

The Arkansas **FREEDOM OF INFORMATION** Handbook



*Open records, open meetings,
open government
for all Arkansas citizens*

Co-Sponsors

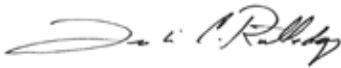
Office of the Governor of Arkansas
Office of the Arkansas Attorney General
Arkansas Press Association
Arkansas Municipal League
Arkansas Broadcasters Association
The Society of Professional Journalists — Arkansas Pro Chapter
Public Relations Society of America — Arkansas Chapter

Open Letter from Arkansas Attorney General

As the chief legal officer for the State of Arkansas, I have an immense appreciation for the Arkansas Freedom of Information Act of 1967. The intent of the FOIA is to ensure an open government by elevating transparency so that citizens may be fully informed of the workings of their government and the actions of their public officials. It is in that spirit that the Arkansas Freedom of Information Handbook—now in its 20th edition—is designed to give all Arkansans, government officials, and journalists a guide for complying with the law.

Details on additional training resources hosted by my office and more FOIA information can be found at ArkansasAG.gov.

Sincerely,



Leslie Rutledge
Attorney General



This is the 20th Edition of the Arkansas Freedom of Information Handbook. It has been updated to include changes in the law by the 93rd General Assembly in 2021 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 **Ray Pierce**, **Kelly Summerside**, and **Beth Walker** of the Arkansas Attorney General's Office for undertaking the legal research and preparation for this edition and to the Arkansas Press Association for the design, coordination, printing and distribution of the publication.

The initial printing of the 20th Edition is 24,000 copies. They 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 consulting their full text to glean their full meaning. To find the full court opinions, go to opinions.arcourts.gov; for the full Attorney General opinions, go to ArkansasAG.gov/opinions.

Sources of FOIA Assistance

Arkansas Attorney General's Office

323 Center St., Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
arkansasag.gov
oag@arkansasag.gov

Arkansas Press Association

411 S. Victory St.
Little Rock, Arkansas 72201
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Arkansas Freedom of Information Task Force Members

Rob Moritz, (chair), journalism instructor, University of Central Arkansas, Senate President Pro Tempore appointee.

Jeff Hankins, (vice chair), vice president of strategic communication and economic development, Arkansas State University System, Governor's appointee.

Wesley Brown, publisher, *The Daily Record* newspaper, Arkansas Press Association appointee.

Neal Gladner, director of sales, US Stations, Arkansas Broadcasters Association appointee.

Will Gruber, Saline County civil attorney, Association of Arkansas Counties appointee.

Elaine Lee, assistant city attorney, City of North Little Rock, Arkansas Municipal League appointee.

Robert Steinbuch, professor of Law, William H. Bowen School of Law at the University of Arkansas, Arkansas Freedom of Information Coalition appointee.

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The Arkansas Freedom of Information Act (FOIA)

Act 93 of 1967

As amended by Act 1201 of 1975 (Extended Sess., 1976); Act 652 of 1977; Act 608 of 1981; Acts 468 and 843 of 1985; Acts 49 and 1001 of 1987; Act 8 of 1989 (3rd Ex. Sess.); 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; Acts 184, 440, 631, and 1291 of 2009; Acts 99, 168, and 210 of 2011; Acts 145, 235, and 411 of 2013; Acts 186, 881, 999, 1015, and 1102 of 2015; Acts 711, 713, 923, and 1107 of 2017; Acts 392, 568, 910, 1012, 1028, and 1034 of 2019; Acts 56, 310, 572, 658, 727 and 778 of 2021.

These acts are codified at Ark. Code Ann. §§ 25-19-101 through -112 (Repl. 2014 & Supp. 2021).

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:

(1)(A) “Custodian,” except as otherwise provided by law and 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) “Disaster recovery system” means an electronic data storage system implemented and maintained solely for the purpose of allowing a governmental unit or agency to recover operational systems and datasets following the occurrence of a catastrophe, including without limitation an act of war, an equipment failure, a cyber-attack, or a natural disaster such as a tornado, earthquake, or fire;

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

(4) “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;

(5)(A) “Municipally owned utility system” means a utility system owned or operated by a municipality that provides:

- (i) Electricity;
- (ii) Water;
- (iii) Wastewater;
- (iv) Cable television; or
- (v) Broadband service.

(B) “Municipally owned utility system” includes without limitation a:

(i) Consolidated waterworks system under the Consolidated Waterworks Authorization Act, § 25-20-301 et seq.;

(ii) Utility system managed or operated by a nonprofit corporation under § 14-199-701 et seq.; and

(iii) Utility system owned or operated by a municipality or by a consolidated utility district under the General Consolidated Public Utility System Improvement District Law, § 14-217-101 et seq.;

(6) “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;

(7)(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;

(8) “Public water system” means all facilities composing a system for the collection, treatment, and delivery of drinking water to the general public, including without limitation reservoirs, pipelines, reclamation facilities, processing facilities, distribution facilities, and regional water distribution districts under The Regional Water Distribution District Act, § 14-116-101 et seq.; and

(9) “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, including without limitation copying through image capture, including still and moving photography and video and digital recording, 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, including without limitation copying through image capture, including still and moving photography and video and digital recording, 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, including without limitation through image capture, including still and moving photography and video and digital recording, 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 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

(B)(i) 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.

