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**Public Law—Arkansas Freedom of Information Act—Working Papers and Litigation Files of Attorneys Hired by Public Entities Are Subject to Disclosure. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).**

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**PUBLIC LAW—ARKANSAS FREEDOM OF INFORMATION ACT—WORKING PAPERS AND LITIGATION FILES OF ATTORNEYS HIRED BY PUBLIC ENTITIES ARE SUBJECT TO DISCLOSURE. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).**

Beginning in 1985, the City of Fayetteville (City), as part of the Northwest Arkansas Resource Recovery Authority (Authority), took steps to develop an incinerator and landfill.<sup>1</sup> The City issued \$22 million in bonds to finance the project and contracted to have the incinerator constructed.<sup>2</sup> The bonds were issued without an election and were unconditionally guaranteed by the City.<sup>3</sup> Following the issuance of the bonds, opposition to the project's cost and potential environmental impact grew. In a nonbinding public referendum on March 8, 1988, voters rejected the project.<sup>4</sup> The following day, the Authority canceled the project in response to the opposition.<sup>5</sup> When it attempted to repay the bondholders, the City discovered that it was \$7 million short.<sup>6</sup> The City retained the McDermott, Will & Emery Law Firm (McDermott) of Washington, D.C. and the Niblock Law Firm (Niblock) of Fayetteville to handle the cancellation and repayment of the bonds and to prepare for potential litigation.<sup>7</sup> The City paid approximately \$400,000 in public funds to both firms for fees and expenses.<sup>8</sup>

On August 15, 1989, the City passed an ordinance raising sanitation fees to cover the \$7 million shortage.<sup>9</sup> A lawsuit, *Robson v. City of Fayetteville*,<sup>10</sup> was filed in Washington County Chancery Court on August 28, 1989, challenging the City's authority to guarantee the type of bonds issued for the incineration project and seeking to invalidate the ordinance which increased sanitation fees.<sup>11</sup>

In anticipation of litigation, Niblock and McDermott created a

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1. *City of Fayetteville v. Edmark*, 304 Ark. 179, 182, 801 S.W.2d 275, 276-77 (1990).
  2. *Id.* at 182, 801 S.W.2d at 277.
  3. *Id.*
  4. *Id.*
  5. *Id.*
  6. *Id.*
  7. *Id.* at 183, 801 S.W.2d at 277.
  8. *Id.*
  9. *Id.*
  10. *Id.*
  11. *Id.* This was referred to as the "incinerator litigation." *Id.*

great number of documents analyzing potential legal issues and the City's position.<sup>12</sup> Dave Edmark and Donrey, Inc., d/b/a Springdale News (Donrey), filed a request with the City under the Arkansas Freedom of Information Act (FOIA)<sup>13</sup> seeking disclosure of these legal documents.<sup>14</sup>

The City requested a protective order from the chancery court in the *Robson* litigation to block Donrey's FOIA request, but the court rejected the City's motion, holding that it lacked jurisdiction because Donrey was not a party before the court.<sup>15</sup> The City did not appeal.<sup>16</sup>

The City next sued Donrey and others in the Chancery Court of Washington County seeking a declaratory judgment that the documents were not subject to disclosure. The City's petition was denied on the basis of lack of jurisdiction and no appeal was pursued.<sup>17</sup>

The Washington County prosecuting attorney issued a subpoena in circuit court requesting that the documents be released.<sup>18</sup> In response to the City's motion to quash the subpoena, the circuit court examined the documents *in camera* and issued a protective order prohibiting the prosecutor's office from releasing any of the documents. The court, however, left open the question of whether Donrey might be able to obtain the FOIA documents in the civil division.<sup>19</sup>

Following the issuance of the prosecutor's subpoena, Donrey renewed its FOIA request for the attorney's documents.<sup>20</sup> When the City refused to comply with Donrey's request, Donrey filed suit in Washington County Circuit Court.<sup>21</sup> The City argued that the documents were not subject to disclosure under the Act for the following reasons: 1) the documents were not in the possession of the City; 2) the documents were not "public documents" within the meaning of the Act; 3) the documents were not subject to the Act because they would not help the public in evaluating the performance of public officials; 4) the protective order in the criminal division fell into one of the Act's specific exemptions from disclosure; and 5) the release of the documents would

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12. *Id.*

13. ARK. CODE ANN. §§ 25-19-101 to -107 (1987 & Supp. 1989).

14. 304 Ark. at 183, 801 S.W.2d at 277.

15. *Id.* at 179, 801 S.W.2d at 275.

16. *Id.* at 183, 801 S.W.2d at 277.

17. *Id.*

18. *Id.* at 183-84, 801 S.W.2d at 277.

19. *Id.*

20. *Id.* at 184, 801 S.W.2d at 277.

21. *Id.*

violate the City's right to a fair trial in *Robson*.<sup>22</sup> The circuit court rejected the City's arguments.<sup>23</sup> The circuit court further concluded that it lacked jurisdiction to issue a protective order that would be binding upon the *Robson* litigation in the chancery court,<sup>24</sup> and ordered that the documents be disclosed under the Act.<sup>25</sup>

The City appealed the circuit court's order to the Arkansas Supreme Court. The court held: 1) the attorneys' documents were public records in the possession of the City and subject to disclosure under the Freedom of Information Act;<sup>26</sup> 2) the documents fell into none of the existing disclosure exemptions;<sup>27</sup> 3) the creation or expansion of any exemptions should be left to the legislature;<sup>28</sup> and 4) the circuit court lacked the jurisdictional authority to issue a protective order binding upon the incinerator litigation in the chancery court.<sup>29</sup> *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).

At common law the public did not have a general right to inspect government records.<sup>30</sup> The English courts eventually established a "litigation interest" rule whereby persons needing information for use in litigation were allowed some access.<sup>31</sup> In the United States, the rule grew to encompass inspection of records by one attempting to protect the public interest.<sup>32</sup> The typical situation involved a taxpayer exposing the financial affairs of a governmental body or irregularities in official conduct.<sup>33</sup> Over time, some courts eliminated the public interest requirement<sup>34</sup> and some states included the right to inspect public docu-

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22. *Id.*

23. *Id.*

24. *Id.* at 191, 801 S.W.2d at 281.

25. *Id.* at 184, 801 S.W.2d at 277.

26. *Id.* at 185-86, 801 S.W.2d at 278.

27. *Id.* at 189-90, 801 S.W.2d at 279-81.

28. *Id.* at 192, 801 S.W.2d at 282.

29. *Id.* at 191-92, 801 S.W.2d at 281.

30. Watkins, *Access to Public Records under the Arkansas Freedom of Information Act*, 37 ARK. L. REV. 741, 744 (citing H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953)). Professor John J. Watkins, Professor of Law, University of Arkansas, B.J. 1970, M.A. 1971, J.D. 1976, University of Texas, is the leading authority on the Arkansas Freedom of Information Act. His 1984 article has been favorably cited by the Arkansas Supreme Court in several FOIA decisions and contains extensive information on the history and law of the records portion of the Act.

