

ARKANSAS

Freedom of Information

HANDBOOK

16th Edition

February 2014



Mike Gaudin's editorial cartoon is reprinted with permission from the 2007 Sunshine Week promotional materials.

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The intent of the Arkansas Freedom of Information Act (FOIA) is to provide access to information in an open and public government, one of the hallmarks of a democratic society. On February 14, 1967, Arkansas adopted one of the strongest and most comprehensive Freedom of Information Acts in the nation. It gives our citizens an opportunity to look at a broad array of information at every level of government and to observe the actions of our government leaders. It also promotes and protects the right of individuals to attend the meetings of policy-making, tax-supported bodies.

The FOIA is the people's law, and as the people's lawyer, I feel that it is vital for us to be as well informed about the workings of our government as we can be. I hope that you find the handbook useful and informative and that it will empower you as an active, involved citizen.

Sincerely,



Dustin McDaniel
Attorney General



This is the 16th Edition of the *Arkansas Freedom of Information Handbook*. It has been updated to include changes from the 2013 session of the 89th Arkansas General Assembly and recent legal precedents.

One of the aims of this publication is to communicate the importance of open government to people across Arkansas. The co-sponsors of the *Handbook* are strong proponents of the Freedom of Information Act (FOIA) and its guarantee of public access to public meetings and public documents.

Thanks to **Beth Walker**, **Ryan Owsley** and **Cheryl Hall** of the Arkansas Attorney General's Office for undertaking the legal research and preparation for this edition and to the Arkansas Press Association for printing and distributing the publication and to **Tres Williams** for producing the handbook.

The initial printing of the 16th Edition is 27,000 copies. They are being and will be distributed by various governmental agencies, associations and other organizations. This entire handbook is available electronically via APA's website. To download the PDF file, go to arkansaspress.org and look for the section titled "APA Publications."

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NOTE: This handbook includes numerous references, summaries, and highlights of Attorney General opinions and court decisions. The summaries of the opinions and decisions are limited by space restrictions. We recommend that you consult their full text to glean their full meaning. For the full Attorney General’s Opinions, go to www.arkansasag.gov and select the “Opinions” tab.

Sources of FOIA Assistance

Attorney General's Office

Aaron Sadler

200 Catlett Prien Tower Building

Little Rock, AR 72201

501.682.2007

Fax: 501.682.8084

www.arkansasag.gov

(Go to Opinions Division, FOIA Link.)

FOIA Hotlines:

APA FOIA Hotline: 501.379.1700

Law Firm of Quattlebaum, Grooms, Tull & Burrow

AG Office FOIA Hotline: 1.800.482.8982

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The Arkansas Freedom of Information Act (FOIA)

Act 93 of 1967

As amended by Act 1201 of 1976; Act 652 of 1977; Act 608 of 1981; Acts 468 and 843 of 1985; Acts 1001 and 49 of 1987; Act 8 of the 3rd Extr. Session of 1989; Act 895 of 1993; Acts 873 and 1335 of 1997; Acts 1093 and 1589 of 1999; Acts 1259, 1336, and 1653 of 2001; Acts 213, 275, 763, and 1214 of 2003, Acts 259, 1994 and 2003 of 2005; Acts 268, 726 and 998 of 2007; and Acts 184, 440, 631 and 1291 of 2009; Acts 99, 168, and 210 of 2011; Acts 145, 235, and 411 of 2013. These acts are codified at Ark. Code Ann. §§ 25-19-101 through -110 (Repl. 2002 & Supp. 2013).

25-19-101. Title.

This chapter shall be known and cited as the “Freedom of Information Act of 1967.”

25-19-102. Legislative intent.

It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials.

25-19-103. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) (A) “Custodian,” with respect to any public record, means the person having administrative control of that record.

(B) “Custodian” does not mean a person who holds public records solely for the purposes of storage, safekeeping, or data processing for others;

(2) “Format” means the organization, arrangement, and form of electronic information for use, viewing, or storage;

(3) “Medium” means the physical form or material on which records and information may be stored or represented and may include, but is not limited to, paper, microfilm, microform, computer disks and diskettes, optical disks, and magnetic tapes;

(4) “Public meetings” means the meetings of any bureau, commission, or agency of the state or any political subdivision of the state, including municipalities and counties boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds; and

(5) (A) “Public records” means writings, recorded sounds, films, tapes, electronic or computer based information, or data compilations in any medium, required by law to be kept or otherwise kept, and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

(B) “Public records” does not mean software acquired by purchase, lease, or license.

(6) “Public water system” means all facilities composing a system for the collection, treatment, and delivery of drinking water to the general public, including, but not limited to, reservoirs, pipelines, reclamation facilities, processing facilities, and distribution facilities.

(7) “Vulnerability assessment” means an assessment of the vulnerability of a public water system to a terrorist attack or other intentional acts intended to substantially disrupt the ability of the public water system to provide a safe and reliable supply of drinking water as required by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub.L. No. 107-188.

25-19-104. Penalty.

Any person who negligently violates any of the provisions of this chapter shall be guilty of a Class C misdemeanor.

25-19-105. Examination and copying of public records.

(a)(1)(A) Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.

(B) However, access to inspect and copy public records shall be denied to:

(i) A person who, at the time of the request,

has pleaded guilty to or been found guilty of a felony and is incarcerated in a correctional facility; and

(ii) The representative of a person under subdivision (a)(1)(B)(i) of this section unless the representative is the person's attorney who is requesting information that is subject to disclosure under this section.

(2) (A) A citizen may make a request to the custodian to inspect, copy, or receive copies of public records.

(B) The request may be made in person, by telephone, by mail, by facsimile transmission, by electronic mail, or by other electronic means provided by the custodian.

(C) The request shall be sufficiently specific to enable the custodian to locate the records with reasonable effort.

(3) If the person to whom the request is directed is not the custodian of the records, the person shall so notify the requester and identify the custodian, if known to or readily ascertainable by the person.

Exemptions:

(b) It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:

(1) State income tax records;

(2) Medical records, adoption records, and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act;

(3) The site files and records maintained by the Arkansas Historic Preservation Program of the Department of Arkansas Heritage and the Arkansas Archeological Survey;

(4) Grand jury minutes;

(5) Unpublished drafts of judicial or quasi-judicial opinions and decisions;

(6) Undisclosed investigations by law enforcement agencies of suspected criminal activity;

(7) Unpublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Judges, and the Attorney General;

(8) Documents that are protected from disclosure by order or rule of court;

(9) (A) Files that, if disclosed would give advantage to competitors or bidders and records maintained by the Arkansas Economic Development Commission related to any business entity's planning, site location, expansion,

operations, or product development and marketing, unless approval for release of such records is granted by the business entity.

(B) However, this exemption shall not be applicable to any records of expenditures or grants made or administered by the commission and otherwise disclosable under the provisions of this chapter;

(10)(A) The identities of law enforcement officers currently working undercover with their agencies and identified in the Arkansas Minimum Standards Office as undercover officers;

(B) Records of the number of undercover officers and agency lists are not exempt from this chapter;

(11) Records containing measures, procedures, instructions, or related data used to cause a computer or a computer system or network, including telecommunication networks or applications thereon, to perform security functions, including, but not limited to, passwords, personal identification numbers, transaction authorization mechanisms, and other means of preventing access to computers, computer systems or networks, or any data residing therein;

(12) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy;

(13) Personal contact information including without limitation home or mobile telephone numbers, personal email addresses, and home addresses of nonelected state employees, nonelected municipal employees, nonelected school employees, and nonelected county employees contained in employer records, except that the custodian of the records shall verify an employee's city or county of residence or address on record upon request;

(14) Materials, information, examinations, and answers to examinations utilized by boards and commissions for purposes of testing applicants for licensure by state boards or commissions;

(15) Military service discharge records or DD Form 214, the Certificate of Release from Active Duty of the United States Department of Defense, filed with the county recorder as provided under § 14-2-102, for veterans discharged from service less than seventy (70) years from the current date;

(16) Vulnerability assessments submitted by a public water system on or before June 30, 2004, to the Administrator of the United States Environmental Protection Agency for a period of ten (10) years from the date of submission;

(17) (A) Records, including analyses, investigations, studies, reports, or recommendations, containing information relating to any Department of Human Services risk or security assessment, known or suspected security vulnerability, or safeguard related to compliance with the Health Insurance Portability and Accountability Act of 1996 or protection of other confidential department information.

