



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-064

November 2, 2016

The Honorable Mark Martin
Secretary of State
Arkansas State Capitol, Room 256
Little Rock, AR 72201

Dear Mr. Martin:

This is in response to your request for an opinion on the disposition of older records kept in the Secretary of State's Elections Division. Your request states that some of these records date back over 20 years and include the following:

1. Statements of financial interest, as described by Ark. Code §§ 21-8-701 *et seq.*
2. Lobbyist disclosures, registrations, and activity reports, as described by Ark. Code §§ 21-8-401 *et seq.* and 21-8-601 *et seq.*
3. Candidate nomination petitions, as described by Ark. Code §§ 7-10-103, 7-7-103, and 7-8-302.
4. New political party petitions, as described by Ark. Code § 7-7-205.
5. Candidate filing information, as described by Ark. Code §§ 7-7-301, 7-10-103, and 7-6-102.
6. Oaths and commissions of elected officials, as described by Ark. Code §§ 21-2-101 *et seq.*
7. Election commissioner oaths, as described by Ark. Code §§ 7-4-102 *et seq.*

8. Political action committee registrations and reports, as described by Ark. Code §§ 7-6-215 *et seq.*

You pose these questions:

1. Is it permissible to destroy these documents after a certain time period?
2. If so, how many years should we retain these records prior to destroying them?
3. If not, is it permissible to digitize these records or to transfer them to another entity?

RESPONSE

As a general matter, Arkansas law does not prescribe a particular amount of time during which you must retain the records described above. Accordingly, so long as you exercise your discretion reasonably and for a legitimate governmental purpose, the time period after which you can discard old records is left to your discretion.

There are three important caveats to my opinion. First, records subject to a litigation-hold notice and records you otherwise know may be reasonably related to current or anticipated litigation must be retained. Second, I can only answer your question generally and with regard to Arkansas law. Certain documents, based on their specific content, could theoretically be subject to specific federal laws that impose a time period for which the record must be kept. Third, it is important to understand that I am not authorized to say and do not say whether as a matter of good public policy or stewardship you should retain these older records; rather my opinion is confined to answering your specific question about what the law allows you to do. Nonetheless, I do below provide you several options if you choose to retain all or some older records.

DISCUSSION

Question 1: Is it permissible to destroy these documents after a certain time period?

Question 2: If so, how many years should we retain these records prior to destroying them?

No Arkansas law of general application requires you to keep the documents at issue for any particular period of time. Neither does any Arkansas law narrowly relating to the specific records at issue require you to keep them for any particular period of time.¹ The criminal code makes it a crime to destroy a public record “with the purpose of impairing the verity, legibility, or availability of a public record...”² But I assume in this opinion that your decision to not retain older records is not for the purpose of impairing the availability of such record, but rather for legitimate governmental reasons such as space, financial resources, etc. I further assume that your decision will be based on a reasonable exercise of discretion and fairly consistent within categories of documents.

The law does require state officials to give the Arkansas History Commission written notice of their intentions “[b]efore destroying or discarding outdated records, other than ephemeral materials...”³ Such records are to be given to the Commission if it determines they have historical value.⁴

Because Arkansas law does not prescribe any period for which you must keep the records you ask about,⁵ it is my opinion that you, as custodian of the records, may

¹ A statute provides that lobbyist activity reports “shall be open to public inspection.” Ark. Code Ann. § 21-8-603(b)(1) (Supp. 2015). Another requires you to “[m]ake all statements and reports filed [under the Disclosure Act for Lobbyists and State and Local Officials] available for public inspection and copying at a reasonable cost during regular office hours.” Ark. Code Ann. § 21-8-606(2) (Repl. 2004). Of the records at issue here, statements of financial interest, and lobbyist disclosures, registrations, and activity reports are filed under the Disclosure Act. Additionally, a law requires that your website “shall allow for searches of political action committee registration information filed in electronic form...” Ark. Code Ann. § 7-6-215(a)(1)(D)(iv) (Supp. 2015). In my view, the statutory provisions quoted in this note do not impose retention requirements but rather simply reinforce the proposition that the records, to the extent they exist, are of a type that are to be publicly available, most commonly under the Freedom of Information Act. *Accord* Op. Att’y Gen. 94-085.

² Ark. Code Ann. § 5-54-121(a) (Repl. 2016)

³ Ark. Code Ann. § 13-3-107(b)(2) (Repl. 2015).

⁴ *Id.*

⁵ Act 918 of 2005, codified at Ark. Code Ann. §§ 25-18-601 to -605 (Repl. 2014), calls for the development of rules and guidelines for “the retention of public records commonly found in most state agencies” but the term “state agencies” does not include you as an elected constitutional officer. *See* Ark. Code Ann. § 25-18-603(2)(B)(i).

determine how long to retain them. As noted above, however, your determination must be reasonable and for a legitimate governmental purpose.

The nature of the record at issue, and the frequency – if any – at which it is filed may, of course, be relevant to the question of how long it should be retained. You may also deem it appropriate to look to law binding other officials and entities with respect to retention periods. In this respect, I note that counties are required to keep certain records similar to some of those at issue in in your request for five years.⁶

I note that Act 1282 of 2015 (uncodified) calls for the creation of the Open Data and Transparency Task Force to, *inter alia*, “[d]etermine the best practices for the state to achieve the most efficient system for *maintaining* the state’s public records....” (emphasis added). You may wish to consult the Task Force with respect to the issues raised by your opinion request.

I also note that a law that appears to apply primarily to documentary evidence and court records nevertheless purports to authorize “any public officer[] whose duty it is to make public records ... to use and employ an approved system of photographic recording ... or other process which accurately reproduces or forms a durable medium for reproducing the original” and thereupon to destroy the original record “unless the document is over fifty (50) years old and handwritten or its preservation is otherwise required by law.”⁷ Accordingly, for some older documents, you have the authority to make electronic copies of such records.

Question 3: If not, is it permissible to digitize these records or to transfer them to another entity?

While the premise of this question is not technically met, I note that one Arkansas statute provides that “[i]f a law requires that a record be retained, the requirement is satisfied by retaining an electronic record” which meets certain criteria stated in the law.⁸ A second statute also authorizes “any state ... official ... to turn over to

⁶ See Ark. Code Ann. § 13-4-306(2)(C) (Repl. 2015).

⁷ Ark. Code Ann. § 16-46-101(a)(2) (Supp. 2015). This law also provides that, if “any department or agency of government, in the regular course of business or activity has kept ... any ... writing, ... and in the regular course of business has caused [it] to be ... reproduced by any ... process which accurately reproduces ... the original, the original may be destroyed in the regular course of business unless its preservation is required by law.” Ark. Code Ann. § 16-46-102(b)(1).

⁸ Ark. Code Ann. § 25-32-112(a) (Repl. 2014). See also *supra* note 5 and accompanying text.

the Arkansas History Commission, for permanent preservation, any official ... records ... not in current use in his or her office.”⁹

While as a general matter Arkansas law may not require you to keep older records, it certainly provides you the ability to decide to digitize those records and/or turn them over to the Arkansas History Commission for more permanent preservation. Indeed, for the older records you identify, the law requires you to give the History Commission written notice and an opportunity to take such records.

Sincerely,



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Attorney General

⁹ Ark. Code Ann. § 13-3-107(a)(1).