31. Watkins, *supra* note 30, at 744 (citing *Rex v. Tower*, 4 M & S 162, 105 Eng. Rep. 795 (1815); *Rex v. Lucas*, 10 East 235, 103 Eng. Rep. 765 (1808); *Rex v. Allgood*, 7 T.R. 746, 101 Eng. Rep. 1232 (1798)).

32. Watkins, *supra* note 30, at 744.

33. Watkins, *supra* note 30, at 744.

34. *Burton v. Tuite*, 78 Mich. 363, 44 N.W. 282 (1889); *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961).

ments within their constitutions.<sup>35</sup>

Nevertheless, broad disclosure of public documents was the exception rather than the rule for several reasons.<sup>36</sup> First, the definition of "public record" was narrow; therefore, many documents in the possession of public entities were not subject to inspection because the documents fell outside the definition.<sup>37</sup> Secondly, the inspection could be denied if the requester possessed an improper motive, such as idle curiosity, commercial gain, or malice.<sup>38</sup> Thirdly, the appropriate remedy for the denial of disclosure, a writ of mandamus, was considered discretionary.<sup>39</sup> Finally, inspection was often prohibited when disclosure would be adverse to the public interest.<sup>40</sup> In an effort to remove the common-law restrictions and ensure public access to public records, every state now has some form of open records statute.<sup>41</sup> The United

35. LA. CONST. art. XII, § 3; N.D. CONST. art. XI, § 6.

36. Watkins, *supra* note 30, at 744-45.

37. Watkins, *supra* note 30, at 744-45. The definition of "public record" at common law included only records required to be kept by state law. Watkins, *supra* note 30, at 745.

38. Watkins, *supra* note 30, at 744-45. Although some jurisdictions eliminated the "interest" requirement, it remained the general rule at common law. Braverman & Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 723 (1981).

39. Watkins, *supra* note 30, at 744-45. In Arkansas the proper remedy was the writ of mandamus. *Bowden v. Webb*, 116 Ark. 310, 173 S.W. 181 (1915). It was within the discretion of the court to issue or withhold the writ. *Patterson v. Collison*, 135 Ark. 105, 111, 204 S.W. 753, 754 (1918).

40. Watkins, *supra* note 30, at 744-45.

41. ALA. CODE § 36-12-40 (Supp. 1990); ALASKA STAT. § 09.25.110 (Supp. 1990); ARIZ. REV. STAT. ANN. § 39-121 (1985); ARK. CODE ANN. § 25-19-105 (Supp. 1990); CAL. GOV'T CODE § 6253 (Deering Supp. 1991); COLO. REV. STAT. § 24-72-203 (1988); CONN. GEN. STAT. § 1-19 (1990); DEL. CODE ANN. tit. 29, § 10003 (1990); FLA. STAT. § 119.07 (1990); GA. CODE ANN. § 50-18-70 (1990); HAW. REV. STAT. § 92F-12 (1989); IDAHO CODE § 9-338 (1990); ILL. REV. STAT. ch. 116, §§ 43.4-29, .101-.103a, .113 (1990); IND. CODE ANN. § 5-14-3-3 (Burns 1987); IOWA CODE § 22.2 (1989); KAN. STAT. ANN. § 45-218 (1986); KY. REV. STAT. ANN. § 61.872 (Michie 1986); LA. REV. STAT. ANN. § 44:31 (West 1982); ME. REV. STAT. ANN. tit. 1, § 408 (1989); MD. STAT. GOV'T CODE ANN. § 10-612 (1984); MASS. GEN. LAWS ANN. ch. 66 § 10 (West 1988); MICH. COMP. LAWS § 15.233 (1981); MINN. STAT. § 13.03 (Supp. 1991); MISS. CODE ANN. § 25-61-5 (Supp. 1990); MO. REV. STAT. § 109.180 (1966); MONT. CODE ANN. § 2-6-104 (1989); NEB. REV. STAT. § 84-712.01 (1987); NEV. REV. STAT. § 239.010 (1986); N.H. REV. STAT. ANN. § 91-A:4 (1990); N.J. REV. STAT. § 47:1A2 (1989); N.M. STAT. ANN. § 14-2-1 (1988); N.Y. PUB. OFF. LAW § 46-84 to -90 (McKinney Supp. 1991); N.C. GEN. STAT. § 132-6 (1986); N.D. CENT. CODE § 44-04-18 (1978); OHIO REV. CODE ANN. § 149.43 (Baldwin 1991); OKLA. STAT. tit. 51, § 24A.5 (1988); OR. REV. STAT. § 192.420 (1985); PA. STAT. ANN. tit. 65, § 66.2 (Purdon 1959); R.I. GEN. LAWS § 38-2-1 to -13 (1990); S.C. CODE ANN. § 30-4-30 (Law. Co-op. Supp. 1989); S.D. CODIFIED LAWS § 1-27-1 (Supp. 1990); TENN. CODE ANN. § 10-7-503 (1987); TEX. REV. CIV. STAT. ANN. § 6252-17a (Vernon Supp. 1991); UTAH CODE ANN. § 78-26-2 (1977); VT. STAT. ANN. tit. 1, § 316 (1985); VA. CODE ANN. § 2.1-342 (Supp. 1990); WASH. REV. CODE §§ 42.17.260 to -310 (Supp. 1991); W. VA. CODE § 29B-1-3 (1986); WIS. STAT. § 19.35 (1986); WYO. STAT. § 92-407 (Supp. 1990).

States Congress joined this movement, adopting the Federal Freedom of Information Act in 1966.<sup>42</sup>

Arkansas courts were surprisingly liberal in allowing access to public records despite the absence of any general statutory right of inspection.<sup>43</sup> In *Collins v. State*<sup>44</sup> the court required disclosure of internal audit records of the Pulaski County Sheriff concerning a deputy accused of embezzling public funds.<sup>45</sup> In *Republican Party v. State ex rel. Hall*<sup>46</sup> the court required the state treasurer to disclose a list of banks in which state money was deposited. In *Hall* the court specifically rejected the argument that there was no common-law right of access to public documents.<sup>47</sup> Most cases, though, dealt with election records which were required by statute to be open for inspection.<sup>48</sup>

In 1968 Arkansas adopted the Freedom of Information Act,<sup>49</sup> which guarantees the public the right to inspect public documents. To be subject to disclosure under the Act, the requested information must be in the possession of an entity covered by the Act, fall within the definition of "public records," and not be specifically exempted by stat-

42. Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

43. J. WATKINS, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 3 (1988).

44. 200 Ark. 1027, 143 S.W.2d 1 (1940).