(B) The records shall include:

(i) Risk and security assessments;
(ii) Plans and proposals for preventing and mitigating privacy and security risks;

(iii) Emergency response and recovery records;

(iv) Privacy and security plans and procedures;

and

(v) Any other records containing information that if disclosed might jeopardize or compromise efforts to secure and protect personal health information or other protected department information.

(C) This subdivision (b)(17) expires on July 1, 2009;

(18) (A) Records, including analyses, investigations, studies, reports, recommendations, requests for proposals, drawings, diagrams, blueprints, and plans, containing information relating to security for any public water system.

(B) The records shall include:

(i) Risk and vulnerability assessments;

(ii) Plans and proposals for preventing and mitigating security risks;

(iii) Emergency response and recovery records;

(iv) Security plans and procedures; and

(v) Any other records containing information that if disclosed might jeopardize or compromise efforts to secure and protect the public water system.

(C) This subdivision (b)(17) shall expire on July 1, 2013; and

(19) Records pertaining to the issuance, renewal, expiration, suspension, or revocation of a license to carry a concealed handgun, or a present or past licensure under Section 5-73-301 et seq., including without limitation all records provided to or obtained by any local, state, or federal government or their officials, agents, or employees in the investigation of an applicant, licensee, or past licensee and all records pertaining to a criminal or health history check conducted on the applicant, licensee, or past licensee except that:

(A) Information or other records regarding an applicant, licensee, or past licensee may be released to a law

enforcement agency to assist in a criminal investigation or prosecution, or to determine the validity of or eligibility for a license;

(B) The name of an applicant, licensee, or past licensee may be released as contained in investigative or arrest reports of law enforcement that are subject to release as public records; and the name and the corresponding zip code of an applicant, licensee, or past licensee may be released upon request by a citizen of Arkansas.

(c) (1) Notwithstanding subdivision (b)(12) of this section, all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.

(2) Any personnel or evaluation records exempt from disclosure under this chapter shall nonetheless be made available to the person about whom the records are maintained or to that person's designated representative.

(3) (A) Upon receiving a request for the examination or copying of personnel or evaluation records, the custodian of the records shall determine within twenty four (24) hours of the receipt of the request whether the records are exempt from disclosure and make efforts to the fullest extent possible to notify the person making the request and the subject of the records of that decision.

(B) (i) If the subject of the records cannot be contacted in person or by telephone within the twenty-four hour period, the custodian shall send written notice via overnight mail to the subject of the records at his or her last known address. Either the custodian, requester, or the subject of the records may immediately seek an opinion from the Attorney General who, within three (3) working days of receipt of the request, shall issue an opinion stating whether the decision is consistent with this chapter.

(ii) In the event of a review by the Attorney General, the custodian shall not disclose the records until the Attorney General has issued his or her opinion.

(C) However, nothing in this subsection shall be construed to prevent the requester or the subject of the records from seeking judicial review of the custodian's decision or the decision of the Attorney General.

(d) (1) Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right

to inspect and copy those records shall not be denied to any citizen.

(2) (A) Upon request and payment of a fee as provided in subdivision (d)(3) of this section, the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment.

(B) A citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian's existing software.

(C) A custodian is not required to compile information or create a record in response to a request made under this section.

(3) (A) (i) Except as provided in § 25-19-109 or by law, any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.

(ii) The custodian may also charge the actual costs of mailing or transmitting the record by facsimile or other electronic means.

(iii) If the estimated fee exceeds twenty five dollars (\$25.00), the custodian may require the requester to pay that fee in advance.

(iv) Copies may be furnished without charge or at a reduced charge if the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest.

(B) The custodian shall provide an itemized breakdown of charges under subdivision (d)(3)(A) of this section.

(e) If a public record is in active use or storage and, therefore, not available at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter.

(f) (1) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.

(2) Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.

(3) The amount of information deleted shall be indicated on the released portion of the record and, if techni-

cally feasible, at the place in the record where the deletion was made.

(4) If it is necessary to separate exempt from nonexempt information in order to permit a citizen to inspect, copy, or obtain copies of public records, the custodian shall bear the cost of the separation.

(g) Any computer hardware or software acquired by an entity subject to § 25-19-103(5)(A) after July 1, 2001, shall be in full compliance with the requirements of this section and shall not impede public access to records in electronic form.

(h) Notwithstanding any Arkansas law to the contrary, at the conclusion of any investigation conducted by a state agency in pursuit of civil penalties against the subject of the investigation, any settlement agreement entered into by a state agency shall be deemed a public document for the purposes of this chapter. However, the provisions of this subsection shall not apply to any investigation or settlement agreement involving any state tax covered by the Arkansas Tax Procedure Act, § 26-18-101 et seq.

25-19-106. Open public meetings.

(a) Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts and all boards, bureaus, commissions, or organizations of the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings.

(b) (1) The time and place of each regular meeting shall be furnished to anyone who requests the information.

(2) In the event of emergency or special meetings, the person calling the meeting shall notify the representatives of the newspapers, radio stations, and television stations, if any, located in the county in which the meeting is to be held and any news media located elsewhere that cover regular meetings of the governing body and that have requested to be so notified of emergency or special meetings of the time, place, and date of the meeting. Notification shall be made at least two (2) hours before the meeting takes place in order that the public shall have representatives at the meeting.

(c) (1) Executive sessions will be permitted only for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public

officer or employee. The specific purpose of the executive session shall be announced in public before going into executive session.

(2) (A) Only the person holding the top administrative position in the public agency, department, or office involved, the immediate supervisor of the employee involved, and the employee may be present at the executive session when so requested by the governing body, board, commission, or other public body holding the executive session.

(B) Any person being interviewed for the top administrative position in the public agency, department, or office involved may be present at the executive session when so requested by the governing board, commission, or other public body holding the executive session.

(3) Executive sessions must never be called for the purpose of defeating the reason or the spirit of this chapter.

(4) No resolution, ordinance, rule, contract, regulation, or motion considered or arrived at in executive session will be legal unless, following the executive session, the public body reconvenes in public session and presents and votes on the resolution, ordinance, rule, contract, regulation, or motion.

(5) (A) Boards and commissions of this state may meet in executive session for purposes of preparing examination materials and answers to examination materials which are administered to applicants for licensure from state agencies.

(B) Boards and commissions are excluded from this chapter for the administering of examinations to applicants for licensure.

(6) Subject to the provisions of subdivision (c)(4) of this section, any public agency may meet in executive session for the purpose of considering, evaluating, or discussing matters pertaining to public water system security as described in § 25-19-105(b)(18).

25-19-107. Appeal from denial of rights - Attorney's fees.

(a) Any citizen denied the rights granted to him or her by this chapter may appeal immediately from the denial to the Pulaski County Circuit Court or to the circuit court of the residence of the aggrieved party, if the State of Arkansas or a department, agency, or institution of the state is involved, or to any of the circuit courts of the appropriate judicial districts when an agency of a county, municipality, township, or school district, or a private organization

supported by or expending public funds, is involved.

(b) Upon written application of the person denied the rights provided for in this chapter, or any interested party, it shall be mandatory upon the circuit court having jurisdiction to fix and assess a day the petition is to be heard within seven (7) days of the date of the application of the petitioner, and to hear and determine the case.

(c) Those who refuse to comply with the orders of the court shall be found guilty of contempt of court.

(d) (1) In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney's fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified.

(2) If the defendant has substantially prevailed in the action, the court may assess expenses against the plaintiff only upon a finding that the action was initiated primarily for frivolous or dilatory purposes.

(e) (1) Notwithstanding subsection (d)(1) of this section, the court shall not assess reasonable attorney's fees or other litigation expenses reasonably incurred by a plaintiff against the State of Arkansas or a department, agency, or institution of the state.

(2) (A) A plaintiff who substantially prevailed in an action under this section against the State of Arkansas or a department, agency, or institution of the state may file a claim with the Arkansas Claims Commission to recover reasonable attorney's fees and other litigation expenses reasonably incurred.

(B) A claim for reasonable attorney's fees and litigation expenses reasonably incurred in an action against the State of Arkansas or a department, agency, or institution of the state shall be filed with the commission pursuant to Section 19-10-201 et seq. within sixty (60) days of the final disposition of the appeal under subsection (a) of this section.

25-19-108. Information for public guidance.

(a) Each state agency, board, and commission shall prepare and make available:

(1) A description of its organization, including central and field offices, the general course and method of its operations, and the established locations, including, but not limited to, telephone numbers and street, mailing, elec-

tronic mail, and Internet addresses and the methods by which the public may obtain access to public records;

(2) A list and general description of its records, including computer databases;

(3) (A) Its regulations, rules of procedure, any formally proposed changes, and all other written statements of policy or interpretations formulated, adopted, or used by the agency, board, or commission in the discharge of its functions.

