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ARKANSASAG.GOV

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.



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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.



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2017 Legislative Session

● Amendments under FOIA

- Act 1107 – Local government “opt in” under Ark. Code Ann. § 25-19-108, regarding information on the web.
- 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.



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Records and Meetings Refresher



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Step 1: Is the entity covered?

- All government entities
- Some **private** entities
 - Public funding + intertwining



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Step 2: Is the meeting/record covered?



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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



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How many make a meeting?

- no quorum required
- any particular number?
- no polling or secret telephone conferences



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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)



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Are e-mails meetings? (Op. 2005-166)

- Usually not
- But they could be—depends on all the facts



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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



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What if the meeting is covered? (Part 2)

- **Attendance** not participation at meetings
- Public must be able to see how each individual member voted.



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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

Step 3: Meetings Exemptions.



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Personnel Matters

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



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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



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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



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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 .



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The Freedom of Information Act

Step 2: 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



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 - (2) are kept



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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



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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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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
- **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



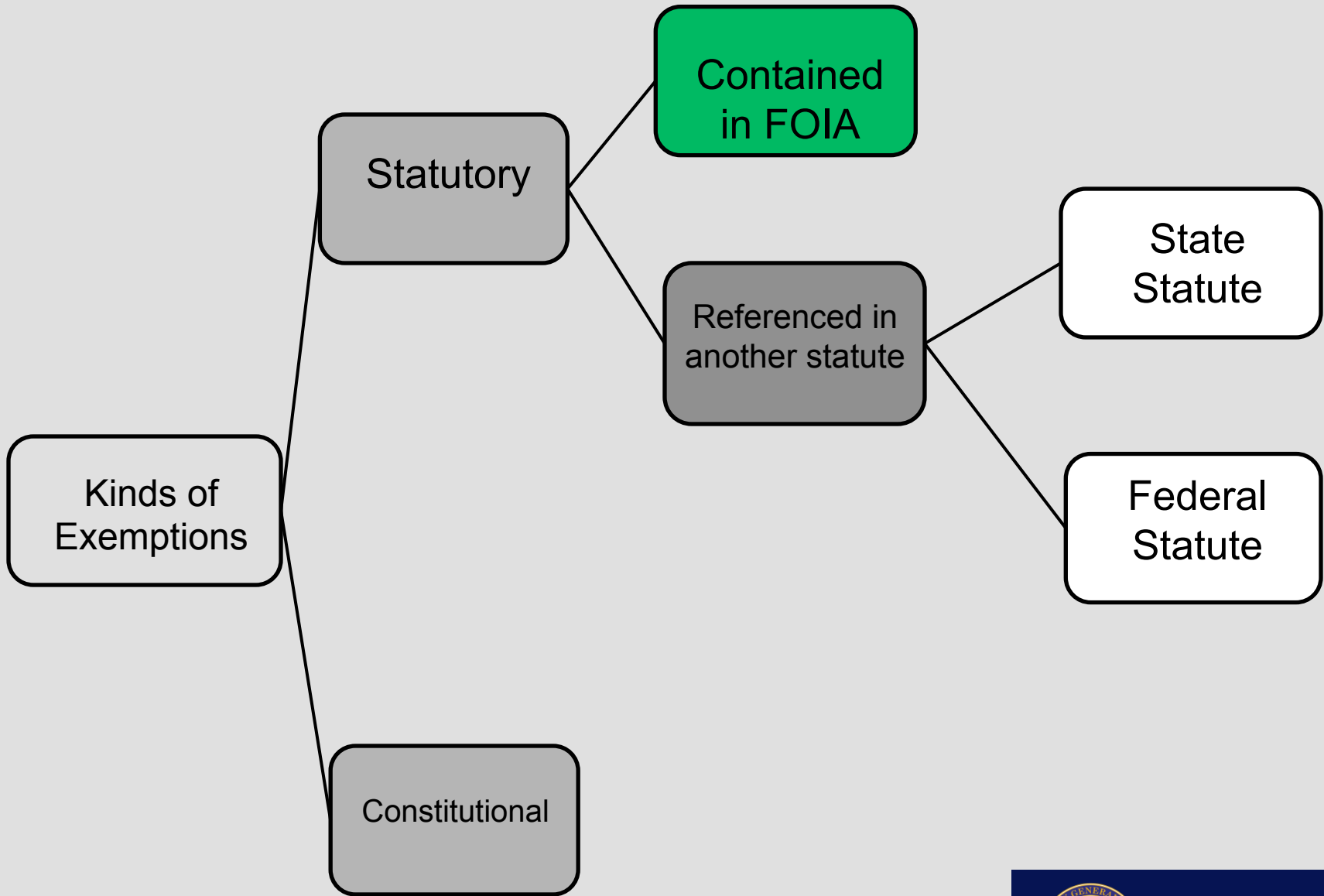
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The **Freedom** of Information Act

Records Exemptions.



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Personnel records

&

Employee evaluation records



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Some records exceptions

Personnel records

- Definition: Virtually all records pertaining to the individual employee aren't evaluation records
- Stance: “It must be disclosed, unless....”



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Personnel records

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- 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.



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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



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Personnel Records – Common Items Open to Inspection

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



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Some records exceptions

Evaluation records

- Definition: Any records created by (or at the behest of) employer to evaluate an employee
- Stance: “Must be withheld, unless....”



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- Test: unless ...
 - Suspended or fired (level of discipline)



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 - Suspended or fired (level of discipline)
 - Final administrative resolution (finality)



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



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- Stance: “Must be withheld, unless....”
- Test: unless ...
 - 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).



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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.



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Mixed Records



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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.



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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.



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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



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Remember

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



-- Ark. Code Ann. § 25-19-105(c)(2)



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4 Steps to **Evaluate** the Request



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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



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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 convertible.”



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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”



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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**



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Evaluating the Request

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



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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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Enforcement



Civil Suits



Class "C" misdemeanor



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Guides to Interpretation

- Freedom of Information Handbook (17th ed.)
- Watkins, Peltz-Steele & Steinbuch, *Arkansas Freedom of Information Act* (6th ed., 2017)
- AG's website [www.arkansasag.gov]



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