

ARKANSAS MUNICIPAL LEAGUE

THE CIVILPEDIA HANDBOOK

A GUIDE TO MUNICIPAL
GOVERNMENT IN ARKANSAS

SECTION 5

FREEDOM OF INFORMATION ACT

FIRST EDITION JANUARY 2024

TABLE OF CONTENTS

INTRODUCTION	4
DISCLAIMER	4
SECTION V. FREEDOM OF INFORMATION ACT	5
CHAPTER 1. INTRODUCTION TO ARKANSAS' FOIA: FUNDAMENTALS FOR MUNICIPAL GOVERNMENT	5
CHAPTER 2. THE REQUEST, THE RESPONSE AND THE NUANCES OF THE FOIA	5
A. Overview	5
B. The Types of FOIA Requests	6
1. A Request to Inspect Public Records	6
2. A Request to Allow a Requestor to Copy Public Records	6
3. A Request for the Custodian of Records to Make a Copy of a Public Record and Give that Copy to the Requestor	6
C. Format or Medium of a FOIA Request	7
D. How Specific the FOIA Request Needs to Be	7
E. Who Can Make a FOIA Request?	7
F. Responding to FOIA Requests	7
1. Are you covered by the FOIA?	8
2. Is the record a public record?	8
3. How soon do you need to respond?	9
4. Does an exception apply?	9
5. Who is the custodian of the records?	9
6. In what format or medium does the requestor want the record?	10
7. What if the records are in active use or storage?	11
8. To charge or not to charge? That is the question.	12
9. The new law on responding to a FOIA request.	14
G. Public Records Exceptions to the FOIA	14
1. Law Enforcement Exemptions: Ongoing Investigations, Criminal Informants and Undercover Officers	15
2. Competitive Advantage and Trade Secrets	18
3. Exceptions for Municipal Utility Systems and Public Water Systems	18
4. Employment Records: Personnel Records and Employee Evaluations/Job Performance Records	20
5. Child Maltreatment Act Exemption	23
CHAPTER 3. PUBLIC MEETINGS	23
A. Definition of Public Meeting	24
B. Notice Requirements, Regular Meetings and Special Meetings	26
C. Exemptions from Meeting Requirements	27
D. Audio/Video Recording	28
CHAPTER 4. ENFORCEMENT	29
A. Introduction	29
B. Civil Remedies and Attorney's Fees: Public Records	29
C. Civil Remedies and Attorney's Fees: Public Meetings	31
D. Criminal Penalties	31
CHAPTER 5. QUESTIONS & ANSWERS	32

INTRODUCTION

Welcome to the first edition of the *Arkansas Municipal Civilpedia: A Guide to Municipal Government in Arkansas*. The primary purpose of the *Civilpedia* is to provide a practical guide to assist elected officials, newly elected and incumbent alike, in learning everything you need to know about your municipal government. While the *Civilpedia* will not replace the need to consult an attorney every now and then, it will provide you with the fundamental information you need regarding your statutory duties and responsibilities, how to pass ordinances and resolutions, municipal boards and commissions, revenue sources for municipalities, human resource issues, and much more. Further, it includes checklists, charts and timelines to provide practical guidance for municipal officials. The *Civilpedia* provides real-world examples and cites Arkansas statutes and case law, and it is designed to be updated on a regular basis as the Arkansas Code is amended and to reflect any changes in case law.

Before diving in, it is important to note that Arkansas statutes are laws passed by the Arkansas General Assembly and are codified into the Arkansas Code Annotated of 1987 as amended. The *Civilpedia* cites many statutes in the Arkansas Code and throughout it you will see Arkansas Code Annotated (abbreviated as A.C.A.) followed by pairs of numbers. When you see, for example, A.C.A. § 14-42-102, it means that the statute can be found in Title 14 – Chapter 42 – Subchapter 1. In this example, Title 14 references “Local Government,” Chapter 42 references “Government of Municipalities Generally” and Subchapter 1 references “General Provisions.” The *Civilpedia* will help you become familiar with the layout of the code, and you’ll learn to recognize that when you see something like A.C.A. § 14-43-104, you know that Chapter 43 pertains predominantly to cities of the first class.¹

DISCLAIMER

The information contained within this handbook is not intended as legal advice for any specific issue that may arise. The *Civilpedia* is meant to be used as a resource to learn more about municipal government in Arkansas. As you know, or will soon find out, many of the issues and challenges municipal governments face on a day-to-day basis are very fact specific. Elected officials are responsible for consulting with legal counsel when questions arise concerning the application of the law to a particular set of facts. This handbook is intended solely for educational and informational purposes.

¹ There will also be times you read citations with the word “et seq.” after them, such as A.C.A. § 14-44-101 et seq. “Et seq.” is an abbreviated form of a range of Latin words that simply means “to follow.” So, if you see A.C.A. § 14-44-101 et seq., it will reference not only A.C.A. § 14-44-101, but every other statute in subchapter one, which in this case would be A.C.A. § 14-44-101 through A.C.A. § 14-44-117 (which is the last statute in this particular subchapter).

SECTION V. FREEDOM OF INFORMATION ACT

Chapter 1. Introduction to Arkansas' FOIA: Fundamentals for Municipal Government

As a municipal official, you already know the importance of Arkansas' Freedom of Information Act (FOIA). At a high level, the FOIA ensures your city or town upholds its commitment to transparency, keeps the public informed and guarantees openness in government. And this commitment to openness is spelled out right in the law:

It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials.²

Before we jump into the details, let's establish some basics. The FOIA is Arkansas' "sunshine law," and it ensures the public's right to access public records and attend public meetings.³ These topics are each covered in detail below, along with the all-important enforcement portion of the FOIA. There are 12 distinct sections in the Arkansas Code dedicated to the FOIA—sections 25-19-101 through 25-19-112.⁴ However, these 12 sections do not contain every FOIA provision of Arkansas law. In fact, many exceptions to the FOIA are found elsewhere in the Arkansas Code. For instance, there's a public disclosure exception in the Child Maltreatment Act in A.C.A. § 12-18-104.⁵

The importance of complying with the FOIA cannot be overstated. The FOIA protects and emphasizes the public's right to know the workings of government. This is why the FOIA contains substantial penalties for non-compliance. These penalties can be both civil and criminal, but losing the trust of the citizen is the biggest consequence of all.

So, how does a municipal government comply with the FOIA? This section of *Civilpedia* aims to answer that question and more. Of course, since the FOIA is extensive, we cannot cover everything in detail, but we can use this section of the *Civilpedia* to focus on the portions of the FOIA that cities and towns will likely encounter. Over the next few chapters, we will review public records, public meetings, and the criminal and civil enforcement of the FOIA. We hope this will shed some light on the sunshine law by giving you a practical guide to refer to when you have questions about the FOIA.

Chapter 2. The Request, the Response and the Nuances of the FOIA

A. Overview

In this chapter, we will focus on public records and responding to requests for public records. We will cover:

- Types of FOIA requests, and from whom you will receive these requests.
- The important steps you need to take in responding to FOIA requests.
- What is, and what isn't, considered a "public record" under the FOIA.
- Common FOIA exemptions and exceptions to the disclosure of public records that you may encounter.
- Some important nuances of the FOIA and a few rules to keep in mind when responding to FOIA requests.

As we navigate the legal, practical and sometimes confusing areas of public records requests, we will offer tips to help you understand what the FOIA requires of you. Figuring out the details of the request, locating the records and responding to the request can feel overwhelming, but we will try to make it easier by breaking down the specific rules to keep in mind and by using examples to show how the rules work in practice.

² A.C.A. § 25-19-102

³ A.C.A. § 25-19-105 (public records) and A.C.A. § 25-19-106 (public meetings).

⁴ The FOIA has sections for definitions, penalties, public records, open public meetings, attorney's fees, special requests for electronic information, the Arkansas Freedom of Information Task Force, and certain requests from law enforcement.

⁵ A.C.A. § 12-18-104 ("Any data, records, reports, or documents that are created, collected, or compiled by or on behalf of the Department of Human Services, the Division of Arkansas State Police, or other entity authorized under this chapter to perform investigations or provide services to children, individuals, or families shall not be subject to disclosure under the Freedom of Information Act of 1967"). See also A.C.A. § 16-19-1104 (exempting records that identify victims of sex offenses from public disclosure).

B. The Types of FOIA Requests

As a city or town official or employee, your duty to provide access to public records begins when you receive a “FOIA request.” Once you have received this request, you will then be tasked with the important job of evaluating and responding to that request. If you have never received or responded to a FOIA request, you may be asking, “What does a FOIA request look like?” We will break that down below.

The most common type of FOIA request is when a citizen asks a custodian of records of a city or town to make copies of certain public records and have those records available for pickup by the requester. While requesting a copy of certain public records is a very common type of FOIA request, this is not the only type of request. Under the FOIA, there are three types of public record requests.⁶

1. A Request to Inspect Public Records

The first type of FOIA request—a request to inspect public records—means just that. A citizen will request access to public documents in order to inspect them. When this happens, you will need to provide reasonable access and reasonable comfort so the requester can inspect these records. That seems kind and polite, and it is also the law.⁷ The definitions of “reasonable access” and “reasonable comforts” depend on the specific facts in each situation.

Keep in mind: If there is a request to inspect records, the requester does not have access to documents to which a FOIA exemption or exception would apply. This means that, if necessary, you will need to redact the information that is exempted from disclosure before allowing the requester to review the records. This also means any copies of public records would need to contain those same necessary redactions. This applies also to the next type of FOIA request.

2. A Request to Allow a Requestor to Copy Public Records

While most requests are for the custodian to make a copy of a public record and give that copy to the requester, there are instances in which the requester will ask to make the copy themselves, most likely by using their cell phone’s camera. This is allowed under the FOIA; in fact, it is a well-recognized “independent right” of a member of the public “to make his or her own copy of a public record.”⁸ However, all FOIA exemptions and exceptions still apply. If the public record is exempt from release, the requester cannot make a copy of that record. Also, if the document contains exempt information that needs to be redacted before the document is releasable, then the requester cannot make a copy of that document until the information is redacted. For example, a requester cannot take a photo of a city employee’s personnel record before the employee’s Social Security number is redacted.

The term “copying” has a loose interpretation, and the FOIA does not list all the ways a citizen can make a copy of a public record.⁹ The FOIA does contain examples, but that list is “without limitation,” which means there are no restrictions on how members of the public can make copies of public documents.¹⁰ A court will interpret the term in a way that encourages access to public information.¹¹

3. A Request for the Custodian of Records to Make a Copy of a Public Record and Give that Copy to the Requestor

This is the most common request, and it is fairly self-explanatory. A citizen will make a request that documents be located, copied and provided to them. Your obligation under the law is to provide copies of those documents quickly and completely, without any undue delay. Of course, there may be costs associated with copying these

6 A.C.A. § 25-19-105(a)(2)(A) (“[a] citizen may make a request to the custodian to inspect, copy, . . . or receive copies of public records”); see *Motal v. City of Little Rock*, 2020 Ark. App. 308, at 14–17, 603 S.W.3d 557, 566 (“[FOIA] clearly permits a citizen to make three independent types of requests under FOIA: (1) request the custodian to allow him or her inspect the public record; (2) request the custodian to allow him or her to copy the public record; or (3) request the custodian to make a copy and give [receive] that copy to him or her”).

7 A.C.A. § 25-19-105(d); see also *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995); *Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004).; Ark. Op. Att’y Gen Nos. 1997-199 (discussing that an agency’s system should not “hamper or frustrate” the citizen’s right to inspect and copy); 2009-158 (explaining that an exact-change policy “adopted in order to inhibit FOIA requests” would violate the law); 1995-355. This does not mean the citizen has the right to take the records somewhere else to copy them, but the custodian can agree to a different place.

8 See *Motal*, 2020 Ark. App. 308, at 15, 603 S.W.3d at 566.

9 *Motal*, 2020 Ark. App. 308, at 17, 603 S.W.3d at 567 (“we hold that in keeping with our mandate to interpret FOIA liberally to accomplish the purpose of promoting free access to public information, the term ‘copy’ should be liberally interpreted to include the taking of a photograph”).

10 See A.C.A. § 25-19-105(a)(1)(A), -105(a)(2)(A), and 25-19-105(d)(1) (each section states the public has “the right to inspect and copy, including without limitation copying through image capture, including still and moving photography and video and digital recording”).

11 See A.C.A. § 25-19-105(a)(1)(A). See also *Motal*, 2020 Ark. App. 308, at 17, 603 S.W.3d at 567.

documents, and your city or town can charge for those costs. But those costs are only the actual costs of copying these records (e.g. cost of the paper, ink, etc.). Generally, personnel time spent complying with this request cannot be charged to the requester. There are a few exceptions to this (i.e. dash cam videos and reformatting certain electronic records.¹²) We will go into more detail on this subject in Part F, but the general rule is that your city or town can charge for actual costs but does not have to charge anything at all.

C. Format or Medium of a FOIA Request

There is no required format or medium for a FOIA request. The request could be made over the phone, via text, in person, by fax or via some other electronic means. In practical terms, it does not matter how you receive the FOIA request.¹³ Some cities have a way for citizens to make FOIA requests by submitting a form on the city's website. While this makes very good practical sense, be careful not to require that requesters use that online form to make requests. You still have the responsibility to comply with requests when someone doesn't use the form.

Also, there is no requirement for the requester to say the following words: "I am making a FOIA request." In fact, there are no required "magic words" someone has to use when making a FOIA request. Requests don't even need to mention the FOIA at all. A good rule of thumb is to assume any request for information is a FOIA request, regardless of whether the FOIA is invoked.

D. How Specific the FOIA Request Needs to Be

It is possible to receive requests for records that seem too broad, too vague or too voluminous to comply with. It's true that FOIA requests need to be "sufficiently specific" so that a custodian can find the requested record "with reasonable effort."¹⁴ But, be careful: Arguing that a FOIA request is not specific enough does not relieve the duty public officials have to release a public record under the FOIA. If the custodian truly lacks the details needed to figure out which records respond to a request, then it's possible that the requester needs to narrow the request to a more reasonable scope.¹⁵ And, in this case, the custodian of records should work with the requester and ask for the details needed to locate the requested records. Bear in mind that your municipality cannot deny requests because they are "too broad and too burdensome."¹⁶ It is critical to be a good public steward by engaging in meaningful conversations with the requestor to determine what they actually want.

E. Who Can Make a FOIA Request?

In theory, anyone in the world could send your city a request, but the FOIA requires responses to FOIA requests made by a citizen of Arkansas. If someone from out of state makes a FOIA request, you are under no legal obligation to respond to that request.

How do you know if someone is a citizen of Arkansas? More than likely, you will know the requester and thus know they are an Arkansas citizen. There are also times the requester makes it clear, or something makes it clear, that they are from another state. In both those situations, it is easy to know whether the FOIA applies or not.

However, sometimes people you do not know will make a request. What do you do then? Do you ask for a copy of their driver's license or a copy of their last utility bill? While there is no clear legal guidance, here is our best advice: If there is reason to believe the person requesting the information is not a citizen of Arkansas, then request a driver's license or, at the very least, ask that they confirm they are an Arkansas resident.

