

# Nonprofits Target Open Records Law With Suit Against Three State Officials

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Two environmental groups filed suit this week under the Alabama Open Records Act seeking to force state officials to turn over documents related to the 35<sup>th</sup> Avenue Superfund federal bribery trial.

Over the past few years many nonprofits, news organizations and others have attempted to use the law to gain access to information but often have been stonewalled by agencies and their officers.

Under the act, any person may request to see and may have copies of official public records, such as email and other correspondence, of government agencies and officials.

Open records and open meetings laws are intended to increase transparency in government actions. The Open Meetings Act guarantees that Alabama residents have access to agencies, boards, commissions and other governmental bodies that conduct the people's business, but news media cried foul recently when the Public Service Commission nixed the use of digital tools during a PSC public hearing.

## Alabama's Open Records Law

The 35<sup>th</sup> Avenue Superfund trial resulted in felony convictions of a Drummond Company vice president and a partner of Balch & Bingham, a law firm employed by Drummond. The jury found the two were guilty of bribing then-state legislator Oliver Robinson in an attempt to keep the coal and coke company from potentially becoming required to pay to clean up industrial pollution emanating from its former ABC Coke facility that has affected North Birmingham and Tarrant residential properties.

While the two convicted men, David Roberson and Joel Gilbert, remain free on appeal, the fallout from the trial convinced the nonprofit organizations of the existence of emails and other material that had not been provided them under an earlier Open Records Act request.



That prompted the Environmental Defense Alliance and Gasp, a clean air and human rights advocate, to make another formal request for documents late last year, alleging that three state officials violated the law by withholding the public records.

The officials are Lance LeFleur, director of the Alabama Department of Environmental Management; Lanier Brown II, a member of that department's oversight body, the Alabama Commission on Environmental Management; and the state's top law enforcement officer, Attorney General Steve Marshall. The agencies have not responded to the nonprofits' open records request, which was filed in No

"We have more than a suspicion" that those materials exist, said David Ludder, attorney for the Environmental Defense Alliance, which is suing in Montgomery Circuit Court in tandem with Gasp.

"Because of the trial, we know the (Federal Bureau of Investigation) collected a considerable amount of evidence that gives us a reasonable basis in fact to believe that there are additional records that were not provided to us," Ludder said. "We made a records request that was pretty expansive.

We were given very few documents, but noticed that evidence collected by the FBI and used in the trial indicated there were more records that were not provided to us."

Ludder acknowledged that the statute of limitations may have run out on any crimes that the requested material may turn up. But he said he hopes the suit may narrow some exceptions to the public records law "so state agencies can never again refuse to provide records as they currently do."

He emphasized that records requests rarely wind up with the release of all the documents being asked for. "We only get a few, but we never get an explanation for what's being withheld, or why they are withheld," he said. "We think the reasons they use to withhold records are not legitimate."

Ludder said he expects the lawsuit to eventually be appealed to the Alabama Supreme Court.

The Environmental Defense Alliance is an Alabama nonprofit organization formed in 2014. It uses law and policy to protect human health and the environment.

Gasp works for healthy air and environmental justice in the Birmingham area. It has played a role in the 35<sup>th</sup> Avenue Superfund Site contamination since its formation 10 years ago,



Lance LeFleur, Steve Marshall and Lanier Brown II. Source: Gasp.

when the U.S. Environmental Protection Agency undertook an evaluation of air quality in the area. The air toxics study led to the EPA's finding that Drummond was "potentially responsible" for cleaning up contamination in the area from its industrial activity.

Drummond hired Balch & Bingham and paid Robinson in a campaign to influence neighborhood residents and public officials to keep the site from being added to the Superfund National Priorities List, which would have put the company in line to pay for much of the multimillion-dollar clean-up costs.

Gasp CEO Michael Hansen said the failure of the public records requests demonstrates that the Alabama Open Records Act is "toothless." The lawsuit, filed May 18, "calls attention to its shortcomings," he said.

In a news release announcing the lawsuit had been filed, Hansen said Gasp has for years been working to ensure that air pollution in the area is reduced and that any cleanup "includes long-term remediation that benefits the residents of the impacted neighborhoods."

### **Open Meetings, Too**

The public's right to be notified of and attend official meetings of governmental bodies was enshrined in the 2015 Alabama Open Meetings Act. The issue generated controversy in recent months when the Alabama Public Service Commission proposed new rules for media that prohibits journalists and others from recording, live-streaming or using laptop computers or any digital device during proceedings of a public hearing on Alabama Power Company's request to expand services by \$1.1 billion.

BirminghamWatch's parent organization, the nonprofit Alabama Initiative for Independent Journalism, recently submitted objections to the PSC's new rule, as has the state press association, other news outlets, and environmental and other groups and individuals.

BirminghamWatch submitted a request to digitally record the PSC hearing but was turned down. Carol Nunnelley, executive director, cited that action as one reason the new media rule should be revised. The rule "fails to recognize that virtually every audio or video recording device used today, including most every device used by television, radio, and other forms of media, is digital," she said in comments to the PSC.

Prohibiting digital tools "would effectively prevent most news coverage of the commission," Nunnelley said.

She urged the commission to provide "full and uncomplicated access" to the PSC decision-making process by alleviating concerns about the new media plan.

