CV-19-929

In the Arkansas Supreme Court

Jennifer Jones, in her official capacity as Clerk of the District Court of Benton County, Arkansas, Bentonville Division	CAppellant/Cross–Appellee
v.	
Professional Background Screening Association, Inc.	Appellee/Cross-Appellant

On Appeal From The Circuit Court of Pulaski County, Arkansas
The Honorable Chris Piazza Presiding

Amicus Brief of the Consumer Data Industry Association, Sue Weaver CAUSE, and Coalition for Sensible Public Records Access

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Arkansas has determined as a matter of public policy that, with the exception of specific records carved out by the legislature, documents and other records created or maintained by governmental agencies ("public records") should be available to members of the public for inspection and copying. The right of access is enumerated in Arkansas's Freedom of Information Act, Ark. Code Ann. § 25-19-101 *et seq*. ("FOIA"). In furtherance of access to public records, this Court has adopted Administrative Order No. 19 ("AO 19") to further the rights of access to judicial records and limit only certain types of requests in balancing any potential strain on the judiciary. *See In re: Adoption of Administrative Order Number 19—Access to Court Records*, 369 Ark. App'x 525 (2007) (per curiam). Amici are uniquely interested in maintaining access to public-record data for both the safety of Americans and the state of the economy.

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* No counsel for a party authored this brief in whole or in part, and no counsel for a party, or a party itself, made a monetary contribution intended to fund the preparation or submission of this brief or otherwise collaborated in the preparation or submission of this brief. No one other than the amicus curiae, its members, or its counsel made a monetary contribution to this brief or collaborated in its preparation.

This case provides an opportunity for this Court to again reiterate that public records should remain open to the public, and to deter courthouses across the state from implementing policies that frustrate such rights of access. Therefore, Amici respectfully request that this Court affirm the decision of the trial court that a request for information about a consumer's potential criminal case is not "Compiled Information" as defined by the AO 19.

A. Public records are by definition intended for public access.

Arkansas's legislature adopted its Freedom of Information Act based in part on the fundamental recognition that access to public-record information is "vital in a democratic society." Ark. Code Ann. § 25-19-102. Arkansas's FOIA requires that "all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records." Ark. Code Ann. § 25-19-105(a)(1)(A). "Public records" means:

> writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is 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(7)(a). With limited exceptions, all court records are to be made open to the public unless protected by a court order. Ark. Code Ann. § 25-19-105(b)(4)–(8).[1]

Consistent with FOIA, this Court has adopted AO 19 to address the manner in which judicial public records shall be made accessible to the public, noting that "[t]he objective of this order is to promote public accessibility to court records, taking into account public policy interests that are not always fully compatible with unrestricted access," and that the order "starts from the presumption of open public access to court records." AO 19, Sec. I Commentary, 369 Ark. App'x at 537, 538. While the Court was mindful to protect the privacy of persons who were not brought into the judicial system voluntarily, the court nonetheless explained:

> This order recognizes there are strong societal reasons for allowing public access to court records, and denial of access could compromise the

[1] FOIA protects grand jury minutes, unpublished drafts of judicial or quasi-judicial opinions and decisions, materials related to ongoing investigations and working papers of certain offices of the government, including the judiciary. Ark. Code Ann. §§ 25-19-105(b)(4)–(8).

> judiciary's role in society, inhibit accountability, and endanger public safety. Open access allows the public to monitor the performance of the judiciary, furthers the goal of providing public education about the results in cases, and, if properly implemented, reduces court staff time needed to provide public access.

Id.

As such, AO 19 begins with the fundamental premise that "all persons have access to court records as provided in this order," even though some people are given greater rights of access necessary for the administration of justice. AO 19, Sec. II(A). The Court admonished that AO 19 "reflects the view that any restriction to access must be implemented in a manner tailored to serve the interests in open access." AO 19, Sec. I Commentary, 369 Ark. App'x at 538.