(B) (i) Rules, regulations, and opinions used in this section shall refer only to substantive and material items that directly affect procedure and decision-making.

(ii) Personnel policies, procedures, and internal policies shall not be subject to the provisions of this section.

(iii) Surveys, polls, and fact-gathering for decision making shall not be subject to the provisions of this section.

(iv) Statistical data furnished to a state agency shall be posted only after the agency has concluded its final compilation and result.

(4) All documents composing an administrative adjudication decision in a contested matter, except the parts of the decision that are expressly confidential under state or federal law; and

(5) Copies of all records, regardless of medium or format, released under § 25-190-105 which, because of the nature of their subject matter, the agency, board, or commission determines have become or are likely to become the subject of frequent requests for substantially the same records.

(b) (1) All materials made available by a state agency, board, or commission pursuant to subsection (a) of this section and created after July 1, 2003, shall be made publicly accessible, without charge, in electronic form via the Internet.

(2) It shall be a sufficient response to a request to inspect or copy the materials that they are available on the Internet at a specified location, unless the requester specifies another medium or format under § 25-19-105(d)(2)(B).

25-19-109. Special requests for electronic information.

(a) (1) At his or her discretion, a custodian may agree to summarize, compile, or tailor electronic data in a particular manner or medium and may agree to provide the data in an electronic format to which it is not readily convertible.

(2) Where the cost and time involved in complying with the requests are relatively minimal, custodians should agree to provide the data as requested.

(b) (1) If the custodian agrees to a request, the custodian may charge the actual, verifiable costs of personnel time exceeding two (2) hours associated with the tasks, in addition to copying costs authorized by § 25-19-105(d)(3).

(2) The charge for personnel time shall not exceed the salary of the lowest paid employee or contractor who, in the discretion of the custodian, has the necessary skill and training to respond to the request

(c) The custodian shall provide an itemized breakdown of charges under subsection (b) of this section.

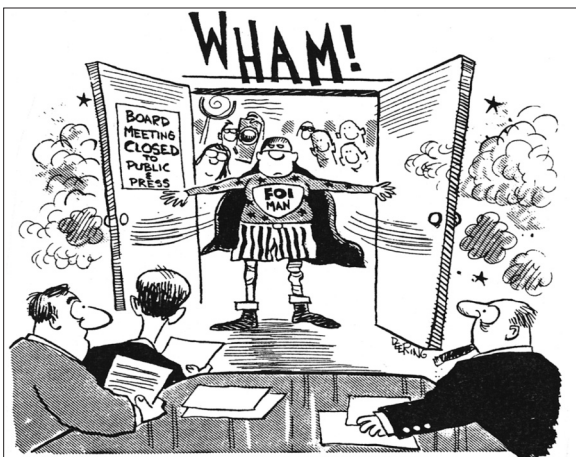
25-19-110. Exemptions.

(a) Beginning July 1, 2009, in order to be effective, a law that enacts a new exemption to the requirements of this chapter or that substantially amends an existing exemption to the requirements of this chapter shall state that the record or meeting is exempt from the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b) For purposes of this section:

(1) An exemption from the requirements of this chapter is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records; and

(2) An exemption from the requirements of this chapter is not substantially amended if the amendment narrows the scope of the exemption.



How to notify public bodies

At the beginning of every year each individual newspaper, radio or television station should send a notification letter to all public bodies in its coverage area, similar to this:

Dear Mayor or Public Servant:

This is to request that our (newspaper, radio or television station) be notified of the dates, times and places of all regular and special meetings of the (name of body).

This request is made in accordance with the Freedom of Information Act. The FOIA requires that the time, date and place of all regular and special meetings be furnished to anyone who requests the information. Specifically it states:

Except as otherwise provided by law, all meetings, formal and informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts, and all boards, bureaus, commissions or organizations of the State of Arkansas, except Grand Juries, supported wholly or in part by public funds, or expending public funds, shall be public meetings.

Further, the FOIA also requires that at least two (2) hours notice be given of an emergency or special meeting, to media which have requested to be so notified, "in order that the public shall have a representative at the meetings."

This letter is our formal request for notification. It has been written so you will have the request on file. We will keep a copy on file in our office. We look forward to working with you as we both serve the public. Please call if you have any questions.

Sincerely,
Ima Citizen

Mail the letter to at least the chairman. But consider sending it to every member of every public body. Better yet, hand deliver it to them to make sure they get it.

We also recommend that you attend a meeting of each body and make your notification request orally, in public. Let the members of the body and the general public see and hear your commitment to open meetings. This would tell citizens their rights and responsibilities regarding the FOIA—"The People's Law."

Major FOIA court decisions

PUBLIC RECORDS

(1) The definition of “public record” under the FOIA is not dependent upon who keeps the record or where it is kept – just that it either is required to be kept or is otherwise kept. *Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004). The act does not itself provide that any particular records shall be kept. *McMahan v. Board of Trustees of the University of Arkansas*, 255 Ark. 108, 499 S.W.2d 56 (1973). *But see* Act 918 of 2005 (as to the retention of records by state agencies).

(2) The FOIA should be broadly construed in favor of disclosure: under the rules of evidence now in effect, there is no exception for the attorney client privilege concerning state-agency records in the possession of its attorney, and such records are subject to public disclosure. *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987).

(3) The intent behind the FOIA contemplates that a corporation doing business in this state is a party entitled to information. Hence, a representative of a corporation is entitled to receive any information that any other person would be entitled to receive pursuant to the FOIA. *Arkansas Hwy. Transp. Dept. v. Hope Brick Works, Inc.*, 294 Ark. 490, 744 S.W.2d 711 (1988).

(4) For a record to be subject to the FOIA and available to the public, it must be (1) possessed by an entity covered by the FOIA; (2) fall within the FOIA’s definition of a “public record,” and (3) not be exempted by the FOIA or other statutes. *Nabholz Const. Corp. v. Contractors for Public Protection Assn.*, 371 Ark. 411, 266 S.W.3d 689 (2007).

(5) “Public records” are those required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions. The question whether a document is a “public record” ultimately depends on its content. The mere fact that a document was created on or is stored on a public computer does not make it a public record under the FOIA. *See Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 716 (2007).

(6) The constitutional right to privacy can supersede the disclosure requirements of the FOIA under a balancing test. The court will balance the individual's privacy interest in nondisclosure against the governmental interest in disclosure under the FOIA. *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

(7) Records that are part of an open and ongoing law enforcement investigation are protected as "undisclosed investigations" under the FOIA. *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990). This is a question of fact in each case. *Id.*

(8) Not all documents connected with law enforcement are sufficiently investigative in nature to fall within the exemption for "undisclosed investigations." *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991). The jail log, arrest records and shift sheets of a police department are not records containing undisclosed law enforcement investigations and are therefore subject to disclosure under the FOIA. Additionally, because the jail division of the police department operates twenty-four hours a day, those are its "regular business hours." The department's records must be available for reasonable inspection by the public at all times during those hours of operation. *Id.* Administrative divisions of the police department might keep different hours. Opinion No. 2001-086.

(9) Emails transmitted between a state employee and the Governor that involved the public's business are subject to inspection and copying under the FOIA, regardless of whether they were transmitted to private email addresses through private internet providers or sent to an official government email address. *Bradford v. Director*, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

(10) The use of unsigned written slips as ballots that were not retained as part of the records of the Arkansas Activities Association, a state organization, violated the FOIA in part because the Association's normal policy was to retain ballots. The recorded votes of the individual members of the organization constitute a record of the performance or lack of performance of official functions carried out by the organization and, as such, are open to inspection and copying. *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989).

(11) The FOIA applies to a privately-owned water system that serves the public purpose of providing water service under a publicly funded contract. *Waterworks v. Kristen Investment Properties*, 72 Ark.App. 37, 32 S.W.3d 60 (2000).

(12) Records in the possession of a city's retained attorney, who was hired in lieu of the city attorney, are subject to disclosure under the FOIA. Attorneys retained for the city in lieu of the regular city attorney are the functional equivalent of the regular city attorney, and the city cannot avoid the FOIA requirements by substituting a private attorney for the city attorney. Legal memoranda prepared by outside counsel for the city for litigation purposes were public records within the meaning of the FOIA; *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).

