

# CV-19-929

IN THE SUPREME COURT OF ARKANSAS

JENNIFER JONES, in her official capacity as Clerk  
of the District Court of Benton County, Arkansas,  
Bentonville Division

APPELLANT/  
CROSS-APPELLEE

v.

No. CV-19-929

PROFESSIONAL BACKGROUND  
SCREENING ASSOCIATION, INC.

APPELLEE/  
CROSS-APPELLANT

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ON APPEAL FROM THE CIRCUIT COURT  
OF PULASKI COUNTY, ARKANSAS  
THE HONORABLE CHRIS PIAZZA

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**BRIEF OF APPELLANT JENNIFER JONES**

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## Points on Appeal

### **I. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PBSA ON ITS FOIA CLAIM BASED UPON ITS ERRONEOUS INTERPRETATION OF AO 19.**

#### **A. Standard of review**

*Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith*, 284 Ark. 418, 683 S.W.2d 601 (1985).

*Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844.

#### **B. The circuit court erred in declaring that Courthouse Concepts's July 2018 request for court records is not a request for "compiled information" subject to AO 19.**

*In re Adoption of Administrative Order No. 19*, 2007 Ark. LEXIS 139.

Att'y Gen. Op. No. 2015-121.

#### **C. The circuit court erred in entering summary judgment in favor of PBSA on its FOIA claim.**

Admin. Order No. 19 § I(A).

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## **Jurisdictional Statement**

Appellee/Cross-Appellant Professional Background Screening Association, Inc. (“PBSA”), f/k/a National Association of Professional Background Screeners, filed this lawsuit on July 23, 2018, in the Circuit Court of Pulaski County, Arkansas. (RP 4). PBSA brought two claims. First, PBSA alleged that Appellant/Cross-Appellee Jennifer Jones, who is the Clerk of the District Court of Benton County, Arkansas, Bentonville Division (“the Bentonville District Court”), has interpreted and applied Arkansas Supreme Court Administrative Order No. 19 (“AO 19”) to PBSA members who request court records to perform background checks in a manner that violates their right to access court records under the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and other federal law. (RP 16-19). Second, PBSA alleged that its members’ requests for court records are governed by the Arkansas Freedom of Information Act (“FOIA”), not AO 19. (RP 19-21). PBSA sought declaratory and injunctive relief along with costs and attorneys’ fees. (RP 18-21, 23-24).

Clerk Jones moved to dismiss the complaint (RP 108) and filed a brief in support (RP 111), which the circuit court denied on January 8, 2019 (RP 143). On January 22, 2019, Clerk Jones filed her answer (RP 150). After engaging in discovery, the parties filed cross-motions for summary judgment (RP 342, 469).

The circuit court held a hearing on the cross-motions on August 6, 2019 (RT 32-104). On August 14, 2019, the circuit court entered an order granting in part and denying in part both parties' motions. (RP 537-38). The circuit court entered judgment in favor of Clerk Jones on the federal-law claims but found in favor of PBSA on the FOIA claim. (RP 537-38). The circuit court also ordered Clerk Jones to respond to a July 2018 FOIA request that gave rise to the lawsuit. (RP 538). Clerk Jones timely filed a notice of appeal of the FOIA rulings on September 12, 2019 (RP 540-41), and PBSA filed a notice of cross-appeal on September 19, 2019 (RP 544-45). The issue on direct appeal is whether the circuit court erred in denying Clerk Jones's motion for summary judgment on PBSA's FOIA claim and ordering her to compile information in response to a FOIA request in contravention of the provisions of AO 19. The issue is ripe for review as the circuit court's judgment is final and disposed of all claims in this case. (RP 537-38).