45. *Id.* In making its ruling the court stated:

[I]t is a public document, paid for with public funds, and available to any citizen for inspection at any reasonable time in the office of the circuit clerk . . . .

. . . . To hold that when such information has been gathered, explained so convincingly that indictments for embezzlement are predicated upon its accuracy, and thereafter convictions are had—to say that the general welfare is best served by consigning to oblivion the details . . . is to lose sight of the paramount interest so inconspicuously represented by the humble taxpayer.

*Id.* at 1042-43, 143 S.W.2d at 8-9.

46. 240 Ark. 545, 400 S.W.2d 660 (1966).

47. *Id.* at 548-49, 400 S.W.2d at 662.

48. J. WATKINS, *supra* note 43, at 3. See *Baker v. Boone*, 230 Ark. 843, 327 S.W.2d 85 (1959); *Brooks v. Pullen*, 187 Ark. 80, 58 S.W.2d 682 (1933).

49. Watkins, *supra* note 30, at 752. Several events in the mid-1960s provided the impetus for the adoption of the Arkansas Freedom of Information Act. There was a push by Arkansas journalists to make government meetings and documents more accessible. *Id.* The Legislative Council conducted studies comparing Arkansas laws with access statutes in other states. *Id.* Several controversial closed meetings were held by public bodies. *Id.* The state Republican Party attempted to obtain voting records under existing statutory law, but was continually required to go to court in order to gain access to the records. *Id.* Winthrop Rockefeller was elected governor as a Republican and lent his support to the Act. *Id.* Finally, several Arkansas Supreme Court decisions, including *Hall*, required disclosure of public records. *Id.* All of these factors combined to provide the political base for the FOIA's passage in 1967. *Id.*

ute.<sup>50</sup> If a record is a "public record" under the FOIA, it must be disclosed unless there is a specific statutory exemption—either in the Act or elsewhere in Arkansas statutory law.<sup>51</sup>

The Arkansas Supreme Court first interpreted the Act in *Laman v. McCord*<sup>52</sup> and held that the Act is to be broadly and liberally construed in favor of disclosure while exemptions are to be narrowly construed.<sup>53</sup> In *Laman* two newspaper editors alleged that a closed session of the North Little Rock City Council violated the Act.<sup>54</sup> In finding for the newspaper editors, the court held that the Act was enacted for the benefit of the public and, therefore, should be construed in favor of the public.<sup>55</sup> The court noted that the legislative intent was included in the Act:<sup>56</sup> "It is vital in a democratic society that public business be performed in an open and public manner."<sup>57</sup> The court stated that the language of the Act "was so clear, so positive, that there is hardly any need for interpretation."<sup>58</sup>

In 1973 the Arkansas Supreme Court sharply narrowed the scope of the Act by limiting the definition of "public records" under the Act. In *McMahan v. Board of Trustees of the University of Arkansas*<sup>59</sup> the court held that lists of persons receiving complimentary University of Arkansas football tickets were not public records as defined by the Act.<sup>60</sup> The court focused on the statutory language in the Act mandating disclosure of records, "which by law are required to be kept and

50. Legislative Joint Auditing Comm. v. Woosley, 291 Ark. 89, 90, 722 S.W.2d 581, 582 (1987) (citing Watkins, *supra* note 30, at 741 (1984)).

51. ARK. CODE ANN. § 25-19-105 (Supp. 1989). See, e.g., Legislative Joint Auditing Comm. v. Woosley, 291 Ark. 89, 722 S.W.2d 581 (1987); Ragland v. Yeargan, 288 Ark. 81, 702 S.W.2d 23 (1986) (corporate and business motor fuel tax records were not specifically exempted by either the FOIA or the Tax Procedure Act, codified at ARK. CODE ANN. § 26-18-303 (1987)).

52. 245 Ark. 401, 432 S.W.2d 753 (1968).

53. See, e.g., Arkansas Gazette Co. v. Southern State College, 273 Ark. 248, 250, 620 S.W.2d 258, 259-60 (1981), *appeal dismissed*, 455 U.S. 931 (1982); North Cent. Assoc. of Colleges & Schools v. Troutt Bros., Inc., 261 Ark. 378, 548 S.W.2d 825, 826 (1977); Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W.2d 350, 352 (1975).

54. 245 Ark. 401, 432 S.W.2d 753 (1968). Ironically, *Laman* addressed the same question at issue in *Edmark* because the closed meeting was with the city attorney. The court was faced with deciding whether the attorney-client privilege could be used to pre-empt the Act. *Id.* at 405-06, 432 S.W.2d at 755-56.

55. *Id.* at 404, 432 S.W.2d at 755.

56. ARK. CODE ANN. § 25-19-102 (1987).

57. 245 Ark. 404, 432 S.W.2d at 755.

58. *Id.*

59. 255 Ark. 108, 499 S.W.2d 56 (1973).

60. *Id.*

maintained,"<sup>61</sup> and concluded that public records were only those required to be kept in the course of a public entity's official duties.<sup>62</sup> The legislature responded to the court's decision in *McMahan* by adding the language "or otherwise kept" to the Act's definition of "public record."<sup>63</sup>

Presently, the Act's definition of "public record" is very broad and comprehensive, as is the scope of who may be compelled to disclose information.<sup>64</sup> Any agency supported by or receiving public funds is subject to the Act. The Act provides that "public records" include records maintained by "a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds."<sup>65</sup> This public funding definition of "public records" makes the Act applicable to even the most obscure public agency.<sup>66</sup> As a result, the Arkansas Supreme Court has found that the Act applies to otherwise seemingly private organizations that receive some public funding.<sup>67</sup>

Although the Arkansas Supreme Court has indicated that the

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61. ARK. STAT. ANN. § 12-2803 (1968), as amended by Act 652 of 1977 and Act 49 of 1987, codified at ARK. CODE ANN. § 25-19-103 (Supp. 1989).

62. 255 Ark. at 110-11, 499 S.W.2d at 56.

63. Act 652 of 1977, ARK. CODE ANN. § 25-19-103 (1987). Act 652 amended the definition of public record to read as follows:

"Public records" means writings, recorded sounds, films, tapes, or data compilations in any form, required by law to be kept *or otherwise kept*, and which constitute a record of the performance or lack of performance of official functions which 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. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

*Id.* (emphasis added).

The records portion of the FOIA was also amended by Act 49 of 1987, which clarified whether and when personnel records should be subject to disclosure. In 1989 the Act was amended by Act 8 of the Third Extraordinary Session of 1989, which provided a new exemption for records of the Arkansas Industrial Development Commission.

64. *Watkins*, *supra* note 30, at 763.

65. ARK. CODE ANN. § 25-19-103 (1987).

66. *Watkins*, *supra* note 30, at 763-64.