(ii) 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) [Repealed.]

(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 or municipally owned utility system.

(B) The records under subdivision (b)(18)(A) 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;

(v) Plans and related information for generation, transmission, and distribution systems; and

(vi) Other records containing information that if disclosed might jeopardize or compromise efforts to secure and protect the public water system or municipally owned utility system.

(19) Records pertaining to the issuance, renewal, expiration, suspension, or revocation of a license to carry a concealed handgun, or a present or past licensee under § 5-73-301 et seq., including without limitation all records provided to or obtained by a 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; and

(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;

(20)(A) Except as provided in subdivision (b)(20)(B) of this section, personal information of current and former public water system customers and municipally owned utility system customers, including without limitation:

(i) Home and mobile telephone numbers;

(ii) Personal email addresses;

(iii) Home and business addressees; and

(iv) Customer usage data.

(B) Personal information of a current or former water system customer or municipally owned utility system customer may be disclosed to:

(i) The current or former water system customer, who may receive his or her own information;

(ii) A person who serves as the attorney, guardian, or other representative of the current or former water system customer, who may receive the information of his or her client, ward, or principal;

(iii) A tenant of the current or former water system customer or municipally owned utility system customer, who may receive notice of pending termination of service;

(iv) A federal or state office or agency for the purpose of participating in research being conducted by such federal or state office or agency, if the federal or state office or agency agrees to prohibit disclosure of the personal information;

(v) For the purpose of facilitating a shared billing arrangement, a county, municipality, improvement district, urban service district, public utility, public facilities board, or public water authority that provides or provided a service to the current or former water system customer or municipally owned utility system customer; or

(vi) An agent or vendor of the water system or municipally owned utility system that provides a billing or administrative service to the water system or municipally owned utility system provided that the agent or vendor and the water system or municipally owned utility system enter an agreement that prohibits disclosure by the agent or vendor of the water system or municipally owned utility system of the personal information of a current or former water system customer or municipally owned utility system customer to any other person;

(21) Electronic data information maintained by a disaster recovery system;

(22) The date of birth, home address, email address, phone number, and other contact information from county or municipal parks and recreation department records of a person who was under eighteen (18) years of age at the time of the request made under this section;

(23)(A) Information related to taxes collected by particular entities under § 26-74-501 et seq.; the Advertising and Promotion Commission Act, § 26-75-601 et seq.; and § 26-75-701 et seq.

(B) However, this exemption does not apply to information or other records regarding the total taxes collected under § 26-74-501 et seq.; the Advertising and Promotion Commission Act, § 26-75-601 et seq.; and § 26-75-701 et seq. in the county or municipality as a whole;

(24)(A) Undisclosed and ongoing investigations by the Alcoholic Beverage Control Board, Alcoholic Beverage Control Division, or Alcoholic Beverage Control Enforcement Division.

(B) Completed investigations by the Alcoholic Beverage Control Board, Alcoholic Beverage Control Division, or Alcoholic Beverage Control Enforcement Division or investigations by the Alcoholic Beverage Control Board, Alcoholic Beverage Control Division, or Alcoholic Beverage Control Enforcement Division that have been provided to the person or entity under investigation are subject to disclosure under this section;

(25)(A) When the custodian is a governmental entity that has knowledge of the individual's assistance as described in this subdivision (b)(25)(A), information that could reasonably be used to identify an individual who is assisting or has assisted a governmental entity in one (1) or more investigations, whether open or closed, of matters that are criminal in nature, if disclosure of the individual's identity could reasonably be expected to endanger the life or physical safety of the individual or a member of the individual's family within the first degree of consanguinity and:

(i) The individual is a confidential informant;

(ii) The individual is a confidential source; or

(iii) The individual's assistance is or was provided under the assurance of confidentiality.

(B) As used in this subdivision (b)(25), "information that could reasonably be used to identify an individual" includes the following:

(i) The individual's name;

(ii) The individual's date of birth;

(iii) A physical description of the individual that could reasonably be used to identify him or her;

(iv) The individual's Social Security number, driver's license number, or other government-issued number specific to him or her;

(v) The individual's work or personal contact information;

and

(vi) Any other information about the individual that could reasonably be used to identify the individual; and

(26)(A) Records, including analyses, investigations, studies, reports, recommendations, requests for proposals, drawings, diagrams, blueprints, and plans containing information relating to security for any medical marijuana cultivation facility, marijuana dispensary, or

marijuana laboratory processor.

