

OKLAHOMA WATCH, INC.
and
PAUL MONIES,
Plaintiffs,

v.

OKLAHOMA OFFICE OF
MANAGEMENT AND ENTERPRISE
SERVICES,
Defendant.

APR 26 2022

RICK WARREN
COURT CLERK

125

Case No. **CV-2022-779**

**PETITION FOR RELIEF FOR VIOLATIONS OF THE
OKLAHOMA OPEN RECORDS ACT**

Plaintiffs Oklahoma Watch, Inc. and Paul Monies (collectively, "Plaintiffs"), by and through undersigned counsel, bring this Petition against the Oklahoma Office of Management and Enterprise Services ("Defendant") and allege as follows:

PRELIMINARY STATEMENT

1. This action arises out of Defendant's refusal to produce in a prompt and reasonable manner records of a public body that are subject to disclosure under the Oklahoma Open Records Act ("ORA"), Okla. Stat. tit. 51, §§ 24A.1-24A.33, and were requested by Plaintiffs.

2. Plaintiffs bring this action pursuant to Okla. Stat. tit. 51, § 24A.17(B) seeking declarative and injunctive relief in the form of an order stating that Defendant's failure to provide the requested records is unlawful and requiring Defendant to make the requested records available to Plaintiffs.

PARTIES

3. Plaintiff Oklahoma Watch, Inc. (“Oklahoma Watch”) is a nonprofit news corporation that produces in-depth and investigative journalism as a public service for the benefit of all Oklahomans. Oklahoma Watch makes its content freely and openly available to the public on its website (oklahomawatch.org), social media platforms, newsletters, and more.

4. Plaintiff Paul Monies (“Monies”), an individual, is a Staff Reporter for Oklahoma Watch who covers state government.

5. Defendant Oklahoma Office of Management and Enterprise Services (“OMES”) is an agency of the State of Oklahoma created by Okla. Stat. tit. 62, § 34.3.

6. Defendant officially resides at 2401 North Lincoln Boulevard, Oklahoma City, OK 73105, which lies within Oklahoma County.

7. Defendant is a “public body” within the meaning of and subject to the ORA. *See* Okla. Stat. tit. 51, § 24A.3(2).

8. In addition to being the State of Oklahoma’s central technology provider (which includes providing services such as designing and administering state agency websites), Defendant serves as the state’s central finance agency and helps state agencies manage money through budgeting, accounting, purchasing, and more. *See About OMES*, Oklahoma Office of Management and Enterprise Services (last modified Dec. 3, 2021), <https://oklahoma.gov/omes/about.html> [<https://perma.cc/7NGJ-JNCX>]; *see also* Oklahoma State Finance Act, Okla. Stat. tit. 62, §§ 34–34.204; Oklahoma Program Performance Budgeting and Accountability Act, Okla. Stat. tit. 62, §§ 45.1–45.11; Taxpayer Transparency Act, Okla. Stat. tit. 62, §§ 46–49; Okla. Stat. tit. 74, ch. 4 – Office of Management and Enterprise Services.

STATEMENT OF FACTS

A. Oklahoma's receipt and documented mismanagement of Coronavirus Relief Funds.

9. Government at every level—federal, state, tribal, and local—mobilized in response to the COVID-19 pandemic. Near the onset of the pandemic, in or about March of 2020, the federal government implemented a variety of programs and allocated trillions of dollars to address pandemic-related issues via the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. Among other things, the CARES Act included a package of stimulus funds—known as “Coronavirus Relief Funds”—to provide state governments with support for public services impacted by COVID-19. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, 134 Stat. 281 (2020).