Jurisdiction lies in the Supreme Court pursuant to Rule 1-2(b) of the Rules of the Supreme Court because the appeal presents a question of first impression regarding the interplay between AO 19 and the FOIA. The appeal is of substantial public interest due to the strong interests made clear by this Court in adopting AO 19 governing access to court records and by the General Assembly in adopting the FOIA. Whether court clerks are required to compile only certain excerpts of

available court records in response to background screening companies' written requests for such records ostensibly pursuant to the FOIA is an important issue needing clarification or development of the law. The appeal involves significant issues concerning the validity, construction, or interpretation of an act of the General Assembly and an administrative order of this Court. Finally, the cross-appeal involves questions of federal constitutional interpretation. For these reasons, the Arkansas Supreme Court should hear and decide this case.

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## **Statement of the Case and the Facts**

*The Parties.* Appellant Jennifer Jones is the Clerk of the District Court of Benton County, Arkansas, Bentonville Division (hereinafter referred to as “the Bentonville District Court”) and has served in that capacity since October 2010. (RP 435). The Bentonville District Court, like other district courts in Arkansas, handles traffic, misdemeanor, and ordinance violations from citations issued within the Bentonville area along with civil and small claims cases. (RP 435-36); *see also* [www.bentonvillear.com/185/District-Court](http://www.bentonvillear.com/185/District-Court) (last visited Feb. 3, 2020). Appellee Professional Background Screening Association, Inc. (“PBSA”), f/k/a National Association of Professional Background Screeners, is a trade association of companies providing employment, tenant, and volunteer background screening services. (RP 396). PBSA represents the interests of its members in this case, including Courthouse Concepts, Inc., an Arkansas for-profit corporation that provides background-screening services. (RP 346, 396).

*Limited Scope Background Checks.* When conducting background checks for employment or other purposes, professional background screening companies like Courthouse Concepts do not check every district court in Arkansas for criminal and civil court records. (RP 435-36). In the Benton County District Court alone, there are 13 different departments within four numbered divisions. *See, e.g.,* [https://www.ballotpedia.org/Arkansas\\_1st\\_State\\_Judicial\\_District](https://www.ballotpedia.org/Arkansas_1st_State_Judicial_District) (last

visited Feb. 3, 2020). Courthouse Concepts does not check all of those departments for court records when conducting background checks for clients. Instead, Courthouse Concepts focuses on the larger departments in the county such as the Bentonville District Court, which is located in the county seat. (RP 435-36). This practice limits the accuracy and completeness of the background checks and imposes a disproportionate burden on the larger departments such as the Bentonville District Court. (RP 435-36).

***Administrative Order 19.*** This Court’s Administrative Order No. 19 (“AO 19”) “governs access to, and confidentiality of, court records.” Admin. Order No. 19 § I(A) (RP 26). AO 19 “applies to all court records,” which include “any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding.” *Id.* § I(E) & III(A)(1)-(2) (RP 26-27). Among other reasons, this Court promulgated AO 19 to “protect individual privacy rights and interests,” “encourage the most effective use of court and clerk of court staff,” and to “avoid unduly burdening the ongoing business of the judiciary.” *Id.* § I(B)(6), (9) & (11) (RP 26). The order was promulgated pursuant to sections 1, 3, and 4 of Amendment 80 to the Arkansas Constitution, Ark. Code Ann. §§ 16-10-101 and 25-19-105(b)(8), and this Court’s inherent rulemaking authority. *Id.* § I(A).

*Limitations on Requests for Compiled Information.* Requests for “compiled information,” which AO 19 defines as “information that is derived from the selection, aggregation, or reformulation of information from more than one court record,” are governed by section VI(B) of AO 19. *Id.* §§ III(A)(10) & VI(B) (RP 27, 28). Requests for compiled information must be made in writing and directed to the court or court agency having jurisdiction over the records. *Id.* § VI(A) (RP 28). Under section VI(B)(1), “[r]equests for compiled records” must “identify the requested information and the desired format of the compilation.” *Id.* § VI(B)(1) (RP 28). The grant of a request for compiled information “may be made contingent upon the requester paying the actual costs of reproduction, including personnel time [exceeding one (1) hour], the costs of the medium of reproduction, supplies, equipment, and maintenance, and including the actual costs of mailing or transmitting the records by facsimile or other electronic means.” *Id.* § VI(B)(2)(a) (RP 28-29). “When the identification of specific individuals is essential to the purpose of the request”—such as records requests for background screening purposes—“then the request must include an executed copy of the Compiled Records License Agreement and the requester must declare under penalty of perjury that the request is made for a scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose, and that the identification of specific individuals is essential to the purpose of the inquiry.” *Id.*

