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October 18, 2012

Ms. Terry Hawkins
Crittenden County Circuit Clerk
Crittenden County Courthouse
100 Court Street
Marion, Arkansas 72364

VIA OVERNIGHT DELIVERY

RE: *Hicks, et al. v. West Memphis, Arkansas Police Department, et al.*
Crittenden County Circuit No. CIV-2012-290-6

Dear Ms. Hawkins:

Enclosed please find the original and two copies of a Reply in Support of Motion to Dismiss Third Amended Petition for Declaratory Judgment, Complaint for Violations of the Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of Appellees. Please file the original and return file-marked copies to me in the enclosed self-addressed, stamped envelope. Thank you for your kind attention to this matter, and please feel free to contact me with any questions or concerns you may have.

Best regards,

A handwritten signature in black ink, appearing to read "C. Jorgensen", with a long horizontal flourish extending to the right.

Colin R. Jorgensen
Assistant Attorney General

CRJ/jkh

Enclosures

CC: (w.encl.): Hon. Victor Hill
Mr. Scott Ellington
Mr. Ken Swindle ✓
Mr. David Peeples

IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS

PAM HICKS and
JOHN MARK BYERS

PLAINTIFFS/APPELLANTS

v.

CV-2012-290-6

THE WEST MEMPHIS, ARKANSAS, POLICE
DEPARTMENT; THE CITY OF WEST MEMPHIS,
ARKANSAS; DONALD OAKES, in his Individual
and Official Capacities as Chief of Police of the West
Memphis, Arkansas, Police Department;
WILLIAM H. JOHNSON, in his Individual and Official
Capacities as Mayor of West Memphis, Arkansas; and
SCOTT ELLINGTON, in his Individual and Official
Capacities as Prosecuting Attorney for the Second
Judicial District of Arkansas

DEFENDANTS/APPELLEES

**REPLY IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED PETITION
FOR DECLARATORY JUDGMENT, COMPLAINT FOR VIOLATIONS
OF THE ARKANSAS FREEDOM OF INFORMATION ACT OF 1967, AND
APPEAL FROM ADMINISTRATIVE DECISION OF APPELLEES**

COMES NOW Separate Defendant/Appellee Scott Ellington, in his Individual and Official Capacities as Prosecuting Attorney for the Second Judicial District of Arkansas ("Prosecutor Ellington"), and offers the following Reply in support of his Motion to Dismiss the Third Amended Petition for Declaratory Judgment, Complaint for Violations of the Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of the Appellees ("Third Amended Petition") filed by Plaintiffs/Appellants Pam Hicks and John Mark Byers ("Plaintiffs").

1. As set forth in Prosecutor Ellington's Motion to Dismiss and Brief, which are incorporated into this Reply by reference pursuant to Ark. R. Civ. P. 10(c), well before the Third Amended Petition was filed in this matter to name Prosecutor Ellington as a Defendant,

Prosecutor Ellington had already offered to make all responsive and non-exempt records available for inspection and copying by Plaintiffs and their attorney, in full compliance with the FOIA. So far as Prosecutor Ellington is aware, neither Plaintiffs' counsel nor the Plaintiffs have ever availed themselves of the offer to examine the records they requested.

Counsel for Plaintiffs now denies that Prosecutor Ellington ever offered to make records available prior to the Third Amended Petition. Counsel's statement is false, but in any event it is immaterial, because there is no dispute that Prosecutor Ellington set forth in his first responsive pleading that he stands ready to provide reasonable access to all responsive and non-exempt records requested by Plaintiffs and their attorney. Even if Prosecutor Ellington had not made this offer prior to his first responsive pleading, which he did repeatedly, upon receipt of Prosecutor Ellington's first responsive pleading, Plaintiffs and their attorney could have come to Prosecutor Ellington's office and inspected the records at their convenience. Plaintiffs' request to inspect the Prosecutor's records is moot. Prosecutor Ellington stands ready to provide access to the entirety of the relevant files delivered to Prosecutor Ellington by his predecessors, with the exception only of affidavits recently received by Prosecutor Ellington's office, which are the subject of an active and ongoing investigation by Prosecutor Ellington's office, and which are therefore exempt from disclosure by Ark. Code Ann. § 25-19-105(b)(6).

2. Prosecutor Ellington offered the Laird Williams FOIA response as an exhibit to his Motion to Dismiss (Exhibit A), because Mr. Williams' FOIA request was substantively identical to Plaintiffs' FOIA request, and Prosecutor Ellington's response to the two FOIA requests was substantively identical. Nowhere in his Motion to Dismiss did Prosecutor Ellington argue that his written response to Mr. Williams' FOIA request should be substituted for his verbal responses to Plaintiffs' counsel and his commitments in his pleadings in this case in

response to Plaintiffs' FOIA request. The identical Laird Williams FOIA response was merely offered to assist the Court in understanding Prosecutor Ellington's position in this case.

