ARKANSAS MUNICIPAL LEAGUE

THE CIVILPEDIA HANDBOOK

A GUIDE TO MUNICIPAL GOVERNMENT IN ARKANSAS

FIRST EDITION JANUARY 2024

Clickable Table of Contents

Table of Contents

Clickable Table of Contents

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 I. Overview of Municipal Government in Arkansas

Chapter 1. Introduction to Municipal Government

A. Overview

Prior to 2011, only cities of the first class enjoyed what is commonly referred to as "Home Rule". Home Rule refers to a certain autonomy that a local government has in its governance. In other words, cities of the first class were authorized to perform any function and exercise full legislative power in any and all matters pertaining to its municipal affairs. We can distinguish this by looking at the authority cities of the second class and incorporated towns had prior to 2011. Cities of the second class and incorporated towns only had the powers granted to them by the Arkansas Constitution and statutes passed by the Arkansas General Assembly. This was termed "Dillon's Rule" and, according to the Arkansas Supreme Court, it meant:

> "Municipal corporations possess and can exercise the following powers, and no others: (1) Those granted in express words (by the state legislature); (2) Those necessarily or fairly implied in or incident to the powers expressly granted; (3) Those essential to the accomplishment of the declared objects and purposes of the corporations; not simply convenient, but indispensable". *Tompos v. City of Fayetteville*, 280 Ark. 435, 438, 658 S.W.2d 404, 406 (1983).

However, Act 1187 of 2011 repealed Dillon's Rule by amending A.C.A. § 14-43-602 to read "(a) A municipality is authorized to perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its municipal affairs, including, but not limited to, the power to tax. (b) The rule of decision known as 'Dillon's Rule' is inapplicable to the municipal affairs of municipalities." "Municipal affairs" are all matters and affairs of government germane to, affecting or concerning the municipality or its government.[2] This may very well be the single most important provision for municipalities in Arkansas.

The Arkansas General Assembly meets every odd year from January to around April for its legislative session. This is where your state legislators get together to pass laws that typically deal with situations that have arisen in the interim between sessions. Local governments are often the first level of government to deal directly with new issues that arise. Because of this, it is vital for municipalities to have the ability to act quickly when necessary to address these issues in order promote and protect the public health, safety and welfare of the citizens of the municipality and thus the citizens of Arkansas.

B. Incorporation

The state of Arkansas comprises 75 counties. Within the 75 counties, there are essentially two types of areas: unincorporated (areas of the county that are not within any municipal boundaries) and incorporated (i.e. municipalities). In Arkansas, the term 'municipality' is defined to mean, "a city of the first class, a city of the second class, or an incorporated town."[3] Every municipality in Arkansas has a unique beginning, whether it includes a specific reason as to why a community decided to incorporate or an interesting figure for whom the municipality is named.[4] However, every municipality shares at least one thing in common—they started as an unincorporated area and incorporated into a municipality.[5]

There are two methods by which an Arkansas community in an unincorporated area may incorporate into a municipality.[6] The first method is through a petition procedure. Under this method, the petition must contain: (1) a description of the geographic area seeking to incorporate, (2) the identity of the persons authorized to act on behalf of the petitioners, and (3) the name proposed for the incorporated area. The petition must be signed by at least 200 people in the area seeking to incorporate or a majority of the qualified electors in the area seeking to incorporate, whichever is greater.[7] Once signed, the petition must be presented to the county court and filed with

2 See A.C.A. § 14-43-601 for a list of exceptions that are specifically state affairs as opposed to municipal affairs.
3 Ark. Code Ann. § 14-43-601(a)(2)(A).
4 Batesville was established in 1821-1822, making it the oldest incorporated municipality in Arkansas!
5 As of publication, Diamondhead is the newest municipality and was officially incorporated on December 3, 2020.
6 A.C.A. § 14-38-116 requires any entity, prior to undertaking an incorporation or disincorporation proceeding, to coordinate with Arkansas Geographic Information Systems Office (GIS) for preparation of legal descriptions and digital mapping for the area being incorporated.
7 A.C.A. § 14-38-101(a)

the county clerk.[8] Shortly after, the county court will set a date for a public hearing and, after the hearing, the court will either approve or reject the incorporation.[9] If the petition is approved, then the incorporation is filed with the Arkansas Secretary of State and notice of election of officers for the newly incorporated municipality is posted.[10]

The second method allows for an election procedure as an alternative for the incorporation of new municipalities having a population of at least 1,500.[11] As with any initiative, a petition is still required, and the petition must also contain the three elements required above. However, the petition must be signed by at least 25% of the qualified voters who reside in the territory proposed to be incorporated.

The one caveat to incorporation is that new municipalities cannot incorporate if they are within three miles of the boundaries of another incorporated municipality or in the area in which the existing municipality is exercising its planning territorial jurisdiction unless the governing body of that municipality has "by written resolution affirmatively consented to said incorporation."[12]

C. Classification of Municipalities

Arkansas municipalities are divided into three classes based on population.[13]

Class of City	Population	Referred to As
First	2,500 or more	City of the First Class
Second	500 – 2,499	City of the Second Class
Incorporated Town	499 or fewer	Incorporated Town

Once a municipality reaches a population of 500, it is classified as a city of the second class, and once a municipality reaches a population of 2,500, it is classified as a city of the first class. However, there are exceptions to this classification criteria. If the council of an incorporated town with fewer than 500 population wishes to become a city of the second class, it may do so by submitting an ordinance to the voters, and if the voters approve, the town becomes a city of the second class. Further, any city with a population of 1,500 or more may, by enactment of an ordinance, become a city of the first class.[14] Arkansas law also allows for cities with certain populations to reduce their classification.[15]

Chapter 2. Roles in Local Government

A. Overview

While the position and title might look different depending on the municipality, fundamentally every municipality has some form of the following three elected positions in which office holders are elected by the citizens of the municipality. These positions are: (1) mayor; (2) council member or city director; and (3) city clerk, treasurer, clerk/treasurer, recorder or recorder/treasurer. In the mayor-council form of government, the legislative branch is made up of council members, while in city manager/city administrator forms of government the legislative branch is made up of a board of directors. Cities of the first class have either: (1) an elected clerk/treasurer or (2) an elected city clerk and an elected treasurer; or (3) an elected city clerk and an appointed treasurer.[16] Cities of the second class have either: (1) an elected recorder/treasurer; (2) an elected recorder and an elected treasurer; or (3) an elected recorder and an appointed treasurer.[17] Incorporated towns have either: (1) an elected recorder/treasurer; or (2) an elected recorder and an appointed treasurer. It is important to note that many municipalities, especially larger cities of the first class, assign the duties that the treasurer would normally hold to a non-elected finance

8 A.C.A. § 14-38-101(c)
9 So long as the petition sufficiently contains everything required, then the petition should be endorsed. However, A.C.A. § 14-38-104(a)(4) does provide some level of discretion to the county court in granting/denying the petition.
10 A.C.A. §§ 14-38-104 - 105
11 A.C.A. § 14-38-115
12 A.C.A. § 14-38-101(b). However, this prohibition does not apply if the area seeking to incorporate contains a population of 1,500 or more.
13 A.C.A. § 14-37-101 et seq. It is important to note that as time has gone by, the substantive differences between the three different classes continues to decrease as cities of the second class and incorporated towns have gotten more and more authority that previously only existed with cities of the first class.
14 A.C.A. § 14-37-103
15 See A.C.A. §§ 14-37-111 and 14-37-114.
16 See A.C.A. §§ 14-43-303, 14-43-316 and 14-43-405.
17 See A.C.A. §§ 14-44-114 and 14-44-115.

officer.[18] Municipalities will also typically have a city attorney; however, as we will cover later, not all city attorneys are elected, and the duties of city attorneys are different depending on the needs of the municipality.

B. Organization of the Governing Body

Before discussing the individual duties and roles each official plays in municipal government, let's review the organization of the governing body and the organizational meeting municipalities have at the beginning of each year. For municipalities operating under the mayor-council form of government, the governing body consists of the city council and the mayor.[19] For municipalities operating under the city manager form or city administrator form of government, the governing body consists of the mayor and the board of directors.

Every year in January the members of the governing body for each city or town (regardless of the form of government) are required to meet and organize the governing body.[20] This annual organization meeting consists of many objectives. These objectives include judging the election returns and the qualifications of the members of the governing body. This meeting is also the time for the governing body to set its rules and procedures for meetings for the rest of the year, including, but not limited to, how the agenda is set for meetings, the filing of resolutions and ordinances, and how citizen commentary will be conducted.[21] This is a good time for the governing body to set a procedure for how special meetings will be called. And, while it doesn't have to be at this meeting, this is also a good time for the mayor and governing body to decide who will perform the functions of the mayor if the mayor is unable to perform the duties of the office or cannot be located.[22] However, the more complete your rules are the better, and your ordinance governing the organization of the governing body can always be amended if the need arises. For cities of the first class, if the mayor is unable to perform the duties of office or cannot be located, then either the city clerk, another elected official if designated by the mayor, or an unelected employee or resident of the city if designated by the mayor and approved by the city council may fill in and perform the functions of the mayor during the disability or absence of the mayor. The same is true for cities of the second class and incorporated towns except instead of the city clerk it would be the recorder who could fill in for the mayor.[23] Again, the law does not require this to be done at the annual organization meeting, but it is highly recommended that you do this at the beginning of the year to be prepared for unforeseen circumstances.

There are many different examples of parliamentary procedures that local governments may adopt, or they may wish to draft their own rules of procedures. Many adopt *Robert's Rules of Order*; however, some others may find it too dense and lengthy for council meetings.[24] What is most important is that the procedures and policies are in writing so everyone can become familiar with them to ensure meetings run smoothly. And, if there are any questions, then you can consult with your written procedures and policies. What is also important is that the procedures and policies are yours, and as such, are subject to change as the governing body wishes.[25]

C. Mayor-Council Form of Government

1. The Mayor

In the mayor-council form of government, the mayor is the principal officer of the city or town. By virtue of this position, not only is the mayor the ex-officio president of the council, but the mayor is also the chief executive officer of the municipality. In other words, the mayor oversees the day-to-day operations of the municipality. The

18 See A.C.A. § 14-59-115(b). The primary duty of the treasurer is to follow the Arkansas Municipal Accounting Law. This may be one of the single most important positions in municipal government, and it certainly is not an easy job. Therefore, some municipalities will have a combined office of the clerk/treasurer and assign the normal duties the treasurer would have to someone specialized or educated in the world of municipal accounting and finance.

19 In mayor-council forms of government, the mayor is the ex officio president of the city council and presides over city council meetings. See A.C.A. § 14-43-501(b). See also Ark. Op. Atty. Gen. No. 96-062, where the attorney general opined that the mayor could not be excluded from executive as the mayor is the ex officio president of the city council and is required to preside at council meetings. And see Ark. Op. Atty. Gen. No. 96-067, where the attorney general opined that the mayor was a member of the governing body for purposes of the Freedom of Information Act.

20 A.C.A. § 14-43-501

21 Some municipalities actually have it in their rules that commentary will be allowed granting each person three minutes and that the minutes will be tracked by an egg timer.

22 See A.C.A. § 14-43-501(b)(3). However, do not get this confused with what happens if there is an actual vacancy in the mayor's position. This provision is for those instances in which the mayor may be very ill and unable to work for a month or longer but has not done something to create an actual vacancy such as tendering a resignation or passing away.

23 See A.C.A. §§ 14-44-107(c) and 14-45-105(c).

24 The first edition of Robert's Rules of Order was published in February of 1876 and was written by Henry Martyn Robert.

25 "A deliberative body, however, is entitled to adopt its own rules of internal procedure, the observance of which is within the discretion of the deliberative body itself, free from supervision by the court. See Reaves v. Jones, 257 Ark. 210, 515 S.W.2d 201 (1974).

duties of the mayor in a mayor-council form of government can be divided into two different categories: administrative and legislative duties.

Administrative Duties

As the executive officer of the municipality, the mayor oversees the day-to-day activities of the municipality and supervises department heads, who are also supervisors of the employees of their respective departments. With that in mind, there are also various other statutory duties required of the mayor. Mayors in cities of the first class are required to prepare and submit to the governing body within the first 90 days of each year a complete report on the finances and administrative activities of the city during the previous year and advising as to the financial condition and future needs of the city and making recommendations.[26] However, all mayors are required to report within the first 90 days of each year to the council on the municipal affairs of the city and recommend such measures as may be advisable.[27] Further, all mayors of cities and towns are also required to prepare and submit a budget to the city council for approval on or before December 1 of each year for the operation of the city or town from January 1 to December 31 of the forthcoming year.[28]

One of the mayor's most important duties in mayor-council forms of government is the appointment and removal of department heads.[29] The city or town council, however, may override the mayor's action by a 2/3 vote of the council.

Let's look at this again: Only the mayor can appoint or remove a department head. In other words, the council cannot make an appointment, nor can the council initiate the removal of a department head—only the mayor can. However, if the mayor makes an appointment and the council overrides the appointment by a 2/3 vote, then the appointment does not happen. The same goes for removals. If the mayor removes a department head, the council can override the removal of the department head by a 2/3 vote. Only the mayor can initiate the process to appoint or remove a department head. The number of department heads in municipalities differ depending on the size and needs of the municipality. The most common examples of department heads are the police chief and fire chief. However, the list does not end there and could include the head of your sanitation department, a water supervisor or building officials.[30] To ensure clarity, the council should declare what positions in the municipality are department heads and conversely which positions are not.

Let's consider a scenario based on what we have covered above.

A police chief has committed a serious violation of the law while on duty and should be terminated.

- Can the council initiate the procedure to terminate the police chief?[31]
- Who is authorized to terminate the police chief?
- If the mayor terminates the police chief, can the city council overturn the decision?[32]

The mayor's appointment power does not end with department heads. There are many different positions on various boards and commissions that the mayor may appoint, such as trustees to a library board (with council approval),[33] a health officer if the position has been created by ordinance,[34] airport commissioners (with council confirmation),[35] a parks and recreation commission (with council confirmation)[36,] marshals in some cities of the second class,[37] or an at-large member of an advertising and promotion commission (with council approval)[38] among others.

26 A.C.A. § 14-58-302
27 A.C.A. § 14-43-504(c)
28 A.C.A. § 14-58-201
29 A.C.A. § 14-42-110
30 See A.C.A. § 14-56-202(b) for more on building officials.
31 No. The council cannot initiate the procedure to appoint or remove a department head.
32 Yes. By a 2/3 vote of the council, the council may override the mayor's decision to appoint or remove a department head.
33 A.C.A. § 13-2-502
34 A.C.A. § 14-262-103
35 A.C.A. § 14-359-105
36 See A.C.A. §§ 14-269-202 and 14-269-302.
37 A.C.A. § 14-44-111
38 A.C.A. § 26-75-605

Legislative Duties

As we will discuss in the next section, the city council in mayor-council forms of government fill the legislative branch of municipal government. However, the mayor does have some legislative duties. To begin, the mayor presides over council meetings, or in other words, helps facilitate the meetings. This includes calling the meeting to order, recognizing council members for questions or comments, and moving the meeting through the agenda. However, the mayor's legislative duties are not merely ministerial. The mayor can vote to establish a quorum of the governing body—a quorum of the governing body is necessary to hold a meeting.[39] The mayor can also vote when the mayor's vote is needed to pass any ordinance, bylaw, resolution or motion.[40] This authority is typically phrased, "the mayor can vote whenever there is a tie." Remember, however, the mayor may vote when the vote is needed to pass any ordinance, bylaw, resolution, or motion. Let's look at a scenario and work through a couple of problems.

Knowledge Check

There is an ordinance in front of the council that would close all public parks at 10 p.m. The council is made up of six council members. All six council members are present at the meeting as well as the mayor presiding over the meeting.

- *If the council votes three votes in favor of the ordinance and three votes against the ordinance, can the mayor vote?*[41]
- *If the council votes two votes in favor of the ordinance, three votes against the ordinance, and one member abstains from voting, can the mayor vote?42*
- *If the council votes three votes in favor of the ordinance, two votes against the ordinance, and one member abstains from voting, can the mayor vote?43*

The mayor also has the authority to veto any ordinance, resolution or order adopted by the council. However, the council may override the mayor's veto by a 2/3 vote of the total membership of the council.[44] The mayor is authorized to veto within five days of the action taken. Before the next regular meeting of the council, the mayor is required to file with the city clerk or recorder, as the case may be, the veto to be laid before the next regular meeting.[45] It is recommended that the mayor file the written veto, providing reasons for the veto, with the clerk or recorder.

Other legislative duties of the mayor include signing all ordinances, resolutions and city council minutes[46] and, after the passage of an ordinance setting the procedure for special council meetings, the mayor has the authority to call the council into session for a special meeting.

2. The City/Town Council

In the mayor-council form of government, the city or town council is the legislative body of the municipality. Most actions taken by the council are legislative in nature. To be more specific, there is very little a single council member can do alone, but they are a part of a larger legislative body that takes action through the passage of legislation (e.g., ordinances, motions, bylaws and resolutions).[47] The council is tasked with enacting ordinances and bylaws concerning municipal affairs that are consistent with state law in order to promote the health, safety and welfare of the public.[48]

39 See A.C.A. §§ 14-43-501 & 14-44-107 and 14-45-105.
40 See A.C.A. §§ 14-43-501 & 14-44-107 and 14-45-105; and see Gibson v. City of Trumann, 311 Ark. 661, 845 S.W.2d 515 (1993).
41 Yes. In this situation we actually have a tie, but more importantly, it takes four votes to pass the ordinance. Since the mayor may vote when the vote is needed for passage, the mayor can vote in favor of the ordinance to pass it.
42 No. If the mayor votes in favor of the ordinance, there would still only be three votes in favor of the ordinance—one shy of the four needed to pass it. Therefore, the mayor cannot vote as his vote would not pass the ordinance.
43 Yes. In this scenario we technically do not have a tie (although an abstention from voting is sometimes seen as voting against). We have three votes in favor of the ordinance and the mayor can cast the fourth vote to pass the ordinance.
44 See A.C.A. §§ 14-43-504 and 14-44-107 & 14-45-105.
45 A.C.A. § 14-43-504(d)
46 A.C.A. § 14-55-205
47 A.C.A. § 14-55-203
48 See A.C.A. §§ 14-55-201 and 14-43-602.

Councils have broad authority to pass local legislation concerning municipal affairs. Councils in cities of the first class may set procedures by ordinance for making purchases that do not exceed the sum of $35,000 and councils in cities of the second class and incorporated towns may provide by ordinance the procedure for making all purchases.[49] Councils also set the time and place for regular city council meetings.[50] From these examples we can see that on one hand the council has authority to enact legislation on municipal affairs, while on the other hand the council also sets procedures dictating how some day-to-day operations should operate.

The powers of the council do not end there, however. The most important power the council has is the "power of the purse," as the council has management and control of the city finances and does so by adopting a budget.[51] It takes money to run a municipality and the council is in charge of appropriating the funds it deems necessary to operate the municipality. Budgets are required to be adopted on or before February 1 of each year and can be adopted by ordinance or resolution.[52] As discussed in the previous section, the council may override the mayor's appointment and removal of department heads by a 2/3 vote of the council and the council may override the mayor's veto by a 2/3 vote. It is also the duty of the council to establish city fire departments and police departments, or contract or enter into interlocal agreements for fire and police services.[53] When it comes to taxes, it is the council's sole discretionary responsibility to pass ordinances levying local sales taxes and referring the same to the voters, as well as certifying to the county clerk the amount of property taxes to be levied within the municipality prior to the regular meeting of the county quorum court in November or December of each year.[54] It is highly recommended that the council vote on the millage not later than August or September to ensure it gets to the county clerk on time.

Regarding appointment powers, councils in cities of the first class may fill, by appointment, the vacancy to the office of mayor if the expired term is less than one year,[55] while in cities of the second class and incorporated towns the council shall fill a vacancy in the mayor's office for the unexpired term by either majority vote of the council or a special election.[56]

3. The City Clerk, Treasurer, Clerk/Treasurer, Recorder or Recorder/Treasurer

In the overview of this chapter, we discussed that every municipality has some type of clerk/recorder position and some type of treasurer position. Now, it differs depending on the classification of the city and the will or needs of the city. As mentioned above, every city of the first class has a city clerk and every city of the second class and every incorporated town has a recorder. Every municipality also has a treasurer, however, the position of treasurer is often combined with the position of clerk or recorder. The best way to concisely review the roles and duties of all these technically different positions is to look at the duties of city clerks and recorders in state and local law (ordinances) as well as separately looking at the duties of treasurer, recognizing that the duties under the clerk/recorder section and the treasurer section will both apply to clerk/treasurers and recorder/treasurers.

City Clerks and Recorders

The duties of city clerks and recorders are prescribed by various legislative acts of the Arkansas General Assembly. Statutorily speaking, the role of city clerks and recorders is limited in scope. For example, one statutory requirement of city clerks is to have the custody of all the laws and ordinances of the city and to keep a regular and correct journal of the proceedings of the council.[57] Moreover, state law requires the city clerk to "submit monthly a full report and detailed statement of the financial condition of the city … show[ing] receipts, disbursements, and balance on hand, together with all liabilities of the city" and to submit the report "to the council in open session."[58] For city clerks in cities of the first class, further duties may be prescribed by ordinance.[59]

49 A.C.A. § 14-58-303. Also see Section II, Chapter X of the Civilpedia.
50 A.C.A. § 14-43-501 (Typically done at the annual organization meeting at the beginning of the year).
51 A.C.A. § 14-43-502
52 A.C.A. § 14-58-202. Also, recall that the mayor is required to submit to the council on or before December 1 of each year a proposed budget for operation for the forthcoming year.
53 See A.C.A. §§ 14-53-101 (fire departments) and 14-52-101 - 102 (police departments).
54 A.C.A. §§ 26-73-202 & 14-14-904
55 A.C.A. § 14-43-401(b)(1)
56 A.C.A. § 14-44-106 & 14-45-103
57 A.C.A. § 14-43-506(a)
58 A.C.A. § 14-43-506(b)(1)-(2)
59 A.C.A. § 14-43-313

Recorders in cities of the second class and incorporated towns have their duties prescribed by ordinance.[60] It is critical to emphasize how important the previous two sentences are. Much of what city clerks and recorders do on a day-to-day basis are not statutory requirements of the job. Rather, duties may be assigned by the council to keep a municipality operating. It is important for a municipality to actually define these extra duties via ordinance for a number of reasons. The first reason is to simply make everyone aware of what the duties of the city clerk or recorder are. Whether it is a seasoned clerk or recorder or someone new running for the office, everyone should be aware of what the duties are and that they are spelled out precisely via ordinance.

This leads to the second reason why this is important, and this reason is better shown through an example.

Let's say Mayor Alex and Recorder Mary are both elected for the first time in the same year. Everything runs smoothly and is going great in the municipality with everyone getting along and doing their duties. Four years later, Mayor Alex doesn't run for reelection, but Recorder Mary does, and Bob runs for mayor. Both get elected to hold office for the next four years. Mayor Bob is nothing like Mayor Alex. He is lazy, never shows up to work and hardly does any of his duties, thus a lot of things end up falling into Recorder Mary's lap. This continues for the next four years. At the next election, Mayor Bob and Recorder Mary get reelected. The same problems persist for the next four years. People rarely see Mayor Bob and Recorder Mary continues to do a lot of the day-to-day work to keep the city operating. At the next election, Recorder Mary gets reelected, and Mayor Bob gets beat by Mayor Charlie. Mayor Charlie is a young, very active mayor who wants nothing more than the best for the city and wants to be highly involved in everything. Unfortunately, this begins to cause some conflicts between Mayor Charlie and Recorder Mary, as Recorder Mary has essentially been doing a lot of the day-to-day work that Mayor Bob neglected. Now that Mayor Charlie is in office and active in the day-to-day operations of the city, Recorder Mary feels like he is encroaching on her job.

This is a common scenario we see in municipalities and one that often leads to the most internal conflict. The good news is it can be easily avoided. So long as the extra duties assigned to the city clerk or recorder are prescribed by ordinance, then we have something we can view and follow. If we end up with a proactive mayor after years of a nonactive mayor, then the council can simply amend the ordinance to take away some of those extra duties that had been assigned to the city clerk or recorder.

City clerks also maintain the official seal of the city.[61] The city clerk may also countersign checks on municipal bank accounts, although others may be designated as check-signers, or "authorized disbursing officers," by ordinance of the council or board of directors.[62] The city clerk or recorder signs bonds and debentures of the municipality[63] and receives, files and retains the financial disclosure statements (also known as Statement of Financial Interest) from elected officials, including the mayor, council members, city clerk, treasurer, the city attorney and the district judge.[64]

The above simply describes the duties prescribed by statute. However, we all know that the duties city clerks and recorders end up with far exceed what is statutorily required. For example, the city clerk or recorder in your municipality may be tasked with the following:

1. Arranging for the publication of official notices, including but not limited to: request for bids, public hearings, ordinances and elections;
2. Preparing ordinances and resolutions with the assistance of the city attorney;
3. Assisting in preparation of the municipality's budget;
4. Instructing and training employees of the city;
5. Administering the city's payroll, insurance programs, and relief and pension funds;
6. Collecting certain municipal taxes and fees;
7. Issuing licenses and permits;

60 See A.C.A. §§ 14-44-109(b) (for cities of the second class) and 14-45-107 (for incorporated towns).
61 A.C.A. § 14-43-406
62 A.C.A. § 14-59-105(b) (city checks must contain the signature of two authorized disbursing officers).
63 See A.C.A. § 14-164-201 et seq. and ACA 14-164-212(a).
64 See A.C.A. § 21-8-701 (listing who is required to file a financial disclosure statement); and see A.C.A. § 21-8-703(a)(3) (designating the city clerk as the recipient of financial disclosures from municipal officers).

8. Serving as the purchasing officer;
9. Handling zoning applications;
10. Serving as a secretary to other municipal boards and commissions;
11. Providing for the destruction of original documents that have been transferred to a legally acceptable electronic or miniature medium;[65] and
12. Handling human resource and personnel issues.

As you can see, the duties of the city clerk and recorder vary widely from city to city, and many of the duties are based on the ordinances of the governing body. Indeed, the duties of the office should be spelled out in an ordinance of the governing body. If the council or board does not take the initiative on this, the clerk should.

Treasurers

The treasurer may have the shortest "job description" in the Arkansas Code, but it entails one of the single most important duties in municipal government: staying in compliance with the municipal accounting code. The municipal accounting code is codified in A.C.A. §§ 14-59-101 to 119. One particular statute in the municipal accounting code, A.C.A. § 14-59-115, prescribes the duties of a municipal treasurer and states two things: (1) "Each municipal treasurer of this state or the designated representative that has been approved by the governing body shall submit a monthly financial report to the council or board of directors," and (2) "municipal treasurers shall maintain the accounting record prescribed in this chapter." The code goes on to lay out the requirements and essentials of municipal accounting and prescribes such things as requiring payments by prenumbered checks and, in some situations, electronic fund transfers,[66] requiring municipalities to reconcile their cash receipts and disbursements journals,[67] maintaining a record of fixed assets,[68] maintenance and destruction of accounting records,[69] and much more that we will cover in detail in Section 2.

Why is all of this important? Since the treasurer is ultimately the person in charge of ensuring the municipality follows the municipal accounting code, if the treasurer refuses or neglects to maintain the books and records, then the treasurer could be charged with malfeasance.[70] Additionally, if the Arkansas Legislative Audit determines that the treasurer is not substantially in compliance with the municipal accounting code, then the Legislative Audit will report to the Legislative Joint Auditing Committee, which has the authority to withhold state turnback funds from the municipality.[71] This is why the role of the municipal treasurer is so important, but this does not mean that the treasurer should ever bear this burden alone. It is up to all municipal officials to ensure budgets are correct, the municipality is not spending more money than it has and the municipal accounting code is followed to ensure turnback funds are not withheld.

4. The City Attorney

The city attorney in the mayor-council form of government is either elected, appointed or contracted with by the municipality. There are a handful of statutes in the Arkansas Code that detail this process.[72] Instead of being distinguished by the classification of the city, however, these statutes are distinguished by the population of the municipality. In cities of the first class with populations over 50,000 the city attorney is by default elected to a four-year term. However, if no attorney residing in the city is elected as city attorney, then the city council may select a resident attorney to fill the office for the remainder of the unfilled term.[73] If no resident attorney of the city is willing to serve as city attorney or if no attorney resides within the limits of the city, then the mayor and city council may contract with any licensed attorney of this state or the attorney's firm to serve as legal adviser,

65 A.C.A. § 14-2-201
66 A.C.A. § 14-59-105
67 A.C.A. § 14-59-108
68 A.C.A. § 14-59-107
69 A.C.A. § 14-59-114
70 A.C.A. § 14-59-118
71 A.C.A. § 14-59-117
72 A.C.A. § 14-43-314 (cities of the first class over 50,000); § 14-43-315 (cities of the first class under 50,000); § 14-42-122 (cities of the first class under 10,000); § 14-43-319 (cities of the first class under 5,000); ACA 14-42-112 (cities of the second class and incorporated towns).
73 A.C.A. § 14-43-314

counselor or prosecutor until a qualified city attorney is elected or appointed.[74] The duties of the city attorney and the salary are all set by the city council.[75]

In cities of the first class under 50,000 in population, if it is not established by ordinance that the office of the city attorney will be appointed, then the position is elected for a four-year term. If there is no resident attorney of the city willing to serve as city attorney or if no attorney resides within the limits of the city, the mayor and council may contract with any licensed attorney in which the duties will be described by ordinance.[76] Note the difference between cities of the first class under 50,000 and over 50,000. In cities over 50,000, the position is by default elected, and the city can only appoint if no one is elected to that office. In cities of the first class under 50,000, the council may adopt an ordinance calling for the position to be appointed by default.

In cities of the first class with populations under 10,000 we see a similar statutory framework with a slight variation. If not established by ordinance that the office of the city attorney will be appointed, then the position is elected, and the officeholder will serve a four-year term. If there is no attorney residing in the city elected, then the council may appoint a resident attorney to fill the office for the remainder of the unfilled term. If there is no attorney serving as city attorney whether by election or appointment, or if no attorney resides within the corporate limits of the city, then upon a 2/3 vote of the council, the municipality may contract with a licensed attorney of this state or the licensed attorney's law firm. Note the difference here: In cities over 50,000 and under 50,000, the mayor and council contract with the city attorney if no resident attorney is serving. In cities of the first class under 10,000, by a 2/3 vote of the council, the city may contract.

In cities of the first class with populations under 5,000, the framework is similar to those larger cities. If it is not pre-established by ordinance that the attorney will be appointed, then the position is elected and will serve a four-year term. If no attorney is elected and no resident attorney is appointed, then the mayor and city council may contract with any licensed attorney of the state or their law firm.

In cities of the second class and incorporated towns, the city attorney is elected unless the council has passed an ordinance stating that the position will be appointed. When no attorney resides within the limits of the city or town or when no resident attorney has been elected, the mayor and city or town council may appoint a licensed attorney to serve as city attorney.

For cities and towns of all sizes, the duties of the city attorney are largely prescribed by ordinance based on the needs of the municipality. However, these duties include, without limitation, authorization to file information for the arrest of any person for violation of any ordinance or laws of the state violated in the city or town, to represent the municipality in civil and criminal actions, advise with all city or town officials as needed, prepare all legal papers, and to file a complete report of the city attorney's work with the council at the end of each year.[77]

As mentioned above, a city attorney may be elected. An elected city attorney must meet the qualifications of an elector, which include a residency requirement. A city attorney may also be appointed if the position is appointed by ordinance. Recall, the position of treasurer may be an appointed position as well, however, even if appointed, the treasurer is still an officer of the municipality and therefore must also be a qualified elector. The same applies to city attorneys. If the municipality does not have anyone elected to the position or if there is no city attorney who lives within the city, then the city is authorized to contract with a licensed attorney or the attorney's law firm. The contract attorney does not have to be a qualified elector as the whole purpose of this provision is to address those instances where there is no one in the city who wants to be the city attorney. If a city needs to contract with a city attorney, an actual agreement with the attorney is needed.

