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Robert William Schroeder III

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PUBLIC LAW—FREEDOM OF INFORMATION ACT—“WORKING PAPERS” EXEMPTION APPLIES NOT ONLY TO OFFICEHOLDER PERSONALLY BUT TO STAFF MEMBERS AND PRIVATE CONSULTANTS AS WELL. *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992).

I. FACTS

On July 22, 1991, Thomas A. Mars, an attorney representing Arkansas Western Gas Company in a utility rate case pending before the Arkansas Public Service Commission, served discovery requests on Arkansas Attorney General Winston Bryant, who represented utility ratepayers.¹ Mars sought production of information gathered by Attorney General Bryant and other information relating to the case generated by Mitchell & Mitchell, an outside consulting firm.² Mars served interrogatories on Attorney General Bryant. The Attorney General objected to the requests.³

On the same day, Mars filed a written request under the Freedom of Information Act⁴ (FOIA) to inspect documents in the offices of the Attorney General and the consulting firm.⁵ The Attorney General made available for inspection all documents that he deemed not to be exempt from disclosure under the working papers exemption⁶ of the FOIA.⁷ Mars was not allowed to inspect documents prepared by staff members in the Attorney General's office or documents generated by the private consultants.⁸

After his request to inspect the documents was refused, Mars filed suit under the FOIA to compel disclosure of documents that

1. *Bryant v. Mars*, 309 Ark. 480, 481, 830 S.W.2d 869, 869 (1992).

2. *Id.*

3. *Id.*

4. ARK. CODE ANN. §§ 25-19-101 to -107 (Michie 1992 & Supp. 1993). The FOIA was enacted to provide access to public documents and meetings with the goal of encouraging active participation in the governmental process. ARK. CODE ANN. § 25-19-102 (Michie 1992).

5. 309 Ark. at 481, 830 S.W.2d at 869-70. Mars did not request any memoranda, working papers, or correspondence created by the Attorney General himself. *Id.* at 481, 830 S.W.2d at 870.

6. ARK. CODE ANN. § 25-19-105(b)(7) (Michie Supp. 1993). Exempted from FOIA disclosure are “[u]npublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, and the Attorney General.” *Id.*

7. 309 Ark. at 481, 830 S.W.2d at 870.

8. *Id.*

were not "personally created by the Attorney General."⁹ The trial court ruled that the FOIA working papers exemption¹⁰ covered only memoranda, working papers, and correspondence of the Attorney General himself and not records "created, prepared, obtained, gathered, or assembled by, or provided or furnished to, members of the Attorney General's staff or private consultants."¹¹ The trial court stayed its ruling pending appeal.¹²

On appeal, the Attorney General presented three arguments to the Arkansas Supreme Court: (1) the Supreme Court is not bound by the decision of the trial court;¹³ (2) the trial court erred in finding that the working papers exemption applies only to the Attorney General personally;¹⁴ and (3) the working papers exemption should apply to all documents "prepared, collected, or assembled by . . . the Attorney General's staff" and outside consultants.¹⁵

On May 26, 1992, the Arkansas Supreme Court unanimously reversed the trial court's decision and dismissed the action.¹⁶ The Supreme Court found that the trial court "erroneously construed the effect of the statutory exemption" and that its interpretation of the working papers exemption was too restrictive.¹⁷

II. HISTORICAL DEVELOPMENT

At common law, there was no general right to inspect government documents.¹⁸ Eventually, however, the common law did recognize a limited right to inspect government documents in certain circumstances.¹⁹ As early as 1815 English courts recognized a "litigation interest" rule which provided litigating parties some access

9. *Id.*

10. ARK. CODE ANN. § 25-19-105(b)(7) (Michie Supp. 1993).

11. 309 Ark. at 481-82, 830 S.W.2d at 870.

12. Appellants' Brief at A-33, *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992) (No. 91-262).

13. 309 Ark. at 482, 830 S.W.2d at 870.

14. *Id.*

15. *Id.*

16. *Id.* at 486, 830 S.W.2d at 872.

17. *Id.* at 482, 830 S.W.2d at 870.

