

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC.

PLAINTIFF

VS.

CASE NO. _____

ARKANSAS DEPARTMENT OF
ENVIRONMENTAL QUALITY

DEFENDANT

**COMPLAINT FOR VIOLATION OF THE ARKANSAS FREEDOM OF
INFORMATION ACT OF 1967**

This is a complaint to enforce the rights of C&H Hog Farms, Inc. to obtain copies of public records pursuant to the Arkansas Freedom of Information Act of 1967 (“FOIA”), Ark. Code Ann. §§25-19-101, *et seq.* C&H alleges as follows:

PARTIES

1. Plaintiff, C&H Hog Farms, Inc. (“C&H”), is an Arkansas Corporation doing business in Newton County, Arkansas.

2. Defendant Arkansas Department of Environmental Quality (“ADEQ” or “Defendant”) is an agency of the State of Arkansas “that is wholly or partially supported by public funds,” making ADEQ subject to the Arkansas Freedom of Information Act’s (FOIA) requirements of providing access to certain public records upon request. Ark. Code Ann. § 25-19-103(5)(A). ADEQ is required by law to keep or otherwise preserve records relating to the performance of its official duties. *See* Ark. Code Ann. § 25-18-601 *et seq.*

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to Ark. Code Ann. § 25-19-107(a).

4. Venue is proper in this judicial district pursuant to Ark. Code Ann. § 16-60-101, because C&H has its principal place of business in this judicial district.

FACTUAL ALLEGATIONS

5. Defendant maintains “public records” within the meaning of Ark. Code Ann. § 25-19-103(6)(a), and is subject to the provisions of the Arkansas FOIA. Ark. Code Ann. §§ 25-19-101, *et seq.* (“FOIA”). Arkansas courts broadly construe FOIA in favor of disclosure. *See, e.g., Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881, 885 (2004).

6. APC&EC Regulation No. 8, Section 8.208(E) provides the rules of procedure for public comments on draft permitting decisions as well as for the implementation of FOIA during public notice and comment proceedings on draft permitting decisions.

7. On September 17, 2018, ADEQ published public notice of its intent to deny Permit 5264-W to C&H (the “Draft Permitting Decision”), with a comment period to close at 4:30 p.m. on October 17, 2018 (the “Comment Period”). A true and correct copy of the Draft Permitting Decision is attached to this Complaint as Exhibit 1, and a true and correct copy of the Public Notice is attached to this Complaint as Exhibit 2.

8. APEC&EC Regulation 8.208 (E) provides as follows:

The Department shall make available the draft permitting decision and other material relevant to the draft permitting decision for inspection and copying at the Department during the public comment period and shall comply with the relevant provisions of the Arkansas Freedom of Information Act. The Department shall provide copies to any person making a request for copies, including any request by mail, telephone, electronic mail, or facsimile. The Department may charge the actual costs of reproduction, mailing, or transmitting the record by facsimile or other electronic means. The Department may require the requester to pay the copy fee in advance if the estimated fee exceeds twenty-five dollars (\$25.00).

9. On October 10, 2018, C&H submitted a written request for certain public records to ADEQ, which ADEQ received. C&H’s request asked ADEQ to provide C&H with copies of

certain, specifically-described public records. A true and correct copy of C&H's request is attached to this Complaint as Exhibit 3 (the "FOIA Request").

10. On October 15, 2018, ADEQ responded to the FOIA Request. Attached hereto as Exhibit 4 is a true and exact copy of ADEQ's response (the "Response"). ADEQ's Response failed to provide any documents. Rather, ADEQ alleged that the request was too "voluminous and broad," which is not an appropriate response. *See, e.g., Daugherty v. Jacksonville Police Dep't.*, 2012 Ark. 264, *8, 411 S.W.3d 196, 201 (2012) ("Simply stated, the Department's August 16 letter in response to Daugherty's first FOIA request, stating that it would not provide the requested records because her request was too broad and burdensome was not a timely and compliant response.").

11. ADEQ's response also asserted that the request was not "sufficiently specific," or that the documents are available somewhere on ADEQ's website of documents, the vast majority of which are not relevant to the FOIA Request.