74 A.C.A. § 14-43-314
75 A.C.A. § 14-43-314(b)&(c)(2)(B)
76 A.C.A. § 14-43-315
77 A.C.A. § 14-42-112

D. City Manager Form of Government

1. Overview

The city manager form of government is a form of local government that provides a clear line of authority and responsibility with a city manager, who acts as the chief executive officer—think CEO of a corporation—and can be held strictly accountable for municipal operations. This form of government is unique because it combines the political leadership of an elected board of directors with the managerial experience of an appointed manager. As discussed above, the city manager form of government contains all the same positions we reviewed in the mayor-council form of government. However, the duties and roles of the officials differ in the city manager form of government.

Before diving into the details of the city manager form of government, it is important to make quick notation. The City Manager Enabling Act of 1989 (Act 907 of 1989, now codified under A.C.A. § 14-61-101 *et seq.*) changed the way city manager forms of government operated—to an extent. Cities organized under the city manager form of government prior to July 3, 1989, are authorized to continue to operate as they previously had under the provisions of A.C.A. § 14-47-101 *et seq.*, unless the city chose to hold a special election in order to exercise one of the options available under A.C.A. § 14-61-101 *et seq*. Given that municipalities operating under this form of government may look different, this handbook provides a broad overview of the city manager form of government while keeping in mind that there may be some distinguishing factors among Arkansas municipalities operating under this form of government.

Only cities with a population of 2,500 or more as of the latest decennial census may adopt the city manager form of government.[78] To adopt this form of government, a petition containing signatures of electors equal to 15% of the aggregate number of ballots cast for all candidates for mayor in the preceding general election must be submitted to the mayor.[79] Once received, the mayor will issue a proclamation submitting the question of organizing the city under the city manager form of government to the electors at a special election.[80] If the electors vote against reorganizing under the city manager form of government, another vote cannot be taken on the issue until four years have passed and another petition is submitted to the mayor.[81] If the electors vote for the reorganization, then the mayor will file certificates stating that the proposition was adopted with the Secretary of State and with the county clerk. Once that is done, the mayor shall call a special election to be held in the city for the purpose of electing seven city directors.[82] This was the process used by municipalities to adopt the city manager form of government prior to 1989. Now, if a municipality wants to adopt the city manager form of government, or if a municipality currently operating under this form of government wants to reorganize under the same form of government with the new law in place, the municipality would need to follow the petition process for special elections codified in A.C.A. § 14-61-113, as well as the new statutes governing initial organization and reorganization codified in A.C.A. §§ 14-61-115 – 116.

2. The Mayor

Unlike the mayor in the mayor-council form of government, the mayor in the city manager form of government can either be elected directly by the electorate of the municipality or the mayor can be a city director who is chosen by the board of directors to fill the role.[83] The default term for a city director chosen as mayor is two years, but the board of directors may provide by ordinance that the term of mayor shall be one year.[84] There is no prohibition on serving as mayor for more than one term.[85] If the mayor is chosen by the electorate, then the mayor serves for a term of four years.[86]

By default, the powers of the mayor are very limited in the city manager form of government. The mayor presides at all meetings of the board and is recognized as the head of city government for all

78 A.C.A. § 14-47-101
79 A.C.A. § 14-47-106(b)
80 A.C.A. § 14-47-106(b)(1)(A)
81 A.C.A. § 14-47-106(b)
82 A.C.A. § 14-47-106(b)(3)
83 See A.C.A. §§ 14-47-116(a)(1) and 14-61-111. This is one of the major differences between the city manager form of government pre-1989 and post-1989 change in the law.
84 A.C.A. § 14-47-116(a)(2)(A)-(B)
85 A.C.A. § 14-47-116(a)(3)
86 A.C.A. § 14-61-111

ceremonial purposes.[87] Further, the mayor signs all written agreements, contracts, bonds, mortgages, pledges, indentures, conveyances and other written instruments that have been approved by the board.[88] Finally, the mayor may vote on all matters coming before the board but does not have the power to veto[89], unless the authority has been given to the mayor by a majority vote of the electorate at a general or special election.[90] In municipalities with the city manager form of government that have a population of over 100,000 the mayor may have the authority to remove and replace the city attorney at the mayor's discretion.[91]

Generally, the role of the mayor in the city manager form of government is largely a ceremonial position. The board of directors acts as the supreme legislative and executive body of the city, and the city employs a qualified city manager to manage the city.[92] The mayor, if chosen from among the directors, is authorized to vote on issues before the board but does not have a veto. A directly elected mayor may have a veto.

However, the board of directors by 2/3 vote via an ordinance or the electors by petition and majority vote can prescribe more authority to the mayor.[93] The list of additional powers a mayor in the city manager form of government may wield can be found in A.C.A. 14-47-140(a)(1)(A)-(G).They include the power to veto,[94] the power to hire and remove the city manager and city attorney,[95] and the power to appoint, subject to confirmation by a majority of the board, persons to fill vacancies on the board.[96]

3. The Board of Directors

In the city manager form of government, the board of directors constitutes the supreme legislative and executive body of the city and is vested with all powers and authority, which prior to reorganization, were vested under then-existing laws, ordinance, and resolutions in the mayor and council of that city.[97] The board has the responsibility to hire a city manager and set their salary.[98] The board can also terminate the city manager's employment at any time with or without cause.[99] After a municipality is reorganized into the city manager form of government, the statutory term of office of the city treasurer, city clerk, city attorney, city marshal and recorder in cities of the second class cease and terminate, and the incumbent of each of these offices remains in office subject to removal and replacement at any time by the board of directors.[100] The board may also override the mayor's veto by a 2/3 vote, if the mayor has a veto.[101]

As the statute states, the board simply constitutes the supreme legislative and executive body of the city. While the board's role is similar to a city or town council's in the legislative aspect (i.e. passing ordinances and resolutions), many executive functions are performed by the city manager. However, the city manager ultimately answers to the board of directors.

4. The City Manager

The city manager acts as the chief executive officer and performs many of the administrative and executive duties the mayor performs in the mayor-council form of government. The city manager is typically someone qualified, through experience, education or both, and chosen by the board of directors to take on the managerial tasks of the city. City managers have the authority, to the extent that such authority is vested in them by the board of directors via ordinance, to supervise and control all administrative departments, agencies, offices and employees of the municipality.[102]

87 A.C.A. § 14-47-116(b)(1)-(2)
88 A.C.A. § 14-47-116(b)(3)
89 A.C.A. § 14-47-116(b)(4)
90 A.C.A. § 14-61-114(b). If the mayor has been granted the authority to veto, then the mayor is not authorized to vote unless the vote is necessary for passage of a measure. See A.C.A. § 14-61-114(d)(2)(B).
91 A.C.A. § 14-47-108(a)(2)(D)
92 A.C.A. § 14-47-109(a)(2)
93 A.C.A. § 14-47-140(a)(1)
94 A.C.A. § 14-47-140(a)(1)(A)
95 A.C.A. § 14-47-140(a)(C)-(G)
96 A.C.A. § 14-47-140(a)(1)(B)
97 A.C.A. § 14-47-109(a)(2). This is also subject to ACA 14-47-120(10) which provides the city manager with, "all powers, except those involving the exercise of sovereign authority, which, under statutes applicable to municipalities under the mayor-council form of government or under ordinances and resolutions of the city in effect at the time of its reorganization, may be vested in the mayor."
98 A.C.A. § 14-47-119
99 A.C.A. § 14-47-119(e)
100 A.C.A. § 14-47-108(a)(1)(2)(B)
101 A.C.A. § 14-47-140(a)(1)(A)(ii)(a)
102 A.C.A. § 14-47-120(1)(A)

In municipalities with populations over 100,000, the city manager has the authority to remove and replace the city attorney at the city manager's discretion if this authority has been vested with the city manager.[103] The city manager enforces all obligations in favor of the city or its inhabitants that are imposed by law, or under the terms of any public utility franchise, upon any public utility. The city manager also has the authority to inquire into the conduct of any municipal office, department or agency that is subject to the control of the board, in which connection he or she shall be given unrestricted access to the records and files of any such office, department or agency and may require written reports, statements, audits and other information from the executive head of the office, department or agency.

The city manager may nominate, subject to confirmation by the board, persons to fill vacancies at any time occurring in any office, employment, board, authority or commission to which the board's appointive power extends (if the mayor doesn't have this appointment power). The city manager may also remove from office all officials and employees, including members of any board, authority or commission who may otherwise be removed by the city's legislative body in the mayor-council form of government.

The city manager also has contracting and purchasing authority and is therefore authorized to contract for and purchase supplies, materials and equipment for the various municipal offices, departments and agencies of the city and may contract for services to be rendered to the city or for the construction of municipal improvements. However, the board is required to establish a maximum amount, and each contract, purchase or authorization exceeding the amount so established shall be put to bid.

The city manager prepares the municipal budget annually and submits it to the board for approval or disapproval and is responsible for its administration after adoption. The city manager is also required to prepare and submit to the board, within 60 days after the end of each fiscal year, a complete report on the finances and administrative activities of the city during the fiscal year. The city manager is also required to keep the board advised of the financial condition and future needs of the city and make necessary recommendations. Overall, the city manager shall perform other such additional duties and exercise such powers as may, by ordinance, be lawfully delegated by the board.

5. The City Clerk and Treasurer

In the city manager form of government, the positions of both the city clerk and the city treasurer are appointed by the board of directors and the board may remove or replace the clerk or treasurer at their pleasure.[104] Like in the mayor-council form of government, the positions of city clerk and city treasurer may be consolidated into a single position by ordinance.[105] The duties and roles of the clerk, treasurer or clerk/treasurer in the city manager form of government are the same as in the mayor-council form of government.[106]

6. The City Attorney

City attorneys in the city manager form of government are not elected but rather hired and/or removed by either the board of directors, the city manager or the mayor, depending on who has been vested such authority. Like the clerk and treasurer in the city manager form of government, when a city reorganizes under the city manager form of government, the statutory term of office of the city attorney ceases and terminates and the incumbent remains in office subject to removal and replacement at any time by the board, city manager or mayor. The duties of the city attorney are similar to those in the mayor-council form of government, mainly duties prescribed by ordinance to fit the needs of the city.

103 A.C.A. § 14-47-108(a)(2)(C)
104 A.C.A. § 14-47-108(a)(2)(B)
105 A.C.A. § 14-47-131(b)(1)
106 See previous pages for duties of city clerks and treasurers.

E. City Administrator Form of Government

1. Overview

Any city of the first class or any city with a population of at least 2,500 may adopt the city administrator form of government.[107] The city administrator form of government is very similar to the city manager form of government. However, there are several important distinctions. In the city administrator form of government, there are seven elected directors and a mayor elected in nonpartisan elections.[108] A city with the city administrator form of government is divided into four wards "composed of contiguous territory and substantially equal population."[109] The persons elected to fill these positions must reside in their respective wards. The other three positions and the position of mayor are elected at large.[110] These are the two major distinctions. In the city manager form of government, the seven directors may all be elected at large or by wards or by wards and districts.[111] In the city administrator form of government, each of the four wards has one director who is elected by the residents of their ward, while the other three directors are elected at large. The mayor in the city administrator form of government is always elected at large as opposed to the city manager form of government, where the mayor is either a director who is elected to the office of mayor by the other directors or elected directly by the electorate.

2. The Mayor

While the mayor in the city administrator form of government is elected at large, the duties of the mayor are still limited compared to the mayor-council form of government. The mayor is recognized as the head of the city government for all ceremonial purposes and presides at regular and special board meetings. However, unlike the mayor in the city manager form of government, the mayor does not have a vote on matters before the board but does have the power to veto all decisions made by the board except for personnel decisions.[112] The mayor also has the authority to sign on behalf of the city all written agreements, contracts, bonds, mortgages, pledges, indentures, conveyances and other written instruments that have been approved by the board of directors.[113]

3. The Board of Directors

The board of directors in the city administrator form of government is the legislative and executive body of the city and is vested with all powers and authority that, immediately prior to the effective date of the reorganization were vested under then-existing laws, ordinances and resolutions in the governing body of the city.[114] The board of directors is also charged with the responsibility of hiring a city administrator and setting the administrator's salary.[115] The board may also, on a majority vote, terminate the city administrator's employment at any time, either for or without cause. However, interestingly enough, the city administrator cannot be terminated between the dates of January 1 and March 1 of the year following any general election in which members of the board are elected.[116] State law also requires the board to meet twice during each calendar month, and any director who fails to attend five consecutive regular meetings of the board, or who fails to attend 50% of the regular meetings of the board during a calendar year shall be deemed to have resigned.[117]

4. The City Administrator

As the chief executive officer of the municipality, the city administrator performs much of the day-to-day work that a mayor in the mayor-council form of government might do. To see the full statutory extent of the city administrator's duties, see A.C.A. § 14-48-117; however, some duties are worth mentioning. The city administrator supervises and controls all administrative departments, agencies, offices and employees to the extent that such authority is vested through an ordinance enacted by the board of directors. The city administrator also represents

107 A.C.A. § 14-48-101
108 See A.C.A. §§ 14-48-108 and 14-48-110.
109 A.C.A. § 14-48-107
110 A.C.A. § 14-48-110
111 A.C.A. § 14-47-109(d)(2)
112 A.C.A. § 14-48-111(a)(3) – (b)(1)
113 A.C.A. § 14-48-111(a)(2)
114 A.C.A. § 14-48-110(a)(2). However, this is subject to the powers of the mayor found in A.C.A. § 14-48-111 and the powers of the city administrator in A.C.A. § 14-48-117.
115 A.C.A. § 14-48-116
116 A.C.A. § 14-48-116(d)
117 A.C.A. § 14-48-120

the board in the enforcement of all obligations in favor of the city or its inhabitants imposed by law. To the extent that the board has prescribed by ordinance, the city administrator may contract for and purchase supplies, materials and equipment for municipal offices and contract for, or authorize contracts for, services to be rendered to the city or for the construction of municipal improvements. The city administrator is also charged with preparing the municipal budget each year, submitting it to the board for approval or disapproval, and is responsible for administration of the budget after adoption. Again, this is not an exhaustive list of the duties of the city administrator, but it showcases the executive nature of the work.

5. The City Clerk and Treasurer

When a municipality adopts the city administrator form of government, the terms of office of the city treasurer, city clerk, city attorney, city marshal and recorder (in cities of the second class) end immediately. These officeholders remain in office subject to the removal and replacement, at any time, by the city administrator with approval of the board of directors.[118] At the discretion of the board of directors, the office of the city treasurer and office of the city clerk may be consolidated by ordinance, or the board may charge another position—typically a finance officer—with the responsibility of administering the financial affairs of the city.[119] The duties of the clerk and treasurer (or finance officer) are statutorily the same as in the mayor-council form of government.

6. The City Attorney

City attorneys in the city administrator form of government are also not elected. As in the city manager form of government, when a city reorganizes under the city administrator form of government, the statutory term of office for the city attorney ceases and the incumbent remains in office. However, here the city attorney is subject to removal and replacement at any time by the city administrator with the approval of the board of directors.[120] Again, the duties of the city attorney are the same as they are in the other two forms of government and predominantly based on what is required and prescribed by ordinance. However, note the difference between the city manager and city administrator forms of government. In the city manager form of government, the oversight belongs to the mayor and board of directors while in the city administrator form of government it is the city administrator, with the approval of the board of directors.

Chapter 3. Ordinances and Resolutions

A. Overview

Generally speaking, the legislative body of a municipality—the council or board of directors—takes official action by passing a resolution or an ordinance. Municipalities are empowered to make and publish bylaws and ordinances, not inconsistent with the laws of this state, which, as to them, shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof.[121] The city attorney prepares most ordinances, resolutions, bylaws and orders or should at least approve the final draft to be submitted to the council. The city clerk or recorder may also assist in preparing ordinances, resolutions, orders and bylaws and, even if the clerk or recorder does not assist in this capacity, it is important for them to understand the legal requirements and customary practice for these documents, as the clerk or recorder will likely be charged with keeping records and ensuring ordinances are published.

Ordinances, bylaws, resolutions and orders all share certain similarities. However, there are distinctions between these different types of actions, and knowing the differences is important. For example, in the Arkansas Code, ordinances and bylaws are frequently referred to in the same sentences and sections, and little distinction is made between the two. It might be helpful to consider bylaws as a subset of ordinances. In other words, all bylaws are ordinances, but not all ordinances are bylaws. As a general rule, ordinances control matters external to the municipality's governing body, and bylaws regulate matters internal to it. Bylaws are defined by *Black's Law Dictionary* as "a rule or administrative provision adopted by an organization for its internal governance and its

118 A.C.A. § 14-48-106
119 A.C.A. § 14-48-124
120 A.C.A. § 14-48-106(a)(2)(B)
121 A.C.A. § 14-55-102

external dealings."[122] In Chapter 1 of this section, we discussed the organizational meeting that municipalities have in January each year in which the governing body determines how the meetings of the governing body will be conducted. Though we may not refer to it as such, if the governing body takes action in setting the dates and times for the council or board meetings for the year, it constitutes a bylaw, as it is an administrative provision adopted for the internal governance of the governing body.

B. Ordinances

A municipal ordinance is a city law through which the mayor and the city council make the power of the city effective. In more technical terms, McQuillin, a respected commentator on municipal law, defined ordinances as all "local law[s] of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality."[123] An ordinance is a local law that usually regulates persons or property and usually relates to a matter of general or permanent nature. An ordinance is more formal and authoritative than a resolution, which is why we recommend your city attorney approve the structure and content of all proposed municipal ordinances.

There are two categories of rules to follow when dealing with ordinances: content and procedure. When it comes to the content of an ordinance there is not a specific section of code that necessarily dictates the content ordinances. However, there are eight key concepts to help ensure you are passing a lawful ordinance:

1. Ordinances must be reasonable.[124]
2. They must not be oppressive.
3. They must not be discriminating or partial.[125]
4. They must not unduly restrain lawful trade.
5. They must not violate civil rights.
6. They must not be ambiguous.[126]
7. They should not conflict with state or federal law.[127]
8. They must contain only one general subject, and the subject must be clearly stated in the title.[128]

Passing an ordinance is a three-part process. First, there is the introduction of the ordinance at a council meeting. Then the city clerk, recorder or city attorney, depending on your local rules, reads the ordinance, and the person(s) proposing the ordinance is allowed the opportunity to explain its provisions. Finally, the council debates the ordinance and either defeats, postpones, refers it to a committee for further study or approves it.

The Arkansas Code does not prescribe the form in which municipal ordinances shall be prepared except that the ordinance must be in writing and clearly signify that it is the "will" of the municipality. A municipal ordinance can be divided into seven parts: (1) the title, (2) the enacting clause, (3) the command (the "WHEREAS" section), (4) the penalty, (5) the repealing clause, (6) the emergency clause and (7) the attestation.

Each of the seven parts has its own distinct function. The title succinctly informs the reader what the ordinance is about (See key concept 8 above). The enacting clause, as the name implies, enacts the ordinance. The command spells out exactly what behavior is mandated or prohibited. The penalty spells out the range of punishments available for those who do not follow the command.[129] The repealing clause gets rid of any other existing ordinances that might conflict with the new ordinance.[130] The emergency clause, which we will discuss further

122 Black's Law Dictionary (11th ed. 2019)

123 5 McQuillin Mun. Corp. § 15:1 (3rd ed.)

124 The ordinance's effect must be related to its purpose. In other words, your goal with the ordinance must make sense. If the ordinance is intended to lower noise levels during the night, then you can't punish people for wearing ugly clothing! This issue is very rare, and municipalities must go far afield for this to be an issue.

125 Ordinances and resolutions should not single out a single person. This would ride the lines of a Bill of Attainder or the legislative body judging a person guilty instead of a court. Discriminatory ordinances, even if they are per se civil rights violations, cause constitutional concerns. For example, banning tall people from property isn't necessarily a civil rights issue as it is not a protected class, but it can cause constitutional concerns.

126 Ordinances that carry fines or punishments in any way may not be ambiguous. In other words, a reasonable person should understand what conduct is prohibited. For example, if we just state, "No running at a moderate speed on the sidewalks" we have questions such as "what is a moderate speed?" If we state, "Dangerous animals are prohibited," what is a "dangerous" animal?

127 See A.C.A. §§ 14-55-102 and 14-55-502.

128 A.C.A. § 14-55-201

129 There are statutory and/or constitutional limits on the amount of penalty that may be imposed by municipal ordinance such as those found in A.C.A. § 14-55-501 504. The governing body, the clerk/recorder and the city attorney should be aware of these limitations.

130 The "Repealer" section is particularly important, especially if the new law is designed to supersede an existing ordinance or part thereof, in which case, it is better to specifi-

below, explains why the municipality cannot postpone the enforcement of the ordinance.[131] Finally, the attestation provides the proof that the ordinance went through the appropriate processes and is a validly enacted ordinance.

Another important clause to consider is a severability clause. If an ordinance has subparts and a court finds one of the parts invalid, the court will likely not strike down the other parts if they are different or distinct enough ("severable") from the invalid portion. A severability clause expresses the council's intention to have the court treat the ordinance as valid even if certain portions of the ordinance are challenged and deemed unconstitutional.[132]

Unlike the content rules of thumb above, when it comes to the procedural rules for municipal ordinances there are statutory requirements that must be met.

1. Reading Requirement

All ordinances of a general or permanent nature must be read fully and distinctly on three different days unless 2/3 of the members of the council suspend the rule.[133] However, in municipalities with a population of fewer than 15,000, if the ordinance under consideration has been submitted to and approved by the electors of the municipality and is being amended, repealed or otherwise altered, then the ordinance shall be fully and distinctly read on three different days not less than 28 days apart.[134]

While the reading requirement is straightforward, there are a few notes to make. First and foremost, the mayor is authorized to vote to pass the motion to suspend the rules.[135] There is also a common argument among attorneys regarding how often to dispense with the reading requirement rule. It is important to note that the reading requirement has been law for over a century without any changes and hearkens back to a time when many people couldn't read and had to hear aloud what an ordinance stated. Some attorneys believe that there must be a first reading and then we can dispense with the rule and have the second and third readings by title only. Some believe that we can dispense with the rule at the beginning of the meeting. Some might even argue that we can dispense the rule at the beginning of the year and not have to dispense with it again for the rest of the year. There is no clarification in the law nor has the Arkansas Attorney General opined on the issue. The safest route you can take, especially if you do not have a city attorney, is to read ordinances in full for the first reading, and then the reading requirement may be dispensed with a 2/3 vote of the governing body. As a practical matter, it is critical that the mayor clarifies precisely what the motion to waive actually seeks.

Certain ordinances—those that contain lengthy technical codes, for example—can be onerous to read aloud. Fortunately, cities are authorized by the passage of a municipal ordinance to adopt by reference technical codes, regulations or standards, without having to set forth the provisions of the code or parts thereof, if three copies of the code, or relevant parts, are filed either electronically or by hard copy in the clerk's office and open to inspection and view by the public prior to the passage of the ordinance.[136]

2. Voting Requirement and Effective Dates

To pass any bylaw, ordinance, resolution or order, a concurrence of a majority of a whole number of members elected to the council is required.[137] The effective date for ordinances of a general or permanent nature is 90 days after publication or posting.[138] However, if the governing body has, by ordinance, fixed the deadline for filing referendum petitions at not less than 30 days nor more than 90 days after the passage of an ordinance, then the effective date shall be the day after the deadline fixed in ordinance.[139] Most municipalities passed such an ordinance decades ago. However, it is critical that the ordinance is easily accessed and clear to ensure compliance with state law.

---

cally name the ordinance in contrast to making the general repealer. A.C.A. § 14-55-401 provides that all ordinances lawfully passed and adopted shall remain in force until altered or repealed by the council.

131 Not all ordinances will have emergency clauses.

132 Drummond v. State, 320 Ark. 385, 389, 897 S.W.2d 553, 555 (1995). A severability clause may read something like – "SECTION. If, for any reason, any portion or portions of this ordinance shall be held invalid, such invalidity shall in no way affect the remaining portions thereof which are valid, but such valid portions shall be and remain in full force and effect".

133 A.C.A. § 14-55-202(a)

134 A.C.A. § 14-55-202(b)

135 Ark. Op. Atty. Gen. No. 2007-051

136 A.C.A. § 14-55-207

137 A.C.A. § 14-55-203

138 A.C.A. § 14-55-203

139 See A.C.A. § 14-55-203 and Ark. Const. art. 5 § 1.

If an ordinance contains an emergency clause, there must be two separate votes: one for the substantive part of the ordinance, and one for the emergency clause.[140] The ordinance, with an emergency clause, will go into effect immediately upon passage or at the time specified by the emergency clause, regardless of publication or posting.[141] However, if the ordinance that contains an emergency clause imposes any fine, penalty, forfeiture or deprivation of liberty or property, then the ordinance will not be effective until it has been published or posted.[142] For example if the municipality is passing a law that contains a penalty, then the public needs to be aware of the new conduct being penalized before it goes into effect.

Speaking of emergency clauses and voting, the mayor is not allowed to vote on an emergency clause.[143] Emergency clauses should be used solely for emergencies, not simply because the council wants something to go into effect immediately for the sake of simplicity. If an ordinance includes an emergency clause, it should also lay out the very specific facts that show why an emergency clause is necessary.

Let's look at two examples and determine if each example provides enough information for an emergency.

> "The council hereby finds that the city is in desperate need of new regulation governing fireworks and hereby declares an emergency, such that this ordinance shall take effect immediately."[144]

> "The council hereby finds that the city is in desperate need of new regulation governing fireworks, because there has been a drought in Jax County and the conditions are ripe for a wildfire. Having seen such fires spread throughout the state in past weeks the City Council, hereby declares an emergency, such that this ordinance shall take effect immediately"[145]

3. Publication Requirement

All bylaws or ordinances of a general or permanent nature and all that contain any fine, penalty or forfeiture are required to be published in some newspaper published in the municipality.[146] If the municipality does not have a newspaper published in the municipality, then written or printed notices may be posted in five of the most public places designated by the governing body. What constitutes a newspaper published in the municipality, you may ask? Unfortunately, there isn't a great answer to the question. There are no Arkansas Supreme Court opinions on the matter, but the attorney general opinions on the issue focus on what work is being performed by the newspaper within the municipality. For example, a newspaper would not necessarily have to be physically printed in the municipality to be considered "published in the municipality." There are many factors a court might look at in adjudicating this issue, such as whether the newspaper's headquarters are located in the municipality, whether it is the municipality's prime source for information or whether the editing takes place in the municipality.[147] Consider these factors when determining where to publish or post municipal ordinances.

C. Resolutions

Unlike ordinances, which are local laws for the municipality of a general or permanent nature, a resolution is an expression of the will of the council. The major distinction between an ordinance and a resolution is that a resolution may not have any legal effect. A resolution is an expression of opinion or intent, but it may also perform some legal act, such as calling for a referendum regarding alcoholic beverages.[148] Resolutions are typically used to state the council's opinion on various matters—for example, supporting or opposing legislation pending at the state capitol. Resolutions also usually affect items of a temporary or administrative nature, such as entering into

140 Ark. Const. art. 5 § 1 provides, "shall vote upon separate roll call in favor of the measure going into immediate operation".
141 A.C.A. § 14-55-203(c)(1)(C)
142 A.C.A. § 14-55-203(c)(1)(C)
143 Ark. Const. art. 5 § 1 provides, , "two-thirds of all the members elected to the city or town councils."
144 This is probably not sufficient enough. Information is lacking, as we see in the second example, to determine whether this is an emergency or not.
145 This provision provides more "necessity." We have added serious conditions that constitute the urgent need to regulate fireworks, as we are in a drought and wildfires are picking up all over the state.
146 A.C.A. § 14-55-206(a)
147 See Ark. Op. Atty. Gen. No. 95-227, where the AG opined that The Fairfield Bay News was in all likelihood "published" in Fairfield Bay although the actual printing took place in Heber Springs, but all other activities necessary to prepare and produce a camera-ready copy of the paper were performed in Fairfield Bay, where the principal office was located.
148 See A.C.A. § 3-9-206(a)(1): "A referendum election [for on-premises consumption] may be called in a city by resolution adopted by a majority vote of the governing body of the city …"

contracts, approving large purchases or entering into agreements with other government units. A resolution is the official expression of the council and may be adopted by the council at one reading, as long as it is not general or permanent in nature.[149]

Since resolutions are simpler to adopt than ordinances, how much of the council's business can be conducted through resolutions? Unfortunately, the law is unclear. Certain actions of the municipality are mandated to be performed on the basis of an adopted ordinance or resolution, such as the establishment of a budget and the authorization to expend funds,[150] enter into contracts[151] and award franchises.[152] An ordinance or resolution is also required when enacting laws carrying monetary or jail time penalties[153] and for the redistricting of wards.[154]

Now that we have discussed resolutions and ordinances, let's work through some examples to determine when ordinances or resolutions go into effect, and when we should use an ordinance or resolution.

Knowledge Check

(1) The city of Olive passed an ordinance prohibiting jaywalking. The ordinance provides a penalty in the form of a fine up to $500. The governing body also passed an emergency clause with the ordinance. When does the ordinance go into effect?[155]

(2) The city of Zorro passes its annual budget each year through an ordinance. Midway through this year the council needed to amend the budget and did so by resolution. Was this proper?[156]

(3) Through one vote, the city of Gemma passed an ordinance, containing an emergency clause, to prohibit fireworks in the city limits. Was this proper?[157]

Chapter 4. Elections, Vacancies and Wards

A. Overview

The purpose of Chapter 4 is to provide a baseline knowledge of elections, wards[158] and vacancies. If you're reading this, you have more than likely already gone through the election process and have been elected. However, there is a lot of information to keep track of in regard to elections and frequent changes to the elections law. We also receive questions regarding citizen initiatives and referendums. While municipalities are familiar with the process of the council referring ordinances, like sales tax and annexation ordinances, to the electorate, many municipalities have never dealt with a citizen's initiative and referendum as it pertains to your local legislation. From there we will turn our attention to vacancies in municipal offices and the procedures to fill vacancies, as well as some common issues that arise. Finally, we will discuss municipal wards detailing which municipalities must have wards, how many wards municipalities must have, and redistricting.

149 A.C.A. § 14-55-202
150 A.C.A. § 14-58-202 (budget may be adopted by ordinance or resolution)
151 City of Dardanelle v. City of Russellville, 372 Ark. 486, 490, 277 S.W.3d 562, 656 (2008) (purchase of property requires resolution by city council)
152 A.C.A. § 14-47-139 (either ordinance or resolution)
153 A.C.A. § 14-55-504 (ordinance required)
154 See A.C.A. §§ 14-43-311 and 14-44-102 (either ordinance or resolution).
155 Although the ordinance contains an emergency clause, the ordinance will not go into effect until the ordinance has been published. Remember, if the action being prohibited is going to be enforced through a punishment or penalty, it cannot go into effect until the public has been put on notice.
156 It was meant to be a trick question! Although budgets may be adopted by either an ordinance or a resolution, we can only amend the enacting document by the same method. If the budget was adopted by an ordinance, it would take an ordinance to amend the previous ordinance, and the same is true for resolutions.
157 No. A municipality cannot pass an emergency clause through the same vote as the ordinance. There must be a separate vote on the emergency clause.
158 Cities of the first and second class only!