F. Responding to FOIA Requests

So, you received one of the types of FOIA requests we mentioned above. Now what? It depends because there is much to consider. Always start by focusing on the ultimate goal of getting the requested information to the

¹² A.C.A. §§ 25-19-109 & 25-19-112.

¹³ A.C.A. § 25-19-105(a)(2)(B) (records requests under the FOIA "may be made in person, by telephone, by mail, by facsimile transmission, by electronic mail, or by other electronic means provided by the custodian").

¹⁴ A.C.A. § 25-19-105(a)(2)(c) (providing that "[t]he request shall be sufficiently specific to enable the custodian to locate the records with reasonable effort").

¹⁵ Ark. Op. Att'y Gen. No. 2020-049. Here, the Attorney General noted a request was not sufficiently specific when it asked for "every record related to every employee." The Attorney General explained the request did not have a time frame and would require that the custodian find and provide "many hundreds of records," including thousands of pages of trivial records and duplicates.

¹⁶ See Daugherty v. Jacksonville Police Dep't, 2012 Ark. 264, at 7-8, 411 S.W.3d 196, 200. See also Ark. Op. Att'y Gen. No. 2003-337 (narrower request needed when request asked for "every record related to every employee").

requester. While we can't discuss everything about the FOIA you need to keep in mind when you receive a FOIA request, these are some of the things you should always consider:¹⁷

1. Are you covered by the FOIA?
2. Is the record a public record?
3. How soon do you need to respond?
4. Does an exception apply?
5. Who is the custodian of records?
6. In what format or medium does the requester want the record?
7. What if the records are in active use or storage?
8. To charge or not to charge? That is the question.
9. The new law on how to respond to FOIA requests.

1. Are you covered by the FOIA?

We will start with the first and easiest question: Is your municipality covered by the FOIA? The answer is yes. All governmental entities, municipal and otherwise, fall under the umbrella of Arkansas' FOIA laws since they carry out public duties and use public funds.¹⁸

Keep in mind: Other publicly funded entities, i.e. not a government entity, are also covered by the FOIA. This means that even a private organization may have to comply with the FOIA when its work is entwined with public affairs and receives public money.¹⁹

2. Is the record a public record?

The second question is not as easy: Does the record you have that responds to the FOIA request meet the definition of "public record" in the FOIA?

When determining whether the record requested is a public record, the focus is primarily on the content of the record. The definition of public records is broad, and it covers records kept that are related to performing an official public function. It also presumes that records maintained in a public office or by a public employee during the scope of employment are public records. If the record requested is kept in city hall or another city or town building, it is more than likely a public record.

The custodian of records' first job is to locate the public records that respond to the request. A record is a public record based on its content, not its form. As a municipal official, it is good practice to assume the record in question is a public record unless it is obvious that the record does not meet the definition of a public record.

What is the definition of a public record?

The FOIA defines "public record" very broadly, and the law casts a wide net to cover nearly all types of records in all types of formats. Essentially, the definition of public records includes any document an entity is legally required to keep. The definition also includes all records "which constitute a record of the performance or lack of performance of official functions." Finally, the definition also presumes any records maintained by an entity subject to FOIA are public records.²⁰ In other words, if your city or town has records that are held either (1) in a public office or (2) by a public official or employee, then the law will likely treat them as public records. With that said, there are a few very narrow ways your city or town can establish that the records "do not constitute a record of the performance or lack of performance of official functions;" however, these are few and far between.²¹

Does the format of a public record matter?

¹⁷ See Ark Op. Att'y Gen. No. 2021-068 ("A document must be disclosed in response to a FOIA request if all three of the following elements are met. First, the FOIA request must be directed to an entity subject to the act. Second, the requested document must constitute a public record. Third, no exceptions allow the document to be withheld").

¹⁸ A.C.A. § 25-19-103(7)(A)

¹⁹ These include private entities that receive public funds, perform activities of public concern, and work on things that intertwine it with governmental entities.

²⁰ A.C.A. § 25-19-103(7)

²¹ Pulaski Cty. v. Ark. Democrat-Gazette, Inc., 370 Ark. 425, 440-41, 260 S.W.3d 718, 722 (2007); Ark. Op. Att'y Gen. No. 2023-040

Again, the content of a public record matters much more than its form. The FOIA's public record definition lists some examples of the kinds of formats a record can take, like "writings, recorded sounds, films tapes, electronic information or computer-based information, or data compilations in any medium."²²

"Public records" means writings, recorded sounds, films tapes, electronic information or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.²³

3. How soon do you need to respond?

The rule is: You need to provide the records requested to the requester immediately. Although, as we'll explain below, some situations might make an immediate response impracticable. For example, a public record that is in "active use" or "storage" may mean you cannot provide the record immediately. When active use or storage truly makes a record unavailable for release, then you still have to respond to the requester to (a) tell them the record is in active use or storage and (b) to set up a date and hour within three days for the release, inspection or copying of the record.²⁴ However, this "Three-Day Rule" is only for records in active use or storage. It does not apply to all requests for records.²⁵

4. Does an exception apply?

Most of the time, if the record is a public record, then the city or town needs to provide the information and disclose the records. But, as you will see below, there are exceptions to the rule that all records are subject to disclosure under FOIA.²⁶

Keep in mind: As you make your way through the discussion of the exemptions and exceptions that shield a record from public disclosure, remember that the document requested should be provided unless a narrow exception or exemption to the FOIA clearly applies.

Keep in mind: Timely and complete responses to FOIA requests necessitates being properly trained. There is no substitution for being properly trained.

5. Who is the custodian of the records?

Per the law, FOIA requests should be directed to the "custodian of the records," which we have mentioned above several times. But who is the custodian of the records? Essentially, that person is the person with administrative control over the records. What does administrative control over the records mean? Unfortunately, the law is not crystal clear, but here is an example to help:

Clark, the city clerk for Civildelphia, Arkansas, received a call from Cindy Citizen, who lives in Eureka Springs. On the phone, Cindy asks to speak with the custodian of records. Clark says that he administers city records. Cindy says she is calling to make a FOIA request to come by and take pictures of city council minutes from the last two years.

Is Clark the custodian of records? Probably so, but since the city has administrative control over the records, Clark is likely not the only custodian of the records. Others in the city would likely also be considered custodians. Let's change the facts of the *Civildelphia* example to help explain this.

City Council Member Shelby of Civildelphia, Arkansas, received a call from Cindy Citizen, who lives in Eureka Springs. On the phone, Cindy asks to speak with the custodian of records. City Council Member Shelby says she does not control the records and hangs up on Cindy.

Is Council Member Shelby the custodian of the records? Maybe. As a city official, she can be considered a custodian, which really means that it's possible for any city or town official to be considered a custodian of the records. Regardless of whether Shelby is a custodian of the records or not, she should not simply hang up on Cindy.

²² A.C.A. § 25-19-103(7)(A)

²³ A.C.A. § 25-19-103(7)(A)

²⁴ A.C.A. § 25-19-105(e)

²⁵ See the section titled "What if the Records Are in Active Use or Storage."

²⁶ "A document must be disclosed in response to a FOIA request if all three of the following elements are met. First, the FOIA request must be directed to an entity subject to the act. Second, the requested document must constitute a public record. Third, no exceptions allow the document to be withheld." Ark. Op. Att'y Gen. No. 2023-049.

While it may not be clear whether she is a custodian of the records, as a city official she has some responsibility to ensure the public has access to the records requested. The proper response from Council Member Shelby would be to let Cindy know that City Clerk Clark is the custodian of the records, and he can assist Cindy in receiving the documents. Also, Council Member Shelby should let Clark know that Cindy has requested records and put Cindy in contact with City Clerk Clark. While Shelby may not be a custodian of the records, it's best to assume she is a custodian of some sort, even if she does not have administrative control over the records. And, as a custodian of some sort, Shelby now has the legal obligation to let Cindy know which custodian has control over the records.

Keep in mind: This provision is new to Arkansas' FOIA. It passed during the 2023 legislative session and reinforces the lesson above: "If the custodian lacks administrative control over any responsive records that may exist, the custodian shall respond and identify the appropriate custodian to direct the request to, if known or readily ascertainable."²⁷

To reiterate, if you receive a FOIA request and if you do not have control of the records requested, please let the requester know you do not have such control. Also, let the requester know who does have control of the records. And finally let that person with control of the records know of the FOIA request. This will ensure the public's right to the records is protected and ensure your city or town is complying with the FOIA.

What about records that belong to the city or town but they are kept by a private entity? To discuss this issue, let's change the scenario.

Clark, the city clerk for Civildelphia, Arkansas, received a call from Cindy, who lives in Eureka Springs. On the phone, Cindy asks to speak with the custodian of records. Clark says that he administers city records. Cindy says she is calling to make a FOIA request for certain bank records. However, these bank records are not kept at city hall; instead, the bank keeps these records.

Does Clark need to provide these records to Cindy? Short answer: yes. These records belong to Civildelphia even though the records are kept at the bank. According to the Arkansas Supreme Court, even when a private custodian has the disclosable public records of a public entity, the public entity—not the private custodian—still has the obligation to provide reasonable access to the records. Ultimately, public officials have “the obligation to produce the public record” even if “a private entity or individual may keep the record for a public official.”²⁸

So, if you know where the records are located, do what you can to ensure those records are provided to the requester. It is your responsibility.

6. In what format or medium does the requestor want the record?

Another key provision of the FOIA concerns the type of format or medium in which your city or town must provide the records to the requester. Remember, an Arkansas citizen can request that the public records be in a certain “format” or “medium.” These terms are defined in the law. “Format” means the organization, arrangement and form of electronic information for use, viewing or storage, and “medium” means the physical form or material on which records and information may be stored or represented.²⁹ Be careful not to get stuck on these definitions. The rule to remember here is that you must provide the records in a format that is “readily available” or a format that is “readily convertible” and feasible for the city to convert using its existing software.³⁰

Keep in mind: If a record is not readily convertible to the requester's preferred format, this doesn't make the record undisclosable. It will still need to be produced in another readily available format your city or town has.

In practice, the most likely scenario is when a requester asks for paper records to be converted into electronic records. In this case, paper documents would be scanned and saved as a PDF file on a flash drive that is provided to the requester. This conversion, among others, is required by law. Also, remember that electronic data should be in a format that makes the files readable, searchable and disclosable by the requester.³¹ If you have electronic records saved as a dataset that can only be opened with a specific city or paid software, then you most likely need to convert it into something else.

²⁷ A.C.A. § 25-19-105(3)

²⁸ Apprentice Info. Sys., 2019 Ark. 146, at 5, 544 S.W.3d 39, 43

²⁹ A.C.A. § 25-19-103(3) & (4)

³⁰ Pulaski Cnty. Special Sch. Dist. v. Delaney, 2019 Ark App. 210, at 5-6, 575 S.W.3d 420, 424. “[FOIA] requires that an agency, upon request, furnish records in a medium or format in which the records are not maintained, as long as conversion to the new medium or format is readily achievable”).

³¹ Ark. Op. Att’y Gen. No. 2014-137. This opinion presents an interesting scenario with the request for DRS data, which is maintained in a way that makes it unorganized, unreadable and difficult to retrieve individual documents. The request for DRS data includes an implied request to convert it into a usable format, but the Attorney General said it would not be readily convertible to do this, even if it is technically possible.

Keep in mind: You can agree to provide data in a format that is not necessarily “readily convertible.”³² So, again, be careful not to get stuck in the precise definition of “readily available” or “readily convertible.” The FOIA encourages cities and towns to do what is necessary to provide the information in a medium or format preferred by the requester. And, while you are not legally required to go above and beyond the FOIA, it is good practice to consider doing so.

While you must provide the requested records in a medium or format that is readily available, you are “not required to compile information or create a record in response to a request made under this section.”³³ In other words, if a requester requests a record that does not exist, you are not required to create that record. Although, this does not mean you do not have an obligation to provide a compilation of responsive records.

While you do not have to compile information or create a record, creating a document in response to a FOIA request might be best depending on the situation. For example, let’s say a requester emails the following request:

Please provide the document that contains a list of the following information: all trash cans purchased by Civildelphia in the last five years; how much money the city paid for each trash can; the vendor of each of the purchased trash cans; and what date each trash can was purchased.

Even though all this information is releasable public information, let’s assume your city or town does not have a document that contains a list of all the information requested. However, you know the information the requester wants, and you know that the information is contained in other documents, such as invoices or purchase orders. While you do not have to create the list, it may be easier to do so. Here’s why.

If you let the requester know that no such list exists, the requester will likely respond with “Please provide all documentation that shows all of Civildelphia’s trash can purchases in the last five years.” Now you will have to provide all the invoices, purchase orders and other documents with information about your city’s trash can purchases. Rather than spending extra time, a more efficient way may be to let the requester know on the front end that “the city does not keep a document containing such a list, but we have created a list based on our records that provides you with the information requested. If you need anything further, please let us know.” This saves everyone time and helps maintain a good relationship with the requester.

7. What if the records are in active use or storage?

As mentioned above, your response to a FOIA request is “to immediately provide to the requester any responsive records” unless the records are “in active use or storage.”³⁴ What does “in active use or storage” mean? As with many provisions of the FOIA, the answer is not always clear. A good rule of thumb is to consider whether the record is available to be immediately provided when requested—“[i]f a public record is in active use or storage and therefore not available at the time a citizen asks to examine it.” This could mean the records are kept in a storage building on the other side of town and the only person with the key is the mayor who is out of town on vacation. Or it could mean that the record is in city hall, but a city employee is currently using the record to finish up a time-sensitive project. Again, there is no clear rule. The Attorney General encourages you to use your common sense.³⁵

What should you do if you receive a request for a public record that is truly unavailable because the record is in active use or storage? In this case, the “Three Day Rule” we referred to earlier comes into play. Under this rule, you need to respond in writing to the requester. In your response, first you need to tell the requester that the record is in active use or storage. Second, your written response needs to “set a date and hour within three (3) working days at which time the record will be available” for public inspection and copying.³⁶ Remember, this rule does not apply unless the record cannot be disclosed immediately because the record is in active use or storage. If the responsive records can be provided immediately, then they should be provided immediately.

Keep in mind: Just because a public record is in active use or storage does not mean you cannot provide it immediately. If it is available, go ahead and provide it to the requester. This provision of the FOIA should not be viewed as an exception to disclosure, and just because the document is difficult to produce because it is in active use or storage does not mean it cannot be disclosed immediately.

³² See A.C.A. § 25-19-109, which explains that custodians can agree to provide data in a specific medium or manner or convert it into a format that is not readily convertible.

³³ A.C.A. § 25-19-105(d)(2)(C).

³⁴ A.C.A. § 25-19-105(a) provides that “[t]he requirements of this subsection do not affect the obligation of a custodian to immediately provide to the requester any responsive records not in active use or storage.”

³⁵ Ark. Op. Att’y Gen. No. 2015-095. The opinion offers four propositions on these rules. Custodians need to disclose nonexempt public records. Most records are in active use or storage. Custodians shouldn’t wait to disclose but rather disclose records as soon as practicable.