§ VI(B)(5) (RP 29). If the request for court records is one for “compiled information” governed by AO 19, then the provisions of the Arkansas Freedom of Information Act (“FOIA”), Ark. Code Ann. §§ 25-19-101 *et seq.*, expressly do not apply. *Id.* § I(A) (RP 26).

***Records Requests by Background Screening Companies.*** Prior to February 2018, the Bentonville District Court routinely fulfilled requests for court records submitted by background screeners like Courthouse Concepts. (RP 346). Courthouse Concepts would email lists of names and birth dates to the Bentonville District Court staff and identify the time periods for the searches. (RP 346). The emails did not identify the records Courthouse Concepts was requesting but, based on their prior course of dealing over many years, court staff knew that Courthouse Concepts only wanted copies of any available docket reports for guilty dispositions on misdemeanor charges within the specified time frame. (RP 437). Occasionally, Courthouse Concepts would request, and the Bentonville District Court would provide, records related to civil cases, as well. (RP 437).

***Compilation of Responsive Records.*** In the Bentonville District Court, court records from 2013 to the present are available online for anyone to see. (RP 349). Older court records, however, are accessible only by Clerk’s office staff through a computer software system called PTS. (RP 437). Employees of the

Bentonville District Court must complete the following multi-step process in order to identify and compile old docket reports:<sup>1</sup>

1. Within the PTS software, they must first go to “Query” and choose “Status for ID” from the drop down menu, then click the search icon.
2. Type in last name, first name, and look for an exact match on the date of birth. (*See* RP 289).
3. If a match is found, they must double click on the name and then click on the “Build” button for the next screen. (*See* RP 290).
4. This populates cases for that name record, if any, for one agency. The Bentonville District Court has three separate agencies in its PTS system (City of Bentonville, State, and Bella Vista). To check them all, court staff must change the agency at the top left of the screen and press the “Build” button for each agency before the cases, if any, will populate. (*See* RP 291).
5. Once cases for a particular agency populate, court staff then must read and scroll through the listings to identify cases that fit the parameter of “guilty misdemeanor” within the specified time period. (*See* RP

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<sup>1</sup> Clerk Jones described this process in her affidavit in support of her summary judgment motion. (RP 435-41). Screen shots of relevant steps in the search process are in the record, as well. (RP 277-98).

291-95 (listing all cases for one individual for the City of Bentonville); RP 296 (listing that individual's cases in Bella Vista); and RP 297 (listing State cases involving the same individual).

6. When reviewing cases, often times there are questions about whether a “traffic” type case is reportable because the offense may (or may not) be a misdemeanor in severity. In this situation, it is not uncommon for court staff to have to look up a statute or ask another clerk for assistance before they can make a determination about whether to include traffic offenses in the search results.
7. If a case qualifies as a “guilty misdemeanor” disposition, court staff must then click on the case docket number and then choose the “Docket” icon at the bottom of the screen. (*See* RP 291). A new window then appears showing the case and associated offenses. (*See* RP 278).
8. In order to print a docket report for each offense on a qualifying case, court staff must review the minutes of the case for each offense, obtain a date on which this offense was scheduled for a hearing, and identify the corresponding type of hearing which was scheduled. (*See* RP 279). There are numerous types of hearings that might occur regarding a criminal charge in the Bentonville District Court. For

example, “A” means an arraignment hearing; “PD” is plea/discovery hearing; “T” means trial; and “R” means restitution hearing. (*See* RP 279). Court staff must scroll through all of the dates shown on the minutes for each offense and identify and make note of a hearing date and type for each offense charged under each docket number. (*See, e.g.,* RP 273-76) (listing numerous offenses under each docket number involving this particular individual); RP 279 (reproducing minutes for one of the offenses in that case)).