B. Elections

Each election, the Arkansas State Board of Election Commissioners in conjunction with the Secretary of State's office and the Arkansas Ethics Commission publish the "Running for Public Office" handbook. In it you will find all of the qualifications for each office of the state as well as updated filing deadlines. It is a great handbook and worth checking out each year before you file for office. Since that handbook exists, we will focus on the baseline requirements for running for municipal offices and look at some important distinctions between "elected" and "appointed" offices. In Chapter 2, we covered all of the municipal officials a municipality might have and some of the differences in positions depending on the classification of the city and form of government. Here, we go into more detail about the qualifications for municipal positions and terms of office.

As a primer, every municipal official must meet some constitutional and statutory qualifications. The most important is that officer holders, whether elected or appointed, are required to possess the "qualifications of an elector."[159] This includes being a citizen of the United States, being a resident of the State of Arkansas, being at least 18 years of age, and lawfully registered to vote in the election for which you are running.[160] You must also have never been convicted of a felony or convicted of embezzlement of public money, bribery, forgery or other infamous crime.[161] You are also prohibited from filing, running as a candidate or holding any municipal office if you have plead guilty or found guilty or plead *nolo contendere* to a public trust crime.[162]

There is a significant distinction between officials who are "elected and appointed" and those officials that are "nominated and confirmed." Municipalities operating under the mayor-council form of government do not have to worry about the nomination and confirmation aspect as it relates to municipal officials. There are two ways an official may hold office in municipal government in mayor-council forms of government. Officials can be elected to hold the office, or they can be appointed to the office. We see appointments generally occur in two ways. First, cities sometimes appoint someone to fill a vacancy when the incumbent office holder ceases to hold the office for which they'd been previously elected prior to the expiration of the term. We also see appointments when a municipality decides to separate the positions of clerk/treasurer or recorder/treasurer and choose to appoint a treasurer. Regardless of these two situations, remember that the person appointed must be a qualified elector to hold the office, and that includes a residency requirement. So, if a treasurer is appointed rather than elected, the treasurer must still be a qualified elector.[163]

On the other hand, some officials in the city administrator and city manager forms of government are nominated and confirmed by the board of directors. The "officials" in these two forms of government who are nominated and confirmed are employees rather than officials, and thus the Arkansas Code does not delineate the qualifications for positions like the clerk and treasurer in cities with these two forms of government.
With this background in mind, let's look at the terms of office of officials in the different forms and classifications of municipalities.

1. Mayor-Council Form of Government

In cities of the first class with a population of 50,000 or more, the mayor, each council member, the city clerk, treasurer, clerk/treasurer and city attorney[164] hold office for a term of four years. The Arkansas Code establishes the timeline of municipal election cycles. The mayor, the clerk and one council member from each ward are elected beginning in 1960 and every four years thereafter. So, by starting in 1960 and counting four years onward, we determine when those positions will be on the ballot, which would be in 2024, 2028, and so forth. On the other hand, the city attorney, the treasurer (if applicable) and one council member from each ward are elected beginning 1962 and every four years thereafter. Therefore, for these positions, we start in 1962 and count four years onward to determine when these positions will be on the ballot. The next ones would be 2026, 2030, and so forth.

159 Ark. Con. art. 19 § 3
160 Ark. Con. art. 3 § 1
161 See Ark. Con. art. 5 § 9 and A.C.A. § 21-8-305.
162 A.C.A. § 21-8-305
163 Ark Op. Atty. Gen. No. 2002-105
164 If the city attorney is elected.

In cities of the first class with a population of fewer than 50,000, the mayor, the city clerk, the treasurer, clerk/treasurer and city attorney hold office for four years. By default, city council members only hold office for a term of two years. However, any city of the first class may, by ordinance referred to and approved by the voters, elect two council members from each ward to four-year terms, resulting in staggered terms with one council member being elected to a four-year term from each ward every two years, with an initial two-year term for position 2.[165]

In cities of the second class, the mayor, recorder, treasurer or recorder/treasurer hold office for a term of four years. The mayor is elected beginning in 1966 and every four years onward, so 2026, 2030, and so forth will be the next election years for mayors in cities of the second class.[166] The recorder, treasurer or recorder/treasurer are elected beginning in 1972 and every four years onward, so the next election years for these positions will be 2024, 2028, and so forth.[167] City council members in cities of the second class are elected to two-year terms, unless the voters have approved four-year terms.[168]

In incorporated towns, the mayor and recorder/treasurer both hold office for a term of four years. The mayor is elected beginning in 1966 and the recorder/treasurer is elected beginning in 1982, which puts both positions on the same four-year cycle, so the next elections for these positions will be in 2026, 2030, and so forth.[169] Council members in incorporated towns are elected to two-year terms, unless the voters have voted for four-year terms.[170]

2. City Manager and City Administrator Form of Government

In the city manager form of government, each director is elected for a term of four years. If the municipality operating under the city manager form of government elects its mayor in an election, then the mayor will also serve for four years. If the mayor is elected by the board of directors themselves, then the mayor by default holds the term for a period of two years unless the board has provided, by ordinance, that the term of the mayor is one year. In the city administrator form of government, each director and the mayor are elected to a term of four years. There are also some additional qualifications to run for board of director in both forms of government. First, in both forms of government, you are required to be 21 years of age to run for office, as opposed to the 18 years old requirement.[171] Further, you are required to have resided within the municipality for at least 30 days to run for the board of directors in the city manager form of government. In the city administrator form of government, the mayor and board of directors are required to be 21 years of age and required to have resided in the municipality for at least six months.[172]

As discussed in the introduction to this section, the clerk, treasurer and city attorney positions are not elected and are instead appointed by the board of directors. Therefore, the term of office for these officials is subject to the board of directors.

3. Miscellaneous Issues

There are three issues that frequently arise in regard to elections and vacancies that deserve attention. The first is recall elections. Any municipal officer who holds an office for a term of four years in the mayor-council form of government is subject to removal from the office by the electors qualified to vote for a successor of the incumbent.[173] A recall requires a petition requesting the removal of a person holding the office that is signed by a number of qualified electors equal to 25%. The petition must be filed by noon not more than 105 days or less than 91 days before the next general election following the election at which the office was elected.[174]

The second issue concerns residency requirements of municipal officials. We have previously covered the required qualifications to run for municipal office. A common question we receive is, "What happens when a council member no longer resides in the ward they were elected to?" This question could apply to any other municipal official who moved outside of the corporate limits. This question is not easy to answer. Outside of the requirement

165 A.C.A. § 14-43-312
166 A.C.A. § 14-44-105
167 A.C.A. § 14-44-115
168 A.C.A. § 14-44-103
169 See A.C.A. § 14-45-104 and 14-45-108.
170 A.C.A. § 14-45-102
171 See A.C.A. § 14-47-109(f) and 14-48-110(f).
172 A.C.A. § 14-48-110
173 A.C.A. § 14-42-119(a)
174 A.C.A. § 14-42-119(b)

to be a qualified elector, there are a couple of statutes in the Arkansas Code that require council members to reside in the corporate limits or wards if voted on by wards.[175] There is even a specific statute that details what happens if a council member ceases to reside in the ward they were elected to.[176] It sounds like it would be easy for a municipality to deal with an issue concerning a municipal official no longer residing in the municipality or ward. Unfortunately, that is not the case, as there is a practical problem to the equation. If a council member refuses to resign their seat after moving outside of the ward they were elected to represent, then as a practical matter, the municipality will have to involve the courts.[177]

The third issue concerns those instances where no one files or refiles for a municipal office. This issue usually comes in two forms: (1) an incumbent official misses the election filing period and no one else files; or (2) an incumbent does not want to run for office again so doesn't file, but no one else files for the office. In both of these situations, we are dealing with the "holdover" provision of the Arkansas Constitution. Article 19, Section 5 of the Arkansas Constitution provides: "All officers continue in office after the expiration of their official terms, until their successors are elected and qualified." Further, the Arkansas Supreme Court has explicitly recognized that this provision of the Arkansas Constitution applies to city council members.[178] Therefore, the incumbent officeholder will continue to hold office until their successor is elected and qualified. So, if you missed the filing period and no one else filed for your position, you would remain in office for a new full term. The same is true if you do not want to continue to hold office, but no one else filed for the position. The incumbent officeholder will remain in office until someone is elected to succeed them.[179] The main takeaway is that neither of these situations create a vacancy in the office because the incumbent officeholder would remain in office and the seat would never be vacant.

C. Initiatives and Referendums

Most municipalities are familiar with referendums, as we are required by law to refer certain ordinances to the voters (i.e. annexation and sales tax ordinances). What municipalities are typically not familiar with are citizen initiatives and referendums. Here, we will go over the background of local initiatives and referendums (we will not be covering the referendum and initiative processes for state laws and constitutional amendments) and walk through some of the procedures and requirements.

Amendment 7 to the Arkansas Constitution, approved by the voters during the 1920 general election, granted the people with the power to propose legislative measures, laws and amendments to the Arkansas Constitution and to enact or reject the same independent of the General Assembly. Amendment 7 also extended the initiative and referendum powers to the legal voters of each municipality and county: "all local, special, and municipal legislation of every character in and for their respective municipalities and counties."[180] It takes 15% of the legal voters of the municipality to order the referendum or invoke the initiative upon any local measure. In other words, it takes a petition signed by 15% of the voters in the municipality. The fifteen 15% is computed upon the total vote cast for the office of mayor at the last preceding general election. So, if 2,000 voters voted in the mayoral election in the previous general election, then the number of signatures needed would be 15% of 2,000, which would be 300 signatures.

For initiatives, the filing of the petition is not less than 60 days and not more than 90 days before the election at which it is to be voted upon. The referendum petition on the other hand is filed not less than 30 days and not more than 90 days after the passage of the measure by the city council. In the previous section we went over when ordinances go into effect, and we learned that an ordinance goes into effect either 91 days after passage or the day after the deadline for filing referendum petitions upon ordinances as fixed by ordinance.[181] This is the time frame that provision is referencing. The city council may, by ordinance, set the deadline for filing referendum petitions

175 A.C.A. § 14-43-308-309

176 A.C.A. § 14-43-310: "… shall cease to reside in the ward from which he or she was elected, that person shall be disqualified to hold the office and a vacancy shall exist which shall be filled as prescribed by law."

177 Ark. Op. Atty. Gen. No. 2011-016; and Ark. Op. Atty. Gen. Nos. 2008-012 and 95-401

178 Phillips v. Earngey, 321 Ark. 476, 481 (1995)

179 It must be noted that you are not forever stuck in office. Nothing prohibits the incumbent officeholder from resigning. However, if the incumbent officeholder did resign, then a vacancy would be created and the vacancy would have to be filled in accordance with the applicable law.

180 Ark. Con. art 5 § 1 as amended by Amendment 7

181 A.C.A. § 14-55-203

on ordinance and that deadline can be anywhere between 30 and 90 days after passage of the measure by the city council.

Municipal referendum petition measures are submitted to the electors at the next regular general election, unless the referendum petition expressly calls for a special election.[182] Further, it is the responsibility of the city clerk or recorder to certify the sufficiency of the petition. This is not something municipal clerks and recorders deal with often. Therefore, it is vital to have a good working relationship with your county clerk, who can provide assistance in this process and provide guidance. One frequently asked question is, "Who pays for the election when the voters bring the referendum or initiative?" In all cases, the city or town would bear the cost.[183] Now, if the issue is on the ballot of the general election or primary election, then the cost isn't as significant as it might be if the issue was the only thing on the ballot.

D. Vacancies

Vacancies in municipal offices occur for a plethora of reasons, the most common being through resignation or death of the officeholder. Luckily, the Arkansas Code provides clear procedures on how municipalities fill these vacant positions, but as always, the procedure is dependent on the class and form of government.

The general premise is that vacancies in municipal offices that are authorized by state law to be filled by appointment by the city or town governing body require a majority vote of the remaining members of the governing body. However, a majority of a quorum of the whole number of the governing body is required to fill the vacancy.[184] Further, the governing body may appoint any qualified elector, including members of a governing body, to fill the vacancy, but a member of the governing body may not vote on their own appointment.[185]

In the mayor-council form of government, vacancies of officers are filled by the city council until a successor is duly elected and qualified. The successor shall be elected for the unexpired term at the first general election that occurs after the vacancy has happened.[186] However, there is one distinction for city council members. In cities of the first class under 20,000, vacancies in the position of city council are filled by the remaining members of the city council. In cities of the first class over 20,000 in population, if the unexpired portion of the term of a council member exceeds one year, then the council may opt to either elect by a majority vote of the remaining members of the council or to call for a special election to fill the vacancy. If the city of the first class has over 20,000 population, but the unexpired portion of the term is one year or less, then the successor shall be chosen by a majority vote of the members of the council.[187]

In cities of the second class, if a vacancy occurs in the office of mayor, marshal, recorder, treasurer or recorder/treasurer, then at the first regular meeting following the vacancy, the city council shall elect a person to fill the vacancy either by a majority vote of the council members or by a call for a special election.[188] Vacancies on the city council, however, are filled only by a majority vote of the remaining members of the council.[189] In incorporated towns, vacancies in the office of council members, recorder/treasurer and marshals are all filled by a majority vote of the town council. The mayor, however, is either elected by a majority of the town council or by a special election.[190]

In the city manager form of government, if there is a vacancy on the board of directors, then the vacancy is filled by a majority vote of the board.[191] In the city administrator form of government, a vacancy in the office of mayor or member of the board of directors is filled by either a majority vote of the board members or by a special election.[192]

182 A.C.A. § 7-9-111(h)
183 A.C.A. § 7-5-104
184 A.C.A. § 14-42-103
185 A.C.A. § 14-42-103
186 A.C.A. § 14-43-412
187 A.C.A. § 14-43-411
188 A.C.A. § 14-44-106
189 A.C.A. § 14-44-104 (It is also important to note that the mayor cannot veto the appointment.)
190 A.C.A. § 14-45-103
191 A.C.A. § 14-47-113
192 A.C.A. § 14-48-115

E. Wards

Wards are divisions or districts of municipalities. They delineate certain areas of the city from each other. For purposes of Arkansas municipalities, they are important for representation and election. Just as the Arkansas General Assembly is divided into 35 Senators and 100 Representatives who each have a specific geographic area that they represent, wards operate the same within municipal boundaries.

1. Mayor-Council Cities and Towns

Incorporated towns do not have wards. Instead, incorporated towns have five council members who are elected at large, or by everyone in the town. The positions are simply designated Positions 1-5. When an incorporated town becomes a city of the second class, the council is required to divide the city into a number of wards of approximate equal population that will seem to best serve the interest of the city.[193] Two council members are elected from each ward and designated as Council Member 1 and Council Member 2. These council members must reside in the ward they represent. However, in cities of the second class, by default the council members still run at large, unless the council has provided by ordinance that all council members will be elected by ward, or the council may provide that one council member in the ward is elected at large and the other council member in the ward is elected by ward only. When a city of the second class becomes a city of the first class, nothing really changes as far as the elections go. There are still two council members per ward, and they may be elected at large, by ward only, or one council member in the ward elected by ward and the other elected at large.[194]

2. City Manager Cities

In the city manager form of government, a city may choose to divide the city by wards and districts (districts overlap multiple wards).[195] Therefore, in the city manager form of government, a director may be selected in the following manners: (1) All members of the board of directors are elected at large; (2) an odd number of directors, including the mayor, with any combination of directors being elected at large and from wards, whether the position designated as mayor is appointed or directly elected; (3) an odd number of directors, including the mayor, with any combination of directors being elected from wards and from larger designated districts that overlap wards, whether the position designated as mayor is appointed or directly elected; (4) all members of the board of directors but one being elected from wards, with one member elected at large who shall be the mayor; or (5) all members of the board of directors being elected form wards.[196] If a city operating under the city manager form of government chooses to select some of its members by ward, then the governing body must divide the territory of the city into the number of wards having substantially equal population, according to the most recent federal decennial census of population in the city, equal to the number of members of the governing body to be elected form wards.[197] If a city chooses to select some of its members by larger designated districts that overlap wards, then the governing body must divide the territory of the city into the number of districts having substantially equal population, according to the most recent federal decennial census, equal to the number of members of the governing body to be elected from districts.

3. City Administrator Cities

In the city administrator form of government and prior to the election for the initial membership of the board of directors and the mayor, the governing body is required to divide the city into four wards with each ward being composed of contiguous territory and of substantially equal population.[198] Out of the seven positions on the board of directors, positions 1-4 are elected by ward (one per ward) while positions 5-7 and the mayor are all elected at large.

193 A.C.A. § 14-44-101
194 See A.C.A. § 14-43-307 and 14-43- 312.
195 A.C.A. § 14-61-109
196 A.C.A. § 14-61-107
197 A.C.A. § 14-61-109(1)
198 A.C.A. § 14-48-107(a)(1)

4. Redistricting

Every so often a municipality may need to redistrict previously established wards. This is typically due to population movement within the municipality itself or population movement across the state generally. Fortunately, the Arkansas Code authorizes the redistricting of wards in cities of the first and second classes.[199] The city has the following powers regarding redistricting. City councils in cities of the first class have the authority to redistrict the wards in their cities when they determine that the people can best be served by adding wards, combining wards or changing ward boundary lines to equalize the population in the various wards.[200] It is the duty of the city council to see that each ward has "as nearly an equal population as would best serve the interest of the people of the city."[201] However, in order to comply with the equal protection clause of the U.S. Constitution, a municipal reapportionment plan should be based on the principle of one-person-one-vote. The validity of any municipal council reapportionment must be tested on the basis of population rather than on the basis of registered voters.

Within 90 days after redistricting, if 100 or more qualified electors in the city are dissatisfied with the redistricting of the city into wards, they shall have the authority to petition the circuit court, which after due hearing, shall have the authority to redistrict the city into such wards as the court shall deem best, if the court finds that the redistricting action by the city council was arbitrary and capricious.[202] City councils in cities of the second class also have the authority to redistrict their wards when they determine that the people can best be served by adding wards, combining wards, or changing ward boundary lines to equalize the population in the various wards.[203] Within 90 days after redistricting, if 50 or more qualified electors are dissatisfied with the division of the city into wards, they shall have the authority to petition the court which, after due hearing, shall have the authority to redistrict the city into such wards as the court shall deem best, if the court finds the redistricting action by the city council was arbitrary and capricious.[204]

Chapter 5. Annexation

A. Overview

Over the past century, municipalities in Arkansas have witnessed firsthand the growth of the state and the movement of the populace from some parts of the state to other parts of the state. Within the past decade alone we have witnessed massive growth and population movement to the northwest region of the state. With growth comes the need for expansion. Given that corporate limits of municipalities are established upon incorporation, annexation is the process of expanding those original boundaries.

Before undertaking the process of annexation, municipalities are required to coordinate with the Arkansas Geographic Information Systems Office (GIS) for preparation of legal descriptions and digital mapping.[205] The GIS Office coordinates the development, maintenance and publication of geographic information across Arkansas. GIS is the state agency that serves as the statutory keeper of municipal boundaries, election precincts, school districts, townships, land survey plats and state-certified coroners.[206] Within 45 days of the effective date of any ordinance or resolution affecting a municipal boundary, the city clerk is required to file with the county clerk written notice, along with complete documentation of the annexation. Then within 30 days of the county clerk's receipt of the proper documentation, the county clerk is required to provide written notice to the Secretary of State of the boundary change.

Various statutes in the Arkansas Code provide certain rules depending on where the property to be annexed is located. For example, if a municipality states its intent, by resolution or ordinance, to annex a territory in which the municipality is exercising its territorial jurisdiction (see Section 4 for more on territorial jurisdiction), then the municipality is required to initiate annexation proceedings within five years of the statement of intent.[207] The municipality is still authorized to exercise its territorial jurisdiction during these five years, but if the municipality

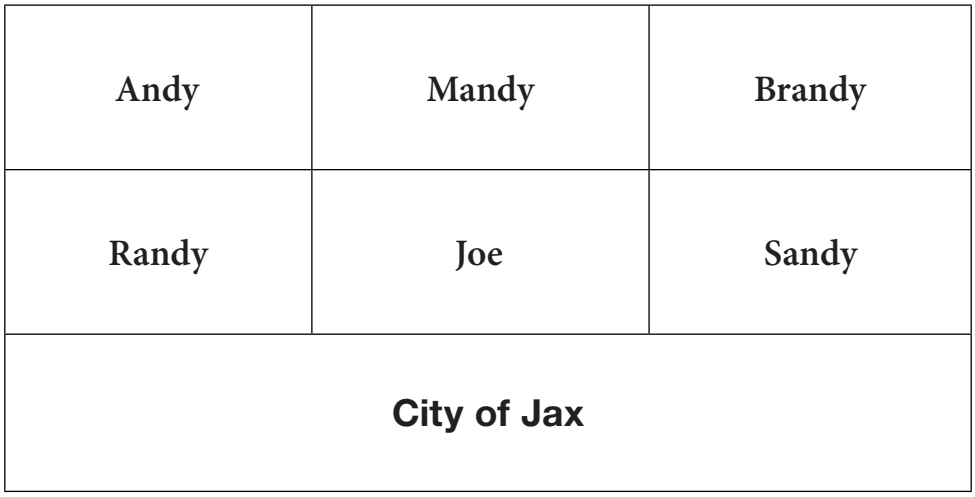
199 A.C.A. § 14-43-311 & 14-44-101
200 A.C.A. § 14-43-311(a)(1)(A)
201 A.C.A. § 14-43-311(a)(1)(B.
202 A.C.A. § 14-43-311(2)(A)-(B)
203 A.C.A. § 14-44-102(a)
204 A.C.A. § 14-44-102(a)
205 A.C.A. § 14-40-101
206 For more information about the Arkansas Geographic Information Systems Office, visit their website at: https://www.transform.ar.gov/gis-office/about-us/.
207 A.C.A. § 14-40-208(a)

does not initiate the annexation during that time frame, then the municipality is prohibited from exercising its territorial jurisdiction for five years.[208] While there are a few more specific rules that may come into play in very certain areas,[209] this chapter will focus on the two primary types of annexation: voluntary and involuntary.

B. Voluntary Annexation

We typically use the term voluntary annexation to refer to those annexations that occur at the behest of a property owner. In other words, it is the property owner who initiates the annexation process. This can be done by either a petition from the majority of real estate owners in the area wishing to annex, or by petition signed by all the property owners who wish to annex into the municipality. Admittedly, it does sound duplicative, but the process is different for each, and we can look at a couple of examples.

When a majority of the real estate owners of any part of a county contiguous to and adjoining any city or town desires to be annexed into the city or town, they may apply by petition to the county court, name the persons authorized to act on their behalf, and they may include in the petition a schedule of services of the annexing municipality that will be extended to the area within three years of annexation.[210] The petition will be filed by the county clerk and public hearing will be heard on the matter.[211] After the public hearing, and if the county court is satisfied that the petition is sufficient, then it is up to the city or town council to vote to approve the annexation.[212] Then, as soon as the resolution or ordinance is passed by the council declaring the annexation has been adopted or passed, the territory shall be a part of the municipality and the inhabitants will enjoy all rights and privileges of the municipality.[213] The process for the 100% annexation is very similar to the process for a majority of real estate owners' annexation, though some of the time frames are slightly different.[214] Both processes are very easy to read and follow through, but let's look at an example of the two different situations.



Let's say there are six three-acre lots outside the city limits. Each lot is owned by a different person: Andy, Mandy, Brandy, Randy, Sandy and Joe. Randy, Joe and Sandy are contiguous and adjoining the city while Andy, Mandy and Brandy are situated directly behind the first three and therefore not contiguous or adjoining the city. Andy, Mandy, Brandy, Randy and Sandy want to be annexed into the city, but Joe does not, and he is in the middle lot that is contiguous to the city. We are not allowed to create enclaves within the city limits, so all property owners will need to be annexed. So, how do the property owners annex? The property owners would simply follow the

208 A.C.A. § 14-40-208(b)
209 A.C.A. § 14-40-201 et seq.
210 A "majority of real estate owners" means a majority of the total number of real estate owners in the area affected if the majority of the total number of owners own more than one half of the acreage affected.
211 A.C.A. § 14-40-601-602
212 A.C.A. § 14-40-603
213 A.C.A. § 14-40-606
214 A.C.A. § 14-40-609

procedures laid out above codified in A.C.A. § 14-40-601-608 and if a majority of the real estate owners wish to be annexed and the petition is sufficient, then the council will be able to vote them into the city. Now, if all six of the property owners want to join into the municipality, then they can simply follow the process for the 100% annexation petition found in A.C.A. § 14-40-609.

C. Involuntary Annexation

We refer to this type of annexation as involuntary simply because it is the municipality that initiates the annexation as opposed to the property owners. The governing body of a municipality may, by 2/3 vote, adopt an ordinance to annex lands contiguous to the municipality if the lands are any of the following: (1) platted and held for sale or use as municipal lots; (2) if the lands are held to be sold as suburban property; (3) when the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary; (4) when the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective municipal uses.[215] However, there are a couple of caveats in A.C.A. § 14-40-302 to be aware of.[216] Municipalities with fewer than 1,000 inhabitants are prohibited from annexing more than 10% of the current land area of the municipality in any one year.[217]

The annexation ordinance must contain an accurate description of the lands desired to be annexed, include a schedule of services of the annexing municipality that will be extended to the annexed area within three years, and the ordinance must fix the date for the annexation election at the next special election date under A.C.A. § 7-11-205. If a majority of the qualified electors vote for the annexation, then the annexation will be included within the corporate limits of the municipality 30 days following the date of recording and filing of the description of the map. If the annexation election is approved by the voters and becomes final, then the governing body for the city will attach and incorporate by ordinance the annexed territory to and in one or more wards of the city.

Chapter 6. Records

A. Overview

Municipal records are paramount to the proper functioning of municipal government. Many records you might have in your municipality have historical value, while others are required by statute to be kept for a certain duration. Municipal records come in all shapes and forms, ranging from police body camera footage to businesses licenses to board and commission appointments. If it is a document that the municipality has, it is more than likely a record. All records are public records and therefore are releasable to the public unless there is a statutory exemption (we will cover the Arkansas Freedom of Information Act in Section 5).

The city clerk and recorder are the predominant municipal record keepers and are tasked with the management, retention and destruction of records. While there isn't a specific way cities have to keep records, it is important that your municipality develops a system that works simply and efficiently. If you are reading this you have probably heard someone at the League say, "The three most important words in the English dictionary are document, document, document." This is true for a variety of reasons pertaining to different aspects of municipal government. The Arkansas Municipal Accounting Code requires that municipalities establish a record of all fixed assets owned by the municipality. [218] So, not only is it important for the municipality to maintain this list for its own interests, but it is a statutory requirement as well.

Documenting and good record keeping is also vital in the event of a lawsuit. Records may be the most important evidence of a defense to a particular lawsuit, and being able to quickly find and produce the right records for your legal counsel to review and prepare in the defense of the municipality makes the process of getting through

215 A.C.A. § 14-40-302

216 Contiguous lands cannot be annexed if they: (1) have a fair market value of lands used only for agricultural or horticultural purposes and the highest and best of the lands is for agricultural or horticultural purposes; (2) are lands upon which a new community is to be constructed with funds from the federal government under Title IV or Title VII; (3) are lands that do not include residents, except as agreed upon by the mayor and county judge; and (4) are lands that do not encompass the entire width of public road right-of-way or public road easements within the lands sough to be annexed, except as agreed upon by the mayor and county judge.

217 A.C.A. § 14-40-302(c)

218 A.C.A. § 14-59-107

a lawsuit not only easier on the attorney, but good for your defense overall. Though municipal records fall in the domain of the clerk and recorder, it is important to always bear in mind that those records belong to the municipality, the state of Arkansas and its citizens.

B. Record Retention

There is an established procedure for retaining, destroying or replacing public records. Until your municipality is thoroughly familiar with the various statutes, public records acts, and the rules and regulations that go along with public records, we should not eliminate them. The statutes concerning record retention are spread all throughout the code, so there isn't any one specific place that provides all the information, but we will attempt to do so here.

In the modern age, most of our documents now are in a digital format and paper records are often saved digitally. The head of any municipal department, commission, bureau or board may cause any or all records kept by the official department, commission or board to be photographed, microfilmed, photostated, or reproduced on or by film, microcard, miniature photographic recording, optical disc, digital compact disc, electronic imaging or other process that accurately reproduces or forms a durable medium for reproducing the original when provided with equipment necessary for such method of recording.[219] Whenever reproductions of public records made in in accordance with the framework above and have been placed in conveniently accessible files or other suitable format and provision has been made for preserving, examining and using them, the head of a city office or department may certify those facts to the mayor who shall have the power to authorized the disposal, archival storage or destruction of the records.

All municipalities may by ordinance[220] establish a policy of record retention and disposal, provided that the municipality complies with any specific statute regarding municipal records and that the following records are maintained permanently in either the original or electronic form: ordinances, city council minutes, resolutions, annual financial audits and year-end financial statements.

1. Accounting Records

Municipal accounting records are divided into three groups: (1) supporting documents, (2) semi-permanent records and (3) permanent records.[221] Supporting documents consist primarily of canceled checks, invoices, bank statements, receipts, deposit slips, bank reconciliations, checkbook register or listing, receipts listing, monthly financial reports, payroll records, budget documents, and bids, quotes and related documentation. Support documents must be maintained for a period of at least four years and in no event shall be disposed of before being audited for the period in question.[222] Semi-permanent records consist of fixed assets and equipment detail records, investment and certificate of deposit records, journals, ledgers and subsidiary ledgers, and annual financial reports. These records must be maintained for a period of not less than seven years and in no event shall be disposed of before being audited for the period in question.[223] Permanent records consist of city or town council minutes, ordinances, resolutions, employee retirement documents and financial audits. These records must be maintained permanently.[224]

Before destroying any of these records, the officer or employee destroying the records must prepare an affidavit stating which documents are being destroyed and which period of time they apply to, and the method of destruction. The destruction of documents must also be approved by the city or town council and recorded in the minutes.[225]

219 A.C.A. § 14-2-201
220 We recommend doing so as part of your organizational ordinance. See A.C.A. § 14-43-501.
221 A.C.A. § 14-59-114
222 A.C.A. § 14-59-114(a)(1)
223 A.C.A. § 14-59-114(a)(2)
224 A.C.A. § 14-59-114(a)(3)
225 A.C.A. § 14-59-114(b)

2. Police Records

All municipalities are required to maintain records for the city or town police department or marshal's office. Police citation books and logs must be kept for at least three years and may not be destroyed before an audit.[226] We are required to maintain permanently or for at least seven years, as the municipality may determine, the following: closed municipal police files for felony and Class A misdemeanor offenses and expungement orders of municipal police cases.[227] If the records are maintained for more than 10 years after the date the record was created, these records may also be copied and maintained in accordance with A.C.A. § 14-2-203. We must maintain for three years accident, incident and offense reports, fine and bond and parking meter records, radio logs and complaint cards, employment records, payroll sheets, timecards and leave requests.

3. Court Records

Municipalities in Arkansas are also required to maintain records for the district courts. We are required to maintain permanently the following records: (1) case indices for all district courts, (2) case dockets for all district courts, (3) active warrants, (4) waivers, (5) expungement and sealed records, (6) files concerning convictions under the Omnibus DWI or BWI Act, A.C.A. § 5-65-101 *et seq*., and (7) domestic battery files.

The following records must be maintained for at least seven years and in no event disposed of before being audited: (1) complete case files and written exhibits for all district courts, not including civil or small claims division cases in which the judgment is not satisfied; (2) show cause orders; and (3) files concerning cases resulting in a suspended imposition of sentence.

Finally, the following records must be maintained for at least three years and in no event disposed of before being audited: (1) bank reconciliations; (2) checkbook registers and check listings; (3) canceled checks; (4) bank statements; (5) receipts; (6) deposit collection records; (7) receipts listings; (8) distribution reports; (9) receipt and disbursement journals; (10) time payment records; (11) citation book logs; (12) citation books from each police department and sheriff's office; (13) served, recalled or quashed arrest warrants; (14) copies of citations; (15) alternative service or community service time sheets; (16) uniform filing fees collection remittance forms and fine reports; (17) miscellaneous fee and fine collection reports; and (18) served or unexecuted search warrants.

