

IN THE CIRCUIT COURT CRITTENDEN COUNTY

**PAM HICKS and JOHN MARK
BYERS**

APPELLANTS

v.

CV-2012-290-6

**THE WEST MEMPHIS, ARKANSAS,
POLICE DEPARTMENT; et al.**

APPELLEES

**SIXTH AMENDED PETITION FOR DECLARATORY JUDGMENT,
COMPLAINT FOR VIOLATION OF THE ARKANSAS FREEDOM OF
INFORMATION ACT OF 1967, APPEAL FROM ADMINISTRATIVE DECISION
OF THE APPELLEES, AND VIOLATION OF COMMON LAW RIGHT OF ACCESS**

Come now Pam Hicks and John Mark Byers (hereinafter, "Appellants"), and for their Sixth Amended Petition for Declaratory Judgment, Complaint for Violation of the Arkansas Freedom of Information Act of 1967, Appeal from Administrative Decision of the City of West Memphis, (hereinafter, "Appellee"), and Violation of Common Law Right of Access, state:

I. INTRODUCTION AND FACTS

1. The Appellants hereby incorporate to this Sixth Amended Petition, Complaint, and Appeal, all statements, allegations, and exhibits of the original and First, Second, Third, Fourth, and Fifth Amended Petitions, and Complaint, and Appeal, as if restated herein word-for-word. Ark. R. Civ. P. 10(c).

2. On, or about, August 18, 2012, the below-signed attorney, on behalf of the Appellants, transmitted, by certified mail, a request to Appellee. See, Appellants' Exhibit 17, August 18, 2012, Letter from below-signed attorney to Appellee, attached.

3. Said request was made pursuant to the Arkansas Freedom of Information Act of 1967.

4. Said Letter was received by Appellee on August 20, 2012. See Appellants' Exhibit 18, PS Form 3800, 7011 1570 0001 5354 5508, attached.
5. Said letter requested, in part,
- Any documentation of phone conversations pertaining to the murders of Steve Branch, Christopher Byers and Michael Moore including potential evidence gathered through use of a Tip-line or Crime Hotline from May 5, 1993, until the present; and,
 - All documentation of any follow up investigations from said conversations including; the Detective(s) that callers or tipsters would have been referred to, and
 - Any documentation of interviews conducted by the West Memphis Police Department regarding victim Steve Branch's step father, Terry Wayne Hobbs; either in person or by telephone or by any other form of communication; and,
 - Any documentation or report of evidence gathered in regard to Terry Wayne Hobbs, including any testing done on such evidence.
6. On, or about, August 20, 2012, the Appellee responded by agreeing to provide the information requested. See, Appellants' Exhibit 19, August 20, 2012, Letter from Appellee to below-signed attorney, attached.
7. On, or about, September 5, 2012, the Appellee revoked the offer to provide the information requested. See, Appellants' Exhibit 20, September 5, 2012, Letter from Appellee to below-signed attorney, attached.

II. CAUSES OF ACTION

8. Appellee relied on three sources of claimed legal authority for their decision:
- Arkansas Code Annotated Section 16-90-1006;
 - *Byrne v. Eagle*, 319 Ark. 587, 892 S.W.2d 487 (1995); and,

- Arkansas Attorney General Opinions 2009-173; 2009-130; and 2003-043.

9. Arkansas Attorney General Opinions are not binding on any Court and need not be addressed.

10. The Appellee's reliance on Arkansas Code Annotated Section 16-90-1006 and *Byrne v. Eagle* is in error and in violation of the Arkansas Freedom of Information Act of 1967, the Appellants' Common Law Right of Access to Public Information, and the Appellants' Constitutional Rights of Privileges and Immunities.

III. STANDARD OF REVIEW

11. As stated in Paragraph 40 of the original complaint: "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).

12. Moreover, as the Appellants reminded the Court in Footnote Two of the Original Complaint, "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.*" Ark. Code Ann. §25-19-110(a).

13. Also, exemptions must be narrowly construed and, when in doubt, the Court must order disclosure of the information. *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986); *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992); *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

14. Finally, as the Court knows, “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).

IV. ANALYSIS

15. What Arkansas Code Annotated Section 16-90-1006 actually states is:

16-90-1006. Misuse of information.