Contrary to this view, the Bentonville District Court has decided that such public-record information need not be made accessible to the public by interpreting AO 19 in such a way as to restrict, or even effectively prohibit, access to the public records AO 19 was intended to open to the public. Appellant's interpretation thus goes too far and frustrates the purpose behind AO 19, violating the public's right of access to public-record information in violation of Arkansas's FOIA.

1. Public record data is crucial to the U.S. economy.

As a threshold matter, it is important to understand the critical roles that public-record data plays in our communities and our national economy. Consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others, use public-record data every day to help consumers achieve their financial and personal goals, and to help businesses, governments, homeowners, property managers, and volunteer organizations avoid fraud and manage risk.

Financial services companies and consumers rely on access to all sorts of public record data for everyday life, such as the purchase of a home, financing a vehicle, etc. In addition to criminal records, public data such as real property lien records, civil judgment records, tax assessments and tax-value records are often included in consumer reports.

Employers throughout the country, including the State of Arkansas itself, utilize some form of a background check, including a search for criminal records, as a means to evaluate potential job applicants and protect public safety. *See, e.g.*, Ark. Code Ann. § 21-15-112(a)(3)(A) (state financial or information technology employees required to complete criminal history checks); Ark. Code Ann. § 12-10-307(2) (staff and supervisors of public safety answering point or

dispatch centers required to submit to criminal background checks); Ark. Code Ann. § 17-14-405(b)(3)(B) (owners of 10% or more of appraisal management companies required to submit to a criminal background check); Ark. Code Ann. § 23-64-506(c)(1) (insurance producers required to submit to background checks) and Ark. Code Ann. § 23-39-505(a)(4)(D) (licensed loan officers, mortgage bankers, mortgage brokers and services required to submit to a background check); *see also NASA v. Nelson*, 562 U.S. 134, 150 (2011) (acknowledging the legitimate needs of the government, as an employer, to screen employees for drug use and other elements of their background).

Rental property managers have a responsibility not only to evaluate the applicant's ability to satisfy their leasing obligations, but also to ensure the safety and wellbeing of their employees, residents, and guests, and use background checks containing public records to do so. *See, e.g., HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (affirming the ability of public housing authorities to have no-fault evictions to protect health and safety interests); *see also* Preventing Crime in Federally Assisted Housing—Denying Admission and Terminating Tenancy for Criminal Activity or Alcohol Abuse, 24 C.F.R. § 5.850 *et seq*. (2013) (defining times when public housing authorities may or must terminate tenants involved in particular types of criminal activity). The responsible use of tenant screening advances all of

these interests—economic stability, protection from identity theft, and general public safety.

Sadly, tragic consequences may result when criminal record information is not utilized. For example, in 2016, a Nebraska tenant's minor child was kidnapped and raped by another resident who had been allowed to move into a rental community without first undergoing a background check. *Cure v. Pedcor Mgmt. Corp.*, 265 F. Supp. 3d 984, 988–89 (D. Neb. 2016) (denying motion to dismiss because plaintiff alleged sufficient facts to argue that if the landlord had conducted a background check, it would have discovered that the perpetrator had multiple convictions for assault and public indecency).

Restrictions on access to public records impair these critical activities to the potential detriment of consumers and businesses alike. This Court should hold that the access restrictions embodied in the Bentonville District Court's interpretation of AO 19, and the adoption of its own procedures, are not "implemented in a manner tailored to serve the interests in open access" as directed by this Court. AO 19, Sec. I Commentary, 369 Ark. App'x at 538.

B. The trial court properly found that the requested public record was not "Compiled Information" as defined by AO 19.

The fundamental question in this case is whether the trial court erred in holding that information about a particular individual's criminal history is not "Compiled Information" as defined by AO 19. The trial court held that information about a person's criminal history is not "Compiled Information," even when the system the courthouse may use to access a particular file is made up of more than one computer system, as is the case in Bentonville. The trial court's interpretation of AO 19 is consistent with FOIA and AO 19 itself.