After a municipality has maintained the records for the requisite amount of time, and after they have been audited, the records may be destroyed. When records are destroyed, the municipality is required to document the destruction by providing an affidavit that states which records are being destroyed and to which period of time the records apply and the method of destruction. The affidavit must be signed by the employee performing the destruction and one other employee of the governing body. Though not required, it is suggested that both the Executive Officer (mayor, city administrator, or city manager) and the recordkeeper (clerk or recorder) also sign.

226 A.C.A. § 16-10-211(a)(3)(K)-(L)

227 A.C.A. § 14-2-204(a)(1). However, we must ensure that A.C.A. §§ 12-12-104 and 14-2-203 are complied with, and records related to crimes of violence as defined in A.C.A. § 5-42-203 are maintained permanently.

Section II. Municipal Finance

Chapter 1. Introduction

In the world of finance, municipal finance is unique. Finance can generally be broken down into three categories: personal, corporate and public. Everyone is familiar with personal finance, which is the management of personal savings, spending and investments. Corporate finance, as the name implies, focuses on how corporations address funding sources, capital structuring, accounting and investment decisions, much of which is motivated by profit. Public finance, including at the local government level, focuses predominantly on revenues, expenditures, debt (depending on the relevant laws) and assets, and it is motivated by public service rather than profit. Arkansas cities and towns focus on providing the best services at the lowest, reasonable cost to the citizenry.

Section II covers an array of concepts about municipal finance, including budgeting process, purchasing, the auditing process, deficit spending, revenue sources and municipal accounting generally. We will go over all the pertinent laws covering each aspect of municipal finance and present checklists and graphs to help better visualize a lot of these processes. We will also work through a handful of real-world problems and common questions that arise in municipalities on a regular basis. Whether you are the mayor, clerk, treasurer, recorder, council member, or municipal employee, everything you need to know about municipal finance should be detailed here in Section II. We may not cover every hypothetical scenario or question that might appear, but even a basic understanding of Section II should put you in the position to effectively manage your city's finances.

Chapter 2. The Municipal Budget

A. The Budget Process

Arkansas municipalities are directed to assure that municipal expenditures are in accordance with an annual budget submitted by the mayor on or before December 1 of each year and approved by the city council or board of directors on or by February 1 of the following year.[228] Unlike the state government, which operates on a fiscal year that starts on July 1 and ends June 30, the fiscal year for municipalities is the calendar year. Therefore, the budget the mayor submits on or before December 1 is the budget for the next calendar year starting January 1 and ending December 31.[229]

The budget appropriates funds for municipal services, goods and activities. Consequently, the mayor, city clerk, treasurer and all others involved in purchasing, expenditures and decisions affecting expenditures, must act in accordance with the governing body's approved budget for the operation of the municipality. In other words, everyone involved in purchasing must be aware of how much has been appropriated and for what said funds have been appropriated for so that the municipality doesn't spend more money than has been appropriated and that funds are used for the purposes they have been appropriated. The annual operating budget should be the principal policy management tool for governing the municipality. It should be the mechanism to evaluate city services, set priorities and balance public service demands against the tax revenues required to furnish them. With that said, it is important that all municipal officials participate in the decision making that goes into building your municipal budget.

Municipal budgets may be adopted by either an ordinance or resolution.[230] The budget is not set in stone for the year and may be amended from time to time as needed. However, the budget must be amended in the same manner in which it was adopted. If the budget was adopted by ordinance, then it would take an ordinance to amend it. If the budget was adopted by resolution, then it would take a resolution to amend it. It is recommended to adopt your budget by resolution as it is easier and more practical to amend when the need arises.

B. Deficit Spending

Deficit spending is, barring specific exceptions, prohibited by state law. Article 12, § 4 of the Arkansas Constitution provides in part, "The fiscal affairs of counties, cities, and incorporated towns shall be conducted on a sound

228 A.C.A. §§ 14-58-201 - 202
229 A.C.A. § 14-71-102
230 A.C.A. § 14-58-202

financial basis […] nor shall any city council, board of alderman, board of public affairs, or commissioners, of any city of the first or second class, or any incorporated town, enter into any contract or make any allowances for any purpose whatsoever, or authorize the issuance of any contract or warrants, scrip or other evidences of indebtedness in excess of the revenue for such city or town for the current fiscal year […]". In short, a municipality generally cannot spend funds it doesn't have or promise future funds that it does not currently have budgeted. However, the Arkansas Constitution has been amended since the original passage of Article 12, § 4. These amendments provide exceptions to the general rule that deficit spending is prohibited.

It is important to note here that when a constitutional amendment is passed, the amendment rarely establishes a framework or a procedure to follow. Instead, amendments tend to grant authority to the General Assembly to establish the framework in which the amendment is to operate. Take revenue bonds for example, which we detail below. Amendment 65 to the Arkansas Constitution authorizes revenue bonds. However, Amendment 65 grants explicit discretion to the General Assembly for purposes of determining for what purposes revenue bonds may be used and the conditions which must be followed.[231] As such, for the purposes of Amendment 65, the General Assembly passed the Revenue Bond Act of 1987 (Act 852 of 1987), which is codified in A.C.A. § 19-9-601 *et seq.*, the purpose being only to provide a procedural framework and to supplement Amendment 65.[232] Compare this with the Local Government Bond Act (Act 871 of 1985), codified in A.C.A. 14-164-301 *et seq*., which was enacted after Amendment 62 (Capital Improvement Bonds). Again, Amendment 62 provided the General Assembly with authority to define and prescribe certain matters in respect to the exercise of the power granted in Amendment 62.[233]

Amendment 62—Capital Improvements

Amendment 62 of the Arkansas Constitution authorizes municipalities to issue bonds for capital improvements of a public nature, as defined by the General Assembly. However, the governing body of a municipality alone cannot issue such bonds. An election must be held on the issue and a majority of the qualified electors voting must approve of the issuance and amount of the bond. The tax to retire the bond may be an *ad valorem* tax on real and personal property, or other taxes authorized by the General Assembly or the legislative body to retire the bonds. Finally, there is a limit on the principal amount of bonded indebtedness that a municipality may have outstanding and unpaid. For municipalities, this limit is set at 20% of the total assessed value for tax purposes of real and personal property in the municipality, as determined by the last tax assessment. Let's look more closely at each of these steps.

Municipalities may issue bonds for capital improvements of a public nature. Bonds can look different depending on if it is a government or corporation issuing the bond. Nevertheless, a municipal bond is issued by a municipality when the municipality needs to raise money. In other words, it is similar to a loan. When someone buys a municipal bond, that person is essentially giving the municipality a loan and, depending on the details of the bond, the person buying the bond will get paid the face value of the bond plus interest–again, very similar to a loan. With that said, under Amendment 62, municipalities are authorized to issue bonds for the purpose of "capital improvements of a public nature." This term is broadly defined in A.C.A. § 14-164-303(2), which also lists allowable capital improvements. The list includes, to name a few, the purchase, lease, construction, reconstruction, restoration, improvement, alteration or repair of things like city halls, courthouses, public offices, jails, police stations, stadiums and arenas, water pollution control facilities, storm sewers, and more.

As mentioned above, the governing body alone cannot issue bonds. The issue must go before the voters for approval. As with levying a general, citywide sales tax, it is ultimately the voters who approve the issuance of the bond and the amount issued. The legislative body will pass an ordinance specifying the principal amount of bonds to be issued, the purpose or purposes for which the bonds are to be issued, and the maximum rate of any ad valorem tax to be levied and pledged to the retirement of the bonds.[234] The question of the issuance of the bonds

231 Ark. Const. Amend. 65, § 1

232 See A.C.A. § 19-9-603. While the General Assembly cannot substantively change the meaning of Amendment 65, it can supplement and provide a procedural framework in which Amendment 65 is to be utilized.

233 A.C.A. § 15-164-302

234 A.C.A. § 14-164-308

is then submitted to the electors of the municipality at the general election or at a special election.[235] An election is always required on the issuance of bonds. For example, if a city has a 1% sales tax in place for general municipal purposes, the council can't pass an ordinance issuing a bond simply because it already has a sales tax in place. [236] The issuance of the bond itself must be approved by the voters.

Bonds will always be backed by some source of funding. In the instance of Amendment 62 bonds, the source is taxes. Under Amendment 62, municipalities are authorized to levy five mills on the dollar of the taxable real and personal property in the municipality to go toward retiring the bond.[237] More commonly, however, municipalities may levy a local sales tax in the amount of 0.125%, 0.25%, 0.5%, 0.75%, 1% or any combination of the amounts to retire the bonds.[238]

To recap, Amendment 62 provides the first exception to the general prohibition on deficit spending through the issuance of a bond for capital improvements of a public nature. The bond will be backed by an *ad valorem* or sales tax dedicated to retiring the bond. The issuance of the bond and sales tax must be submitted to the voters for approval in order to issue the bond.

Amendment 65—Revenue Bonds

Amendment 65 provides the second exception to the rule against deficit spending. Amendment 65 permits municipalities to issue "revenue bonds." Revenue bonds may be issued for the purpose of financing all or a portion of the costs of capital improvements of a public nature, facilities for the development of industry or agriculture, and for such other purposes as may be authorized by the General Assembly.[239] Again, the amendment refers to "capital improvements of a public nature" and the enabling statutes determine what is authorized.[240] Revenue bonds mean "bonds, notes, certificates or other instruments or evidences of indebtedness the repayment of which is secured by rents, user fees, charges, or other revenues (other than assessments for local improvements and taxes) derived from the project or improvements financed in whole or in part by such bonds […]."[241] In other words, revenue bonds are bonds that are backed by a specific revenue source, whether that source is rents, user fees, charges or other revenues derived from the project or improvement that is being financed. Unlike capital improvement bonds under Amendment 62, revenue bonds are not backed by *ad valorem* or sales taxes. In fact, it is explicitly prohibited. Another distinction is that while Amendment 65 grants the General Assembly the authority to require an election on the issuance of a revenue bond, the General Assembly has not yet done so. Therefore, an election for the issuance of a revenue bond under Amendment 65 is not required.[242] However, a public hearing is required before the issuance of the bond.[243]

One of the most common utilizations of revenue bonds is in the scope of water and wastewater projects. Making capital improvements to a water system can be very costly and almost always requires the issuance of bonds to fund improvements. Revenue bonds are popular for capital improvements of this nature because, thanks to customers of the municipal water system, a revenue source is already established to pay for the bond.

Amendment 78—Short-Term Finance

Amendment 78 provides the final major exception to the general rule prohibiting deficit spending. Amendment 78 authorizes municipalities to incur short-term financing obligations maturing over a period, or having a term, not to exceed five years.[244] Cities may incur short-term financing obligations for the purpose of acquiring, constructing, installing or renting real property or tangible personal property having an expected useful life of more than one year.[245] The aggregate principal amount of short-term financing obligations incurred by a municipality cannot exceed 5% of the assessed value of taxable property located within the municipality, as determined by the last tax assessment completed before the last obligation was incurred by the municipality. Short-term financing

235 A.C.A. § 14-164-309
236 Ark. Op. Atty. Gen. No. 2011-014
237 Ark. Const. Amend. 62, § 2
238 A.C.A. § 14-164-327
239 Ark. Const. Amend. 65, § 1
240 A.C.A. § 19-9-604(2)
241 Ark. Const. Amend. 65, § 3
242 Ark. Const. Amend. 65, § 1 and A.C.A. § 19-9-606
243 A.C.A. § 19-9-607
244 Ark. Const. Amend. 78, § 2
245 Ark. Const. Amend. 78, § 2

does not require approval from the voters before the municipality enters into a short-term financing agreement, nor does the financing have to be backed by any specific source of funds.

Chapter 3. Arkansas Municipal Accounting Law

The Arkansas Municipal Accounting Law, codified in A.C.A. §§ 14-59-101 through 14-59-119, provides the rules by which cities and towns are to handle municipal funds. It guides disbursements, bank reconciliations, record retention and other aspects of municipal bookkeeping.

A. Duties of the Municipal Treasurer

Before examining the Arkansas Municipal Accounting Law, let's briefly revisit the duties of the treasurer. The treasurer is ultimately responsible for ensuring compliance with the law.[246] However, it should never be the treasurer's burden alone. It is up to every official to ensure your municipality is in compliance.

First and foremost, treasurers are required to maintain the accounting records prescribed in the Arkansas Municipal Accounting Law.[247] The treasurer or designated representative that has been approved by the governing body must submit a monthly financial report to the council or board of directors.[248] If the treasurer does not comply with the Arkansas Municipal Accounting Law or requests that specific duties be assigned to another employee or contracting entity, the governing body of a municipality may assign specific duties outlined in this chapter to another employee, or it may contract for the services to be performed by a private, qualified person or entity.[249] However, before the governing body assigns or contracts with a person or entity for the disbursement of funds, the governing body of a municipality shall establish by ordinance a method that provides for internal accounting controls and documentation for audit and accounting purposes.[250] The treasurer shall approve the disbursement of funds before the private, qualified person or entity disburses the funds. The governing body of a municipality shall ensure that the person or entity is adequately insured and bonded and conforms to best practices and standards in the industry. However, the governing body may not assign duties relating to the collecting of funds to anyone other than an employee of the municipality.

B. Applicability and Bank Accounts

The Arkansas Municipal Accounting Law applies to all funds under the budgetary control of the governing bodies of the municipalities of this state, with the exception of water and sewer departments.[251] As for bank accounts, any municipality receiving state aid in the form of general turnback or highway revenues is required to maintain all funds in depositories approved for such purposes by law.[252] Further, cities are required to maintain separate bank accounts for general funds and street funds.[253] This requirement is very important and compliance tends to be a frequent finding from Legislative Audit. This statute will be covered in more detail later in this section.

C. Disbursements

Disbursements generally must be made by prenumbered checks drawn upon the bank account of the municipality. The checks are the normal checks provided by commercial banking institutions and are required to contain, at a minimum, the following information: date of issue, check number, payee, amount, and the signatures of two authorized disbursing officers of the city.[254]

There are a couple of exceptions to the requirement to disburse funds by prenumbered checks. In a few situations, cities are authorized to utilize electronic fund transfers. Disbursements of funds used for payment of salaries and wages of municipal officials and employees may be made by electronic funds transfer provided that

246 A.C.A. §§ 14-59-115 and 14-59-118
247 A.C.A. § 14-59-115(b)(1)
248 A.C.A. § 14-59-115(a)
249 A.C.A. § 14-59-115(b)(2)
250 A.C.A. § 14-59-115(b)(2)
251 A.C.A. § 14-59-102. Water and Sewer Departments are covered under the Municipal Water and Sewer Department Accounting Law codified in A.C.A. § 14-237-101 et seq.
252 A.C.A. § 14-59-104(a). See Chapter 4.
253 A.C.A. § 14-59-104(b)
254 A.C.A. § 14-59-105(a)-(b). Typically, the mayor and the clerk/recorder/treasurer are signatories on checks. However, it is important to have someone else, like a council member, authorized to sign checks in the event that the mayor or clerk/recorder/treasurer is unable to sign.

the municipal employee or official responsible for disbursements maintains a ledger containing, at a minimum: (1) name, address and SSN of the employee receiving payment of salary or wages; (2) routing number of the bank in which the funds are held; (3) account number; (4) accounts clearing house trace number pertaining to the transfer; (5) date and amount transferred; and (6) proof that the employee has been notified of the direct deposit of their salary or wages by electronic funds transfer.[255]

Cities may also utilize electronic fund transfers when making payments to federal or state governmental entities.[256] Beyond these two key exceptions, A.C.A. § 14-59-105(e) provides a framework to expand what cities may use electronic fund transfers for, but it is important to read the statute and understand everything that is required before using electronic fund transfers for additional disbursements not mentioned above.[257]

Municipalities are also authorized, with council approval, to establish petty cash funds under A.C.A. § 14-59-106. In establishing such a fund, a check is to be drawn upon the general fund of the municipality payable to "petty cash."[258] A paid-out slip is to be maintained with the petty cash and when the fund becomes depleted, the municipality may then draw another check payable to "petty cash" in an amount which equals the total paid-out slips issued.[259]

D. Fixed Asset Records

All municipalities are required to keep a record of the municipality's fixed assets. Fixed assets are simply assets that are purchased for long-term use and are not likely to be converted quickly into cash. Examples of fixed assets include land, buildings and equipment. The governing body is required to adopt a policy defining fixed assets and, at a minimum, the policy must set forth the dollar amount and useful life necessary to qualify something as a fixed asset. Further, cities are required to establish by major category and maintain, at a minimum, a listing of all fixed assets owned by the municipality. The categories of fixed assets must include the major types, such as land, buildings, motor vehicles (by department), equipment (by department) and other assets. The listing must be totaled by each category with a total for all categories. The listing must contain the following: (1) property item number, if used by the municipality; (2) brief description; (3) serial number, if available; (4) date of acquisition; and (5) cost of property.

These records detailing the fixed assets of the municipality may need to be updated from time to time as land is sold or as vehicles and equipment are sold and replaced.

E. Bank Reconciliations

Every month, all municipalities are required to reconcile their cash receipts and disbursement journals to the amount on deposit in banks. Again, this is required to be done every month. The monthly reconciliation must be approved by a municipal official or employee other than the person preparing the reconciliation, as designated by the chief executive officer of the municipality. So, if the treasurer or clerk/treasurer prepares the reconciliation, then the treasurer or clerk/treasurer cannot be the person to also approve the reconciliation. It must be approved by someone designated by the chief executive officer and who did not prepare the reconciliation.

F. Prenumbered Receipts

All funds received by the municipality must be formally receipted at the time of collection or the earliest opportunity by the use of prenumbered receipts or mechanical receipting devices.[260] If using prenumbered receipts, there are some minimum standards that must be met. If manual receipts are used, receipts must be prenumbered by the printer and a printer's certificate obtained and retained for audit purposes.[261] The printer certificate must state the date printing was done, the numerical sequence of receipts printed and the name of the printer. Further,

255 A.C.A. § 14-59-105(c)
256 A.C.A. § 14-59-105(d)
257 A.C.A. § 14-59-105(e) in short requires municipalities to: (1) establish by ordinance an electronic funds payment system directly into payees' accounts in financial institutions in payment of any account allowed against the municipality; (2) establish written policies and procedures to ensure that the electronic funds payment system provides for internal accounting controls and documentation for audit and accounting purposes; and (3) comply with the information systems best practices approved by the Legislative Joint Auditing Committee before implementation by the municipality.
258 A.C.A. § 14-59-106(b)
259 A.C.A. § 14-59-106(c)
260 A.C.A. § 14-59-109(a)
261 A.C.A. § 14-59-106(b)(1)(A)

the prenumbered receipts must contain the following information: (1) date, (2) amount of receipt, (3) name of person or company from whom money was received, (4) purpose of payment, (5) fund to which receipt is to be credited, and (6) identification of employee receiving money. If manual receipts are used, then the original receipt should be given to the party making payment and a duplicate copy of the receipt shall be maintained in numerical order in the receipt book and made available to the auditors during the course of the annual audit. Additional copies of the receipt are optional and may be used for any purposes the municipality deems fit. If using an electronic receipting system, the system must be in compliance with the Information Systems Best Practices Checklist provided by the Legislative Joint Auditing Committee.

G. Cash Receipts Journals

Municipalities must establish a cash receipts journal or an electronic receipt listing that shall indicate: (1) the receipt number, (2) the date of the receipt, (3) the payor, (4) the amount of the receipt, (5) classification or general ledger account. The classification of the receipts shall include the major sources of revenue, such as state revenues; property taxes; sales taxes; fines, forfeitures and costs; and franchise fees.

All items of receipts must be posted to and properly classified in the cash receipts journal or electronic receipts listing. The journal shall be properly balanced and totaled monthly and on a year-to-date basis. The journal shall be reconciled monthly to total bank deposits as shown on the municipality's bank statements. The electronic receipts listing shall be posted to the general ledger at least monthly. The general ledger shall be reconciled monthly to total bank deposits as shown on the municipalities' bank statements.

H. Cash Disbursement Journals

Municipalities must also establish a cash disbursements journal or electronic check register that shall indicate the date, payee, check number or transaction number, amount of each check written or transaction, and classification or general ledger account. The classifications of expenditures shall include the major type of expenditures by department, such as personal services; supplies; other services and charges; capital outlay; debt service; and transfers out. The cash disbursements journal shall be properly balanced and totaled monthly and on a year-to-date basis. The cash disbursements journal shall be reconciled monthly to total bank disbursements as indicated on the monthly bank statements. The electronic check register shall be posted to the general ledger at least monthly. The general ledger shall be reconciled monthly to total bank disbursements as indicated on the monthly bank statements.

I. Debit Card and Credit Card Payments

Municipalities are authorized to accept a legal payment and any associated costs through a debit card or credit card in accordance with applicable state and federal law.[262] Municipalities may enter into a contract with a credit card or debit card company and pay any fee normally charged by the credit card or debit card company for allowing the municipality to accept the credit card or debit card as payment. When a payment is made through a credit card or debit card, the municipality shall assess a transaction fee equal to the amount charged to the municipality by a credit card or debit card company. However, a municipality shall not assess a transaction fee for payments made through a credit card or debit card if the governing body of the municipality determines that the transaction fee is included in the amount charged for the service or product for which a credit card or debit card payment is made.

J. Annual Publication of Financial Statement

Every year the governing body is required to publish a financial statement of the municipality, including receipts and expenditures for the period and a statement of the indebtedness and financial condition of the municipality. The financial statement must be published one time in a newspaper published in the municipality, but if there is no newspaper published in the municipality, then the financial statement must be posted in two of the most public places in the municipality. The financial statement shall be at least as detailed as the minimum record of accounts as provided in this chapter and it must be published by April 1 of the following year.

262 A.C.A. § 14-59-119(a)

K. Accounting Record Retention

Municipal accounting records can be divided into three groups: (1) support documents, (2) semipermanent records and (3) permanent records.

Support documents consist primarily of canceled checks, invoices, bank statements, receipts, deposit slips, bank reconciliations, checkbook register or listing, receipt listing, monthly financial reports, payroll records, budget documents, and bids, quotes and related documentation. Support documents must be maintained for a period of at least four years and in no event shall they be disposed of before being audited for the period in question.

Semipermanent records consist of fixed assets and equipment detail records; investment and certificate of deposit records; journals, ledgers and subsidiary ledgers; and annual financial reports. Semipermanent records must be maintained for a period of not less than seven years and in no event shall be disposed of before being audited for the period in question. For investment and certificate of deposit records, the seven years of required maintenance begins on the date of maturity.

Permanent records consist of city or town council minutes, ordinances, resolutions, employee retirement documents and annual financial audits. Permanent records shall be maintained permanently.

When documents are destroyed, the municipality shall document the destruction by the following procedure. First, an affidavit must be prepared stating which documents are being destroyed, the period of time to which they apply and the method of destruction. The affidavit is to be signed by the municipal employee performing the destruction and one council member. Next, the council must approve the destruction of documents and there must be an appropriate note of the approval indicated in the council minutes along with the destruction affidavit. Council approval must be obtained before destruction.

L. Withholding Turnback and Penalty

When Legislative Audit audits a municipality's financials, if there is a finding of a municipality being in substantial noncompliance with the Municipal Accounting Law, then the municipality is referred to the Legislative Joint Auditing Committee (LJAC). Once Legislative Audit notifies LJAC of the noncompliance, then the LJAC will in writing notify the mayor and the city or town council that the municipality's accounting records do not substantially comply with this chapter.

The municipality will have 60 days after the date of notification to bring the accounting records into substantial compliance with the Municipal Accounting Law. After the 60 days allowed for compliance or upon request by the appropriate municipal officials, Legislative Audit shall review the records to determine if the municipality substantially complies with this chapter. If Legislative Audit still finds substantial noncompliance with the Municipal Accounting Law, then they will notify the LJAC, which in turn may notify the Treasurer of State. If reported to the Treasurer of State, the Treasurer of State will place 50% of the municipality's turnback in escrow until the LJAC committee reports that the municipality has substantially complied. If Legislative Audit has not received a request for a review of the records from the municipality before the end of the 120-day period after the first date of notification of noncompliance, the LJAC may notify the municipality and the Treasurer of State of the continued noncompliance. Upon notice by the LJAC, the Treasurer of State will then withhold all turnback until such time that the accounting records have been reviewed and determined by Legislative Audit to be in substantial compliance with the Municipal Accounting Law. If after six months Legislative Audit has still not received a request for a review of the records, then LJAC may notify the Treasurer of State that the municipality has forfeited all escrowed funds, and the Treasurer of State will redistribute all escrow turnback funds applicable to the municipality among all other municipalities receiving turnback.

Failure to comply with the Municipal Accounting Laws can lead to a municipality having its turnback funds withheld. However, it does not end there. If the LJAC concludes the process under A.C.A. § 14-59-117, detailed above, and in the immediately subsequent three-year period the LJAC concludes the process a second time, the LJAC may notify the Attorney General and the Governor of its actions. The Attorney General may then file pleadings in the circuit court of the Sixth Judicial District to revoke the charter of the municipal corporation. The municipality would then consolidate back into the county.

Chapter 4. Municipal Accounting Handbook

A. Accounting System

Before you can set up or understand your accounting records, dive into your day-to-day transactions, and get your books ready for end-of-month or end-of-year reporting, you must gain an understanding of some basic accounting concepts.

Accounting is the method in which financial information is gathered, processed and summarized into financial statements and reports. An accounting system is represented by the following graphic, which is further explained below.

1	2	3	4	5
Business Transactions (Source)	Journal Entry	General Ledger	Trial Balance	Fund Statements (Financial Statements)

Every accounting entry is based on a business transaction, which is always evidenced by a business document, such as a check, invoice or travel form. A journal is a place to record the transaction of a municipality. The typical journals used to record the chronological, day-to-day transactions, such as revenue and expenditures, are cash receipts journals and cash disbursements journals. While a journal records transactions as they happen, a ledger groups transactions according to their *type*, based on the accounts they affect. A general ledger is a collection of all balance sheets, revenue and expense accounts used to keep municipal accounting records. At the end of an accounting period—a calendar month—all journal entries are summarized and transferred to the general ledger accounts. This procedure is called "posting."

A trial balance is prepared at the end of an accounting period by adding up all the account balances in your general ledger. The sum of the debit balances should equal the sum of your credit balances. If total debits do not equal total credits, then you must track down the errors. Finally, financial statements, which are fund statements consisting of balance sheets and income statements, are prepared from the information in your trial balance.

Basic accounting records are required by Arkansas law and are important because the resulting financial statements and reports assist you, your mayor and city council in planning and making sound financial decisions.

B. Accounting Basics (Assets = Liabilities + Fund Balance)

If you understand the definition and goals of an accounting system, you are ready to learn the following accounting concepts and definitions.

- Assets—Items of value held by the municipality. Assets are balance sheet accounts. Examples of assets are cash, investments, fixed assets, etc.
- Liabilities—This is what your municipality owes to creditors. Liabilities are also balance sheet accounts. Examples include payroll, taxes payable, loans and bonds payable, money due to other governmental agencies, etc.
- Fund Balances—The net worth of each of your funds. An accumulation of revenues received less expenses incurred. Assets, liabilities and fund balances are **permanent** accounts. In other words, they **do not** close at the end of the accounting period. Fund balances are reported in the following classifications:
  - Nonspendable—Fund balances that are either not in spendable form or legally or contractually required to be maintained intact.
  - Restricted—Fund balances which have constraints, or restrictions, on the use of resources that are either:
    - A) externally imposed by creditors, grantors, contributors, or laws or regulations of other governments; or
    - B) imposed by law.
  - Committed—Fund balances that can only be used for specific purposes pursuant to constraints imposed by ordinances.

- Assigned—Fund balances that are constrained by the city's intent to be used for specific purposes, but are neither restricted nor committed. Assigned fund balances include all remaining amounts (except negative fund balances) that are reported in governmental funds, other than the general fund, that are not classified as nonspendable, restricted nor committed, and amounts in the general fund that are intended to be used for a specific purpose. Cities should not report an assigned fund balance if the assignment would result in a negative unassigned fund balance.
- Unassigned—Unassigned fund balance is the residual classification of the general fund. The general fund should be the only fund that reports a positive unassigned fund balance amount. In other governmental funds, if expenditures incurred for specific purposes exceeded the amounts restricted, committed or assigned to those purposes, it may be necessary to report a negative unassigned fund balance.

The accounting equation: **Assets = Liabilities + Fund Balance.** It is important to note that the assets are on the left-hand side of the equation, and liabilities and fund balances are on the right-hand side of the equation. Once you master the above accounting terms and concepts, you are ready to learn about the following day-to-day accounting terms.

- Debits—At least one component of every accounting transaction (journal entry) is a debit amount. Debits increase assets and decrease liabilities and fund balance. In bookkeeping texts, examples and ledgers, you may see the word "Debit" abbreviated as "**Dr.**"
- Credits—At least one component of every accounting transaction (journal entry) is a credit amount. Credits increase liabilities and fund balances and decrease assets. In bookkeeping texts, examples and ledgers, you may see the word "Credit" abbreviated as "**Cr.**"

Assets = Liabilities + Equity (Fund Balance) Revenues – Expenditures

Assets	**(Increase = Debit)** **(Decrease = Credit)**
Liabilities	**(Increase = Credit)** **(Decrease = Debit)**
Fund	**(Increase = Credit)** **(Decrease = Debit)**
Revenue	**(Increase = Credit)** **(Decrease = Debit)**
Expenditures	**(Increase = Debit)** **(Decrease = Credit)**

C. Arkansas Self-Insured Fidelity Bond Program

All Arkansas municipalities participate in the Self-Insured Fidelity Bond Program administered by the Governmental Bonding Board. This program covers actual losses sustained by the participating entity through any fraudulent or dishonest act or acts committed by any of the officials or employees, acting alone or in collusion with others, during the bond period to an amount not exceeding the lesser of $300,000 or the amount of the bond. Premiums for coverage are determined by the State Risk Manager and approved by the board. These premiums are paid by the State Treasurer from funds withheld from the Municipal Aid Fund. There is a $2,500 deductible per occurrence. A certificate of coverage may be obtained by contacting the Risk Management Division at 501-371-2690 or via email at insurance.risk.management@arkansas.gov. Copies of the bond policy may be obtained at www.insurance.arkansas.gov/risk.htm. All Proof of Loss notices must be submitted to the Arkansas Governmental Bonding Board by the Division of Legislative Audit. Coverage is provided for funds audited in compliance with Section 4 of the Bond policy. Private audits—those not performed by Legislative Audit—must be completed within 18 months of each participating governmental entity's fiscal year end.

D. Accounting and Budgeting

Fund Accounting.

A fund is an accounting entity with a set of self-balancing accounts. It is used to record financial information associated with the specific activities of that entity. Sounds simple enough, right? It is a bunch of account numbers or names that tell the financial story of an activity. Self-balancing means Debits = Credits. Every time a financial transaction takes place, at least one account is debited and one account is credited.

How many funds should a government have?

There is no set number of funds that a government should have. The number depends on the size and complexity of the government. A practical accounting rule states that a government should use the smallest number of funds possible that will allow the government to meet legal and sound financial administration requirements. However, we do know that we are required to maintain at least two different funds and bank accounts: (1) General Fund and (2) Street Fund.[263]

What are fund types and classifications?

Every general purpose government (municipal, county, state, etc.) should have a general fund. A general fund means one, and only one, general fund. There are three types of funds that a government may use: (1) governmental fund, (2) proprietary fund types and (3) fiduciary fund types. The chart below shows all of the fund types and fund classifications. Don't panic! The list is here just to let you know that these things exist. You will probably not have to use all of them.