9. Once court staff have identified a hearing date and type for each offense, they must go to “Browse” and choose the “Daily Docket” report. (*See* RP 280).
10. In the “Daily Docket” report, court staff must then choose the agency from a drop-down menu, the Division (City of Bentonville, State, or Bella Vista), and enter the hearing date they wish to search. This generates a list of all cases heard that day. (*See* RP 281-82). Then they choose the “Print” icon, which results in a pop-up screen with various options. (*See* RP 282-83).
11. From there, court staff must select the correct report (Daily Docket) and then a new window pops up showing the Daily Docket parameters, and they must then press the “Print” icon again. (*See* RP 283-84).

12. Then the PTS system requires court staff to enter the “Action type,” which is the hearing type described in paragraph 8 above, and click the “OK” button. (*See* RP 285).
13. The PTS system will then allow court staff to review one document containing docket reports for every offense with the same event type heard that day. (*See* RP 286-87).
14. Court staff must then scroll through all of the docket reports for that day and print only the individual records for each docket number and offense for which they are searching. (*See* RP 24-25) (locating the desired docket report on page 2 of a 13-page report of restitution hearings held on that date).
15. For any given case, the search steps described above may have to be repeated multiple times depending on how many offenses are being charged in each case and whether the offenses associated with the particular docket number were heard (or occurred) on different dates (*i.e.*, contempt of court or failure to appear charges that happened after the original underlying charges).
16. Once a docket report is printed for all of the offenses included in a particular docket number, court staff must then move on to locating and printing docket reports for other qualifying cases within that



particular agency summary listing. Many individuals have multiple docket numbers (cases) in the Bentonville District Court, each with multiple qualifying offenses, within the requested time period. (*See, e.g.,* RP 273-76).

17. Once the court staff check a name record in one particular agency (*e.g.,* City of Bentonville), they must then repeat the entire process described above in the other two agencies (State and Bella Vista).
18. There are also occasions when court staff have to physically locate the case file in order to provide the requested docket sheet. This usually is because complete information is not contained within the PTS software due to a prior conversion of software from an older system.
19. When review of physical files is required, court staff also have to review the docket and redact, when appropriate, certain identifying information that they cannot legally release.

(RP 437-41). Once court staff completes all the names on a particular list, an email is sent to the Courthouse Concepts representative letting them know the list is complete and any corresponding dockets are ready for pick up. (RP 441).

***The Burdens of Background Checks on the Bentonville District Court.***

Clerk Jones and her staff must compile records responsive to background screeners' requests in addition to their regular court duties. (RP 268). Due to the

daily and continuous nature of the requests, along with transitions in staffing and/or workload demands at the Bentonville District Court, it was not uncommon for court staff to have to work overtime in order to fulfill the requests from background screening companies like Courthouse Concepts. (RP 441). Additionally, when short-staffed, it was not uncommon for Clerk Jones herself to take several lists home with her at night and complete them from her laptop in the evenings or on weekends. (RP 441-42).

Despite the Bentonville District Court's best efforts to provide responsive records as quickly as possible, Courthouse Concepts would sometimes send emails asking about the delay or when court staff thought they would have a list completed for them. (RP 265-69, 442). On occasion, clients of Courthouse Concepts and other background screeners would call the Bentonville District Court Clerk's office to question whether they were behind in completing the lists or to verify if the information they were receiving from the background screener was accurate. (RP 442). These additional inquiries added to the workload of the Bentonville District Court Clerk's office and caused additional disruption of their normal business activities. (RP 442).