10. Oklahoma received approximately \$1.2 billion of Coronavirus Relief Funds. *See* CARES FORWARD, State of Oklahoma (last visited Apr. 25, 2022), <https://caresact.ok.gov/> [<https://perma.cc/XV77-EYG6>]. Governor Kevin Stitt established CARES FORWARD, a team of cabinet secretaries and public employees, to distribute the funds. *Id.*

11. Both the Legislative Office of Fiscal Transparency and the Oklahoma State Auditor and Inspector subsequently discovered irregularities—as well as a lack of transparency, accountability, and oversight—in Oklahoma's management of Coronavirus Relief Funds. *See* Paul Monies, *Oklahoma Deems Billions in Federal Covid Relief Fund Applications a Secret*, Oklahoma Watch (updated Mar. 3, 2022), <https://oklahomawatch.org/2022/02/24/oklahoma-deems-billions-in-federal-covid-relief-fund-applications-a-secret/> [<https://perma.cc/95NK-SVCL>]; *see also* Legislative Office of Fiscal Transparency, *Rapid Response Evaluation: Coronavirus Relief Funds*, State of Oklahoma (Feb. 2021), http://www2.okloft.gov/Reports/COVID_Report.pdf [<https://perma.cc/7HZF-LBGY>]; *Oklahoma State Department of Health Investigative Audit*, Oklahoma State Auditor and Inspector (Feb. 8,

2022),

<https://www.sai.ok.gov/Search%20Reports/database/Dept%20of%20Health%20Web%20Final.pdf> [https://perma.cc/26CZ-BT9T].

12. For example, the Legislative Office of Fiscal Transparency’s evaluation of the Coronavirus Relief Funds managed and allocated by CARES FORWARD found, among other issues, that: (i) the process for spending Coronavirus Relief Funds lacked structure and clarity, as CARES FORWARD inconsistently provided detail to policymakers about funding proposals or funding decisions, did not track or explain rejected funding proposals, did not maintain a centralized repository for documentation of funded projects or reimbursements, and deployed a highly subjective process for approving funding; (ii) a significant component of funds expended by CARES FORWARD was at risk of not meeting federal standards for “necessary” expenses in responding to the pandemic; and (iii) CARES Forward missed opportunities to better address outstanding direct needs. *See* Legislative Office of Fiscal Transparency, *Rapid Response Evaluation: Coronavirus Relief Funds*, State of Oklahoma, 7 (Feb. 2021),

http://www2.okloft.gov/Reports/COVID_Report.pdf [https://perma.cc/7HZF-LBGY].

13. An investigative audit of the Oklahoma State Department of Health, which received reimbursement from Coronavirus Relief Funds for certain pandemic-related purchases, found, among other issues, that documentation could not be provided to indicate that purchased goods such as Personal Protective Equipment were ever received by the state. *See Oklahoma State Department of Health Investigative Audit*, Oklahoma State Auditor and Inspector, 12–13 (Feb. 8, 2022),

<https://www.sai.ok.gov/Search%20Reports/database/Dept%20of%20Health%20Web%20Final.pdf> [https://perma.cc/26CZ-BT9T].

B. Oklahoma’s receipt of \$3.19 billion for pandemic relief under the American Rescue Plan Act.

14. In March 2021, the federal government enacted the American Rescue Plan Act (“ARPA”) to address the continued impact of COVID-19 on the economy, public health, state and local governments, individuals, and businesses. *See FACT SHEET: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. Department of the Treasury (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families> [https://perma.cc/HH2H-4M89]; *see also* American Rescue Plan Act of 2021, Pub. L. No. 117–2, 135 Stat. 4 (2021).

15. Under ARPA, the State of Oklahoma and its local governments were awarded a combined \$3.19 billion to respond to the public health and economic emergency, provide premium pay to essential workers, replace revenue lost due to the pandemic, and make necessary investments in water, sewer, and broadband infrastructure. *What is ARPA?*, State of Oklahoma (last modified Dec. 9, 2021), <https://oklahoma.gov/arpa/about-arpa/what-is-arpa.html> [https://perma.cc/P8AK-62ZQ].

16. Any ARPA funds (including the \$3.19 billion awarded to the State of Oklahoma and local governments) not obligated by December 31, 2024, as well as any funds obligated by December 31, 2024, but not expended by December 31, 2026, must be returned to the federal government. *See* Coronavirus State and Local Fiscal Recovery Funds, 31 C.F.R. § 35.5 (2022).

17. Of the \$3.19 billion in ARPA funding awarded to Oklahoma, \$1.87 billion was allocated to the state for investment into projects benefitting all Oklahomans, and \$1.32 billion was made available to Oklahoma counties, cities, and local communities. *What is ARPA?*, State of Oklahoma (last modified Dec. 9, 2021), <https://oklahoma.gov/arpa/about-arpa/what-is-arpa.html> [https://perma.cc/P8AK-62ZQ].