Fund Type:	Governmental	Proprietary	Fiduciary
Fund Classifications:	**General Fund**	**Enterprise Funds (2)**	**Pension Funds (3)**
	Special Revenue (1) Debt Service Capital Projects Permanent Funds	 Internal Service	Investment Trust Private Purpose Trust Agency Funds(4)
Examples:	General Fund Street Fund (1)	Water Fund (2) Sewer Fund (2)	Fire Pension (3) Admin. of Justice (4)

Which funds will I have to use?

Most cities and towns in Arkansas will use two fund types and three fund classifications. The governmental funds are used to account for activities primarily supported by taxes, grants and similar revenue sources. Under the governmental fund type, there is the (1) general fund, (2) debt service fund, (3) permanent fund (e.g. municipal cemetery fund) and (4) special revenue fund (e.g. street fund). The fiduciary funds are used to account for activities that cannot be used to support the government's own programs. Under the fiduciary fund type, there is the (1) agency fund (e.g. the Administration of Justice fund) and (2) the pension fund (e.g. the Police Pension and Relief Fund). The proprietary funds are used to account for activities supported form fees and charges (e.g. water fund or sewer fund).

263 See A.C.A. § 14-59-101 et seq.

E. General Payroll and Tax Reporting Information

Payroll Taxes

Payroll involves numerous types of taxes and deductions, all with specific rules and deadlines. Both taxes and deductions can be fully paid by the employee, fully paid by the employer, or both parties pay a part of it. The most common taxes are (1) Social Security Tax (FICA), (2) Federal Withholding, (3) State Withholding, (4) Federal Unemployment and (5) State Unemployment.

Social Security Tax (FICA)

This includes Social Security and Medicare Tax. A portion is deducted from the employee and the employee also pays a portion. Currently, Social Security is 12.4% with ½ (6.2%) paid by both the employee and the employer. Medicare, on the other hand, is 2.9% with ½ (1.45%) paid by both the employee and employer.

Social Security has a wage base limit, but Medicare does not. Therefore, when the employee's gross taxable salary reaches the base limit, no more Social Security tax is deducted. However, Medicare is calculated on 100% of taxable salary. It is important to remember that the wage base limit changes every year so it is recommended that you verify this annually.

Payment is made monthly or with each payroll, depending on the size of the annual payroll. The payment method is determined by the IRS and is subject to change. It is recommended this tax is paid within three working days of the payroll date to ensure compliance and to eliminate fees for non-payment or late payments. IRS fees can be very hefty.

Federal Withholding and State Withholding

Federal Withholding is only paid by the employee. The amount withheld is the amount remitted to the IRS. This tax is remitted with the Social Security Tax. State Withholding is also only paid by the employee. The amount withheld is the amount remitted to the State of Arkansas. Payment is made monthly by the 15th of the next month. Use Form AR-941M to remit the payment to the Department of Finance and Administration (DFA). The State usually sends a packet in January of each year with 12 monthly reports, an annual reconciliation and address labels. Reports can also be filed online at atap.arkansas.gov. This is the recommended method of filing. Annual reconciliation should be filed using Form AR 3MAR and this is due by February 28 of the year immediately following the tax year you are filing.

Federal Unemployment and State Unemployment Tax

Federal Unemployment Tax (FUTA) is not currently required by municipalities. FUTA supplements state unemployment if state unemployment runs out of funds for benefits. State Unemployment Tax (SUTA) is fully paid by the employer. Every January you should receive notification of the annual rate. The unemployment insurance tax is computed on the wages paid to each employee on a calendar quarter basis. The current taxable wage base that Arkansas employers are required by law to pay unemployment insurance tax on is $12,000 per employee, per calendar year.

Payment of SUTA is made quarterly by the end of the month following the end of each calendar quarter. Therefore, SUTA reports are due by January 31 (for the fourth quarter of the previous calendar year), April 30, July 31 and October 31.

Other Payroll Deductions and Common Payroll Errors to Avoid

There are many different types of deductions and expenses that must be remitted. These range from health insurance, child support, garnishments or savings accounts. It is common that health insurance is paid by both parties. Garnishments and child support would only be paid by the employee. Retirement plans are usually paid by both parties, but long-term employees may not be required to contribute. Deductions should be processed according to the specific rules for that deduction. For example, health insurance is usually paid monthly through an accounts payable check. Retirement payments are also paid monthly, LOPFI (www.lopfi-prb.com) and APERS (www.apers.org) both require online processing. Child

support and garnishments are usually paid every payroll, but the specific requirements can be found in the court order.

Some of the most common payroll errors noted in municipal audit reports are: (1) failure to file federal and state payroll reports, (2) federal and state payroll reports or forms improperly filed, (3) failure to properly report compensation to the IRS and the Arkansas Department of Finance and Administration, (4) failure to properly remit payroll taxes and withholdings to the IRS and DFA, and (5) failure to reconcile amounts on payroll reports and forms filed with IRS and DFA to city records.

Important General Payroll Information

New Hire Reporting: All employers must report their new and rehired employees to the state directory of new hires. Federal law mandates the new hires be reported within 20 days of the date of hire. For information contact the Arkansas New Hire Reporting Center at 800-259-2095 or 501-376-2125.

I-9 Forms: I-9 Forms verify that all new employees are eligible to work in the United States. Each employee must fill one out and provide the necessary documentation within three days of employment.

W-4 Forms: The IRS requires a completed W-4 Withholding Allowance Certificate before any employee is entitled to claim withholding allowances. All new employees and those employees whose withholding status has changed should file a new W-4.

Arkansas State Withholding: This form is used to claim withholdings for state tax.

Applications and Job Postings: Applications should remain on file for one year. Job postings and advertisements should be on file for one year. Employers must treat medical records as confidential information; they must be kept separate from the employee's general personnel file. Access should be limited to individuals with a need-to-know basis. All employee files must contain an application, W-4 and an I-9.

Withholdings: For child support, remit money immediately. For bankruptcy, remit as per direction of the court. For wage garnishment, remit as per direction of the court.

Employee Termination: For a worker who quits, pay the next regular payday. For a worker who is fired, pay within seven days.

Postings: Federal laws require every covered employer to post specific labor information. If your city has any branch offices or separate locations, each must display a complete set of postings. State laws require postings for minimum wage, right to know, unemployment insurance, worker's compensation and sexual harassment.

W-2: Send W-2s to each employee by January 31. Reports must be filed with a W-3 by February 28 to the Social Security Administration. (These forms should be ordered in October or November.)

W-9: A request for taxpayer identification number and certification, Form W-9 is used to get the correct TIN (taxpayer identification number) to report, for example, real estate transactions, transactions with vendors, etc.

1099: Form 1099 is used to report income of vendors that are not incorporated to whom you have paid over $600, and the form must be sent out by January 31. Reports must be filed with the IRS with a recap Form 1096. (These forms should be ordered in October or November.)

Chapter 5. Sources of Revenue

A. Overview

Municipalities in Arkansas have several ways to generate revenue in order to provide the necessary services that municipalities offer. Municipalities are not for-profit entities, nor do they derive any type of revenue from the sale of goods or anything similar. Instead, municipalities predominantly receive revenue to operate through taxes and services provided. In this chapter, we will cover the major sources of revenues that municipalities have at their disposal.

B. City and County Local Sales Taxes

The most typical source of revenue for municipalities in Arkansas is a sales tax. A sales tax is a consumption tax imposed by the government on the sale of goods and services. The state of Arkansas, counties and municipalities are all authorized to have sales taxes. For municipalities, the beginning of the authority to levy a sales tax comes from A.C.A. § 14-43-606(a), which provides: "No municipality shall levy any sales, which includes gross receipts or gross proceeds, use, payroll, or income tax other than those authorized by law." Municipalities cannot simply levy a sales tax in whatever manner or amount that they so choose. Instead, we must look at the specific operating authorities that authorize municipalities to levy sales taxes

City Sales Tax

Municipalities in Arkansas have two operating authorities in which they may levy a sales tax under A.C.A. § 26-75-201 *et seq.* and 26-75-301 *et seq*. Although both subchapters are nearly identical, it is important to note that they authorize separate taxes.[264] Under both operating authorities, the governing body may adopt an ordinance levying a local sales and use tax in the amount of 0.125%, 0.25%, 0.5%, 0.75%, 1%, or any combination of these amounts for the benefit of the city.[265] These two provisions were amended by Act 1561 of 2001 to add the language "or any combination [of these amounts]." What is the maximum tax rate that can be levied? The Attorney General has opined that the plain wording of the statutes would suggest that the fractional amounts can be combined, which could yield a sales tax of 2.625%, assuming voter approval is obtained.[266]

The sales tax is levied on the receipts from the sale at retail of all items and services that are subject to taxation under the Arkansas Gross Receipts Act of 1941 (A.C.A. § 26-52-101 *et seq*.) and the Arkansas Compensating Tax Act of 1949 (A.C.A. § 26-53-101 *et seq.*).[267] In other words, the sales tax is levied on what the state of Arkansas authorizes to be taxed. If the state passes a tax exemption on a particular item, then that item will also be exempt from local sales taxes. Therefore, under both subchapters 2 and 3, a municipality could levy a sales tax of up to 2.625% with voter approval. Revenues generated from the levying of a sales tax under these two subchapters may be used for general revenue,[268] special revenue (if the ballot title restricts the use of funds)[269] or pledged to bonds (if done by a separate vote).[270]

Broadly speaking, there are five steps to levying a sales tax: (1a) the levying ordinance, (1b) the levying petition, (2) the ordinance calling for the special election, (3) the election, (4) mayor's proclamation and (5) notification to the Arkansas Department of Finance and Administration (DF&A). In order for the municipality to initiate the process of levying a sales tax, it must adopt an ordinance levying the sales tax. This is the ordinance that will provide the percentage being levied, the expiration of the tax if needed, the effective date and purpose of the tax (whether for general purposes or a dedicated purpose).[271]

Citizens may also initiate the levying of a sales tax. A legal voter of the municipality may file a petition with the governing body requesting a special election on the question of levying a local sales tax.[272] The petition must be signed by a number of the legal voters in the city that is no less than 15% of the number of votes cast for the office

264 See Ark. Op. Atty. Gen. Nos. 2008-036, 97-087, 96-093, 94-058, 93-078.
265 A.C.A. §§ 26-75-207 and 26-75-307
266 Ark. Op. Atty. Gen. No. 2008-036
267 A.C.A. §§ 26-75-212 and 26-75-312
268 A.C.A. §§ 26-75-201(c)(2) and 26-75-301(c)(2)
269 A.C.A. §§ 26-75-206 and A 26-75-306
270 A.C.A. §§ 26-75-204-205 and 26-75-304-305
271 A.C.A. §§ 26-75-207 and 26-75-307
272 Id.

of mayor at the last preceding general election. On the date of the filing of a petition or on the date of adoption of an ordinance levying a local sales tax for the benefit of the city, the city by ordinance shall provide for the calling of a special election on the question in accordance with A.C.A. § 7-11-201 *et seq*.[273] Note: If the municipality is the one initiating the levy of the sales tax, then the municipality should pass two ordinances at the council or director meeting, (1) the levying ordinance and (2) the ordinance calling for the special election.

The special election will be called on the next special election date under A.C.A. § 7-11-205. It is important to note that the law surrounding special elections has changed in previous years. Prior to the 2021 Arkansas legislative session, municipalities could have special elections on the second Tuesday of any month, unless the election would be held in the month in which the preferential primary or general election was scheduled. There are now only two dates a year in which municipalities can have special elections: either the second Tuesday of March or November in a year when a presidential election is held, or the second Tuesday of May or November in all other years.

Following the election, the mayor must issue a proclamation of the results of the election with reference to the local sales tax, and the proclamation must be published one time in a newspaper having general circulation in the city.[274] The mayor must also notify the secretary of DF&A of the rate change after publication of the proclamation has occurred and 90 days before the effective date of the tax.[275] This notification allows DF&A to notify the retailers of the change in rates.

County Sales Tax

The operating authorities for the county sales tax is codified in A.C.A. § 26-74-201 *et seq*. and 26-74-301 *et seq*. County sales taxes may also affect the cities and towns within them. If the county has levied a sales tax pursuant to one of these two subchapters, then the municipalities within the county receive a per capita share of the levied sales tax.[276] However, if the county has levied a sales tax pursuant to A.C.A. § 26-74-401 *et seq.*, then the municipality may or may not receive a share depending on whether the municipality has its own sales tax.[277]

C. Ad Valorem General Fund Property Tax

Article 12, Section 4 of the Arkansas Constitution authorizes the governing body of a municipality to levy up to five (.005) mills.[278] Voter approval is not required, and the revenue generated from this millage may be used for general or specific purposes.

A city can have an additional millage up to one mill (.001) each for police and fire pensions.[279] However, these specific mills must be approved by the voters. It is only the five general mills that the governing body of the municipality may levy without having an election. Most importantly, municipalities must certify the millage amount each year with the county clerk on or before the time fixed by law for levying county taxes.[280]

Cities and towns may also receive a portion of certain mills levied by the county. Pursuant to A.C.A. § 26-79-104, of the amount collected from the county's annual three-mill road tax, the county courts must apportion one half, except when a greater amount is allowed by law, of the amount collected upon property within the corporate limits of any city or town for use in making and repairing the streets and bridges in the respective cities or towns.

D. State Turnback and Municipal Aid

One of the key revenue sources for municipalities in Arkansas is the Municipal Aid Fund, also known as state turnback. The Municipal Aid Fund consists of general revenues made available to the Municipal Aid Fund by the Revenue Stabilization Law (A.C.A. § 19-5-101 *et seq*.) and such special revenues derived from highway user imposts by the Arkansas Highway Revenue Distribution Law, (A.C.A. § 27-70-201 *et seq*.) These two items are

273 A.C.A. §§ 26-75-208 and 26-75-308
274 A.C.A. §§ 26-75-209 and 26-75-309
275 Id.
276 A.C.A. §§ 26-74-214(b)(2) and 26-74-313(d)(1)
277 A.C.A. § 26-74-409(a)(3) provides, "Furthermore, the Treasurer of State shall determine which cities or towns within the county do not levy a local sales tax and remit to those cities or towns a percentage of the tax based upon the population of the city or town versus the population of the county."
278 See also A.C.A. § 26-25-102.
279 A.C.A. § 24-11-404 and 24-11-812
280 A.C.A. § 26-73-202. See also A.C.A. § 14-14-904(b), which provides, "the quorum court at its regular meeting in November or December of each year shall levy the county taxes, municipal taxes, and school taxes for the current year." Therefore, you should have your certification to the county by the end of October.

generally referred to as general turnback and street turnback respectively. General turnback is established through the Arkansas Revenue Stabilization Law and is an appropriation of state revenue to municipalities. The amount of the appropriation is set by the state legislature.

Street turnback, however, includes a variety of taxes on fuel, gas and diesel in which municipalities get 15%, counties get 15% and the state gets 70% of the taxes collected.

General turnback and street turnback make up the Municipal Aid Fund. These funds are divided on a per capita basis among the municipalities in Arkansas. While general turnback may be used for any municipal purposes, there are limitations on what street turnback funds may be used for. Remember: Street funds must be maintained in a separate bank account and cannot be commingled with the general fund account.[281] Further, street turnback funds may only be used for the purposes authorized in A.C.A. § 27-70-207(c)(1). The purposes include: (1) the maintenance, construction and reconstruction of streets that are not continuations of state highways and for other surface transportation; (2) any public transportation; and (3) any other transportation system improvement or service within the political subdivision, including without limitation those projects defined as a transportation system under A.C.A. § 27-76-103[282], regardless of whether or not the political subdivision is a member of a regional mobility authority.

E. Franchise Fees

Franchise fees are fees paid by a utility to a municipality for using public rights of way for the utility's lines. Rights of way typically include municipally owned water lines, sewer lines and, for some cities, electric lines. However, not every municipality owns all the utilities. Therefore, when private utilities, like electricity providers, are needed in a municipality, then a private utility company will lay its utility lines in the municipality's right of way. In return, the municipality may receive compensation in the form of franchise fees for that usage.

For the purposes of franchise fees on public utilities, the term "public utility" means electric, gas, sewer, water, or telephone company or utility, and any company or utility providing similar services.[283] Franchise fees are authorized to be set by either ordinance or resolution.[284]. If a franchise fee has no end date or time period, then it would be of a general or permanent nature and should therefore be established by ordinance. If, on the other hand, the franchise fee is for a limited time, then it may be appropriate to enact a franchise fee through a resolution. The franchise fee established cannot exceed 4.25% of revenue collected by the public utility, unless the city has come to an agreement with the utility for a larger amount.

F. Solid Waste/Sanitation Fees

Arkansas law requires municipalities to provide solid waste management systems that adequately provide for the collection and disposal of all solid wastes generated or existing within the municipality. A municipality may enter into an agreement with another municipality, county or regional solid waste management district, private persons, or any combination thereof to provide this service.

The municipality is authorized to levy and collect fees and charges and require such licenses as necessary to fulfill the purposes set out in A.C.A. § 8-6-201 *et seq*. If fees and service charges billed are more than 90 days delinquent, then the bill may be entered on the tax records of the county as a delinquent periodic fee or service charge and may be collected by the county with personal property taxes.

G. Fines and Forfeitures

Municipalities may pass ordinances that are enforced through the imposition of fines, forfeitures and penalties on violators of city ordinances. Recall from Section I Chapter 3 that ordinances must be reasonable and not oppressive nor ambiguous. These factors should also be considered in the setting of fines for the violation of an

281 A.C.A. § 14-59-104(c).

282 A.C.A. § 27-76-103 defines "Transportation project" as (a) any part of a transportation system; (b) construction on or of any part of a transportation system; (c) maintenance on or operation of any part of a transportation system; or (d) preservation of any part of a transportation system. It further defines "Transportation system" to mean "infrastructure that provides mobility for people or goods in a region, including without limitation: (a) roads; (b) streets; (c) highways; (d) bridges; (e) tunnels; (f) sidewalks; (g) bicycle paths; (h) trails; (i) toll facilities; (j) pedestrian ways; (k) intermodal facilities; (l) port authorities; (m) waterways; (n) railroads; (o) parking facilities; (p) public transit systems; (q) traveler information systems; (r) intelligent transportation systems; (t) traffic signal systems; (u) safety improvements; or (v) any other means of surface or water transportation.

283 A.C.A. § 14-200-101(a)

284 A.C.A. § 14-200-101(b)(1)

ordinance. For example, a fine set at $1,000,000 for jaywalking would very likely be held to be unreasonable. Also recall that ordinances imposing a penalty are not effective until they have been published as to put everyone on notice of the prohibited conduct.

H. Business Licenses

Municipalities are charged with protecting and promoting the safety and health of the public. One of the ways cities accomplish this is through the issuance of business licenses, which allows them to keep track of businesses operating within the corporate limits of the municipality and helps ensure businesses are operating properly. Municipalities are authorized, by an ordinance passed by 2/3 vote of the governing body, to require any person, firm, individual or corporation engaging in any trade, business, profession, vocation or calling to pay a license fee or tax.[285] However, a person, firm, individual or corporation is not required to pay a license fee in more than one city unless such person, firm, individual or corporation maintains a place of business in more than one city.[286]

I. Water and Wastewater Rates

Revenue generated from water and wastewater system rates tend to be the major funding sources for those municipal services. The process for setting those rates is similar for each, with some key differences.

Water Systems

Municipalities are authorized to charge rates for resident and nonresident consumers of municipal waterworks systems. The rates must be fixed by the legislative body of the municipality. This is true regardless of whether the municipality has a separate water commission. The governing body has the ultimate say in the setting of rates.[287] However, the rates that are charged must be adequate to: (1) pay the principal of and interest on all revenue bonds and revenue promissory notes as they mature, (2) make such payments into a revenue bond sinking fund as may be required by ordinance or trust indenture, and (3) provide an adequate depreciation fund and to prove the operating authority's estimated cost of operating and maintaining the waterworks system.[288]
If water rates generate a surplus, A.C.A. § 14-234-214(e) requires that the municipality treat the surplus accordingly:

1. If any surplus is accumulated in the operation and maintenance fund that is in excess of the operating authority's estimated cost of maintaining and operating the plant during the next fiscal year, then the excess may be transferred to either (a) the depreciation account or (b) to the bond and interest redemption account;
2. If any surplus is accumulated in the depreciation account over and above what the operating authority finds necessary for probable replacements needed during the current fiscal year and the next fiscal year, then the excess may be transferred to the bond and interest redemption account;
3. f a surplus shall exist in the bond and interest redemption account, it then may be applied as authorized to (a) the payment of bonds that may later be issued for additional betterments and improvements; (b) to the purchase or retirement, in so far as possible, of outstanding unmatured bonds payable from the bond and interest redemption account, at no more than fair market value therefore; (c) the payment of any outstanding unmatured bonds payable from the bond and interest redemption account that may be subject to call for redemption before maturity; or (d) any other municipal purpose.[289]

The intent of water rates is to ensure the system is operating sufficiently, that it is sufficiently maintained, and that any indebtedness is being addressed. Only after a city funds these purposes may the remaining surplus funds be used for general municipal purposes.

285 A.C.A. § 26-77-102(a)
286 A.C.A. § 26-77-102(b)
287 A.C.A. § 14-234-214(a)
288 A.C.A. § 14-234-214(b)(1)-(3)
289 A.C.A. § 14-234-214(e)

Two recent changes to state law on water systems, Act 605 of 2021 and Act 545 of 2023,[290] have the intent of improving water systems across the state and ensuring water systems are bringing in sufficient funds through their rates to cover the operation and maintenance of the water systems. Providers of retail water services are required have rate studies conducted in accordance with the following schedule: By July 1, 2024, and every five years thereafter for a provider that serves 500 or fewer customers; by July 1, 2025, and every five years thereafter for a provider that serves 501 to 1,000 customers; and by July 1, 2026, and every five years thereafter for a provider that serves more than 1,000 customers.[291]

Rate increase recommendations from the rate study must be implemented within one year of the receipt of the rate study. However, if the recommended rates would increase the provider's rates by 50% or more, then the provider may phase in the rate increase over a two-year period.[292] Providers are also required to deposit a minimum of 5% per annum of gross revenues in a dedicated refurbishment and replacement account.[293] Of course, a city may spend any amount of its cash savings at any time for refurbishment and replacement of its water system facilities. The laws' requirements are intended to ensure all water systems are fiscally, and physically, sound.

If a municipal provider services customers outside of the municipal boundaries of the provider and the number of those customers outside the municipal boundaries and in unincorporated areas equals or exceeds 20% of the total customer base of the municipal provider, then a nonvoting advisory committee to the municipal provider must be established by the governing body of the municipality.[294] The makeup and duties of this advisory committee is determined by the governing body that creates the committee. However, there must be at least two nonresident customers from the area being served outside the municipal boundaries serving on the committee.[295]

Wastewater Systems

There are two main differences between the supervision of wastewater systems and water systems. First, wastewater systems are required to be supervised by a sewer committee.[296] For water systems, the governing body may establish a separate commission at their discretion or serve in that capacity themselves. The wastewater committee is charged with the construction, acquisition, improvement, equipment, custody, operation and maintenance of any works for the collection, treatment or disposal of sewage and the collection of revenue from it for the service rendered. While the day-to-day operations of a wastewater system are overseen by the wastewater commission, it is the governing body of the municipality that has the authority to establish and maintain just and equitable rates or charges for the use and services rendered by the wastewater system.[297]

The second main difference between the two systems is that in order to adjust the rates for wastewater systems, there must be a public hearing in which all users of the system and owners of property served or to be served by the system shall have the opportunity to be heard concerning the proposed rate changes.[298]

Chapter 6. Purchasing and Procurement

A. Overview

When spending funds, city officials should ask, "Am I following the law and the budget? Am I protecting the public's funds by using a good process?" State law does not always provide a clear answer on how to spend municipal funds. Therefore, it is important to have a strong grasp on the statutes governing purchasing and procurement in order to have a good process in place. This chapter covers who has the authority to spend funds, make purchases and enter into contracts, examines which purchases and procurements require competitive bidding and other essential procedures.

290 Act 605 of 2021 and Act 545 of 2023 are now codified in A.C.A. § 14-234-801 et seq. Act 545 amended sections of the code that Act 605 previously enacted.
291 A.C.A. § 14-234-802(c)
292 A.C.A. § 14-234-802(c)(B)
293 A.C.A. § 14-234-802(e)
294 A.C.A. § 14-234-802(c)
295 A.C.A. § 14-234-804(c)
296 A.C.A. § 14-235-206(a)
297 A.C.A. § 14-235-223(a)
298 A.C.A. § 14-235-223(d)

B. Mayor-Council Form of Government

As covered in Section 1, the mayor in a mayor-council form of government makes purchases on behalf of their municipality. The law describes the mayor's power to "make purchases of all supplies, apparatus, equipment, materials, and other things requisite for public purposes" as "exclusive," meaning the authority is exclusive to the mayor. [299] The law does authorize the governing body to set procedures for making all purchases that do not exceed the threshold for bidding, and occasionally the council may need to regulate the purchasing power of the mayor.[300] However, any regulation must not divest the mayor of the "exclusive" power to make purchases. The safest way for a council to regulate purchasing is through the budgeting process. This method allows the council to appropriate the funds for specific purposes and the council can always amend or update the budget as needed. Cities of the second class and incorporated towns do not have default rules on making purchases like a city of the first class, but they are required to set their own procedures by ordinance. The rules that are applicable to cities of the first class provide a great starting point.

Knowledge Check

The city of Morgan is a city of the first class. The city needs a snowplow to clear the parking lot at city hall and nearby municipal buildings. The bidding threshold in Arkansas for a purchase of this type is $35,000. The mayor purchases a snowplow for $32,000. The average cost of snowplows, however, is $10,000. Unhappy with the expenditure, the city council wishes to regulate the mayor's purchasing power.

- *Can the council pass an ordinance requiring the mayor to come before the council to get permission before the mayor purchases anything over $10,000. Is this proper?*[301]
- *Can the council pass an ordinance requiring bids on anything over $5,000? Is this proper?*[302]

Purchasing Commodities

By law, cities of the first class must bid out purchases exceeding $35,000. Purchases under this $35,000 threshold do not require bidding, but cities should follow the procedure that the council has set for purchases under this threshold. Processes Having a procedure in place is highly recommended. It can include requirements for bids, minimum quotes or other reasonable processes. Many municipalities do not set any procedures and leave it up to the mayor. However, having a written, agreed-upon procedure ensures everyone knows what is required and ensures consistency when there is turnover in office.

As mentioned above, purchases for cities of the first class over $35,000 must go out for bid. The mayor or the mayor's authorized representative will take bids through legal advertisement in any local newspaper. Bids received will be opened and read on the date set for receiving bids, and they must be read in the presence of the mayor or the mayor's representative. All municipalities can accept bids through writing or electronic media. Currently, there is no specific law on what a mayor must do to "authorize" a representative, but again, putting it in writing is recommended.

Lowest Responsible Bidder

Prior to Act 208 of 2023, the law just provided for the bid to be awarded to the "lowest responsible bidder." Act 208 provides some legislative clarity. Now, the law specifically authorizes municipalities to base its award on the

299 A.C.A. § 14-58-303(a)

300 See A.C.A. § 14-58-303(b) for cities of the first class.

301 No. Remember, the mayor is the exclusive contractor or purchaser. If the mayor is required to go before the council to get permission to purchase something that: (1) already has funds appropriated and (2) is below the bidding threshold, then it is likely the council has divested the mayor of his exclusive authority to purchase. Under this scenario, the mayor couldn't purchase anything above $10,000 without council approval.

302 Yes. Here, the council is not preventing the mayor from making specific purchases or spending funds. Instead, the council is simply setting a procedure asking for purchases over $5,000 to be bid.

following methods of evaluation: (1) the lowest immediate costs, (2) the lowest demonstrated life cycle costs, (3) the lowest demonstrated term costs or (4) a combination of any of the above. The "lowest demonstrated life cycle costs" refers to the cost of an asset as determined by the mayor to be credibly established by a bidder over the life cycle of the asset, taking into consideration the asset's initial capital costs, maintenance costs, operating costs and residual value at the end of the life of the asset. The "lowest demonstrated term costs" refers to the costs of an asset as determined by the mayor to be credibly established by a bidder over a portion of the life cycle of the asset, again taking into consideration the asset's initial capital costs, maintenance costs and operating costs during the portion of the life cycle of an asset.

C. City Administrator Form of Government

In the city administrator form of government, the city administrator serves as the contractor or purchaser, but the board of directors may regulate the process more than a council can in the mayor-council form of government. Recall, in the city administrator form of government, the board constitutes the executive and legislative branch, which is why the board has more authority to regulate than a council in the mayor-council form of government.

The board is required to set the maximum bidding threshold for the municipality. In other words, the board sets the limit at which the city administrator must solicit bids. The board may also dictate the extent of the city administrator's power and set reasonable regulations on the process. The board may also appoint a committee or create a department of personnel to assist the city administrator with purchasing and contracting. Prior to entering a contract or purchase that exceeds the maximum bidding threshold, the agreement must receive approval by the city administrator and the board.

D. City Manager Form of Government

Under the city manager form of government, the city manager serves as the contractor or purchaser. As in the city administrator form of government, the board of directors may regulate the process more than the council in a mayor-council form of government.

The board is required to set the maximum bidding threshold in this form of government. In other words, the board may limit when the city manager must solicit bids. The board may also set the extent of the city manager's power and adopt reasonable regulations on the process. The board may also appoint a committee or create a department of the city manager's office to assist with purchasing and contracting.

E. Bid Waivers

In some instances, municipalities may need to waive competitive bidding for purchases that would normally require it. For mayor-council forms of government, bidding may be waived by resolution in "exceptional situations" or where the bidding procedure is deemed "not feasible or practical." In the city manager and city administrator forms of government, the board may waive bidding by ordinance (not by resolution as in mayor-council cities) in "exceptional situations where this procedure is not feasible." Little guidance exists on what constitutes "exceptional" situations or feasibility. The Arkansas Supreme Court has offered an opinion deferring to the governing bodies in these situations. In short, the court has indicated that it would uphold a bid waiver as long as the municipality followed the appropriate rules and passed the requisite resolution or ordinance.[303]

Waiving bidding should always be a last option and not the starting point of procurement. It should be limited to emergency situations when the city needs something quickly, when known supplies are dwindling or to realize good savings.

F. Bid Exemptions

Arkansas law exempts many services and commodities from the bidding process completely. A non-exhaustive list of 21 bid exemptions is codified in A.C.A. § 14-58-104. Some key exemptions include: any commodities needed in instances in which an unforeseen and unavoidable emergency has arisen in which human life, health or public property is in jeopardy; used motor vehicles, machinery or equipment (including a leased vehicle with more

303 See Klinger v. City of Fayetteville, 293 Ark. 128, 732 S.W.2d 859 (1987); and see Ark. Op. Atty. Gen. No. 95-255.

than 5,000 miles of use, leased to the municipality, and including new vehicles that are purchased form a licensed car dealership in Arkansas as long as the price is less than the fleet price awarded on state contract); and motor fuels, oil, asphalt, asphalt oil and natural gas.

Many exemptions listed in the statute were added only recently, and the courts have not yet analyzed the specifics of the law. While these provisions exist to give municipalities flexibility in procurement, it is important to proceed with care.

G. Public Improvement Contracts—Construction Purchases

Public improvement contracts require bidding more often than normal purchases and have much fewer bid waiver provisions. All municipalities must take bids for any public improvement that exceeds $50,000. Public improvements include the major repair, alteration or erection of buildings, structures or other permanent improvements. The person who awards contracts for general purchases for your municipality will also award contracts for public improvement contracts.

Municipalities may further negotiate an award of a public improvement contract with the apparent lowest responsible bidder if all bids exceed the amount appropriated for the contract if (1) bidding on alternates was not required and (2) the low bid is within 25% of the appropriated amount. The apparent lowest responsible bidder may be determined by deducting the alternates in numerical order. After the deductions are made, the cost must be less than 25% of the amount appropriated before an award with the lowest responsible bidder may be negotiated.