(a) A person who is a member or employee of the Crime Victims Reparation Board or who accepts the report of criminal activity on behalf of a local crime stoppers program commits an offense if the person intentionally or knowingly divulges to a person not employed by a law enforcement agency the content of a report of a criminal act or the identity of the person who made the report without the consent of the person who made the report.

(b) An offense under this section is a Class A misdemeanor.

16. Here, we know that the legislature has required that any exemption to the Freedom of Information Act must be specific. There is no exemption to the Freedom of Information Act of 1967 for Tip-line or Crime Hotline information.

17. Therefore, the presumption is that Tip-line or Crime Hotline information is not exempt.

18. The Appellee takes a broad-reading of Arkansas Code Annotated Section 16-90-1006. Such a reading would exclude all Tip-line or Crime Hotline information. In compliance with guidance given by the Court in the cases cited above, the Court would be well-advised to take a more conservative reading of any statute allegedly restricting the Freedom of Information Act of 1967. The Court may take such a conservative reading by analyzing whom said statute is actually directed to.

19. Specifically, the statute addresses: “A person who . . . accepts the report of criminal activity on behalf of a *local crime stoppers program*” (emphasis supplied).

20. Arkansas Code Annotated Section 16-90-1001(3) explains that

“Local crime stoppers program” means the acceptance and spending of donations by a private, nonprofit organization for rewards to persons who report information concerning criminal activity to the organization, if the organization:

(A) Operates less than statewide; and

(B) Forwards reported information to the appropriate law enforcement agency.

21. Here, by a straight-forward reading of the above definition, the Appellants have not asked for information from a “Local crime stoppers program”. They have asked for Tip-line or Crime Hotline information from a police department.

22. Moreover, regardless of whether Tip-line or Crime Hotline is somehow considered synonymous with a “Local crime stoppers program”, the Appellants also asked for follow up investigations, interviews, and any testing done. This part of the request obviously has nothing to do with Tip-line or Crime Hotline or “Local crime stoppers program” information, but is a request of any action take with regard to such information.

23. In the alternative, even if Arkansas Code Annotated 16-90-1006 should be read to include the request made by the Appellants (which it should not), the statute should be read in conjunction with the Arkansas Freedom of Information Act of 1967.¹

24. Specifically, and as the Appellants have conceded, ongoing investigations are exempt

¹ “All legislative acts relating to the same subject are said to be *in pari materia* and must be construed together and made to stand if they are capable of being reconciled.” *Minnesota Min. & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151, 155 (Ark. 1999).

from the Arkansas Freedom of Information Act.²

25. Therefore, even if Arkansas Code Annotated Section 16-90-1006 were read to include the information requested by the Appellants, such a reading should be limited to include information regarding ongoing investigations.

26. On October 24, 2012, the Court heard the undisputed and uniform testimony of the representatives of the Appellee that the information requested does not involve an ongoing investigation.

27. Therefore, again, Arkansas Code Annotated Section 16-90-1006 should be declared inapplicable to the request made by the Appellants to the Appellee on August 18, 2012.

28. In fact, it is this common sense approach in reading two potentially conflicting definitions together that the Court used in *Byrne v. Eagle*. There, the Court held: “For us to treat the two application processes differently for purposes of public disclosure would render inconsistent and absurd consequences. Moreover, it is clear beyond question that the intent of the General Assembly was to keep the application process confidential during the preliminary stages until an approval recommendation had been made to the authority.” 319 Ark. 587, 892 S.W.2d 487, 490 (1995).

29. Here, the legislative intent of protecting Tip-line or Crime Hotline information, if at all, should only be applied to ongoing investigations.

30. In the alternative, Appellants assert their rights to the information sought pursuant to their Constitutional Rights under the Privileges and Immunities Clause of the Federal and State

² The statutory exemption under the Arkansas Freedom of Information Act actually only applies to “Undisclosed investigations by law enforcement agencies of suspected criminal activity”. Ark. Code Ann. §25-19-105(b)(6). However, the Arkansas Supreme Court has included in this definition “ongoing investigations”. See, e.g., *McCambridge v. Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

Constitutions, and seek an order from this Court declaring Arkansas Code Annotated 16-90-1006 unconstitutional as applied to them.