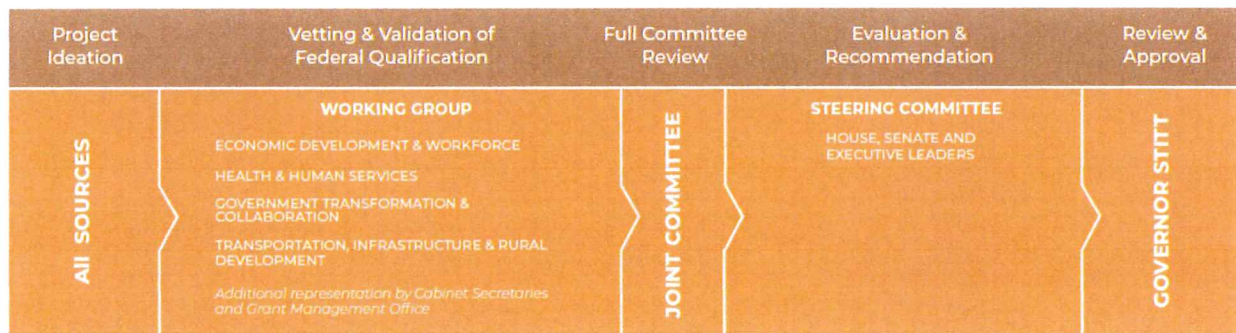
18. The Oklahoma Legislature and state executive branch officials established the Joint Committee on Pandemic Relief Funding (“Joint Committee”) to “ensure [ARPA] funds are allocated in a responsible and transparent manner and in accordance with federal guidelines.” *Id.*

19. The State of Oklahoma’s process of selecting projects or proposals for ARPA funding is as follows:

The Joint Committee will receive and evaluate proposals through a vetting process and engagement with stakeholders, including members of the Executive Branch, state agencies, community organization, and public submissions.

Projects may be assigned to the working groups within the Joint Committee. Once the working groups vet the projects, they will pass them on to the Joint Steering Committee for evaluation and recommendation. Projects will then be sent to the Governor for final approval before any ARPA dollars will be expended.

Id.



American Rescue Plan Fact Sheet, State of Oklahoma (last visited Apr. 25, 2022), https://oklahoma.gov/content/dam/ok/en/arpa/documents/ARPALegislativeFactSheet_09172021.pdf [https://perma.cc/26LV-DVA6].

20. To facilitate the application process for the \$1.87 billion in funds awarded to the State of Oklahoma, the state created a publicly available web portal through which any person could submit a proposal, project, or idea for ARPA funding. *See American Rescue Plan Act (ARPA)*, State of Oklahoma (last modified Apr. 18, 2022), <https://oklahoma.gov/arpa.html>

[<https://perma.cc/Q576-ZUST>]; American Rescue Plan Act Proposal Portal, State of Oklahoma (last visited Apr. 25, 2022), https://okgov.force.com/ARPAIntake/s/?language=en_US [<https://perma.cc/2AN8-AFXE>].

21. The State of Oklahoma also created a web portal to facilitate the application process for the \$1.32 billion made available to Oklahoma counties, cities, and local communities. *See American Rescue Plan Act (ARPA)*, State of Oklahoma (last modified Apr. 18, 2022), <https://oklahoma.gov/arpa.html> [<https://perma.cc/Q576-ZUST>]; Local Governments Login, State of Oklahoma (last visited Apr. 25, 2022), <https://okgov.force.com/ARPA/s/login/?ec=302&startURL=%2FARPA%2Fs%2F> [<https://perma.cc/3Z3H-NFQB>].

22. As of April 1, 2022, the State of Oklahoma had received a total of 1,439 projects, proposals, and ideas for ARPA funding from both the general public and various entities, with a total value of requested funding exceeding \$17.904 billion. *See Project Portal Closure and Top Focus Areas*, State of Oklahoma (last modified Apr. 4, 2022), <https://oklahoma.gov/arpa/newsroom/project-portal-closure-and-top-focus-areas.html> [<https://perma.cc/P223-DV9P>].