Cities must put people on notice that the municipality is accepting bids. Cities are required to publish notice to receive bids one time each week for not less than two consecutive weeks in a newspaper of general circulation published in the county in which the proposed improvements are to be made. Cities may also publish notice in a trade journal reaching the construction industry. The notice must contain: (1) a brief description of the type of work contemplated; (2) the approximate location of the work contemplated; (3) the place at which prospective bidders may obtain plans and specifications; (4) the date, time and place at which sealed bids shall be received; (5) the amount, which may be stated in a percentage, of the bid bond required; (6) a statement of the taxing unit's reservation of the right to reject any or all bids and to waive any formalities; and (7) other pertinent facts or information that may appear necessary or desirable.

H. Real and Personal Property

Municipalities are authorized to sell, convey, lease, rent, let or dispose of any real estate or personal property owned by the municipality, including real estate or personal property that is held by the municipality for public or governmental purposes.[304] Municipalities may also buy any real estate or personal property.[305] The mayor is charged with executing contracts and conveyances and lease contracts when the mayor is authorized by a resolution in writing and approved by a majority vote of the governing body present and participating.[306] Note that while the mayor acts as executor, the council has the final say over the buying and selling of contracts concerning real estate or personal property of the municipality.

Cities may sell real property without requesting bids.[307] There are two reasons for this. First, real property should be appraised to determine its worth before being put up for sale. Second, Article 12, Section 5 of the Arkansas Constitution prohibits municipalities from not only becoming stockholders in any corporation, but also prohibits municipalities from obtaining or appropriating money for, or loaning its credit to any corporation, association, institution or individual. In other words, Article 12, Section 5 prohibits direct donations to private individuals and corporations. To be clear, Article 12, Section 5 does not prevent contracts between municipalities and private parties, so long as the agreements are supported by adequate consideration.[308] What constitutes "adequate consideration" is the subject of much case law, but the takeaway is that there must be some type of *quid pro quo*, or something for something. When selling municipal property, the city must receive something in return, like cash for real property. It is important to note that "adequate consideration" does not have to be fully monetary.

304 A.C.A. § 14-54-302(a)(1)
305 A.C.A. § 14-54-302(a)(2)
306 A.C.A. § 14-54-302(b)
307 See Act 575 of 2019, amending A.C.A. § 14-54-302 to strike "real estate" from bidding requirement.
308 See Ark. Op. Atty. Gen. No. 2017-088 for further analysis of Article 12, § 5.

Public advantage can constitute consideration.[309] Municipalities may receive consideration in the form of money but may also receive consideration in the form of a nonfinancial benefit to the municipality.

Knowledge Check

The city of Nash has a very bad stray cat and dog problem. The city does not have an animal shelter, nor does it have the funds to establish an animal shelter, staff it and board animals. A nonprofit animal shelter wants to set up shop in the city to help alleviate this problem. The city has a piece of property that is not being used by the municipality that the animal shelter wants to utilize. The appraisal shows the property to be worth approximately $20,000. Can the city sell the property to the animal shelter for the much lower amount of $5,000?[310]

Personal property is treated slightly differently than real property. The mayor or the mayor's authorized representative may sell or exchange any municipal personal property with a value of $20,000 or less, unless the governing body has, by ordinance, established a lower amount.[311] However, if the personal property exceeds $20,000 (or the maximum provided by resolution), then it must go through competitive bidding.[312] If personal property of the municipality becomes obsolete or is no longer used by the municipality, the personal property may: (1) sold at public or internet auction, (2) sent to the Marketing and Redistribution Section, (3) transferred to another governmental entity within the state or (4) donated under this section.[313] "This section" refers to A.C.A. § 14-54-302, which authorizes municipalities to donate real estate or personal property, or any part of the real estate or personal property, to the United States Government or any agency of the United States Government, for any purpose under A.C.A. § 14-54-302(a)(3). Since the United States Government is not a private individual or corporation, this statute does not run afoul of Article 12, Section 5 of the Arkansas Constitution.

I. Professional Services

There are some services for which municipalities are prohibited from using the competitive bidding process. Cities are prohibited from using competitive bidding in the procurement of legal, financial advisory, architectural, engineering, construction management and land surveying professional consultant services. State law provides this leeway so cities may hire the professional that would be best suited for the job. Further, the list above is not exhaustive. Municipalities may elect to not use competitive bidding for other professional services not listed above with a 2/3 vote of the governing body. The law defines "other professional services" as "professional services not included [above] as defined by a political subdivision with a 2/3 vote of the governing body." In other words, the governing body gets to dictate to some degree what a professional service is.

Although cities are not required to submit for bidding for these services, they must follow a process to obtain these professional services. The law indicates that cities are to send out a request for qualifications (RFQs) in order to evaluate candidates for the work to be done. When evaluating the candidates' qualifications, cities must consider: (1) the specialized experience and technical competence of the firm with respect to the type of professional services required; (2) the capacity and capability for the firm to perform the work in question, including specialized services within the time limitations fixed for the completion of the project; (3) the past record of performance of the firm with respect to such factors as control of costs, quality of work and ability to meet schedules and deadlines; and (4) the firm's proximity to and familiarity with the area in which the project is located. This process allows cities to pick the firm that is best qualified and capable of performing the desired work and negotiate a contract for the project.

309 City of Blytheville v. Parks, 221 Ark. 734, 255 S.W.2d 962 (1953)

310 Yes, more than likely. If the city sells the property, they are receiving monetary consideration to the tune of $5,000, but it is also receiving a non-financial benefit, or a public advantage, in the form of the animal shelter picking up the stray animals in the city and providing shelter. It is critical for the sale to be lawful that the written sales agreement outlines the public advantage and purpose as being additional consideration to the tendered cash.

311 A.C.A. § 14-54-302(c)

312 A.C.A. § 14-54-302(d)

313 A.C.A. § 14-54-302(e)

J. Cooperative Purchasing

The State of Arkansas allows municipalities to purchase from joint procurement entities provided the item is a commodity or service and the particular commodity or service bid specification is in compliance with Arkansas procurement law. Commodity includes goods, leases, insurance and equipment. It does not include a lease or interest in real property, exempt commodities and capital improvements. Exempt commodities include items bought for resale, advertising, livestock and livestock products, maintenance on office equipment, perishable foods, postage, printed materials for use in a library, travel expenses, works of art for museums or public display, and utility services or equipment. It is important to note that the law does not authorize municipalities to utilize cooperative purchasing for public improvements or capital works projects. It is limited to commodities and services. Cooperative purchasing can be very beneficial for municipalities that may benefit from lower prices and potentially a more streamlined administrative procedure.

To determine whether bid specifications are in accordance with Arkansas law, check to determine whether the bid specs are: (1) advertised for the proper amount of time, (2) performance time period has not expired and (3) the purchaser is following the contract terms. The National Institute for Public Procurement maintains a listing of cooperative purchasing programs online at nigp.org/our-profession/cooperative-purchasing-programs. Among the more well-known cooperative purchasing entities are: National IPA, NJPA, TCPN, TIPS/TAPS, US Communities and Sourcewell.

To utilize cooperative purchasing, there must be a cooperative purchasing agreement. This is an agreement entered into as the result of a procurement conducted by or on behalf of more than one public procurement unit or by a public procurement unit with an external activity.[314] Public procurement unit includes municipalities in Arkansas, state agencies and other subdivisions of the state.[315] For example, City A may enter into a cooperative purchasing agreement with City B in order for City A to utilize a contract without having to bid it out because City B has already bid it out. With cooperative purchasing, the competitive bidding process is in place, but it is streamlined.

Most cooperative purchasing services and commodities are not bid with the federal requirements included in the advertisement, bid specs and contracts. However, some are. It is up to the municipality to determine whether the proper language has been included in the contract. Some federal agencies, such as FEMA, will allow the contract to be reformed to meet the requirements.

Chapter 7. Audits

A. Overview

By now, you know just how important municipal finance is to your city or town. It is so important, in fact, that municipal finances have state legislative oversight. While the Arkansas General Assembly doesn't dictate how your municipality spends municipal funds, they do make sure that your municipality is compliant with the law in the way your municipality handles funds and spends funds.

B. Legislative Audit

The mission of Arkansas Legislative Audit is to serve the General Assembly, the Legislative Joint Auditing Committee and the citizens of the State of Arkansas by promoting sound financial management and accountability of public resources entrusted to various governmental entities. Arkansas Legislative Audit assists the legislature in oversight of state and local government, and it is responsible for over 1,000 engagements, including audits, financial and compliance reports and special reports.[316]

Every municipality is required to have an annual audit or agreed-upon procedures engagement of municipal finances. This audit or agreed-upon procedures engagement may be performed by Arkansas Legislative Audit or you may procure the services of an independent person licensed and in good standing to practice accounting by the Arkansas State Board of Public Accountancy.[317] It is important to note that Arkansas Legislative Audit does

314 External procurement activity includes any buying organization not located in this state which, if located in this state, would qualify as a public procurement unit.
315 Other subdivisions of the state include fire protection districts, regional water distribution districts, rural development authorities ….
316 Preparing for a Legislative Audit: Mission Statement. arklegaudit.gov/resources
317 A.C.A. § 14-58-101

not audit municipal utilities. However, municipalities that provide sewer services and water services are required to obtain an annual financial audit of the system if the system has at least 2,000 service connections during a fiscal year.[318] If there are less than 2,000 service connections but more than 100 connections, then an annual audit or annual agreed-upon procedures and compilation report must be completed.[319] The audits on water and sewer systems must be completed within one year following each system's fiscal year end.[320] Within 30 days of completion of the audit report or the agreed-upon procedures and compilation report, the accountant performing the audit or agreed-upon procedures and compilation report must submit the report to the legislative auditor.[321] Finally, the audit report or agreed-upon procedures and compilation report must be reviewed by the appropriate board at the next regularly scheduled open meeting after receiving the report.[322] If the report for a municipal water or sewer system is not submitted to the legislative auditor on behalf of the municipality within 18 months after the end of a fiscal year that the report covers, the Legislative Joint Auditing Committee (LJAC) may give notice of that fact to the Treasurer of State, who will be required to withhold any turnback funds due to the municipality in escrow until notified by LJAC that all reports covering periods through the most recent fiscal year have been filed, at which time the withheld turnback funds will be released back to the municipality.

C. The Legislative Audit

Legislative Audit goes beyond making sure debits match credits and noting any discrepancies. Legislative Audit checks to see if municipalities are in compliance with various state laws, including the Municipal Accounting Law, the Arkansas District Courts Accounting Laws, and the laws governing municipal budgets, purchasing and payments of claims among others.[323]

The best way a municipality can prepare for a legislative audit is to ensure all the necessary records that Legislative Audit requires are easily accessible. Legislative Audit has available a great resource on their website called "Preparing for a Legislative Audit of a Municipality." The link to that page A PDF is available at arklegaudit.gov/resources. It includes a list of the records Legislative Audit needs.

D. Audit Findings

After Legislative Audit has conducted an audit, they will send the municipality the audit report. The report details the municipality's receipts and disbursements. More importantly, the report contains "findings," which detail any statutory compliance issues. A finding will look like the one below.[324]

Mayor and Recorder/Treasurer

1. Restricted Street Fund monies were spent in a manner inconsistent with Ark. Code Ann. § 27-70-207 for 2021 and 2020 of $2,800 and $1,709, respectively. Additionally, adequate supporting documentation was not maintained for a transfer of $332 from Street Fund to General Fund in 2020.

After reviewing the findings, the governing body should take appropriate action to address each finding and recommendation contained in the audit report. It is important to note that audit findings do not include the solution to fixing the issue, but instead point out the issue that was not in compliance. For the example above, the city can reference A.C.A. § 27-70-207 to ensure that it spends street funds for the statutorily authorized purposes and to prevent repeat findings of the same issues.

E. Federal Grant

If a municipality expends more than a certain amount of federal funds in a fiscal (calendar) year, the federal government will require what is known as a single or compliance audit. Preparation for an audit should begin at the time the award is received. It is best to document as you proceed. There are specific requirements that must be

318 A.C.A. § 14-234-119(a)
319 A.C.A. § 14-234-119 (b)
320 A.C.A. § 14-234-119(c)
321 A.C.A. § 14-234-120
322 A.C.A. § 14-234-121
323 See A.C.A. § 14-58-103(b) for a list of laws for which Legislative Audit is checking compliance.
324 A.C.A. § 10-4-418 requires audit reports to be reviewed by the governing body at the first regularly scheduled meeting following receipt of the audit report.

met when managing grants and they are usually set forth in the grant award or in the Office of Management and Budget's Uniform Grants Guidance (UGG) 2 CFR 200. Questioned costs during a grantor audit can lead to a city or town having to reimburse an amount improperly paid. Further, municipal personnel should respond promptly to auditor requests. Most of the compliance audits are primarily conducted virtually, which helps to cut down on the costs.

Federal Single Audit Act and Expenditure Threshold

Federal audit and annual reporting requirements are located in 2 CFR Part 225. Municipalities that expend $750,000 or more in a year in federal awards are required to have a single compliance audit conducted for that year. The amount is determined by adding all of the grant expenditures (not revenue or receipts) of all of the federal grants that the city has for the year. Audits are performed by an outside auditor. Legislative Audit does not do this type of audit. The Grants Division of the Arkansas Municipal League maintains a list of Arkansas auditors who perform these services. Consequently, if expenditures are over the audit threshold in one year, it will be necessary to budget for the cost to pay for this audit. Audit findings made during the compliance audit are provided to the granting agency via an upload into the Single Audit Clearinghouse, which could prompt an audit by the federal granting agency. Audit findings may also keep the city from being awarded additional grant funds.

To determine which grant or loan programs will be audited, city personnel will prepare a Schedule of Expenditure of Federal Assistance (SEFA). Grant information is grouped by federal department and includes the names of the grants, amount of the expenditures and the federal Assistance Listing numbers (for grants like the Dewey Decimal system for libraries). Depending upon whether the city is a low-risk auditee or a high-risk auditee, a certain percentage of the total expenditures must be audited. The Office of Management and Budget prepares a protocol for the auditors to follow. It is called the Cumulative Supplement and it is usually available by June of each year at www.whitehouse.gov. It is suggested that grant managers download the audit protocol for the grants for which the most funding was expended and check it to be sure that the city has followed the rules.

Audit Timing

Single audits are required to be completed and uploaded into the Single Audit Clearinghouse by September 30 of each year. Due to the limited number of auditors that offer these services, be sure to hire the auditor much earlier in the year.

Copies of Compliance Audits

Although the Single Audit Clearinghouse has copies of the audit available on that website and the city's website, most state pass-through granting agencies still require copies of audits. To meet this expectation, it is recommended that you email granting agencies the single audit section along with a link to the entire audit document on the city's website. This saves the city the cost of sending a large document in the mail.

Record Retention for Grants

In addition to the record retention requirements under state law, the federal government also requires that recipients of federal awards retain records and supporting documents for at least three years after submitting the final expenditure report or, for an award that is renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report.[325] There are exceptions to this rule. The federal government can now notify recipients in writing to retain documents longer. Sometimes, this requirement can be found in a grant award document such as the American Rescue Plan Act, which requires municipalities to keep the records for five years after the grant ends. Further, records should be retained until all litigation, claims or audit-related issues have been resolved.

Records for real property and equipment acquired with federal funds must be retained for three years after final disposition. In instances where federal grants result in program income after the end of the grant, the retention period starts from the end of the municipality's fiscal year in which the program income is earned. If records are retained after the retention period has expired, then federal auditors have the right to go back through them and recover any improper costs.

325 2 CFR S 200.334

Section III. Municipal Human Resources and Personnel

Chapter 1. Introduction

The most important resources any organization has are the people working for it. This is as true for municipalities as it is for Fortune 500 companies. As we will discuss throughout this chapter, municipalities are simultaneously government and employer, and with that intersection comes unique challenges and requirements. However, with a little attentiveness and patience, our cities and towns can thrive while balancing the needs of the employer and the rights of the employee, creating a safe workplace, and ensuring high quality public services for the citizens.

Chapter 2. Employment Law

A. "At-Will" Employment

When discussing human resources, it makes sense to start at the very beginning—the hiring process and the description of the type of employment being offered. There are essentially two types of employment: at-will or contract employment. In Arkansas, the default type of employment is at-will employment, unless the employment is for a fixed term or unless the city or town's employee handbook stipulates that the employee may only be terminated for cause.[326] Therefore, in the majority of circumstances, both the employer and the employee may end the employment relationship at any time, for any reason that is not unlawful.[327]

Importantly, the courts have noted at least four exceptions to the at-will standard, holding that employers violate the law when they take adverse action against an employee for refusing to violate a criminal law, for exercising a statutory right, for complying with a statutory duty, or where the termination would violate a general public policy of the state.[328] Municipalities are encouraged to ensure that their employee handbooks contain a provision expressing that all employment with the municipality is at-will. If the municipality's personnel manual or handbook contains a "for cause" provision, the employee can rely on that document and may have a legal cause of action if the employment is terminated arbitrarily. Clearly establishing at-will employment will ensure that all parties are on notice of their individual legal standing and rights regarding the employment status.

B. Personnel Files

Every employee should have a personnel file. The Society for Human Resources Management (SHRM)[329] recommends that all documents related to the employee's job be kept in this file. For example, a personnel file should contain all hiring documents, any performance reviews that have been conducted, documentation of any disciplinary actions (including verbal warnings), the employee's job description, and copies of the employee handbook that have been acknowledged and signed by the employee. Equally as important is what documents should not be included. The Americans with Disabilities Act (ADA) is clear that employers are prohibited from including any medical information in an employee's personnel file. HR officers and managers will want to create a separate file for medical documentation and records. Additionally, all federal I-9 forms should be kept separate from personnel files.

It is recommended that municipalities adopt a policy in writing regarding the supervision of and access to personnel files. By having a written policy in place, we are able to see who exactly is in charge of personnel files and who may have access to them. This also helps ensure continuity as new elected officials take office.

As will be discussed in the Freedom of Information Act (FOIA) portion of this publication, all public records shall be open to inspection and copying by the public.[330] In Arkansas, the definition of "public records" is broad and includes all documents in all mediums that are required to be kept by law and "which constitute a record of the performance or lack of performance of official functions."[331] Personnel files are not automatically exempt, and

326 Eddings v. City of Hot Springs, Ark., 323 F.3d 596 (2003)
327 Unlawful reasons for termination can include violations of the Civil Rights Act, the Americans with Disabilities Act, the Fair Medical Leave Act, the Fair Labor Standards Act, and other state and federal laws. These will be further discussed later in this publication.
328 Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380, 381 (1988)
329 www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/includedinpersonnelfile.aspx
330 A.C.A § 25-19-105(a)(1)(A)
331 A.C.A § 25-19-103(1)

therefore they fit under this umbrella, as the law provides that "all records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records."[332]

However, the law provides exceptions that municipal officials and employees must be made aware of to ensure the constitutional privacy rights of employees are upheld. Courts have held that the constitutional right to privacy can supersede the disclosure requirements of the FOIA.[333] To that end, the Arkansas FOIA exempts "personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.[334] As a general rule, the following information is exempt and should be redacted if an employee's personnel file is requested for inspection or copying:[335]

- Dates of birth
- Social Security numbers
- Personal banking information
- Marital status/dependent information
- Net pay/payroll deductions
- Medical information
- Personal contact information
- Home/cell phone numbers
- Personal email addresses
- Home addresses of non-elected employees
- Leave information[336]

Additionally, public employers must be mindful that requests for employee evaluation or job performance records are held to a different standard than personnel records. If a particular record is created by or at the behest of the employer for purposes of investigating allegations of employee misconduct, the records are not automatically disclosable.[337] Employee evaluation records or job performance records are only disclosable if the record or evaluation in question has led to the employee's suspension or termination, there has been a final administrative resolution of the matter, and if the public has a compelling interest in the disclosure of the record or evaluation.[338] In terms of best practices, it may be best to keep job performance records and employee evaluations separately labeled in the personnel file.

Since certain redactions are required, the municipality should invest in redaction tools or software if it has not already. The mere fact that a public document may contain information that is exempt from the FOIA does not make the entirety of the document exempt, and public employers are still required to provide the non-exempt portions of public records for inspection and copying.[339] Employers will have to redact exempt information and personal private information prior to turning the records over.

As to the question of how long personnel files should be kept, there is a plethora of law spread throughout state and federal statutes and regulations about this topic. These laws and regulations dictate different record retention requirements based on different facts for employees. Records for an employee who is paid through federal grant funding must be retained longer than records for an employee who is paid solely from the city's general fund. As a rule, public employers should establish a policy wherein all employee records are kept for a minimum of eight years. This will ensure compliance with the vast majority of state and federal retention requirements. That said, if an individual retires from employment with the city, all retirement documents are required to be kept permanently under Arkansas law, so plan accordingly and ensure that these documents are removed from personnel files prior to the files' disposal, in accordance with local policy.[340]

332 Id.
333 McCambridge v. City of Little Rock, 298 Ark. 219, 766 S.W.2d 909 (1989)
334 A.C.A § 25-19-105(b)(12)
335 See Young v. Rice, 308 Ark. 593, 826 S.W.2d 252 (1992), holding that the court will weigh the public interest in the requested records against the affected individuals' privacy interest in withholding them.
336 Ark. Op. Atty. Gen. No. 2006-225
337 Ark. Op. Atty. Gen. No. 98-122
338 Id.
339 A.C.A § 25-19-105(f)
340 A.C.A § 14-59-114(a)(3)(A)

C. The Family and Medical Leave Act (FMLA)

The famed American comedian and actor George Burns once said, "Happiness is having a large, loving, caring, close-knit family in another city." Families can have a profound impact on the lives of employees and employers, both in and outside of the workplace. While Burns' witticism may have merit beyond comedic value, employees are often called to those other cities to care for family members in some capacity or another. Illnesses and injuries happen, and rarely do they come with advanced warning giving employees and employers time to prepare. While advancements in remote work capabilities have given some workers the option to carry their job duties with them, it is not an option for every worker. In short, some workers will necessarily miss work to care for themselves or their families. Enter the Family and Medical Leave Act (FMLA)[341].

The FMLA is a federal law mandating that certain employers offer certain employees 12 weeks of unpaid leave during a 12-month period for certain specified reasons. This section will discuss which employers are subject to the FMLA, which employees are eligible for FMLA coverage, what conditions qualify for FMLA leave, and how long an employee may be absent under FMLA leave. Additionally, the FMLA only mandates unpaid leave, but many employers allow staff to take paid leave concurrently with FMLA leave if the employee is entitled to paid leave. Employers will need to know what employees are entitled to paid sick leave by law or by agreement.

Covered Employers

The starting point for any FMLA analysis is to determine if an employer is subject to the FMLA at all. Simply put, not every entity with employees is subject to the FMLA's regulations. For example, private sector employers are only subject to FMLA if the business has 50 or more employees on staff for 20 or more weeks in either the current or preceding year.[342] Municipalities, however, are not private sector employers. Federal, state and local governments are colloquially known as public sector employers. Cities and towns are public agencies, and the FMLA is applicable to all public agencies, no matter how many individuals are employed by the city or town. If you are reading this, you are likely an official or employee of a city or town and the FMLA applies to your entity.

Eligible Employees

Now that we've established that all public employers are subject to the FMLA, the second step in the analysis is to determine if an employee qualifies for coverage. To do that, employers must know how the law defines the term "employee." On the surface, the law's definition is straightforward: "any individual employed by an employer."[343] This is a very broad definition, and if it seems familiar, it is the same definition used by the Fair Labor Standards Act. Please note that volunteers, contract labor, and elected or appointed public officers do not qualify as employees.[344]

Now that a working definition of employee has been established, employers can determine if an employee is eligible for leave under FMLA. Again, definitions offer guidance. The Act defines an eligible employee as an individual who has been employed by a covered entity for a minimum of 12 months, who has worked a minimum of 1,250 hours during the previous 12-month period and who has requested FMLA leave. The 12 months that the employee is required to have worked does not have to be consecutive. As a general matter, employers do not have to look back more than seven years to determine if the employee has worked a total of 12 months.[345] However, the employee must have worked at least 1,250 hours during the 12 months preceding the first day that the employee takes leave. But what if an employee was on paid or unpaid leave during that period? Does that count? It absolutely does. If an employee was on the payroll at the time the leave was taken, employers must count the time towards the determination of eligibility.

There is a second factor in determining if an employee is eligible for FMLA coverage. The law specifically excludes employees who work for an employer with less than 50 employees in a 75-mile radius.[346] This may seem confusing because the law has established that all public employers are subject to the FMLA regardless of how

341 29 U.S.C. §§ 2601-2654
342 29 U.S.C. § 2611(4)(A)(i). See also 29 C.F.R. § 825.104.
343 29 U.S.C. § 2611(3). See also 29 U.S.C. § 203.
344 29 U.S.C. § 203
345 You may have to look back more than seven years if the employee was out on covered military leave or if there is a written agreement between the city and the employee such as a collective bargaining agreement.
346 29 U.S.C. § 2611(2)(B)(ii)

many individuals they employ. Both are true. Although all public agencies are subject to the FMLA regardless of the number of employees, a public employee will only be eligible for FMLA if the employee works for an agency with 50 or more employees in a 75-mile radius. All public employers are covered, however, not all public employees are. If your city or town employs fewer than 50 employees, the employees likely do not qualify for FMLA leave. This nuance is tricky but important, which makes diligence paramount.

Qualifying Conditions

Having covered which employers and employees are subject to and eligible for FMLA, the next step is to determine if the requested leave is for an authorized reason. The FMLA authorizes leave for:[347]

- Pregnancy, birth, adoption and foster care.
- Personal or family member care related to serious health conditions.
- Qualifying military related leave.

It is a straightforward list, but there are a number of terms in that list that must be defined to get a full picture of conditions that are FMLA eligible. Again, employees are only eligible for 12 weeks of FMLA leave during a 12-month period. During a calendar year, FMLA may be taken at different times for different reasons, but this time is factored together. For example, if an employee takes eight weeks off work to care for a newborn child and later develops a serious health condition, they would only be entitled to four weeks of FMLA leave during the 12-month window.

Pregnancy, Birth, Adoption and Foster Care

FMLA leave may be taken prior to the birth of the child. Pregnant employees are allowed to utilize FMLA leave for prenatal care or if complications from the pregnancy render the employee unable to work.[348] The spouse of a pregnant individual may also utilize FMLA leave to provide care for an expectant spouse who is incapacitated during the pregnancy. However, to be considered a spouse, the individuals must be legally married or have moved from a state which recognizes common law marriages and have met the criteria of common law marriage. Fiancés, boyfriends and/or biological parents with no spousal relationship are not eligible for FMLA leave to care for a pregnant individual.[349] Similarly, an eligible employee may take FMLA leave for the birth of a child. The 12-month window in which FMLA leave is authorized for the birth of a child is limited to exactly 12 months from the day the child is born. Additionally, employers should be aware of the Pregnant Workers Fairness Act (PWFA) and what steps municipal employers must take to comply with that law.[350]

Since Arkansas does not have a general prohibition against nepotism, a municipality may find itself facing circumstances where two employees are married to one another and having a child together. When spouses who are employed by the same employer are both eligible for FMLA leave, the spouses are not entitled to 12 individual weeks of FMLA leave each. Instead, the employer combines the hours for each, and the total allowed childbirth leave for both spouses together is 12 weeks.[351] If the newborn develops a serious medical condition, each spouse may take up to the full FMLA leave of 12 weeks to care for the child.[352] In a similar vein to the PWFA, municipal governments need to be aware of the Providing Urgent Maternal Protection for Nursing Mothers (PUMP) Act to ensure the rights of new mothers are protected when they return from FMLA leave.[353]

The FMLA also contemplates and provides leave for employees who adopt children or host foster children. Eligible employees are entitled to FMLA leave when a child is placed with the employee for adoption or fostering.[354] The employee is able to take the leave either immediately before the child enters the home or after the placement. Employees who adopt or foster are given a window that expires 12 months from the date the child is placed in the custody of the parent to request and take authorized FMLA leave.[355] FMLA leave for this purpose is no longer

347 29 U.S.C. § 2612(a)(1)9A) to (F)
348 29 C.F.R. § 825.120
349 Id.
350 42 U.S.C. §§ 2000gg-2000gg-6
351 29 C.F.R. § 825.120(a)(3)
352 29 C.F.R. § 825.120(a)(6)
353 29 U.S.C. § 218
354 29 C.F.R. § 825.121(a)(1)
355 29 C.F.R. § 825.121(a)(2)

available after the child has been with the adoptive or fostering employee more than one year. Spouses who work for the same employer that adopt or foster a child are entitled to a combined total of 12 weeks of leave for adoption or fostering.[356]

Although there are noted similarities between birth and adoption or fostering, there are also a few nuances unique to adoption and fostering as well. For example, the FMLA defines what constitutes adoption and fostering. The law defines adoption as being the legal and permanent assumption of the responsibility of raising a child as one's own, while fostering is the state sanctioned 24-hour care of children by individuals other than a parent or guardian.[357] In both cases, the government and the employee will have engaged in a legal process. The employee cannot, for example, unilaterally move a child into their home and call it adoption or fostering.

Serious Health Condition of an Employee or Employee's Family

The second category of approved FMLA leave is for a serious health condition. This raises certain questions: What is a serious medical condition? Who does the law consider to be family members? Can an employee take 12 weeks of FMLA leave to care for their third cousin who has a common cold? There are three portions of this authorized category of leave that must be defined for employers.

First, employers need to have a solid understanding of what conditions are considered serious health conditions. This intricate element is the main source of confusion and contention in human resources departments. A serious health condition is an illness, injury, impairment or any physical or mental condition that involves overnight hospital care, inpatient treatment, treatment in connection with inpatient care, hospice, or admittance in a residential medical facility.[358] If FMLA leave is requested for a chronic medical condition, authorization can only be given if the condition requires no less than two annual visits to a health care provider[359] for treatment, the condition continues over an extended period, and the condition causes episodic incapacity.[360] Keep in mind that the first of the two or more health care visits must occur within seven days of the original first day of incapacity to qualify as an authorized cause.[361]

Permanent incapacity may also qualify if the incapacity is a result of a condition that medical professionals have not developed effective treatment for, such as Alzheimer's disease.[362] Consider also conditions requiring ongoing treatments that will cause sporadic absences, otherwise known as intermittent leave.