3. Plaintiffs' request for attorney's fees under Ark. Code Ann. § 16-22-309 is without legal merit and should be denied accordingly. § 16-22-309 provides:

(a)(1) In any civil action in which the court having jurisdiction finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee in an amount not to exceed five thousand dollars (\$5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party unless a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or the amended pleadings knew, or reasonably should have known, that he would not prevail.

(b) In order to find an action, claim, setoff, counterclaim, or defense to be lacking a justiciable issue of law or fact, the court must find that the action, claim, setoff, counterclaim, or defense was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known, that the action, claim, setoff, counterclaim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Id. Plaintiffs argue that Prosecutor Ellington should be sanctioned under this provision because "Whether [Prosecutor Ellington] responded to [Plaintiffs'] letter by communicating with Mr. Laird, or his next-door neighbor, or an imaginary friend has absolutely no relevance in this matter, and he should be sanctioned for even making such a frivolous argument." Plaintiffs' Response, p. 3. As explained above, Prosecutor Ellington has not asserted that his response to Mr. Williams' FOIA request should somehow be substituted for his response to Plaintiffs' FOIA request. Prosecutor Ellington communicated the same response to Counsel Swindle as he

provided to Mr. Laird. As explained below, sanctions under § 16-22-309 are plainly unwarranted in any event.

Plaintiffs also request sanctions under § 16-22-309 based upon Plaintiffs' tortured argument that Prosecutor Ellington has somehow committed fundamental misconduct by responding to the lawsuit Plaintiffs filed and by repeating therein the FOIA response he had previously given. This is a nonsensical argument and it has no merit. According to Plaintiffs, the conversations between Prosecutor Ellington and Mr. Swindle, in which Prosecutor Ellington stated his willingness to open his files, somehow constitute privileged compromise negotiations under Ark. R. Evid. 408, and Prosecutor Ellington's "release of the privileged communication between counsel is so fundamental in its violation of the Rules of Evidence and established Arkansas Law" that sanctions are warranted against Prosecutor Ellington. This argument is silly. The fee request should be promptly denied.

First, § 16-22-309 has no application in any FOIA case regardless of the facts because § 16-22-309 is a general provision for attorney's fees and the FOIA contains its own specific attorney's fees and expenses provision. *See* Ark. Code Ann. § 25-19-107(d)(1) ("In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney's fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified."); *Shelton v. Fiser*, 340 Ark. 89, 94, 8 S.W.3d 557 (2000) ("It has long been the law in Arkansas that a general statute must yield when there is a specific statute involving the particular subject matter.") (citing *Bd. of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997); *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994); *Conway Corp. v. Constr. Eng'rs, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989)). Of course, in any

event, as set forth in Prosecutor Ellington's Motion to Dismiss, Plaintiffs are specifically barred from recovering fees or costs against the State, any State agency, or any State official under the FOIA. *See* Ark. Code Ann. § 25-19-107(c)(1) ("the court shall not assess reasonable attorney's fees or other litigation expenses reasonably incurred by a plaintiff against the State of Arkansas or a department, agency, or institution of the state.").

Second, § 16-22-309 has no application in any event because Prosecutor Ellington's response to Plaintiffs' lawsuit was entirely appropriate and raised a defense specifically set forth in the FOIA itself. Prosecutor Ellington has not raised any claim or defense "in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause[.]" Ark. Code Ann. § 16-22-309(b). Additionally, there is no amount in controversy in this case, so any fee award under § 16-22-309 would be \$0 in any event because § 16-22-309 calls for the lesser of \$5,000 or 10% of the amount in controversy, *supra*. Prosecutor Ellington simply set forth in his Motion to Dismiss that he previously told Mr. Swindle that he would provide reasonable access to public records in compliance with the FOIA. If anything, Plaintiffs are the party who have presented a non-justiciable issue to this Court by raising their baseless claim for attorney's fees under § 16-22-309.

Third, Plaintiffs' contention that Prosecutor Ellington's communications with Mr. Swindle in response to the FOIA request by Mr. Swindle are somehow privileged in a lawsuit brought by Mr. Swindle over that very FOIA request, is meritless. Prosecutor Ellington simply pled affirmatively in his Motion to Dismiss that he stood ready to make all responsive and non-exempt records available for inspection and copying by Plaintiffs and their attorney, in full compliance with the FOIA. This is an affirmative defense to Plaintiffs' FOIA action. Under Plaintiffs' peculiar reasoning, communications regarding any FOIA request or FOIA response

may not be raised when an FOIA suit is filed. Under Plaintiffs' reasoning, neither the plaintiff nor the defendant in an FOIA action can present evidence of the plaintiff's FOIA request, the defendant's response, or any communications between the plaintiff and defendant about the FOIA request. In other words, according to Plaintiffs, no party to an FOIA action can present any evidence about the single relevant issue in an FOIA action. Of course, evidence concerning FOIA requests and responses is the ultimate issue in any FOIA action. Plaintiffs' argument that evidence of the single most important issue in any FOIA action is inadmissible under Rule 408 is incorrect, and simply absurd. Plaintiffs' request for fees pursuant to Ark. Code Ann. § 16-22-309 should be denied.