³⁶ A.C.A. § 25-19-105(e)

8. To charge or not to charge? That is the question.

It can sometimes be expensive to fulfill a FOIA request. The costs incurred by cities and towns when responding to records requests raise questions about recouping those costs. A question we often receive is: “Can we charge a fee for the costs of producing a record?” The short answer to that question is yes, but only for the “actual costs of reproduction.”³⁷ The FOIA does not require you to copy and deliver the records completely free of charge, but it places clear limits on the costs you can charge to offset the expenses of reproducing records to fulfill a request.³⁸

FOIA defines which specific costs you can legally charge to the requester: “Any fee for copies shall not exceed the actual costs of reproduction.”³⁹ Those “actual costs of reproduction” do not include every possible cost a city has related to fulfilling a FOIA request.⁴⁰ There are some expenses that the FOIA does not consider to be an actual cost of reproduction. The only “actual costs” you may charge for are the costs of:

- the medium of reproduction;⁴¹
- supplies, equipment and maintenance; and
- mailing or transmitting the record by facsimile or other electronic means.⁴²

The FOIA allows you to charge for paper, ink, a USB drive or CD, and postage, and those charges must reflect what your city actually pays to copy and mail a document. Calculating the actual costs can be complicated, and if your city decides to charge, it must provide an itemized breakdown of these charges.⁴³ The time it takes to calculate actual costs might be greater than the costs themselves. Realistically, the only cost you can trace to a specific request is how much the city pays to mail paper records to a requester. Another point to note: The FOIA allows your city or town to require a citizen to pay for those actual costs in advance but only if the charge is greater than \$25.⁴⁴ So, if you receive a request for copies of hundreds of paper documents that will cost the city \$100 to copy and mail, then you can require the citizen to pay for the fee upfront.

The most significant expense your city or town will likely have is not paper or postage, but personnel time. However, a city or town may not charge for the time its employees spend fulfilling a request. This includes the time spent finding a record, evaluating it for exemptions, making redactions, copying it and sending it to the citizen who requested it.⁴⁵ Also excluded is the time spent determining if a FOIA exemption applies, or the cost of the time it takes to redact parts of the record.⁴⁶ If it takes a city or town employee 30 hours to find and review the records, you cannot factor in the employee’s hourly rate when determining how much to charge as a fee.⁴⁷

Keep in mind: There are a few narrow exceptions to this for certain requests for accident reports, certain electronic data and law enforcement media. We will cover those in more detail below.

If you are considering charging a fee, it is important that you make sure that the request is a request for copies of records. Remember, there are three types of requests: to obtain copies of a record, to inspect records, and to make copies of a record. This fee provision only applies when the citizen wants to receive copies of a record from the city.⁴⁸ This means you cannot charge a fee if the citizen only wants to inspect public records or when a citizen makes their own copy of a record.⁴⁹

37 A.C.A. § 25-19-105(d)(3)(a)(i)

38 There are a few sections in the FOIA about charging fees for reproduction. See A.C.A. §§ 25-19-105(d)(3), -109, -112. Section 25-19-105(d) limits charges to actual costs of reproduction. Section 25-19-109 concerns charging fees for “special requests” for electronic data. In 2021, section 25-19-112 was added to inform law enforcement about charging for video or body camera footage. Note that the fees we’re discussing now are different from attorney’s fees related to FOIA violations.

39 A.C.A. § 25-19-105(d)(3)(a)(i)

40 See Ark. Op. Att’y Gen. Nos. 2009-186; 2006-093 (charge cannot include personnel time to retrieve electronic records, like emails); 2009-060 (stating copying costs are determined on a case-by-case basis); 2005-259.

41 A.C.A. § 25-19-103(3). Recall the “medium” is the “physical form or material” the record takes, such as paper or optical disks (e.g., a CD or DVD).

42 A.C.A. § 25-19-105(d)(3)(A)(i)–(ii)

43 A.C.A. § 25-19-105(d)(3)(B) (“The custodian shall provide an itemized breakdown of charges under subdivision (d)(3)(A) of this section”).

44 A.C.A. § 25-19-105(d)(3)(A)(iii). See Ark. Op. Att’y Gen. No. 2003-135 (a city fulfilling a request for copies of a terminated employee’s records “may charge a copy fee in advance if the fee is estimated to exceed \$25.00”). The Attorney General also addressed the city’s concerns about nonpayment. The Attorney General explained that risk is part of the statute: “[i]f the copy cost is greater than \$25.00, you can be assured that the fee will be paid.”

45 A.C.A. § 25-19-105(d)(3)(A)(i). (No charge for “existing [city] personnel time associated with searching for, retrieving, reviewing, or copying the records”).

46 A.C.A. § 25-19-105(f). See Ark. Op. Att’y Gen. No. 2005-259 (charging a fee for a request to inspect records, that is, listen to cassette tapes, is not consistent with the FOIA).

47 *Daugherty v. Jacksonville Police Dep’t*, 2012 Ark. 264, at 12, 411 S.W.3d 196, 203. In this case, when fulfilling a request for a copy of electronic files, the department could not “charge fees that exceeded the cost of reproduction and certainly could not include the hourly rate” of an employee to calculate the charged fee.

48 A.C.A. § 25-19-105(d)(3)(A)(v)

49 A.C.A. § 25-19-105(f)

Should you charge a fee at all? The law allows but does not require that your city charge a fee for the costs of reproducing and sending copies of records in response to a request.⁵⁰ In most cases, supplying records will not be too costly for your city or town. Remember, the touchstone of the FOIA is transparency. Charging fees for every request, including simple requests, may discourage access to information and conflict with FOIA's purpose to maintain openness in government. Declining to charge helps build trust with the community and shows your city or town's commitment to transparency.

Accident Reports and Special Requests for Electronic Data

Before moving on, there are other "actual costs" sections of the FOIA we need to address. The fee provision in section 25-19-105(d)(3) begins with "[e]xcept as provided in § 25-19-109 or by law." This means there are other laws that may allow you to charge fees other than your city's actual costs to reproduce and provide records. An example of this is the law that sets a \$10 fee for vehicle accident incident reports from local police.⁵¹

Another exemption to the general "actual costs" rule involves special requests for electronic data. The use of electronic data is a bit misleading. It does not apply to every request for a record that is stored digitally. It does not apply to standard electronic records, such as emails, or the documents your city or town stores on a secure online drive. In those situations, the general "actual costs" rule applies.⁵²

To explain the special requests for electronic data, first remember that the FOIA does not require custodians to create or compile records. It also does not require that custodians supply records in a custom format that is not readily available. However, your city may agree to compile or customize records even though doing so is not required by the FOIA.⁵³ This provision involves requests that go further than what the FOIA typically requires for reproduction. In these cases, a custodian "may agree to summarize, compile, or tailor electronic data in a particular manner or medium and may agree to provide the data in an electronic format to which it is not readily convertible."⁵⁴

The provision encourages custodians to customize or compile data, particularly when doing so is not expensive or time-consuming.⁵⁵ However, this is different from reproduction of records. Rather, it is a situation where the custodian and requester reach an agreement.⁵⁶ In the agreement, the custodian agrees to a request to provide data in a special way and may charge for additional costs other than actual costs. These additional costs include "the actual, verifiable costs of personnel time exceeding two (2) hours associated with the tasks."⁵⁷ However, the charge "shall not exceed the salary of the lowest paid employee or contractor who, in the discretion of the custodian, has the necessary skill and training to respond to the request."⁵⁸

Law Enforcement Media

There is also a specific provision in the FOIA that elaborates on the time and costs law enforcement personnel must spend to fulfill requests for copies of audio and visual media. This section is important for local police departments to understand how to handle requests for body camera footage, dashcam videos or other types of media records kept by law enforcement.

First, note that this section does not mean FOIA does not require disclosure. It's a section that helps law enforcement respond to requests for video and audio recordings. It does so by allowing the department to charge for certain costs unique to audio/video requests.⁵⁹ Here's what to know:

- If fulfilling the request will take less than three hours, there's no charge.

50 Ark. Op. Att'y Gen. No. 2011-060. In this opinion, the Attorney General was asked: "Pursuant to the FOIA, must the custodian of records charge a fee for the actual cost of reproduction of the record?" The Attorney General answered no, "the FOIA does not require custodians to always charge" and the legislative intent behind the fee provision was to modernize the FOIA and codify the "then-current practice" of charging a fee for copies of records.

51 A.C.A. § 27-53-210(c)

52 Ark. Op. Att'y Gen. No. 2006-093

53 A.C.A. § 25-19-109

54 A.C.A. § 25-19-109

55 A.C.A. § 25-19-109(a)(2)

56 Ark. Op. Att'y Gen. No. 2009-186

57 A.C.A. § 25-19-109

58 A.C.A. § 25-19-109

59 A.C.A. § 25-19-109

- If it will require more than three hours, “the request shall be charged at a rate that does not exceed twenty dollars (\$20.00) per hour on a prorated basis for each hour of running time of audio media, visual media, or audiovisual media provided to the requester.” If this is the case, then you may require advance payment.
- As in the other cost provisions, you still need to provide an itemized invoice.

9. The new law on responding to a FOIA request.

A new provision of the FOIA passed in 2023, and while it may not completely alter your city or town’s practice of how it responds to a FOIA request, it is important to keep in mind. The law now requires the custodian of the records to send a written response to (almost) every public records request. This written response can be emailed to the requester; we are not sure if it can be texted to the requester.⁶⁰ More specifically, the FOIA now requires a written response in the following situations:⁶¹

1. If the records that respond to the request do not exist, then the custodian needs to respond and tell the requester that no records exist.
 - ♦ “(A) If no records exist that are responsive to the request, the custodian shall respond that no records exist;”
2. If there are records but an exemption applies, then the custodian has to respond and explain what exemptions apply.
 - ♦ “(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”
3. As mentioned earlier, if the request was sent to someone who is not the custodian, then the response needs to include the identity of the custodian.
 - ♦ “(C) If the custodian lacks administrative control over any responsive records that may exist, the custodian shall respond and identify the appropriate custodian to direct the request to, if known or readily ascertainable.”

G. Public Records Exceptions to the FOIA

Now our discussion moves to the exceptions to FOIA, but first, let’s review where we are in the process. You have received a FOIA request for public records. Since the FOIA applies to your city or town, you must find the records that respond to the request. Your next step is to see if those records fall under the definition of public records. Let’s say those records do exist and are “public records” subject to disclosure under the FOIA. Now what?

The short answer: You need to supply those records. The long answer: You must determine if an exception or exemption to the FOIA applies. Working through the long answer is part of your responsibility as an elected official and/or custodian of the records. In this chapter, our goal is to help you understand the FOIA exemptions a city or town is likely to come across when responding to a FOIA request.

First, always remember that even exempt public records are still public records. The records would otherwise be releasable except that one or more of the FOIA’s exemptions apply. When we say exemptions, we are not just referring to the FOIA law contained in A.C.A. § 25-19-101, *et seq.* Rather, FOIA exceptions and exemptions are scattered throughout the Arkansas Code. Regardless of whichever exemption you think might apply, know that the exemptions to FOIA are always very narrow. Courts will almost always favor disclosure unless it is clear that the record falls neatly within the exemption. The Supreme Court has put it this way: “[i]f the intention is doubtful, openness is the result.”⁶² This is perhaps the most important takeaway from our discussion of FOIA and public records:

⁶⁰ A.C.A. § 25-19-105 provides that “[a] custodian’s response under subdivision (a)(3) of this section may be delivered by electronic mail.”

⁶¹ A.C.A. § 25-19-105 states that “[i]f a custodian knowingly fails to respond as required under subdivision (a)(3) of this section, he or she shall be subject to the penalties in § 25-19-104 for a violation of this chapter.”

⁶² Ark. Dep’t of Com., Div. of Workforce Servs. v. Legal Aid of Ark., 2022 Ark. 130, at 5, 645 S.W.3d 9, 12 (citing Dep’t of Ark. State Police v. Keech Law Firm, 2017 Ark. 143, 2-3, 516 S.W.3d 265, 267).

Keep in mind: It is best to assume a public record is subject to disclosure unless you can prove that a clear exemption applies.

The FOIA has numerous exemptions covering all kinds of documents. We are going to focus on a few of the most common exemptions cities and towns will see and use most often:

- Exceptions that apply to law enforcement related documents
- Exceptions concerning employee evaluations and employee personnel records
- Exceptions applying to water and other municipal utility systems
- Exceptions applying to documents that could give competitive advantage

The vast majority of exceptions and exemptions can be found in A.C.A. § 25-19-105(b) and § 25-19-105(c). Part (b) provides a long list of exemptions for certain kinds of records. In part (c), the FOIA dedicates an entire section on a specific type of FOIA exception for employee-related records, including job evaluation and performance records.⁶³ The exemptions listed in part (b) cover many different but specific kinds of records. Some of the exemptions are more straightforward, like the exemptions for state income tax records, medical records, adoption records and education records.⁶⁴ Others are less clear, like law enforcement records and employment records.

What if the record has exempt and non-exempt information?

There are some instances when the records that fulfill a FOIA request include both disclosable public records and non-disclosable personal or private records. This kind of request would involve providing public records that also include personal notes, messages or documents that do not relate to the job of a public official. When faced with this problem, the custodian must redact or separate the private/personal records from the public records. One example would be when a FOIA request is for all communications between two employees of a city or town who have exchanged both work and personal messages.⁶⁵

The FOIA offers some guidance on what to do when a public record has both information that needs to be disclosed and contains information that fits one of the FOIA exceptions or exemptions. First, a public entity cannot deny a FOIA request because some of the information in a responsive public record is exempt from disclosure. “No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.”⁶⁶ Second, if part of the record is exempt but other parts are not, then “[a]ny reasonably segregable portion of a record shall be provided after deletion of the exempt information.”⁶⁷ The custodian should note how much information was deleted, ideally on the document itself where the custodian made the deletion.⁶⁸ Also, always remember the city or town has to cover the cost of the separation.⁶⁹

Keep in mind: You may be penalized if you fail to produce public documents that are responsive to a FOIA request. However, if you provide the documents but redact what shouldn't be redacted, you may still be penalized. So, pay close attention to the redactions you make.

1. Law Enforcement Exemptions: Ongoing Investigations, Criminal Informants and Undercover Officers

The FOIA exempts certain law enforcement records from public disclosure. At a very high level, the FOIA specifically creates an exception from disclosure for the following kinds of law enforcement records:

⁶³ Part (c) is just one, albeit important, employee-related record exemption pertaining to employee evaluation and job performance records. Other exemptions in part (b) can apply to employees of a public entity too. In fact, part (b)(12) is an explicit exemption for employee-related records exemption disclosure of “[p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”

⁶⁴ A.C.A. § 25-19-105(b)(1)–(2)

⁶⁵ *Myers v. Fecher*, 2021 Ark. 230, 635 S.W.3d 495, 501 (remanding so lower court could “perform a detailed content-based analysis and segregate the messages to determine whether the messages fall within the FOIA definition of ‘public records.’ See *Pulaski I.*”).