(B) The records under subdivision (b)(26)(A) of this section 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;
- (v) Plans and related information for generation, transmission, and distribution systems; and
- (vi) Other information that, if disclosed, would jeopardize or compromise efforts to secure and protect the security of a medical marijuana cultivation facility, marijuana dispensary, or marijuana laboratory processor.

(27)(A) Ballots, other than sample ballots, unless otherwise ordered by a court of law.

(B) Subdivision (b)(27)(A) of this section does not apply to a poll watcher during an election, who shall be allowed to inspect a voter statement and ballot while ensuring the secrecy of the vote is maintained and subject to reasonable restrictions prescribed by the State Board of Election Commissioners.

(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) Except as stated under subdivision (c)(4) of this section, 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.

(4) If a request for public records seeks only the gross salary of a public employee or a set of public employees, then the:

(A) Records custodian is not required to notify the public employee or set of public employees before disclosing the gross salary amount; and

(B) Public employee whose gross salary is the subject of the request for public records is not entitled to seek an opinion from the Attorney General under subdivision (c)(3)(B) of this section.

(d)(1) Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy, including without limitation copying through image capture, including still and moving photography and video and digital recording, 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.

(v) Except as provided in § 25-19-109, the custodian may

not charge a fee for the requestor's inspection or copying, including without limitation copying through image capture, including still and moving photography and video and digital recording, of public records.

(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 technically 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, including without limitation copying through image capture, including still and moving photography and video and digital recording, 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(7)(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)(A) Except as provided under subdivision (c)(6) of this section, an executive session will be permitted only for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.

(B) 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 that 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, a public agency may meet in executive session for the purpose of considering, evaluating, or discussing matters pertaining to public water system security or municipally owned utility system security as described in § 25-19-105(b)(18).

(7) An executive session held by the Child Maltreatment

Investigations Oversight Committee under § 10-3-3201 et seq. is exempt from this section.

(d)(1) All officially scheduled, special, and called open public meetings shall be recorded in a manner that allows for the capture of sound, including without limitation:

- (A) A sound-only recording;
- (B) A video recording with sound and picture; or
- (C) A digital or analog broadcast capable of being recorded.

(2) A recording of an open public meeting shall be maintained by a public entity for a minimum of one (1) year from the date of the open public meeting.

(3) The recording shall be maintained in a format that may be reproduced upon a request under this chapter.

(4) Subdivisions (d)(1) and (2) of this section do not apply to:

- (A) Executive sessions; or
- (B) Volunteer fire departments.

(5) Cities of the second class and incorporated towns are exempt from subdivisions

(d)(1) and (2) of this section until July 1, 2020.

(e)(1) If the Governor declares a disaster emergency under the Arkansas Emergency Services Act of 1973, § 12-75-101 et seq., a public entity may assemble, gather, meet, and conduct an open public meeting through electronic means, including without limitation by:

- (A) Telephone;
- (B) Video conference; or
- (C) Video broadcast.

(2) If an open public meeting is held under subdivision (e)(1) of this section:

(A) The public may attend the open public meeting using electronic means; and

(B) Notice of the method the public may attend the open public meeting shall be published with the notice of the open public meeting.

(3) Physical presence of the public or of an individual member of the public entity at the open public meeting is not required under this subsection.

(4) The open public meeting shall be recorded in the format in which it is conducted, including without limitation:

- (A) A sound-only recording;
- (B) A video recording with sound and picture; or
- (C) A digital or analog broadcast capable of being recorded.

(5) A public entity shall maintain the records of an open public meeting held under this subsection for a minimum of one (1) year from the date of the open public meeting.

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, after filing suit, has obtained from the defendant a significant or material portion of the public information he or she requested, 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 State 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 § 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, electronic 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 § 25-19-105 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).

(c)(1) An entity that is subject to this chapter that is not included in subsection (a) of this section may opt in to any provision under subdivisions (a)(1)-(5) through ordinance or resolution enacted by its governing body.

(2) The ordinance or resolution under subdivision (c)(1) of this section

shall comply with subdivision (b)(1) of this section.

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.

25-19-111. Arkansas Freedom of Information Act Task Force.

(a)(1) There is created the Arkansas Freedom of Information Task Force for the purpose of reviewing, evaluating, and approving proposed amendments to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(2) No later than the first day of November in each even-numbered year preceding a regular legislative session, the task force shall:

(A) Complete a study of proposed exemptions from or additions to the Freedom of Information Act of 1967, § 25-19-101 et seq.; and

(B) Report to the General Assembly its recommendations concerning proposed exemptions from or additions to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b)(1) The task force shall consist of nine (9) members as follows:

(A) One (1) member appointed by the Governor;

(B) One (1) member appointed by the President Pro Tempore of the Senate;

(C) One (1) member appointed by the Speaker of the House of Representatives;

(D) One (1) member appointed by the Arkansas Press Association, Inc.;

(E) One (1) member appointed by the Arkansas Freedom of Information Coalition;

(F) One (1) member appointed by the Arkansas Pro Chapter of the Society of Professional Journalists;

(G) One (1) member appointed by the Arkansas Broadcasters Association;

(H) One (1) member appointed by the Association of Arkansas Counties; and

(I) One (1) member appointed by the Arkansas Municipal League.