18. John J. Watkins, *Access to Public Records Under the Arkansas Freedom of Information Act*, 37 ARK. L. REV. 741, 744 (1984) (citing H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 25 (1953)). Professor Watkins, Professor of Law, University of Arkansas, B.J. 1970, M.A. 1971, J.D. 1976, University of Texas, a leading authority on the Arkansas Freedom of Information Act, served as counsel to Mars in *Bryant*.

19. John J. Watkins, *Open Meetings Under the Arkansas Freedom of Information Act*, 38 ARK. L. REV. 268, 271 (1984). See generally Watkins, *supra* note 18, at 744-45.

to information.²⁰ That judicially created rule ultimately grew to encompass parties who sought to protect the public interest, usually by calling into question financial irregularities or some similar dereliction of duty.²¹

In the United States, the right to inspect government documents also originated primarily in the courts.²² By 1940, only twelve states had public information statutes resembling those currently in force.²³

Prior to adoption of a freedom of information statute in Arkansas, the state supreme court was progressive in permitting access to public records.²⁴ As early as 1915, the court took an expansive view of allowing public access to government documents.²⁵ In *Bowden v. Webb*,²⁶ the court disagreed with county election commissioners who argued that election poll books were not open to public inspection.²⁷ The court determined that, although the actual ballots were secret,²⁸ the poll books were "public records" and thus subject to inspection.²⁹ The court continued this expansive view in 1933 in *Brooks v. Pullen*,³⁰ another case involving election judges who denied public access to tally sheets and poll books.³¹ The court held that the records were open to "all persons."³² Three later cases involving statutes, one in the late 1950's³³ and two in the mid-1960's,³⁴ continued the court's liberal trend of allowing access to public documents.

20. Watkins, *supra* note 18, at 744.

21. Watkins, *supra* note 18, at 744.

22. William R. Henrick, Comment, *Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except"*, 45 FORDHAM L. REV. 1105, 1107 (1977). Only a few states enacted early statutes granting inspection rights. *Id.* One such state, Wisconsin, provided limited access by statute as early as 1849. *Id.* at 1105 (citing L. AMICO, STATE OPEN RECORDS LAWS: AN UPDATE 2 (1976) (FOI Center, Columbia, Mo.)).

23. Henrick, *supra* note 22, at 1107. These states were Alabama, California, Idaho, Iowa, Massachusetts, Montana, Nebraska, Nevada, New York, North Carolina, South Dakota, and Wisconsin. Henrick, *supra* note 22, at 1107 n.10.

24. JOHN J. WATKINS, THE ARKANSAS FREEDOM OF INFORMATION ACT 3 (1988).

25. See *Bowden v. Webb*, 116 Ark. 310, 173 S.W. 181 (1915).

26. 116 Ark. 310, 173 S.W. 181 (1915).

27. *Id.* at 315, 173 S.W. at 183.

28. *Id.*

29. *Id.* at 315-16, 173 S.W. at 183.

30. 187 Ark. 80, 58 S.W.2d 682 (1933).

31. *Id.* at 81, 58 S.W.2d at 683.

32. *Id.* at 84, 58 S.W.2d at 684.

33. *Baker v. Boone*, 230 Ark. 843, 327 S.W.2d 85 (1959). The court in *Baker* upheld the right of candidates to examine voter lists. *Id.*

34. *Whorton v. Gaspard*, 239 Ark. 715, 393 S.W.2d 773 (1965) (regarding voter lists); *Gaspard v. Whorton*, 239 Ark. 849, 394 S.W.2d 621 (1965) (regarding absentee

In *Collins v. State*,³⁵ where a deputy was accused of embezzling public money, the court required disclosure of audit records of a sheriff's office.³⁶ The court upheld the deputy's conviction,³⁷ but ruled that summaries of audit records to which the defendant had been denied access were public records and, therefore, available for inspection.³⁸

In *Republican Party v. State ex rel. Hall*,³⁹ the court required the state treasurer to release a list of banks in which state money was held.⁴⁰ Expressing dismay that disclosure was even at issue,⁴¹ the court declared that the list was "a part of the public transactions of the office"⁴² and thus subject to inspection.⁴³

Arkansas adopted the Freedom of Information Act in 1967, thereby guaranteeing access to public records and meetings.⁴⁴ Several attempts to enact the FOIA occurred in the twenty years before its passage,⁴⁵ but a series of events in the 1960's combined to

voting records). The court in the latter case observed that "the denial to the public of reasonable access to public records . . . is not conducive to the perpetuation of our form of government." *Gaspard*, 239 Ark. at 850, 394 S.W.2d at 622.