⁶⁶ A.C.A. § 25-19-105(f)(1)

⁶⁷ A.C.A. § 25-19-105(f)(2). “Any reasonably segregable portion of the record shall be provided after deletion of the exempt information.”

⁶⁸ A.C.A. § 25-19-105(f)(3) (“The amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, at the place in the record where the deletion was made.”).

⁶⁹ A.C.A. § 25-19-105(f)(4) (“If it is necessary to separate exempt from nonexempt information in order to permit a citizen to inspect, copy, including without limitation copying through image capture, including still and moving photography and video and digital recording, or obtain copies of public records, the custodian shall bear the cost of the separation.”).

1. Ongoing criminal investigations: “Undisclosed investigations by law enforcement agencies of suspected criminal activity”⁷⁰
2. Undercover officers: “The identities of law enforcement officers currently working undercover with their agencies”⁷¹
3. Confidential informants: “Information that could reasonably be used to identify “a confidential informant helping the government with a criminal investigation”⁷²

Of course, each of these exceptions raises questions. For instance, what is an “undisclosed” investigation? Does undercover mean what we think it means? What makes someone a confidential informant?

Then there’s the practical issue: What specific physical or electronic records do these exceptions actually cover? Just because the FOIA has specific exceptions for these kinds of law enforcement records does not mean these are the only exceptions a municipal law enforcement agency can use. For example, it is possible other types of law enforcement records, such as a police officer’s employment records, are exempt because of one of the two employee-related records exceptions we will discuss later. Like with all FOIA exceptions, the three exemptions above are very narrow. Always remember our cardinal rule: Public records should be released unless the exemption clearly applies to that record.

Ongoing Criminal Investigations

What is an “undisclosed” investigation? The word has been described as “one of the most ambiguous phrases in the entire FOIA.”⁷³ Fortunately, the Arkansas Supreme Court has provided guidance:

We have consistently held that the purpose of this statutory exemption is to protect ongoing investigations. “If a law enforcement investigation remains open and ongoing it is one meant to be protected as ‘undisclosed’ under the [FOIA].”⁷⁴

This exception recognizes the sensitive nature of records detailing an ongoing criminal investigation. However, whether this exemption applies to a specific investigation really comes down to the facts of the case, the details for each investigation and the content of the records at issue.⁷⁵ Since evaluating this exemption can be especially difficult for a custodian, we will go through some examples of what to look for to decide if this exemption applies. Of course, we cannot review every instance where the exemption may apply, but we can provide you some basic guidelines.

The City of Civildelphia has a division that administers public benefits to eligible residents. The division processes applications with a ‘formula’ to determine eligibility. After a group of eligible Civildelpians mysteriously lost benefits, they hired the law firm of Will, Kerr & Sons to investigate. The firm sent the city a FOIA request for copies of “all public records containing or referring to the word ‘formula’ . . . including communications, memorandums and emails sent or received by division employees and third parties.” The division provides thousands of responsive records but redacts the vast majority of content. The division argues that the ongoing investigation exemption applies to the information because the formula is used to screen for fraudulent benefit claims. The division also cites a statute permitting city benefits divisions to conduct administrative investigations and hearings and refer the potential criminal fraud to law enforcement.

Will the “ongoing investigation” exemption apply here? In this example, the exemption most likely does not apply. This is because the division is not a law enforcement agency authorized to investigate criminal activity.⁷⁶

⁷⁰ A.C.A. § 25-19-105(b)(6)

⁷¹ A.C.A. § 25-19-105(b)(10)

⁷² A.C.A. § 25-19-105(b)(25)

⁷³ Ark. Op. Att’y Gen. No. 2006-094 (quoting John J. Watkins and Richard J. Peltz, *The Arkansas Freedom of Information Act* 114 (4th ed. 2004)).

⁷⁴ Ark. Dep’t of Com., Div. of Workforce Servs. v. Legal Aid of Ark., 2022 Ark. 130, at 5, 645 S.W.3d 8, 16 (quoting *Martin v. Musteen*, 303 Ark. 656, 660, 799 S.W.2d 540, 542 (1990)).

⁷⁵ Dep’t of Ark. State Police v. Keech Law Firm, P.A., 2017 Ark. 143, 516 S.W.3d 265 (2017)

⁷⁶ This example is based on the facts from Ark. Dep’t of Com., Div. of Workforce Servs. v. Legal Aid of Ark., 2022 Ark 130, 645 S.W.3d 8, (2022). The case involved an algorithm used by the Division of Workforce Services to evaluate pandemic unemployment applications and was part of what DWS called a national effort to combat fraud. The court held the investigation exemption didn’t apply because, as in our example, it was not a law enforcement agency. See *Legislative Auditing Committee v. Woosley*, 291 Ark. 89, 93, 722 S.W.2d 581 (1987) (“exemption includes only agencies which investigate suspected criminal activity under the state penal code and have enforcement powers.”); Ark. Op. Att’y Gen. No. 2006-094.

Rather, the division acts in an administrative capacity only, and it can only refer criminal activity to the police. That’s one of the nuances of the exemption: It applies to public offices with the power to investigate and enforce criminal activity. So, even if your city or town is investigating something that could be criminal, the exemption might not apply.

The use of the phrase “open and ongoing” is somewhat confusing too, because an investigation might be “open” but not “ongoing” enough for the exemption to apply. For example:

Civildelphia received a FOIA request from the family of a victim in a 50-year-old criminal investigation. The family requests records on the case from the last two years. Last year, a true crime podcast did an episode on the case. The police department looked into the speculation from the podcast, but nothing came out of it. No charges have been filed and it’s unlikely any will be soon.

Should the police department release the records to the family? At first glance, the ongoing investigation exemption could apply here—it is an active investigation into suspected criminal activity. However, the exemption will likely not apply under these facts. Given the small amount of case activity in the last two years, the age of the case and the unlikelihood charges will be filed, the Arkansas Supreme Court would likely not classify this as an “open and ongoing” investigation to avoid disclosure under the exemption.⁷⁷

Even if the investigation is open and ongoing, the exemption still only applies if the records are “sufficiently investigative.”⁷⁸ “The mere fact that records relate somehow to an ongoing criminal information will not, alone, support withholding nonexempt public records.”⁷⁹ The “sufficiently investigative” rule has been used to find that the exemption does not apply to every typical law enforcement record, such as documents with routine information and details like jail logs, arrest records, shift sheets and prison-transport manifests.⁸⁰

In short, law enforcement records with routine information (like an incident report with offense details, date, time, location, officers involved) may not be sufficiently investigative for the exemption to apply. On the other hand, the exemption would apply to records where public disclosure would hinder the police’s ability to investigate potential suspects and could be harmful to those under investigation.⁸¹ The kinds of information the exemption seeks to prevent from disclosure include: an officer’s speculations of a suspect’s guilt, assessments of witness credibility, an officer’s internal work product, ballistics reports, fingerprint comparisons, results of blood or other lab tests, and the statements of criminal informants.⁸²

Criminal Informants

The FOIA exemption covering criminal informants is designed to prevent disclosing records that could reveal the identity of individuals who assist the government in criminal investigations. There’s some nuance to this rule.⁸³ First, the investigation must be criminal in nature, and it applies to past or present assistance in open or closed criminal investigations. Next, the exemption applies only “if disclosure of the individual’s identity could be reasonably expected to endanger the life or physical safety” of the person or immediate family member.⁸⁴ Finally, the individual must be a confidential informant, a confidential source, or whose assistance was given “under the assurance of confidentiality.”⁸⁵

The FOIA provides a list of what information could be reasonably used to identify a confidential informant or source. It includes names, dates of birth, physical description, Social Security numbers, driver’s license numbers or other government-issued numbers, work and personal contact information, as well as any other information about the individual someone could reasonably use to identify the person.

77 Dep’t of Ark. State Police v. Keech Law Firm, P.A., 2017 Ark. 143, 516 S.W.3d 265. In Keech, the court thought meager activity in a 54-year-old murder case did not constitute an ongoing investigation. The records were released to the family.

78 Hengel v. City of Pine Bluff, 307 Ark. 457, 463, 821 S.W.2d 761, 764 (1991); Ark. Op. Att’y Gen. No. 2022-006 (“The Arkansas Supreme Court has made clear that not all documents connected with law enforcement are ‘sufficiently investigative’ in nature to qualify for the law enforcement investigation exemption.”).

79 Ark. Op. Att’y Gen. No. 2022-006

80 Ark. Op. Att’y Gen. No. 2006-094

81 Id. (citing Johnson v. Stodola, 316 Ark. 423, 872 S.W.2d 374 (1994)).

82 See id.; Hengel, 307 Ark. 457, 821 S.W.2d 761 (1991); Ark. Op. Att’y Gen. No. 2002-188.

83 A.C.A. § 25-19-105(b)(25)(A)

84 The FOIA specifies the family member must be within the first degree of consanguinity.

85 A.C.A. § 25-19-105(25)(B)

Undercover Officers

The FOIA includes an exception that applies to records that could identify a law enforcement officer who is currently working undercover.⁸⁶ This situation usually arises when a FOIA request asks for identifying information for all law enforcement officers.

For example, consider a FOIA request for photos of all uniformed, plain clothed, non-undercover law officers in a police department. On the department's social media and public transparency sites, anyone could access identifiable information and photos about all the department's officers. The department objected to the FOIA request because identifying undercover officers would be as easy as comparing the requested information for non-undercover offices with the data requested. The Arkansas Supreme Court took up this issue, finding that the undercover officer's exception to FOIA disclosure applied to this FOIA request.⁸⁷ The court put it this way: "knowing who is not undercover would reveal that the officers whose photographs were not released are undercover."⁸⁸

2. Competitive Advantage and Trade Secrets

Hacking and cyber attacks targeting local and state governments are on the rise.⁸⁹ The FOIA acknowledges this risk. FOIA requests for public records that have sensitive computer system and network information that would pose a high risk for these attacks are exempt from disclosure.⁹⁰ This exemption protects things like passwords, personal identification numbers and any other similar record with data or information someone can use to access computer systems.⁹¹ When you review records in responding to a FOIA request, check for information that could lead to a security breach.

3. Exceptions for Municipal Utility Systems and Public Water Systems

There are two exceptions for public records concerning public water systems or municipally owned utility systems. Since FOIA exceptions are narrow, you can only use these exemptions if the requested public records have information about a public water system or municipal utility system. Even so, the exemptions do not apply to all records of the public water or municipal utility system. Generally, they only exempt specific records that have system security information or the personal information of customers.⁹² FOIA defines both "public water system" and "municipally owned utility system" and gives some examples.

"Public water system" means all facilities composing a system for the collection, treatment, and delivery of drinking water to the general public [. . .]

FOIA lists reservoirs, pipelines, reclamation facilities, processing facilities, distribution facilities and regional water distribution districts under The Regional Water Distribution Act as possible examples.⁹³ Public entity-owned water systems and rural water districts likely fall under this definition, and even publicly funded yet privately-owned entities that "serve the public purpose of providing water service" are covered by this exception.⁹⁴

"Municipally owned utility system" means a utility system owned or operated by a municipality that provides: (i) Electricity; (ii) Water; (iii) Wastewater; (iv) Cable television; or (v) Broadband service.

The FOIA specifically says the definition of municipally owned or operated utility systems encompasses consolidated waterworks system, utility systems a city or town leases to a nonprofit to manage or operate, and utility systems owned or operated by a consolidated utility district.⁹⁵ Like the examples for public water systems, the list is

86 A.C.A. § 25-19-105(b)(10)

87 Ark. State Police v. Racop, 2022 Ark. 17, 638 S.W.3d 1 (2022); Ark. Op. Att'y Gen. No. 2014-011. The Attorney General's office takes the position that a law enforcement agency employing undercover officers should not release photographs of any officer.

88 Racop, 2022 Ark. 17, at 5-6, 638 S.W.3d at 4

89 See Sophos, The State of Ransomware in State and Local Government 2023, Sophos (Aug. 01, 2023), <https://www.sophos.com/en-us/whitepaper/state-of-ransomware-in-government>.

90 A.C.A. § 25-10-105(b)(11)

91 Steinbuch, The Arkansas Freedom of Information Act, 8th Edition § 5.01[12] (2022) (Matthew Bender) (citing Ark. Op. Att'y Gen. Nos. 2008-137 & 2003-064). The first explains employee ID numbers that could give access to computer data are exempt; the second explains the exemption applies to credit card account numbers and agency ID numbers that could give access to computerized data.

92 A.C.A. §§ 25-19-105(b)(18)(A) (safety and security information); 25-19-105(b)(20)(A) & (B) (customer information).

93 A.C.A. § 25-19-103(8). The facilities listed are only examples of what could be a public water system. The FOIA makes it clear the list is "without limitation."

94 Ark. Op. Att'y Gen. No. 2007-192. The Attorney General opines that FOIA applies to public water systems in different scenarios, primarily as an analysis of when public funds subject a private entity to FOIA and its exemptions. The opinion says FOIA disclosure applies to records of municipally owned water systems, rural water districts, community water associations and non-public entities that are subject to FOIA. The Attorney General cites Ops. Ark. Att'y Gen. Nos. 2000-129; 1997-244; 2002-285; 2004-205; and 2001-314 to support the above. See Ark. Op. Att'y Gen. No. 227 (2007) (POA water system might trigger FOIA and its exemptions).

95 Subdivision (5)(B) explains the definition of "municipally owned utility system" includes the water and utility systems under the Consolidated Waterworks Authorization Act, § 25-20-301 et seq.; (ii) utility system managed or operated by a nonprofit corporation under § 14-199-701 et seq.; and (iii) utility system owned or operated by a municipality

without limitation. The examples do make it clear the definition of municipally owned utility system is broad and includes utility systems provided by a group of cities and towns, nonprofits, and utility improvement districts. For example, Central Arkansas Water falls within the scope of this definition.

Both exemptions narrowly apply to certain records. The first exempts certain records to promote the safety and security of public water and municipal utility systems. The second exempts records with customers' personal information on them.

Security Records

The safety or security exception covers records with information that if disclosed might put the system's security and protection efforts at risk or in danger. With this general purpose in mind, the FOIA offers some specific examples of the kinds of records that fall under this exception. Possible records that are exempt include:

- Risk and vulnerability assessments
- Plans and proposals for preventing and mitigating security risks
- Emergency response and recovery records
- Security plans and procedures
- Plans and related information for generation, transmission and distribution systems

There is also a catch-all category in the list for records "containing information that if disclosed might jeopardize or compromise efforts to secure and protect the public water system or municipally owned utility system."⁹⁶

Customer Personal Information

The customer information exception exempts records with the personal information of the current and former customers served by public water or municipally owned utility customers.⁹⁷ The exempt personal information includes without limitation:

- Home and mobile telephone numbers;
- Personal email address;
- Home and business address; and
- Customer usage data.⁹⁸

However, the exception contains its own exception. The personal information of public water and municipal utility customers is releasable when the FOIA request comes from the following:

- (a) The current or former water system customer, who may receive their own information.
- (b) A person who serves as the attorney, guardian or other representative of the current or former water system customer, who may receive the information of their client, ward, or principal.