(13) The FOIA requires the state agency to arrange for reasonable access to public records, notwithstanding the agency's contention that the records are not in its actual or constructive possession or control. *Swaney v. Tilford*, 320 Ark 652, 898 S.W. 2d 462 (1995).

(14) In determining whether personnel records are exempt from disclosure under Ark. Code Ann. § 25-19-105(b)(12), the court will weigh the public interest in the requested records against the affected individuals' privacy interest in withholding them. *Young v. Rice*, 308 Ark 593, 826 S.W.2d 252 (1992). Revealing "intimate details" of a person's life gives rise to a substantial privacy interest. *Id.* In considering the "public interest" prong of the balancing test, the court will examine the degree to which release of the information would keep the citizens advised of the performance of their public officials. *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998).

PUBLIC MEETINGS

(15) Statutes enacted for the public benefit are to be construed most favorably to the public. The FOIA was passed wholly in the public interest and is therefore to be liberally interpreted to the end that its purposes may be accomplished. The Act states that "except as otherwise specifically provided by law, all meetings...of the governing bodies of all municipalities ...shall be public meetings." There exists no provision of law which "specifically" exempts meetings between the city council and the

city attorney from the coverage of the FOIA. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968).

(16) When the State Police Commission conducts a hearing on the application for reinstatement of a discharged state policeman, the FOIA requires that the taking of testimony and hearing of arguments be held in public. At the conclusion of the evidentiary hearing the Commission may go into executive session to discuss the decision it should reach. *Arkansas State Police Commission v. Davidson*, 253 Ark. 1090, 490 S.W.2d 788(1973).

(17) When a committee of a board or commission that is subject to the FOIA meets for the transaction of business, the meeting is a public meeting and subject to the provisions of the Act. Members of the news media are interested parties and have standing to institute a declaratory judgment action to enforce the provisions of the act. *Arkansas Gazette Company v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975).

(18) A group meeting of the members of a city council, even if less than a quorum, is subject to the FOIA if members of the council discuss or take action on any matter on which foreseeable city council action will be taken. *Mayor and City Council of El Dorado v. El Dorado Broadcasting Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976). The act covers informal unofficial group meetings for the discussion of governmental business. *Id.*

(19) One-on-one discussions between a city administrator and city board members to approve a proposed real estate purchase violated the FOIA's open meeting requirements. *Harris v. City of Fort Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004).

(20) The meetings of the Arkansas State Committee of the North Central Association of Colleges and Schools, a private nonprofit organization, are subject to the FOIA because the Association's state committee is composed of public servants, has its official situs and operation in a publicly owned facility, and is supported wholly or in part with public funds. *North Central Association of Colleges and Schools v. Troutt Brothers*, 261 Ark. 378, 548 S.W.2d 825 (1977).

(21) The FOIA establishes no right to minutes of a

grand jury proceeding. There is a policy of secrecy surrounding grand jury proceedings, and the limited exception under which disclosure can be made requires the moving party to establish a “particularized need” which does not include a general “fishing expedition.” *Thomas v. United States*, 597 F.2d 656 (8th Cir. 1979).

(22) The FOIA allows the board of a public supported agency (i.e., county hospital board), or committee of a public funded agency to discuss or consider a personnel issue in an executive or private session. However, testimony and voting on the issue must be done in a public session. *Baxter County Newspapers, Inc. v. Medical Staff of Baxter General Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981).

(23) A nonprofit regional health planning corporation that received its primary funding from the federal government was subject to this chapter and violated its open public meeting requirements when it reconsidered the granting of a certificate of need to construct a hospital after conducting a telephone poll of members of the executive committee. *Rehab. Hosp. Services Corp. v. Delta Hills Health Systems Agency and Flener*, 285 Ark. 397, 687 S.W.2d 840 (1985).

EXECUTIVE SESSIONS

(24) When a public body is meeting in executive session to consider disciplining an employee, all discussion must be related to the legal purpose for which the session was called. Such discussion may properly delve into all circumstances surrounding the incident that gave rise to the question of discipline in the first place without contravening the FOIA. Once a decision has been made in executive session that discipline or other action is needed, all further acts of the public body should be public. *Commercial Printing Company et al. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977).

(25) The purpose of the FOIA is to protect the public's right to information, not to specify what action shall be taken in an executive session on a personnel matter. The FOIA requires that a resolution or motion actually considered or decided in executive session must be publicly ratified by a public vote if it is to be legal. *Yandall v. Havana Board of Education*, 266 Ark. 434, 585 S. W.2d 927 (1979).

What to do if a judge tries to close a courtroom to the public.

by Katherine Shurlds

Even though courts are not covered by FOI, open courts are still preferred and are usually open. You can still challenge any attempt to close a courtroom.

- Stay in contact with the attorneys in the case so you will know when they plan to file a closure motion. It's easier to convince a judge not to close a meeting than to convince him to reopen it.
- If a judge orders you to leave a hearing that has been open to that point, you should raise your hand, stand and say:

Your Honor, I am [your name], a reporter for the [your newspaper]. I respectfully request the opportunity to register on the record an objection to the motion to close this proceeding to the public, including the press. Our legal counsel has advised us that standards set forth in recent state and federal court decisions give us the opportunity for a hearing before the courtroom is closed. Accordingly, I respectfully request such a hearing and a brief continuance so our counsel can be present to make the appropriate arguments. I also ask that my objection be made part of the court record. Thank you.

- If the judge does not let you make your statement and orders the courtroom cleared, leave and write a short note to the Judge with the information above. Ask a court officer to give the note to the judge. Call your editor immediately.
- If you learn that a court proceeding is in progress or has already been held in secret, try to get the following information for your lawyer: Who sought closure and on what grounds? For instance, to protect fair trial rights, trade secrets or other confidential information or privacy? What kind of proceeding? Criminal or civil? Trial, pretrial or post trial hearing, or appeal? Has the court held a hearing on closure? If so, what findings did the judge make concerning closure? Is the proceeding still going on?

Again, call your editor immediately. You may decide to ask the judge for a meeting at which you will ask to be admitted to the hearing if it is ongoing, or to see a transcript of the proceedings as well as any documents that were

introduced.

- If the judge decides to keep the hearing closed, you will need a lawyer to file a motion for your newspaper to intervene for the limited purpose of asserting its First Amendment rights. Your lawyer might also file a motion seeking a stay of further proceedings in the case you are covering until the access issue has been decided.
- If the judge denies the motion to intervene or, after hearing your argument, keeps the proceeding closed, you may want to appeal. Call your lawyer.

Questions and answers

IN GENERAL

Q. Who is Subject to the FOIA?

A. All governmental entities are subject to the FOIA. And a private entity is subject to the FOIA if it received public funds and is intertwined with the activities of government.

Q. Who may obtain records?

A. “Any citizen of the State of Arkansas” may inspect and copy public records. “Citizen” includes corporations. A requester’s purpose or motive in seeking access to particular records is irrelevant. Nothing in the FOIA restricts the subsequent use of information obtained under the act.

Q. What records are subject to the act?

A. Any record “required by law to be kept or otherwise kept and that constitutes a record of the performance or lack of performance of official functions” is a public record. Further, “all records maintained in public offices or by public employees within the scope of their employment are presumed to be public records.” The FOIA covers both records created by an agency and those received from third parties. The physical form of the record is unimportant, as the FOIA applies to “writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium.”

Q. Is every record (such as an email) created on a public computer a public record?

A. Not necessarily. It will depend on whether the email reflects the performance or lack of performance of official functions. *Pulaski County v. Ark. Dem-Gaz., Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007).

Q. What records are exempt from disclosure?

A. . The FOIA lists 20 specific exemptions, plus a catch all exemption that incorporates the confidentiality provisions of other statutes. If a public record does not fall squarely within an exemption, it must be disclosed. Exemptions must be narrowly construed. Unclear or ambiguous exemptions will be interpreted in a manner favoring disclosure. At the same time, the court will balance the interests between disclosure and nondisclosure using a common-sense approach. *ADFA v. Pharmacy Assoc.*, 333 Ark. 451, 970 S.W.2d 217 (1998). If a record contains both exempt and nonexempt information, it must be made available for public inspection with the exempt material deleted or redacted.

Q. How does one request records?

A. The request should be directed to the “custodian of the records.” It need not be in writing, though a written request is advisable, because it provides a record if litigation becomes necessary. The request must be specific enough for the custodian to locate the records with reasonable effort.

Q. Does the request have to be made in person?

A. No. It can be made in person or by telephone, fax, mail, email or via the Internet if the custodian has created an on-line form for that purpose.