***The Dispute.*** In one five-day period in February 2018, Courthouse Concepts requested criminal and civil court records for approximately 840 people from the Bentonville District Court. (RP 436-37, 446-68). The date ranges of the requests

varied from 7 years, 10 years, 25 years, to unlimited. (RP 446-68). All of those requests would have required court staff to complete the time-consuming, multi-step search process described above for every guilty misdemeanor disposition for each person in three different agencies in the PTS system. After consulting with a staff attorney for the Administrative Office of the Courts and reviewing Attorney General Opinion No. 2015-121, Clerk Jones notified Courthouse Concepts that those requests technically fell under AO 19 and referred them to the order and the AOC's website. (RP 257-72). Clerk Jones informed Courthouse Concepts that "the completion of lists is on hold until we hear from the AOC that your request should be filled." (RP 267). Courthouse Concepts's president, Paul Hickman, then intervened and threatened suit. He stated that Courthouse Concepts had 1,200 names outstanding for which he wanted the Bentonville District Court to complete records searches, and he maintained that AO 19 did not apply to those requests. (RP 266).

***The FOIA Request.*** Approximately five months later, in July 2018, Courthouse Concepts submitted a FOIA request to Clerk Jones for "any and all court records" related to one individual. (RP 210). The July 2018 request was different from all other requests for court records submitted by Courthouse Concepts from at least October 2010 through February 2018. (RP 510). Courthouse Concepts had never before asked for "all court records" for anyone.

Instead, Courthouse Concepts sent daily requests for copies of docket reports for guilty dispositions on misdemeanor charges and, on occasion, civil case docket reports, within a specified time frame for multiple individuals at a time—often dozens of people a day, and sometimes many more than that. (RP 510). Before the July 2018 FOIA request, Courthouse Concepts had never requested records on pending misdemeanor charges, arrests for which the charges were dismissed, arrests that resulted in an acquittal or nolle prosequi, or traffic records from the Bentonville District Court. (RP 510). Quite to the contrary, Courthouse Concepts had indicated to the Court affirmatively that those types of records were *not* part of the requested search. (RP 510). Based on the Bentonville District Court’s understanding of the scope of Courthouse Concepts’s records requests, maintained over many years, Clerk Jones viewed the July 2018 request as no different from any other request. (RP 510).

In addition, and due to the nature of the Court’s PTS system and the fact that court records are kept by hearing date/type (rather than by case number or individual name) and are segregated into three separate agencies (City of Bentonville, State, and Bella Vista), court staff viewed the July 2018 FOIA request as a request for “compiled information” under AO 19. (RP 514). Court staff would still have to go through the multiple search steps described above in order to

compile “all records” maintained by the court for the individual named in the request. (RP 511-14).

Accordingly, Clerk Jones advised Courthouse Concepts that its request was governed by AO 19 and provided a copy of the order, a Compiled Records License Agreement, a Request for Compiled Information Affidavit, and a Request for Compilation of Court Information for Courthouse Concepts to complete and return for consideration by the Bentonville District Court Judge. (RP 211-27, 242-54). Courthouse Concepts never completed a request for compiled court records from the Bentonville District Court under AO 19 or submitted an executed copy of the Bentonville District Court’s Compiled Records License Agreement. (RP 444). Therefore, neither the Bentonville District Court nor the AOC has had an opportunity to consider and decide whether Courthouse Concepts is entitled to compiled court records under AO 19. (RP 444-45). Instead, Courthouse Concepts, through a trade association, filed suit.