There has been a plethora of litigation stemming from efforts to define a serious health condition. Both the legislative history of the FMLA and subsequent case law include the following under this definition: heart attack and conditions requiring heart surgery; most cancers; spine and lumbar conditions that require therapy or surgery; strokes; severe respiratory conditions; appendicitis; pneumonia; emphysema; severe arthritis; severe nervous disorders; injuries that are the result of serious accidents (whether they occur on or off the job); pregnancy and pregnancy related complications including miscarriages, prenatal care and childbirth; major restorative dental procedures; cosmetic surgery after a disfiguring incident or the removal of a cancerous growth; issues stemming from mental illnesses; and severe and chronic allergies.[363] Lastly, an employee who is struggling with substance abuse issues may qualify to take authorized leave if the condition meets the treatment thresholds discussed above. However, FMLA leave related to substance abuse can only be taken for treatment by a health care provider or to receive treatment services based on a referral from a health care provider.[364] The employee is not entitled to leave merely because the employee's substance abuse issues result in absenteeism unrelated to treatment.[365]

It may also be helpful to know some common illnesses that, although intrusive and unpleasant, are not generally considered to be serious health conditions. Conditions such as the common cold, the flu, ear and toothaches,

356 29 C.F.R. § 825.121(a)(3)
357 29 C.F.R. § 825.121(g)-(f)
358 29 U.S.C. § 2611(11) and 29 C.F.R. §§ 825.113-115
359 A health care provider is defined as either a medical doctor or a doctor of alternative medicine, licensed by the state to practice medicine, or any other person determined by the Secretary of Labor to be capable of providing health care services. See 29 C.F.R. §825.125.
360 29 U.S.C. § 2611(11) and 29 C.F.R. §§ 825.113-115
361 Id.
362 Id.
363 29 C.F.R. § 825.113(d)
364 29 C.F.R. § 825.119
365 Id.

indigestion and upset stomachs, minor ulcers, headaches other than migraines, and routine dental issues do not qualify for leave under FMLA.[366]

When an employee suffering from a condition involving an illness, injury, impairment, or if another physical or mental condition renders the employee unable to perform the essential functions of the job, they are likely entitled to FMLA leave.[367] This is not to say that the law requires an employee to literally be, in that moment, rendered either mentally or physically incapacitated that they could not possibly do any work. The law is written and interpreted so that it applies to circumstances that require an employee to be physically absent from the workplace to be treated or evaluated for an actual or potential serious health condition.[368]

The more difficult task is to determine whether an employee is authorized to take leave to care for a family member suffering from a serious health condition. This authorization hangs upon the definition of "family member." The law defines family members as spouses, children, parents or children for whom an employee stands *in loco parentis*—meaning that the employee is in the position of a parent by assuming and discharging parental obligations.[369] On a related note, employers should know that "to care for" means that the employee is allowed leave to provide for both the basic physical and psychological needs of the family member, including but not limited to the medical, hygienic, nutritional, safety and medical transportation needs.[370]

Military Related Leave

Finally, the FMLA contemplates that individuals may simultaneously be enlisted military personnel or have close relatives who are serving in the military. Leave may be authorized when an employee's spouse, son or daughter, or parent who is a member of the armed forces or reserves is called for active duty or is given notice of an impending call to active duty.[371] Further, if a parent of an active duty service member is incapable of self-care, the FMLA provides for an employee to take leave to care for the incapacitated parent.[372] From a public policy standpoint, employment should not interfere with the combat readiness of soldiers, which includes care of military families.

In all the cases and circumstances that have been discussed so far, the maximum FMLA leave an employee is entitled to is 12 weeks. However, The FMLA provides an exception for extended leave in situations where a member of the military requires care in conjunction with a serious injury or illness stemming from their military service. In certain situations, eligible employees of covered employers are authorized to take up to 26 weeks of leave.

Understanding the 12-Month Leave Period

As discussed above, FMLA mandates covered employers to all eligible employees to take 12 of unpaid leave (or 26 weeks to care for an injured military family member) during a 12-month period. How are employers to know when the 12-month period begins? Does it follow the calendar year? Is it the fiscal year?[373] Does it start from the employee's date of hire? These are all good questions, and at least as far as the FMLA is concerned, the answer to all of them is "yes." Simply put, employers are allowed to designate the parameters of the 12-month window as a matter of local policy. For municipal employers, this means that the city council or board of directors should set your policy or delegate the authority to do so to the mayor or the mayor's representative.

As a practical matter, a single method should be selected and applied to all departments to ensure uniformity. Many municipalities have opted for a "rolling" 12-month period. This minimizes the amount of leave that an employee takes in totality and protects the employer from a circumstance where an employee could "stack" leave. Stacking leave is a situation where the employee takes 12 weeks of leave at the end of a calendar year and 12 more weeks at the beginning of the next calendar year. Employees are hired because they are needed to perform

366 29 C.F.R. § 825.113(d)
367 29 U.S.C. § 2612(a)(1)(D)
368 29 C.F.R. § 825.123(a); Prenatal care is also covered. See 29 C.F.R. § 825.120(a)(4).
369 29 U.S.C. § 2612(a)(1)(C)
370 29 C.F.R. § 825.124(a)
371 29 U.S.C. § 2612(a)(1)(E)
372 29 C.F.R. § 825.126(b)(8).
373 Almost all cities and towns in Arkansas have a fiscal year that overlaps with the calendar year because the law requires municipal budgets to be passed by the governing body of the municipality by February 1 for the year. See A.C.A § 14-58-201.

important functions, and most cities and towns cannot afford for an employee to take six months off work.[374] If your municipality has not established and designated the 12-month period for FMLA leave, and an employee sues the city for denying leave, it is likely that the court will choose a window of leave for the city. In other words, you may lose that lawsuit, so ensure that you have a policy regarding the FMLA leave.

Another issue that commonly arises from FMLA leave is whether the employee is required to take a full day of leave or whether FMLA leave can be taken in partial days. This is otherwise known as intermittent or reduced-schedule leave. Leave does not have to be taken in full-day increments, although it certainly can be, and full-day increments are likely the most common. However, employees can take intermittent leave—they may take FMLA leave in "blocks" of time that are less than one day. Also, an employee may work on a reduced-leave schedule that allows them to work fewer hours per day or per week. In order to take intermittent leave or work a reduced schedule for FMLA purposes, the employee must be eligible for leave and the leave must be for a qualifying reason as discussed above.[375]

For an employee to be entitled to intermittent or reduced-schedule leave, the employee must be able to perform the essential functions of the job during the time that they are working, and they must make a "reasonable effort" to schedule the leave so as to not disrupt the employer's business operations.[376] When an employee wishes to take intermittent or reduced-schedule leave, the employer is prohibited from forcing the employee to take more leave than is necessary, and the employer is mandated to account for FMLA leave in the increments that are no greater than one hour.[377] Because the law allows for a total of 12 weeks of FMLA leave, employers will need to know what schedule the employee's work day is predicated on. For example, if an employee's workday is eight hours, and the employee takes three hours of leave for treatment of a serious medical condition, the employer cannot mandate the employer take a full eight hours or even a half day totaling four hours if it is not necessary. The employer would log that the individual took three hours for FMLA leave and still retains five hours FMLA leave available to constitute a full day of leave.

Notice Requirements

Every covered employer is required to provide notice to employees of the FMLA's rights and obligations. There are three types of notice required by law:

1. The Notice Poster

Every municipality is a covered employer, so every municipality is required to have a notice poster. It must be legible, using large text to ensure that employees can read it easily, and it must be posted in a prominent location in the workplace. Most cities and towns have employees in several different locations. Each location is required to have a notice poster. It is not sufficient to only have one poster placed in city hall. For employers that have employees working remotely, an electronic notice poster will suffice. The city is also required to provide general notice by including notice in an employee handbook or by giving the employee notice on the date of hire.[378] Employers will also want to consider that notice must be given in the language in which employees are literate, which may be a language other than English.[379]

2. Notice of Eligibility, Rights and Responsibilities

Employers have five business days in which to provide an employee who has requested FMLA leave with a notice of eligibility, rights and responsibilities.[380] Occasionally, an employer may learn of an employee's need to take FMLA leave through some channel other than the employee. This five-day window applies to those circumstances as well. For example, if an employer learns that an employee has been in a car wreck and is in a coma, the employer is obligated to provide the employee and the employee's family with notice even if the employee has not informed the employer.

374 Reminder: An employee might be able to take 26 weeks off to care for an injured military family member.
375 29 C.F.R. § 825.202
376 29 C.F.R. § 825.203
377 29 C.F.R. § 825.205
378 29 C.F.R. § 825.300
379 Id.
380 29 C.F.R. § 825.300(c)(1)-(6)

If an employer determines that an employee is ineligible to take FMLA leave, the employer is required to provide, at minimum, one reason why. This can legally be done verbally, but employers are advised to put everything in writing and keep the record in the employee's file. If the employee requests subsequent FMLA leave and the employee's eligibility has not changed, then the employer need not provide a new eligibility notice. However, if the employee has since qualified for FMLA eligibility, the employer must provide notice of eligibility, rights and responsibilities within five days. The rights and responsibilities must include any requirement for the employee to provide medical certification, any requirement that the employee substitute paid leave, and the maintaining of benefits.[381]

3. Designation Notice

Once an employer has determined whether the employee's requested leave is qualified under the FMLA, the employer must provide a designation notice to the employee within five days. Practically, most employers provide the designation notice along with the eligibility, rights and responsibilities notice. This notice will state whether the leave has or has not been granted as FMLA-qualifying, and whether more information is needed. If more information is required to make a determination, a written explanation is required and should sufficiently explain what is needed from the employee. If the municipality has a policy requiring the employee to substitute paid leave during FMLA leave, the designation notice must state as such, as well as advise the employee of the amount of leave that will count against the employee's FMLA leave. If the amount of leave that will be taken is undeterminable, the employer is required to inform the employee of the right to request the amount of FMLA leave to be counted against FMLA entitled leave at least once in a 30-day period if leave was taken in that 30-day window. If the employer requires a fitness-for-duty exam prior to returning to work, that requirement must also be noted in the designation notice.[382] Such notice must have the essential functions of the job listed so that the medical personnel performing the fitness-for-duty examination will know what to test for.[383]

Employee Notice Requirement

Employees also bear responsibility to notify an employer of certain things when the employee is going to take, or is currently taking, FMLA leave. If the leave is foreseeable, such as childbirth or a scheduled medical procedure, the employee is required to notify the employer at least 30 days prior.[384] The notice can be written or verbal, but again, it is much easier to document such notice if it is written. When these foreseeable events occur, the employee is only required to give this notice a single time, but they must advise the employer of any changes in regard to the scheduled leave, any necessary prolongations of the leave, or any new dates for intermittent leave. If the qualifying reason is foreseeable and the employee did not give the employer the required notice, the employer may deny the leave until at least 30 days have passed.[385] However, FMLA leave cannot always be scheduled in time to provide 30 days' notice. Accidents and emergencies happen. Employers should establish a policy requiring employees to provide notice as soon as it is practicable to do so.[386] The law allows employers to designate FMLA leave as qualifying prospectively and retroactively.[387] Some employees may not wish to have leave designated as FMLA leave for a variety of reasons. However, unless the employee can show actual harm or injury from an employer's early or late FMLA designation, the employer is within their rights to do so. A simple conversation between human resources managers and employees can avoid many future problems on both accounts.

Certification and Recertification

Employers may require the employee taking the leave to provide a doctor's note describing the need for the leave. The FMLA allows employers to implement a policy that requires the worker taking leave to provide a certification from a licensed medical professional within 15 days or when reasonably possible that qualifies the leave.[388] That said, unless circumstances change, a single doctor's note should be sufficient to cover the entirety of the leave, including multiple absences due to intermittent leave. Employers should not ask for a doctor's note every

381 Id.
382 If the employee handbook requires a fitness for duty certification, this notice isn't required in the designation notice, but it's best to cover all bases.
383 29 C.F.R. § 825.300(d)(1)-(6).
384 29 C.F.R. § 825.302(a)
385 29 C.F.R. § 825.304
386 29 C.F.R. § 825.302(a)
387 29 C.F.R. § 825.301(d)
388 29 C.F.R. § 825.305(b)

time the employee is absent due to the leave. Some courts have held employers liable for violating the FMLA when they have done so. However, there are circumstances that will necessitate recertification, discussed in more detail below.

If the medical certificate that the employee provides is vague, ambiguous or non-responsive, the employer is required to inform the employee via written notice that the doctor's certification is incomplete or insufficient.[389] The employee then has seven days to bring a corrected certification back to the employer. If the employer has questions regarding the certification, an authorized representative such as an HR official or manager may contact the healthcare provider to discuss the form. However, the employee's direct supervisor is expressly prohibited from contacting the employee's health care provider.[390]

If the employer, after the employer has contacted the health care provider to discuss the certification, still believes that the certification is lacking or invalid, the employer may—at the employer's expense—send the employee to get a second opinion from a health care provider that the employer designates. If the first and second opinion are conflicting, then the employer may—again, at the employer's expense—seek a third opinion, but the employer will be bound by the third opinion. If the municipality does choose to seek a second or third opinion, the employer is required to obtain authorization from the employee to release relevant medical information to the subsequent health care providers. If the employee will not authorize the medical records release, the municipality may deny FMLA leave.[391]

Remember, an employer should avoid requesting a certification every time the employee is absent. That would be an overburdensome process and potentially violate the FMLA. However, circumstances do occur when recertification is necessary to ensure that the FMLA process is being property utilized. The baseline rule is that the employer should not request a certification more than once in a 30-day period.[392] For that matter, there is no practical reason to request recertification for any reason other than further absenteeism that the employee claims is a further extension of the qualifying reason that prompted the original FMLA leave in the first place. That said, if an employee's condition is likely to cause an absence that lasts longer than 30 days, the law generally allows employers to request a recertification one time in a six-month period.[393] So again, the focus should not be on each occurrence of an absence, but the overall umbrella of absences that stem from a qualifying reason in a limited window of time.

FMLA Leave: Paid or Unpaid

Generally, this will be a matter of local policy. For certain uniformed employees, such as police officers and firefighters, the law has certain paid leave requirements that will be discussed below. For other non-uniformed employees, there are very few state level entitlements to paid sick leave. However, many municipalities do offer paid sick leave to employees—it's a great tool to improve morale, it helps ensure employees are able to focus on their health and well-being, and paid leave serves as a great recruiting tool. If the employee is entitled to any paid leave—including vacation, personal or sick leave—the employer may require that an employee use this leave concurrently with qualifying FMLA leave, including for intermittent leave.[394]

D. The Americans with Disabilities Act (ADA)

Many Americans live with physical or mental impairments that substantially limit their ability to engage in major life activities. These impairments, otherwise called "disabilities," might affect the way an employee completes a task or the tools the employee will need access to, but the employee is still capable of doing the essential functions of the job. These individuals are no less in need of employment than those who do not have disabilities. Historically, the laws have not provided for or entitled disabled Americans to workplace provisions or protections. This is no longer the case.

The Americans with Disabilities Act (ADA) is a federal law that provides workplace protections for most citizens living with disabilities by creating certain rights that covered employers are required to respect and protect.[395]

389 29 C.F.R. § 825.305(c)
390 29 C.F.R. § 825.307(a)
391 29 C.F.R. § 825.307(b)-(c)
392 29 C.F.R. § 825.308(a)
393 29 C.F.R. § 825.308(b)
394 29 C.F.R. § 825.207(a)
395 42 U.S.C. §§ 12101-12213

As employers, local governments must understand the requirements of the ADA, must be able to identify what situations necessitate accommodation, and must know how to engage in the interactive process with employees to ensure that needs of all parties are met. Disabled citizens must earn a living. Employers must ensure that necessary work is being performed. Both can be accomplished when savvy employers understand that one of the most important roles of human resources is ensuring ADA compliance by clearly identifying the essential functions of each and every position by performing a full analysis of the positions. A detailed job description allows employers to understand and communicate the physical and mental attributes that each job position requires. In turn, this empowers the employer's ability to engage in exploratory conversations with disabled employees to find reasonable, workable and functional accommodations.

Covered Employers

The ADA prohibits both private and municipal employers with 15 or more employees from discriminating against qualified individuals simply because they are disabled.[396] An employee is a "qualified individual" if they can "perform the essential functions" of a job that they are applying for or that they currently hold with or without a reasonable accommodation.[397] Remember, the employer initially determines what functions are essential and, where employers have provided a written job description as part of an employee handbook or used in advertisements for the position, a court reviewing a legal challenge under the ADA will give consideration to this description.

Covered Employees

The ADA provides protections for municipal employees and applicants for municipal jobs if the municipality employs at least 15 employees for 20 or more calendar work weeks in either the current or preceding calendar year.[398] The 20-week qualifier is collective; it does not have to be consecutive. A one-week lapse where a city only has 19 employees does not restart the clock. Importantly, the ADA does not apply to independent contractors or individuals who volunteer their time for the city.

To qualify for ADA protections, a disabled employee must have the skills, experience, education or other requirements needed to perform all essential functions of a given job, with or without an accommodation.[399] Again, responsible employers will have identified the skills, experience, education and other requirements that are legitimately related to the competent and safe performance of a job position. An essential function is defined as one that is a "fundamental job duty of the employment position the individual with a disability holds or desires."[400] As you can see, the employer has quite a bit of discretion in determining what job functions are essential.

Lastly, and this may seem intuitive, the employee must be disabled in some manner. A disability is defined under the law as any physical or mental impairment that substantially limits one or more major life activity, and the employee must show a history (even if brief) to show that they are regarded as having such an impairment.[401] The limitation must be substantial but doesn't have to completely prevent or restrict the employee from performing the major life activities. To determine how substantial a limitation is, step back and compare the limitation to the average person in the general population and make assessments of the impairment on a one-on-one, case-by-case basis, avoiding generalizations. It's also important to note that the courts have prohibited employers from factoring in "corrective measures" that help an employee overcome a disability.[402] So, avoid the tendency to consider if an employee or applicant is on medication, or whether a piece of medical equipment assists the employee when doing such an evaluation. While an exhaustive list of major life activities would require its own encyclopedic volume, employers should consider the performance of manual tasks, vision, hearing, walking, standing, lifting, reading, working and other activities.[403]

396 42 U.S.C. § 12111(5)
397 42 U.S.C. § 12111(8)
398 42 U.S.C. § 12111(5) and 29 C.F.R. § 1630.2(e)
399 29 C.F.R. § 1630.2(m)
400 29 C.F.R. § 1630.(2)(n)(1)
401 42 U.S.C. 12102(1); 29 C.F.R. § 1630.2(g)(1)
402 See Sutton v. United Airlines, Inc., 527 U.S. 471, 488 (1999).
403 42 U.S.C. § 12101(2)(a)

Accommodations

When a covered entity employs or has an applicant who informs the employer of a disability, the employer is required to provide a reasonable accommodation, unless doing so would cause the employer an undue hardship. It is the employee's responsibility to let the employer know that an accommodation is required, unless the employer knows or should know that the employee has a disability that is creating problems in the workplace, or that would prevent the employee from asking for an accommodation.[404]

This gives rise to a broader set of questions:

- How do we know what accommodation is needed?
- Do we have to grant a request for every accommodation an employee wants?
- How do we start the implementation process?

To answer these and other questions, the ADA instructs employers to engage in an "interactive process" when the employer realizes that a disability exists and the employee requires an accommodation.[405] The interactive process is an informal, good-faith conversation between the employer and the employee. It does not have to be overly complicated. The employee must give the employer enough information about the disability so that the employer can provide a reasonable accommodation. The employer should keep detailed documentation for the personnel file, ask about the details of the disability to understand the scope, request notes or contact information from medical providers, and—most importantly—discuss potential accommodations with the employee. Not every request for a specific accommodation has to be accepted, as some might present an undue hardship on the employer or interrupt the work environment for other workers. All that is required under the law is that the employer provide a reasonable accommodation, and therefore the employer must engage in the interactive process.

A reasonable accommodation is one that enables a qualified applicant to be considered for a job or allows a change to the work environment that enables an employee to perform a job and enjoy all the benefits and privileges that employment provides to similarly situated employees without a disability.[406] This could require adaptations to existing work spaces, job restructuring, modifications to work schedules, additional training, the presence of ADA-certified assistance animals in the workplace, new technology, or the provision of accessible equipment. A reasonable accommodation may not be readily apparent, and the HR professionals may have to flex their creative muscles, but that is what the interactive process is designed for. Thanks to advancements in technology, employers can now consider remote work as a reasonable accommodation as well.

Not every accommodation is a reasonable one, however. Employers are not required to eliminate or redefine the essential function of a job or lower productivity and quality standards. Also, an accommodation that would impose an undue hardship is not reasonable. Employers must consider the nature and cost of an accommodation, whether the accommodation is feasible considering the financial resources available, the size of the employing entity and how many facilities are available, and the type of work the entity does.[407] Of course, there is no clear and definitive line in the sand, at least as far as the law is concerned. Courts view whether an accommodation creates an undue hardship on a case-by-case basis. Cities with large populations have different resources, abilities, infrastructure, financial capacities and worker pools than municipalities with small populations. All of these factors must be considered when determining the reasonableness of an accommodation.

Lastly, the law prohibits covered employers from taking retaliatory action against any employee for requesting an accommodation or for reporting a violation of the law, even if the accommodation was not for the reporting party themselves. When a city or town violates the law, they can be sued and may be liable for compensatory and punitive damages, attorney fees, back pay and more. Retaliation is considered a second violation, which will double or triple the municipality's liability. On this note, municipal employers should know that where an employee cannot perform the essential functions of a job, they are under no obligation to employ the individual. When issues arise, contact the city attorney immediately.

404 See Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2nd Cir. 2008).
405 29 C.F.R. 21 1630.2(o)(3)
406 29 C.F.R. § 1630.2(o)(1)
407 42 U.S.C. § 12111(10)(b)

E. The Fair Labor Standards Act (FLSA)

Introduction

The Fair Labor Standards Act (FLSA) is a comprehensive federal law that establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. It is a dense and complicated set of laws that can be difficult to navigate. To assist municipalities with compliance, here are 21 things you should know about the FLSA. If issues arise based on the points below, please consult with your city attorney before taking any action.

21 Things You Should Know

All Employees

1. Effective January 1, 2021, the minimum wage in Arkansas rose to eleven dollars ($11.00) per hour except as otherwise provided in this subchapter." (A.C.A. § 11-4-210(a)(2)).

Note: The federal minimum wage for covered, non-exempt employees is $7.25 per hour. However, states are entitled to set a higher minimum wage. Accordingly, the higher Arkansas wage rates are applicable.

2. Overtime or compensatory time must be paid at time and one-half of the employee's regular hourly rate (29 U.S.C. § 207(a)(1)). Even if the employee receives a salary, overtime or compensatory time must be granted unless the employee is exempt as explained below.

Employers cannot avoid paying overtime or compensatory time by averaging hours over several workweeks. The FLSA requires that each workweek stand alone (29 C.F.R. § 778.104). (See chart below for information on uniformed employee shifts).

3. If an employee volunteers to substitute shifts with another employee after first obtaining the employer's approval and works more than the maximum hours for a given work period because of the switch, the employer is not responsible for paying the additional overtime (29 C.F.R. § 533.31(a)).

The regulations state that this may occur "only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or 'trade time' with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision." (29 C.F.R. § 533.31(b)).

Employers are not required to maintain a record of time traded and there is no specific period of time in which the shift must be paid back (29 C.F.R. § 533.31). Therefore, the employee's paycheck for that period would not reflect the switch in additional hours or overtime pay (29 C.F.R. § 553.31).

4. Employees do not have to be paid for "on-call" time unless their activities are overly restricted (29 C.F.R. § 785.17). On-call time should not be counted as compensable unless the employee is required to remain at or near the employer's premises or otherwise cannot use their time freely (29 C.F.R. § 785.17). Providing electronic pagers or cell phones to employees can solve many on-call time problems.

Exempt Employees

5. Elected municipal officials, their personal staffs, persons appointed by elected officials to serve on a policymaking level, and legal advisors are considered exempt employees and are excluded from coverage under the FLSA (29 C.F.R. § 553.11).

Trainees and students are not employees within the meaning of the FLSA if they meet all six criteria below:

(1) The training, even though it includes actual operation of the facilities of the federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but is supervised by them;

(4) The federal activity which provides the training derives no immediate advantage from the activities of the trainee—on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training (5 C.F.R. § 551.104).

6. Volunteers are not employees, and a public agency employee cannot volunteer to do the same work for which they are being paid by the same public agency (29 C.F.R. §§ 553.100, 553.102).

7. Prisoners are generally not treated as employees under FLSA (U.S. Department of Labor Field Operations Handbook 10b27, www.dol.gov/whd/FOH/FOH_ch10.pdf).

8. Executive, administrative and professional "white-collar" employees are exempt from both minimum wage and overtime provisions if they meet all the requirements specified for their job category. These are not the only exemptions, but are the most typical in Arkansas cities and towns.

Executive Employees

(A) The employee must be compensated on a salary basis at a rate not less than $684 per week;

(B) The employee's primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;

(C) The employee must customarily and regularly direct the work of two or more other full-time employees or their equivalent; and

(D) The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight (29 C.F.R. § 541.100).

Administrative Employee

(A) Compensated on a salary or fee basis at a rate of not less than $684 per week exclusive of board, lodging or other facilities;

(B) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(C) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (29 C.F.R. § 541.200).

Professional Employee

(A) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(B) Compensated on a salary or fee basis at a rate of not less than $684 per week exclusive of board, lodging, or other facilities; and

(C) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (29 C.F.R. § 541.300).

Computer Employee Exemption

(A) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(B) The (a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $684 per week exclusive of board, lodging or other facilities, and the (a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(ii) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(iii) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(iv) A combination of the aforementioned duties, the performance of which requires the same level of skills (29 C.F.R. § 541.400).

9. Employees of amusement or recreational establishments are exempt from minimum wage and overtime if one of the following requirements is satisfied:

(A) The establishment must not operate for more than seven months in any calendar year.

(B) During the preceding calendar year, the establishment's average receipts for any six months of that year must have been equal to or less than one-third of its average receipts for the other six months of that year (29 C.F.R. § 779.385).

Uniformed Employees: Police and Fire

10. Law enforcement officers in cities and towns with fewer than five law enforcement officers, including the chief or marshal, are exempt from the overtime provisions (29 U.S.C. § 213(b)(20); 29 C.F.R. §§ 553.200, 553.211). To count as a law enforcement officer, the officer must be someone: (1) who is a uniformed or plain-clothed member of a body of officers and subordinates who are legally authorized to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes; (2) who has the power to arrest; and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics (29 C.F.R. § 553.211).

Volunteers are not considered "employees" for this purpose however. No distinction is made between part-time and full-time employees. This means that if you have four or fewer than four law enforcement officers (not including radio operators), the city does not have to pay overtime. You must be sure your officers receive minimum wage for all hours worked in a work period.

11. Cities and towns with fewer than five paid firefighters, including the chief (if paid), are exempt from paying overtime to those employees who meet the following definition. "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who is:

(A) trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or state; and

(B) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk (29 U.S.C. § 203(y); see also 29 C.F.R. § 553.210(a)).

You must be sure your paid firefighters (four or fewer) receive minimum wage for all hours on duty during the work period (see 29 U.S.C. § 213(b)(20) and A.C.A. § 11-4-210(a)(2)).

12. Volunteer firefighters and auxiliary police officers are "volunteers" and are not treated as employees under the 1985 amendments to the FLSA (29 C.F.R. § 553.104(b)).

13. The FLSA provides a partial overtime exemption for law enforcement officers and firefighters who work a "work period" established by the city of no fewer than seven days and no more than 28 days. The city can establish separate work periods for the police department and the fire department. If the city fails to establish a work period, 207(k) does not apply and a fire or police employee working over 40 hours will accrue overtime compensation (29 C.F.R. § 553.230).

The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel, determining that law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171 and that fire department employees working in excess of 212 hours within a 28-day period must also be compensated (29 C.F.R. § 553.230). These 28-day standards can be used as ratios to determine maximum hours for other approved work periods. See the following chart.

Maximum Hour Standards for work periods of 7 to 28 days – section 7(k). 29 C.F.R. § 552.230.		
Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

When determining compensatory time for either law enforcement personnel or firefighters who miss a shift due to illness, vacation, personal leave or any other reason, hours missed will not count as hours worked and are not compensable for overtime purposes (29 C.F.R. §§ 553.201, 553.230).

14. Civilian radio operators, clerks, secretaries and janitors of police and fire departments are on a 40-hour workweek with time and one-half for all hours over 40 hours per week. They do not qualify for the law enforcement officers or firefighters' "work period" hours exemption (see 29 C.F.R. §§ 553.210(b), 553.211(e)).

15. The city as employer has the option of paying overtime or of giving comp time off. The employee must understand that the city has a policy of compensatory time off. Compensatory time is accrued at one and one-half hours for each hour worked. Public safety employees—police and fire—and emergency response employees can accrue a maximum of 480 hours of comp time or 320 hours worked. After an employee has accrued maximum compensatory time, the employee must be paid in cash for overtime worked.

An employee shall be permitted to use accrued comp time within a reasonable period after requesting it if to do so would not disrupt the operations of the employer. Payment of accrued comp time upon termination of employment shall be calculated at the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher (29 C.F.R. § 553.21(o)(3)(B)).

If the employer pays cash wages for overtime hours rather than in compensatory time, the wages must be paid at one and one-half times the employee's regular rate of pay (29 C.F.R. § 553.232).

The U.S. Supreme Court has held that a public employer may require its employees to use their accumulated compensatory time (*Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655 (2000)). If employees do not use accumulated compensatory time, the employer must pay cash compensation in some circumstances. In order to avoid paying for accrued compensatory time, Harris County, Texas, enacted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time. The Court described Harris County's policy as follows: "The employees' supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use their compensatory time at specified times." The Court held that, although 29 U.S.C. § 207(o)(5) limits an employer's ability to prohibit the use of compensatory time when requested, that does not restrict the employer's ability to require employees to use compensatory time.

Non-Uniformed Employees

16. All non-uniformed employees are entitled to overtime or compensatory time off after 40 hours per week worked unless they are otherwise exempt (see, for example the categories discussed in No. 8 above) (29 C.F.R. § 778.101).

17. There is no FLSA limit on the number of hours per day worked (other than child labor) (29 C.F.R. § 778.102).

18. A work week under the FLSA is defined as seven consecutive 24-hour periods (although this may be altered for police and firefighters as discussed above). Note that this may not be the same as the city's "pay period." The city can determine the day and the time of day that the work week begins. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by them. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act (29 C.F.R. § 778.105). We recommend that the city workweek for water, sewer, street, sanitation, etc., employees begin at 5 p.m. on Fridays.

The city can schedule the hours worked within the workweek to limit or prevent overtime. If an emergency occurs over the weekend and some employees must work 16 hours Saturday and 16 hours Sunday, then the city can (if their services are not absolutely needed) tell those employees to take off the rest of the week after working one eight-hour shift each. This way each employee is limited to 40 hours per week for the week beginning 5 p.m. on Friday.

19. Only hours worked count in calculating overtime. Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked (see 29 C.F.R. § 778.102).

20. If an employee works more than 40 hours per week, the city could give them compensatory time off at the rate of one and one-half hours for each hour worked over 40 hours per week. The compensatory time belongs to the employee and can accrue to a maximum of 240 hours (160 hours actual work).

Employees must be allowed to use their comp time when they desire unless it would unduly disrupt the city's operations to do so at that particular time. For a discussion of requiring the employee to take accumulated compensatory time, see No. 16 above.

In the event of termination of employment, an employee shall be paid for all accrued comp time at their then salary or the average rate of pay for the final three years of employment, whichever is greater (29 C.F.R. §§ 553.21, 553.25).

Chapter 3. Personnel Handbook

An employee handbook provides guidance and information on an organization's mission, vision, values, policies and procedures, and workplace code of conduct. The Arkansas Municipal League offers a *Sample Personnel Handbook* to help your city establish guidelines concerning various personnel issues. However, employment law is heavily regulated and rapidly changing, and it is a sample only. The League strongly encourages you to continually monitor and update your city's personnel handbook to ensure that it continues to meet the needs of your city from both legal and employee relations standpoints. While it may seem burdensome, a personnel handbook should be reviewed annually by city officials and city attorney(s). This task could result in substantial monetary savings if it prevents just one lawsuit or administrative complaint filed against the city.

If you adopt a personnel handbook, failing to follow and consistently enforce its guidelines may result in legal liability. The League suggests that the handbook adopted by your city be as simple and concise as possible. You are strongly encouraged to develop a handbook that is practical and useful for your city. If you can define a policy or guideline, you can enforce it. Before adopting a final version of any handbook, you should ask your city attorney to review it to ensure that it complies with federal, state and local laws.

Finally, policies are of no value if city employees, supervisors, department heads and officials are not advised of them. For that reason, each employee should be provided with a copy of the handbook and be required to execute an acknowledgement of receipt and understanding.

Content

The content of your city's personnel handbook will be based on the size and complexity of your city. The League's *Sample Personnel Handbook* is extremely comprehensive and not all content will be appropriate for your city. Carefully review the sample and select the content that is right for your organization.

