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## **Ethical Issues Regarding Conflicts of Interest by Council, Board and Commission Members of the City of Springdale**

City Council members and members of Boards and Commissions of the City of Springdale, Arkansas are sometimes faced with possible conflicts of interest. These are often complicated issues and very fact specific. The purpose of this article is to go over some of the common conflict of interest questions involving Council members and members of Boards and Commissions.

### **Common Law Prohibition Against Conflicts of Interest:**

As the Arkansas Attorney General noted in Ark. Op. Att'y Gen. No. 95-099: The "conflict of interest theory" is based "on the fact that an individual occupying a public position uses the trust imposed in him and the position he occupies to further his own personal gain. It is the influence he exerts in his official position to gain personally in spite of his official trust which is the evil the law seeks to eradicate." *City of Coral Gables v. Weksler*, 164 S.2d 260, 263 (Fla. App. 1964). See also generally 63A AmJur.2d *Public Officers and Employees* § 321 (1984).

The common law prohibition against conflicts of interest provides as follows:

"A public office is a public trust . . . and the holder thereof may not use it directly or indirectly for personal profit, or to further his own interest, since it is the policy of law to keep an official so far from temptation as to insure his unselfish devotion to the

public interest. Officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public, and where a conflict of interest arises, the office holder is disqualified to act in the particular matter and must withdraw."

67 C.J.S. *Officers* § 204.

In Ark. Op. Att'y Gen. No. 93-184, the Arkansas Attorney General summarized the operative inquiry as being whether the officer "has a personal interest which might interfere with the unbiased discharge of his duty to the public." The furtherance of the officer's personal interest is thus the focal point of inquiry in determining whether an unlawful conflict of interest exists at common law. See *Van Hovenberg v. Holman*, 201 Ark. 370 (1940).

Therefore, under the common law, the council member or board or commission member, when considering a conflict of interest, should ask this question: "Do I have a personal interest which might interfere with the unbiased discharge of my duty to the public?" This is often a personal decision which the member is going to have to answer for themselves, after looking at all the facts of the case.

### **Statutory Conflicts of Interest:**

Ark. Code Ann. § 21-8-304(a) provides:

No public servant shall use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, or for those

with whom he or she has a substantial financial relationship that are not available to others except as may be otherwise provided by law.

The public official, as to this provision, will have to ask this question, "Am I using my position to secure special privileges or exemptions for myself or others close to me including those in which I have a substantial financial relationship, in such a situation that is not available to others?" Again, the facts of each case will have to be analyzed.

Under Ark. Code Ann. § 14-42-107(b)(1), Arkansas law provides that "no alderman, council member, official, or municipal employee shall be interested, directly or indirectly, in the profits of any contract for furnishing supplies, equipment, or services to the municipality unless the governing body of the city has enacted an ordinance specifically permitting aldermen, council members, officials, or municipal employees to conduct business with the city and prescribing the extent of this authority. However, § 14-42-107(b)(2) provides that, "the prohibition prescribed in this subsection shall not apply to contracts for furnishing supplies, equipment, or services to be performed for a municipality by a corporation in which no alderman, council member, official, or municipal employee holds any executive or managerial office or by a corporation in which a controlling interest is held by stockholders who are not aldermen or council members."

### **Springdale City Ordinance:**

In response to the language in § 14-42-107(b)(1) about a city enacting an ordinance permitting certain conduct, the Springdale City Council passed Ordinance No. 4499 on May 10, 2011. This ordinance is codified in

Sec. 2-11 of the Code of Ordinances of the City of Springdale, and provides as follows:

"Persons appointed to boards and commissions may contract with the city for furnishing supplies, equipment, or services, provided that the State law and city ordinances of the City of Springdale are followed in the purchasing or acquiring of such supplies, equipment, or services, but if competitive bidding is required by law, competitive bidding shall not be waived unless other competitive quotes are solicited by the city. However, no board or commission members shall be interested, directly or indirectly, in the profits of any contract for furnishing supplies, equipment, or services, which are authorized specifically by the board or commission in which they serve. For example, no member of the Springdale Airport Commission shall be involved, directly or indirectly, in any contract for the furnishing of supplies, equipment, or services to the Springdale Airport."

You will note that this exception was made for persons appointed to boards and commissions within the city, but not for city council members.

### **Some Attorney General Opinions Which Give Guidance:**

Having gone over the common law conflicts of interest and the relevant statutory law that applies, I think it is helpful to review a few Arkansas Attorney General opinions in order to get a better idea of how to analyze a conflict of interest. Below I have summarized some questions that have previously been asked of the Attorney

General, along with a summary of the Attorney General's response.

**Question:** Is there a conflict of interest for builders and/or developers who build and develop within the City of Benton, to serve as members of the planning and zoning commission of the City of Benton?

**Answer:** A builder or developer may serve on a city's planning and zoning commission because such service does not give rise, per se, to an unlawful conflict of interest. This is subject to the condition, however, that a commissioner must not participate in making decisions that might constitute a common law conflict of interest. This will involve a question of fact in each instance. *See Op. Att'y Gen. No. 2011-133.*

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**Question:** Can a mayor vote to break a 3 – 3 deadlock by the city council in order to carry a motion increasing the mayor's salary?