35. 200 Ark. 1027, 143 S.W.2d 1 (1940).

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

37. *Id.* at 1043, 143 S.W.2d at 9.

38. *Id.* The court ruled that the defendant had waived his right to object and, therefore, the denial of access to the summaries was not prejudicial. *Id.* at 1040-41, 143 S.W.2d at 8.

39. 240 Ark. 545, 400 S.W.2d 660 (1966).

40. *Id.* at 549, 400 S.W.2d at 662. The court, rejecting the argument that there was no common law right of access to public records, stated that "if there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions." *Id.*

41. *Id.* at 547, 400 S.W.2d at 662.

42. *Id.* at 548, 400 S.W.2d at 662.

43. *Id.* at 549, 400 S.W.2d at 662.

44. ARK. CODE ANN. §§ 25-19-101 to -107 (Michie 1992 & Supp. 1993). The policy goals of the legislature in enacting the FOIA were expressly set forth in the Act:

It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.

ARK. CODE ANN. § 25-19-102 (Michie 1992).

45. See generally *Watkins*, *supra* note 18, at 741-51. See also John J. Watkins, *Open Meetings Under the Arkansas Freedom of Information Act*, 38 ARK. L. REV. 268 (1984). The initial attempts were made by members of the Arkansas press corps and principally dealt with gaining access to public meetings. *Watkins*, *supra* note 18, at 749. The Arkansas legislature in 1947 passed the first open meetings statute. *Watkins*, *supra* note 18, at 750 n.42. That statute affected only state

produce a clearer need for the Act.⁴⁶

For a record to be subject to disclosure under the FOIA, it must be in the possession of an entity covered by the Act, fall within the Acts definition of "public records," and not be specifically exempted by statute.⁴⁷ Several exemptions are provided for within the FOIA,⁴⁸ and others may be found elsewhere in Arkansas statutes.⁴⁹

In 1968, the Arkansas Supreme Court first construed the FOIA in *Laman v. McCord*.⁵⁰ This case arose because members of the

government, not county or municipal agencies. *Watkins, supra* note 18, at 750 n.42. By 1952 the statute was virtually useless. *Watkins, supra* note 18, at 750 n.42. In 1953, the General Assembly passed an open meetings statute that was to apply to local governmental agencies as well. *Watkins, supra* note 18, at 751 n.46. Although the legislature specifically made available for public inspection two types of records, the 1953 statute contained no general open records provision. Acts of 1953, No. 78, § 1 and No. 90, § 1. These statutes dealt with franchise and license records and accident reports. Act 90 remains in effect today. See ARK. CODE ANN. §§ 27-53-209 to -210 (Michie 1994) (regarding accident reports).

46. *Watkins, supra* note 18, at 752. These events included a renewed effort by Arkansas journalists to make government meetings and records more accessible, an Arkansas Legislative Council study delineating the differences between Arkansas law and other states, and several closed meetings by government officials that created great controversy. *Watkins, supra* note 18, at 752. Additionally, Winthrop Rockefeller, a progressive Republican, was elected governor. *Watkins, supra* note 18, at 752.

47. *Legislative Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 90, 722 S.W.2d 581, 582 (1987) (citing *Watkins, supra* note 18, at 741 (1984)).

48. The following exemptions are among those included in section 4 of the Act:

- (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 and marketing . . . and
- (10) Personnel records to the extent that disclosure would constitute clearly unwarranted invasion of personal privacy.

ARK. CODE ANN. § 25-19-105(b) (Michie Supp. 1993).