67. *See, e.g., Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989) (a voluntary association to regulate extracurricular athletic activities of secondary schools was subject to the Act); *Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 S.W.2d 258 (1981), *appeal dismissed*, 455 U.S. 931 (1982) (an athletic conference was subject to the FOIA because some funds that it received from members were public funds); *North Cent. Assoc. of Colleges & Schools v. Troutt Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977) (a voluntary organization of colleges and secondary schools was subject to the FOIA because it was supported by contributions from members, some of whom were publicly funded).



mere receipt of public money by an entity will cause the entity to become subject to the Act, there is some question regarding this proposition.<sup>68</sup> It is unlikely that the legislature intended that the receipt of public money, regardless of the contribution's size or purpose, would automatically make an entity subject to the Act.<sup>69</sup> The Act's declaration that "*public* business be performed in an open and public manner"<sup>70</sup> is consistent with this view. A 1983 Arkansas Attorney General's opinion concluded that the mere receipt of Medicare funds did not make a privately owned hospital subject to the Act.<sup>71</sup> Even in situations where the public funding provision was used to encompass seemingly private entities, it can be argued that the entities acted on behalf of the public.<sup>72</sup> Therefore, the court's language can be seen as simply making clear that public entities cannot avoid disclosure by "farming out" their duties and that private entities performing public functions will be subject to the Act.<sup>73</sup>

Another aspect of the Act's definition of "public records" is its requirement that documents "constitute a record of the performance or lack of performance of official functions."<sup>74</sup> Although this wording has the potential to limit disclosure under the Act, the relationship between the record and official duties is easy to establish.<sup>75</sup> For example, ballots used in selecting the sites of the state high school basketball tournament have been found to be public records.<sup>76</sup> Private papers left at the scene of a murder-suicide have also been found to be records of performance.<sup>77</sup> Records of the amount of athletic scholarship awards to student athletes have been found to be within the "performance" language, as well.<sup>78</sup>

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68. Watkins, *supra* note 30, at 767.

69. Watkins, *supra* note 30, at 767.

70. ARK. CODE ANN. § 25-19-102 (1987).

71. 83 Op. Ark. Att'y Gen. 163 (1983).

72. *E.g.*, Arkansas Gazette Co. v. Southern State College, 273 Ark. 248, 620 S.W.2d 258 (1981), *appeal dismissed*, 455 U.S. 931 (1982) (faculty members participated in athletic conference meetings in their capacity as state employees).

73. Watkins, *supra* note 30, at 767-68. If a public entity hires an accountant to conduct an audit, the accountant's records which are relevant to the audit are subject to the FOIA while other files not relating to the work performed for the public entity would remain out of reach. Watkins, *supra* note 30, at 768-69.

74. ARK. CODE ANN. § 25-19-103 (1987).

75. Watkins, *supra* note 30, at 776.

76. Depoyster v. Cole, 298 Ark. 203, 766 S.W.2d 606 (1989).

77. McCambridge v. City of Little Rock, 298 Ark. 219, 766 S.W.2d 909 (1989) (the papers could be used to evaluate the performance of the police in their investigation).

78. Arkansas Gazette Co. v. Southern State College, 273 Ark. 248, 620 S.W.2d 258 (1981),

In *Arkansas Gazette Co. v. Pickens*<sup>79</sup> the court was confronted with the issue of whether the Act placed any limits on who is entitled to access to public records. Under the Act, “[e]xcept 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 of the State of Arkansas.”<sup>80</sup> The court indicated that it would not allow the citizen requirement under the Act to block access by corporations.<sup>81</sup> The court again considered the question of who may obtain access under the Act in *Arkansas Highway & Transportation Department v. Hope Brick Works, Inc.*<sup>82</sup> The court’s language in *Hope Brick Works* suggests that the court interpreted *Pickens* to mean that *anyone* could obtain access under the Act.<sup>83</sup>

The Act provides a laundry list of exemptions which are not subject to disclosure, including working papers of judges and some state officials, documents protected by court order, and files that would advantage “competitors.”<sup>84</sup> However, as previously mentioned, in *Laman*

*appeal dismissed*, 455 U.S. 931 (1982).

79. 258 Ark. 69, 522 S.W.2d 350 (1975).

80. ARK. CODE ANN. § 25-19-105 (Supp. 1989).

81. 258 Ark. at 77-78, 522 S.W.2d at 355. In *Pickens* the requesting corporation was a newspaper and there was no showing that the individual reporter making the request was a citizen of Arkansas. *Id.* The court pointed to the vital role of the press in providing information to the public in providing support for its holding that members of the news media are interested parties. *Id.*

82. 294 Ark. 490, 744 S.W.2d 711 (1988).

83. *Id.* at 495-96, 522 S.W.2d at 712.

84. Section 4 of the Act, codified at ARK. CODE ANN. § 25-19-105(b) (Advance Code Supp. 1991) provides the following exemptions:

- (1) State income tax records;
- (2) Medical records, scholastic records, and adoption records;
- (3) The site files and records maintained by the Arkansas Historic Preservation Program and the Arkansas Archaeological Survey;
- (4) Grand jury minutes;
- (5) Unpublished drafts of judicial or quasi-judicial opinions and decisions;
- (6) Undisclosed investigations by law enforcement agencies of suspected criminal activity;
- (7) Unpublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, and the Attorney General;
- (8) Documents which are protected from disclosure by order or rule of court;
- (9)(A) Files which, if disclosed, would give advantage to competitors or bidders; and
- (B) Records maintained by the Arkansas Industrial Development Commission related to any business entity’s planning, site location, expansion, operations, or product development/marketing . . . and
- (10) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.

*Id.*

the court held that in order to facilitate the Act's stated purpose of requiring disclosure, the statutory exemptions must be specifically provided and narrowly construed.<sup>85</sup> In rejecting the argument that the attorney-client privilege qualified as an exemption under the Act, the court relied on language in the Act requiring open meetings "except as otherwise specifically provided by law,"<sup>86</sup> and focused on the word "specifically."<sup>87</sup> The court feared that an exemption based upon the privilege would swallow the entire Act.<sup>88</sup> The court has continued to narrowly construe any exemption.<sup>89</sup>

The degree to which the court strictly construes the exemptions is illustrated by the court's decision in *City of Fayetteville v. Rose*.<sup>90</sup> In *Rose* a defendant indicted by a federal grand jury for manufacturing and possessing explosive devices sought disclosure of the police investigation files.<sup>91</sup> The Act provides an exemption for "undisclosed investigations by law enforcement agencies," but the court held that once the investigation was completed and the grand jury had indicted Rose, the police records were no longer exempt from disclosure.<sup>92</sup>

Although the court in *Laman* held that the attorney-client privilege did not provide an exemption under the Act, this doctrine has historically protected some communications between an attorney and client.<sup>93</sup> The privilege may have originated at Roman law.<sup>94</sup> In England the justification for the privilege was initially based on the loyalty that

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85. *Laman v. McCord*, 245 Ark. 401, 404-06, 432 S.W.2d 753, 755-56 (1968).