For certain requests, the custodian should consider both who is requesting the information and what the information is being used for. For instance, if a state or federal agency is conducting research, then the information may be disclosed to it as long as the agency or office "agrees to prohibit disclosure of the personal information."⁹⁹ Disclosing the information is also allowed if requested by certain present or past utility providers "for the purpose of facilitating a shared billing arrangement."¹⁰⁰ Finally, if the water or municipal utility system has third

or by a consolidated utility district under the General Consolidated Public Utility System Improvement District Law, § 14-217-101 et seq.

96 A.C.A. § 25-19-105(b)(18)(B)(iv)

97 A.C.A. § 25-19-105(b)(20). This exemption is found in subdivisions (b)(20)(A), and its exceptions are in (b)(20)(B). Ark. Op. Att'y Gen. No. 2023-24 ("The exception for customer-usage data is part of a broader exception for all personal information of former and current customers of public water systems and municipally owned utility systems." To maintain customer privacy, the personal-information exception lists certain customer records that are excluded "without limitation:" (1) home and mobile phone numbers, (2) personal email addresses, (3) home and business addresses and (4) customer-usage data. Each part of the personal-information exception must be given effect. Because the General Assembly listed customer-usage data separately, redacting the customer-usage data to remove other identifying information does not affect this part of the exception.

98 Ark. Op. Att'y Gen. No. 2023-024. The question posed: "Upon request for customer-usage data, can a custodian redact identifying information of customers so that the records can be disclosed without violating this exception?"

99 A.C.A. § 25-19-105(b)(20)(B)(iv). A federal or state office or agency for the purpose of participating in research being conducted by such federal or state office or agency, if the federal or state office or agency agrees to prohibit disclosure of the personal information.

100 A.C.A. § 25-19-105(b)(20)(B)(v). For the purpose of facilitating a shared billing arrangement, a county, municipality, improvement district, urban service district, public utility, public facilities board or public water authority that provides or provided a service to the current or former water system customer or municipally owned utility system customer.

party “agents or vendors” for its billing or administrative services, then customer personal information can be disclosed to the third party, but this is only true when the third party has an agreement with the system prohibiting disclosure to any other person.¹⁰¹

4. Employment Records: Personnel Records and Employee Evaluations/Job Performance Records

As we discussed in Section III, certain parts of an employee’s file can be kept private even though it is a public record.¹⁰² We should make something clear from the start—the FOIA has different exemptions for distinct types of employment records.¹⁰³ These can generally be placed in two categories: personnel records (A.C.A. § 25-19-105(b)(12)) and employee evaluation or job performance records (A.C.A. 25-19-105(c)(1)).

Distinct Exemptions, Distinct Definitions and Distinct Tests

Classifying the record correctly is the initial and vital step because it determines which test you have to work through to see if the exemption applies. “The test for whether these two types of documents may be released differs significantly.”¹⁰⁴ From a practical perspective, an employee’s job evaluation and performance records may be physically kept in the employee’s personnel file. Keep these categories separate in your mind but know that a single record may be a mixed record containing information that custodians need to redact because an exemption narrowly applies to one portion of the record but not the entirety of the record.¹⁰⁵ However, when it comes to employment records, a document can’t be both a personnel record and an evaluation or job performance record.¹⁰⁶

To the first point about redaction of information found in a personnel file, the statute states that the files are only exempt if disclosure of the information would be a “clearly unwarranted invasion of personal privacy” but does not define that phrase.¹⁰⁷ Fortunately, subsequent case law and Attorney General opinions have provided guidance on the sorts of “items that must not be disclosed” when a record “meets the test for disclosure” under the FOIA:

- Personal contact information of public employees, including personal telephone numbers, personal email addresses and home addresses (A.C.A. § 25-19-105(b)(13))
- Employee personnel number (Ops. Att’y Gen. 2014-094, 2007-070)
- Marital status of employees and information about dependents (Op. Att’y Gen. 2001-080)
- Dates of birth of public employees (Op. Att’y Gen. 2007-064)
- Social Security numbers (Ops. Att’y Gen. 2006-035, 2003-153)
- Medical information (Op. Att’y Gen. 2003-153)
- Any information identifying certain law enforcement officers currently working undercover (A.C.A. § 25-19-105(b)(10))
- Driver’s license number and photocopy of driver’s license (Ops. Att’y Gen. 2017-125, 2013-090)
- Insurance coverage (Op. Att’y Gen. 2004-167)
- Tax information or withholding (Ops. Att’y Gen. 2005-194, 2003-385)
- Payroll deductions (Op. Att’y Gen. 98-126)
- Banking information (Op. Att’y Gen. 2005-194)¹⁰⁸
- Education records (Op. Att’y Gen 2005-113)¹⁰⁹

To start the process of classifying records, ask whether the record meets the definition of “personnel records” or “employee evaluation or job performance record.” If it doesn’t meet either of those definitions, then neither

101 A.C.A § 25-19-105(b)(20)(B)(vi). An agent or vendor of the water system or municipally owned utility system that provides a billing or administrative service to the water system or municipally owned utility system provided that the agent or vendor and the water system or municipally owned utility system enter an agreement that prohibits disclosure by the agent or vendor of the water system or municipally owned utility system of the personal information of a current or former water system customer or municipally owned utility system customer to any other person.

102 See Section III, Chapter 2 of Civilpedia, “Employment Law.”

103 They’re often described as “two mutually exclusive groups” with disclosure tests that “differ[] significantly” from the other. See Ark. Op. Att’y Gen No. 2023-055.

104 Ark. Op. Att’y Gen. No. 2020-008

105 Ark. Op. Att’y Gen No. 2020-063

106 See Ark. Op. Att’y Gen No. 2020-051. In this opinion, the custodian classified employee records as personnel and evaluation records. The Attorney General rejected this, saying, “[c]learly, for the purposes of the FOIA, this cannot be so. Personnel records are distinct from employee-evaluation records under the FOIA.” Id. at n.27.

107 A.C.A § 25-19-105(b)(12)

108 Id.

109 See also A.C.A § 25-19-105(b)(2).

employment record exception makes it exempt from disclosure. But if the record does fall under one of the definitions, then you apply the disclosure test for that type of record to see if that exemption applies. In other words, if the record is a personnel record, you apply the test for personnel records. If the record is an employee evaluation or job performance record, then you use the employee evaluation or job performance record test.¹¹⁰

Personal Contact Information of Non-Elected Municipal Employees

The personal contact information of non-elected municipal employees would most likely fall under the personnel records umbrella, but the FOIA specifically exempts this information from disclosure in section 25-19-105(b) (13). The exempted contact information includes at least the employee's home address, personal phone numbers and email addresses.¹¹¹

Defining Personnel Record and Employee Evaluation or Job Performance Record

A personnel record is essentially all records pertaining to individual employees other than employee evaluation or job performance records.¹¹² Classifying a record as a personnel record requires first ruling out that the record is an evaluation or performance record of the individual employee. A record is an evaluation or job performance record if it meets three requirements:

1. The record is created by or at the behest of the employer.
2. The record evaluates the employee.
3. The record details the employee's performance or lack of performance on the job.¹¹³

Therefore, evaluation records are records an employer creates to evaluate a specific employee that details the employee's job performance "with regard to a specific incident or incidents."¹¹⁴ In other words, these kinds of records are a supervisor's review of an employee's job duties in order to evaluate them.¹¹⁵ If any of the three requirements is missing, then the record is not an employee evaluation or job performance record. For example, if the personnel file includes a previous employer's evaluation or job performance record, then the record isn't an employee evaluation record because the employer did not create it.

Payroll and salary records are personnel records. Gross salary information is not exempt as an unwarranted invasion of personal privacy under the exemption. On the other hand, net pay is exempt.¹¹⁶ The private interest of other banking and financial information also outweighs the public interest, such as payroll deductions, tax information, withholdings, insurance coverage, retirement benefits, banking information (for example, the account and routing numbers), and other records with sensitive financial details.

Missing a requirement means you cannot use the employee evaluation or job performance exemption, but the record may still fall under the definition of personnel record. If the record still concerns an individual employee, then it's a personnel record. In other words, personnel records are "all records that pertain to an individual employee and were not created by or at the behest of the employer to evaluate the employee."¹¹⁷ In this case, the custodian would treat it like a personnel file and redact information that would constitute a clearly unwarranted invasion of privacy.

Tests for Disclosure (Personnel Records Only)

Now that you've used the definitions to classify the record as either a personnel record or an employee evaluation or job performance record, it's time to discern if the record passes or fails the disclosure test.¹¹⁸ The test is tied

¹¹⁰ See Ark. Op. Att'y Gen. No. 2023-086.

¹¹¹ A.C.A. § 25-19-105(b)(13)

¹¹² FOIA doesn't give a definition of "personal records," but the Attorney General's office has consistently opined that 'personnel records' are all records other than "employee evaluation or job-performance records" that pertain to individual employees." See id.

¹¹³ See *Thomas v. Hall*, 2012 Ark. 66, 6-9, 399 S.W.3d 387, 391-93; Ark. Op. Att'y Gen. No. 2023-077 (explaining the definitions and tests for each record).

¹¹⁴ Remember, the record can be created at the behest of the employer. That is, the employer orders or asks someone else to create it.

¹¹⁵ *Hall*, 2012 Ark. 66, at 6, S.W.3d at 391

¹¹⁶ Ark. Op. Att'y Gen. Nos. 2023-085; 2005-194

¹¹⁷ Ark. Op. Att'y Gen. No. 2023-077

¹¹⁸ See Ark. Op. Att'y Gen. No. 2021-002 (citing Ark. Op. Att'y Gen. No. 2020-063).

to the classification, and it's crucial to keep them separate. Remember, this test only applies to personnel records. There's an entirely different test for employee-evaluation or job performance records. Here's the test:

Personnel records are open and should be disclosed “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”¹¹⁹

The FOIA doesn't explain how disclosure can invade personal privacy, or what makes it clearly unwarranted. Fortunately, the Supreme Court has used a balancing test when deciding if disclosure is a clearly unwarranted invasion of personal privacy.¹²⁰ The test puts the employee's interest in keeping the information private on one side of the scale, with the public's interest in disclosure on the other. The scale is initially tipped toward the public interest and disclosing the records. Applying the test has two steps:

Step 1. Identify and evaluate the private interest.

First, identify the privacy interest of the information. After that, objectively evaluate how significant or minimal that interest is. A custodian's ultimate job at this step is to determine if the personal or intimate nature of the information in the requested record makes the private interest greater than minimal.¹²¹

- If the private interest is only minimal, then the public interest outweighs it. The scale falls in favor of disclosure, so the custodian should release the records.
- If the privacy interest is significant, not trifling, then move to Step 2.

Step 2. Balance the private interest with the public's interest in disclosure.

The public's interest is based on the purpose of the FOIA: Does releasing this record shed light on how the government performs public functions?

The first step in the balancing act is to identify the private interest. The question to ask next is whether this interest is so personal or intimate in nature to make it more than a minimal interest. If the private interest is only minimal, then the scale tips in favor of disclosure. But if the private interest is more than minimal, then we move on to step two.¹²² In step two, custodians compare the two interests to see if the private interest outweighs the public. This test is an objective one, meaning that custodians should not consider their personal opinions or beliefs about which way the scale should tip.

Tests for Disclosure (Employee Evaluation and Job Performance Records Only)

Employee evaluation records need to meet all parts of a four-part test to be disclosed under the FOIA:

Step 1. Suspension or Termination. The employee was suspended or terminated;

Step 2. Administrative Finality. The suspension or termination is administratively final and is, therefore, incapable of any administrative reversal or modification;

Step 3. Relevance. The records in question formed a basis for the decision to suspend or terminate the employee; and

Step 4. Compelling Interest. The public has a compelling interest in the disclosure of the records in question.

If the record at issue was “generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct,” then it's an employee evaluation record.¹²³ Suspension and termination letters that contain the reasons for that action are also employee evaluation records.¹²⁴ Suspension let-

¹¹⁹ A.C.A. § 25-19-105(b)(12); *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992)

¹²⁰ *Young*, 308 Ark. at 598, 826 S.W.2d at 255

¹²¹ *Id.*

¹²² Ark. Op. Att'y Gen. Nos. 2023-086; 2020-063

¹²³ Ark. Op. Att'y Gen. No. 2015-057; *Thomas*, 2012 Ark. 66, at 9–10, 399 S. W.3d. at 392–93)

¹²⁴ Ark. Op. Att'y Gen. No. 2023-086.

ters are not always employee evaluation records. For instance, a suspension letter can be a personnel record when it hasn't evaluated the employee for allegations of misconduct.

“Mixed Records”

Sometimes, a FOIA request might ask for “mixed records.”¹²⁵ Mixed records are those that are:

- More than one person's evaluation,
- At least one person's evaluation and at least one person's personnel record, or
- More than one person's personnel record.¹²⁶

If you have mixed records, you need to parse through the records and classify them in portions based on the employees. This means you should apply the definitions to see if the responsive records would disclose another employee's personnel record or employee evaluation record. If that's the case, then your job is to apply the right test to each portion to determine if it's disclosable.¹²⁷

5. Child Maltreatment Act Exemption

Earlier, we referred to other exceptions located elsewhere in the Arkansas Code outside of the FOIA itself. These exemptions are “laws specifically enacted” to limit public disclosure.¹²⁸ One example is the Child Maltreatment Act, which has several public disclosure exceptions and detailed procedures in order to protect the confidentiality of records related to child maltreatment.¹²⁹ Similar protections are afforded to the victims of sexual assault. The Child Maltreatment Act specifically exempts from the FOIA:

*Any data, records, reports, or documents that are created, collected, or compiled by or on behalf of the Department of Human Services, the Division of Arkansas State Police, or other entity authorized under this chapter to perform investigations or provide services to children, individuals, or families shall not be subject to disclosure under the [FOIA].*¹³⁰

Additionally, the Act also prohibits any re-disclosure of this information by law enforcement, a prosecuting attorney or a court.¹³¹ The non-disclosure mandate of this Act applies to local law enforcement agencies that conduct child maltreatment investigations.¹³² The Child Maltreatment Act exemptions operate somewhat differently than other FOIA exemptions. Many public records can be disclosed after certain exempted information is redacted, but this exemption includes the entire record with information about a child maltreatment investigation. An example of this exemption comes from the facts behind the case of *Dillard v. City of Springdale*.¹³³ In that case, a FOIA request led to the release of reports that detailed a child maltreatment investigation. Though the names of children were redacted from the reports, the identities of the child-victims were nonetheless easy to discern, this is because the parents' names and victims' ages were not redacted. Given that redaction will not always ensure confidentiality, the Child Maltreatment Act exempts the whole record or report from a child maltreatment investigation.

Chapter 3. Public Meetings

As mentioned above, the FOIA can generally be broken down into two main focuses: records and meetings. Open public meetings are part of the bedrock of an open and accountable government. Discussions about how public funds are being spent and what decisions are being made that impact the lives of citizens must be held in public. This is a large part of why the FOIA is so important, and as with records, “the FOIA is also to be liberally

¹²⁵ See e.g., Ark. Op. Att'y Gen. No. 2023-055. The Attorney General reviewed a FOIA request for records from an internal investigation of an employee's complaint against a co-worker. The records at issue were (1) the investigator's memo and (2) emails between the investigator and employee that the investigator forwarded to agency staff. All the records were mixed records.

