

Opinion No. 2012-143

March 11, 2013

A. Watson Bell, Chairman
Arkansas Workers' Compensation Commission
324 Spring Street
Post Office Box 950
Little Rock, Arkansas 72203-0950

Dear Mr. Bell:

You have asked for my opinion on whether certain records maintained by the Arkansas Workers' Compensation Commission are exempt from disclosure under the Arkansas Freedom of Information Act (FOIA), which is codified at A.C.A. §§ 25-19-101 to -110.

Arkansas law requires the Commission to determine whether an employer qualifies as an "extra-hazardous employer" for certain purposes. To fulfill this obligation, the Commission may use certain data kept by the Department of Workforce Services. But Arkansas law—specifically, A.C.A. § 11-10-314(n)—"strictly prohibits" the Commission from disclosing any of this "confidential" data.

A journalist has made an FOIA request for, among other things, the names of employers that the Commission currently considers to be "extra-hazardous employers." You ask whether the confidentiality rules outlined above prohibit the Commission "from disclosing the identity of employers."

RESPONSE

In my opinion, the answer to your question is "yes."

DISCUSSION

The FOIA requires that, upon receiving a valid FOIA request, a custodian must disclose the requested public records unless some law has been “specifically enacted to provide otherwise.”¹ The answer to your question turns on whether A.C.A. § 11-10-314(n) has been “specifically enacted” as an FOIA exception.

The Arkansas Supreme Court has taken a narrow view of the term “specifically enacted.” In *Ragland v. Yeargan*, the Arkansas Supreme Court established a general rule for assessing whether a statute creates an exception to the FOIA:

[T]he objectives of the FOIA are such that whenever the legislature fails to specify that any records in the public domain are to be excluded from inspection, or is less clear in its intendments, then privilege must yield to openness....We hold, therefore, that the burden of confidentiality rests on the legislation itself, and if the intention is doubtful, openness is the result.²

There are two general ways for the legislature to make clear “its intendments” regarding any statute. First, the legislature can declare the statute at issue an exception to the FOIA by specifically mentioning or citing the latter. For example, after the court’s decision in *Ragland v. Yeargan*, the legislature amended the statute that was at issue in that case to clearly reference the FOIA: “It is the specific intent of this chapter that...[certain documents filed by certain persons] shall not be subject to the provisions of the Freedom of Information Act of 1967, § 25-19-101 *et seq.*”³

Second, even when it does not specifically reference the FOIA, the legislature can clearly indicate its intent to create an FOIA exception by expressly providing for a record’s nondisclosure.⁴ The Arkansas Supreme Court’s decision in *Byrne v. Eagle*

¹ A.C.A. § 25-19-105(a)(1)(A).

² 288 Ark. 81, 85–86, 702 S.W.2d 23, 25 (1986).

³ A.C.A. § 26-18-303(a)(2)(B).

⁴ It is not entirely clear whether this second option is available to the legislature after 2009, which is when the legislature enacted A.C.A. § 25-19-110. This statute purports to require that if, after July 1, 2009, the legislature wants to create “a new exception” from the FOIA, the legislature must “state that the record or meeting is exempt from the Freedom of Information Act of 1967, § 25-19-101 *et seq.*” Statutes that prescribe certain language for or attempt to bind subsequent legislatures—as section 25-19-110 does—are typically called “entrenchment rules.” The validity

illustrates this method of creating an FOIA exception.⁵ In *Byrne*, the court assessed whether the following statute was specific enough to create an FOIA exception: “All applications [of a certain kind that are] submitted to [a certain state agency] and all supporting documents ... submitted with the applications **shall be confidential and shall not be open to public review**, except as provided in this subchapter...”⁶ The court thought that this language was obviously sufficient: “[I]t is clear beyond question that the intent of the General Assembly was to keep the application process confidential...”⁷

The statute at issue in *Byrne* is similar to the one you ask about, section 11-10-314(n). The latter also clearly provides for nondisclosure:

(n)(1) Beginning on and after January 1, 1995, the Workers' Health and Safety Division of the Workers' Compensation Commission may be furnished, for production of the extra-hazardous employer identification formula, the following data to the extent that such data is maintained in the department's computer database:

- (A) Employer name;
- (B) Federal employer identification number;
- (C) Employer address and plant locations in Arkansas;
- (D) Employer telephone number;
- (E) Employer standard industrial classification code;

or effect of such rules is questionable. *See generally Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (refusing to require Congress “to employ magical passwords in order to effectuate an exemption from” a statute that required any exemptions be stated “expressly”); Amandeep S. Grenwal, *Legislative Entrenchment Rules in the Tax Law*, 62 Admin. L. Rev. 1011 (2010) (summarizing the kinds of entrenchment rules, some case law, and academic commentary); Laurence H. Tribe, *American Constitutional Law*, § 2-3, p. 125, n.1 (3d ed. 2000) (arguing that entrenchment rules are invalid); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002) (arguing that entrenchment rules are valid, helpful aids in construing legislative intent). Nevertheless, it is not necessary to address section 25-19-110's validity or effect because the statute you ask about predates the effective date of section 25-19-110.

⁵ 319 Ark. 587, 892 S.W.2d 487 (1995).

⁶ A.C.A. § 15-5-409(b) (emphasis added).

⁷ 319 Ark. at 594, 892 S.W.2d at 490.

(F) Maximum number of employees by calendar year;

(G) Unemployment insurance account number; and

(H) Reporting unit number.

(2)(A) The division shall be **strictly prohibited from making any disclosure or redisclosure** of the confidential information which may be made available to it under this subsection. (Emphasis added.)

In my opinion, a court faced with your question would probably conclude that the emphasized language renders section 11-10-314(n)(1) specific enough to qualify as an exception to the FOIA. This conclusion is consistent with this office's view in similar inquiries about other statutes. For example, in 1997, this office opined that a State Crime Lab statute qualified as an exception to the FOIA when it used the terms "privileged and confidential."⁸

Because section 11-10-314(n) most likely qualifies as an FOIA exception, the "Workers' Health and Safety Division" of the Commission is not permitted to release the "employer name" or the other items in section 11-10-314(n)(1), whether individually or collectively.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh

⁸ See Op. Att'y Gen. 97-294 (assessing A.C.A. § 12-12-312(a)(1)).