86. ARK. CODE ANN. § 25-19-106 (1987).

87. 245 Ark. at 405-06, 432 S.W.2d at 755-56.

88. *Id.* at 406, 432 S.W.2d at 756. The court stated:

On the one hand, to deny to the city council the right to meet in secret with the city attorney might in some instances work to the public disadvantage. But, on the other hand, to allow the council to go into executive session at any time, upon the pretext of consulting the city attorney about legal matters, might readily open the door to repeated and undetectable evasions of the Freedom of Information Act—also to the public disadvantage.

*Id.*

89. See *Legislative Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 126 S.W.2d 581 (1987) (the exemption for the working papers of members of the General Assembly did not extend to legislative committees); see also ARK. CODE ANN. § 25-19-105(b)(7) (Supp. 1989).

90. 294 Ark. at 468, 743 S.W.2d 817 (1988).

91. *Id.* The city argued that the police records were exempt from disclosure pursuant to ARK. CODE ANN. § 25-19-105(b)(6) (Supp. 1989), which protects undisclosed criminal investigations. *Id.*

92. *Id.*

93. E. CLEARY, *MCCORMICK ON EVIDENCE* § 89 (3d ed. 1984).

94. E. CLEARY, *supra* note 93, at § 87.

a lawyer owed his client.<sup>95</sup> As the privilege evolved, the need to promote full disclosure between the client and attorney became the reason for the privilege.<sup>96</sup> If clients fully informed their attorneys, then the attorneys could efficiently handle the litigation to reach a just solution.<sup>97</sup> Although the attorney-client privilege is well-founded in the adversarial system, it is not an absolute privilege. Because the privilege is likely to exclude competent, accurate evidence, it has been held that the privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of the principle."<sup>98</sup> The Arkansas Supreme Court has said:

This protection extends to every communication which the client makes to his legal adviser, for the purpose of professional advice or aid, upon the subject of his rights and liabilities. Nor is it necessary that any judicial proceedings in particular should have been commenced or contemplated; it is enough if the matter in hand, like every other human transaction, may by possibility become the subject of judicial enquiry. The great object of the rule seems plainly to require that the entire professional intercourse between client and attorney, whatever it may have consisted in should be protected by profound secrecy.<sup>99</sup>

The privilege applies to corporate as well as individual clients.<sup>100</sup> Uniform Rule of Evidence 502 includes public officials and organizations within its definition of "client" under the privilege.<sup>101</sup>

The work-product doctrine, which can also be used by an attorney to protect confidentiality, prevents discovery of an attorney's files and mental impressions.<sup>102</sup> This protection is much broader than that provided by the attorney-client privilege since it extends to communica-

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95. E. CLEARY, *supra* note 93, at § 87.

96. E. CLEARY, *supra* note 93, at § 87; 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (1961).

97. E. CLEARY, *supra* note 93, at § 87.

98. J. WIGMORE, *supra* note 96, § 2291, at 554.

99. *Bobo v. Bryson*, 21 Ark. 387, 388-89 (1860) (quoted in *Laman v. McCord*, 245 Ark. 401, 407-08, 432 S.W.2d 753, 756-57 (1968) (Fogleman, J., concurring)).

100. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 921 (1963).

101. UNIF. R. EVID. 502 (1974).

102. *Hickman v. Taylor*, 329 U.S. 495 (1947). The court's decision was later codified in FED. R. CIV. P. 26(b)(3). NEWBERN, ARKANSAS CIVIL PROCEDURE AND PRACTICE § 17-2 (1985). The Arkansas Supreme Court followed *Hickman* in *Dritt v. Morris*, 235 Ark. 40, 357 S.W.2d 13 (1962). In 1979 Arkansas adopted the Arkansas Rules of Civil Procedure, codifying *Hickman*. NEWBERN, ARKANSAS CIVIL PROCEDURE AND PRACTICE § 17-2 (1985).

tions from third parties in addition to those of the client.<sup>103</sup> Until the promulgation of the Federal Rules of Civil Procedure and their discovery provisions,<sup>104</sup> the work-product doctrine had little significance because there were no practical means for invading a litigating party's files and strategies.<sup>105</sup>

The work-product doctrine differs from the attorney-client privilege in many ways. The rationale for the work-product doctrine, unlike the attorney-client privilege, is to maintain the integrity of the adversarial system.<sup>106</sup> The doctrine may be claimed by either the attorney or the client.<sup>107</sup> Another difference is that disclosure to a third party does not necessarily waive the work-product doctrine.<sup>108</sup> Work-product in the form of mental impressions, conclusions, memos, and strategies is given special protection.<sup>109</sup> The Eighth Circuit has held "opinion" work-product to be protected as a general rule,<sup>110</sup> although extraordinary circumstances might justify disclosure.<sup>111</sup>

The court in *Laman* rejected the argument that the attorney-client privilege creates an exemption under the Act.<sup>112</sup> The court reasoned that the attorney-client privilege<sup>113</sup> was a testimonial privilege directed at communications within the context of litigation and, therefore, was not a "specific" exemption from the Act.<sup>114</sup> In a concurring opinion, Justice Fogleman took exception with the court's limited view of the attorney-client privilege, but agreed that the codification of the privilege did not create a "specific" statutory exemption to the Act.<sup>115</sup>

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103. NEWBERN, *supra* note 102, § 17-2.

104. FED. R. CIV. P. 26-37.

105. Smith, *The Work Product Doctrine: Its Origin, Evolution and Status in Modern Practice*, 33 S.D.L. REV. 224, 224-25 (1988).

106. J. MOORE, J. LUCAS, & C. GROTHEER, 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[4], 26-389 (1989); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953).

107. MOORE, *supra* note 106, at ¶ 26.64[4].

108. MOORE, *supra* note 106, at ¶ 26.64[4].

109. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

110. *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973).

111. *In re Murphy*, 560 F.2d 326 (8th Cir. 1977) (attorney required to submit documents for judicial inspection). If the work product is at issue, it is not protected. MOORE, *supra* note 106, at ¶ 26.64[3.-2].

112. 245 Ark. 401, 432 S.W.2d 753 (1968).