31. Appellants respectfully request a hearing within seven days of this Petition. Ark. Code Ann. §25-19-107(b).

WHEREFORE, Appellants pray for an order from this Court granting their Fourth Amended Petition, Complaint, and Appeal against the Appellants, for an order to the Appellees requiring them to allow Appellants to view and examine all evidence gathered in the investigation of the murders that occurred in West Memphis on May 5, 1993, for an order from this Court directing the Defendants to provide an evidence log or list identifying the physical evidence, for an order from this Court directing the Defendants to provide all logs or other records indicating who has been permitted access to any of the physical evidence, for an order requiring the Appellee, Ellington, to provide the information requested in the Appellants' Exhibit 11, for an order directing the Appellee to produce investigative notes, for an order from this Court granting them access to the information requested pursuant to their common law right of access to public information, for an order granting the Appellants access to any documentation of phone conversations pertaining to the murders of Steve Branch, Christopher Byers and Michael Moore including potential evidence gathered through use of a Tip-line or Crime Hotline from May 5, 1993, until the present; all documentation of any follow up investigations from said conversations including; the Detective(s) that callers or tipsters would have been referred to, any documentation of interviews conducted by the West Memphis Police Department regarding victim Steve Branch's step father, Terry Wayne Hobbs; either in person or by telephone or by any other form of communication; and, any documentation or report of evidence gathered in regard to Terry Wayne

Hobbs, including any testing done on such evidence, and for all other proper relief.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Ken Swindle", written over a horizontal line.

Ken Swindle

Ark. Bar #97234

619 West Walnut Street

Rogers AR 72756

Telephone (479) 621-0120

Fax (479) 621-0838

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby state that the above-referenced document was transmitted to David Peoples, and the Arkansas Attorney General's Office, via facsimile, this 27th day of October, 2012.

A handwritten signature in blue ink, appearing to read "Ken Swindle", written over a horizontal line.

Ken Swindle

SWINDLE LAW FIRM

KEN SWINDLE, Esq.
619 W. Persimmon Street
Rogers AR 72756
Phone: (479) 621-0120 Fax: (479) 621-0838

August 18, 2012

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

Via Certified Mail:
7011 1570 0001 5354 5508

Re: Freedom of Information Act Request

Dear Sir or Madam:

Re: Freedom of Information Act Request

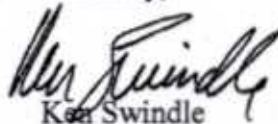
Dear Sir or Madam:

Allow this to follow up my requests on behalf of Pam Hicks and John Mark Byers. Pursuant to the Freedom of Information Act of 1967, and in addition to the information previously requested, I am also requesting documentation of the following information:

1. Any documentation of phone conversations pertaining to the murders of Steve Branch, Christopher Byers and Michael Moore including potential evidence gathered through use of a Tip-line or Crime Hotline from May 5, 1993, until the present; and,
2. All documentation of any follow up investigations from said conversations including; the Detective(s) that callers or tipsters would have been referred to, and;
3. A detailed explanation of the procedure that the West Memphis Police Department employs with its use of such Tip-Line or Crime Hotline resources; and,
4. Any documentation of interviews conducted by the West Memphis Police Department regarding victim Steve Branch's step father, Terry Wayne Hobbs; either in person or by telephone or by any other form of communication; and,
5. Any documentation or report of evidence gathered in regard to Terry Wayne Hobbs, including any testing done on such evidence.

Would you kindly let me know what arrangements are necessary for my clients, accompanied by my agent, Danny Owens, to review the information requested? Thank you, and I look forward to working with you in this matter.