**Answer:** Although the mayor was authorized to make the vote to carry the motion, it was an improper conflict of interest for the mayor to vote in this specific instance because the issue directly affected the mayor's pecuniary interest. *See Op. Att'y Gen. No. 2007-034.*

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**Question:** Is it a conflict of interest for a justice of the peace to vote in the quorum court on the county budget when his son has a salary from the sheriff's department in it?

**Answer:** No. No conflict exists when a justice of the peace votes in favor of an overall county budget that only incidentally contains the salary of his son who is

working in a subdivision of county government. *See Op. Att'y Gen. No. 86-609.*

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**Note From City Attorney:** The following two questions were part of the same opinion, and the first question relates to whether the alderman has a conflict under Ark. Code Ann. § 21-8-304(a), while the second question involves whether there is a conflict under the common law.

**Question:** Is it a violation of State law for an alderman to vote on a petition by the church of which he is a member to close the public street on which the church abuts on both sides?

**Answer:** I consider it unlikely that the city council's closing of a street adjacent to a church would qualify as the bestowal of a "special privilege" on a voting alderman simply because he belongs to the church. I must stress, however, that the ultimate determination of whether the alderman would secure a "special privilege" by an ordinance vacating the street will be one of fact based upon a thorough consideration of all the circumstances, possibly including the extent and nature of the alderman's relationship with the church. *See Op. Att'y Gen. No. 2003-007.*

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**Question:** Is it a conflict of interest for the alderman to vote on the petition by the church of which he is a member to close the public street on which the church abuts on both sides?

**Answer:** This office has held on various occasions that no conflict of interest will exist at common law where the official's conduct benefits him merely as a member of

a class. In Ark. *Op. Att'y Gen. No. 2003-22*, the question was whether a justice of the peace who was also an attorney might sponsor legislation benefiting the court system in which he practiced, and it was opined that the quorum court member would not be disqualified from sponsoring a county ordinance where the interest was only as a member of the class. In *Op. Att'y Gen. No. 89-044*, the Attorney General opined that it was no unlawful conflict of interest where a justice of the peace votes to appropriate funds supporting a school system in which he is employed, in the absence of facts implicating his own, direct pecuniary interest. The Attorney General, in this opinion, opined that logic would suggest that if it is not unethical for a quorum court member to vote on issues that might affect his own or his co-workers' economic prospects, it would *a fortiori* pose no ethical problem for an alderman to approve closing a road that abuts a church he and others attend. However, the Attorney General noted that only a finder of fact could determine whether the alderman's vote in this particular instance might be impermissibly influenced by pure self-interest. *See Op. Att'y Gen. No. 2003-007*.

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**What do you do at the meeting if you have a conflict?**

The Arkansas Attorney General has also addressed this issue and opined that if a commission member disqualifies himself or herself from voting on a matter before the commission due to a conflict of interest, that member should also refrain from participating in formal discussions with the applicant which takes place prior to the vote. With respect to zoning and planning boards, the following has been stated on this subject: "Where a member has disqualified himself,

he must take no part in the hearing or in the process of decision. Withdrawal is not accomplished if the member presides at the hearing, but does not vote." 83 AmJur 2d Zoning and Planning §812 (1992). In the Attorney General's opinion, it was pointed out that the rationale behind conflict of interest prohibitions is equally applicable to all forms of participation in the matter before the public body. *See Op. Att'y Gen. No. 93-446*.

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**Note From City Attorney:** It is my advice that based on these opinions that if any member of the council or any other board or commission of the city states they have a conflict of interest, they should take no part, whatsoever, regarding the issue. This even includes commenting on the issue. The member with the conflict should state before the matter is discussed that they have a conflict, and should not make any other comments until after the issue has been decided and is no longer being discussed.

Jeff Harper  
City Attorney

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**Graffiti Incidents in Springdale Continue to Decline**

Prior to 2011, Springdale endured several years of problems associated with "graffiti." The term "graffiti," as defined by Chapter 42, Article V, Section 42-91(a) of the Springdale Code of Ordinances, means and includes any unauthorized inscription, word, figure, or design or collection thereof, which is marked, etched, scratched, painted, drawn, or printed on any structural component of any building structure or other facility, regardless of the nature of the material of

that structural component. The existence of graffiti on buildings or on structures, such as fences or walls, in locations that can be viewed by the public is detrimental to property values, degrades the community, causes an increase in crime, and is inconsistent with Springdale's property maintenance and aesthetic standards. In short, graffiti is a substantial inconvenience and annoyance for a property owner and is a substantial eye sore for Springdale.

For these reasons, the Springdale City Council passed Ordinance Number 4435 on July 13, 2010. This ordinance, among other things, requires all incidents of graffiti to be reported to the police department. In addition, this ordinance authorizes Springdale's Public Works Department to remove the graffiti in the event the property owner is unable or unwilling to do so. This ordinance went into effect on August 12, 2010.

For the entire year of 2010, Springdale had 444 total graffiti incidents reported to the police department. This equals 1.22 incidents per day for the year 2010. Because the ordinance mentioned above went into effect in August of 2010, 2011 was the first full calendar year in which this ordinance was in effect.

For the entire year of 2011, Springdale had 297 total graffiti incidents reported to the police department. This equals 0.81 incidents per day for the year 2011. This represents a reduction in the number of graffiti incidents in Springdale of more than 33% from 2010 to 2011.