***The Lawsuit.*** PBSA filed suit against Clerk Jones in her official capacity as Clerk of the Bentonville District Court on July 23, 2018. (RP 4). PBSA alleged that Clerk Jones’s interpretation and application of AO 19 to PBSA members’ requests for court records violates their right to access court records under the First Amendment to the United States Constitution and federal common law. (RP 16-19). PBSA also claimed that its members’ requests for court records are governed

by the FOIA, not AO 19. (RP 19-21). PBSA sought declaratory and injunctive relief along with costs and attorneys' fees. (RP 18-21, 23-24). After engaging in discovery, the parties filed cross-motions for summary judgment. (RP 342, 469). The circuit court held a hearing on the cross-motions on August 6, 2019. (RT 32-104). On August 14, 2019, the circuit court entered an order granting in part and denying in part both parties' motions. (RP 537-38). The circuit court entered judgment in favor of Clerk Jones on the federal-law claims but found in favor of PBSA on the FOIA claim. (RP 537-38). The circuit court also ordered Clerk Jones to respond to the July 2018 FOIA request that was the subject of the lawsuit. (RP 538). Clerk Jones timely filed a notice of appeal of the FOIA rulings on September 12, 2019 (RP 540-41), and PBSA filed a timely notice of cross-appeal (RP 544-45).

## Argument

PBSA members' requests for court records for background screening purposes are requests for compiled court records governed by AO 19, not the FOIA. This Court should reverse the circuit court's order granting PBSA's request for declaratory and injunctive relief regarding a July 2018 request for court records and dismiss this case with prejudice.

### **I. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PBSA ON ITS FOIA CLAIM BASED UPON ITS ERRONEOUS INTERPRETATION OF AO 19.**

#### **A. Standard of review**

A circuit court should only grant summary judgment when it is clear that there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. *Danner v. MBNA Am. Bank, N.A.*, 369 Ark. 435, 437, 255 S.W.3d 863, 865 (2007). Summary judgment for the defendant is appropriate when the plaintiff has not or cannot prove facts sufficient for relief or when the law does not recognize the claim asserted. *Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith*, 284 Ark. 418, 422-23, 683 S.W.2d 601, 603-04 (1985). "If no factual dispute exists and the complaint does not state a cause of action, it should be disposed of by summary judgment rather than exposing the litigants to unnecessary delay, work and expense in going to trial when the trial judge would be bound to

direct a verdict in movant’s favor after all evidence is adduced.” *Joey Brown Interest*, 284 Ark. at 423, 683 S.W.2d at 604. On review, this Court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment left a material question of fact unanswered. *Danner*, 369 Ark. at 438, 255 S.W.3d at 866. This Court reviews issues of law, including a circuit court’s substantive interpretations of law, *de novo*. *Hobbs v. Jones*, 2012 Ark. 293, at 8, 412 S.W.3d 844, 850. An abuse-of-discretion standard of review applies with regard to a circuit court’s factual findings that underpin its legal conclusions. *Ark. Lottery Comm’n v. Alpha Mktg.*, 2013 Ark. 232, at 6, 428 S.W.3d 415, 419.

**B. The circuit court erred in declaring that Courthouse Concepts’s July 2018 request for court records is not a request for “compiled information” subject to AO 19.**

As detailed above, the dispute between the parties arose in February 2018 when the Bentonville District Court declined to compile certain criminal and civil court records for 840 different people, going back between 7 to 25 years or more, unless and until Courthouse Concepts followed the procedures this Court set in place for obtaining such records under AO 19. (RP 266-68, 446-68). Months later, setting the stage for this lawsuit, Courthouse Concepts submitted for the first time a request for “all court records” pertaining only to one individual. (RP 48). As analyzed below, the circuit court below erred in issuing a declaratory judgment



that the July 2018 request was not a request for “compiled information” within the meaning of AO 19 and that AO 19 provided no basis for Clerk Jones to refuse to respond to that request (RP 537). This Court should reverse on this point and dismiss the entire case with prejudice.

As an initial matter, PBSA’s request for retrospective declaratory and injunctive relief regarding the July 2018 request is barred by sovereign immunity and should have been dismissed. *See Alpha Mktg.*, 2013 Ark. 232, at 14-15, 428 S.W.3d at 423-24 (holding that retrospective injunctive and declaratory relief is barred by sovereign immunity). In addition, the circuit court erred as a matter of law in its interpretation of AO 19. When construing administrative rules and orders, this Court gives the words contained in them “their plain and ordinary meaning[.]” *Dukes v. Norris*, 369 Ark. 511, 516, 256 S.W.3d 483, 486 (2007) (citing *Johnson v. Ark. Bd. of Examiners in Psychology*, 305 Ark. 451, 808 S.W.2d 766 (1991)).