113. ARK. STAT. ANN. § 28-601 (1962) (repealed by Act 1143 of 1976 (Extended Session)).

114. 245 Ark. at 406, 432 S.W.2d at 755-56. In the majority's view, the privilege provided only that an attorney could not testify in a court about client confidences. Because the privilege extended only to disclosure sought in court, the court reasoned that the privilege was not a specific exemption under the FOIA that would prevent disclosure outside the courtroom. *Id.*

115. *Id.* at 407-08, 432 S.W.2d at 756-57 (Fogleman, J., concurring). Justice Fogleman argued that the majority took too narrow a view of the privilege. He focused on the historical

Although *Laman* dealt with open meetings, the court applied the same logic to claims of exemptions from the open records provisions in *Scott v. Smith*<sup>116</sup> and the court again held that the attorney-client privilege was not an exception to the Act.<sup>117</sup> In *Scott* a request was made to examine the documents of a state agency's general counsel.<sup>118</sup> The agency had forwarded some of the documents to an assistant attorney general.<sup>119</sup> The trial court ruled that a letter, a memorandum, and trial notes of the assistant attorney general were covered by the Act's specific statutory exemption for "[u]npublished memoranda, working papers and correspondence"<sup>120</sup> of the attorney general. However, the trial court ordered the disclosure of agency records that were in the possession of the agency's counsel and the assistant attorney general.<sup>121</sup> In affirming the trial court's decision, the supreme court said, "Unlike the Freedom of Information Act, the attorney-client privilege has been narrowly construed since it prevents the dissemination of truthful information."<sup>122</sup> The court concluded that the attorney-client privilege<sup>123</sup> is an evidentiary rule limited to court proceedings<sup>124</sup> and decided that there had been no changes in the privilege in the nineteen years since *Laman* that would create a specific exemption to the Act.<sup>125</sup>

The Freedom of Information Act exempts the working papers of the governor, state legislators, the attorney general, and supreme court justices.<sup>126</sup> However, in *Legislative Joint Auditing Committee v. Woosley*<sup>127</sup> the court held that the working papers of auditors employed by the Legislative Joint Auditing Committee were not covered by the

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importance of the attorney-client privilege and its necessity in the adversarial system. Even so, Justice Fogleman noted that the attorney-client statute protected only disclosure of the subject matter of conferences, but did not specifically provide for the right of public entities to hold such conferences in private. *Id.*

116. 292 Ark. 174, 728 S.W.2d 515 (1987).

117. *Id.* at 175-76, 801 S.W.2d at 515-16.

118. *Id.*

119. *Id.*

120. ARK. CODE ANN. § 25-19-105 (1987).

121. 292 Ark. at 175, 728 S.W.2d at 515.

122. *Id.* at 176, 728 S.W.2d at 515 (citing *Vittitow v. Burnett*, 112 Ark. 277, 165 S.W. 625 (1914)).

123. ARK. R. EVID. 502. Compare *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) with *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987). The court's treatment of the privilege in each case is identical.

124. 292 Ark. at 176, 728 S.W.2d at 515.

125. *Id.*

126. ARK. CODE ANN. § 25-19-105(b)(7) (Supp. 1989).

127. 291 Ark. 89, 722 S.W.2d 581 (1987).

"working papers" exemption.<sup>128</sup> *Woosley* indicated that the working papers exemption applied only to the officials themselves.<sup>129</sup>

In *Scott*, in addition to rejecting the attorney-client privilege as an exemption, the court also held that the work-product doctrine shield from discovery was not a statutory exemption within the meaning of the Act.<sup>130</sup> The court found that the work-product limitation on the scope of discovery,<sup>131</sup> like the attorney-client privilege, did not specifically apply under the Act.<sup>132</sup>

Similarly, in *Hope Brick Works, Inc.*<sup>133</sup> the court rejected the State's argument that the highway department's real estate appraisals in the hands of state attorneys are protected by a work-product exemption or by attorney-client privilege. The court based its analysis on the decision in *Scott v. Smith*<sup>134</sup> and stated:

[W]e specifically rejected the argument for reversal that the court erred in holding that the Freedom of Information Act applied to litigation files maintained by attorneys representing state agencies. Refusing to create an exemption or exception to the Freedom of Information Act based upon the attorney-client relationship, we pointed out that the attorney-client privilege was not one of the Act's exceptions.<sup>135</sup>

Therefore, while the working papers of the listed officials are exempted from disclosure under the Act, the working papers of state agencies,

128. *Id.* In making its ruling the court stated: "The working papers of an auditor who is a state employee cannot be deemed the private papers of individual legislators without completely disregarding the plain and simple language of the FOIA. The act does not exempt working papers of employees of a legislative committee, only those of the legislators." *Id.* at 92, 722 S.W.2d at 383.

129. *WATKINS*, *supra* note 43, at 75.

130. 292 Ark. 174, 728 S.W.2d 515. ARK. R. CIV. PRO. 26(b)(3) protects an attorney's work product from discovery in the course of civil litigation. Referring to Rule 26, the court stated:

[Rule 26] is a procedural rule limited to discovery. Neither [the attorney-client privilege evidentiary rule] nor ARCP Rule 26(b)(3) specifically provides that it should have application outside of these limited areas, and we have previously held that a statute dealing with admission of evidence and discovery should not create a specific exception to the Freedom of Information Act.

*Id.* at 176, 728 S.W.2d at 515-16 (citing *Baxter County Newspapers, Inc. v. Medical Staff of Baxter Gen. Hosp.*, 273 Ark. 511, 622 S.W.2d 495 (1981)).

131. ARK. R. CIV. PRO. 26(b)(3).

132. 292 Ark. at 176, 728 S.W.2d at 515-16.

133. 294 Ark. 490, 744 S.W.2d 711 (1988).

134. 292 Ark. 174, 728 S.W.2d 515 (1987).

135. 294 Ark. at 495, 744 S.W.2d at 714.

city and county officials, or anyone else, are not exempted.<sup>136</sup>

The Act exempts documents protected from disclosure by order or rule of the court.<sup>137</sup> In *Arkansas Newspaper, Inc. v. Patterson*<sup>138</sup> a newspaper sought access to closed hearings and a sealed motion in a trial where a 15-year-old boy was charged with capital murder. Though the court was not required to rule because the trial had ended by the time the FOIA request came before it, the court stated that "the Freedom of Information Act specifically provides that documents which are protected from disclosure by order or rule of court are not required to be open for inspection and copying."<sup>139</sup> Given the Act's exemption and the holding in *Patterson*, a court is free to ensure the integrity of its proceedings by issuing orders preventing disclosure when necessary. Without the exemption for judicial orders, the Act might be unconstitutional with regard to its impact on court proceedings.<sup>140</sup>

In *City of Fayetteville v. Edmark*<sup>141</sup> the court began its analysis by considering the legislature's intent that the public be fully apprised of the conduct of public business.<sup>142</sup> The court focused on the holding in *Laman*, that the "Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved,"<sup>143</sup> and stated that the issues must be viewed in this light.<sup>144</sup>

First, the court concluded that the attorneys' files were public records within the meaning of the Act.<sup>145</sup> The court reviewed the papers in question and concluded that, because they concerned the propriety of the City's actions throughout the bond issue, the documents clearly could be used to evaluate the performance of city officials.<sup>146</sup>

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136. WATKINS, *supra* note 43, at 75.