It appears, based on the number of graffiti incidents reported to the police department thus far in 2012, that the reduction in the number of graffiti incidents was not an anomaly in 2011. In fact, it appears that the

number of graffiti incidents in Springdale continues to decline at a rapid pace. As you can see below, the number of graffiti incidents reported between January 1 and August 15 of 2012 are substantially lower than the number of graffiti incidents reported between this same time period in 2010 and 2011.

From January 1 through August 15, 2010, there were 290 graffiti incidents reported to the police department. This equals 1.27 incidents per day.

From January 1 through August 15, 2011, there were 173 graffiti incidents reported to the police department. This equals 0.76 incidents per day, which represents a reduction of more than 40% from 2010 to 2011.

From January 1 through August 15, 2012, there were 140 graffiti incidents reported to the police department. This equals 0.61 incidents per day, which represents a reduction of more than 19% from 2011 to 2012.

See the two bar graphs at the end of this article.

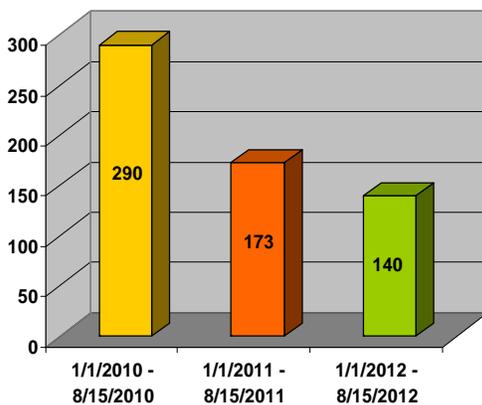
The numbers above reflect that from 2010 to 2012, Springdale has seen a reduction of more than 51% in the number of graffiti incidents reported to the police department. This means that from 2010 to 2012, the number of graffiti incidents in Springdale has been cut in half.

There is no question that the ordinance passed on July 13, 2010, has reduced and continues to reduce the number of graffiti incidents in Springdale. In addition, due to the swift response and action taken by the Springdale Police Department and the Springdale Public Works Department, the

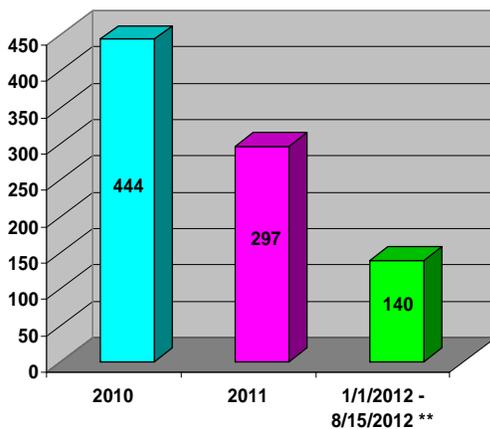
graffiti that is reported is removed from Springdale in a more timely and efficient manner. This not only helps to reduce further graffiti, but it also makes Springdale a more aesthetically pleasing city.

Jonathan D. Nelson  
Deputy City Attorney

**Total Number of Graffiti Incidents Reported to Springdale Police Department**



**Total Number of Graffiti Incidents by Calendar Year**



\*\*Note: Estimate for the total year of 2012 = 198

### Arkansas Supreme Court Decides Freedom of Information Act Case in Which City Argued the FOIA Request was too Broad and Burdensome

**Facts Taken From the Opinion:** This Freedom of Information Act (FOIA) action stems from requests made by Partne A. Daugherty (appellant) after she was stopped for speeding by Jacksonville Police Officer Paul Huddleston on June 24, 2010. On August 13, 2010, Daugherty submitted the first of three requests to the Jacksonville Police Department pursuant to the FOIA. In it, she requested, inter alia:

3. A complete copy of any and all audio and video images/recordings of, including but not limited to, any and all patrol vehicle video and separate body recordings with all audio made by Officer Josh Wheeler from July 24, 2010, through August 13, 2010.

4. A complete copy of any and all audio and video images/recordings of, including but not limited to, any and all patrol vehicle video and separate body recordings with all audio made by Officer Huddleston from July 24, 2010, through August 13, 2010.

In response, Jacksonville City Attorney Robert Bamberg sent Daugherty a letter, dated August 16, 2010, stating that part of the information in the FOIA request would be provided. But with regard to the requested audio and video recordings of Officers Wheeler and Huddleston, the Department refused to provide them, noting that

your requests are too broad and burdensome. Between the two, there



were over Four Hundred (400) separate recordings/incidents, and duplication of such will take too much time and is too broad of a request in nature.

Four days later on August 20, 2010, Daugherty sent a second FOIA request, again asking for all audio and video recordings from Officers Wheeler and Huddleston from June 24, 2010, through August 20, 2010. The city attorney responded, again refusing to turn over the requested audio and video recordings on the basis that Daugherty's requests were "too broad and burdensome." The letter also stated as follows:

After extensive research, there are over One Thousand (1,000) separate recordings and incidents. Duplication of such will take an estimated Ninety (90) hours to prepare, and the FOI Act allows for the City to assess charges for such and require payment prior to compiling said information. To do so would be payable at a rate of Twenty seven and 51/100 Dollars (\$27.51) per hour to compile and produce. . . .