(2)(A) Each member of the task force shall serve a term of four (4) years.

(B) A member of the task force shall not serve more than two (2) terms.

(3) A vacancy on the task force shall be filled in the manner of the original appointment.

(4) The task force shall elect from its membership:

(A) A chair; and

(B) Other officers deemed necessary by the task force.

(c)(1) Five (5) members of the task force shall constitute a quorum for the purpose of transacting business.

(2) A majority vote of the total membership of the task force is required for any action of the task force.

(d) The members of the task force shall meet at their own expense and shall not be entitled to reimbursement for mileage or per diem.

(e)(1) The initial members of the task force shall be appointed within thirty (30) days of August 1, 2017.

(2)(A) The President Pro Tempore of the Senate shall call the first meeting of the task force, which shall occur within sixty (60) days of August 1, 2017.

(B) The task force shall begin its review under subdivision (a)

(2) of this section within thirty (30) days of the call of the first meeting.

25-19-112. Audio media, visual media, and audiovisual media — Findings — Intent — Law enforcement.

(a) The General Assembly finds that:

(1) The allocation of time of trained law enforcement personnel, dispatchers, and detention personnel toward fulfilling requests for copies of audio media, visual media, and audiovisual media is substantial; and

(2) The uniform assessment of costs to defray and recover the allocation of time of trained law enforcement personnel, dispatchers, and detention personnel toward fulfilling requests for copies of audio media, visual media, and audiovisual media is necessary.

(b) It is the intent of the General Assembly to encourage the use of audio media, visual media, and audiovisual media by state and local law enforcement agencies and detention centers.

(c)(1) A state, county, municipal, school, college, or university law enforcement agency, dispatch center, public safety answering point, jail, detention center, or electronic record provider may charge for the costs associated with retrieving, reviewing, redacting, and copying audio media, visual media, and audiovisual media as provided under this section.

(2) A request for audio media, visual media, and audiovisual media that:

(A) Requires three (3) hours or less of personnel and equipment time to fulfill the request shall be provided at no charge:

(i) Except for the cost of reproduction of the media; or

(ii) Unless the requestor or the requestor's entity has made a request under this section in the immediately preceding thirty-day period;

(B) Requires more than three (3) hours of personnel or equipment time to fulfill the request shall be charged at a rate that does not exceed twenty dollars (\$20.00) per hour on a prorated basis for each hour of running time of audio media, visual media, or audiovisual media provided to the requestor; and

(C) Is estimated to require more than three (3) hours of personnel or equipment time to fulfill the request may be required to be prepaid.

(3) A request for audio media, visual media, and audiovisual media shall be sufficiently specific to enable the custodian to locate the requested audio media, visual media, and audiovisual media with reasonable effort.

(4) An electronic record provider that charges for costs under this section shall provide a copy of the invoice to the entity required to maintain the audio media, visual media, or audiovisual media.

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 that 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 Reporter

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 be kept. *McMahan v. Bd. of Trustees of the Univ. of Arkansas*, 255 Ark. 108, 499 S.W.2d 56 (1973). *But see* Ark. Code Ann. §§ 25-18-601 – 605 (Repl. 2014 & Supp. 2021) (concerning the retention of public 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 Pub. Prot. Ass’n.*, 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 Cty. v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 716 (2007).

(6) The fact that public records may be kept by a private entity or individual does not make that entity or individual a “covered entity” under the FOIA. The public entity remains the custodian of the records, even if it does not have physical custody of them. Any request for or dispute over such public records must involve the “custodian of the records,” i.e., the public entity, and not the private entity alone. *Apprentice Info. Sys., Inc. v. DataScout, LLC*, 2018 Ark. 146, 544 S.W.3d 39.

(7) The plain language of the FOIA confirms that the General Assembly intended that direct public funding be required to bring private entities within the scope of the Act. Indirect government assistance or incentives, such as tax incentives to lure industry to the state, are insufficient to make private entities subject to the Act. *Sebastian Cty. Chapter of Am. Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993).

(8) 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).

(9) 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.* See also *Dept. of Arkansas State Police v. Keech Law Firm*, 2017 Ark. 143, 516 S.W.3d 265 (holding that sparse activity after two years on a 54-year-old case was insufficient to show that the investigation was "open and ongoing").

(10) 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. Op. Att'y Gen. 2001-086.

(11) Vehicle accident reports created by police officers are not a "motor vehicle record" under the federal Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725, which prohibits disclosure of personal information in connection with a motor vehicle record. Therefore, names and addresses in such reports are not shielded from disclosure under the FOIA. *Arkansas State Police v. Wren*, 2016 Ark. 188, 491 S.W.3d 124 (*cert. denied*, 137 S.Ct. 623 (2017)).