137. ARK. CODE ANN. § 25-19-105(b)(8) (Supp. 1989).

138. 281 Ark. 213, 662 S.W.2d 826 (1984).

139. *Id.* at 215, 662 S.W.2d at 827.

140. WATKINS, *supra* note 43, at 77.

141. 304 Ark. 179, 801 S.W.2d 275 (1990).

142. *Id.* at 184, 801 S.W.2d at 277-78 (citing ARK. CODE ANN. § 25-19-102). The court used *Laman* as the "benchmark for the interpretation of the intent of the FOIA." 304 Ark. at 184, 801 S.W.2d at 278.

143. *Id.* at 184-85, 801 S.W.2d at 278 (*quoting* *Laman v. McCord*, 245 Ark. 401, 404, 432 S.W.2d 753, 755 (1968)).

144. 304 Ark. at 185, 801 S.W.2d at 278.

145. *Id.* at 185-86, 801 S.W.2d at 278.

146. *Id.* at 186, 801 S.W.2d at 278. The City conceded that the documents would be subject to disclosure if they had been in possession of the regular city attorney. *Id.* at 186, 801 S.W.2d at 278-79.



The court relied on *Scott* for the proposition that even litigation files are subject to disclosure under the Act, noting that there is no exemption for attorney-client privilege or attorney work-product.<sup>147</sup>

Second, the court rejected the City's claim that the documents were not in the City's possession and, therefore, not subject to the Act.<sup>148</sup> The court stated, "The FOIA requirements cannot be circumvented by delegation of regular duties to one specially retained to perform the same task as the regular employee or official."<sup>149</sup> The court noted that the City had paid \$400,000 in legal fees to the outside attorneys and concluded that this also placed the documents within the definition of "public records." The court, however, did not expressly identify the link with the "public funding" provision in the Act's definition of "public records."<sup>150</sup>

Third, after the court determined that the documents were indeed public records within the Act, it found that the records did not fall into any of the statutory exemptions provided by the Act.<sup>151</sup> The City claimed that the documents were subject to the protective order issued in connection with the prosecutor's subpoena, and therefore exempt.<sup>152</sup> The court rejected this argument because the order did not, nor was it intended to, protect the documents from FOIA disclosure.<sup>153</sup>

The City also argued that the files should be shielded under the specific exemption protecting information that gives an advantage to competitors or bidders.<sup>154</sup> The court concluded that the public is not a "competitor" within the meaning of the statute.<sup>155</sup> The court noted that the public is composed of both those who agree and those who disagree with a particular government action, and that the Act's definition of "public" is to be construed broadly.<sup>156</sup> In the court's view, excluding

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147. *Id.*

148. *Id.* at 186-87, 801 S.W.2d at 279.

149. *Id.* at 187, 801 S.W.2d at 279. "When the state or a political subdivision thereof seeks to conduct its affairs through private entities, it seems clear that those entities are for all practical purposes the government itself." *Id.* (quoting *Watkins*, *supra* note 30, at 764).

150. *Id.* at 187, 801 S.W.2d at 279. See ARK. CODE ANN. § 25-19-103 (1987).

151. 304 Ark. at 189-90, 801 S.W.2d at 279-81.

152. *Id.* at 189, 801 S.W.2d at 280-81.

153. *Id.*, 801 S.W.2d at 280. The court quoted the City counsel as conceding: "Judge Gibson said that he was not foreclosing the Springdale News from seeking their civil remedy." *Id.* at 189, 801 S.W.2d at 280. The court also noted that the City had not appealed the two earlier attempts to block access to the documents. *Id.* at 189-90, 801 S.W.2d at 280.

154. *Id.* at 190, 801 S.W.2d at 280.

155. *Id.*, 801 S.W.2d at 281.

156. *Id.* (citing *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975)).

adverse litigants from access to public documents would be tantamount to creating a new exemption—something the court has repeatedly indicated that it would not do.<sup>157</sup> Furthermore, the court concluded that the increased risk that the City would lose the challenge to the bond issue in *Robson* did not justify creating a new exemption by judicial fiat.<sup>158</sup>

Fourth, the City further argued that the circuit court erred in holding that it did not have jurisdiction to enter an order to protect the *Robson* proceedings in the chancery court.<sup>159</sup> The supreme court also rejected this argument.<sup>160</sup> Although it recognized a court's power to ensure the integrity of its own proceedings, the supreme court held that the Act did not confer the power upon the circuit court to issue an order binding upon the proceedings in the chancery court.<sup>161</sup> If the chancery court had issued the protective order, the circuit court apparently would have been bound by it in considering the FOIA request. The circuit court, however, did not have jurisdiction to issue the protective order for proceedings in the chancery court.<sup>162</sup> The court stated that the documents would not have been appropriate for a protective order in any event because of their relationship to the public interest.<sup>163</sup>

The court ended its opinion with a discussion of some of the policy considerations of the Act. The court took the position that creating an exemption for legal work-product was a task for the legislature, not the court.<sup>164</sup> The court pointed out that the working papers of some public officials are exempt from disclosure, but city attorneys and attorneys for state agencies are not included in the exemption.<sup>165</sup> If there are problems due to the narrow scope of the exemptions, it is up to the legislature, not the court, to correct them.

In addressing the argument that disclosure denied the City the right to a fair trial, the court concluded that “[e]nhanced risk of losing a trial does not equate to not getting a fair trial, but is a policy decision

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157. *Id.* at 190, 801 S.W.2d at 281.

158. *Id.* at 192-95, 801 S.W.2d at 282-83.

159. *Id.* at 191, 801 S.W.2d at 281.

160. *Id.*

161. *Id.* at 191.

162. *Id.* at 191-92, 801 S.W.2d at 281-82.

163. *Id.*

164. *Id.* at 192, 801 S.W.2d at 282.

165. *Id.* at 192, 801 S.W.2d at 282. The working papers of only the governor, legislators, supreme court justices, and the attorney general are exempt from disclosure. Legislative Joint Auditing Comm. v. Woosley, 291 Ark. 89, 722 S.W.2d 581 (1987).

for the legislature."<sup>166</sup> The court balanced the City's interest in the litigation against the public's interest in disclosure.<sup>167</sup> The court concluded that the rules of evidence and procedure and the trial court's discretion in controlling its proceedings were sufficient to protect the City's right to a fair trial.<sup>168</sup>

In a concurring and dissenting opinion, Justice Turner accepted the court's outcome but argued that there is a need to apply the attorney-client privilege in some instances where the client is a public entity.<sup>169</sup> Turner argued that "purely legal memoranda—the work-product of a retained attorney that remains in the exclusive possession of the attorney and that had not been previously furnished to the public agency[-]" should not be subject to disclosure under the Act.<sup>170</sup>

In *Edmark* the court made it clear that neither the attorney-client privilege nor the work-product doctrine will provide protection for a public attorney's files. The Freedom of Information Act trumps them both. "Thus, a government attorney lives in something of a glass house as far as his work product and client communications are concerned."<sup>171</sup> The Act provides access to his files for opponents, while the attorney-client privilege and the work-product doctrine shield the opponents' files.

