The Freedom of Information Act

Made Simple.
Legislative Intent

A.C.A. § 25-19-102

• to ensure that electors are fully advised of the activities and decisions of their public officials

• liberally construed in favor of openness

• exceptions are narrowly construed

Made Simple.
FOIA Overview—3 Step Approach

• Step 1: Is entity covered?
FOIA Overview—3 Step Approach

- Step 1: Is entity covered?
- Step 2: Is the record/meeting covered?
FOIA Overview—3 Step Approach

• Step 1: Is entity covered?

• Step 2: Is the record/meeting covered?

• Step 3: Are there any exemptions?
Step 1: Is the entity covered?

- All government entities
Step 1: Is the entity covered?

- All government entities
- Some private entities
  - Public funding + intertwining
Step 1: Is the entity covered?

- All government entities

- Some *private* entities
  - Public funding + intertwining

- Examples
  - Busing
  - Buildings
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Step 2: Is the record covered?
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Definition & Rule

Step 2: Is the record covered?
Step 2: Is the record covered?

- What is a “public record”?
  - (1) Writings, sounds, electronic info, or videos that
Step 2: Is the record covered?

- What is a “public record”?
  - (1) Writings, sounds, electronic info, or videos that
  - (2) are kept
  - (3) that constitute a record of the performance or lack of performance of official functions
Step 2: Is the *record* covered?

- What is a “public record”?
- (1) Writings, sounds, electronic info, or videos that
- (2) are kept
- (3) that constitute a record of the performance or lack of performance of official functions

- Examples: emails, job applications, personnel files, some job evaluations
Public Records (con’t)—How do you know?

• The content

• The presumption:
  • (1) maintained in public offices or by public employees
  • (2) within the scope of their employment
Public Records (con’t)

- The content

- The presumption:
  - (1) maintained in public offices or by public employees
  - (2) within the scope of their employment

- Rebutting the presumption
  - record doesn’t reflect the “performance or lack of performance of official functions.”

- Content based
Step 2: Is the *record* covered?

General rule:

All “public records” must be disclosed unless exempt
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Step 3: Records Exemptions.
Kinds of Exemptions

- Statutory
  - Contained in FOIA
  - Referenced in another statute
- Constitutional
- State Statute
- Federal Statute
Step 3: Some records exceptions

Personnel records

&

Employee evaluation records
Step 3: *Some* records exceptions

**Personnel records**

- Definition: virtually all records pertaining to the individual employee that aren’t evaluation records
Step 3: Some records exceptions

*Personnel records*

• Definition: virtually all records pertaining to the individual employee that aren’t evaluation records

• Stance: “It must be disclosed, unless....”
Step 3: *Some* records exceptions

*Personnel records*

- Definition: virtually all records pertaining to the individual employee that aren’t evaluation records

- Stance: “It must be disclosed, unless....”

- Test: unless doing so constitutes a “clearly unwarranted invasion of personal privacy”
Personnel Records -
Commonly **Exempted** Items

- Social Security numbers
- Medical info
- Insurance, pension & benefit info
- Tax info & withholdings
- Personnel numbers
- Personal contact info (home/cell numbers; home addresses; personal email addresses)
- Date of birth
- Marital status and info on dependents
Personnel Records -
Common Items Open to Inspection

- Name
- Salary info
- Contracts
- Employment applications
- Resumes
- Educational background
- Work History
- Leave Records
- Letters of recommendation
Step 3: Some records exceptions

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  - The records formed a basis for the decision (relevance); and

- There’s a compelling public interest in the disclosure (compelling public interest).
Compelling Public Interest

- Factors to consider when determining that a compelling public interest is present:
  - The nature of the infraction that lead to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved;
  - The existence of a public controversy related to the agency and its employees;
  - The employee’s position within the agency.
Mixed Records

- A record is “mixed” when it can be classified as:
  - More than one person’s evaluation,
  - More than one person’s personnel record, or
  - At least one person’s evaluation and at least one person’s personnel record.
Mixed Records

• First step: Classify the records.
• Second Step: Apply the relevant test for disclosure and make any necessary redactions.

Note: Most complaints against public employees are either the personnel records or employee-evaluation records of the person being complained about.

A complaint by a public employee is also usually a personnel record of the complainant.
How to make a FOIA Request

• **Mode**
  - Any method will do

• **Specificity**
  - Detailed enough to locate the records with “reasonable effort.”