(12) 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. Dir.*, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

(13) 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), overruled on other grounds by *Harris v. Fort Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006).

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

(15) 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).

(16) 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).

(17) 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).

(18) A request for records cannot be denied because the custodian deems the request too burdensome if the request is otherwise specific enough under § 25-19-105(a)(2)(C). *Daugherty v. Jacksonville Police*

Dept., 2012 Ark. 264, 411 S.W.3d 196.

(19) A request for electronic copies of paper records cannot be denied when they are readily convertible under § 25-19-105(d)(2) (B) because the public entity deems the request too voluminous and burdensome given the limitations of its scanning capabilities. *Pulaski Cty. Special Sch. Dist. v. Delaney*, 2019 Ark. App. 210, 575 S.W.3d 420.

(20) Photographs of a law enforcement agency's non-undercover officers are exempt under Ark. Code Ann. § 25-19-105(b)(10) if their disclosure would, under the circumstances, reveal the identities of the agency's undercover officers. *Arkansas State Police v. Racop*, 2022 Ark. 17, 638 S.W.3d 1 (quoting with approval Op. Att'y Gen. 2014-011).

PUBLIC MEETINGS:

(21) 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).

(22) When the State Police Commission conducts a hearing on the application for reinstatement of a discharged state police officer, 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 Comm. v. Davidson*, 253 Ark. 1090, 490 S.W.2d 788 (1973).

(23) 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 Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975).

(24) 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 Broad. Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976). The Act covers informal, unofficial group meetings for the discussion of governmental business. *Id.*

(25) 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). But a city administrator did not violate the open-meetings law by presenting individual board members a memorandum opining on a proposed ordinance. *McCutchen v. City of Fort Smith*, 2012 Ark. 452, 425 S.W.3d 671. See also *Arkansas Okla. Gas Corp. v. MacSteel Div. of Quanex*, 370 Ark. 481, 262 S.W.3d 147 (2007) (concluding that the open-meetings provision was not violated where county judge asked quorum court members if they understood the agenda, and where there was no evidence that a business acted in any capacity other than its own when it contacted quorum court members to lobby for its interests).

(26) Emails and other forms of electronic communications between public officials could constitute public meetings, just like telephonic communications, and thus be subject to the open-meetings provisions of the FOIA. *City of Fort Smith v. Wade*, 2019 Ark. 222, 578 S.W.3d 276.

(27) 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 Cent. Assoc. of Colleges and Schools v. Troutt Bros.*, 261 Ark. 378, 548 S.W.2d 825 (1977).

(28) 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).

(29) The FOIA allows the board of a publicly supported agency (i.e., county hospital board), or committee of a publicly 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 Cty. Newspapers, Inc. v. Medical Staff of Baxter Gen. Hosp.*, 273 Ark. 511, 622 S.W.2d 495 (1981).

(30) 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. Serv's Corp. v. Delta Hills Health Sys. Agency and Flener*, 285 Ark. 397, 687 S.W.2d 840 (1985).

EXECUTIVE SESSIONS:

(31) 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 Co. et al. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977).

(32) 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 Bd. of Educ.*, 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 the FOIA, 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 court session 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 media outlet]. 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 supervisor 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 & Answers

About the Arkansas FOIA

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 receives 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, obtain copies of and photograph 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 that is "required by law to be kept or [is] 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 Cty. v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007).

Q. What records are exempt from disclosure?

- A. The FOIA exempts numerous records and pieces of information from disclosure. See Ark. Code Ann. § 25-19-105(b) (Supp. 2021). In addition, the FOIA incorporates the confidentiality provisions of other statutes in the Arkansas Code. 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. *DF&A 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. Direct the request 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 online form for that purpose.

Q. When must the agency make the records available?

A. Generally, 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 has the scanning capability.

Q. Is the custodian required to mail the copies?

A. Probably yes, although this is not entirely clear under the act. Op. Att’y Gen. 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. The FOIA exempts four kinds of meetings from the requirement that the public be allowed to attend. A closed meeting, called 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 personnel 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.” Executive sessions may be held by certain water systems and other utility systems to discuss security issues. Executive sessions may also be held by the General Assembly’s Child Maltreatment Investigations Oversight Committee under Ark. Code Ann. § 10-3-3201 et seq.

Q. What is a recommended way to announce an executive session pursuant to Ark. Code Ann. § 25-19-106(c)(1)?

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 [identify the purpose, i.e., 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 such an executive session is announced in public, must the individual public officer or employee be named?

A. No.

Q. Who may attend such 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. Yes. The court shall award attorney’s fees and other litigation expenses to a plaintiff who, after filing suit, has obtained from the defendant a significant or material portion of the public information he or she requested, and may to a public entity that 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. But a plaintiff who substantially prevails against the State may file a claim with the Arkansas State Claims Commission for fees and expenses. Ark. Code Ann. § 25-19-107(e)(1) and (e)(2).

