

FOIA

made
simple

Overview of this Training

Part 1—FOIA Provisions

- Purposes
- The 3 Steps
 - Meetings
 - Records

Part 2—FOIA Practice

- Making FOIA requests
- Responding to FOIA requests

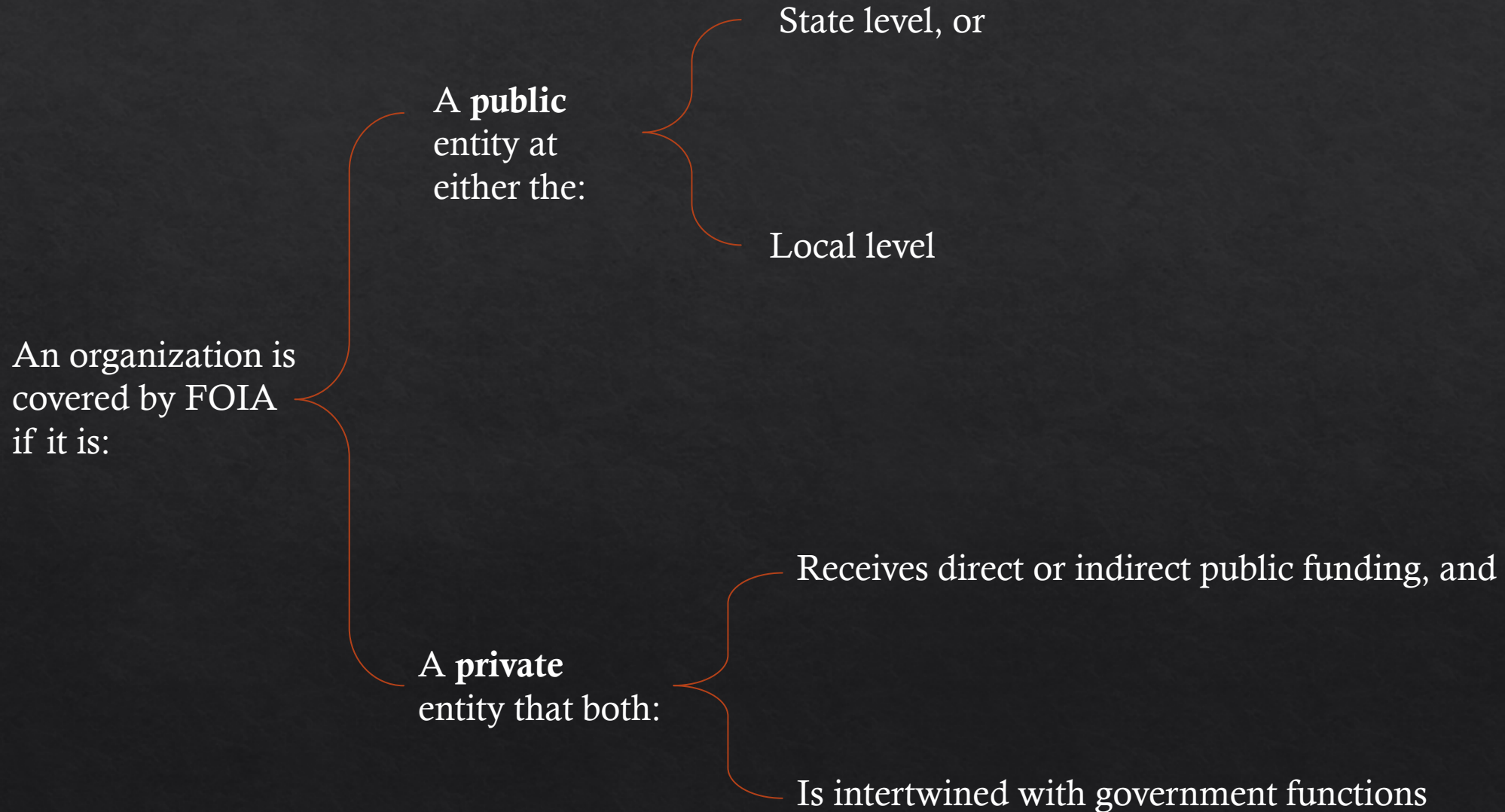
FOIA's **Purposes**: A.C.A. § 25-19-102

- 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

FOIA Overview—3 Step Approach

- ◆ Question 1: Is entity covered?
- ◆ Question 2: If so, is the record or meeting covered?
- ◆ Question 3: If so, are there any exemptions?

Question 1: Who is covered by FOIA?



FOIA Overview—3 Step Approach

◆ Question 1: Is entity covered?

◆ Question 2: If so, is the record or meeting covered?