AO 19 applies to background screeners’ requests for records from the Bentonville District Court under the plain language of its terms. Requests for “compiled information” are expressly governed by section VI of AO 19, and no one is entitled to obtain compiled information from any court without first complying with the requirements of AO 19. As discussed above, AO 19 defines “compiled information” as “information that is derived from the selection,

aggregation *or* reformulation of information from more than one court record.”  
AO 19 § III(A)(10) (emphasis added).

A per curiam opinion issued by this Court in *In re Adoption of Administrative Order No. 19* explains that “compiled information is different from case-by-case access because it involves information from more than one case.” 2007 Ark. LEXIS 139, at \*37 (RP 309). “Compiled information . . . involves only some of the information from some cases and the information has been reformulated or aggregated; it is not just a copy of all of the information in the court’s records.” *Id.* “Compiled information involves the creation of a new court record.” *Id.* “In order to provide compiled information, a court generally must write a computer program to select the specific cases or information sought in the request, or otherwise use court resources to identify, gather, and copy the information.” *Id.* at \*38 (RP 309). This Court also explained that the court or court agency having jurisdiction over the records at issue “may impose any number of additional restrictions upon requesters concerning the terms by which the requested information is disclosed.” *Id.* at \*50 (RP 312). The Court also confirmed that “information may be released to a requester who intends to engage in commercial uses[.]” *Id.* at \*50-51 (RP 312).

On the undisputed facts and as a matter of law, the lists of names submitted by background checkers like Courthouse Concepts to Clerk Jones qualify as

requests for “compiled information” under AO 19. Background checkers are not seeking all of the available court records with respect to one case. Instead, they are seeking only *some* of the available court records from *some* of the cases involving specific *persons*. The record is replete with details on the numerous steps Clerk Jones and her staff must take in order to identify the available court records for an individual, generate and review minutes of court proceedings involving each charge in each case involving that individual, generate “Daily Docket” reports for the date(s) on which each charge in each case was heard, review the Daily Dockets, and identify and print only those docket reports for the persons and offenses at issue from a larger record of all cases heard that day. All of those steps must be repeated multiple times if there are multiple offenses charged in a case, which is common, and if the offenses associated with the particular docket number were heard (or occurred) on different dates (i.e., contempt of court or failure to appear charges that happened after the original underlying offense). (RP 440). Moreover, all of those steps must be completed *three times* in order to check the name records for each court agency within the administrative control of the Bentonville District Court (City of Bentonville, State, and Bella Vista). Many individuals have multiple cases (docket numbers), with multiple offenses, in the Bentonville District Court within the requested time periods. (RP 440). Because the Bentonville District Court must use computer software, court personnel, and

other court resources “to identify, gather, and copy the [requested] information” as expressly contemplated by this Court when it adopted AO 19’s provisions governing access to compiled information, this Court should find that Courthouse Concepts’s requests are governed by AO 19. *See In re Admin. Order No. 19*, 2007 Ark. LEXIS 139, at \*37-38 (RP 309).

The fact that Courthouse Concepts styled its July 2018 request as one under the FOIA—and deliberately changed its longstanding practice by requesting “all court records” regarding only one person—makes no difference. It is undisputed that Bentonville District Court staff would still have to “derive” the responsive records from the “selection” and “aggregation” of “information from more than one court record” as expressly governed by AO 19. (RP 511-14). As described in detail above, the Bentonville District Court’s records are accessible only through the Court’s Daily Docket reports by hearing date, and the records subject to such requests must be selected and aggregated from other nonresponsive records. Moreover, in order to provide “all records” maintained by the Bentonville District Court for one individual, court staff would still have to “use court resources to identify, gather, and copy the information,” rendering it a request for “compiled information” as this Court explained in its commentary to AO 19. *See In re Admin. Order No. 19*, 2007 Ark. LEXIS 139, at \*37-38 (RP 309).