If you wish for such an extreme request to be prepared, please forward a deposit to the City Clerk's Office for the estimated costs to do so--Two Thousand Four Hundred Seventy-five and 90/100 Dollars (\$2,475.90).

Daugherty filed a third FOIA request on September 2, 2010. Therein, she requested all audio and video recordings for Officer Huddleston on June 24, 2010, for Officer Wheeler on June 24-25, 2010, and all audio recordings recorded via the shoulder and body mics of Officer Wheeler for June 25, 2010, from 10:00 a.m. until 5:00 p.m. By letter dated September 7, 2010, the city

attorney responded that Daugherty had already been provided the audio and video recordings from Officers Wheeler and Huddleston on June 24, 2010, and that all other audio and video recordings from that time frame had been purged from the Department's system.

Thereafter, on September 9, 2010, Daugherty filed a complaint in circuit court, alleging that the Department's refusal to provide the requested records violated the FOIA. She further asserted that the Department's requirement that she pay \$2,475.90 for copying of the records is not permitted under the FOIA. Finally, she alleged that the Department knowingly and purposefully engaged in spoliation of evidence, in an attempt to circumvent the FOIA, by destroying public records.

A hearing was held on Daugherty's complaint on September 16, 2010. Daugherty testified that she was prompted to file the FOIA requests after receiving a speeding ticket when she believed she was not speeding. She stated that after realizing she had requested recordings from a period beginning July 24, 2010, instead of June 24, 2010, she filed a new FOIA request with the correct date. According to Daugherty, she wrote on the request that she would pick up the records and even provide a flash drive if needed. Daugherty admitted that she received a copy of the traffic citation issued to her on June 24, 2010, but explained that the copy did not satisfy her FOIA request, as her request was for all audio and video recordings of traffic stops made by Officer Huddleston on June 24, 2010, and all stops by Officer Wheeler on June 24-25, 2010.

After Daugherty testified, the Jacksonville Police Department, it's Chief of Police, Gary Sipes, and Gary Fletcher, Mayor of Jacksonville (collectively referred to as the

"Department") moved for a directed verdict, asserting that Daugherty had received her copy of the requested video and that the continued litigation over the issue was frivolous. The Pulaski County Circuit Court denied the motion for directed verdict. Thereafter, Captain Ken Boyd of the Jacksonville Police Department testified and explained that the Department has an audio-and video-recording system used and activated by patrol officers. The recorders in the patrol units are wirelessly downloaded, and the files are transferred to a server stored in Captain Boyd's office. According to Captain Boyd, access to the server is limited and password protected. He also stated that the recordings are maintained for a forty five-day period and then purged from the system. The purpose of the forty-five-day limitation is to ensure adequate storage space on the server, according to Captain Boyd. Captain Boyd also testified that Daugherty's FOIA requests entailed over 1,000 files that required converting the files before burning them to a disc. He further stated that this process takes an average of five minutes per video, meaning it would have taken approximately ninety hours to download all of those to disc. According to Captain Boyd, he did not have the technology to remove any given day's recordings to a disc, flash drive, or any other media. He stated that when he pulls up a particular video to burn it to a disc, it goes through a conversion process because if he simply tried to copy the files to give to someone, the files would be unreadable.

Following arguments to the bench, the circuit court announced it was dismissing Daugherty's complaint after finding there was no violation of the FOIA by the Department. A written order was entered of record on September 29, 2010. Therein, the circuit court found that Daugherty's August 13 request received a timely and compliant

response. Moreover, the circuit court found that the Department's requirement that Daugherty pay \$2,475.90 to obtain the records requested in her August 20 FOIA request was reasonable. Finally, the court found that the Department's inability to comply with the September 2 request because of the automatic forty-five-day purging of records was not unreasonable and did not constitute arbitrary and capricious behavior. From that order Daugherty appealed to the Arkansas Supreme Court.

**Argument and Decision by Arkansas Supreme Court:** For her first point on appeal, Daugherty argued that the circuit court clearly erred in finding that she received a timely and compliant response to her August 13 FOIA request from the Department. Specifically, she argued that the Department clearly violated the mandatory disclosure requirements of the FOIA when it refused to provide the requested video and audio recordings on the basis that her request was "too broad and burdensome." In response, the Department asserted that the circuit court did not clearly err where the evidence demonstrated that it made a good-faith attempt to determine which records Daugherty desired and to then provide them. Moreover, the Department stated that it searched the Department's records and timely informed and provided to Daugherty "certain records requested, certain requirements for Appellant to obtain other records, and the unavailability of specific records as requested."

The Court noted there was no dispute as to whether the requested records are public records subject to disclosure under the FOIA; nor was there any dispute over the fact that the records do not fit within any recognized exception. The question for the court, then, was whether the Department's August 16 letter, stating that the request was

“too broad or burdensome,” was compliant with the dictates of the FOIA, as determined by the circuit court. The Court held that a review of the FOIA, as well as case law interpreting it, reveals that the response was not compliant with the requirements of the FOIA.