C. Plaintiffs’ request for records pertaining to Oklahoma’s use of ARPA funds and Defendant’s denial of that request.

23. On March 11, 2022, Monies, in his role as a Staff Reporter for Oklahoma Watch, submitted an ORA request (“Request”) to Defendant for “[a] copy of any and all proposals, projects, ideas, etc. submitted to the State of Oklahoma’s portal (oklahoma.gov/arpa) for American Rescue Plan Act (ARPA) funds from October 1, 2021 to March 10, 2022.” A true and correct copy of Plaintiffs’ Request is attached as **Exhibit A**.

24. On March 21, 2022, Caden Cleveland, the Director of Legislative and Public

Affairs for OMES, responded to the Request, stating in relevant part:

[A]t this time ARPA project requests within the submission portal are not available for release. These records are temporarily confidential as they are being considered as going through a joint legislative and executive procurement process. Reference for this can be found per the statutory authority (Title 74 O.S. 85.5(j) (9)) and also in this Procurement Information Memorandum (PIM). As these potential projects go through the joint executive and legislative ARPA selection process, they will be considered as confidential to protect requester information and also the integrity of the procurement process as each requested project could result in a contract with the state. While the information is not able to be supplied currently, once the legislative working groups approve certain projects to then be considered by the full joint committee, more details of these projects will be made public on the Oklahoma.gov/ARPA website.¹

A true and correct copy of Defendant's response to the Request is attached hereto as **Exhibit B**.

25. As of the filing of this Petition, Defendant has not made any records available to Plaintiffs in response to the Request.

CAUSE OF ACTION

Violation of the Oklahoma Open Records Act, Okla. Stat. tit. 51, §§ 24A.1–24A.33

26. Plaintiffs repeat, reallege, and incorporate the allegations set forth in paragraphs 1 through 25 as though fully set forth herein.

27. The purpose of the ORA is “to ensure and facilitate the public’s right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.” Okla. Stat. tit. 51, § 24A.2.

¹ The underlined text indicates a hyperlink. Defendant linked to an online version of Okla. Stat. tit. 74, § 85.5(J)(9) which states: “J. The State Purchasing Director shall undertake the following:” “9. Determine whether and to what extent information included in a bid or similar offer is confidential and reject all requests to disclose the information so designated.” A true and correct copy of the Procurement Information Memorandum (PIM) hyperlinked by Defendant is attached hereto as **Exhibit C**.

28. Accordingly, the ORA provides that “[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours.” *Id.* § 24A.5.

29. “A public body must provide prompt, reasonable access to its records A delay in providing access to records shall be limited solely to the time required for preparing the requested documents and the avoidance of excessive disruptions of the public body’s essential functions.” *Id.* § 24A.5(6).

30. “[P]ersons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access” Okla. Stat. tit. 51, § 24A.2.

31. “Unless a record falls within a statutorily prescribed exemption in the [ORA], the record must be made available for public inspection.” *Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, ¶12, 73 P.3d 871, 875.

32. “The public body urging an exemption [to disclosure] has the burden to establish the applicability of such exemption.” *Id.*

33. “Because of the strong public policy allowing public access to governmental records,” the ORA’s provisions must be construed “to allow access unless an exception clearly applies” *Okla. Ass’n of Broads., Inc. v. City of Norman*, 2016 OK 119, ¶15, 390 P.3d 689, 694.

34. The records sought by Plaintiffs’ Request are records of public bodies as defined by the ORA. Okla. Stat. tit. 51, § 24A.3.

35. Defendant possesses records responsive to Plaintiffs’ Request.

36. There is no legal basis for Defendant’s failure or refusal to disclose the requested

records. Both Okla. Stat. tit. 74, § 85.5(J)(9) and the Procurement Information Memorandum (Ex. C) cited by Defendant as authority for refusing to disclose records responsive to Plaintiffs' Request are inapplicable and/or were improperly and unlawfully cited to deny Plaintiffs' Request. Okla. Stat. tit. 74, § 85.5(J)(9) provides: "J. The State Purchasing Director shall undertake the following:" "9. Determine whether and to what extent information included in a bid or similar offer is confidential and reject all requests to disclose the information so designated." The requested records—all proposals, projects, ideas, etc. submitted to the State of Oklahoma's online portal for ARPA funds—are not a bid or similar offer to which the State Purchasing Director's authority under 74 O.S. § 85.5(J)(9) applies. The Procurement Information Memorandum cited by Defendant (Ex. C) also incorrectly relies on 74 O.S. § 85.5(J)(9).