Q. When must the agency respond?

A. Records must be made available immediately unless in active use or storage, in which case they must be made available within three working days of the request. Requests for personnel records and employee evaluation records must be acted upon within 24 hours of the custodian’s receipt of the request. During that same period, the custodian must make all practicable efforts to notify the person making the request and the subject of the records of the custodian’s decision regarding personnel or evaluation records. The custodian, requester, or subject of the records may seek an Attorney General’s opinion on whether the custodian’s decision regarding personnel or evaluation records is consistent with the act.

Q. Is the custodian required to furnish copies of public records?

A. Yes, for a fee, if the custodian has the necessary duplicating equipment.

Q. Is the custodian required to scan paper records into an electronic medium such as a PDF?

A. Yes, if the custodian's scanning equipment makes that process relatively simple. Opinion No. 2006-186.

Q. Is the custodian required to mail the copies?

A. Probably yes, although this is not entirely clear under the act. Opinion No. 2008-071.

Q. What fee may be charged?

A. Copy charges cannot exceed actual reproduction costs, and the custodian must provide an itemized breakdown of the charges. The charges can include actual costs of mailing or faxing or emailing the records.

Q. Can the custodian require that the fee be paid in advance?

A. Yes, if the estimated copy fee exceeds \$25.00.

Q. Can the custodian waive the fee?

A. Yes, if it is determined that the records are requested primarily for noncommercial purposes and that the waiver is in the public interest.

Q. Who may attend public meetings?

A. Because meetings "shall be public," any person may attend.

Q. What is a meeting?

A. Any meeting, formal or informal, regular or special, of a governing body including sub-bodies. A quorum of the governing body need not be present for the meeting to be subject to the FOIA. If two members meet informally to discuss past or pending business, that meeting may be subject to the FOIA. This question will turn on the facts of each case.

Q. May private citizens request notification of meeting times of public boards?

A. Yes, as to regular meetings. Notice of emergency or special meetings is only provided to news media that have requested notice.

Q. What meetings are exempt from the FOIA?

A. An executive session may be held "for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee." In contrast, an executive session to consider general salary matters, an across the board pay increase, or the overall performance of employees as a group is not permissible. An executive session may also be held by state

licensing boards and commissions “for purposes of preparing examination materials and answers to examination materials,” and for “administering examinations.”

Q. Who may attend an executive session?

A. Only the top administrator in an agency, the employee’s immediate supervisor, the employee in question, and any person being interviewed for the top administrative position in the agency involved. Neither the agency’s attorney nor the employee’s attorney may attend an executive session.

Q. When does the action discussed in an executive session become legal?

A. When the governing body involved ratifies the action with a public vote in open session following the executive session. If no public vote is taken, any decision reached in closed session has no legal effect.

Q. How does one challenge an agency’s action?

A. “Any citizen denied the rights granted to him may appeal immediately from the denial” to an appropriate circuit court, which may issue “orders” to enforce the act.

Q. Are attorney’s fees available?

A. The court may award attorney’s fees and other litigation expenses to a party who has substantially prevailed in an FOIA case unless the court finds that the position of the defendant was substantially justified or that other circumstances make an award unjust. However, no fees may be awarded against the State or any State agencies or departments. (Ark. Code Ann. § 25-19-107(e)(1).)

Q. Is the violation of the FOIA a criminal offense?

A. A person who “negligently violates” the FOIA is guilty of a Class C misdemeanor.

Q. What is a recommended way to announce an executive session?

A. After approval of a motion to retire into executive session, the chairman may announce: “This body has voted to retire into executive session to consider the [employment, appointment, promotion, demotion, discipline or resignation] of an employee. We will reconvene in public session following this executive session to present and vote on any action arrived at in private.”

Q. When the specific purpose of an executive session is announced in public (Ark. Code Ann. § 25-19-106 (c)(1)), must the individual public officer or employee be named?

A. No.

ATTORNEY GENERAL OPINIONS

The opinion numbers represent the year and sequence the opinion was issued, e.g., Opinion No. 99-018 was the 18th opinion issued in 1999.

AGENCIES GENERALLY

I. MEETINGS

Q. Does a committee or subcommittee of a governing body have to meet the requirements of the FOIA?

A. Generally, yes. Opinion No. 98-169, citing *Ark. Gazette Co. v. Pickens*, 258 Ark. 69, 522 S. W.2d 350 (1975); See also Opinion Nos. 2006-059 and 2003-170.

Q. Does the FOIA's open meeting requirement apply to an advisory body that does not include members of the larger governing body to which it reports?

A. This is not entirely clear under the FOIA or current case law. Until clarified, the requirement can be construed to apply only to "governing bodies," i.e., those with final decision-making authority or whose recommendations are routinely rubber-stamped (so-called "de facto" governing bodies). Opinion No. 2003-170.

Q. Must a governing body hold a public meeting even if its only purpose is to gather information?

A. Yes. Opinion No. 95-098.

Q. Are social gatherings of members of governing bodies subject to the FOIA?

A. No, as long as any discussion of government business is only intermittent and incidental to the social function. But any regular gathering of members of a governing body demands close scrutiny. Opinion No. 95-020.

Q. Can a governing body meet with its attorney in a closed meeting to discuss a pending lawsuit?

A. No. Opinion Nos. 96-372, 95-360, 87-420; *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968).

Q. Could members of a public board or agency meet informally in closed session to discuss recommendations by administrative employees and other board or

agency business before the public meeting.

A. No. Opinion No. 90-239; *Mayor & City Council of El Dorado v. El Dorado Broadcasting Co.*, 260 Ark. 821, 544 S. W. 2d 206 (1976).

Q. Following an executive session, must a public agency reassemble in public for the purpose of formally voting on any resolution, ordinance, rule, contract, regulation, or motion approved at the closed session?

A. Yes. Ark. Code Ann. § 25-19-106 (c) (4); *Arkansas State Police Comm. v. Davidson*, 253 Ark. 1090, 490 S.W.2d 788 (1973); Opinion 2008-115.

Q. After a public meeting is adjourned, can it be reconvened immediately if a quorum is present for the new meeting?

A. No, because it is a special meeting and the members would not be able to give the required two hours notice. Opinion No. 95-308.

Q. Would it violate the FOIA if the governing board of a public entity voted by secret ballot at a public meeting?

A. It depends on the manner in which the ballots are used. The ballots must be signed, retained, and made available for public inspection. Opinion Nos. 97-016, 92-124; *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989).

Q. Who may ask for an executive session?

A. Only a member of the governing body. Opinion Nos. 96-009 and 87-478.

Q. If a matter is discussed at a regular public meeting of a public agency with no action taken, could the members later vote on the matter by telephone?

A. No, unless the public's right to hear or monitor the telephone conversation is safeguarded, e.g., by use of speaker phones. Opinion 2000-096.

Q. Are conference calls of governing bodies subject to the FOIA?

A. Yes. *Rehab Hospital Services Corp. v. Delta Hills Health Systems Agency, Inc.*, 285 Ark. 397, 687 SW.2d 840 (1985); Opinion No. 94-167.

Q. Can a governing board of a public entity go into executive session to discuss general salary matters or to set policy and criteria for filling positions?

A. No. Opinion Nos. 2009-077 and 93-403.

Q. Can a governing body meet in executive session to screen and review employment applications?

A. Yes, if the meeting revolves around a specific individual or individuals and not policies. Opinion Nos. 2006-059, 93-403 and 91-070.

Q. Are there any restrictions on media attendance at public agency meetings?

A. Members of the media may not attend executive sessions. There are no general restrictions with respect to open public meetings. The purpose of the FOIA, however, is to ensure the free and open transaction of all government business, and the act does not give license to members of the media or others, to disrupt public meetings or otherwise usurp the authority that the people have given to those elected to carry out the duties of government. Opinion No. 2006-152.

Q. Is it a violation of the FOIA if some members of the public are unable to attend a public meeting due to size limitation?

A. This will depend upon the reasonableness of the access to the meeting under the particular facts. See Opinion No. 2006-152.

Q. Are the minutes or tape recordings of executive sessions open for public inspection and copying?

A. No, although the governing body could vote to make them open. Opinion Nos. 2000-251 and 91-323.

Q. Would a meeting between the head of a public entity and members of his or her staff be subject to the FOIA?

A. No. Opinion Nos. 2006-059 and 2003-17. See *National Park Medical Ctr., Inc. v. Arkansas Department of Human Services*, 322 Ark. 595, 911 S.W.2d 250 (1995).

Q. Is a public meeting of a governing board/entity subject to live broadcast by the media attending, and may a private citizen videotape the meeting?