◆ Question 3: If so, are there any exemptions?

Question 2: Is the *meeting* covered?

An event or gathering
is a “public meeting”:

actually, if two or more members of the governing body “meet”

constructively, if the governing body effectively communicated
even though no two members gathered or directly spoke

When 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

When the meeting is covered—part 2

- ◆ **Attendance** not participation at meetings
- ◆ **Recording**—at least audio
- ◆ Public must be able to see how each individual member voted.

FOIA Overview—3 Step Approach

◆ Question 1: Is entity covered?

◆ Question 2: If so, is the record or meeting covered?

◆ **Question 3: If so, are there any exemptions?**

Kinds of
Exceptions
(*in FOIA itself*)

- licensing exams
- water security
- child maltreatment oversight committee
- personnel matters

Procedure for
using an exception

- notice
- announcement
- limited attendance
- public vote

Personnel Matters

- ◆ **Only** for hiring, firing, appointing, promoting, demoting, disciplining, or resigning of public officer or employee



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

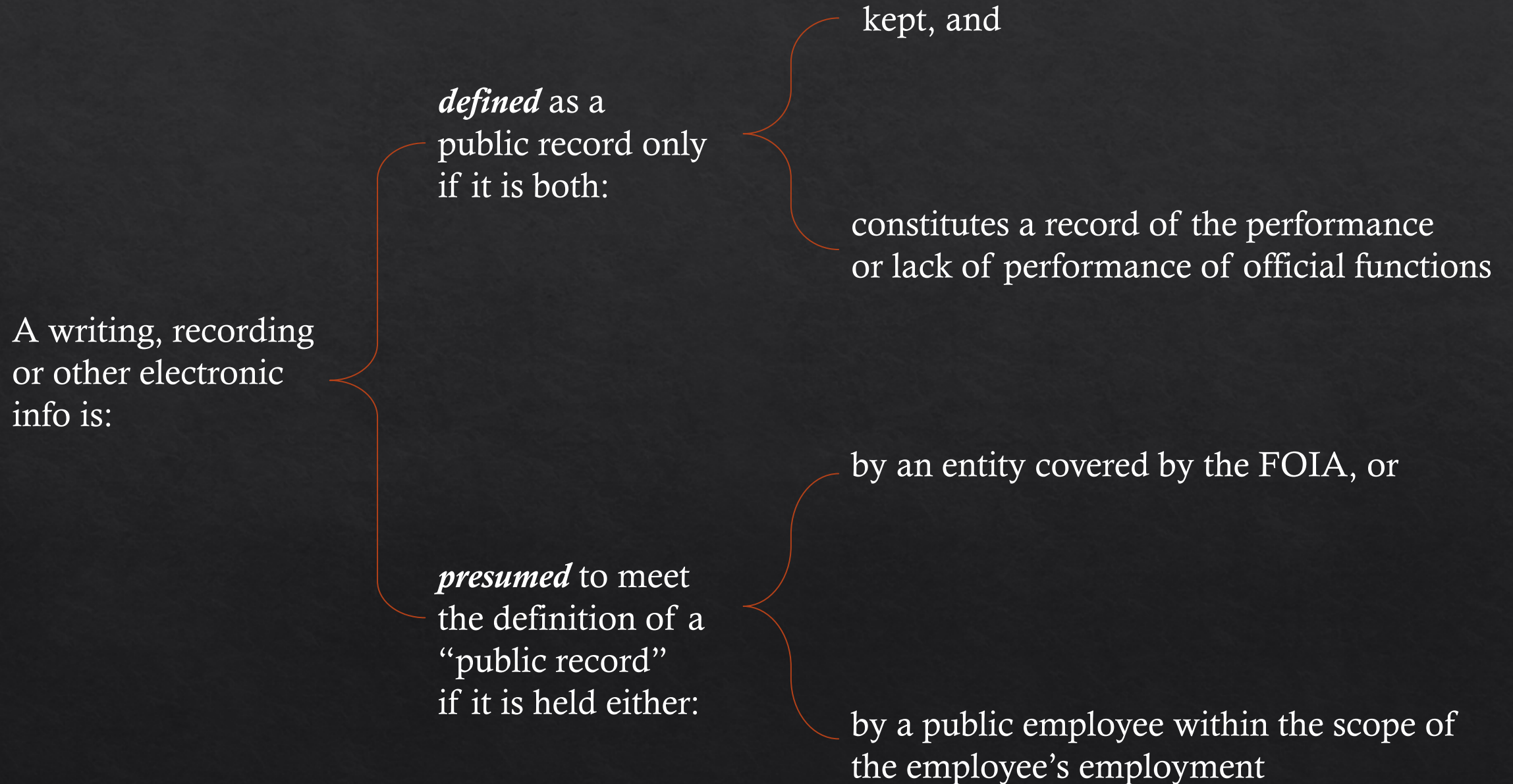
Enforcement

- ◇ 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.