¹²⁶ Ark. Op. Att'y Gen. Nos. 2023-086; 2020-037

¹²⁷ Ark. Op. Att'y Gen. Nos. 2022-006; 2023-086

¹²⁸ A.C.A. § 25-19-105(a)(1)(A)

¹²⁹ A.C.A. §§ 12-18-101 to -1011

¹³⁰ A.C.A. § 25-18-104(a)

¹³¹ A.C.A. § 25-18-104(b)

¹³² Ark. Op. Att'y Gen. No. 2016-068

¹³³ *Dillard v. City of Springdale*, No. 5:17-CV-5089, 2022 U.S. Dist. LEXIS 23349, at *21 (W.D. Ark. Feb. 9, 2022); *Dillard v. City of Springdale*, 930 F.3d 935, 943 n.5 (8th Cir. 2019)

interpreted most favorably to the public interest of having public business performed in an open and public manner.”¹³⁴

A. Definition of Public Meeting

The FOIA provides a very useful definition of public meetings: “Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all municipalities . . . shall be public meetings.”¹³⁵ Essentially, this means all meetings of the governing body of your city or town are public meetings. What constitutes a “governing body?”

The term “governing body” does not necessarily mean the entire governing body. “Governing body” also does not mean a quorum of the governing body. Instead, the best rule to follow is that a gathering of two or more members of your city or town’s governing body could be considered a “meeting” under the FOIA and thus be open to the public. So, rather than focus on the number of participants, the most important thing to consider is what is being discussed in that gathering. Unfortunately, there is no hard and fast rule about what conversations have to happen in order for a “meeting” to occur. We do, however, have guidance from the Arkansas Supreme Court that helps: “any group meeting called by the mayor or any member of the city council at which members of the city council, less in number than a quorum, meet for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council.”¹³⁶

With the words of the Supreme Court in mind, here is the safest definition of public meeting for purposes of the FOIA: A public meeting is any gathering of two or more members of the governing body for the purpose of discussing a municipal issue for which there is the likelihood an action will need to be taken or will need to be discussed taking. If the meeting is for that purpose, then it is a meeting that shall be open to the public.

‘Formal’ and ‘Informal’ Meetings

For purposes of the FOIA, there is no distinction between a formal or informal meeting. Both are contemplated by the FOIA and thus must be public if the meeting fits the definition above. Again, rather than focus on the formal, or informal, nature of a meeting, the determinative factor about whether a meeting should be public is the content of that meeting.

Meetings via Phone, Text or Email

Not all meetings of governing bodies are held in person. Meetings can also occur via phone or email. While we know of no case directly addressing text messages, we can safely say that text messages can also be considered a meeting. Of course, always remember the content of the conversation is what determines whether the phone call, email or text message is a “public meeting” for purposes of the FOIA. Remember, if the meeting is done “for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council.”¹³⁷

It’s been long held by the Arkansas Supreme Court that phone calls can constitute meetings, and the Court has recently expanded this to other forms of electronic communication:

“We therefore have no difficulty in concluding that FOIA’s open-meeting provisions apply to email and other forms of electronic communication between governmental officials just as surely as they apply to in-person or telephonic conversations.

It is unrealistic to believe that public business that may be accomplished via telephone could not also be performed via email or any other modern means of electronic communication.”¹³⁸

One-on-One Meetings and Polling (aka Daisy Chaining)

Now, let’s turn to “polling,” or as we like to call it, “daisy chaining.” This is when a city official or employee—but not necessarily a member of the governing body—contacts members of the governing body individually to discuss a matter on which the governing body will take

¹³⁴ Harris v. City of Fort Smith, 359 Ark. 355, 350, 197 S.W.3d 461, 646 (2004)

¹³⁵ A.C.A. § 25-19-106(a)

¹³⁶ Harris v. City of Fort Smith, 359 Ark. 355, 350, 197 S.W.3d 461, 646 (2004)

¹³⁷ Mayor & City Council of El Dorado v. El Dorado Broad. Co., 260 Ark. 821, 824, 544 S.W.2d 206, 208 (1976)

¹³⁸ City of Fort Smith v. Wade, 2019 Ark. 222, at 7, 578 S.W.3d 276, 280

action.¹³⁹ For example, a vote on whether to buy a new fire truck will be taken at the next city council meeting. The fire chief contacts each member of the city council to inform them of the reasons a new fire truck is needed and to ask how they will vote. All this is done outside of the presence of the public, and it is known as “polling” or “daisy chaining.” While this is all informal, it is still a meeting held outside the view of the public and is thus a violation of the FOIA.

According to the Arkansas Supreme Court, when the purpose of the informal one-on-one meeting is to “obtain a decision of the Board as a whole” the meeting is subject to the FOIA and thus must be public.¹⁴⁰ Conducting a series of one-on-one informal meetings to obtain a decision is a violation of the FOIA. And just because the official or employee who made the calls is not a member of the governing body, that does not circumvent the public meetings requirement of the FOIA.¹⁴¹

Informational-Only Meetings

Let us now turn to a common FOIA question we receive from city or town officials: “As mayor, does the FOIA prevent me from talking with any city councilperson about city business?” The answer is no; the FOIA is not that restrictive. However, whether the FOIA requires this type of discussion to occur in a public meeting very much depends on the situation. There is a very fine line between sharing information with a city council member about what is happening in the city and talking with city council members “for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council.” While we cannot provide you a bright line rule, we can find some guidance from the Arkansas Supreme Court:

“[Mr. Kelly, the City Administrator] did not violate the open-meetings provision of the FOIA when he presented to individual Board members, in advance of a study session, a memorandum expressing his opinion on a proposed ordinance that might come before the Board.”¹⁴²

While helpful, it is important to know more about the facts of this situation to understand the lesson of the statement above. This is from a case involving the city of Fort Smith and the city administrator, Mr. Kelly. During Mr. Kelly’s first year on the job, he evaluated the city’s existing personnel and administrative organization. In doing so, he discovered that, while he did not have the authority to hire or fire department heads, the board of directors could grant him that authority. So, Mr. Kelly prepared a memorandum, draft ordinance and other documents proposing the board give him that authority. Prior to a board study session,¹⁴³ Mr. Kelly delivered that memorandum to five of the seven members of the board. As he was delivering the memorandum, two members of the board expressed to Mr. Kelly their preliminary support for the measure, and two members of the Board expressed their disfavor with the proposal. Under those circumstances, the court determined no meeting had occurred.

Incidental Meetings and Chance Encounters

Another common question is: “I’m a city council member and I go to church with Chris, another council member. Am I violating the FOIA by talking with Chris during our Sunday school class?” The answer is no . . .

139 While a council member could call each of the other council members to poll them too, that would not be considered polling; instead, because two council members would be discussing an issue that will soon come before the governing body as a whole, each of the calls would constitute a public meeting and thus having those public meetings in private would violate the FOIA.

140 See *Harris v. City of Fort Smith*, 359 Ark. 335, 365, 197 S.W.3d 461, 467 (2004). “Under the particular facts of the matter before us, we conclude that an informal meeting subject to the FOIA was held by way of the one-on-one meetings. The purpose of the one-on-one meetings was to obtain a decision of the Board as a whole on the purchase of the Fort Biscuit property. Counsel for the City at oral argument acknowledged that the issue in this case did not involve a meeting of two as discussed in *El Dorado*, supra, but rather involved conversations that took place with all seven Board members. The facts of this case are more analogous to *Rehab Hospital*, supra, where this court found that polling the Executive Committee to determine the Committee’s decision was a meeting that was subject to the FOIA.”

141 The FOIA may not be circumvented by delegation of duties to others. See, e.g., *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). *Harris v. City of Fort Smith*, 359 Ark. 335, 365, 197 S.W.3d 461, 467 (2004).

142 *McCutchen v. City of Fort Smith*, 2012 Ark. 452, at 12, 425 S.W.3d 671, 679

143 Pop Quiz: Is the board’s “study session” a meeting under the FOIA? Answer: Yes. Two or more members of the governing body are meeting “for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council.” *Mayor & City Council of El Dorado v. El Dorado Broad. Co.*, 260 Ark. 821, 824, 544 S.W.2d 206, 208 (1976).

unless you and Council Member Chris are talking to discuss a “matter on which foreseeable action will be taken by the city council.” In other words, if you are talking about that week’s Sunday school lesson or about the football team’s victory the day before, then your discussion would not be considered a meeting. The Arkansas Supreme Court does not apply the FOIA “to a chance meeting or even a planned meeting of any two members of the city council.”¹⁴⁴ So, meeting after Sunday school is not considered a public meeting under the FOIA unless city business is being discussed.¹⁴⁵

Always remember, it is the content of the discussion between city officials that is the most important factor in determining whether that discussion is a public meeting under the FOIA. It is the ultimate goal of the FOIA to allow the public to know what is happening in their government. “Thus, the conduct of public business, for purposes of the Freedom of Information Act, does not consist merely of the final result reached by a public body, but rather is a spectrum including all phases of the process by which an end result is achieved, including deliberations, discussion, and information gathering. Accordingly, the Freedom of Information Act gives the public the right to observe the entire spectrum, not just selected parts.”¹⁴⁶

B. Notice Requirements, Regular Meetings and Special Meetings

Fortunately for us, the notice requirements are much simpler to explain compared to what a meeting is or is not under the FOIA. The Arkansas Legislature has laid it all out very clearly. The main thing to keep in mind is that the notice requirements are different for regular meetings and special meetings.

Regular Meetings

While the FOIA contains no definition of “regular” meetings, the term presumably refers to regularly scheduled meetings of governing bodies. For those regular meetings, “the time and place of each regular meeting shall be furnished to anyone who requests the information.”¹⁴⁷

Keep in mind: If someone requests notice for regular meetings, they don’t need to ask again to be entitled to notice for every meeting. Once someone has requested notice, you should keep providing it until they ask for it to stop.

While the FOIA does not give any guidance concerning the form of that notice, always remember the reason why public notice is required for public meetings is to ensure the citizens know when decisions impacting them are made. Whether the notice is sufficient to provide proper notice to citizens is difficult to determine, but please take whatever steps you believe are sufficient and reasonable to ensure notice is provided.

Special (Emergency) Meetings¹⁴⁸

Notice requirements for regular and special (or emergency) meetings are a bit different. First, let’s discuss when you can have a special meeting.

Special (emergency) meetings can occur whenever your city or town chooses, however the special called meeting can only occur two hours after notice has been given for that special meeting.¹⁴⁹ As is the case with the notice requirements for regular meetings, there is no hard and fast rule as to what constitutes legally sufficient notice. An email to the radio station manager is likely sufficient, but a text message to the radio station manager’s brother is not. But rather than worry about whether the notice is sufficient, our advice is to provide as much notice through

¹⁴⁴ Mayor & City Council of El Dorado v. El Dorado Broad. Co., 260 Ark. 821, 824, 544 S.W.2d 206, 208 (1976); see also Ark. Op. Att’y Gen. No. 96-317 (“casual or ‘chance encounters’ will ordinarily not fall within the act.”).

¹⁴⁵ “Because it is quite natural that members of such entities establish social relationships that lead to contact outside working hours, an open meetings law construed to cover discussion of public policy incidental to social encounters is probably too restrictive. On the other hand, the Arkansas FOIA expressly provides that closed sessions must not be held to defeat the spirit of the open meetings requirement. Accordingly, a social function that is used as a device to circumvent the FOIA should be treated as a violation of the act.” Ark. Op. Att’y Gen. No. 95-020; see also Ark. Op. Att’y Gen. No. 2001-065.

¹⁴⁶ Ark. Op. Att’y Gen. No. 80-16

¹⁴⁷ A.C.A § 25-19-106

¹⁴⁸ The FOIA makes no distinction between a “special” and “emergency” meeting. Because we most often use the term “special called” meeting, we will use that term going forward.

¹⁴⁹ In the event of special meetings, the person calling the meeting shall notify the representatives of the newspapers, radio stations, and television stations, if any, located in the county in which the meeting is to be held and any news media located elsewhere that cover regular meetings of the governing body and that have requested to be so notified of emergency or special meetings of the time, place, and date of the meeting. Notification shall be made at least two hours before the meeting takes place in order that the public shall have representatives at the meeting.

as many means as is reasonably possible. In our view, there is no such thing as too much notice, so always err on the side of more.

Per the FOIA, you “shall notify the representatives of the newspapers, radio stations, and television stations, if any, located in the county in which the (special) meeting is to be held.”¹⁵⁰ You may ask, “Our local radio station never comes to our meetings, never asks any questions about our meetings, and has commented that they do not have the time to come to our meetings; so, do we have to provide the radio station notice?” The answer is yes. The FOIA requires notice to the radio station regardless of whether they will attend, have attended or want to attend the meeting.

What does “located in the county” mean? What does “located” mean, particularly in the age of the internet? If you are wondering whether to notify a particular media outlet because it may not be technically located in the county, notify it anyway. Remember our advice above: Err on the side of more. Remember, too, that the FOIA is designed to foster and encourage citizen engagement. The more notice the better to accomplish that laudable goal.

Aside from the media in your county, the FOIA also requires notice to other media outlets outside of your county, but only under certain circumstances. You “shall notify . . . any news media located elsewhere that cover regular meetings of the governing body.” But, to be entitled to notice for emergency or special meetings, news media must have “requested to be so notified of emergency or special meetings of the time, place, and date of the meeting.”

The law doesn’t provide precise definitions of keywords like “requested” or “cover,” which makes it difficult to give precise advice. We think it is safe to advise that a quick email or simple text from the newspaper editor asking to be notified would be sufficient. As for what “cover regular meetings” means, again, we do not know. But if the radio station sends someone to the meetings two or three times a year, that would probably constitute “cover.” Again, the FOIA is designed to encourage more citizen engagement, so err on the side of notifying too many people rather than parse these definitions.

C. Exemptions from Meeting Requirements

As with public records, there are exceptions to the FOIA’s requirements that meetings be open to the public. Meetings that are not open to the public are called “executive sessions,” but there are very few and very limited reasons to go into executive session.

Executive Session to Discuss Certain Employment Issues

The only reasons you will go into executive session are to consider “employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.”¹⁵¹ It is a common belief that executive sessions are available for all employment issues, but that is not correct. It bears repeating: Executive sessions are only allowed to consider “employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.”

In the event you go into an executive session for one of these reasons, you “shall” announce the “specific purpose” of the executive session in public before going into executive session.¹⁵² Unfortunately, the law is not clear on what specific words you should use to publicly announce the purpose of the executive session. For example, if you are going into executive session to discuss demoting an employee, it may not be sufficient to announce to the public, “We are going into executive session to discuss an employment matter.” However, you could ensure compliance with the law by announcing, “We are going into executive session to discuss the demotion of an employee.” You do not have to be so specific that you would identify the employee. If you did have to be that specific, the rationale for going into executive session would be lost. We suggest making a motion to go into executive session, stating the purpose for going into executive session, followed by a second and vote.