37. Defendant has failed to provide prompt, reasonable access to records responsive to Plaintiffs' Request as required by the ORA.

38. Disclosure of the requested records is intended to, and reasonably likely to, enable Plaintiffs, who are members of the news media, to evaluate whether those entrusted with the affairs of the government (*i.e.*, allocating \$3.19 billion meant to benefit all Oklahomans and local communities across the state) are honestly, faithfully, and competently performing their duties as public servants. Among other things, disclosure of the requested records will enable members of the press and the public to review and debate the merits of both selected *and* rejected proposals for public dollars.

39. Accordingly, disclosure of the requested records serves the public interest.

40. Defendant has violated the ORA by withholding the records requested by Plaintiffs and by failing to provide prompt, reasonable access to its records. Defendant will

continue to be in violation of the ORA absent declaratory and injunctive relief from this Court.

REQUESTED RELIEF

Therefore, Plaintiffs respectfully request the Court enter an order:

A. Declaring the records sought by Plaintiffs are open records available to the public for inspection and copying in accordance with the Oklahoma Open Records Act;

B. Declaring Defendant's refusal and failure to provide the requested records an unlawful violation of the Oklahoma Open Records Act;

C. Declaring Defendant's failure to provide the requested records in a prompt, reasonable manner an unlawful violation of the Oklahoma Open Records Act;

D. Requiring the prompt production of all requested records that have been improperly withheld by Defendant;

E. Prohibiting Defendant from recovering search fees from Plaintiffs, and providing that fees (if any) for copying of electronic records are chargeable only to the extent of reasonable, direct costs (*e.g.*, the cost of a CD-ROM necessary to store copies of electronic records);

F. Awarding Plaintiffs reasonable attorney's fees and the costs of this action; and

G. Granting such other and further relief as the Court deems just and proper.

DATED: April 26, 2022

Respectfully submitted,



Kathryn E. Gardner, OBA #33509
Reporters Committee for Freedom of the Press
110 S. Hartford Ave., Ste. 2524
Tulsa, OK 74120
T: (918) 255-0060

kgardner@rcfp.org
Counsel for Plaintiffs
Oklahoma Watch and Monies

EXHIBIT A

On Mar 11, 2022, at 11:18 AM, OMES Open Records <orr@omes.ok.gov> wrote:



OKLAHOMA
Office of Management
& Enterprise Services

OPEN RECORDS REQUEST – CONFIRMATION EMAIL

Your OMES open records request has been received.

You will be notified by email when the requested records are available for release.

Your confirmation number is 11305.

A copy of your request is provided below.

OMES will email you if additional information is needed, or if we are unable to process your request.

Legislative & Public Affairs | Office of Management and Enterprise Services
Oklahoma.gov | omes.ok.gov



OKLAHOMA

In compliance with 51 O.S. Section 24A.5(6), OMES has established procedures to protect the integrity and organization of its records and prevent excessive disruption of its essential functions. OMES procedure requires a search to locate records, an initial review to ensure relative records are gathered, and in most cases a final legal review to redact any confidential information not subject to the Open Records Act. Records deemed confidential under state or federal statute will not be released to you.

COPY OF OMES OPEN RECORDS REQUEST 11305:

Requestor: Paul Monies

Organization: Oklahoma Watch

Media: Yes

Email: pmonies@oklahomawatch.org

Phone: 571-319-3289

Fax:

Address: 2300 N. Lincoln Blvd., 4th Floor Press Room

Nature of Request:

Other/unknown. Type of records not listed/I do not know the nature of my request.

RECORDS REQUESTED:

A copy of any and all proposals, projects, ideas, etc. submitted to the State of Oklahoma's portal (oklahoma.gov/arpa) for American Rescue Plan Act (ARPA) funds from October 1, 2021 to March 10, 2022.

