RSJ&G **MEMORANDUM**

**TO:** FELICIA MASON
BRAD ENGLISH

**FROM:** DENNIS R. BAILEY DRB
J. EVANS BAILEY JEB

**RE:** ALABAMA OPEN RECORDS ACT

**DATE:** SEPTEMBER 30, 2024

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**Alabama's "New" Open Records Act: What to know?**

On October 1, 2024, Alabama's "New" Open Records Act (the "Act") will take effect. In general, the purpose of the Act is to amend the existing laws to codify uniform procedures for requesting and responding to open records requests. The Act also codifies several points from case law and attorney general opinions that had not previously been found in the Alabama Code. We've compiled the following list of what to know to assist the Alabama Press Association and its members.

**(1) The definition of what is a public or open record has not changed.**

While the Act makes many changes, it does not change what is a public record. The Act changes the word "writing" in Ala. Code § 36-12-40 to "record" and uniformly uses the term "record" throughout. Recent, non-binding, opinions from Justice Shaw on the Alabama Supreme Court questioned whether the former

use of "writing" in the statute referred to a smaller scope of materials than the commonly used term "record." *See Something Extra Publ'g, Inc. v. Mack*, 350 So. 3d 663, 669 (Ala. 2021) ("Although, as part of what has been labeled the "Open Records Act," § 36-12-40 by its terms provides for the inspection of "any public writing," it does not provide for the inspection of "records" generally...") (Shaw, J., concurring). The uniform change to "record" or "records" in the Act puts to bed any notion that the former use of "writing" referred to some smaller subset of materials. In addition, the Act makes clear that records that do not exist at the time of the request are not public records, and a public officer is not obligated to make a new record in response to a request. Ala. Code § 36-12-44(d).

**(2) The Judicial Branch is excluded from the procedural requirements of the Act.**

The Alabama Code expressly provides that judicial records are public records. *See, e.g.,* Ala. Code § 41-13-1 (defining public writing as "any record authorized to be made by any law of this state belonging or pertaining to any court of record"). To that end, the trial and appellate courts have long-provided public access to their records. Court records are typically available in every clerk's office in exchange for a small fee, and appellate court opinions are released publicly through each court's website on the day they are decided. Not wanting to upset an already-functioning system of public access, the Legislature has excluded the judiciary from the procedural requirements of the Act discussed in more detail below. *See* Ala. Code § 36-12-40(b).

The Act does add a prohibition on parties to pending or threatening litigation from obtaining relevant information from a public officer via the Act. Pending or threatening litigants must use the discovery methods under applicable Court rules to obtain public records relevant to their case. Ala. Code § 36-12-46. Given that the timelines below are generally longer than the deadlines provided for responding to discovery (30 days) and subpoenas (15 days) under the Alabama Rules of Civil Procedure, this provision should have only a marginal impact.

**(3) The Act makes clear only Alabama "residents" can request public records.**

Before the recent amendment, the Open Records Act provided that "[e]very citizen" had a right to inspect and take a copy of public records. In 2013, the Supreme Court noted that this version of the Open Records Act made its provisions only available to the citizens of Alabama – despite no language expressly limiting the Open Records Act's provisions to only "Alabama citizens" or "citizens of Alabama." *See McBurney v. Young*, 569 U.S. 221, 226, 133 S. Ct. 1709, 1714 (2013). Nevertheless, the Attorney General adopted the Supreme Court's interpretation of a Virginia statute to suggest that only Alabama citizens were entitled to request Alabama public records. Ala. Att'y Gen. Op. 2018-030.

The Act codifies this approach while changing the operative word from "citizen" to "resident." A "resident" is defined in the Act as "An individual who is permanently domiciled in Alabama with an expectation to remain in Alabama as demonstrated by reasonable proof of residency such as, but not limited to, an Alabama driver license or voter registration." Ala. Code § 36-12-43(b)(3). A public officer may

request "reasonable evidence" of proof of a requester's residency. Ala. Code § 36-12-44(f).

The Act does not prohibit "residents" from making a request on behalf of or in place of non-residents (*i.e.,* proxy requests).

**(4) There are now two types of requests: standard and time-intensive.**

The Open Records Act did not previously draw a distinction between simple requests that might take only a moment of a government employee's time and more complex requests that might take hours or days. The prior Act also did not set any deadlines for acknowledging or providing a substantive response to a request. Any request, large or small, under the old Act could languish for days or even months without any legal deadline in sight or even an acknowledgement the request had been received.

The new Act seeks to address both omissions by creating two tracks or paths for acknowledging and responding to a request depending on the type of request: "standard" or "time-intensive." These terms ought to be familiar to most members as they are borrowed from Governor Ivey's recent Executive Order 734.

A "standard request" seeks specific or discrete records a public officer, or the officer's designee, determines would take less than eight hours to time to process. Ala. Code § 36-12-43(b)(4). The public officer may, but is not required, to charge a reasonable fee before providing records responsive to a standard request. Ala. Code § 36-12-44(a)(2).