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. Ark. Code Ann. § 25-19-104.

ATTORNEY GENERAL OPINIONS:

The opinion numbers represent the year and sequence the opinion request was received, e.g., Op. Att’y Gen. 99-018 was the 18th opinion request received in 1999. Some opinions may be released in a year later than their opinion number. See, e.g., Op. Att’y Gen. 2014-118 (issued on March 10, 2015).

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. Op. Att’y Gen. 98-169 (citing *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975)); see also Ops. Att’y Gen. 2006-059, 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). Op. Att’y Gen. 2014-124.

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

A. Yes. Op. Att’y Gen. 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. Op. Att’y Gen. 95-020.

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

A. No. Ops. Att’y Gen. 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. Op. Att’y Gen. 90-239; *Mayor & City Council of El Dorado v. El Dorado Broad. 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); Op. Att’y Gen. 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. Op. Att’y Gen. 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. Ops. Att’y Gen. 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. Ops. Att’y Gen. 96-009, 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. Op. Att’y Gen. 2000-096.

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

A. Yes. *Rehab Hosp. Serv’s Corp. v. Delta Hills Health Sys. Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985); Op. Att’y Gen. 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. Ops. Att’y Gen. 2009-077, 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. Op. Att’y Gen. 2006-059, 93-403, 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. Op. Att’y Gen. 2006-152.

Q. Are citizens entitled to videotape public meetings?

A. Yes, as long as the videotaping does not disrupt the meeting. Op. Att’y Gen. 2012-022. Public meetings must be recorded to capture at least audio and in a way that can be reproduced upon request. Ark. Code Ann. § 25-19-106(d).

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

A. This will depend upon the reasonableness of the access to the meeting under the particular facts. See Op. Att’y Gen. 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. Op. Att’y Gen. 2000-251, 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. Op. Att’y Gen. 2006-059, 2003-170. *See National Park Med. Ctr., Inc. v. Arkansas Dep’t of Human Serv’s*, 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. Op. Att’y Gen. 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.” Ark. Code Ann. § 25-19-106(a); Op. Att’y Gen. 84-91. In the event of emergency or special meetings, the person calling the meeting shall notify representatives of the me-

dia 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. The FOIA’s open-meetings provisions apply to email exchanges, but it is a question of fact whether particular email communications violate the FOIA. *City of Ft. Smith v. Wade*, 2019 Ark. 222, 578 S.W.3d 276. A violation may occur through a sequential or circular series of email communications or under circumstances suggesting that the governing body was deliberating in secret. Op. Att’y Gen. 2005-166. Nevertheless, the email messages likely would be subject to disclosure as a “public record.”

II. RECORDS

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

- A. Yes. Ark. Code Ann. § 25-19-105(c)(2); Op. Att’y Gen. 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); Ops. Att’y Gen. 2006-225 (and opinions cited therein), 93-076, 87-115.

Q. What information is not exempt?

- A. Salary and compensation in addition to regular paycheck, 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. Ops. Att’y Gen. 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 Op. Att’y Gen. 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. Op. Att’y Gen. 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. Ops. Att’y Gen. 2013-144, 2007-322.
- Q. What if a record can be classified as one person’s evaluation and another employee’s personnel record?**
- A. Such a record is considered a “mixed record.” A record falls into this category when it can be classified as (1) more than one person’s evaluation record, (2) more than one person’s personnel record, or (3) at least one person’s evaluation and at least one person’s personnel record. The custodian must classify the record as it pertains to each employee named and apply the appropriate test(s) for disclosure in each instance. Ops. Att’y Gen. 2017-034, 2015-129, 2015-057.
- 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. Op. Att’y Gen. 2007-258.
- Q. If an entity is subject to the FOIA, may that entity legally withhold information about its employees’ salaries?**
- A. No. Ops. Att’y Gen. 2007-070, 2001-223. See also Ark. Code Ann. § 25-19-105(c)(4) (Supp. 2021).
- 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. Ops. Att’y Gen. 2009-170, 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 Op. Att’y Gen. 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); Ops. Att’y Gen. 2006-093 (discussing the required time period for responding to an FOIA request), 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). Ops. Att’y Gen. 2003-095, 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. Op. Att’y Gen. 2006-158. However, the custodian may be required to remove intimate information giving rise to a privacy interest. Op. Att’y Gen. 2000-058.

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

A. Generally, yes. Ops. Att’y Gen. 2009-156, 90-248, 87-108.

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

A. Generally, yes. Ops. Att’y Gen. 86-020, 87-115. However, access to Arkansas Crime Information System criminal records is restricted. Ops. Att’y Gen. 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. Op. Att’y Gen. 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. Op. Att’y Gen. 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. Op. Att’y Gen. 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. Op. Att’y Gen. 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 Op. Att’y Gen. 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 when it receives public funds and carries on public business or is otherwise intertwined with the activities of a public entity?