4. The only possible issue remaining with respect to Plaintiffs' FOIA request to Prosecutor Ellington is whether Prosecutor Ellington has properly declined to disclose certain affidavits received by his office this year that are related to an ongoing law enforcement investigation by his office. *See* Ark. Code Ann. § 25-19-105(b)(6) ("the following shall not be deemed to be made open to the public under the provisions of this chapter . . . [u]ndisclosed investigations by law enforcement agencies of suspected criminal activity."); *Martin v. Musteen*, 303 Ark. 656, 660, 799 S.W.2d 540 (1990) ("if a law enforcement investigation remains open and ongoing it is one meant to be protected as 'undisclosed' under the act."). Plaintiffs properly concede that ongoing law enforcement investigations of suspected criminal activity are exempt from disclosure under the FOIA. *See* Plaintiffs' Response, p. 5. Plaintiffs argue further that when a defendant in an FOIA action relies upon this exemption, the trial court must determine whether there is an ongoing law enforcement investigation. Prosecutor Ellington agrees. At the hearing in this matter, Prosecutor Ellington will offer the affidavits for the Court's *in camera* inspection. Prosecutor Ellington will also make available, should the court desire to hear it,

witness testimony to confirm that there is in fact an ongoing investigation related to the subject matter of the affidavits. Again, the affidavits are the *only* records that Prosecutor Ellington has declined to disclose in response to Plaintiffs' FOIA request. Mr. Swindle and the Plaintiffs are free to inspect Prosecutor Ellington's files at his office during normal business hours, as Prosecutor Ellington set forth in his Motion to Dismiss.

5. Plaintiffs state that they "appreciate the concern of [Prosecutor Ellington] in disclosing [] any information regarding any legitimate ongoing investigation" and the Plaintiffs have requested that the hearing scheduled for October 24, 2012 be closed to the public or alternatively, that the Court conduct an *in camera* review of the ongoing investigation. Plaintiffs' Response, p. 8. Prosecutor Ellington does not object to a closed hearing if the Plaintiffs wish the hearing to be closed to the public; Prosecutor Ellington agrees that the proper procedural approach is for the trial court to conduct an *in camera* inspection of the records that Prosecutor Ellington claims are exempt from FOIA disclosure, so that the Court may determine whether the exemption applies. *See, e.g., Watkins v. Dale*, 2011 Ark. App. 385, *6 ("[W]e reverse and remand for the trial court to hold a hearing and conduct an *in camera* review of the [records] to determine if they fall within one of the exceptions from FOIA set forth in Ark. Code Ann. § 25-19-105(b)."): Prosecutor Ellington notes that Plaintiffs raise a separate FOIA claim against other Defendants in this matter, and Prosecutor Ellington does not know whether closing the entire hearing would be appropriate under the circumstances. Prosecutor Ellington plans to offer the undisclosed affidavits for the Court's *in camera* inspection and, if the court desires, will also offer witness testimony in open court to confirm the existence of an ongoing investigation, without revealing substantive details regarding the investigation that would defeat the purpose of the FOIA exemption at Ark. Code Ann. § 25-19-105(b)(6). Even if the hearing is closed to the

public, Prosecutor Ellington objects to revealing details about any ongoing investigation to Plaintiffs or their attorney (who made the FOIA request to Prosecutor Ellington), for the same reason.

6. Pursuant to Rule 10(c) of the Arkansas Rules of Civil Procedure, Prosecutor Ellington incorporates by reference his previously filed Motion to Dismiss and Brief, and contends that following the hearing on October 24, 2012, the Third Amended Petition against Prosecutor Ellington should be dismissed because: (a) the Third Amended Petition against Prosecutor Ellington fails to state a claim for which relief can be granted under Ark. R. Civ. P. 12(b)(6); (b) Prosecutor Ellington has complied with the FOIA, and will continue to comply with the FOIA by making all responsive and non-exempt records available for inspection and copying; (c) Prosecutor Ellington has properly denied access to records related to an ongoing law enforcement investigation, which are exempt from disclosure by Ark. Code Ann. § 25-19-105(b)(6); (d) the Third Amended Petition against Prosecutor Ellington in his individual capacity is outside the scope of the FOIA; and (e) the recovery of fees or costs against a state official or state entity in an FOIA action is explicitly barred by Ark. Code Ann. § 25-19-107(e)(1).

WHEREFORE, Separate Defendant/Appellee Scott Ellington, in his Individual and Official Capacities as Prosecuting Attorney for the Second Judicial District of Arkansas, prays that the Third Amended Petition against him be dismissed with prejudice, and for all other just and appropriate relief.