12. The documents requested in the FOIA Request are not only sufficiently specific, but the FOIA Request was carefully drafted to request documents relevant to the Draft Permitting Decision. In particular, the FOIA Request identified documents specifically related to those documents ADEQ identified as supporting the Draft Permitting Decision, and specifically related to the basis for ADEQ's Draft Permitting Decision. ADEQ is precisely the agency with knowledge as to what documents are responsive to the FOIA Request. By refusing to provide the documents requested in the FOIA Request, ADEQ has violated its obligations under APC&EC Regulation 8.208(E), has prohibited C&H from filing appropriate comments upon the Draft Permitting Decision prior to the close of the Comment Period, and has deprived C&H of its due process rights to notice and an opportunity to comment on the Draft Permitting Decision.

13. ADEQ's Response does not satisfy ADEQ's obligations under the FOIA, and represents a pattern of abuses of its obligations under the FOIA.

14. By comparison, the FOIA Request was directed to both ADEQ and the Arkansas Pollution Control and Ecology Commission ("APC&EC"). APC&EC had no difficulty understanding the scope and substance of the FOIA Request, and has produced voluminous documents in response to the FOIA Request. At this point, C&H believes that APC&EC has responded in good faith to the FOIA Request as it relates to APC&EC; although C&H is currently evaluating APC&EC's response, and reserves the right to amend this Complaint in the event it determines that APC&EC's response is deficient.

13. ADEQ has not properly responded to the FOIA Request, and has therefore deprived C&H of the rights granted by Ark. Code Ann. §§ 25-19-105(d) and 25-19-105(e) and has failed to meet its FOIA obligations under APC&EC Regulation 8.208(E).

CLAIM FOR RELIEF

14. The allegations set forth in the foregoing paragraphs 1-13 are incorporated herein by reference.

15. The FOIA, Ark. Code Ann. § 25-19-105(a)(2), provides: "A citizen may make a request to the custodian to inspect, copy, or receive copies of public records." The statute provides that "[a]ll records maintained in the public offices or by public employees within the scope of their employment shall be presumed to be public records." Ark. Code Ann. § 25-19-103(6)(A).

16. The records that C&H requested through the FOIA Request are public records within the meaning of Ark. Code Ann. § 25-19-103(6)(A) and 25-19-105(a)(1)(A), and are not subject to any exemption from disclosure.

17. ADEQ has refused to give C&H copies of any of the records C&H requested.

18. ADEQ violated the Arkansas FOIA, Ark. Code Ann. § 25-19-105(a) 25-19-105(e), by not producing the requested records promptly, by not producing the requested records within three working days, and by not producing the requested records within a reasonable time.

19. By failing to give C&H copies of requested public records within a reasonable time, ADEQ has violated and is continuing to violate C&H's rights under Ark. Code Ann. § 25-19-105.

20. ADEQ should be ordered to extend the Comment Period for a reasonable period of time after it fully complies with its obligations under the FOIA, unless this Court finds that ADEQ lacked jurisdiction to establish the Comment Period and voids the Public Notice and Comment in *C&H Hog Farms, Inc. v. Arkansas Pollution Control and Ecology Commission*, Case No. 51-CV-18-58.

PRAYER FOR RELIEF

WHEREFORE, C&H respectfully prays that this Court:

1. Order ADEQ to provide C&H with the public records identified in the FOIA Request;
2. Order ADEQ to extend the Comment Period for a reasonable time after ADEQ provides C&H with all of the public records identified in the FOIA Request, unless this Court finds that ADEQ lacked jurisdiction to establish the Comment Period and voids the Public Notice and Comment in *C&H Hog Farms, Inc. v. Arkansas Pollution Control and Ecology Commission*, Case No. 51-CV-18-58.

3. Award C&H reasonable attorneys' fees and cost pursuant to Ark. Code Ann. § 25-19-107; and
4. Order such additional relief as the Court may deem just and proper.

DATED this the 16th day of October, 2018

Respectfully submitted,

/s/ William A. Waddell, Jr.

William A. Waddell, Jr., AR Bar No. 84154
FRIDAY, ELDREDGE & CLARK, LLP
400 West Capitol Ave, Ste. 200
Little Rock, Arkansas 72201
(501) 370-1510
Waddell@fridayfirm.com

and

Charles R. Nestrud, AR Bar No. 77095
BARBER LAW FIRM PLLC
425 West Capitol Ave, Ste. 3400
Little Rock, Arkansas 72201
(501) 372-6175
cnestrud@barberlawfirm.com

Attorneys for C&H Hog Farms, Inc.