¹⁵⁰ A.C.A. § 25-19-106(b)(2)

¹⁵¹ A.C.A. § 25-19-106(c)(1)(A)

¹⁵² A.C.A. § 25-19-106(c)(1). By using the term “specific purpose,” the legislature made plain that the announcement must reflect why the governing body is invoking the exemption. For example, “we are going into executive session to consider the demotion of an employee” would suffice because Section 25-19-106(c)(1) specifically lists demotion as one of the matters that can be discussed at a closed meeting. By contrast, a general statement that “we are going into executive session to consider personnel matters” would not satisfy the requirement.

If you are in an executive session and a decision is made, whatever decision is made is not legal unless that decision is ratified in the open meeting.¹⁵³ This means that the governing body can consider a decision and come to that decision in executive session, but that decision is legal and effective only when that decision is formally voted on in a public meeting.

As for who can attend these executive sessions, it is not just anyone. Other than the governing body, the following individuals can attend executive sessions: (1) the person holding the top administrative position in the public agency, department or office involved; (2) the immediate supervisor of the employee involved; and (3) the employee. But these individuals can only attend if the governing body requests their attendance. In addition, if the executive session is to interview an applicant “for the top administrative position in the public agency, department or office involved,” that applicant may attend the executive session “when so requested by the governing body.”

Keep in mind: City attorneys cannot attend these types of executive sessions.

Executive Sessions to Discuss Certain Water, Sewer and Utility Issues

Your city or town is also allowed to go into executive session “for the purpose of considering, evaluating, or discussing matters pertaining to public water system security or municipally owned utility system security as described in § 25-19-105(b)(18).” The matters described in that section include:

- A. Records, including analyses, investigations, studies, reports, recommendations, requests for proposals, drawings, diagrams, blueprints, and plans containing information relating to security for any public water system or municipally owned utility system.
- B. The records under subdivision (b)(18)(A) of this section include:
 - (i) Risk and vulnerability assessments;
 - (ii) Plans and proposals for preventing and mitigating security risks;
 - (iii) Emergency response and recovery records;
 - (iv) Security plans and procedures;
 - (v) Plans and related information for generation, transmission, and distribution systems; and
 - (vi) Other records containing information that if disclosed might jeopardize or compromise efforts to secure and protect the public water system or municipally owned utility system.

The law does not set forth who can attend this executive session, but we would advise that any employee who can provide the best information on the topics listed above would be able to attend the executive session. We also believe that it would be appropriate to have someone attend who has the requisite knowledge even if the person is not an employee, e.g. a contract-based advisor or an employee of the state who can assist.

If you are going into executive session to discuss one of the issues listed above, the rules set out in the “Executive Session to Discuss Certain Employment Issues” section above still apply. You must announce the specific purpose of the executive session, and no action taken in the meeting is legal unless that action is taken in the public meeting after the executive session.

Keep in mind: The discussion during an executive session is limited to the reasons announced to the public before going into the executive session. While this is not explicitly stated, this notion is firmly entrenched in Arkansas law: “[e]xecutive sessions must never be called for the purpose of defeating the reason or the spirit of this chapter.”¹⁵⁴

D. Audio/Video Recording

The requirement to audio record public meetings is a very straightforward rule: “all officially scheduled, special, and called open public meetings shall be recorded in a manner that allows for the capture of sound.”¹⁵⁵ There are many ways to meet this legal requirement. The recording could be (1) sound only, (2) a video recording with

¹⁵³ A.C.A. § 25-19-106. “No resolution, ordinance, rule, contract, regulation, or motion considered or arrived at in executive session will be legal unless, following the executive session, the public body reconvenes in public session and presents and votes on the resolution, ordinance, rule, contract, regulation, or motion.”

¹⁵⁴ A.C.A. § 25-19-106(3)

¹⁵⁵ A.C.A. § 25-19-106(d)(1)

sound and picture, or (3) a digital or analog broadcast capable of being recorded. Although these are the listed recording methods in the FOIA, there may be other ways to record the meeting.

You must also consider the format of the recording for purposes of reproduction and how long to maintain the recording. The law does not require any specific type of recording, but it does require the recording be reproducible. In addition, the recording must be maintained for one year from the date of the public meeting.

There are many different methods to accomplish all that the law requires. For instance, simply using the voice memo function on a smartphone to record satisfies the law. Some cities use a cassette or digital recorder. So long as it captures the audio, is reproducible, and can be stored for a year, the specific method does not matter. The law also does not say where the recording should be stored, but if you use your phone to record, we strongly advise saving that recording to a device to which your city or town has easy access. We have had the issue arise where the recorder recorded the meeting on their phone, but when it was requested, the recorder had finished their term and left office. In that instance, the recording was unavailable to be reproduced by the city or town.

Chapter 4. Enforcement

A. Introduction

Violation of the FOIA is a serious concern for many different reasons. Considering that the fundamental goal of the FOIA is to ensure the public has access to public records and public meetings, it is important to do your absolute best to fully comply with the FOIA. Of course, as we set out above, the FOIA is not always clear when it comes to some details. But again, the overall goal of providing access to the public is what is most important. If you fall short of that goal and fail to comply with provisions of the FOIA, there are penalties for that failure.

It is important to first keep in mind that the question of whether, and when, the FOIA has been violated can only be determined on a case-by-case basis, which means that the question of what penalties are available can only be determined on a case-by-case basis.¹⁵⁶ With that said, the FOIA does contain some specific civil and criminal penalties for violating the FOIA.

When it comes to non-compliance, the FOIA can be broken down between non-compliance regarding documents and non-compliance regarding public meetings. As it pertains to documents, you will most likely suffer potential penalties for not releasing documents when requested pursuant to the FOIA. A bit less likely, but still common, are the potential penalties for providing documents that have been improperly redacted. The other most common potential source of penalties is holding meetings in private that should be held in public. In addition, there are potential penalties for not recording meetings as required under A.C.A. § 25-19-104.¹⁵⁷

Penalties may be assessed for not releasing documents at all, for redacting information that should be released, or for redacting information that should not be released. The first thing you are likely to receive is a letter from an attorney notifying of their intent to sue if the documents are not released, then a lawsuit to force you to release the information, and then a judge ordering you to release the information.

The potential penalties include both civil remedies and criminal penalties. We will cover these penalties below. While the civil and criminal penalties can be substantial, perhaps the biggest penalty is the political one. Any appearance that you are hiding something establishes a damaging perception and erodes the trust you need to effectively manage your city or town.

B. Civil Remedies and Attorney's Fees: Public Records

To help explain what civil remedies are available, let's consider a scenario:

On Monday September 12, Citizen Joe emails your city clerk a FOIA request for "all emails from the mayor and the city clerk between September 1 and September 12." However, despite receiving the email from Mr. Joe and despite

¹⁵⁶ This court held "that some actions taken in violation of the requirements of the act may be voidable. It will be necessary for us to develop this law on invalidation on a case-by-case basis." *Rehab Hospital*, 285 Ark. at 401, 687 S.W.2d at 843. *Harris v. City of Fort Smith*, 359 Ark. 355, 363, 197 S.W.3d 461, 466 (2004)

¹⁵⁷ While these are far and away the most common methods of non-compliance, and thus the most common ways to violate the FOIA, there is the potential for trouble if you release information that isn't releasable under the FOIA. There is also a way for the Attorney General to enforce the FOIA.

the fact that all of the emails requested are releasable under the FOIA, the city clerk does not produce the emails to Mr. Joe. On September 15, Mr. Joe emails the city clerk to ask when the emails he requested will be provided; again, the city clerk ignores Mr. Joe's emails. On September 22, Mr. Joe, through his attorney "Attorney Susan," files a lawsuit against the city for not producing the requested documents. On that same day, the judge orders the city to attend a hearing on September 25.

What happens at this hearing?

First, the judge is going to ask the city, "Why did you not turn over these emails?" Considering the city clerk simply ignored the requests, there is no legally justifiable explanation for failing to comply with the request. Without a legally justifiable explanation, the judge will enter an order finding that the city violated the FOIA and order the city clerk to provide the emails as soon as possible.

What if the city clerk still refuses to comply?

If that were to occur, A.C.A. § 25-19-107(c) requires the judge to find the person responsible for not complying with the order to be held in contempt. The penalty for contempt, while extremely unlikely, could be jail time. The most likely penalty for contempt of court is some sort of civil penalty, i.e. order to pay.

Wait, there's more.

Mr. Joe won his case; the judge ruled the city violated the FOIA. That is not the end of it. Mr. Joe had to hire Attorney Susan, and Ms. Susan spent several hours preparing and filing the lawsuit, preparing for the hearing and attending the hearing. And because of that work on Mr. Joe's behalf, he owes Ms. Susan \$3,500. This is where the most substantial monetary penalty exists: attorney's fees. Under A.C.A. § 25-19-107(d)(1), because the city provided Mr. Joe the emails after filing the lawsuit, the judge shall order the city to pay the \$3,500 Mr. Joe owes Ms. Susan.

To illustrate the next point, let's slightly alter the facts of the scenario above.

On September 23, after Mr. Joe filed the lawsuit on September 22 and after the judge ordered the City attend a hearing to hear why the emails were not produced, the city clerk sends Mr. Joe all the documents he requested on September 12.

Despite the fact the city clerk provided the emails, she did so only after Mr. Joe had to hire Attorney Susan and file a lawsuit against the city. It is important to first note that just because the city clerk provided the documents before a judge ordered her to do so does not mean the city has not violated the FOIA. The violation of the FOIA occurred by not providing the documents initially.

Regardless of that initial FOIA violation, Mr. Joe and Ms. Susan may not want to attend the hearing—there would be no purpose in asking the judge to order the production of documents that have already been produced. However, Mr. Joe still had to pay Ms. Susan to prepare and file the lawsuit. Under A.C.A. § 25-19-107(d)(1) the judge shall order the city to pay Ms. Susan's attorney fees. This payment of attorney fees is required because Mr. Joe, after filing suit, "obtained from the [city] a significant or material portion of the public information [Mr. Joe] requested." Again, the judge is required to order these fees "unless the court finds that the position of the [city] was substantially justified," which, in this scenario, it was not.

One more fact change:

Rather than just ignoring Mr. Joe's FOIA request, the city clerk provides Mr. Joe all the emails except one, which the clerk believes contained information that exempted it from disclosure. In our scenario, this email contains reference to a personnel record the city clerk believes would "constitute a clearly unwarranted invasion of personal privacy."¹⁵⁸ Mr. Joe still sues claiming a violation of the FOIA by not releasing that one email.

At the hearing on September 25, the judge hears from Ms. Susan about why the email is releasable and from the city attorney about why the email is not releasable. Ultimately, the judge agrees with Ms. Susan and orders the city to provide the email, which the city does. Mr. Joe asks the judge to order the city to pay the attorney fees he

158 A.C.A. § 25-19-105(a)(12)

owes Ms. Susan. Mr. Joe believes this is proper because he obtained a significant or material portion of the public information requested after he brought suit.

However, despite the fact Mr. Joe prevailed at the hearing and the city provided the email, he may not be entitled to attorney fees. Assuming the city clerk's reasoning for not releasing the record was "substantially justified," the city will not pay the attorney's fees. Of course, whether or not the city clerk's position is "substantially justified" is very fact-specific. The Arkansas Legislature only recently passed this portion of the FOIA, and we have not seen many instances in which a city or town did not have to pay attorney fees because of a substantially justified, albeit wrong, position. With that in mind, we encourage you not to withhold documents requested unless you are sure the FOIA does not require the release of the documents.

C. Civil Remedies and Attorney's Fees: Public Meetings

Civil remedies under FOIA for violations of the public meetings requirement are different from those for violations for failure to provide documents. Again, considering a scenario will help to explain.

At the city's upcoming city council meeting, the council will discuss and potentially vote on whether to purchase new playground equipment for the park. The new playground equipment will cost \$27,000 and Mayor Jane needs the city council's approval before spending city funds on the new equipment. The day before the meeting Mayor Jane calls five of the eight council members to determine whether they support the funding request. Mayor Jane does not call the other three council members because she knows they will oppose the spending of the money. The five members of the city council called by Mayor Jane agreed to the expenditure of the \$27,000. Mayor Jane purchased the playground equipment the next day, and the issue was never brought before the city council during any city council meeting.

Citizen Joe learns of the expenditure of money without a public vote and files a lawsuit through Attorney Susan claiming a FOIA violation.

What Happens Next?

First and most obviously, this is a FOIA violation. Money is being spent without public approval, and any "approval" that was given was done through a series of one-on-one meetings (even Legislative Audit would take issue with Mayor Jane's actions).

The civil remedy, however, is not as clear. The most likely civil remedy is to void the expenditure of the money because the "approval" was done via that series of one-on-one phone calls.

In short, any decision made outside a public meeting. Whether it is a meeting through a series of one-on-one discussions or a meeting where the public is not properly notified, any decision made by the city or town would likely be voided by a judge should the city or town be sued by a citizen.

While not as clear, a city or town that holds a private meeting that should otherwise be public under the FOIA can be required to pay attorney fees if a lawsuit against the city or town for that meeting is successful. However, it is not clear as to when attorney fees would be awarded. Regardless, it is best to assume attorney fees will be awarded to the citizen suing the city or town for a FOIA meeting violation.¹⁵⁹

D. Criminal Penalties

Finally, there are criminal penalties for violating the FOIA. The most important thing to note about the criminal provisions of the FOIA is that unlike many other criminal statutes, you do not have to intend to violate the law in order to be criminally charged with violating the law. According to A.C.A. § 25-19-104, "[a]ny person who negligently violates any of the provisions of this chapter shall be guilty of a Class C misdemeanor." A Class C misdemeanor is punishable by a fine of up to \$500, imprisonment for up to 30 days, or both.

¹⁵⁹ A.C.A. § 25-19-107. "If the defendant has substantially prevailed in the action, the court may assess expenses against the plaintiff only upon a finding that the action was initiated primarily for frivolous or dilatory purposes."

As with most things we have discussed, the question of whether a “negligent” violation of the law has occurred can only be decided on a case-by-case basis. That said, here is how Arkansas law defines the term:

(A) A person acts negligently with respect to attendant circumstances or a result of his or her conduct when the person should be aware of a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.

(B) The risk must be of such a nature and degree that the actor’s failure to perceive the risk involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation considering the nature and purpose of the actor’s conduct and the circumstances known to the actor.¹⁶⁰

Note the phrase “gross deviation of the standard of care” contained in the definition above. A “gross deviation” appears to be more than making a simple mistake when applying the FOIA. Because criminal charges for a FOIA violation are extremely rare, there is not much guidance to help establish how this criminal charge works. However, even the simplest violation of the FOIA could lead to potential criminal charges, so be careful and always call your city attorney or the League if you are unsure.

Chapter 5. Questions & Answers

The *Arkansas Freedom of Information Handbook* has several FOIA question-and-answer sections. Here are the Q&As that are most relevant to municipal government.

MUNICIPAL GOVERNMENT¹⁶¹

Q. Do meetings and deliberations of a municipal planning and zoning commission fall within the FOIA open meeting requirement?