- A. Yes. *See Rehab Hosp. Serv’s Corp. v. Delta Hills Health Sys. Agency*, 285 Ark. 397, 687 S.W.2d 840 (1985); *North Cent. Assoc. of Colleges & Schools v. Troutt Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977); and *Kristen Inv. Properties v. Faulkner Cty. Waterworks*, 72 Ark. App. 37, 32 S.W.3d 60 (2000). 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-Steele & R. Steinbuch, *The Arkansas Freedom of Information Act* § 2.03 (6th ed. 2017). 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 Ops. Att’y Gen. 2005-214* (property owners’ association exercising authority over sewage disposal); *2004-223* (private non-profit 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 S.W.2d 275 (1990); *Ops. Att’y Gen. 2005-164, 2001-172, 96-185*.

Q. Are all of the records of such a private entity subject 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*; *Op. Att’y Gen. 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. *Ops. Att’y Gen. 93-092, 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. See also Op. Att’y Gen. 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. Ops. Att’y Gen. 98-127, 90-305.

Q. Are 911 tape recordings open under the FOIA?

A. Generally, yes. Ops. Att’y Gen. 99-409, 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. Op. Att’y Gen. 2000-287.

Q. Are current tax assessments public records?

A. Generally, yes. See Op. Att’y Gen. 2004-023.

Q. May a County Judge, County Sheriff, County Clerk, Circuit Clerk, and County Assessor meet without violating the open meetings provision of the FOIA?

A. Yes, because this group does not comprise a governing body. Op. Att’y Gen. 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(b), the quorum court must allow citizens a “reasonable opportunity to participate prior to a final decision.” See Op. Att’y Gen. 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. Op. Att’y Gen. 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); Op. Att’y Gen. 97-067.

Q. Can the board and staff of a municipally owned utility system meet in executive session on matters related to system security?

A. Yes. Ark. Code Ann. § 25-19-106(c)(6); Op. Att’y Gen. 2015-024.

Q. Does the FOIA prohibit disclosure of personal information of current and former customers of a municipally owned utility system?

A. Yes. Ark. Code Ann. § 25-19-105(b)(20); Op. Att’y Gen. 2015-056.

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

A. Yes. Ops. Att’y Gen. 98-174, 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. Op. Att’y Gen. 2002-161.

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

A. Yes. Ops. Att’y Gen. 2003-289, 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; Op. Att’y Gen. 95-098.

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

A. No. Op. Att’y Gen. 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 Broad. Co.*, 260

Ark. 821, 544 S.W. 2d 206 (1976), *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W. 2d 350 (1975) and Ops. Att’y Gen. 99-018, 91-225. But there is no bright-line rule that two members talking about city business constitutes a “meeting” under the FOIA. A violation is most likely to occur when successive meetings of two members are held prior to action by the governing body, thereby avoiding public discussion. Op. Att’y Gen. 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. Op. Att’y Gen. 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. Ops. Att’y Gen. 97-080 (deliberations of quasi-judicial bodies must be open to the public), 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. Op. Att’y Gen. 84-91. Only public officers or employees may 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. Op. Att’y Gen. 90-305.

PUBLIC SCHOOLS

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

- Q. If a school superintendent's contract 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. Op. Att'y Gen. 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). 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* Op. Att'y Gen. 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(c)(2). Op. Att'y Gen. 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. Op. Att'y Gen. 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* Ark. Code Ann. § 25-19-105(b)(2); 34 C.F.R. § 99.37; *cf.* Ops. Att'y Gen. 2013-083, 2013-027.
- Q. Are meetings of student government (Student Government Association) subject to the FOIA?**
- A. Yes, if the body is funded by public funds. Ops. Att'y Gen. 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." Op. Att'y Gen. 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)(4), notice of regular meetings must be published on the district's website at least 10 days before the meetings, and notice of rescheduled regular meetings must be published on the web at least 24 hours before the rescheduled 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. Op. Att'y Gen. 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. Op. Att'y Gen. 88-082.
- Q. Can a school board meet in an executive session with its attorney to discuss pending litigation?**
- A. No. Op. Att'y Gen. 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. Op. Att'y Gen. 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 Op. Att'y Gen. 2006-059. If it is purely advisory with no decision-making power, its meetings may be closed. *Id.* See also Op. Att'y Gen. 2003-170. Its records will, nevertheless, be open. See Ops. Att'y Gen. 2014-124, 2006-059, 2002-092.
- Q. Can a school board meet in executive session to discuss the blanket hiring of certified personnel?**
- A. No. Op. Att'y Gen. 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. Op. Att'y Gen. 99-100.