A review of Ark. Code Ann. § 25-19-105(a)(2)(C) reveals that a citizen making a request under the FOIA must provide a request that is “sufficiently specific to enable the custodian to locate the records with reasonable effort.” There is no allegation that Daugherty’s request was not specific enough; rather, the Department refused to comply with the request on the basis that it deemed it too broad and too burdensome. Nothing in the FOIA allows a public agency to decline to reply to a request on this basis. While the Department could have requested that Daugherty make her request more specific, that was not the problem with her request. The Department’s response, refusing to comply with the request, is in direct conflict with the Act and with this court’s case law interpreting the Act. “We have explained that we liberally interpret the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner.” See *Nabholz*, 371 Ark. 411; *Fox v. Perroni*, 358 Ark. 251 (2004).

The court held that the FOIA does not give the custodian of records the power to pick and choose which requests it may comply with. Nor does the custodian get to choose to release only records it deems relevant, such as the video of Daugherty’s stop in this case. The Court disagreed with the Department’s assertion in its brief that it cannot be said that it denied Daugherty her rights under FOIA where its “repeated efforts to provide Appellant with information *reasonably deemed relevant* in

response to her requests.” The court held that there is simply no relevancy requirement in the FOIA. Accordingly, it was error for the circuit court to find that the Department complied with Daugherty’s August 13 FOIA request.

Next, Daugherty argued that the circuit court erred in finding that the Department’s requirement that she pay a deposit of \$2,475.90 to obtain the records did not violate the FOIA. Daugherty asserted that the legislature specifically clarified and limited a custodian’s ability to charge unreasonable copying and duplication fees in an attempt to deter citizens from “reasonable access” to public records. The Department asserted to the contrary that the circuit court’s finding—that its requirement of a deposit was in compliance with section 25-19-109—was reasonable and should be affirmed.

The court noted the question for them on appeal was whether the circuit court correctly interpreted section 25-19-109 to authorize the imposition of the fee required by the Department in response to Daugherty’s FOIA request. The Court held that the applicable provision to Daugherty’s request is Section 25-19-105(d), which provides in relevant part as follows:

(2)(A) Upon request and payment of a fee as provided in subdivision (d)(3) of this section, the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment.

(B) A citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian’s existing software.

(C) A custodian is not required to compile information or create a record in response to a request made under this section.

(3)(A)(i) Except as provided in § 25-19-109 or by law, any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.

Ark. Code Ann. §25-19-105(d)(2)(A)–(d)(3)(A)(i) Supp. 2011).

Thus, under this provision, where Daugherty simply requested a copy of the files, the Department could not charge fees that exceeded the cost of reproduction and certainly could not include the hourly rate of Captain Boyd in assessing costs to Daugherty. The court held that circuit court erred in its interpretation and application of section 25-19-109 and thereby erred in concluding that the Department's requirement of a fee in the amount of \$2,475.90 was reasonable and not a violation of the FOIA.

Next, the court turned to Daugherty's remaining two points on appeal. First, she argued that it was error for the circuit court to conclude that the Department timely and reasonably complied with her September 2 FOIA request, wherein she narrowed her previous requests to copies of audio and video recordings of Officer Huddleston on June 24 and Officer Wheeler on June 24–25. Second, she asserted that the circuit court erred in finding no misconduct in the Department's destruction of public records. The Department countered that the circuit

court's rulings were not erroneous as it did timely respond to Daugherty's requests and that the purging of records did not violate the FOIA.

Following receipt of Daugherty's third FOIA request, the Department responded by letter dated September 7, 2010. Therein, the Department stated that Daugherty had previously received the audio and video recordings of Officers Wheeler and Huddleston on June 24, 2010. The response also stated that the Department was providing certain requested audio recordings from June 24, as well as copies of certain traffic citations that had been issued. With regard to the remaining requests for audio and video recordings, the Department stated that those records had been purged from the system and were no longer available.

The court noted that in addressing the September 2 FOIA request and the purging of records, the circuit court stated that

Defendants timely and reasonably complied with Plaintiff's latest FOI request through a September 7, 2010, letter from City Attorney Bamburg. Said letter noted that recordings from said dates had been purged from the Jacksonville Police Department's system, and the Court notes that the standard purging date for such records would have been August 8, 2010, from information provided by the parties and Capt. Boyd's testimony. Further, the Court notes that automatic purging of the system after a Forty-Five (45) day period is not an unreasonable period of recording preservation and does not constitute arbitrary or capricious behavior, recognizing doing so is Department policy with application to any such recordings contained in the

Department's system not specifically preserved otherwise.

Thus, the court held the circuit court's determination that the Department timely and reasonably replied to the September 2 FOIA request necessarily hinges on its finding that the Department's purging of the records after forty-five days was not unreasonable.

The court held that the only issue that was properly raised and ruled on with regard to the retention policy is whether the Department's actions of purging the records violated the FOIA. Turning to the FOIA itself, the court agreed with Daugherty (appellant) that there is no specific retention period for public records set forth in the Act. The Attorney General has issued several opinions on the retention of records within the context of FOIA. The Attorney General has specifically recognized that the FOIA does not require that the document be retained because the FOIA is not a records-retention statute. Op. Ark. Att'y Gen. 2000-220 (2000). However, in answering the question of whether destruction of certain police department documents, in the absence of any stored reproduction of the records, would constitute a violation of the FOIA, the Attorney General opined as follows:

It is my opinion that the destruction of any police department documents in the absence of a stored reproduction would violate the FOIA *only* if the documents were destroyed *after* a request for access to the documents had been presented to the Department. However, such destruction, even in the absence of a FOIA request, could violate a separate criminal law.

