Freedom of Information Act (FOIA) Update and Refresher

Arkansas City Attorney Association
Summer CLE Program
Arkansas Municipal League Headquarters

2017 Legislative Session

- New security-related exemptions
  - Act 376 – *Department of Community Correction’s “Emergency Preparedness Manual”*
  - Act 474 – State Capitol Police operations, emergency procedures, and personnel.
  - Act 541 – Same as Act 474 for public schools and higher-ed institutions.
  - Act 438 – Arkansas State Police security-related records concerning the Governor’s mansion and the mansion grounds.
2017 Legislative Session

• Law Enforcement Personnel

Act 531 – Exempts any record that depicts or records the death of a law enforcement officer but allows access upon order of a circuit court upon a showing of “good cause” (factors include need for public evaluation of an officer’s conduct and privacy interest of officer’s family)

NOTE: None of these new exemptions will be found in the FOIA itself. They are contained in other parts of the Arkansas Code.

2017 Legislative Session

• Amendments under FOIA


- Act 711 – Amendment to allow disclosure of utility system customers’ “personal information” for billing and other purposes.

- Act 923 – 9-member FOIA Task Force to study/recommend FOIA amendments.
Records and Meetings Refresher

Step 1: Is the entity covered?

- All government entities
- Some private entities
  - Public funding + intertwining
Step 2: Is the meeting/record covered?

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
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
- Public must be able to see how each individual member voted.

The Freedom of Information Act

Step 3: Meetings Exemptions.
Kinds of Exceptions

- licensing exams
- water security
- personnel matters

Procedure for using an exception

- notice
- announcement
- limited attendance

Step 3: Meetings Exemptions.

Personnel Matters

— only for purpose of considering hiring, firing, appointing, promoting, demoting, disciplining, or resigning of public officer or employee
Executive 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

Executive 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.

The Freedom of Information Act

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

- What is a "public record"?
  - (1) Writings, recorded sounds, electronic info, or videos that
  - (2) are kept
Is the record covered?

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

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
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• Rebutting the presumption
  – Record doesn’t reflect the “performance or lack of performance of official functions.”
  – Content based

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Is the record covered?

General rule:

All “public records” must be disclosed unless exempt
The Freedom of Information Act

Records Exemptions.

Kinds of Exemptions:
- Statutory
  - Contained in FOIA
  - Referenced in another statute
- Constitutional
- State Statute
- Federal Statute
Personnel records

&

Employee evaluation records

Some records exceptions
Personnel records

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

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

- **Definition:** Virtually all records pertaining to the individual employee aren’t evaluation records

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

- **Test:** unless doing so constitutes a “clearly unwarranted invasion of personal privacy”

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**Balancing Test**

- **Step 1:** Identify existence and level of any privacy interest  
  - If *de minimis*, release record(s). No balancing.

- **Step 2:** Balancing  
  - Identify *public interest* (degree to which disclosure would shed light on workings of government).
  - If substantial, usually release.
Personnel Records – Commonly Exempted Items

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

Personnel Records – Commonly Items Open to Inspection

- Name
- Salary Info
- Contracts
- Employment applications
- Resumes
- Educational background
- Work History
- Leave Records
- Letters of recommendation
Some records exceptions
Evaluation records

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• Stance: "Must be withheld, unless...."

• Test: unless ...
  – Suspended or fired (level of discipline)
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  - There’s a compelling public interest in the disclosure (compelling public interest).

Compelling Public Interest

Factors to consider when determining whether 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.

**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
Remember

A public employee is entitled to his or her own personnel records and employee-evaluation records.


4 Steps to Evaluate the Request
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- 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

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 convertible.”
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?
    – person with “administrative control”

Evaluating the Request

• Step 2: How long do you have to respond?
  • 3 days if in storage or active use (non-personnel/evaluation)
  • Otherwise: immediately
Evaluating the Request

• Step 3: Evaluate the record
  • Public record?
  • Exemptions?
  • Redactions? (wield the Sharpie)

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
Enforcement

Class "C" misdemeanor

Civil Suits

Guides to Interpretation

• Freedom of Information Handbook (17th ed.)


• AG’s website [www.arkansasag.gov]