AO 19 defines "Compiled Information" as "information that is derived from the selection, aggregation or reformulation of information from more than one court record." AO 19, Sec. III(A)(10). Information about a consumer's criminal case is not "Compiled Information" under the Rule.

This Court took pains to explain in AO 19 that "Compiled Information" does not mean a request for information from one particular case:

> Section III(A)(10) recognizes that compiled information *is different from case-by-case access because it involves information from more than one case*. Compiled information is different from bulk access in that it involves only some of the information from some cases and the information has been

> reformulated or aggregated; it is not just a copy of all the information in the court's records.

AO 19, Sec. III Commentary, 369 Ark. App'x at 544 (emphasis added).

This Court also explained that a request for information that already exists within the court record is not "Compiled Information": "*Compiled information involves the creation of a new court record*. In order to provide compiled information, a court generally must write a computer program to select the specific cases or information sought in the request, or otherwise use court resources to identify, gather, and copy the information." AO 19, Sec. III Commentary, 369 Ark. App'x at 544 (emphasis added).

Based on the definitions above and the clear guidance from this Court, a request to determine if a court file exists on an identified consumer does not seek Compiled Information. A request for a copy of a docket summary or a charge or a case disposition is not a request for Compiled Information. All criminal case files contain some form of a charging instrument and a disposition or judgment record. Both documents exist in the physical file, and the same information is presently reflected in each virtual case file.

A request to see if an individual has a criminal conviction does not become a request for Compiled Information even if the clerk must look in two systems: one to identify if a case file exists, and the

other to pull the file and identify the record requested. The process undertaken by Bentonville is akin to searching a terminal to determine if a file exists, and if it does (which apparently happens less than 20% of the time (RP 348)), proceeding to a virtual file cabinet to locate the file and copy the requested page. This process does not change the nature of the information that presently exists in the file, or the fact that the information exists. It is simply the same information maintained and delivered in a new way.

Amici recognize that certain requests could easily amount to a request for "Complied information" from the court's record taken as a whole. Consider a journalist who intends to write an article about crime rates in a particular neighborhood. The journalist would like to know about the number of crimes that have occurred in that zip code, at night, an in which the alleged perpetrator is male. Searching for any particular consumer's name (i.e. a case file) would not serve their needs. Instead, the journalist requires a survey of all criminal records, perhaps even requiring a researcher to create a complex query to identify all cases alleging violations of the particular statute, limiting results to a particular location, limiting the results further to crimes where the perpetrator was male, and where the alleged crime occurred a night.

In this example, there is no single document in the courthouse containing this information; it must be created. It must be "compiled"

based on the search results (by offense type, sex of offender, and time of offense) across all criminal records. This is the type of search that would seek "Compiled Information" under AO 19—not merely a lookup function for a particular individual's case.

Appellant seems to suggest that the nature of the information is transformed because the Bentonville court record system for pre-2013 records is antiquated, and the District Court has chosen not to invest in technology to provide research capabilities to the public through terminal access. In adopting AO 19, this Court urged lower courts to "endeavor to make at least the following information, when available in electronic form, remotely accessible to the public" including: (1) litigant/party/attorney indexes to cases filed with the court; (2) listings of case filings, including names of the parties; (3) the register of actions or docket sheets; (4) calendars or dockets of proceedings, including case numbers and captions, date and time of hearings and location of hearings; and (5) judgments, orders, or decrees. AO 19, Section V(A). Technology has evolved significantly over the past 13 years since A0 19 was adopted, with the evolution of data lakes and data stores making data management more efficient, and operationally more cost effective. Thus, any burden experienced by Bentonville's staff would be unnecessary with an investment in sufficient technology resources, and, in any event, does not change

the nature of the information from an individual case record to "Compiled Information."