A "time-intensive" request is one the public officer determines would take more than eight hours of staff time to process. Ala. Code § 36-12-43(b)(6). A requestor is required to pay a reasonable fee for receiving records responsive to a time-intensive request. Ala. Code § 36-12-44(b)(2). This can include partial payments for costs associated with document searches. *Id.*

The Act does not limit or define what type of fees may be charged, nor does it set a defined rate structure. This means the type of fees charged and their "reasonableness" will be governed by existing case law and attorney general opinions. *See e.g.* Op. Att'y Gen. Ala. No. 2007-067 (2007) (fees for public records must be reasonable and based on actual cost); Op. Att'y Gen. Ala. No. 2008-073 (2008) (costs for legal advice may not be included in reasonable fees charged for public record requests).

**(5) New acknowledgment and response deadlines.**

A public officer has 10 days to acknowledge a proper standard request and 15 business days from acknowledgement to provide a "substantive response" (defined in detail below). Ala. Code § 36-12-44(a)(3) & (a)(4). The deadline to provide a substantive response can be increased in 15-business-day increments upon written notice to the requester; however, a standard request is presumed to be denied if a substantive response is not provided within 30 business days or 60 calendar days following acknowledgment, whichever is earlier; or the requested records are not produced within the earlier of 30 business days or 60 calendar days following the payment of the estimated fees to the public officer. Ala. Code § 36-12-44(a)(4) &

(a)(5). There is no presumptive denial under this time frame if: (a) the request is not proper or the public officer is not obligated or required to respond as provided in this section; (b) the public officer has responded in part; (c) the public officer and requester have reached an agreement regarding the time or substance, or both, of the response; (d) negotiations are ongoing between the public officer and the requester; or (e) the public officer has reasonably communicated the status of the request to the requester. Ala. Code § 36-12-44(a)(6).

A public officer has 10 business days to acknowledge a proper "time-intensive" request. Ala. Code § 36-12-44(b)(3). The officer then has an additional 15 business days to notify the requester that the request qualifies as a time-intensive request. (Ala. Code § 36-12-44(b)(4). The time-intensive request notice must also provide the requester with an estimate of likely fees and the opportunity to withdraw the request and submit a standard request. *Id.* A substantive response to a time-intensive request is required within 45 business days after the requester elects to proceed with the time-intensive request. *Id.* The responsive deadline can be increased in 45-business-day increments with written notice to the requester. *Id.* Like with a standard request, a time-intensive request is presumed denied if: (a) substantive response is not provided within 180 business days or 270 calendar days following the requester's election to proceed with a time-intensive request, whichever is earlier, or (b) the records are not produced within the earlier of 180 business days or 270 calendar days following the payment of the estimated fees to the public officer. Ala. Code § 36-12-44(b)(6). The presumed denial does not exist if (a) the request is not proper or the public officer is

not obligated or required to respond as provided in this section; (b) the public officer has responded in part; (c) the public officer and requester have reached an agreement regarding the time or substance, or both, of the response; (d) negotiations are ongoing between the public officer and the requester; or (e) the public officer has reasonably communicated the status of the request to the requester.

Requests must be made with "reasonable specificity." Ala. Code § 36-12-44(c). If a public officer seeks clarification or additional information in response to a vague request, all timelines are tolled and then restarted once a clarified request or additional information is provided. Ala. Code § 36-12-44(g).

A "substantive response" to a standard or time-intensive request "sets forth the public officer's ultimate position on the substance of the request." Ala. Code § 36-12-43(b)(5). This can include, in whole or in part, providing the requested recorders, providing a time and place the record will be made available, a statement the records will be provided upon the payment of a fee, a denial of the request for failing to substantially complete a request form or follow the officer's written procedures for requests; or a denial of the request stating the other reasons the request has been denied. *Id.*

**(6) Additional procedures and forms.**

The Act contemplates that a public officer can adopt written procedures for a requester to follow. These written procedures can establish a standard request form, a designee to who a request should be made, the permissible methods of transmitting requests, and any other relevant policies. Ala. Code §36-12-45(a)(1). These

procedures must be made reasonably available to the public. § 36-12-45(a)(2). Failure to follow written procedures can be grounds for denying a request. Ala. Code § 36-12-45(a)(3).

In the absence of such procedures, requests can be made by hand or by mailing to the main office or principal place of business of the public officer having custody of the requested records. Ala. Code § 36-12-45(b)(1). The Act includes an example standard request form in the absence of written procedures adopting another form that shall read substantially as follows:

> Requester's contact information:
> Name: _____
> Phone number: _____
> Email address: _____
> Street address: _____
> City: _____
> State: _____
> Agency you are requesting public records from: _____
> _____
> Date of request: _____
> Records requested: (Be as specific as possible. A public officer is not obligated to respond to a request that is vague, ambiguous, overly broad, or unreasonable in scope, nor is a public officer obligated to respond to a request that seeks records that do not exist or materials that are not public records. Additionally, extensive requests for public records may increase the fees to cover the administrative cost of searching and copying the requested records.)
> _____
> _____
> _____
> _____
> _____
> Payment of fees may be required before your request is fulfilled.

> By submitting this request, you certify that you are an Alabama resident with standing to make a request for public records pursuant to Alabama law.

Ala. Code § 36-12-45(b)(3).

**(7) Conclusion**

It is our hope that the above answers any questions the APA or its members may have regarding the new Act. We are more than happy to answer any additional questions that may arise. Dennis Bailey and Evans Bailey may be reached at 334-206-3100.