The FOIA does not contain any records retention requirements. That

is, the FOIA does not state how long public records must be retained. However, the destruction of public records that have been requested under the FOIA could constitute a violation of the Act, which carries a criminal penalty. (Such violation, if done negligently, constitutes a misdemeanor. A.C.A. § 25-19-104.) Moreover, a citizen who has been aggrieved by such destruction may be entitled to civil relief. A.C.A. § 25-19-107.

Finally, it is important to note that destroying a public record (even one that has not been requested under the FOIA), if done with the requisite intent, constitutes "tampering with a public record," within the meaning of A.C.A. § 5-54-121, and is a felony.

Op. Ark. Att'y Gen. 2001-340 (2001)

The court held that they are precluded from addressing the question of whether a violation of a statute, such as section 14-2-204, necessarily implicates a violation of the FOIA. The court held they are limited to the issue raised below, specifically that the Department's action was a violation of Ark. Code Ann. § 25-19-104 (Supp. 2011). That section provides that "[a]ny person who negligently violates any of the provisions of this chapter shall be guilty of a Class C misdemeanor."

The court noted that the question is whether Daugherty proved that the Department negligently violated the FOIA. The circuit court rejected this argument, and the Arkansas Supreme Court held that they could not say this was error based on the record before them. Captain Boyd testified at the hearing that it was Department policy to purge the system that maintained the



the issue at a meeting on February 23, 2009. Otto attended the meeting, and asserted that he was able to return to work. The city council nonetheless adopted a resolution terminating Otto's employment with the City. According to Otto, the City later replaced him with workers in their twenties. At the date of his termination, Otto was 59 years old.

Otto filed suit against the City of Victoria in the District Court for the District of Minnesota, alleging violations of the Americans With Disabilities Act (ADA), the Age Discrimination Employment Act (ADEA), the due process clause of the 14<sup>th</sup> Amendment, and State law. The district court granted summary judgment in favor of the City and Otto appealed his case to the Eighth U.S. Circuit Court of Appeals.

#### **Decision by Eighth U.S. Circuit Court of Appeals:**

The Court noted for Otto's ADA claim to survive summary judgment, he must show that he was qualified to perform the essential functions of his position, with or without reasonable accommodation. The essential functions of a Public Works Worker II include few sedentary duties and frequent lifting of objects weighing fifty pounds. Limited as he is to four hours of sedentary work per day and unable to engage in heavy lifting, Otto is physically incapable of fulfilling these responsibilities. While it is true that Otto told the city council that he could still perform these functions, his assertion was undermined by his own physician's determination that Otto's disability permanently restricts his ability to work. The ADA "does not require an employer to permit an employee to perform a job function that the employee's physician has forbidden." *Alexander v. Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003).

Otto also enumerated several accommodations that he says the City should have provided so that he could perform the job. He suggests that the City could have limited his job to sedentary duties, offered him a part-time job as an ice-hockey rink attendant, or assigned other employees in the Department of Public Works to assist him in carrying out his job. The Court held these proposed accommodations are not reasonable. The ADA does not require an employer to create a new position or to eliminate or reallocate essential job functions in accommodating an employee with a disability. *See Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999). And in any event, Otto pointed to no evidence that a position accommodating his disability was available at the time of his termination, or that he ever applied for such a position.

Otto argued that he could have performed the essential functions of his job if the City had provided a back brace or similar support. The Court pointed out that the record does not establish a genuine issue of fact about whether this accommodation would be sufficient. While Otto's functional capacity evaluation mentions that using a lumbar roll improved his tolerance for sitting, Otto cited no evidence suggesting that a back brace would have addressed his work restrictions concerning heavy lifting.

Finally, Otto contended that there is a disputed issue of fact for trial, because one member of the city council, in explaining her vote against Otto's termination, questioned whether the City had exhausted all opportunities for reasonably accommodating Otto. Otto cited the deposition testimony of Councilmember Kimberly Roden that "the information that was in front of me did not give me



## **Eighth Circuit Upholds District Court's Decision Requiring the City of Fayetteville to Pay Attorneys' Fees and Costs**

**Facts Taken From the Opinion:** Rogers Group, Inc. ("Rogers Group") operates a limestone quarry (the "Quarry") in an unincorporated section of Washington County, Arkansas. The Quarry is located entirely outside, but within one mile of, the corporate limits of the City of Fayetteville, Arkansas ("Fayetteville"). The Quarry is not located within Fayetteville's planning or zoning authority. Fayetteville passed an ordinance providing "for the licensing and regulation of rock quarries." This ordinance found that "the operation of a rock quarry would be a nuisance to the citizens and City of Fayetteville, Arkansas, if operated or used other than as prescribed in [the Ordinance]." The ordinance provided that to operate a rock quarry within Fayetteville or one mile beyond Fayetteville's corporate limits, a quarry operator must obtain a license from Fayetteville after demonstrating its full compliance with all requirements of the ordinance. The ordinance limited quarry operations to a total of 60 hours per week and allowed "major noise producing activities" only between 8:30 a.m. and 4:30 p.m., Monday through Friday. The ordinance also restricted rock blasting to a five-hour period on the first and third Wednesday of each month. Additionally, the ordinance stated that a quarry must comply with several "safeguards and measures" to protect Fayetteville's roads from all vehicles, regardless of ownership, exiting the quarry. The consequences of violating the ordinance included criminal punishment, fines, and revocation or suspension of a quarry's license.

