

SWINDLE LAW FIRM

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November 5, 2012

David Peebles
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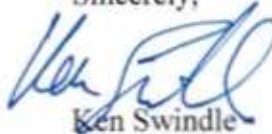
Arkansas Attorney General's Office
Attention: Colin Jorgensen
323 Center Street
Suite 200
Little Rock AR 72201

Re: *Hicks v. The West Memphis, Ark., Police Dept., et al.*
Crittenden County Circuit Court, CV-2012-290-6

Dear David and Colin:

Please find attached copies of the Appellants' Motion and Brief for Attorney Fees Against Separate Appellee, Scott Ellington.

Sincerely,



Ken Swindle

Attachment

pc: Pam Hicks
John Mark Byers

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

**MOTION AND BRIEF FOR ATTORNEY FEES
AGAINST SEPARATE APPELLEE, SCOTT ELLINGTON**

Come now the Appellants, and for their Motion and Brief for Attorney Fees Against Separate Appellee, Scott Ellington, states:

1. The Appellee, Scott Ellington, has acknowledged not responding to the request of the Appellants for 91 days.
2. Said inaction is in violation of the Freedom of Information Act of Arkansas of 1967.
3. As is shown in the Brief below, said violation entitles the Appellants to Attorney fees.
4. The attorney for the Appellants spent approximately 11.2 hours and \$50 for the service of process fee in dealing with Mr. Ellington's non-response. See Affidavit, attached.
5. The Appellants respectfully request payment of \$2,290.00 in reimbursement.
6. The Appellants reserve the right to request additional compensation depending upon any response required to the current motion or any additional travel time required for the hearing of the current motion.

WHEREFORE, Appellants respectfully pray that their Motion for Attorney Fees be

granted, for \$2,290.00 in compensation for attorney fees and cost reimbursement, for the opportunity to supplement said request as needed, and for all other proper relief.

II. BRIEF

As the Court knows, "In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney's 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." Ark. Code Ann. §25-19-107(d)(1).

Here, it is undisputed that the Appellee refused to comply with the request of the Appellants until the 91 days after the transmission of said request. However, custodians of records shall "within 24 hours of [requests made pursuant to the Freedom of Information Act] determine whether the records are exempt from disclosure and make efforts to the fullest extent possible to notify the person making the request and the subject of the records of the decision." Ark. Code Ann. §25-19-105(c)(3)(A). Therefore, the response was untimely. In fact, strangely enough, the Appellee's own exhibits to his motion to dismiss, showing the exchange of 10 separate emails pleading for a response from the Appellee concede this point. See, Exhibits to Motion to Dismiss filed by Appellee and incorporated herein. Ark. R. Civ. P. 10(c). Therefore, the Appellee, by his own statement in Paragraph 3 of his Motion to Dismiss, concedes that he does, in fact, have information in response to the request made, and, again, by his own exhibits to the motion to dismiss, concedes that he did not timely respond to said request. In fact, the Appellee did not respond at all until the second to the last day that his answer to the lawsuit filed against him was due, which was 91 days after service of the request. In such a situation, the

Appellants have obviously "substantially prevailed" in their appeal and attorney fees and cost reimbursement are justified.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Ken Swindle, hereby state that the above-referenced document was transmitted to David Peebles, via facsimile, (870) 732-7514, and to the Office of the Arkansas Attorney General, via facsimile, (501) 682-8084, this 5th day of November, 2012.


Ken Swindle

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

AFFIDAVIT OF KEN SWINDLE

1. I am the attorney for the Appellants in the above-styled matter. I am over 18 years old and of sound mind to make this Affidavit.

2. On, or about, July 12, 2012, I transmitted by facsimile, electronic mail, and postal mail certified delivery, a request to Scott Ellington, as Prosecutor for the Second Judicial District of Arkansas.

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

4. Said Letter was received by Mr. Ellington by facsimile and email on July 12, 2012, and by certified mail on July 26, 2012.

5. Mr. Ellington never provided the information requested.

6. Mr. Ellington did not provide an opportunity to view the information requested.

7. On August 30, 2012, I spent approximately 36 minutes drafting and transmitting a Complaint against Mr. Ellington for his refusal to respond to said request.

8. On behalf of the Appellants, I filed a complaint against Mr. Ellington on September 4, 2012.

9. Mr. Ellington was served a copy of the Summons and Complaint on September 11, 2012.

10. Mr. Ellington responded to said Complaint with a motion to dismiss on, or about, October 11, 2012.

11. In said Answer, Mr. Ellington stated: "By filing this pleading, Prosecutor Ellington is stating on the record that he will make all responsive and non-exempt records available to Mr. Swindle and the Plaintiffs, for their inspection and copying if they so desire, in complete compliance with the FOIA." Para. 3.

12. Said declaration was made 91 days after the first transmittal to Mr. Ellington described above.

13. Said declaration was the first time Mr. Ellington offered to make any information available to the Appellants.

14. On October 14, 2012, I spent approximately four hours researching and drafting a response to said motion to dismiss.

15. Further, on October 15, 2012, I spent approximately five hours 45 minutes further researching and drafting a response to said motion to dismiss.

16. Both the Complaint and the Response to the Motion to Dismiss would have been wholly unnecessary but for the complete lack of response by Mr. Ellington to the Appellants' request.

17. As shown in Mr. Ellington's own exhibits to his Motion, I also transmitted eight emails between July 17, 2012, and August 10, 2012, and supervised two more emails from his assistant on August 11 and 13.

18. All of these emails were attempts to get Mr. Ellington to respond to the July 12, 2012 request,

19. I also made several telephone calls to Mr. Ellington between July 17, 2012, and August 10, 2012.

20. Between the electronic mails and telephone conversations, I conservatively spent another hour attempting to get Mr. Ellington to comply with the request transmitted on July 12, 2012.

21. In total, I have spent approximately 11.2 hours not including the current motion and any additional time for travel to a hearing in responding to the issues related to Mr. Ellington.

22. Based upon my experience, an attorney's fee of \$200 per hour is reasonable for said work.

23. I also paid \$50.00 for service of process upon Mr. Ellington.

In witness whereof, I hereunto set my hand this 5th day of November, 2012.


Ken Swindle

STATE OF ARKANSAS)
)
COUNTY OF Benton)

Subscribed and sworn to before me on 5th day of November, 2012.



My commission expires: June 11th, 2022