Exceptions to the Arkansas FOIA

The Arkansas Freedom of Information Act is not all inclusive. That is, other state statutes contain provisions that—either expressly or effectively—allow additional exemptions or exceptions to both the open-records and open-meetings provisions of the FOIA. A non-exhaustive list of such statutes include:

RECORDS:

- Ark. Const., amend. 98, §§ 5 and 10 (Application or renewal and supporting information and dispensary records of a qualifying patient under the Arkansas Medical Marijuana Amendment)
- Ark. Code Ann. § 5-4-617 (records or information that could be used to identify people or entities who participate in lawful executions or lethal injections, or makers or vendors of drugs and other medical equipment used in lethal injections)
- Ark. Code Ann. § 5-55-104 (Records of Medicaid recipients)
- Ark. Code Ann. §§ 5-64-1101 to -1113 (Sale records of ephedrine and other non-prescription drugs)
- Ark. Code Ann. § 5-73-325 (Security plans of firearm-sensitive areas)
- Ark. Code Ann. § 6-10-134 (Records notifying a school district of the adjudication or conviction of a minor)
- Ark. Code Ann. § 6-15-503 (Notice information regarding home-schooled children provided to local school district superintendents)
- Ark. Code Ann. §§ 6-15-1304, 6-61-139 (Records or information regarding security or emergency plans of public schools and institutions of higher education)
- Ark. Code Ann. § 6-15-2909 (Personally identifiable information of student test-takers under the Arkansas Educational Support and Accountability Act)
- Ark. Code Ann. § 6-17-2804 (Raw Teacher Excellence and Support System data reported to and collected by the Division of Elementary and Secondary Education)
- Ark. Code Ann. § 9-9-217 (Uniform Adoption Act)
- Ark. Code Ann. § 9-9-504 (Voluntary adoption registry)
- Ark. Code Ann. §§ 9-27-309, 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 (Certain records of Legislative Council)

Ark. Code Ann. § 10-4-422 (Working papers of Division of Legislative Audit)

Ark. Code Ann. § 10-4-429 (State entity reports of IT or other computer security incidents)

Ark. Code Ann. § 11-10-314 (Certain records of Division of Workforce Services)

Ark. Code Ann. § 11-10-902 (Information gathered by the state new-hire registry)

Ark. Code Ann. § 12-6-701 (Records that depict or record the death of a law enforcement officer)

Ark. Code Ann. § 12-8-108 (Security and emergency information concerning the Governor's Mansion and mansion grounds)

Ark. Code Ann. § 12-12-211 (Arkansas Crime Information Center)

Ark. Code Ann. § 12-12-312 (State Crime Laboratory)

Ark. Code Ann. § 12-12-913 (Sex and Child Offender Registration Act of 1997)

Ark. Code Ann. § 12-14-109 (Certain information related to State Capitol Police)

Ark. Code Ann. § 12-27-148 (Division of Community Correction Emergency Preparedness Manual)

Ark. Code Ann., title 12, ch. 75, note 1 (Homeland Security Information Act; expires July 1, 2023)

Ark. Code Ann. § 14-2-102 (Military Service Discharge Record, i.e., "DDForm 214s" on file with a county recorder)

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 medical staff or medical peer review committees)

Ark. Code Ann. § 16-85-408 (Indictment issued against person not in confinement)

Ark. Code Ann. §§ 16-90-1401 to - 1419 (The Comprehensive Criminal Record Sealing Act)

Ark. Code Ann. § 16-93-202 (Presentence reports, pre-parole reports, and supervision histories of Parole Board)

- Ark. Code Ann. § 17-12-508 (Confidential documents of licensed certified public accountants undergoing peer review)
- 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. § 20-16-504 (Sexually transmitted disease records of Dept. of Health's HIV/STD/Hepatitis C Section)
- 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 used in medical research)
- 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. § 23-115-404 (Names of lottery winners of amounts greater than \$500,000).
- Ark. Code Ann. § 26-18-303 (Confidential tax records)
- Ark. Code Ann. § 27-19-510 (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)

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- 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. § 14-116-308 (Regional Water Distribution District board meetings)
- Ark. Code Ann. § 16-13-222 (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/>.

FEDERAL FREEDOM OF INFORMATION ACT

5 U.S.C. § 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. § 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. § 1232g

This section prevents disclosure by federally or state-supported educational programs or institutions of certain information about students that 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 18 years or older. The subsection known as the Buckley Amendment (20 U.S.C. § 1232g(b)(1)) 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 that 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 Ann. § 5-71-206(b):

Subsection (a) of this statute makes it a crime to fail to disperse during a riot or unlawful assembly when ordered to do so by a law enforcement officer. Subsection (b), however, states:

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

Ark. Code Ann. § 16-85-510:

Before any editor, reporter, or other writer for any newspaper, periodical, radio station, television station, or internet news source, or publisher of any newspaper, periodical, or internet news source, 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 or she 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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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
- Association of Arkansas Counties
- Office of the Governor of Arkansas
- Office of the Arkansas Attorney General
- Society of Professional Journalists — Arkansas Pro Chapter
- Society of Professional Journalists University of Arkansas, Fayetteville
- University of Arkansas at Little Rock



Gov. Winthrop Rockefeller signing the Arkansas Freedom of Information Act into law on February 14, 1967.

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.