Rogers Group sued Fayetteville in federal district court. In its suit, Rogers Group stated that the district court had subject matter jurisdiction over the suit based on (1) diversity jurisdiction because the lawsuit was between citizens of different states and the amount in controversy exceeded \$75,000 and (2) federal question jurisdiction because the complaint asserted rights arising from the Constitution and laws of the United States. Count I of the lawsuit requested declaratory and injunctive relief and asked the district court to declare that Fayetteville has no authority to regulate or license the Quarry and further requested that the district court enjoin Fayetteville from attempting to enforce the ordinance against the Quarry. According to Rogers Group, under Arkansas law, Fayetteville lacked authority to regulate the Quarry, which was located entirely outside Fayetteville's city limits, because a rock quarry is not a nuisance per se. Count II of the lawsuit asserted that the ordinance was arbitrary, capricious, and unreasonable and denied Rogers Group liberty and property without due process of law. According to Rogers Group, the ordinance violated the Due Process Rights conferred by the United States Constitution and the Arkansas Constitution. Rogers Group claimed that no rational basis existed for the ordinance. Rogers Group asked the court to declare that the ordinance is invalid and to enjoin Fayetteville from enforcing the ordinance against Rogers Group or any other person or entity. Rogers Group also asked the court to award Rogers Group damages, pursuant to 42 U.S.C. § 1983, in an amount commensurate with the damages it has suffered, together with attorneys' fees and costs incurred. Rogers Group also sought relief on a claim for an unconstitutional taking without just compensation, in violation of the United States Constitution. Rogers Group asserted that it had not been compensated for the taking of its vested

rights to mine crushed stone in the Quarry and was entitled to just compensation in an amount to be determined at trial, or to an order enjoining enforcement of the ordinance based on Fayetteville's failure to provide just compensation. Rogers Group again sought damages under 42 U.S.C. § 1983.

**Decision by the District Court:** Rogers Group moved for a preliminary injunction enjoining Fayetteville from enforcing or attempting to enforce the ordinance. The district court entered an order granting Rogers Group's motion for a preliminary injunction. The court acknowledged that, under Arkansas law, whether a lawful activity is a nuisance must be judicially determined. The district court concluded that because no court had determined that the Quarry was a nuisance, Rogers Group was likely to prevail on the merits of its claim, based on Fayetteville's lack of jurisdiction to legislate quarry activity outside of its city limits. Thus, the district court entered an order enjoining Fayetteville from enforcing the ordinance. Fayetteville appealed the district court's preliminary injunction order, but the Eighth Circuit Court of Appeals affirmed the order. In finding that the district court did not err in its preliminary injunction order, the Eighth Circuit concluded that absent a judicial determination that the Quarry's activities constitute a nuisance, Fayetteville has no statutory authority to regulate the Quarry in the guise of abating a nuisance.

Following the appeal of the preliminary injunction, the district court held a telephone conference call with the parties to discuss the status of the case. By this time, both parties had filed motions for summary judgment. During this conference, the district court expressed its view that, pursuant to the law-of-the-case doctrine,

Rogers Group was entitled to partial summary judgment because Fayetteville has no authority to regulate or license the Quarry. The district court then indicated that, if it ruled in this manner, that such a ruling would likely render the remaining claims moot and would also require the court to deny Fayetteville's motion for summary judgment as moot. Fayetteville requested additional time to discuss the matter with its City Council before the district court entered orders on the pending motions. The district court granted Fayetteville's request.

Fayetteville subsequently filed a "Report to the Court" in which it advised the district court that Fayetteville's City Council had passed another ordinance which repealed and deleted the challenged ordinance and substituted it with one which only regulated quarries operating inside Fayetteville's city limits. Fayetteville advised the court that it took this action to preserve the viability of the rock quarry operating license within Fayetteville's city limits and to avoid litigation expense. Rogers Group responded that, despite the new amended ordinance, it was still entitled to a final ruling on the issue of Fayetteville's authority to regulate rock quarries outside of Fayetteville's city limits and that, based on the law of the case, Rogers Group was entitled to partial summary judgment on that issue. Rogers Group conceded that, if the court granted partial summary judgment on that issue, the remainder of its claims would be moot and should be dismissed without prejudice.

After considering these arguments, the district court stated that Fayetteville did not have the authority to regulate rock quarries outside of its city limits absent a judicial declaration that such activity is a nuisance. The district court further stated that Fayetteville's action in replacing the

ordinance with a new version that did not contain the unauthorized provisions has no bearing on the resolution of this issue. In fact, the district court stated that, because Fayetteville has now (apparently prompted by adverse holdings by the district court) eliminated the challenged provisions from its city code, it appears to the court that Rogers Group has succeeded in its challenge to the unauthorized provisions of the original ordinance. The district court then stated that all of the claims in the lawsuit were now moot and, on this basis, the district court dismissed the case because there was no longer any case or controversy in existence.