Appellant relies on an Attorney General opinion interpreting AO 19 for the proposition that a request for a copy of criminal-history information is "Compiled Information." Op. Ark. Att'y Gen. No. 121 (2015) ("AG Opinion"). But that reliance is misplaced. The AG Opinion assumes without explanation that the request would seek "Complied Information" under AO 19. After citing the definition for a "case record," it makes the conclusory statement that "[b]ecause the records at issue in your questions seem to fall within Order 19's key threshold definitions, the Order requires their disclosure 'subject to the limitations of sections V through X.'" Op. Ark. Att'y Gen. No. 121, at 3 (2015). As discussed above, information related to an individual's criminal record is not "Compiled Information," so Sections V through X of AO 19 do not apply.

The AG Opinion suggests, and Appellant's testimony seems to affirm, that unless a person knows the exact case information (name, date, case number) of the court record they would like to review, that person may never access pre-2013 case information unless they complete a compiled records request. *See* (RP 174) ("[I]f they could not specify that there was a specific court record, in other words, if they came and said they wanted Johnny's speeding ticket from 2010, that would be different because they have told me what exactly they

need. But yes, if it was just a general records request [I would have advised the request falls under AO 19]. . .); *see also* (RP 176) (". . . it was a very different request if they were actually to get a report from Arkansas State Police that said they knew specifically which cases they needed and then if they told me specifically which cases they needed, that was not a problem, we could get that.") Such an interpretation of AO 19 is inconsistent with Arkansas's FOIA and AO 19 itself, and should not be adopted by this Court.

The AG Opinion also states that "[AO 19]…establishes a procedure that is independent of FOIA {and] …. only uses the FOIA as a 'gap-filler.'" Op. Ark. Att'y Gen. No. 121, at 2 (2015). But that misconstrues the regulatory framework within which the AO 19 fits. Arkansas law clearly provides that unless excluded under FOIA, court records are public records subject to inspection and copying by any citizen of the State. Ark. Code Ann. § 25-19-105. AO 19 is intended to govern specific types of requests for information, while preserving FOIA's general rule that the public has a right of access to court records generally. Respectfully, this Court cannot by administrative order fundamentally change a right of access to public-record information guaranteed under Arkansas law, nor do Amici believe that is what was intended. Instead, AO 19's purpose is to facilitate open access to public-record information, while attempting to relieve the burden special requests impose on the

judicial system. Thus, the limitations in AO 19 relate to limited requests, namely "Bulk Records" and "Compiled Information."

If Appellant's position were correct, then Arkansas's FOIA laws related to access to public-record information maintained by the judiciary would be essentially stripped of their effect because there would be no case record a person could access except in their own individual case. Further, if Appellant's interpretation were correct, other provisions of the Rule would have little if any meaning, such as: (i) AO 19's presumption in favor of "open public access to court records" found in the Commentary to Section I; (ii) the time and place the public may access records found in Section IX, which states that "[c]ourt records that are publicly accessible will be available for public access in the courthouse during regular business hours established by the court;" and (iii) the Court's admonition in the Commentary to Section I that "any restriction to access must be implemented in a manner tailored to serve the interests in open access." AO 19, Sec. I Commentary, 369 Ark. App'x at 538.

In fact, and contrary to the public policy favoring access to records, Appellant's interpretation has had an ongoing chilling effect on access to public-record information. Appellant admits that her office has not fulfilled any public-record requests for pre-2013 case records since February 2018. (RP 174). The record in this case demonstrates that the Bentonville District Court's interpretation of

AO 19 has created an impermissible bar that frustrates access to public records that should be open to every Arkansan, and which further frustrates the free and ready access to public records relied on across the country. This Court should not adopt the Appellant's reasoning, but should instead affirm the trial court's determination that the information is not "Compiled Information" under AO 19.

Conclusion

For the foregoing reasons, this Court should affirm the trial court's decision regarding AO 19.

Respectfully submitted,

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Certificate of Compliance

I certify that this amicus brief (1) complies with Administrative Order No. 19's requirement concerning confidential information; and (2) conforms to the word count limitations identified in Rule 4-2(d) as interpreted by the Clerk's office for amicus briefs, in that the entire brief, including every section, contains 3,761 words.

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