FOIA Overview—3 Step Approach

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Question 2: Is the *record* covered?



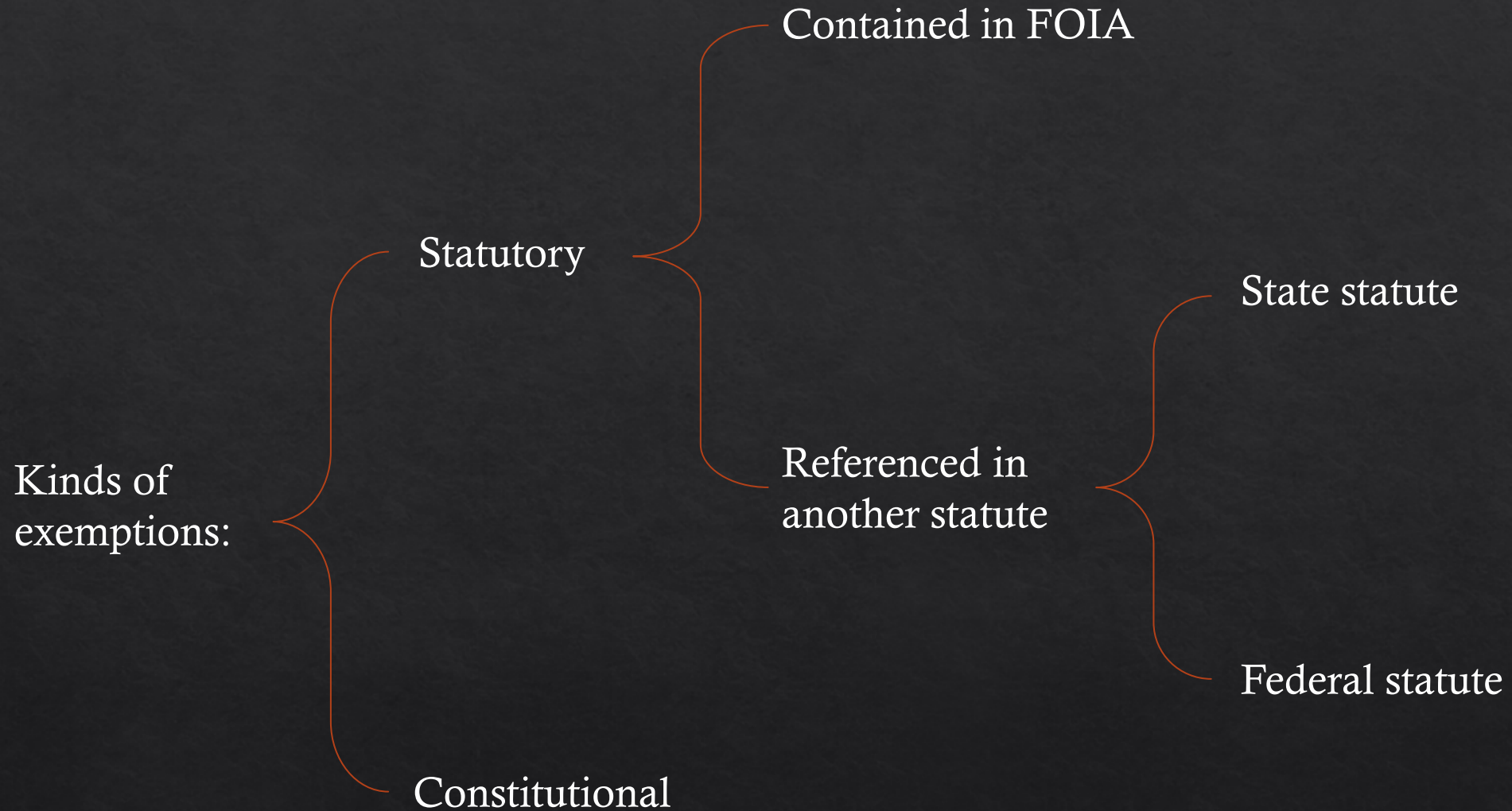
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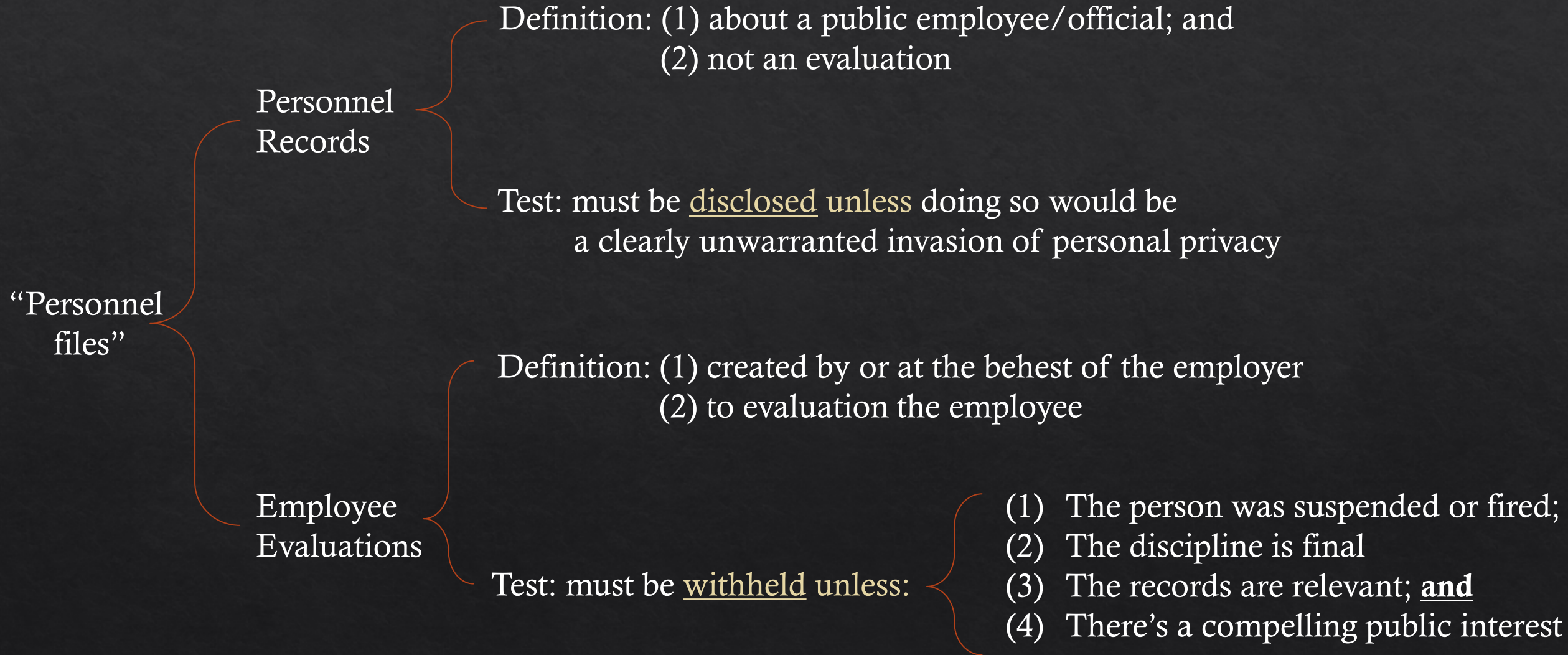
Question 3: Is the record exempt?



