which records and information may be stored or represented. For this reason, your Freedom of information request to review the physical evidence in this matter is denied.

Arrangements to inspect and/or copy the documents and any other "public records" that are available pursuant to the Arkansas Freedom of Information Act may be made by contacting Capt. Regina Meek of the West Memphis Police Department at 626 East Broadway, West

Mr. Ken Swindle
June 12, 2012
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Memphis, AR, 72301, or by phone at 870-732-7684.

Sincerely,

A handwritten signature in black ink, appearing to read "David C. Peoples". The signature is written in a cursive style with a large, looping initial "D".

David C. Peoples
City Attorney

cc: Chief Donald Oakes
Capt. Regina Meek