



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2024-020

January 29, 2024

David A. Couch
1501 North University Avenue, Suite 219
Little Rock, Arkansas 72207

Jen Standerfer
2302 Southwest Nottingham Avenue
Bentonville, Arkansas 72713

Dear Mr. Couch and Ms. Standerfer:

I am writing in response to your request, made under A.C.A. § 7-9-107, that I certify the popular name and ballot title for a proposed initiated act. In Opinion Nos. 2023-116 and 2023-127, I addressed prior versions of your proposed initiated act. You have now revised the text of your proposal and submitted it for review.

My decision to certify or reject a popular name and ballot title is unrelated to my view of the proposed measure's merits. I am not authorized to consider the measure's merits when considering certification.

1. Request. Under A.C.A. § 7-9-107, you have asked me to certify the following popular name and ballot title for a proposed initiated amendment to the Arkansas Constitution:

Popular Name

The Arkansas Government Disclosure Act.

Ballot Title

An Initiated Measure Amending the Arkansas Code to Create the "Arkansas Government Disclosure Act";

To Amend the Freedom of Information Act of 1967 to Protect Citizens' Interest in Government Transparency, To Protect Citizens' Privacy Interests, and To Ensure the Government Shares Information with the Public Freely;

To Require That Public Meetings be Conducted in a Manner that Allows the Public to Attend and Hear the Governing Body’s Meaningful Discussion and Deliberation on Official Business;

To Require Governing Bodies to Publish Notice of Meetings;

To Create the Arkansas Government Transparency Commission to Help Citizens Obtain Compliance With, To Issue Opinions Concerning, And to Sanction Violations of Government Transparency Laws;

To Repeal the Provision of Law Allowing a School Board of Directors, Superintendent, and Their Attorney From Holding a Meeting Outside of Public Observation to Discuss Pre-Litigation, Litigation, Settlement, Contract Disputes, and Real Property;

To Define “Cybersecurity”, “Government Transparency”, “Minority Party”, and “Public Notice”;

To Clarify That Public Records Shall Be Disclosed Within Three (3) Days of Their Request, And That the Custodian Must Explain the Reason for Any Nondisclosure and Specify the Date and Time for Compliance;

To Clarify that a Communication Between Two (2) or More Members of a Governing Body For the Purpose of Exercising a Responsibility, Authority, Power, or Duty of the Governing Body Concerning Official Action Shall be Open to the Public and Available for Public Attendance;

To Clarify That A Series Of Communications Between an Agent, Employee, or Person Paid by the Governing Body and One (1) or More Members of the Governing Body to Poll the Votes or Support of the Governing Body Concerning Official Action Shall Be Open to the Public and Available for Public Attendance;

To Allow Recovery of Attorney’s Fees, Expenses, and Costs by a Plaintiff When the Plaintiff Substantially Prevails in an Action for a Violation of Law Concerning Government Transparency;

To Create a Civil Penalty With Personal Liability for a Person who Violates the Freedom of Information Act of 1967;

To Require Disclosure of Public Records That Are More Than Three (3) Months Old and Reflect the Planning or Provision of Security Services to Constitutional Officers and Their Families, The Governor’s Mansion, and the State Capitol Shall

Be Disclosed Unless the Commission Finds that Confidentiality is Essential to the Ongoing Security Service;

To Provide for the Qualifications, Procedures, Funding, Authority, and Functions of the Arkansas Government Transparency Commission;

To Establish the Arkansas Government Transparency Commission With Five (5) Members Appointed by the President Pro Tempore of the Senate, the Speaker of the House of Representatives, the Minority Leader of the Senate, the Minority Leader of the House of Representatives, and the Lieutenant Governor;

To Provide an Appellate Process for Review of Decisions Made by the Arkansas Government Transparency Commission;

And To Provide That the Provisions of the Act are Severable.

2. Rules governing my review. In Opinion No. 2023-116, I explained the rules governing popular names and ballot, and the rules governing my review of proposed measures. Rather than repeat those explanations, I incorporate them here by reference.