A. Yes.¹⁶²

Q. May applicants for appointment to the planning commission be interviewed in an executive session of the city board?

A. No, because this is not the “top administrative position” in the city.¹⁶³

Q. Can the board and staff of a municipally owned utility system meet in executive session on matters related to system security?

A. Yes.¹⁶⁴

Q. Does the FOIA prohibit disclosure of personal information of current and former customers of a municipally owned utility system?

A. Yes.¹⁶⁵

Q. Is a Municipal Civil Service Commission subject to the open meetings requirements under the FOIA?

A. Yes.¹⁶⁶

Q. Can a Municipal Civil Service Commission interview applicants for police officer or firefighter in executive session?

A. Yes, as to internal applicants, if the job change would be a promotion; No, as to external applicants.¹⁶⁷

Q. Is the mayor included in the governing body for purposes of the FOIA?

A. Yes.¹⁶⁸

Q. Can the mayor and city council meet in a closed session with the city attorney?

A. No.¹⁶⁹

¹⁶⁰ A.C.A. § 5-2-202(4)

¹⁶¹ These questions, answers and citations come from pages 43–44 of The Arkansas Freedom of Information Handbook, 20th Edition (2022), arkansasag.gov/wp-content/uploads/2022-FOIA-Handbook-20th-Edition.pdf.

¹⁶² Op. Att’y Gen. No. 97-067

¹⁶³ A.C.A. § 25-19-106(c)(2)(A); Op. Att’y Gen. No. 97-067

¹⁶⁴ A.C.A. § 25-19-106(c)(6); Op. Att’y Gen. No. 2015-024

¹⁶⁵ A.C.A. § 25-19-105(b)(20); Op. Att’y Gen. 2015-056

¹⁶⁶ Ops. Att’y Gen. 98-174, 88-058

¹⁶⁷ Op. Att’y Gen. No. 2002-161

¹⁶⁸ Ops. Att’y Gen. 2003-289, 95-227

¹⁶⁹ A.C.A. § 25-19-106; Op. Att’y Gen. 95-098

Q. May a candidate to fill a vacancy on the city board be interviewed in executive session?

A. No.¹⁷⁰

Q. If two city council members meet to discuss matters on which foreseeable action will be taken, is the FOIA violated?

A. Possibly.¹⁷¹ But there is no bright-line rule that two members talking about city business constitutes a “meeting” under the FOIA. A violation is most likely to occur when successive meetings of two members are held prior to action by the governing body, thereby avoiding public discussion.¹⁷²

IN GENERAL¹⁷³

Q. Who may obtain records?

A. “Any citizen of the State of Arkansas” may inspect, obtain copies of and photograph public records. “Citizen” includes corporations. A requester’s purpose or motive in seeking access to particular records is irrelevant. Nothing in the FOIA restricts the subsequent use of information obtained under the act.

Q. What records are subject to the act?

A. Any record that is “required by law to be kept or [is] otherwise kept and that constitutes a record of the performance or lack of performance of official functions” is a public record. Further, “all records maintained in public offices or by public employees within the scope of their employment are presumed to be public records.” The FOIA covers both records created by an agency and those received from third parties. The physical form of the record is unimportant, as the FOIA applies to “writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium.”

Q. Is every record (such as an email) created on a public computer a public record?

A. Not necessarily. It will depend on whether the email reflects the performance or lack of performance of official functions.¹⁷⁴

Q. How does one request records?

A. Direct the request to the “custodian of the records.” It need not be in writing, though a written request is advisable because it provides a record if litigation becomes necessary. The request must be specific enough for the custodian to locate the records with reasonable effort.

Q. Does the request have to be made in person?

A. No. It can be made in person or by telephone, fax, mail, email or via the internet if the custodian has created an online form for that purpose.

Q. When must the agency make the records available?

A. Generally, records must be made available immediately unless in active use or storage, in which case they must be made available within three working days of the request. Requests for personnel records and employee-evaluation records must be acted upon within 24 hours of the custodian’s receipt of the request. During that same period, the custodian must make all practicable efforts to notify the person making the request and the subject of the records of the custodian’s decision regarding personnel or evaluation records. The custodian, requester, or subject of the records may seek an Attorney General’s opinion on whether the custodian’s decision regarding personnel or evaluation records is consistent with the act.

Q. Is the custodian required to furnish copies of public records?

A. Yes, for a fee, if the custodian has the necessary duplicating equipment.

Q. Is the custodian required to scan paper records into an electronic medium such as a PDF?

A. Yes, if the custodian has the scanning capability.

Q. Is the custodian required to mail the copies?

A. Probably yes, although this is not entirely clear under the act.¹⁷⁵

¹⁷⁰ Op. Att’y Gen. 96-269

¹⁷¹ See City Council of El Dorado v. El Dorado Broad. Co., 260 Ark. 821, 544 S.W. 2d 206 (1976), Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W. 2d 350 (1975) and Ops. Att’y Gen. 99-018, 91-225.

¹⁷² Op. Att’y Gen. 99-018

¹⁷³ These questions, answers and citations come from pages 31–34 of The Arkansas Freedom of Information Handbook, 20th Edition (2022).

¹⁷⁴ Pulaski Cty. v. Ark. Democrat-Gazette, Inc., 370 Ark. 435, 260 S.W.3d 718 (2007)

¹⁷⁵ Op. Att’y Gen. 2008-071

Q. Who may attend public meetings?

A. Because meetings “shall be public,” any person may attend.

Q. What is a meeting?

A. Any meeting, formal or informal, regular or special, of a governing body including sub-bodies. A quorum of the governing body need not be present for the meeting to be subject to the FOIA. If two members meet informally to discuss past or pending business, that meeting may be subject to the FOIA. This question will turn on the facts of each case.

Q. May private citizens request notification of meeting times of public boards?

A. Yes, as to regular meetings. Notice of emergency or special meetings is only provided to news media that have requested notice.

Q. What meetings are exempt from the FOIA?

A. The FOIA exempts four kinds of meetings from the requirement that the public be allowed to attend. A closed meeting, called an “executive session,” may be held “for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.” In contrast, an executive session to consider general personnel matters, an across-the-board pay increase, or the overall performance of employees as a group is not permissible. An executive session may also be held by state licensing boards and commissions “for purposes of preparing examination materials and answers to examination materials” and for “administering examinations.” Executive sessions may be held by certain water systems and other utility systems to discuss security issues. Executive sessions may also be held by the General Assembly’s Child Maltreatment Investigations Oversight Committee under A.C.A. § 10-3-3201 *et seq.*

Q. What is a recommended way to announce an executive session pursuant to A.C.A. § 25-19-106(c)(1)?

A. After approval of a motion to retire into executive session, the chairman may announce: “This body has voted to retire into executive session to consider the [identify the purpose, i.e., employment, appointment, promotion, demotion, discipline or resignation] of an employee. We will reconvene in public session following this executive session to present and vote on any action arrived at in private.”

Q. When the specific purpose of such an executive session is announced in public, must the individual public officer or employee be named?

A. No.

Q. Who may attend such an executive session?

A. Only the top administrator in an agency, the employee’s immediate supervisor, the employee in question, and any person being interviewed for the top administrative position in the agency involved. Neither the agency’s attorney nor the employee’s attorney may attend an executive session.

Q. When does the action discussed in an executive session become legal?

A. When the governing body involved ratifies the action with a public vote in open session following the executive session. If no public vote is taken, any decision reached in closed session has no legal effect.

Q. How does one challenge an agency’s action?

A. “Any citizen denied the rights granted to him may appeal immediately from the denial” to an appropriate circuit court, which may issue “orders” to enforce the act.

Q. Is the violation of the FOIA a criminal offense?

A. A person who “negligently violates” the FOIA is guilty of a Class C misdemeanor.¹⁷⁶

176 A.C.A. § 25-19-104

AGENCIES GENERALLY¹⁷⁷

I. MEETINGS

Q. Does a committee or subcommittee of a governing body have to meet the requirements of the FOIA?

A. Generally, yes.¹⁷⁸

Q. Does the FOIA's open meeting requirement apply to an advisory body that does not include members of the larger governing body to which it reports?

A. This is not entirely clear under the FOIA or current case law. Until clarified, the requirement can be construed to apply only to "governing bodies," i.e. those with final decision-making authority or whose recommendations are routinely rubber-stamped (so-called "de facto" governing bodies).¹⁷⁹

Q. Must a governing body hold a public meeting even if its only purpose is to gather information?

A. Yes.¹⁸⁰

Q. Are social gatherings of members of governing bodies subject to the FOIA?

A. No, as long as any discussion of government business is only intermittent and incidental to the social function. But any regular gathering of members of a governing body demands close scrutiny.¹⁸¹

Q. Can a governing body meet with its attorney in a closed meeting to discuss a pending lawsuit?

A. No.¹⁸²

Q. Could members of a public board or agency meet informally in closed session to discuss recommendations by administrative employees and other board or agency business before the public meeting?

A. No.¹⁸³

Q. Following an executive session, must a public agency reassemble in public for the purpose of formally voting on any resolution, ordinance, rule, contract, regulation, or motion approved in a closed session?

A. Yes.¹⁸⁴

Q. After a public meeting is adjourned, can it be reconvened immediately if a quorum is present for the new meeting?

A. No, because it is a special meeting and the members would not be able to give the required two-hours' notice.¹⁸⁵

Q. Would it violate the FOIA if the governing board of a public entity voted by secret ballot at a public meeting?

A. It depends on the manner in which the ballots are used. The ballots must be signed, retained, and made available for public inspection.¹⁸⁶

Q. Who may ask for an executive session?

A. Only a member of the governing body.¹⁸⁷

Q. If a matter is discussed at a regular public meeting of a public agency with no action taken, could the members later vote on the matter by telephone?

A. No, unless the public's right to hear or monitor the telephone conversation is safeguarded, e.g., by use of speaker phones.¹⁸⁸

Q. Are conference calls of governing bodies subject to the FOIA?

A. Yes.¹⁸⁹

¹⁷⁷ These questions, answers and citations come from pages 35–40 of The Arkansas Freedom of Information Handbook, 20th Edition (2022).

¹⁷⁸ Op. Att'y Gen. 98-169 (citing Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W.2d 350 (1975)); see also Ops. Att'y Gen. 2006-059, 2003-170.

¹⁷⁹ Op. Att'y Gen. 2014-124

¹⁸⁰ Op. Att'y Gen. 95-098

¹⁸¹ Op. Att'y Gen. 95-020

¹⁸² Ops. Att'y Gen. 96-372, 95-360, 87-420; Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968)

¹⁸³ Op. Att'y Gen. 90-239; Mayor & City Council of El Dorado v. El Dorado Broad. Co., 260 Ark. 821, 544 S.W.2d 206 (1976)

¹⁸⁴ A.C.A. § 25-19-106(c)(4); Arkansas State Police Comm. v. Davidson, 253 Ark. 1090, 490 S.W.2d 788 (1973); Op. Att'y Gen. 2008-115

¹⁸⁵ Op. Att'y Gen. 95-308

¹⁸⁶ Ops. Att'y Gen. 97-016, 92-124; Depoyster v. Cole, 298 Ark. 203, 766 S.W.2d 606 (1989)

¹⁸⁷ Ops. Att'y Gen. 96-009, 87-478

¹⁸⁸ Op. Att'y Gen. 2000-096

¹⁸⁹ Rehab Hosp. Serv's Corp. v. Delta Hills Health Sys. Agency, Inc., 285 Ark. 397, 687 S.W.2d 840 (1985); Op. Att'y Gen. 94-167

Q. Can a governing board of a public entity go into executive session to discuss general salary matters or to set policy and criteria for filling positions?

A. No.¹⁹⁰

Q. Can a governing body meet in executive session to screen and review employment applications?

A. Yes, if the meeting revolves around a specific individual or individuals and not policies.¹⁹¹

Q. Are there any restrictions on media attendance at public agency meetings?

A. Members of the media may not attend executive sessions. There are no general restrictions with respect to open public meetings. The purpose of the FOIA, however, is to ensure the free and open transaction of all government business, and the act does not give license to members of the media or others, to disrupt public meetings or otherwise usurp the authority that the people have given to those elected to carry out the duties of government.¹⁹²

Q. Are citizens entitled to videotape public meetings?

A. Yes, as long as the videotaping does not disrupt the meeting.¹⁹³ Public meetings must be recorded to capture at least audio and in a way that can be reproduced upon request.¹⁹⁴

Q. Is it a violation of the FOIA if some members of the public are unable to attend a public meeting due to room capacity?

A. This will depend upon the reasonableness of the access to the meeting under the particular facts.¹⁹⁵

Q. Are the minutes or tape recordings of executive sessions open for public inspection and copying?

A. No, although the governing body could vote to make them open.¹⁹⁶

Q. Would a meeting between the head of a public entity and members of his or her staff be subject to the FOIA?

A. No.¹⁹⁷

Q. Is a public meeting of a governing board/entity subject to live broadcast by the media attending, and may a private citizen videotape the meeting?

A. Yes, subject to reasonable limitations, the meeting may be both broadcasted by the media and videotaped by private citizens.¹⁹⁸

Q. Is a committee meeting open to the public if it is called by a non-committee member? If so, who must notify the press?

A. Generally, yes; the meeting is open to the public, assuming that this is a “governing body.”¹⁹⁹ In the event of emergency or special meetings, the person calling the meeting shall notify representatives of the media who have requested notice.²⁰⁰

Q. Is there a “meeting” for purposes of the FOIA where one member of a governing body emails another member?

A. The FOIA’s open-meetings provisions apply to email exchanges, but it is a question of fact whether particular email communications violate the FOIA.²⁰¹ A violation may occur through a sequential or circular series of email communications or under circumstances suggesting that the governing body was deliberating in secret.²⁰² Nevertheless, the email messages likely would be subject to disclosure as a “public record.”

¹⁹⁰ Ops. Att’y Gen. 2009-077, 93-403

¹⁹¹ Ops. Att’y Gen. 2006-059, 93-403, 91-070

¹⁹² Op. Att’y Gen. 2006-152

¹⁹³ Op. Att’y Gen. 2012-022

¹⁹⁴ A.C.A. § 25-19-106(d)

¹⁹⁵ See Op. Att’y Gen. 2006-152

¹⁹⁶ Ops. Att’y Gen. 2000-251, 91-323

¹⁹⁷ Ops. Att’y Gen. 2006-059, 2003-170. See *National Park Med. Ctr., Inc. v. Arkansas Dep’t of Human Serv’s*, 322 Ark. 595, 911 S.W.2d 250 (1995)

¹⁹⁸ Op. Att’y Gen. 2012-022

¹⁹⁹ A.C.A. § 25-19-106(a); Op. Att’y Gen. 84-91

²⁰⁰ A.C.A. § 25-19-106(b)(2)

²⁰¹ *City of Ft. Smith v. Wade*, 2019 Ark. 222, 578 S.W.3d 276

²⁰² Op. Att’y Gen. 2005-166



The Civilpedia Handbook
Section V. Freedom of Information Act

Arkansas Municipal League
P.O. Box 38
North Little Rock, AR 72115-0038
501-374-3484

Rev. 6/20/2024