49. See, e.g., ARK. CODE ANN. § 26-18-303(a)(1) to (a)(2)(A) (Michie Supp. 1993).

50. 245 Ark. 401, 432 S.W.2d 753 (1968).

news media and the public had been excluded from a closed session of the North Little Rock City Council, which had met with the city attorney to discuss impending litigation.⁵¹ The court rejected the city's argument that it could not adequately prepare for a case if the city council was unable to meet privately with the city attorney.⁵² Analogizing municipal government to state government, the court held that the city attorney could as effectively prepare its case without meeting behind closed doors with the city council as the state's Attorney General could without meeting privately with members of the General Assembly.⁵³

Writing for the court, Justice George Rose Smith lauded the goals of the FOIA and determined that it was passed solely in the interest of the public, the Act must be liberally interpreted.⁵⁴ In this first construction of the FOIA, the court held that the FOIA is to be liberally interpreted. The legislature did not specifically exempt a meeting between the city council and city attorney; because no exemption existed, the court's liberal construction of the FOIA mandated that the meeting be deemed open to the public.⁵⁵

In its second case construing FOIA exemptions,⁵⁶ the court held that the policies behind the *Laman* rule of liberal interpretation of the Act did not demand a conclusion that the policies considered in creating an exemption to the Act⁵⁷ were less praiseworthy or "to be any more lightly regarded."⁵⁸ In other words, a policy goal that favored an exemption was as important as a policy goal that favored a more liberal interpretation of the Act. The court suggested only that exemptions should be more narrowly construed.⁵⁹

51. *Id.* at 402, 432 S.W.2d at 754.

52. *Id.* at 405-06, 432 S.W.2d at 755-56.

53. *Id.* at 405, 432 S.W.2d at 755.

54. *Id.* at 404-05, 432 S.W.2d at 755.

55. *Id.* at 405-06, 432 S.W.2d at 755-56.

56. *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977).

57. At issue in *Commercial Printing* was the personnel exemption. Arkansas law then provided:

Except as otherwise specifically provided by law, all meetings formal or informal, special or regular, of . . . all boards, bureaus, commissions, or organizations of the State of Arkansas . . . supported wholly or in part by public funds, or expending public funds shall be public meetings. . . . Executive [closed] sessions will be permitted only for the purpose of discussing or considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.

261 Ark. at 473, 549 S.W.2d at 793 (quoting ARK. STAT. ANN. § 12-2805 (Repl. 1968)).

58. 261 Ark. at 473, 549 S.W.2d at 793.

59. *Id.*

A 1986 case⁶⁰ continued the trend in FOIA cases of liberally interpreting the statute.⁶¹ The court held that if an exemption is not found in the FOIA, or if legislative intent is unclear, then disclosure is required.⁶²

In *McCambridge v. City of Little Rock*,⁶³ a man apparently killed his wife, his children, and then himself. Police found notes, diaries, and letters addressed to the man's lawyer and mother.⁶⁴ The court refused to create an attorney-client exemption to the FOIA, which would have prevented public disclosure of those items.⁶⁵ Holding that exemptions should be construed narrowly "to counterbalance the self-protective instincts of the governmental bureaucracy,"⁶⁶ the court concluded that the attorney-client privilege is an evidentiary rule limited to court proceedings and does not apply outside the scope of those proceedings.⁶⁷

Before a document is made available for public inspection under the FOIA, it must be determined that the requested document is not subject to any specific exemption.⁶⁸ States have enacted

60. *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). At issue in *Ragland* was whether the revenue commissioner was required to disclose motor fuel tax information under the FOIA. The applicable statute provides:

(a)(1) The director is the official custodian of all records and files required by any state tax law to be filed with the director and is required to take all steps necessary to maintain their confidentiality.

(2)(A) Except as otherwise provided by this chapter, the records and files of the director concerning the administration of any state tax law are confidential and privileged. These records and files and any information obtained from these records or files or from any examination or inspection of the premises or property of any taxpayer shall not be divulged or disclosed by the director or any other person who may have obtained these records and files.

(B) It is the specific intent of this chapter that all tax returns, audit reports, and information *pertaining to any tax returns . . .* shall not be subject to the provisions of [the FOIA].