Key idea underlying
many exceptions:

*Shield the deliberative process
and
make the product public*

Question 3: Is the record exempt?



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

Mixed Records—Definition

- ◇ 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--Approach

- ◆ Step 1: Classify the records.
- ◆ Step 2: 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.

Complaints by public employees are also usually a personnel record of the complainant.

Question 3—*key exception: working papers*

“unpublished
memoranda,
working papers, and
correspondence of
the...members of the
[GA]”

who: (1) some constitutional officers and their staff

what: memos, correspondence (to/from), “working papers”

when: it is “unpublished”

where: in the hands of an exempt person

why: “promote free exchange of thought”

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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

- ◇ 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?

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
 - ◆ 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

Step 4—Responding to the Request

Act 879 of 2023

25-19-105(a)(3): A custodian shall respond as follows in writing...:

- (A) If no records exist that are responsive to the request, the custodian shall respond that no records exist;
- (B) If any responsive records that exist are subject to exemptions under this chapter or other law, the custodian shall respond and identify the applicable exemptions; and [...]

Responding to the Request— *Charging for copies*

- ◆ Only “actual costs of reproduction”
- ◆ That includes mailing or faxing
- ◆ Doesn’t include employee time
- ◆ > \$25, then pay in advance
- ◆ Itemize the charges

Guides to Interpretation

- ◆ Freedom of Information Handbook (20th ed.)
- ◆ Watkins, Peltz-Steele & Steinbuch, *Arkansas Freedom of Information Act* (Arkansas Law Press, 6th ed., 2017)
- ◆ AG's website [www.arkansasag.gov]

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