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.
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Kinds of Exceptions

- licensing exams
- water security
- personnel matters

Procedure for using an exception

- notice
- announcement
- limited attendance
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
Is the *record* covered?

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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
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”
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 – Common 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….”
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  – Suspended or fired (level of discipline)
  – Final administrative resolution (finality)
  – 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 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
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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

Civil Suits

Class “C” misdemeanor

Civil Suits
Guides to Interpretation

• Freedom of Information Handbook (17th ed.)


• AG’s website [www.arkansasasag.gov]