ARK. CODE ANN. § 26-18-303(a) (Michie Supp. 1993) (emphasis added). The commissioner argued that the statute prevented disclosure of the motor fuel tax records sought by the plaintiff. The plaintiff argued that the statute required denial of access only to individual tax returns. The court agreed with the plaintiff. 288 Ark. at 81, 702 S.W.2d at 23.

61. 288 Ark. at 85, 702 S.W.2d at 25.

62. *Id.* at 85-86, 702 S.W.2d at 25.

63. 298 Ark. 219, 766 S.W.2d 909 (1989).

64. *Id.*

65. *Id.* at 226, 766 S.W.2d at 912.

66. *Id.* at 225-26, 766 S.W.2d at 912.

67. *Id.* at 226, 766 S.W.2d at 912.

68. *Legislative Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 90, 722 S.W.2d 581, 582 (1987) (citing *Watkins*, *supra* note 18, at 741).

exemptions for a variety of reasons.⁶⁹ In Arkansas, the working papers exemption was enacted to protect the "work product" of the decision-making process and to encourage the frank exchange of ideas during that process.⁷⁰ For the first time the exemption became the principal issue of a supreme court case in *Legislative Joint Auditing Committee v. Woosley*.⁷¹ In *Woosley*, a newspaper sought release of notes and records that were used to compile an audit of a county circuit clerk's office.⁷² The audit was made available, but the notes were not.⁷³ The trial court granted access to the notes despite the auditors' claim that the notes fell under the working papers exemption granted to legislators.⁷⁴ The auditors argued that, as employees of a legislative committee, their notes were not subject to public disclosure.⁷⁵ The supreme court affirmed the trial court and stated:

The working papers of an auditor who is a state employee cannot be deemed the private papers of individual legislators [whose papers are exempt] 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.⁷⁶

The supreme court again narrowly construed the working papers exemption in *City of Fayetteville v. Edmark*.⁷⁷ In *Edmark*, the court held that an outside attorney doing work for a municipality becomes, for purposes of the FOIA, a city attorney, and

69. For a comprehensive compilation of FOIA statutes, see Burt A. Braverman and Wesley R. Hepler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720 (1981). A majority of states exempt information made confidential by a state or federal statute, information gathered by law enforcement officials in investigations, and personal privacy information. *Id.* at 740-41, 745-46. Approximately one-third of the states exempt trade secrets or commercial information, the release of which would cause injury to a company's competitive position. *Id.* at 741-43. More than one-third of the states exempt preliminary departmental memoranda of governmental agencies. *Id.* at 743-45. Finally, ten states have an exemption which protects information that relates to litigation against a public body. *Id.* at 746.

70. *McCambridge v. City of Little Rock*, 298 Ark. 219, 228, 766 S.W.2d 909, 913 (1989).

71. *Legislative Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987).

72. *Id.* at 90-91, 722 S.W.2d at 582.

73. *Id.* at 90, 722 S.W.2d at 582.

74. *Id.* at 92, 722 S.W.2d at 583.

75. *Id.* at 91, 722 S.W.2d at 583.

76. *Id.* at 92, 722 S.W.2d at 583.

77. 304 Ark. 179, 801 S.W.2d 275 (1990).

his records therefore become public records subject to public disclosure.⁷⁸ Similarly, in *Scott v. Smith*,⁷⁹ the court held that the working papers exemption was not available to an Arkansas Department of Human Services attorney.⁸⁰ The court determined that there was no exemption for the attorney-client privilege applicable to state agency records.⁸¹ Consequently, records in the possession of the agency's attorneys are subject to public disclosure.⁸²

The court rejected another attempt to deny access to litigation files in *Arkansas Highway and Transportation Department v. Hope Brick Works*.⁸³ In *Hope Brick Works*, attorneys for the Arkansas Highway and Transportation Department argued that their working papers were exempt under the FOIA.⁸⁴ The attorneys were not members of the attorney general's staff, but were internal highway department employees.⁸⁵ The court, relying on *Scott v. Smith*,⁸⁶ held that the working papers exemption did not apply to litigation files maintained by attorneys representing state agencies.⁸⁷ The court again refused to create an exemption to the FOIA based on the attorney-client privilege.⁸⁸

III. ANALYSIS OF THE COURT IN BRYANT

In *Bryant v. Mars*,⁸⁹ the Arkansas Supreme Court considered a trial judge's ruling that the working papers exemption was available only to the officeholder personally and not his assistants or outside consultants.⁹⁰ After first determining that the records sought by the appellee fell within the definition of a "public record,"⁹¹

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

79. 292 Ark. 174, 728 S.W.2d 515 (1987).