The court's rejection of the work-product doctrine is probably more significant than its rejection of the attorney-client privilege. The concerns voiced by Justice Fogleman in *Laman* and Justice Turner in *Edmark* seem to have more to do with work-product than attorney-client communications. The justification for the work-product doctrine is to maintain the integrity of the adversarial system, and the fact that a client is a public entity makes its rationale no less compelling.

On the other hand, there are several reasons why the attorney-client privilege should not be applied to public entities. First, because the privilege belongs to the client (*i.e.*, the entity), it does not provide the incentive for disclosure which is its justification. Employees would

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166. 304 Ark. at 193, 801 S.W.2d at 282.

167. *Id.* at 193-94, 801 S.W.2d at 282-83. The court noted that it had recently been required to balance the constitutional right of privacy with the public's right to know. *Id.* at 194, 801 S.W.2d at 283 (citing *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989) (balancing a citizen's constitutional right to privacy against the public interest in disclosure of private documents at a crime scene)).

168. *Id.* at 194, 801 S.W.2d at 283.

169. *Id.* at 195, 801 S.W.2d at 283-84.

170. *Id.* (Turner, J. concurring and dissenting).

171. WATKINS, *supra* note 43, at 76.

not be protected as individuals, so they would have little additional incentive to make full disclosure to the government attorney. Second, the government employee's incentive to make full disclosure to the government attorney is also tempered by the fact that a subsequent political administration may choose to disclose information that is initially privileged. Third, governmental employees have an affirmative duty to report wrongdoing. This also lessens the governmental employee's expectation of confidentiality.

The fourth reason for rejecting the attorney-client privilege for governmental entities also supports limiting the work-product doctrine for public entities. In the private corporate setting, the economic costs of misfeasance and malfeasance provide an internal incentive for corporations to operate within economic and ethical norms and to make internal investigations. This economic incentive is missing in the governmental context. The incentive for internal investigation and self-correction for governmental entities is the political cost associated with public disclosure of wrongdoing. Even temporarily denying the public access to information reduces the incentive for responsible government.

In *Edmark* the court left the responsibility for protecting the integrity of the system and weighing the constitutional issues in the hands of the trial courts. One possible way out of the government attorney's dilemma is to seek an order from the court in which litigation is pending, since the Act provides a specific exemption for documents protected by court order. The fact that the court found the City's failure to appeal in the incinerator litigation important enough to mention twice,<sup>172</sup> among the labyrinth of facts presented, may indicate that the court will look favorably upon orders protecting litigation documents from the Act.

After *Edmark* it seems safe to say that the court will not allow the governmental entity to make any inquiry into the motives of the person making a request for documents. The Freedom of Information Act makes no provision for such inquiry<sup>173</sup> and, given the court's broad interpretation of the Act, the court appears hostile to any attempt on the part of a public agency to examine the motives of a requesting party. This is particularly so in light of the court's refusal in *Pickens* and *Hope Brick Works, Inc.* to allow agencies to use the statutory require-

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172. 304 Ark. at 183, 191, 801 S.W.2d at 277, 281.

173. *Watkins*, *supra* note 30, at 762.

ment of citizenship to block FOIA requests.<sup>174</sup>

Application of the Act to require disclosure of the files of attorneys employed by public agencies can be expected to cause some problems. Disclosure may sometimes even be adverse to the public interest. Obviously, the release of litigation files would benefit the opposing side in the midst of litigation. Though the court in *Edmark* stated that the increased chance of losing a trial did not constitute a deprivation of the right to a fair trial, there must be some limit to this proposition. At some point an increased chance of losing *does* constitute a deprivation of the right to a fair trial. If disclosure increases the public entity's chances of losing from fifty percent to ninety-nine percent, is it not effectively being denied a fair trial? Along the same vein, would the court require disclosure of litigation files if the City were facing criminal liability? Although its ruling may be correct, the court treated the constitutional question in *Edmark* somewhat superficially.

Increasing the public entity's risk of losing will increase the entity's potential financial liability in the short run. In the case of *Edmark*, it is probable that the chief beneficiaries of any recovery from the City's liability on the bonds would be institutional investors, who are probably not the "public" that the Act was intended to protect.

Balanced against the detriment to the public interest is the very important benefit of encouraging governmental accountability. The Act calls the public's right to know "vital."<sup>175</sup> It has been argued that the decisions of the Arkansas government often fail to benefit a majority of its people.<sup>176</sup> The Freedom of Information Act may address that criticism and curb future governmental abuses. While compliance with the Act may increase financial liabilities in the short run, these liabilities should decrease in the long run as governmental abuses are deterred by the threat of publicity. Open government requires more input into the decision-making process, which provides more opportunities to identify mistaken policies and programs before they are put into practice.

It is difficult to hold public officials accountable without access to public information. The importance of public access to information is amply illustrated by the degrees to which the totalitarian governments of the twentieth century have gone to limit it. Free information is necessary for free government.

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174. See Watkins, *supra* note 30, at 760-62.

175. ARK. CODE ANN. § 25-19-102 (1987).

176. D. BLAIR, ARKANSAS POLITICS AND GOVERNMENT: DO THE PEOPLE RULE? 18-19 (1988).

Perhaps a balance could be struck by providing a temporary exemption until the end of litigation for the types of legal memoranda mentioned by Justice Turner. In *Edmark* the court concluded that even if providing this type of exemption were desirable, it should be a question for the legislature.<sup>177</sup> It should also be kept in mind that there is the danger that any exemption might be used to swallow the entire Act. The court seems to have taken the better approach. Trial courts already have the authority to order the nondisclosure of documents if it is necessary to ensure a fair trial. Even a temporary exemption for the duration of the litigation might last for years, especially in complex securities litigation such as that which could have developed around the bonds in *Edmark*. Such delay might dampen the ability of the public to hold its officials accountable.

James Madison wrote: "A Popular Government without popular information, or the means of acquiring it is but a Prologue to a Farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>178</sup> In the modern parlance, knowledge is power. In *Edmark* the court continued its string of decisions keeping such power in the hands of the people through the Arkansas Freedom of Information Act. Although there are valid arguments to be made for maintaining the secrecy of the public attorney's litigation files, the court's refusal to restrict the scope of the Act should benefit the public interest in the long run.

*Lawrence W. Jackson*

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177. 304 Ark. at 192, 801 S.W.2d at 282.

178. Letter from James Madison to W. T. Barry, August 4, 1822, in *THE COMPLETE MADISON* 377 (Padover ed. 1953).