A. Yes, subject to reasonable limitations, the meeting may be both broadcasted by the media and videotaped by private citizens. Opinion No. 2012-022.

Q. Is a committee meeting open to the public if it is called by a non committee member? If so, who must notify the press?

A. Generally, yes; the meeting is open to the public, assuming that this is a “governing body.” (A.C.A. § 25 19 106(a);

Opinion No. 84-91). In the event of emergency or special meetings, the person calling the meeting shall notify representatives of the media who have requested notice. Ark. Code Ann. § 25-19 106(b)(2).

Q. Is there a “meeting” for purposes of the FOIA where one member of a governing body emails another member?

A. Generally, no. Opinion No. 2005-166. But the email message would be subject to disclosure as a “public record.” Opinion No. 1999-018. A violation may nevertheless occur through a sequential or circular series of email communications or under circumstances suggesting that the governing body was deliberating in secret. Opinion No. 2005-166.

II. RECORDS

Q. Does a public employee have a right to examine his own personnel file?

A. Yes. Ark. Code Ann. § 25-19-105(c)(2); Opinion No. 2000-058.

Q. What type of information contained in a personnel file is exempt from disclosure under the “clearly unwarranted invasion of personal privacy” exemption?

A. Examples of exempted information include: home and personal cell phone numbers, date of birth, religious affiliation, information about family life, welfare payments, legitimacy of children, marital status, payroll deductions, social security numbers, credit union statements and other financial records, insurance coverage, and medical records. Ark. Code Ann. § 25-19-105(b)(13); Opinion Nos. 2006-225 (and opinions cited therein), 93-076, 87-115.

Q. What information is not exempt?

A. Salary and compensation in addition to regular pay check, names, dates of hire, job title, work history, educational background, job applications and resumes, training and certification, work email addresses, terms of a settlement releasing an employee from his or her contract. Opinion Nos. 2006-225 (and opinions cited therein), 93-114, 88-078.

Q. Are records related to the suspension or termination of a public employee subject to disclosure?

A. Yes, if the records constitute “evaluation or job performance records” and if the test for releasing such records is

met. There must be a final administrative resolution of the suspension or termination; the records must have formed a basis for the decision; and there must be a compelling public interest in disclosure. Ark. Code Ann. § 25-19-105(c)(1); see Opinion No. 2005-030.

Q. What types of records constitute “employee evaluation or job performance records?”

A. Employee evaluation records are any records that were created by or at the behest of the employer to evaluate an employee. Typical examples are written reprimands, letters of caution, documents supporting a recommendation for suspension or dismissal, letters related to promotions and demotions. *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387 (2012). Opinion No. 2007-322 (and opinions cited therein).

Q. Does a resignation in the face of a disciplinary challenge equate to a suspension or termination for purposes of the FOIA?

A. Generally, no, if the resignation is voluntary, but a coerced resignation might amount to a termination. Opinion Nos. 2013-144 and 2007-322.

Q. Are employee leave records, including sick leave records, subject to inspection and copying under the FOIA?

A. Generally yes, with the redaction of any medical records or private information exempt under the “clearly unwarranted” standard applicable to personnel records. Opinion No. 2007-258.

Q. If an entity is subject to the FOIA, may that entity legally withhold information about its employees’ salaries?

A. No. Opinion Nos. 2007-070 and 2001-223.

Q. Under the FOIA, are Social Security numbers of public employees listed in personnel records confidential?

A. Yes, because this is an intimate detail the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Opinion Nos. 2009-170 and 2006-035. The Federal Privacy Act (5 U.S.C. § 552a) must be referenced in the case of other public records containing social security numbers. See Opinion No. 2000-203.

Q. Assume a requested record is in active use or storage, which gives the custodian three days to disclose records. Is that three business days or three calendar days?

A. Three business days. Ark. Code Ann. § 25-19-105(e); Opinion Nos. 2006-093 (discussing the required time period for responding to an FOIA request) and 98-223.

Q. Is a governmental agency under any statutory obligation to compile or create a record to satisfy an FOIA request if no such record currently exists?

A. No. Ark. Code Ann. § 25-19-105(d)(2)(C). Opinion Nos. 2003-095 and 2004-023.

Q. Are records of accusations or complaints involving public employees subject to disclosure?

A. Generally yes, if the records were not created in connection with an agency inquiry or investigation of alleged employee misconduct. Opinion No. 2006-158. However, the custodian may be required to remove intimate information giving rise to a privacy interest. Opinion No. 2000-058.

Q. Are files containing the applications of successful as well as unsuccessful job candidates subject to disclosure under FOIA?

A. Generally, yes. Opinion Nos. 2009-156, 90-248 and 87-108.

Q. Is the public allowed access to arrest records of persons apprehended and taken into custody?

A. Generally, yes. Opinion Nos. 86-020 and 87-115. However, access to Arkansas Crime Information System criminal records is restricted. Opinion Nos. 93-106, 91-111. Ark. Code Ann. § 12-12-211.

Q. Are law enforcement investigation files open to inspection and copying after an arrest but before trial?

A. It depends. There is no bright-line rule for determining when an investigation is closed. Opinion No. 2002-303.

Q. Can a custodian of the records charge a requester a fee for personnel time spent satisfying a FOIA request?

A. Generally no. Opinion No. 2009-060. But if the request is unusually large, Ark. Code Ann. § 25-19-105(d)(3)(A)(i) suggests that there may be a fee for hiring temporary workers to process the request. Opinion No. 2003-203.

III. PRIVATE ENTITIES

Q. If a private company receives a public grant does the public have a right to examine the application

(which may or may not include personal and/or financial statements)?

A. Generally yes. Opinion No. 85-100. But see Ark. Code Ann § 25-19-105(b)(9)(A) (competitive advantage exemption).

Q. Is the mere receipt of public funds sufficient to bring a private corporation within the FOIA?

A. No. See Opinion No. 2007-227 and *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).

Q. Is a private entity subject to the FOIA where it receives public funds and carries on public business or is otherwise intertwined with the activities of a public entity?

A. Yes. See *Waterworks v. Kristen Invest. Prop.*, 72 Ark App. 37, 32 S.W.3d 60 (2000); *North Central Association of Colleges & Schools v. Trout Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977) and *Rehab Hosp. Services Corp. v. Delta Hills Health Systems Agency*, 285 Ark. 397, 687 S.W.2d 840 (1985). The inquiry should focus on whether there is a symbiotic relationship between the private entity and the state or local government, such as when the private entity receives public funds for the general support of activities that are closely aligned with those of government. J. Watkins & R. Peltz, *The Arkansas Freedom of Information Act* (5th ed. 2009). When the activities of a private organization and the government become intertwined, the private organization may well render itself part of the government for FOIA purposes. See Opinion Nos. 2005-214 (property owners' association exercising authority over sewage disposal); 2004-223 (private nonprofit corporation operating a hospital); 2000-039 (private, nonprofit corporation licensed by the State as a community service provider); 95-273 (private nonprofit agency on aging providing services under a federal grant program); 89-082 (nonprofit organization assisting local law enforcement in emergency situations).

Q. Does the FOIA apply to a private entity that is paid from public funds for services rendered to a government agency?

A. Yes, in some instances. The question seems to be whether the private entity is the "functional equivalent" of government employees. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 SM.2d 275 (1990); Opinion Nos. 2005-164, 2001-172, 96-185.

Q. Are all of the records of such a private entity sub-

ject to the FOIA?

A. Probably not. The FOIA applies to records [and meetings] relevant to the task performed on behalf of the public agency in that instance. *Edmark*; Opinion No. 2008-154.

Q. Although a property owners' association is normally composed of private owners, may it still fall within the FOIA if it receives public funds and it uses those funds to carry out a governmental function?

A. Yes. Opinion Nos. 93-092 and 85-29.

COUNTY GOVERNMENT

The following questions and answers pertain to matters peculiar to county government.

Q. Does the County Government Code contain a privacy statute for county records?

A. Yes. See Ark. Code Ann. 14-14-110 (Repl. 1998). See also Opinion No. 2001-373 (discussing the scope of this statute).

Q. Does the FOIA allow inspection and copying of active investigative files maintained by a County Sheriff's department?

A. No. Opinion Nos. 98-127 and 90-305.

Q. Are 911 tape recordings open under the FOIA?

A. Generally, yes. Opinion Nos. 99-409 and 94-100.

Q. Is a meeting of the county Election Commission open under the FOIA?

A. Yes. Ark. Code Ann. § 7-4-105(6).

Q. Are meetings of a county equalization board open under the FOIA?

A. Yes. Opinion No. 2000-287.

Q. Are current tax assessments public records?

A. Generally, yes. See Opinion No. 2004-023.

Q. Are "exit" conferences between state auditors and county officials and/or school administrators required to be open to the public (media)?

