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?

An organization is covered by FOIA if it is:

- A **public** entity at either the:
  - State level, or
  - Local level

- A **private** entity that both:
  - Receives direct or indirect public funding, and
  - Is intertwined with government functions
This search supports the use of Boolean operators. To use an operator in your search it MUST be capitalized.

For example, use AND to return all opinions that contain both of the search terms used (e.g., property AND tax).
Alternatively, OR can be used to return opinions that use any of the search terms used (e.g., property OR tax). Finally, NOT can be used to return opinions that do not contain the search terms used after the operator (e.g., property NOT tax).

HTML and PDF links of full opinions will be provided if available.

Enter your search terms. You can perform a full text search or search by Requester, Opinion Number, Year, or Recent Opinions.
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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
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 1
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

◇ 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 record covered?

A writing, recording or other electronic info is:

**defined** as a public record only if it is both:

- constitutes a record of the performance or lack of performance of official functions

**presumed** to meet the definition of a “public record” if it is held either:

- by an entity covered by the FOIA, or
- by a public employee within the scope of the employee’s employment

kept, and
FOIA Overview—3 Step Approach

✧ Step 1: Is entity covered?

✧ Step 2: If so, is the record or meeting covered?

✧ Step 3: If so, are there any exemptions?
Question 3: Is the record exempt?

Kinds of exemptions:

- Statutory
  - Contained in FOIA
  - Referenced in another statute
- Constitutional
  - State statute
  - Federal statute
Key idea underlying many exceptions:

*Shield the deliberative process*

*and*

*make the product public*
Question 3: Is the record exempt?

"Personnel files"

Personnel Records

Definition: (1) about a public employee/official; and (2) not an evaluation

Test: must be disclosed unless doing so would be a clearly unwarranted invasion of personal privacy

Employee Evaluations

Definition: (1) created by or at the behest of the employer (2) to evaluation the employee

Test: must be withheld unless:
(1) The person was suspended or fired;
(2) The discipline is final
(3) The records are relevant; and
(4) There’s a compelling public interest
Compelling Public Interest

- **Factors** to consider when determining that a compelling public interest is present:
  - The nature of the infraction that led 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—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.
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
<table>
<thead>
<tr>
<th>who: (1) some constitutional officers and their staff</th>
</tr>
</thead>
<tbody>
<tr>
<td>what: memos, correspondence (to/from), “working papers”</td>
</tr>
<tr>
<td>when: it is “unpublished”</td>
</tr>
<tr>
<td>where: in the hands of an exempt person</td>
</tr>
<tr>
<td>why: “promote free exchange of thought”</td>
</tr>
</tbody>
</table>

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

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Part 2—FOIA Practice
• Making FOIA requests
• Responding to FOIA requests
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

قوانين 3:Evaluate the record

قوانين Public record?

قوانين Exemptions?

قوانين 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
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.)


✧ AG’s website [www.arkansasag.gov]
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