80. *Id.* at 176, 728 S.W.2d at 516.

81. *Id.* at 176, 728 S.W.2d at 515.

82. *Id.* at 174, 728 S.W.2d at 515. The appellants in *Scott* raised the issue of the working papers exemption only in relation to the Department of Human Services attorney and not to an assistant attorney general who also possessed the documents sought by the appellee. *Id.* at 175, 728 S.W.2d at 515.

83. *Arkansas Highway and Transp. Dep't v. Hope Brick Works*, 294 Ark. 490, 744 S.W.2d 711 (1988).

84. *Id.* at 492, 744 S.W.2d at 712.

85. Appellants' Brief at 16, *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992) (No. 91-262).

86. 292 Ark. 174, 728 S.W.2d 515 (1987).

87. 294 Ark. at 495, 744 S.W.2d at 714.

88. *Id.*

89. 309 Ark. 480, 830 S.W.2d 869 (1992).

90. *Id.* at 481, 830 S.W.2d at 869.

91. *Id.* at 482-83, 830 S.W.2d at 870. The FOIA defines "public records" as: writings, recorded sounds, films, tapes, or data compilations in any form,

the court addressed the issue of whether the statutory exemption for working papers of the attorney general extended to assistant attorneys general.⁹² While remarking that existing case law on the issue was an illuminating and even appeared to be in conflict,⁹³ the court reviewed *Scott*⁹⁴ and *Hope Brick Works*⁹⁵ and attached great precedential value to the distinction between state agency records and records held by the officials whose papers are specifically exempted by the FOIA.⁹⁶

The court did not attempt to distinguish *Woosley*;⁹⁷ indeed, it acknowledged that *Woosley* favored the appellee.⁹⁸ The court suggested that the implication created by *Woosley*, that only "private papers" of legislators are exempted and not those of legislative assistants,⁹⁹ is an acceptable conclusion.¹⁰⁰

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.

ARK. CODE ANN. § 25-19-103(1) (Michie 1992).

92. 309 Ark. at 483, 830 S.W.2d at 871.

93. *Id.* The court seemed unsettled by the incongruous opinions of Ark. Highway and Transp. Dep't v. Hope Brick Works, 294 Ark. 490, 744 S.W.2d 711 (1988) and Scott v. Smith, 292 Ark. 174, 728 S.W.2d 515 (1987). In *Scott* there was no appeal of a trial court ruling that documents held by an assistant attorney general were exempted from the FOIA as working papers (the appeal concerned only an agency attorney). In *Hope Brick Works* the court appeared to ratify the trial court's ruling in *Scott*. The conflict about which the court in *Bryant* expressed concern appears to be the result of the failure in *Scott* to appeal the issue with respect to the assistant attorney general. *Id.*

94. Scott v. Smith, 292 Ark. 174, 728 S.W.2d 515 (1987). *Scott* held that files of Department of Human Services attorneys were not entitled to FOIA exemption. *Id.* at 176, 728 S.W.2d at 516.

95. Arkansas Highway and Transp. Dep't v. Hope Brick Works, 294 Ark. 490, 744 S.W.2d 711 (1988). The court in *Hope Brick Works* rejected the argument that the FOIA does not apply to litigation files. *Id.* at 495, 744 S.W.2d at 714.

96. 309 Ark. at 483-84, 830 S.W.2d at 871.

97. *Woosley* held that the working papers of state auditors employed by the Legislative Joint Auditing Committee were not exempt from disclosure under the working papers exemption of the FOIA. Legislative Joint Auditing Comm. v. Woosley, 291 Ark. 89, 93, 722 S.W.2d 581, 584 (1987); see *supra* notes 71-76 and accompanying text.