A. No. Opinion No. 84-207. These meetings are not conducted by a governing body.

Q. May a County Judge, County Sheriff, County Clerk, Circuit Clerk, and County Assessor meet with-

out violating the open meetings provision of the FOIA?

A. Yes, because this group does not comprise a governing body. Opinion No. 87-288.

Q. Is there a right of public participation with respect to county quorum court meetings?

A. Yes. Under Ark. Code Ann. § 14-14-109(6), the quorum court must allow citizens a “reasonable opportunity to participate prior to a final decision.” See Opinion No. 99-248.

MUNICIPAL GOVERNMENT

The following questions and answers pertain to matters peculiar to municipal government.

Q. Do meetings and deliberations of a municipal planning and zoning commission fall within the FOIA open meeting requirement?

A. Yes. Opinion No. 97-067.

Q. May applicants for appointment to the planning commission be interviewed in an executive session of the city board?

A. No, because this is not the “top administrative position” in the city. Ark. Code Ann. § 25-19-106(c)(2)(A); Opinion No. 97-067.

Q. Is a city-owned water system subject to the requirements of the FOIA?

A. Yes. Opinion No. 2000-129.

Q. Does the FOIA require disclosure of customer specific payment history records of a city-owned or other publicly-owned water system?

A. Yes. Opinion No. 2007-192.

Q. Is a Municipal Civil Service Commission subject to the open meetings requirements under the FOIA?

A. Yes. Opinion Nos. 98-174 and 88-058.

Q. Can a Municipal Civil Service Commission interview applicants for police officer or firefighter in executive session?

A. Yes, as to internal applicants, if the job change would be a promotion; but no as to external applicants. Opinion No. 2002-161.

Q. Is the mayor included in the governing body for purposes of the FOIA?

A. Yes. Opinion Nos. 2003-289 and 95-227.

Q. Can the mayor and city council meet in a closed session with the city attorney?

A. No. Ark. Code Ann. § 25-19-106; Opinion No. 95-098.

Q. May a candidate to fill a vacancy on the city board be interviewed in executive session?

A. No. Opinion No. 96-269.

Q. If two city council members meet to discuss matters on which foreseeable action will be taken, is the FOIA violated?

A. Possibly. See *City Council of El Dorado v. El Dorado Broadcasting Co.*, 260 Ark. 821, 544 S.W. 2d 206 (1976), *Gazette Co., v. Pickens*, 258 Ark. 69, 522 S.W. 2d 350 (1975) and Opinion Nos. 99-018 and 91-225. But there is no bright line rule that two members meeting constitutes a “meeting” under the FOIA. A violation is most likely to occur if the two members meet with other individuals concerning matters on which the whole governing body will foreseeably act. Opinion Nos. 2003-376, 96-317, 96-067, and 95-227. A violation may also occur in the event successive meetings of two members are held prior to action by the governing body, thereby avoiding public discussion. Opinion No. 99-018.

STATE GOVERNMENT

The following questions and answers pertain to matters peculiar to state government.

Q. Is a State Board whose rules specify meeting dates, required to publish those meeting dates prior to each meeting?

A. No. Opinion No. 81-30. But state agencies, boards, and commissions are required to make available via the Internet certain information regarding their organizations, including their rules and regulations. Ark. Code Ann. § 25-19-108.

Q. Can the Alcoholic Beverage Control Board deliberate in private concerning the issuance of a license?

A. No. Opinion Nos. 97-080 (deliberations of quasi-judicial bodies must be open to the public) and 79-144.

Q. Can a committee, board, or commission meet in private to determine action relating to the reprimand of state-licensed professionals (e.g., physicians, nurses, real estate agents, etc.)?

A. No. Opinion No. 84-91. Only public officers or employees will be discussed in private. The mere fact that one is licensed by the state does not render that person a public officer or employee.

Q. Is a state agency contract a public record under the FOIA?

A. Yes. Ark. Code Ann. § 25-18-501.

Q. Must the contents of a State Police investigation be disclosed to the news media after the investigation is closed, is not continuing, and is not part of a larger investigation?

A. Yes. Opinion No. 90-305.

PUBLIC SCHOOLS

The following questions and answers pertain to matters peculiar to local public school districts.

Q. If a school superintendent was not renewed at the end of his or her contract term, are the superintendent's evaluation records open under the FOIA?

A. No, because there has been no suspension or termination. Opinion No. 2001-125.

Q. Is a school district permitted to release the home addresses of public school employees?

A. No. Employees' contract information published on the district's website cannot contain personal addresses. *See* Ark. Code Ann. § 6-11-129(a)(1)(A)(viii) (Supp. 2013). Further, such information is exempted under Ark. Code Ann. § 25-19-105(b)(12) (exemption for personnel records) and § 25-19-105(b)(13) (personal contact information). *See* Opinion No. 2003-364.

Q. Can a superintendent meet with the school board in executive session to discuss the possible dismissal of an employee?

A. Yes, if the superintendent's presence is requested by the school board. Ark. Code Ann. § 25-19-106. Opinion No. 88-082.

Q. Can a superintendent hold a series of individual discussions with school board members to poll members

and thereby arrive at a board decision before a public meeting?

A. No. Opinion No. 2000-111.

Q. Must schools release records of disciplinary actions taken against students?

A. No, because disclosure would be inconsistent with the federal Family Educational Rights and Privacy Act (FERPA). *See* A.C.A. § 25-19-105(b)(2); *cf.* Opinion No. 90-056.

Q. Is student directory information (name, address, telephone number, activities, awards) open under the FOIA?

A. This depends on the school's policy regarding directory information and on whether the student has requested nondisclosure. A.C.A. § 25-19-105(b)(2); *cf.* Opinion No. 96-044.

Q. Are annual negotiation meetings between administrative personnel and Classroom Teachers Association representatives, absent the presence of school board members, open to the public?

A. No. Opinion No. 79-169.

Q. Are meetings of student government (Student Government Association) subject to the FOIA?

A. Yes, if the body is funded by public funds. Opinion Nos. 96-086, 78-63.

Q. Are school board retreats considered public meetings?

A. This will depend upon the particular facts. If the retreat will involve discussion of official school matters on which foreseeable action might be taken, then "yes." Opinion No. 2001-146.

Q. Is there a particular notice requirement with respect to school board meetings?

A. Yes. Under Ark. Code Ann. § 6-13-619(a)(3) (Supp. 2013) notice of regular meetings must be published on the district's website at least 10 days before the meetings, and notice of re-scheduled regular meetings must be published on the web at least 24 hours before the re-scheduled meeting.

Q. May an executive session be held to discuss student discipline matters?

A. Yes, but only if an appeal of the disciplinary action of the student is pending, and if the parent or guardian of the pupil requests the closed session. Opinion No. 87-478; Ark. Code Ann. § 6-18-507.

Q. Can a school board go into executive session with all principals and assistant principals present?

A. No. Opinion No. 88-082.

Q. Can a school board meet in an executive (closed) session with its attorney to discuss pending litigation?

A. No. Opinion No. 95-360.

Q. May the governing body of a state university go into executive session for the purpose of setting the policy and criteria to be utilized in the search for a new president?

A. No. Opinion No. 87-80.

Q. Are the meetings of a “Chancellor Search Advisory Committee” subject to the FOIA’s open meetings requirements if no member of the University Board of Trustees sits on the Committee?

A. This will depend upon the role of the Committee and the power invested in it. *See* Opinion No. 2006-059. If it is purely advisory with no decision-making power, its meetings may be closed. *Id.* *See also* Opinion No. 2003-170. Its records will nevertheless be open, however. *See* Opinion Nos. 2006-059 and 2002-092.

Q. Can a school board meet in executive session to discuss blanket hirings of certified personnel?

A. No. Opinion No. 91-070.

Q. Can a school board meet in executive session to deliberate and reach its decision whether to terminate a teacher even if the teacher has requested a public hearing under the Teacher Fair Dismissal Act?

A. Yes, because the FOIA governs the deliberations of the school board. Opinion No. 99-100.

This outline is based on several sources, including decisions of the Arkansas Supreme Court, Arkansas Attorney General Opinions, and *The Arkansas Freedom of Information Act*, by John J. Watkins, University of Arkansas School of Law, M&M Press, Fayetteville, AR, 1995 (3rd ed.) and J. Watkins & R. Peltz, *The Arkansas Freedom of Information Act* (5th ed. 2009) (used by permission).

