

Administrative Order No. 19

Access to Court Records

But first, The Arkansas Freedom Of Information Act

Stolen from Deputy AG Ryan Owsley's FOIA Roadshow Presentation

Three-step approach:

- 1) Is the entity covered?
- 2) Is the record/meeting covered?
- 3) Are there any exemptions?

1) Arkansas FOIA covers all government entities and some private entities. Private entities might be subject to FOIA if there is “public funding + intertwining.”

2) Is the record covered?

A “public record” is

- Writings, sounds, electronic information, or videos that
- Are kept
- That constitute a record of the performance or lack of performance of official functions

3) Is there an exemption?

- State income tax records
- Medical, adoption, and education records
- Certain historical and archeological records
- Grand jury minutes
- Unpublished drafts of judicial or quasi-judicial opinions and decisions
- Undisclosed criminal investigations
- Governor, AG, legislative, and appellate judges' working papers
- Documents protected by court rule or order
- Trade secrets (basically)
- Etc.



Administrative Order No. 19

FOIA governs access to court records *unless Administrative Order No. 19 covers it.*

Governs access to, and confidentiality of, court records.

Requestors do not have to be citizens of Arkansas, and there is no requirement that they have to state a purpose for asking for the records.

Section I(E)

Clerks and courts *may* redact or restrict information that was considered public in records created before Jan. 1, 2009

However, records available via *remote access must* be redacted if they contain confidential information, even if they are pre-January 2009.



Section III. Definitions

(1) Court record: Case and administrative records, but *not* information maintained by other agencies that is not necessary to a court's decision or part of the basis of the decision or judicial process.

“[I]f the information is provided to the court as part of a case or judicial proceeding, the court's access rules then apply, regardless of where the information came from or the access rules of that agency.”



(2) Case record: “is meant to be all inclusive of information that is provided to, or made available to, the court that relates to a judicial proceeding.”

This includes “any information that relates to a judicial proceeding generated by the court itself, whether through” court or clerk personnel.

The Comments describe two categories of case records.

1-Documents, such as notices, minutes, orders, and judgments, which become part of the court record.

2-Information gathered, generated or kept for the purpose of managing court cases. It does not have to be a document; it might be in a case management system, docket, or case and party index.



Court Reporters' "notes and transcripts...of what transpired at a hearing, or an audio or video recording of the proceeding."

BUT, public access is to be granted *at the discretion of the judge* during business hours. Anything otherwise confidential does not have to be redacted, as it was disclosed in open court. Court reporters *are required* to make transcripts only at the request of the judge or parties. Parties must pay fees as set out by statute.



(3) Administrative record: Might be maintained by the court or clerk. Related to management and administration of the court or clerk's office.

- Internal court policies
- Memoranda and correspondence
- Court budget and fiscal records
- Other “routinely produced administrative records, memos, and reports”
- Meeting minutes

(6) Public access does not depend on a reason for asking or prior permission from a judge.

“Access is defined to include the ability to obtain a copy of the Information, not just inspect it.”

The comments encourage the courts and clerks to make information available in many forms and to think about the “digital divide.” Some people have physical impairments. Others do not have access to computers.

What about remote access?

The comments acknowledge that electronic redaction is cost-prohibitive for many courts, but predicts that improvements in technology will make it more accessible.

AOC is currently reviewing requests for proposals from redaction vendors. Will this be part of the Contexte/CourtConnect “package?”



(7) Remote access:

The comments lay out four elements of this definition.

- Access is electronic
- Searching, viewing, and copying are available electronically
- A person does not have to visit the courthouse for access
- No assistance from clerks or court staff is necessary to gain access

The comments also say remote access can be online, email, a kiosk, terminal, or dial-in service.

Jump to Section V. Remote Access

It's not required.

In theory, it would save court and clerk staff time in responding to requests.

It must comply with Sections IE and VII and prevent indexing by internet search engines.

(8) In electronic form: Evidence

The comments include information created by court reporters and trial or hearing evidence that is digital or analog. They also contemplate a future when trials are live-streamed online.

(10) Compiled information “is different from case-by-case access because it involves information from more than one case.”

The information must be “reformulated or aggregated” and “involves the creation of a new record.”

The comments acknowledge that it might be cost-prohibitive to compile data, since that may require programmers or too much staff time. It might be easier to provide bulk data and let the requestor sort through the information.

(11)-(14) Confidential and sealed information

Neither can be disclosed, but sealed cases may not even be acknowledged.

Protective orders will require redaction of some information, for example, trade secrets.

Attorneys involved in cases with confidential information are entitled to access, except for petitioners who have asked to keep their addresses confidential in order of protection cases.

We can't suppress court records without a court rule, court order, or legislation. There must be a rule that addresses it.



(16) Who is the custodian?

AOC is not the custodian of court records we disseminate in bulk or compilations.

The Supreme Court Clerk is the custodian of the appellate court records.

That electronic records are not physically located in the courthouse does not relieve the courts' or clerks' responsibility for the content. It does not give the person responsible for safekeeping the records authority to disseminate the information.

Section VI. Bulk and Compiled Information

AOC requires completed forms.

Requests to other courts “*shall* be made in writing on the form provided [?] to the court or court agency having jurisdiction over the records.”

There is no three-day requirement as in FOIA.

For compiled information, requests must identify the requested information and “desired” format.

You may charge “actual costs of reproduction, including personnel time [if over an hour], costs of the medium reproduction, supplies, equipment, and maintenance, including the actual costs of mailing or transmitting the records by fax or other means.” (FOIA doesn’t allow personnel time)

There might be fees determined by statute or ordinance. Charges can be waived.

Section VI(B)(3)

When the request includes cases or information excluded from public access or (and?) the identification of specific individuals is not essential, the records may be provided, but redact

- Names
- Addresses (except zip codes)
- Month and day of birth (not year of birth)

Identification of individuals in compiled data

Compiled data might include confidential information, but the names of people isn't necessary to satisfy the request or research.

When names are required, an affidavit and license agreement must be completed.

“Names, addresses, and dates of birth will only be provided...when the requester declares under penalty of perjury that identification of individuals is essential to the inquiry and that the request is for a scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.”

The license agreement may be waived for government agencies. There might be an interagency or intergovernmental agreement.

Bulk data, a history

Section VII. Court Records Excluded From Public Access

Examples from the commentary:

- (1) HIPPA, tax records, SSNs
- (2) Adoption records, grand jury, AIDS, drug tests, etc.
- (4) SSNs—Last four digits okay
- (7) Notes, communications, deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies. This may include court reporter materials, except for the official transcript.

Subsection B. Administrative Records

This section “presumes that administrative records will be governed by [FOIA], but recognizes that some public record exclusions are codified outside of the Act and that courts have inherent authority to restrict access to court records.”

FOIA exemptions only apply to FOIA records and should not be read as applying FOIA exemptions to the courts.

Reason for security plan exclusion...

Section VIII. Obtaining Access to Information Excluded From Public Access

- The reasons for deviating would be extraordinary. The requester must provide the request in writing and it must be notarized.
- Public interest must outweigh the harm in disclosure OR why the information should not be excluded to begin with.
- Examples?
- Notice to parties required. Hearing within 30 days. Proof is a preponderance of the evidence.
- The court may restrict how the information is used if the request is granted.

Section IX. When Records May be Accessed

Regular business hours.

Access to trial exhibits and trial transcript source materials not filed with the clerk is at the court's discretion.

Can be a challenge for court reporters during a trial when the press wants access. Access is up to the trial judge.