98. 309 Ark. at 484, 830 S.W.2d at 871. The decision in *Woosley* turned on the court's finding that documents which were created by an auditor, though employed by a committee created by the legislature, could not be the "private papers" of a legislator. 291 Ark. at 92, 722 S.W.2d at 583.

99. 291 Ark. 89, 722 S.W.2d 581 (1987).

100. 309 Ark. at 484, 830 S.W.2d at 871.

While reaffirming its general policy that the FOIA must be liberally construed,¹⁰¹ the court wrote that it was "aware of the need for a balancing of interests"¹⁰² to put into effect what it perceived to be the intent of the legislature.¹⁰³ The court seemed willing to accept the notion that the term "attorney general," as used in the Act, meant more than the single person who served as attorney general.¹⁰⁴ Citing Judge Richard Posner,¹⁰⁵ the court said that judges are often faced with the responsibility of placing themselves in legislators' shoes to determine what the legislators intended when drafting the statute.¹⁰⁶ The court held that to effectuate the legislature's intent, the term "attorney general" should be given its common and ordinary meaning, which, according to the court, included not only the officeholder personally but his staff members as well.¹⁰⁷

Finally, the court held that the documents generated by the private consultants were also exempt as working papers under the FOIA.¹⁰⁸ The court was forced to distinguish *Edmark*,¹⁰⁹ where it had held that an outside attorney doing work for a city was a public employee whose records were subject to disclosure.¹¹⁰ It distinguished the earlier case by noting that there was no statutory exemption in *Edmark* similar to the exemption at issue in *Bryant*.¹¹¹ The court determined that the consultants' papers were entitled to the same protection afforded the working papers of the attorney general and were therefore exempt.¹¹²

IV. SIGNIFICANCE

After *Bryant v. Mars*, it is clear that the law in Arkansas is that assistant attorneys general and private consultants are both

101. See *Ragland v. Yeargen*, 288 Ark. 81, 702 S.W.2d 23 (1986); *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968).

102. See generally *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989); *Simmons First Nat'l Bank v. Liberty Mut. Ins. Co.*, 282 Ark. 194, 667 S.W.2d 648 (1984).

103. 309 Ark. at 485, 830 S.W.2d at 872.

104. *Id.* at 484, 830 S.W.2d at 872.

105. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

106. 309 Ark. at 484-85, 830 S.W.2d at 871-72 (citing POSNER, *supra* note 105, at 273).

107. 309 Ark. at 485, 830 S.W.2d at 872.

108. *Id.*

109. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).

110. *Id.* at 189, 801 S.W.2d at 280.

111. 309 Ark. at 485-86, 830 S.W.2d at 872.

112. *Id.*

covered by the "attorney general" exemption.¹¹³ What is not clear after *Bryant* is whether the court's interpretation of the working papers exemption would extend to members of the governor's staff or members of the staffs of the justices of the supreme court.¹¹⁴ Additionally, it is not clear whether non-committee legislative staff members' papers would be entitled to the exemption.¹¹⁵ It is not inconceivable that the court would find that the working papers exemption does cover the personal staffs of legislators, supreme court justices, and the governor. Further, exactly how the court might define "correspondence" is unclear.¹¹⁶

The court's decision in *Bryant* follows the national trend,¹¹⁷ which seems to be to provide protection to the working papers of executive officeholders.¹¹⁸ Further, the additional holding in *Bryant*, that outside consultants are entitled to the working papers exemption, is supported in many jurisdictions.¹¹⁹

113. See *Bryant v. Mars*, 309 Ark. 480, 485-86, 830 S.W.2d 869, 872 (1992).

114. The working papers exemption provides protection to "[u]npublished memoranda, working papers, and correspondence of the Governor, Members of the General Assembly, Supreme Court Justices, and the Attorney General." ARK. CODE ANN. § 25-19-105(b)(7) (Michie Supp. 1993).

115. The court refused to extend the working papers exemption to notes of the staff of the Joint Auditing Committee. *Legislative Joint Auditing Comm. v. Woolsley*, 291 Ark. 89, 722 S.W.2d 581 (1987).