Exceptions to the Arkansas FOIA

The Arkansas Freedom of Information Act is not all inclusive; that is, other state statutes contain provisions allowing for, in effect, exemptions or exceptions to both the open records and open meetings provisions of the FOIA. Some of these include:

OPEN RECORDS

- Ark. Code Ann. 5-55-104 (Records of Medicaid Recipients)
- Ark. Code Ann. 5-64-1104 to -1112 (Sale records of certain pharmaceutical products)
- Ark. Code Ann. 9-9-217 (Uniform Adoption Act)
- Ark. Code Ann. 9-9-506 (Voluntary adoption registry)
- Ark. Code Ann. 9-27-352 and 9-28-217 (Confidentiality of Juvenile Records)
- Ark. Code Ann. 9-28-208 (Court's report on Juvenile committed to Division of Youth Services)
- Ark. Code Ann. 10-3-305 (Records of Legislative Council)
- Ark. Code Ann. 10-4-422 (Working papers of Division of Legislative Audit)
- Ark. Code Ann. 11-10-314 (Certain records of Employment Security Division)
- Ark. Code Ann. 11-10-902 (Information gathered by the state new hire registry)
- Ark. Code Ann. 12-12-211 (Arkansas Crime Information Center.)
- Ark. Code Ann. 12-12-312 (State Crime Laboratory)
- Ark. Code Ann. 12-12-505, 506 (Central Registry Records concerning child abuse investigations) (See also 12-12-512)
- Ark. Code Ann. 12-12-914 (Sex and Child Offender Registration Act of 1997)
- Ark. Code Ann. 12-75 subch. 1n (Homeland Security Information Act; expires July 1, 2009)
- Ark. Code Ann. 14-2-102 (Military Service Discharge Record, i.e., "DDForm 214s")
- Ark. Code Ann. 14-14-110 (County Privacy statute)
- Ark. Code Ann. 14-15-304 (Coroner's Investigation records).
- Ark. Code Ann. 16-10-404 (Records of Judicial Discipline and Disability Commission)
- Ark. Code Ann. 16-32-111 (Confidentiality of juror information)

- Ark. Code Ann. 16-46-105 (Records and meetings of hospital or medical PEER review committees)
- Ark. Code Ann. 16-85-408 (Indictment issued against person not in confinement)
- Ark. Code Ann. 16-90-601 - 605 (Expunged records of minor nonviolent first offenders and minor felony offenders subsequently pardoned)
- Ark. Code Ann. 16-90-901 to -906 (Expunged records)
- Ark. Code Ann. 16-93-102 (Presentence reports, preparole reports, and supervision histories of Parole Board)
- Ark. Code Ann. 17-95-104 (Reports of physician misconduct submitted to State Medical Board)
- Ark. Code Ann. 20-9-304 (Certain records of State Board of Health)
- Ark. Code Ann. 20-14-506 (Personally identifiable information in program for handicapped children)
- Ark. Code Ann. 20-15-203 (Arkansas Regional Cancer Registry)
- Ark. Code Ann. 20-16-207 (Certain records of Arkansas Reproductive Health Monitoring System)
- Ark. Code Ann. 20-16-501, 504 (Venereal disease records of Department of Health's Division of Health Maintenance)
- Ark. Code Ann. 20-16-906, 1108 (abortion-related information collected by the Ark. Dept. of Health)
- Ark. Code Ann. 20-18-304, 305 (Birth certificates, death certificates, other vital records)
- Ark. Code Ann. 20-46-103 (Certain records of State Board of Health. Arkansas Medical Society)
- Ark. Code Ann. 20-46-104 (Certain records of State Hospital)
- Ark. Code Ann. 23-61-205 (Examination report of Insurance Commissioner)
- Ark. Code Ann. 26-18-303 (Confidential tax records)
- Ark. Code Ann. 27-19-501, 510 (Accident report filed by driver)
- Ark. Code Ann. 27-50-906, 907 (Abstracts of driver's record)
- Ark. Sup. Ct. Administrative Order No. 19 (Governing access to court records)

OPEN MEETINGS

- Ark. Code Ann. 6-17-1509 (School board hearing under Teacher Fair Dismissal Act)

- Ark. Code Ann. 6-18-507 (School board hearing of appeal by suspended student)
Ark. Code Ann. 9-9-217 (Adoption hearings)
Ark. Code Ann. 9-27-309 (Judicial proceedings involving juveniles)
Ark. Code Ann. 114-116-308 (Regional Water Distribution District board meetings)
Ark. Code Ann. 16-14-222 (Domestic relations cases)

Related Federal Acts

Below are summaries of three Federal Acts which related to Freedom of Information. These acts are available online at <http://uscode.house.gov//usc.htm>.

FEDERAL FREEDOM OF INFORMATION ACT

5 U.S.C.A. § 552

Under this section, all federal agency records are disclosable to any member of the public who requests and “reasonably describes” them. The section creates a liberal disclosure requirement limited only by specific exemptions which are narrowly constructed. The exemptions include personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Factors to consider in determining whether a private entity may be considered an agency for purposes of this section include whether the entity’s regular operations are subject to substantial federal control or supervision, whether it has independent legal decision making authority, whether it has independent authority to perform specific governmental functions, and to what extent the government has financial involvement with the entity.

FEDERAL PRIVACY ACT

5 U.S.C.A. § 552A

The Privacy Act protects citizens against improper disclosure of information about them that may be held by government agencies. The main purpose of the section is to forbid disclosure unless it is required by section 552 of this title (the federal Freedom of Information Act). Absent written consent by an individual, any disclosure of information covered by this section is prohibited, unless narrowly construed exceptions.

FEDERAL FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

20 U.S.C.A. § 1232g

This section prevents disclosure by federally or state supported educational programs or institutions of certain information about students which is deemed confidential. While students and their parents retain the right to access the student's educational records, a written consent to disclosure of records to the public is required of either the parent or the student himself if the student is eighteen years or older. The subsection known as the Buckley Amendment (20 U.S.C., Sec. 1232g (b)(I)) provides that no funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records unless furnished in compliance with a judicial order. There is an exception which allows state and local educational officials access to records necessary in connection with audit and evaluation of educational programs.

Reporters at the scene

• **Ark. Code Annotated § 5-71-206:**

Following a section explaining that it is a crime to fail to disperse during a riot or unlawful assembly when ordered to do so by a law enforcement officer):

“It is a defense to a prosecution under this section that the actor was a news reporter or other person observing or recording the events on behalf of the news media not knowingly obstructing efforts by a law enforcement officer or other person engaged in enforcing or executing the law to control or abate the riot or unlawful assembly.”

Arkansas Shield Law

ARKANSAS SHIELD LAW

(Ark. Code Annotated § 16-85-510)

“Before any editor, reporter or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner

of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he may have written, published or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.”

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First Amendment, U.S. Constitution

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press: or the right of the people peaceably to assemble and petition the Government for a redress of grievances.”

The Arkansas Freedom of Information Coalition:

Members of the coalition represent virtually every media organization in the state of Arkansas—both print and broadcast—as well as the following:

American Civil Liberties Union of Arkansas
Arkansas Broadcasters Association
Arkansas College Press Association
Arkansas Education Association
Arkansas Municipal League
Arkansas Policy Foundation
Arkansas Press Association
Arkansas Press Women
Arkansas Tech University, Russellville
Associated Press
Associated Press Broadcasters Association
Associated Press Managing Editors
Association of Arkansas Counties
Office of the Governor of Arkansas
Office of the Arkansas Attorney General
Society of Professional Journalists
University of Arkansas, Fayetteville
University of Arkansas at Little Rock



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How to challenge a meeting about to be closed

Below is a suggested statement for reporters and citizens to use when a board, commission, or other government entity (including committees thereof) votes to go into executive session. The reporter or citizen should rise and state:

“The Arkansas Freedom of Information Act requires that you state the purpose of the executive session before going into it. I request that you do so at this time.”

The reason given must be for the specific purpose of considering “employment, appointment, promotion, demotion, disciplining or resignation of any public officer or employee.” This may not include general discussion about making policies related to these. This must be done in open session.

Anything else violates the Freedom of Information Act, and the reporter or citizen should call somebody’s attention to this point.

If the body persists, the reporter should notify his or her supervisor immediately, and the citizen should contact the prosecuting attorney.