Rogers Group then filed a motion for attorneys' fees and costs, seeking to recover \$110,419.71 in attorneys' fees and costs incurred in prosecuting the lawsuit. The district court granted the motion, finding that Rogers Group was a "prevailing party" because: (1) there was a court-ordered change in the legal relationship because the preliminary injunction blocked Fayetteville from enforcing the original ordinance; (2) the preliminary injunction was a judgment rendered in favor of Rogers Group because it was an order from which an appeal could be and, in this case, was taken; and (3) the preliminary injunction provided Rogers Group with "judicial relief" in the sense that the injunction prevented the implementation and enforcement of the original ordinance, which could have severely limited Rogers Group from operating and/or expanding its business. The district court further found that Rogers Group was entitled to a fee award under § 1988 even though the court never reached the constitutional claims because the allegations in the complaint raised a substantial constitutional claim sufficient to confer jurisdiction, which is sufficient to support an award of fees under § 1988.

**Appeal to the Eighth Circuit Court of Appeals:** Fayetteville appealed the district court's decision to award fees and costs to Rogers Group to the United States Court of Appeals for the Eighth Circuit. Fayetteville argued that the district court erroneously awarded attorneys' fees to Rogers Group because it was not a prevailing party entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988. In response, Rogers Group argued that it was a prevailing party entitled to an award of attorneys' fees and costs.

**Analysis by and Decision of the Eighth Circuit Court of Appeals:** The Eighth Circuit stated that whether Rogers Group is entitled to attorneys' fees depends upon (1) whether Rogers Group is a "prevailing party" and, if so, (2) whether it prevailed under § 1988 when its § 1983 claims were never addressed. The Eighth Circuit stated that, in the United States, parties are ordinarily required to bear their own attorneys' fees, meaning the prevailing party is not entitled to collect its attorneys' fees from the loser. This "American Rule" sets forth a general practice of not awarding fees to a prevailing party absent explicit statutory authority. The Eighth Circuit noted, however, that Congress has authorized the award of attorneys' fees to the prevailing party in numerous statutes, including 42 U.S.C. § 1988. To obtain attorneys' fees under 42 U.S.C. § 1988, a party must be a "prevailing" party. The Eighth Circuit stated that a party is not a "prevailing" party if that party initially obtains a preliminary injunction but then ultimately loses on the merits as the case plays out. The Eighth Circuit also stated that a preliminary injunction granting temporary relief that merely maintains the status quo does not confer prevailing party status. The Eighth Circuit stated that for a preliminary injunction to create prevailing party status for purposes of obtaining an award of

attorneys' fees, a court should consider (1) whether there has been a court-ordered change in the legal relationship between the parties and (2) whether a judgment has been rendered in favor of the party seeking fees, even if no damages were awarded in the judgment itself. The Eighth Circuit also stated that a claimant is not a prevailing party merely by virtue of having acquired a judicial pronouncement unaccompanied by judicial relief.

Applying these factors to the case at hand, the Eighth Circuit concluded that Rogers Group was a prevailing party for purposes of 42 U.S.C. § 1988. The Eighth Circuit noted that the district court's preliminary injunction blocked Fayetteville from enforcing the ordinance, which Fayetteville otherwise planned to enforce against Rogers Group. The Eighth Circuit stated that the preliminary injunction provided concrete and irreversible judicial relief to Rogers Group. The Eighth Circuit noted that, in granting the preliminary injunction, the district court engaged in a thorough analysis of the probability that Rogers Group would succeed on the merits of its claim that Fayetteville lacked the authority to regulate or license the Quarry. Therefore, the Eighth Circuit stated that the preliminary injunction was not one that merely maintained the status quo. Instead, it was a court-ordered change in the legal relationship between the parties. Second, the Eighth Circuit noted that the preliminary injunction constituted a judgment rendered in favor of Rogers Group. The term "judgment" includes a decree and any order from which an appeal lies. Preliminary injunctions are appealable orders. The Eighth Circuit noted that, in this case, Fayetteville actually did appeal the preliminary injunction. Thus, reasoned the Eighth Circuit, the preliminary injunction meets the legal definition of a judgment, and there was no dispute that it was rendered in

favor of Rogers Group. Third, the Eighth Circuit stated that there is no doubt that Rogers Group received "judicial relief." "Relief" is defined as redress or benefit and can be equitable or injunctive in nature. The Eighth Circuit stated that, in this case, Rogers Group asked the district court for equitable or injunctive relief, and the district court granted this relief in the form of the preliminary injunction. For these reasons, the Eighth Circuit held that Rogers Group was a "prevailing party" in this matter.

The Eighth Circuit next addressed whether Rogers Group was entitled to an award of fees despite the fact that the constitutional claim was dismissed as moot in light of Fayetteville's amended ordinance. The Eighth Circuit agreed with the district court and stated that Rogers Group was entitled to an award of fees. The Eighth Circuit stated that the district court had proper jurisdiction of all of the claims, which were all based on the same "common nucleus of operative fact" and the same argument, which was whether or not Fayetteville could regulate rock quarries that were not located within its city limits.

For all of these reasons, the Eighth Circuit agreed with the district court, affirmed the judgment of the district court in favor of Rogers Group, and upheld an award of attorneys' fees and costs.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on July 5, 2012. The case was an appeal from the United States District Court for the Western District of Arkansas, Honorable Jimm Larry Hendren, Judge. The case citation is *Rogers Group, Inc. v. City of Fayetteville*, 683 F.3d 903 (8th Cir. 2012).

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