116. See JOHN J. WATKINS, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 76-77 (1988).

117. See, e.g., *Taylor v. Worrell Enters., Inc.*, 409 S.E.2d 136 (Va. 1991) (holding that an itemized list of long distance telephone calls placed by the governor's office fit within the exemption for "memoranda, working papers, and correspondence and was not required to be disclosed"); *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978) (ruling that the results of a character investigation requested by the governor were not "public records" since the investigation was discretionary); *Mathews v. Pyle*, 251 P.2d 893 (Ariz. 1952) (holding that documents and other information received by the governor as a result of an investigation of the state land office were not "public records"). *But see Times Mirror Co. v. Superior Court*, 813 P.2d 240 (Cal. 1991) (ruling that the correspondence exemption only applies to letters; consequently, a governor's appointment calendars and schedules are not within the exemption).

118. Telephone Interview with Alan Janesch, Director of Intergovernmental Relations, National Governors' Association (June 1992).

119. See, e.g., *Xerox Corp. v. Town of Webster*, 480 N.E.2d 74 (N.Y. 1985) (holding that "[o]pinions and recommendations that would . . . be exempt from disclosure under [FOIA] as 'intra-agency materials,' . . ." if prepared by agency employees, "do not lose their exempt status simply because they are prepared for the agency . . . by an outside consultant"). *In re Austin v. Purcell*, 478 N.Y.S.2d 64 (N.Y. App. Div. 1984) (ruling that although prepared by an outside entity, consultant's reports are treated as intra-agency material for purposes of disclosure under the FOIA). *But see DeMaria Bldg. Co. v. Department of Management and Budget*, 407 N.W.2d 72 (Mich. Ct. App. 1987) (holding that a report of an

What may be most significant about the *Bryant* decision is the court's apparent retreat from its self-imposed rule of construing FOIA exemptions narrowly.¹²⁰ One commentator has noted that two basic principles, *inter alia*, have guided the Arkansas Supreme Court in its consideration of FOIA cases.¹²¹ Having consistently interpreted FOIA exemptions as narrowly as possible, the first principle guiding the court is that where the scope of an exemption is unclear, it will be construed in a manner that favors disclosure.¹²² The second principle is a legal presumption in favor of disclosure, manifested in a requirement that entities who oppose disclosure of a document bear the burden of showing that the document should not be disclosed.¹²³ In the sense that the court in *Bryant* seemed to retreat from this long-standing policy of construing FOIA exemptions narrowly, it is possible that the decision is an aberration—a case limited by its facts. In the alternative, the court may have begun with *Bryant* to consider FOIA cases in a new and different manner. Future cases with different facts will prove which theory is accurate.

Finally, there was support in Arkansas for the *Bryant* decision from an unlikely corner. One of the last editorials published in the *Arkansas Gazette* argued that the court should extend the working papers exemption to cover assistant attorneys general.¹²⁴ The editorial appealed to the court's common sense: "Naturally, the attorney general himself files and tries very few lawsuits. What public purpose would be served to allow him to keep his notes, memoranda and correspondence secret, but to reveal those of the 60 lawyers in his office who actually do the work?"¹²⁵

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independent consultant to a public body did not fall under FOIA exemption for communications and notes within a public body or between bodies of an advisory nature).

120. Legislative Joint Auditing Comm. v. Woosley, 291 Ark. 89, 722 S.W.2d 581 (1987); Ragland v. Yeorgan, 288 Ark. 81, 702 S.W.2d 23 (1986); Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968).

121. WATKINS, *supra* note 24, at 61.

122. WATKINS, *supra* note 24, at 61.

123. WATKINS, *supra* note 24, at 61 n.36 (citing Ark. Op. Att'y Gen. No. 75-130 ("ruling that the burden of going forward with the evidence and proving compliance with the law is cast upon the party opposing the application of the Freedom of Information Act")).

124. *This Time, FOI Shouldn't Apply*, ARKANSAS GAZETTE, Sept. 6, 1991, at 8B.

125. *Id.*