3. Application. Having reviewed the text of your proposed initiated act, as well as your proposed popular name and ballot title, I substitute and certify the following popular name and ballot title:

Popular name:

The Arkansas Government Disclosure Act of 2024

Ballot title:

An initiated act repealing a provision of Act 883 of 2023, which allows a school's board of directors, superintendent, and attorney to hold a meeting outside public observation to discuss pre-litigation, litigation, settlement, contract disputes, and real property; providing that a public record is exempt from disclosure to the extent that it contains information in which an individual has a substantial personal privacy interest; providing that, if access to a public record is not provided immediately upon request, the custodian must promptly write the requester explaining why and providing a time and date within three working days of the request that the responsive records will be made available; providing that a custodian's failure to respond to a request for public records within three working days of the date of the request is considered a denial of the request, unless the custodian's time to respond has been extended by the Arkansas Government Transparency Commission; requiring that all public meetings be conducted in a manner that allows the public to attend and hear the governing body's meaningful discussion and deliberation on official business; requiring that the time, place, and

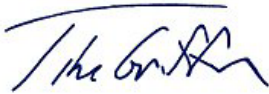
date of regularly scheduled public meetings be published online at least 48 hours before the meeting takes place if the governing body holding the meeting owns or maintains a website or social-media page; defining “public meeting” to include, without limitation, a communication between two or more members of a governing body for the purpose of exercising a responsibility, authority, power, or duty of the governing body concerning official action; defining “public meeting” to also include, without limitation, a series of communications between an agent, employee, or person paid by the governing body and one or more members of the governing body to poll the votes or support of the governing body concerning official action; permitting a governing body to meet in executive session to discuss the response to the terms of a demand affecting the cybersecurity of a government entity; providing that a plaintiff in a lawsuit about open records or open meetings may be awarded reasonable attorney’s fees and other litigation expenses if a court finds that, regardless of whether the defendant’s position was substantially justified, the plaintiff has substantially prevailed (1) after a trial on the merits, (2) through a defendant’s voluntary compliance, or (3) through an agreed resolution with a defendant; requiring a trial court to assess a civil penalty of at least \$1,000 to be personally payable by a custodian or member of a governing body who knowingly fails to comply with Arkansas’s laws governing open meetings or open records; requiring the disclosure of public records that are more than three months old and that reflect the planning or provision of security services to constitutional officers and their families, the Governor’s mansion, and the State Capitol, unless the Arkansas Government Transparency Commission finds that confidentiality is essential to the ongoing security service; creating the Arkansas Government Transparency Commission to interpret, help obtain compliance with, and sanction violations of Arkansas’s laws governing open meetings and open records; providing that the Arkansas Government Transparency Commission shall be composed of five members, with one appointed by each of the following: the President Pro Tempore of the Senate, the Speaker of the House of Representatives, the minority leader of the Senate, the minority leader of the House of Representatives, and the Lieutenant Governor; providing for the qualifications, procedures, funding, authority, and functions of the Arkansas Government Transparency Commission; providing an appellate process to review decisions of the Arkansas Government Transparency Commission; defining (1) “cybersecurity” as the measures taken to achieve protection against the criminal or unauthorized use of electronic data, (2) “government transparency” as the government’s obligation to share information with its citizens or deliver information to citizens, (3) “minority party” as the political party who holds the second greatest number of members in the governmental body to which the members are elected, and (4) “public notice” as notice distributed to the general public; and providing that the provisions of this initiated act are severable.

While the foregoing have been substituted and certified, I believe that, in light of the significance of the subject matter undertaken and the potential complexity and far-reaching effects of this proposal, a cautionary note is warranted. You should be aware that experience has shown a correlation between the length and complexity of initiated measures and their susceptibility to a successful ballot-title challenge. Any ambiguity in the text of a measure could lead to a successful court challenge. Significant changes in law often have unintended consequences that, if known, would give voters serious ground for reflection. Further, since your initiated act is so lengthy, it requires a lengthy summary. As several of my predecessors have noted when certifying certain lengthy and complex ballot titles, the Court has repeatedly warned sponsors of statewide measures about their ballot titles' length and complexity.¹ In Opinion No. 2023-038, I summarized the Court's decisions on the significance of a ballot title's length and complexity.

Under A.C.A. § 7-9-108, instructions to canvassers and signers must precede every petition, informing them of the privileges granted by the Arkansas Constitution and the associated penalties for violations. I have included a copy of the instructions that should be incorporated into your petition before circulation.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim Griffin", with a horizontal line above it.

TIM GRIFFIN
Attorney General

¹ See, e.g., Ark. Att'y Gen. Op. No. 2000-137.