EXHIBIT B

From: Caden Cleveland <Caden.Cleveland@omes.ok.gov>
Subject: RE: [EXTERNAL] Re: OMES open records request - confirmation no.: 11305
Date: March 21, 2022 at 5:36:18 PM CDT
To: Paul Monies <pmonies@oklahomawatch.org>
Cc: OMES Open Records <orr@omes.ok.gov>

Hey Paul,

Thanks for reaching out. As mentioned before, at this time ARPA project requests within the submission portal are not available for release. These records are temporarily confidential as they are being considered as going through a joint legislative and executive procurement process. Reference for this can be found per the statutory authority ([Title 74 O.S. 85.5\(j\)\(9\)](#)) and also in this [Procurement Information Memorandum](#) (PIM). As these potential projects go through the joint executive and legislative ARPA selection process, they will be considered as confidential to protect requester information and also the integrity of the procurement process as each requested project could result in a contract with the state. While the information is not able to be supplied currently, once the legislative working groups approve certain projects to then be considered by the full joint committee, more details of these projects will be made public on the Oklahoma.gov/ARPA website. Additionally, as mentioned before, the chairs of the ARPA joint legislative committee would be happy to take any questions about the process or specific projects that you may have in mind.

--

Caden Cleveland | Director of Legislative & Public Affairs
Office of Management and Enterprise Services
p. 405-521-2213 | c. 405-388-8048
Oklahoma.gov | omes.ok.gov



OKLAHOMA

EXHIBIT C



**State of Oklahoma
Office of Management and Enterprise Services
Purchasing Division**

PROCUREMENT INFORMATION MEMORANDUM

Affected Entities/Personnel: Executive State Agencies	Subject: Confidentiality of ARPA Documents
Effective Date of PIM: 11/23/2021	Point of Contact: PIM@omes.ok.gov
Prior PIM: N/A	Statutory and Rule Reference: 74 O.S. 85.5 J.(9) OAC:260-115-1-1 (c)
Approved: Dan Sivard, State Purchasing Director	Approval Date: 11/23/2021

As a means of disseminating relevant state procurement information to state entities, the Office of Management and Enterprise Services, Purchasing Division periodically issues Procurement Information Memoranda. To the extent any information in this Procurement Information Memorandum (“PIM”) conflicts with information in a previously issued memorandum, the information in this PIM controls. This PIM specifically addresses the confidentiality of documents submitted for projects/procurements potentially receiving ARPA funds.

Summary

Pursuant to 74 O.S. § 85.5 J.(9) the State Purchasing Director has determined that all documents received by the State of Oklahoma in regard to the use and distribution of ARPA funds are confidential information and not subject to open record requests.

1. Legal Framework and Background

The State Purchasing Director under supervisions of the Director of the Office of Management and Enterprise Services, has the sole and exclusive authority for all acquisitions used or consumed by State agencies [74 O.S. §85.5 A]. The State Purchasing Director also has the responsibility to promulgate rules pursuant to provisions of the Oklahoma Central Purchasing Act [74 O.S. §85.5 C)].

One such rule is OAC 260:115-1-1. (c): **Official directives.** The State Purchasing Director shall issue directives, instructions or written communications to state agencies regarding required procurement practices and procedure to ensure compliance with provisions of the Central Purchasing Act, procurement rules, and any other mater relating to state agency acquisitions.

As such, PIMS issued by the state Purchasing Director are official directives dealing with specific issue and procedures governing agency procurement, they are not advisory in nature. They are authoritative directives toward agencies and department on “best procedure” in regard to procurement related matters.

With that prior authority in mind, this PIM will serve as current authority for maintaining the confidentiality of those documents and records received in connection with the receipt and/or distribution of ARPA funds.

The authority for the State Purchasing Director to make this determination is found in Title 74 O.S. 85.5 J.9. to wit:

The State Purchasing Director shall undertake the following:

9. Determine whether and to what extent information included in a bid or similar offer is confidential and reject all requests to disclose the information so designated.

The State Purchasing Director has determined that information received in connection with the receipt and/or distribution of ARPA funds is an “offer” initiating the procurement process and therefore such information is determined to be confidential and not subject to release from an open record request.

2. Practitioner Comments/ Conclusions

Requests asking for any documents, including but not limited to, books, papers, photographs, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, coming into the custody, control or possession of public officials, public bodies or their representatives in connection with the receipt or distribution of ARPA funds shall be maintained as confidential.