A 2015 Attorney General opinion specifically held that AO 19 applies to “FOIA” requests submitted by background screening companies for the court records of specific individuals for the purpose of performing employment background checks. Att’y Gen. Op. No. 2015-121 (RP 270-72). The Attorney General explained in that opinion that AO 19 “establishes a procedure” for obtaining court records “that is independent of the FOIA.” (RP 271). The Attorney General determined that the records requested by background screeners like Courthouse Concepts “fall within Order 19’s key threshold definitions” and are subject to the “limitations” governing disclosure of “compiled information” contained in section VI. (RP 272). This Court should find this opinion persuasive authority on this issue and adopt the Attorney General’s reasoning in this case.

For all of the foregoing reasons, the Court should reverse the circuit court and hold that the July 2018 request was a request for “compiled information” within the meaning of AO 19 and that AO 19 provided an appropriate basis for Clerk Jones to refuse to respond to the request.

**C. The circuit court erred in entering summary judgment in favor of PBSA on its FOIA claim.**

The circuit court also erred in declaring that Courthouse Concepts’s July 2018 request for court records was a valid request under the FOIA, that Clerk Jones violated the FOIA by failing to respond to the request, and in ordering Clerk Jones to respond to the FOIA request. (RP 538). As an initial matter, PBSA lacks

standing to appeal the denial of Courthouse Concepts’s FOIA request to circuit court. PBSA is not an Arkansas citizen and has never submitted a FOIA request to the Bentonville District Court. *See* Ark. Code Ann. § 25-19-107(a).

The FOIA claim fails on the merits, as well. As discussed above, AO 19 applies to background screeners’ records requests to the Bentonville District Court, and AO 19 expressly states that requests for compiled court records are not governed by FOIA. Admin. Order 19 § I(A). The FOIA, moreover, specifically provides that “[d]ocuments that are protected from disclosure by order or rule of court” are exempt from disclosure. Ark. Code Ann. § 25-19-105(b)(8). Finally, a “custodian is not required to compile information or create a record in response to a request made under” the FOIA. Ark. Code Ann. § 25-19-105(d)(2)(C). While the FOIA does not define what it means “to compile information,” AO 19 does define the term “compiled information” and, as discussed above, that definition clearly applies to the lengthy, time-consuming, multi-step process that Clerk Jones and her staff must go through in order to identify and compile records responsive to PBSA members’ requests. Accordingly, under the plain language of both AO 19 and the FOIA, the FOIA does not apply to the records requests at issue, and the circuit court erred in concluding otherwise. This Court should reverse the Court’s grant of summary judgment to PBSA on the FOIA claim.

## Request for Relief

Based on the foregoing, Appellant Jennifer Jones respectfully requests that this Court: (1) reverse the circuit court's order granting PBSA's request for declaratory and injunctive relief regarding the July 2018 request for court records; (2) declare that the July 2018 request for court records was a request for "compiled information" within the meaning of AO 19; (3) declare that the FOIA does not apply to the July 2018 request; and (4) dismiss this case with prejudice.

Respectfully submitted,

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## Certificate of Service

I hereby certify that on this 3rd day of February, 2020, I electronically filed the foregoing via the eFlex electronic filing system, which shall send notification of the filing to any participants. I also certify that I will serve a paper copy of the brief within five calendar days upon the following:

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**Certificate of Compliance with Administrative Order No. 19  
and With Word-Count Limitations**

I hereby certify that the foregoing Brief complies with Administrative Order No. 19 in that that all “confidential information” has been excluded from the “case record” by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable.

Further, the undersigned states that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d) and said Brief contains 5,613 words.

**Identification of paper documents not in PDF format:** The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

*/s/ Jennifer L. Merritt*

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