• **Medium**
  - Any medium in which the record exists or is “readily available.”
4 Steps to Evaluate the Request
4 Steps to **Evaluate** the Request

- Step 1: What’s requested?
- Step 2: How long do you have to respond?
- Step 3: Evaluate the record(s)
- Step 4: Prep and send
Evaluating the Request

• **Step 1**: What’s requested?
  
  • Is it detailed enough?
    • If not, get clarification.
    • Is it a personnel record or employee evals?
  
  • Who’s the custodian?
Personnel/Evaluation Records
Compliance

• Notice Requirements
  • Notify employee and requester within 24 hours of the agency decision

• Overnight mail notice is required if other notice fails

• The requester, custodian or subject may request an opinion from the Attorney General

• Redact any exempt information and provide the records
Evaluating the Request

- **Step 2**: How long do you have to respond?
  - 3 days if in storage or active use
  - Otherwise: immediately
Evaluating the Request

- **Step 3**: Evaluate the record
  - Public record?
  - Exemptions?
  - Redactions? (wield the Sharpie)
Personnel/Evaluation Records Compliance

- Notice Requirements
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  - Redact any exempt information and provide the records
Responding to the Request

- **Step 4**: Prep & send the record(s)
  - Open for inspection if requested

- Making the copies
  - The requester can *require* copies.

- **Charging** for copies?
  - *Only* “actual costs of reproduction”
  - That includes mailing or faxing
  - Doesn’t include employee time
  - $25 in advance
  - Itemize the charges
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Step 2: Is the meeting covered?
Step 2: Is the meeting covered?

- Identifying a meeting
  - definition
  - types

- Requirements
  - notice requirements
  - attendance
What is a “meeting”?—definition

- A.C.A. 25-19-106(a): “all meetings, formal or informal, special or regular, of the governing bodies of all municipalities [and] counties...shall be public meetings.”

- In other words: “All meetings are public meetings.”

- But what’s a ‘meeting’?

- What’s a governing body?
  - It’s a body that can make decisions
Kinds of meetings

Open
- Regular
- Special
- Emergency
- Social?

Closed
- Licensing Exams
- Water Security
- Personnel Matter
How many make a meeting?

- no quorum required
- any particular number?
- no polling or secret telephone conferences
Social Gatherings/Conferences?

- Not a “meeting” if discussion of government business at the social gathering is incidental and intermittent (Op.95-020)

- Probably not a “meeting” if governing body has no control over the conference, function, or proceeding (Op. 94-131)
Are **e-mails** meetings? (Op. 2005-166)

- Usually not

- But they could be—depends on all the facts
What if the meeting is covered? (Part 1)

Notice Requirements

- Regular Meetings:
  - (1) time and place must be given to
  - (2) anyone who asks

- Special/Emergency Meetings:
  - (1) time, place and date – 2 hours in advance
  - (2) to news media
    - (a) in the county where the meeting’s held, and
    - (b) located elsewhere that cover the regular meetings
  - (3) that have asked to be notified
What if the meeting is covered? (Part 2)

- **Attendance** not participation at meetings
- But see A.C.A. § 14-14-109(b), requiring county boards to afford citizens “a reasonable opportunity to participate prior to the final decision.”
- Public must be able to see how each individual member voted.
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Step 3: Meetings Exemptions.
Step 3: Meetings Exemptions.

Kinds of Exceptions

- licensing exams
- water security
- personnel matters

Procedure for using an exception

- notice
- announcement
- limited attendance
Personnel Matters

- only for hiring, firing, appointing, promoting, demoting, disciplining, or resigning of public officer or employee
Exec. Session—**Procedure**

- Notice requirements still apply.

- Must announce specific purpose before going in.

- Must vote in **public** afterward or action is void.

- Other specific state laws may allow private meetings
Exec. Session—Attendance

- Persons who can attend **by right**: all members of the governing body

- Persons who can attend **by invitation**:
  - interviewee for top administrative position
  - the top administrator, immediate supervisor, and employee

- Persons who **cannot attend**:
  Everyone else, including attorneys
Enforcement

- Action is **void** if no public vote

- Noncompliance in other respects renders action **voidable**

  Court will only invalidate the action when:

  - Plaintiff has given the body a chance to hold a meeting that conforms;
  - Remedy is sought to vindicate public as opposed to private interest;
  - The FOIA violation was substantial; and
  - The defendant *knowingly* violated the Act.
Enforcement

Civil Suits

Class “C” Misdemeanor
Guides to Interpretation

• Freedom of Information Handbook (18th ed.)


• Attorney General’s website: ArkansasAG.gov