Sincerely,


Ken Swindle



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 or PO Box No. 626 EAST BROADWAY STREET
 City, State, ZIP+4[®]
 WEST MEMPHIS AR 72301
 PS Form 3811, February 2004 (HICKS) See Reverse for Instructions

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 checked="" type="checkbox"/> Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) Brenda Buss</p> <p>C. Date of Delivery 8/19/12</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>1. Article Addressed to: WEST MEMPHIS POLICE DEPARTMENT 626 EAST BROADWAY STREET WEST MEMPHIS AR 72301</p>	<p>3. Service Type <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 5354 5508</p>

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1

PLAINTIFF'S
 EXHIBIT

18



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

FAX: (870) 732-7514

E-mail: dpeeples@citywm.com

August 20, 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 August 18, 2012, specifically directed to the West Memphis Police Department has been referred to this office for a response.

The items specifically referenced as numbers 1, 2, 4, and 5 in your request of August 18, 2012, appear to be "public records" as defined by the Arkansas Freedom of Information Act. To the extent that the West Memphis Police Department has custody of any of these specifically referenced items, 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, during regular business hours, at 626 East Broadway, West Memphis, AR, 72301, or by phone at 870-732-7684.

The item specifically referenced as number 3 in your request of August 18, 2012, appears to request a "detailed explanation," rather than an identifiable document. Please see A.C.A. §25-19-105(d)(2)(c) which provides that "A custodian is not required to compile information or create a record in response to a request made under this section." To the extent that item number 3 calls for the compilation of information or the creation of a record, it is denied. I am advised that the West Memphis Police Department is not aware of any specific existing record that would be responsive to item number 3.

Sincerely,

David C. Peeples
City Attorney

cc: Chief Donald Oakes
Capt. Regina Meek



CITY OF WEST MEMPHIS

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

DAVID PEEPLES
CITY ATTORNEY**FAX TRANSMISSION**(870) 732-7515
FAX: (870) 732-7514
E-mail: dpeeples@citywm.com

TO: Mr. Ken Swindle

FROM: DAVID C. PEEPLES

DATE: September 5, 2012

RE: Supplemental response to FOI request dated August 18, 2012

FAX NO: 479-621-0838TOTAL PAGES INCLUDING THIS ONE 2

ORIGINAL TO FOLLOW BY MAIL YES () NO (x)

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE IMMEDIATELY

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CITY OF WEST MEMPHIS

205 S. Redding • P.O. Box 1728 • West Memphis, AR 72393-1728 • (870) 732-7500

DAVID C. PEEPLES
CITY ATTORNEY

(870) 732-7515

Fax: (870) 732-7514

E-mail: dpeeples@citywm.com

September 5, 2012

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

Re: Freedom of Information Request

Dear Mr. Swindle:

This letter serves to supplement the response dated August 20, 2012, to your Freedom of Information request dated August 18, 2012, directed to the West Memphis Police Department.

It has come to the attention of the West Memphis Police Department that information received from a "tip line" or "crime hotline" may be subject to the provisions of A.C.A. §16-90-1001, et seq., pertaining to Local Crime Stoppers Programs. Specifically, A.C.A. §16-90-1006 makes it a criminal offense to disclose the content of a report of a criminal act or the identity of the person who made the report to a person not employed by a law enforcement agency without the consent of the person who made the report. The Arkansas Supreme Court has held and the Arkansas Attorney General has opined that statutes that limit the disclosure of certain records to certain persons or for certain purposes are sufficiently specific to qualify as an AFOI exemption. See *Byrne v. Eagle*, 319 Ark. 587, 892 S.W.2d 847 (1995) and Attorney General Opinions 2009-173, 2009-130 and 2003-043. Consistent with the holding in *Byrne* and the Attorney General opinions, it is our position that the application of criminal sanctions to the unauthorized disclosure of these records is sufficient indication of the General Assembly's intent that these records be exempt from disclosure under the Arkansas Freedom of Information Act.

To the extent that your Freedom of Information request of August 18, 2012, seeks the disclosure of information that is prohibited by the criminal sanctions set out in A.C.A. §16-90-1006, your request must be respectfully denied.

Sincerely,

A handwritten signature in black ink, appearing to read "David C. Peeples", is written over a horizontal line.

David C. Peeples
City Attorney

cc: Chief Donald Oakes
Capt. Regina Meek