A personnel handbook should contain only general information and guidelines. It is not intended to be comprehensive or to address every specific application of, or exceptions to, the general policies and procedures contained within the document.

When writing your personnel handbook, it is appropriate to use gender-neutral pronouns such as they/them/theirs. Your handbook is a first step toward respecting people's gender identity and creating a welcoming space for people of all genders.

Basically, personnel handbooks should include the following:

Overview and General Information. An employee handbook should set a positive tone and identify information about your city such as its mission, vision and values. It should also contain a disclaimer that makes it clear that the handbook is to be used as a guide and is not intended to create an employment contract.

Non-Discrimination and Anti-Harassment. An employee handbook should outline your city's policies ensuring equal treatment of all employees (Equal Employment Opportunity statement) and, if you have more than 15 employees, an Americans with Disabilities Act (ADA) policy. It should also contain your city's policy regarding unlawful discrimination and harassment, bullying and if applicable, your city's civility policy.

Complaint reporting and investigation procedures should be outlined so that employees understand their rights and responsibilities in this regard. The steps should be well-defined. Retaliation and false accusations should also be addressed.

Compensation and Matters Affecting Employment Status. Employees need guidance on work hours and attendance, compensation and payroll procedures, overtime and compensatory time, vacancies and promotions, performance evaluations, resignation, termination, etc. This section should be used to provide this information.

Benefits. The benefits section of an employee handbook should contain vacation policies for both uniformed and non-uniformed employees, holidays, holiday pay for uniformed employees, sick leave for both uniformed and non-uniformed employees, funeral or bereavement leave (if applicable), military leave, family medical leave, maternity leave (if applicable), and leave for jury duty.

It should contain general information on employee health benefits, life coverage and supplemental coverages offered if applicable. You may consider making this section a statement of coverage provided without specifically referring to a provider since that is subject to change.

It is important to note that the Affordable Care Act governs the timing of when benefits (if offered) must become effective. It is important to stay abreast of other legal guidelines as well. For example, A.C.A. § 14-52-114 became effective August 1, 2023, and increased the amount of annual paid leave time a member of the armed forces shall be granted to 168 hours per calendar year plus necessary travel time for annual training requirements and other duties performed in an official duty status.

Code of Conduct. Policies and guidelines regarding employees' code of conduct should be included in a city's employee handbook to ensure a safe and productive work environment. This section should include ethical standards, uniforms and personal appearance, and acceptable behavior toward staff members, city officials and the public.

This section is the place for your drug-free workplace policy, use of narcotics, alcohol and tobacco policy, outside employment guidelines, and information on the use of city assets and resources including city vehicles.

Miscellaneous Information. Use this section to include a policy statement, conflicts statement, severability language, information about how and when policies can be changed and other legal statements. Sample verbiage can be found in the League's *Sample Personnel Handbook*.

Employee Acknowledgement. All employees should be provided with a copy of the personnel handbook. At the time it is distributed, the employee should be given the opportunity to review the contents, ask questions for clarification if requested, and then be required to execute an acknowledgement of receipt and agreement to comply with the policies and procedures contained within the handbook. A sample employee acknowledgement is provided in the League's *Sample Personnel Handbook*. The acknowledgement should be maintained in the employee's personnel file. Each time the handbook is updated, a new copy of the handbook should be provided to each employee and a new acknowledgement executed and placed in the employee's personnel file.

Chapter 4. Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee because of the person's race, color, religion, national origin, sex (including pregnancy and related conditions, gender identity and sexual orientation), age (40 and older), disability, genetic information (including employer requests for, or purchase, use or disclosure of genetic tests, genetic services or family medical history), retaliation for filing a charge, reasonably opposing discrimination, or participating in a discrimination lawsuit, investigation, or proceeding, Interference, coercion, or threats related to exercising rights regarding disability discrimination or pregnancy accommodation.

Most employers, including cities and towns, with at least 15 employees are covered by EEOC laws. The laws apply to all types of work situations, including but not limited to hiring, firing, layoffs, transfers, promotions, harassment, training, wages, failure to provide reasonable accommodations for a disability, job training, benefits and more.

An employer's responsibilities under EEOC laws are:

- To provide equal pay to male and female employees who perform the same work unless an employer can justify a pay difference under the law.
- To prohibit discrimination against or harassment of applicants, employees or former employees because of race, color, religion, sex, national origin, age, disability or genetic information.
- An employer must not use employment policies or practices that have a negative effect on applicants or employees of a particular race, color, religion, sex, or national origin, or applicants or employees with disabilities unless the policies or practices are related to the job and are necessary for the operation of your city.
- An employer must not use employment policies or practices that have a negative effect on applicants or employees who are 40 or older unless the policies or practices are based on a reasonable factor other than age.
- An employer must provide reasonable accommodations for an applicant's or employee's religious beliefs, disability, pregnancy, childbirth or related medical condition.
- An employer cannot request medical or genetic information from applicants. However, an employer may request medical or genetic information from employees in very limited circumstances, but if legally obtained it must be kept in a confidential, separate medical file.
- An employer cannot retaliate against an applicant, employee or former employee for reporting discrimination, participating in a discrimination investigation or lawsuit, or for opposing discrimination.
- An employer is required to display a poster that describes the federal employment discrimination laws. A copy of the poster can be obtained at www.eeoc.gov/poster.

An employer must retain employment records, such as applications, personnel and payroll records as required by law.

Cities and towns may also be required to provide an informational report to the government. The State and Local Government Information Report (EEO-4) is a mandatory biennial data collection that requires all state and local governments with 100 or more employees to submit demographic workforce data, including data by race/ethnicity, sex, job category and salary band. They are filed in odd years, the most recent being 2023. The filing by eligible state and local governments is required under section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-8(c), 29 CFR 1602.30 and .32-.37.

Cities and towns with more than 50 employees and whose U.S. federal grant awards such as certain U.S. Department of Justice (DOJ) grants are over $25,000 may be required to submit an Equal Employment Opportunity Plan (EEOP). An EEOP is a comprehensive document that analyzes a grant recipient's relevant labor market data, as well as the recipient's employment practices. It is used to identify possible barriers to the participation of women and minorities in all levels of a recipient's workforce. The report should include a plan to address the barriers. Its purpose is to ensure the opportunity for full and equal participation of men and women in the workplace, regardless of race, color or national origin.

Cities and towns can work with their human resources department to prepare the plan. It should be reviewed and approved by the mayor before submitting the plan to the granting agency. Since the plan covers the entire city workforce, only one EEOP is required and may be turned in for any grant for which it is required. For more information and online template, see the DOJ website at www.ojp.gov/program/civil-rights-office/equal-employment-opportunity-plans.

For more information regarding the EEOC, visit www.eeoc.gov.

Chapter 5. Municipal Drug Testing

A. Introduction

As employers, Arkansas municipalities need to have a legally sound, written drug and alcohol testing policy that outlines expectations and responsibilities for both the employee and the employers. Once again, cities and towns are not simply employers—you are also the government. Because of that fact, there are constitutional

implications that must be considered to ensure that the citizens' constitutional rights are safeguarded while also ensuring that the workplace is safe, functional and drug-free.

When a city or town is enforcing a drug testing policy, the baseline consideration is the Fourth Amendment of the U.S. Constitution. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects" by prohibiting unreasonable searches and seizures by the government.[408] A search within the meaning of the Fourth Amendment is considered unreasonable when the search violates a citizen's reasonable expectation of privacy.[409] As a general rule, the governmental entity must get a warrant prior to conducting a search. However, when it comes to drug testing—especially urine tests—exceptions to the warrant requirement come into play.[410] The U.S. Supreme Court has long recognized that "government offices could not function if every employment decision became a constitutional matter."[411] So, as municipal employers, it is important to understand that drug testing falls within the protective parameters of the Fourth Amendment, but a warrant is not normally necessary. Even though a warrant may not be necessary, municipalities are not free to drug test without limitations. The law provides for two different categories of drug testing: (1) drug testing conducted when the employer has individualized, reasonable suspicion that the employee is using controlled substances unlawfully, or (2) suspicionless drug testing of certain qualified employees, including conditional post-offer, pre-employment drug tests.

B. Testing Pursuant to Reasonable Suspicion

The vast majority of municipal employees will fall into this category, from our receptionists to our street crews to the maintenance workers. As will be discussed further below, employees who are not considered to be in safety or security sensitive positions cannot be drug tested unless the employer has individualized, reasonable suspicion that the worker is abusing drugs or alcohol. This means that the city must be able to articulate objective facts that would lead a reasonable person to believe that drug-related activities have taken place and the employee who will be tested is involved in that drug-related activity.[412] This essentially means that random drug testing of these employees is strictly prohibited. Firsthand knowledge that drug-related activity has occurred is sufficient.[413] For example, if the employer walks in on an employee snorting a powdery substance off of the restroom counter, a reasonable person would have suspicion to believe that the individual is doing drugs. However, information that is provided by reliable third parties can also give rise to reasonable suspicion when supported by the third party's history of reliability, the specificity of the information being provided to the employer, the existence of corroborating information, and when other facts are presented that support the employer's suspicion.[414] Documentation will be key if an employee challenges the city's reasonable suspicion to require a drug test.

Suspicionless Drug Testing

While random drug testing is prohibited for most municipal workers, certain types of employees can be randomly drug tested without the need for the city or town to articulate facts giving rise to reasonable suspicion. Where an employee's job is considered to be a safety or security sensitive position, random drug tests are allowed. The Arkansas Constitution defines a "safety sensitive position" as one that qualifies for drug/alcohol testing under the Department of Transportation's regulations or "any position designated in writing by an employer as a safety sensitive position in which a person performing the position while under the influence of [drugs or alcohol] may constitute a threat to health or safety."[415] This includes but is not limited to an employee who carries a firearm, performs life-threatening procedures, works with confidential information or documents pertaining to criminal

408 U.S.C.A. amend. IV
409 See National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
410 Green v. City of N. Little Rock, 388 S.W.3d 85, 90 (Ark. App. 2012)
411 Connick v. Myers, 461 U.S. 138, 143 (1983)
412 Dimeo v. Griffin, 721 F. Supp. 958, 973 (N.D.Ill. 1989); and see Green at 388 S.W.3d 85.
413 Kittle-Aikeley v. Strong, 844 F.3d 727 (Eighth Cir. 2016)
414 George v. Dept of Fire, 637 So.2d 1097, 1101 (La.App. 1994)
415 Ark. Const. Amend. 98, § 2(25)

investigations, or who works with or around hazardous or flammable materials, controlled substances, food or medicine.[416] The definition also applies to workers who operate, repair, maintain or monitor heavy equipment, machinery, aircraft, motorized watercraft or motor vehicles.[417]

The key aspect of defining a safety sensitive position is determining that a momentary "lapse of attention could result in injury, illness, or death."[418] If the employment position fits into this category and the municipality has designated it as a safety sensitive position, then random drug testing may be allowed, and the Fourth Amendment is satisfied. Random testing should be conducted in adherence with federal regulations.[419] Treat all safety and security sensitive employees equally and fairly. The League highly recommends creating a list of all employees on the payroll who meet these criteria and generate the tests at random with the assistance of the agency performing the tests.

Post-Offer, Pre-Employment Drug Testing

The two categories of testing discussed above pertain to individuals who are already employed by the municipality. Cities also have tools they can rely on to avoid hiring someone who may have substance abuse issues. Can the city test potential employees? Does a city have to articulate probable cause to drug test prior to employment? The short answer is no. Local governments are allowed to require job applicants to submit to drug testing as part of a pre-employment physical examination after a conditional job offer.[420] This can also apply to pre-employment fitness-for-duty examinations. The government still has to establish "special needs" beyond simply normal law enforcement or crime detection to do so, and simply wishing to have a drug-free workplace is not enough justification by itself.[421] However, where an employee volunteers to take the test and signs a release, such a program is allowed.

Chapter 6: Mental Health in the Workplace

Employee mental health and well-being is an important component of an employee's overall wellness. Overall wellness is based on both physical and mental health, and the COVID-19 pandemic has underscored the importance of providing comprehensive support to our employees. When a municipality helps an employee address mental health, overall employee engagement and experience improve.

Mental health is the emotional, psychological and social well-being of an individual. The Municipal Health Benefit Program (MHBP) provides coverage for mental health conditions just as the program provides coverage for physical health conditions. Some additional benefits a municipality may choose to offer to assist municipal employees include an employee assistance program, a mental health first aid program, management training around mental health issues, workshops or seminars on stress management, mental health days, and support for work/life balance.

The MHBP provides an employee assistance program option. Mental health first aid is a program that provides a professional on staff or on call for employee mental health concerns. The League offers stress management and mental resilience training that is available to members.

Mental health assistance for employees increases employee engagement and productivity, lowers absenteeism and resignation, and has a positive impact on the bottom line of the municipality.

416 Id.
417 Id.
418 Id.
419 See 49 U.S.C. § 31306.
420 Chandler v. Miller, 520 U.S. 305 (1997)
421 Id.

Section IV: Planning and Zoning

Chapter 1: Introduction

Municipal officials in Arkansas must be familiar with all aspects of running a modern city or town. Whether your municipality is large enough, or willing enough, to necessitate planning and zoning is for you to decide. While some officials may deal with some of the concepts we discuss in this chapter only indirectly, others must deal with them on a daily basis. In either case, and regardless of the position your municipality finds itself in, officials should understand the basics in order to make what can sometimes be hard decisions. Section IV covers the basic description of the origins of planning and the role planning has in municipal government. Once familiar with the contents of this section, you will have an understanding of how planning will interact with your departments and you will be able to understand the implications of decisions by the planning commission and, ultimately, the governing body.

Chapter 2. Planning Authority

The authority for municipalities to plan and to regulate land use derives from two sources. The first is simply the municipality's police power. The Arkansas Supreme Court has explained the government's police power succinctly in *Springfield v. City of Little Rock*, 226 Ark. 462, 290 S.W.2d 620 (1956).

> "The police power is as old as the civilized governments which exercise it. Moreover, it has been said that the very existence of government depends on it, as well as the security of the social order, the life and health of the citizen, the enjoyment of private and social life, and the beneficial use of property. One of the most important fields of legislation that may be enacted under the police power is that of regulations in the interest of public health."

Under this police power, municipalities have the authority to protect the health, safety and general welfare of the citizenry.[422] This is predominantly what land use regulations are about. These types of regulations ensure that businesses and homes are built to code to prevent any potential disaster afflicting the property owners, visitors or those just passing by. They also ensure the quietness of a neighborhood by enacting zoning to establish a buffer between industrial areas and residences. Almost everything related to land use regulations can be tied back to the principle that it is the duty of a municipality to protect the public health, safety and comfort of the citizenry.

The second source for planning authority comes from the Arkansas Code, primarily in A.C.A. § 14-56-401 *et seq*. In Arkansas, cities of the first and second class and incorporated towns have the power to adopt and enforce plans for the coordinated, adjusted and harmonious development of the municipality and its environs.[423] Put simply, your municipality may choose whether or not it wants to engage in planning and land use regulation—it is not mandatory. However, if a municipality decides to engage in planning, it must do it in the same way as all other municipalities, with a few caveats. Unfortunately, there is no simplified process in the Arkansas Code for smaller municipalities. Therefore, a city with a population of 2,000 must follow almost the same process as the largest municipalities in the state.

Chapter 3. Planning in General

Once a municipality in Arkansas has decided to engage in planning, there are a number of steps that must be taken in order to begin the process. There are also a number of concepts that elected officials must understand. This Chapter will outline these procedures as a general introduction to planning in our state.

The Planning Commission

The first step in the process is to establish by ordinance a planning commission. The planning commission has broad authority to prepare plans for the city and its planning area. The governing body of the municipality may create a planning commission of not less than five members, of whom at least two-thirds shall not hold

422 Kirkham v. City of North Little Rock, 227 Ark. 789, 301 S.W.2d 559 (1957). See also City of Little Rock v. Smith, 204 Ark. 692, 163 S.W.2d 705 (1942). (The police power of the state is one founded in public necessity and this necessity must exist in order to justify its exercise. It is always justified when it can be said to be in the interest of the public health, public safety, public comfort, and when it is, private rights must yield to their security, under reasonable laws").

423 A.C.A § 14-56-402.

any other municipal office or appointment except membership on the board of adjustment or a joint planning agency.[424] Based on the language provided and the specific inclusion of membership in the board of adjustment and joint planning agency, this language would prevent us from appointing commissioners who already hold a position on another municipal board or commission. A city of the second class or an incorporated town may elect by ordinance to allow the city council to serve as the planning commission and board of adjustment.[425] The appointment and terms of the members of the planning commission are prescribed by ordinance.[426] The governing body of the municipality may appoint one-third of the membership of the commission from electors living outside of the municipal limits but within the recorded planning jurisdiction of the municipality.[427] Once the commission has been established and the members have been appointed, the commission will designate one of its members as chair and select a vice chair and such other officers as it may require.[428] If the municipality has elected by ordinance to have the council serve as the planning commission, then the mayor would serve as chair.[429] The commission is required to establish regular meeting dates providing for at least one regular meeting to be held each quarter of the calendar year, and the commission is required to maintain a public record of all business, resolutions, transactions, findings and determinations.[430] The purposes of the commission are to: (1) prepare, or have prepared, a plan of the municipality; (2) receive and make recommendations on public and private proposals for development; (3) prepare and administer planning regulations; (4) prepare and transmit to the governing body of the municipality recommended ordinances implementing plans; and (5) advise and counsel the municipal government and other public bodies.[431]

The Planning Area

Once established, the commission's first action will be to establish a planning area map.[432] The planning area is the region for which the municipality will prepare plans, ordinances and regulations. It may consist of the entire municipality's territorial jurisdiction or a portion of it. A municipality's territorial jurisdiction extends up to 3 miles, depending on population, beyond the city limits.[433] Municipalities under 8,000 population will have a jurisdictional area up to 1 mile beyond the corporate limits but are unable to exercise any zoning authority outside the corporate limits. Municipalities between 8,000 and 60,000 population have a jurisdictional area of 1 mile beyond the corporate limits and are authorized to administer and enforce planning ordinances outside their corporate limits. Municipalities between 60,000 and 150,000 have a jurisdictional area of 2 miles beyond the corporate limits and are authorized to administer and enforce planning ordinances outside their corporate limits. Municipalities over 150,000 have a jurisdictional area of 3 miles and are authorized to administer and enforce planning ordinances outside their corporate limits.[434] Whenever the territorial limits of two or more municipalities conflict, the limits of their respective territorial jurisdictions shall be a line equidistant between or as otherwise agreed between the municipalities.[435]

The Planning Area Map

With the planning area defined as above, the commission will now need to prepare a map showing the general location of streets, public ways and public property.[436] The map should also show the planning area boundaries. The commission will be in charge of maintaining and updating the planning area map as necessary, for instance when the municipality annexes more property. Once the planning area map has been prepared, the municipality must file the map with the county recorder and keep a copy available in the clerk or recorder's office. The planning area map provides a number of benefits. It can designate the long-range master street plan for the area; it can

424 A.C.A § 14-56-404(a)(1)
425 A.C.A § 14-56-404(a)(2)
426 A.C.A § 14-56-405. See also Ark. Op. Atty. Gen. No. 2007-051 ("In delegating to municipalities the authority to prescribe by ordinance the manner and method of appointment and the terms of members, in my opinion, the General Assembly also delegated a necessarily incidental authority over the qualifications for appointment that may be exercised by ordinance. Because, as noted above, the Arkansas Supreme Court has characterized term limit provisions as a qualification for office, it appears that a municipality may, by ordinance, enact term limits on the service of planning commissioners").
427 A.C.A § 14-56-405
428 A.C.A § 14-56-406(a)(1)
429 A.C.A § 14-56-406(a)(2)
430 A.C.A § 14-56-407
431 A.C.A § 14-56-411
432 A.C.A § 14-56-412(c)
433 A.C.A § 14-56-413
434 A.C.A § 14-56-413(a)(2)
435 A.C.A § 14-56-413(a)(1)(B)
436 A.C.A § 14-56-412(c)

indicate the future location of needed community facilities such as parks and fire stations; it can graphically display the city's long-range land-use intentions, i.e. policies; and it can provide a general idea of suburban areas that will become part of the city.

The Plan

Once the planning area is defined and mapped, it is time to form the actual plan. The plans of the municipality should address the present and future needs of the community, promoting the safety, morals, order, convenience, prosperity and general welfare of the citizens, and it should be reviewed on a regular basis.[437] The plans may provide, among other things: efficiency and economy in the process of development, the appropriate and best use of land, convenience of traffic and circulation of people and goods, safety from fire and other dangers, adequate light and air in the use and occupancy of buildings, healthful and convenient distribution of population, good civic design and arrangement, adequate public utilities and facilities, and wise and efficient expenditures of public funds.[438] Municipalities are certainly not limited to these areas above, but they are an excellent place to start and provide a great checklist for making development decisions.

The plan provides a blueprint for growth of the municipality. It outlines the manner in which the city will accommodate development or redevelopment and it should establish an overall vision for the ultimate form of the municipality. However, it does a lot more. First, a well-prepared plan will regulate growth in a manner that is in the best interest of all its citizens. Second, the plan will provide valuable information to prospective residents and investors as they seek a stable environment in which to settle or do business. The plan also identifies and analyzes the various growth issues facing the municipality. The plan should be developed in ways to ensure these issues can be resolved. Third, the plan explains in greater detail how growth will be managed in a way that fits the economic resources of the municipality. In other words, municipalities want growth, and they want business coming into the municipality. However, we want to ensure that we have all the necessities in place to handle sudden growth. Fourth, the plan provides the foundation for regulations, including the zoning code and subdivision code. This is the most critical function of the plan since its adoption provides a basis upon which a municipality may exercise zoning and subdivision regulations. Finally, the plan provides a rational basis for making land use decisions. This is extremely important in an age of almost constant litigation. Your city attorney will be extremely pleased when the planning commission and council make decisions based on the plan.

We have touched on what the plan does do. Let's look at what the plan doesn't do. The plan itself is not a legal document. It is a policy document that sets forth the intention of the municipality's planning commission and governing body regarding growth and development decisions. The plan is not a zoning code. Its provisions are general and do not refer to specific properties. Following adoption and filing of the land use plan, the commission may prepare a recommended zoning code or ordinance for the entire area of the municipality to submit to the governing body of the municipality.[439] The plan does not cover all elements of government; it simply is a comprehensive plan adopted by the planning commission and is not a "strategic" plan. Rather it is an element of strategic planning for the municipality. The plan is not a magic cure-all to all a municipality's problems. It can solve very few problems unless it enjoys the full support of the planning commission, governing body and residents. The plan does not control construction standards of individual buildings except to the point that they are compatible with the Arkansas Fire Prevention Code and other state and federal regulatory mandates. And finally, the plan is not a static instrument. Each municipality should address the method by which the plan can be amended to meet new challenges and issues. Municipalities often wrestle with how to amend the land use plan if a specific rezone request seems justified but is inconsistent with the plan. The key takeaway is we must always be prepared for challenges, whether we see them coming or not, and be prepared to adapt.

Form of the Plan

The Arkansas Code does not specify the form in which the plan should be prepared. The code only specifies certain steps that must be taken in order to prepare and adopt the plan. Since there is no prescribed form, plans have taken many forms over the years, from multi-volume sets to simple brochures. The appropriate form is that

437 A.C.A § 14-56-403(a)
438 A.C.A § 14-56-403(b)
439 A.C.A § 14-56-416(a)(1)

which serves your city best. Over the last decade or so, plans have tended to be more compact and more visual than in the past, and most plan documents are now created for internet access.

The Planning Period

As with the form of the plan, there is no statutory requirement for the period to be covered by the plan. For years, a 20-year planning period was considered appropriate and is still used in many cases. Some municipalities, particularly those in high-growth areas or those in areas of the state being impacted by unique forces, find long planning periods impractical. While two decades may seem in ordinarily long when utilities and public safety are considered, long term planning is a must.

In reality, different elements of the plan may require different time periods. For example, the land use element of a plan may require updating as frequently as every five years for some municipalities. And we have seen the need for this very recently with crypto mining facilities coming to the state. This is a unique technology and business that took all of us by surprise with the unique operation and noise levels generated. Transportation infrastructure projects, on the other hand, can take years to complete from the time they are first planned, so that element of the plan may project more than 20 years. The planning and construction of new community facilities may fall somewhere in between.

Implementing Policies

We have covered the commission, the planning area and the plan. Before getting into the specifics of the different regulations, let's walk through the implementation of policies and the role the planning commission and the governing body of the municipality play in the process. All plans, recommended ordinances and regulations must be adopted through the procedure laid out in A.C.A. § 14-56-422. The planning commission must hold a public hearing on the plans, ordinances and regulations proposed and provide notice of the public hearing by publishing notice in a newspaper of general circulation in the city at least one time 15 days prior to the hearing.[440] Following the public hearing, proposed plans may be adopted and proposed ordinances and regulations may be recommended as presented or in modified form by a majority vote of the entire commission.[441] After the commission has adopted the plans and recommendation of ordinances and regulations, the commission must certify the adopted proposal to the governing body of the municipality for its adoption.[442] The governing body of the municipality then may return the proposal to the commission for further study or recertification or, by a majority vote of the governing body, may adopt by ordinance or resolution the proposal submitted by the commission.[443] Once the governing body of the municipality has adopted the proposal, the adopted plans, ordinances or regulations will be filed in the office of the city clerk.[444] Importantly, after the adoption of plans, ordinances and regulations and proper filing with the city clerk, any alteration, amendment, extension or discontinuance of the plans, ordinances or regulations must be made in conformance with this process or by a majority vote of the governing body of the municipality.[445]

Chapter 4. Zoning

Although there are codes and programs at the state and federal level that aid in achieving plan goals, municipalities generally implement plans in a number of ways. Included in these are zoning codes or ordinances.

Zoning Ordinance

Following the adoption and filing of the land use plan, the commission may prepare for submission to the legislative body a recommended zoning code for the entire area of the municipality. The ordinance must consist of both a map and text. The ordinance may regulate many things such as the location, height, bulk, number of stories and size of buildings; open space; lot coverage; density and distribution of population; and the uses of land, buildings and structures. It may require off-street parking and loading, provide for districts of compatible uses for

440 A.C.A § 14-56-422(1). Notice by first class mail must be mailed to the boards of directors of all school districts affected by the proposed plan, ordinance or regulation if the school district is to be affected by the proposal.
441 A.C.A § 14-56-422(2)
442 A.C.A § 14-56-422(3)
443 A.C.A § 14-56-422(4)
444 A.C.A § 14-56-422(5)
445 A.C.A § 14-56-423

large-scale unified development, for elimination of uses not in conformance with provisions of the ordinance, and for such other matters as are necessary to the health, safety and general welfare of the municipality. It may include provisions for administration and enforcement; designate districts or zones of such shape, size or characteristics as deemed advisable; and allow and regulate home-based work as provided in A.C.A. § 14-1-106.[446]

The zoning ordinance must further provide for a board of zoning adjustment, which may either be composed of at least three members, or the commission as a whole may sit as the board of zoning adjustment.[447] The zoning board of adjustment shall: (1) Hear appeals from the decision of the administrative officers in respect to the enforcement and application of the ordinance, and may affirm or reverse, in whole or in party, the decision of the administration offices; (2) hear requests for variances in instances where strict enforcement of the ordinance would cause undue hardship due to circumstances unique to the individual property under consideration, and grant such variances only when it is demonstrated that such action will be in keeping with the spirit and intent of the zoning ordinance.[448] However, the board shall not permit, as a variance, any use in a zone that is not permitted under the ordinance, but the board may impose conditions in the granting of a variance to insure compliance and to protect adjacent property.[449] The board is further required to establish regular meeting dates and each session shall be a public meeting with public notice. Public notice consists of publishing the meeting date and business to be discussed in a newspaper of general circulation in the city, at least one time seven days prior to the meeting.[450] However, many municipalities often add additional notifications such as individual newspaper notifications for each request and notification to adjoining property owners.

Zoning Code Pitfalls

There are some pitfalls that can cause problems with the zoning code. Keep in mind the following: strict separation of land uses without considering the context of a proposed development; using the same "default zoning" for all recently annexed land; developing an unmanageable number of zoning districts with little flexibility; reliance on the proposed use of the land during a re-zoning hearing; emphasis on exact land uses instead of suitability factors; failing to analyze regulations to make sure they promote the health, safety, welfare and morals of the community. Regulations that lower property values without clearly meeting this standard may invite legal challenge.

Chapter 5. Subdivisions

Following the adoption and filing of a master street plan, the planning commission may prepare and administer, after approval of the legislative body, regulations controlling the development of land.[451] The development of land includes, but is not limited to:

- The provision of access to lots and parcels;
- The extensions or provision of utilities;
- The subdividing of land into lots and blocks; and
- The parceling of land resulting in the need for access and utilities.[452]

The subdivision regulations may establish or provide for the minimum requirements as to:

- Information to be included on the plat filed for record;
- The design and layout of the subdivision, including standards for lots and blocks, street rights-of-way, street and utility grades, consideration of school district boundaries and other similar items; and
- Standards for improvements to be installed by the developer at his or her own expense, such as street grading and paving; curbs, gutters, and sidewalks; water, storm, and sewer mains; street lighting; and other amenities.[453]
- The subdivision regulations may also do the following:

446 A.C.A § 14-56-416(a)(3)(A)-(F)
447 A.C.A § 14-56-416(b)(1)
448 A.C.A § 14-56-416(b)(1)-(2)(B)
449 A.C.A § 14-56-416(b)(2)(i)(b)-(c)
450 A.C.A § 14-56-416(b)(3)
451 A.C.A § 14-56-417(a)(1)
452 A.C.A § 14-56-417(a)(2)
453 A.C.A § 14-56-417(b)(1)

- Permit the developer to post a performance bond or other surety in lieu of actual installation of required improvements before plat approval;
- Provide for the dedication of all rights-of-way to the public;
- Govern lot or parcel splits, which is the dividing of an existing lot or parcel into two or more lots or parcels;
- Establish a procedure to be followed to secure plat approval by the planning commission;
- Require the developer conform to the plan currently in effect;
- Require the reservation of land for future public acquisition to use for community or public facilities indicated in the plan. This reservation may extend no more than one year from the time the public body responsible for the acquisition is notified of the developer's intent. Further, no deed or other instrument of transfer shall be accepted by the county recorder for record unless it is to a lot or parcel platted and on file or accompanied with a plat approved by the commission.

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.[454]

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.[455] 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.[456] 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.[457]

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.

454 A.C.A § 25-19-102

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

456 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.

457 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.[458]

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.[459] 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."[460] 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.[461] 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.[462] A court will interpret the term in a way that encourages access to public information.[463]

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

458 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").

459 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.

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

461 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").

462 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").

463 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.[464]) 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.[465] 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."[466] 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.[467] 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."[468] 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

464 A.C.A §§ 25-19-109 & 25-19-112.

465 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").

466 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").

467 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.

468 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:[469]

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.[470]

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.[471]

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.[472] 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.[473]

Does the format of a public record matter?

469 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").
470 A.C.A § 25-19-103(7)(A)
471 These include private entities that receive public funds, perform activities of public concern, and work on things that intertwine it with governmental entities.
472 A.C.A § 25-19-103(7)
473 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."[474]

"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.[475]

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.[476] However, this "Three-Day Rule" is only for records in active use or storage. It does not apply to all requests for records.[477]

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.[478]

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 property 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

474 A.C.A § 25-19-103(7)(A)
475 A.C.A § 25-19-103(7)(A)
476 A.C.A § 25-19-105(e)
477 See the section titled "What if the Records Are in Active Use or Storage."
478 "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.

records. Regardless of whether Shelby is a custodian of the records or not, she should not simply hang up on Cindy. 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."[479]

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." [480]

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.[481] 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.[482]

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.[483] If you have electronic

479 A.C.A. § 25-19-105(3)
480 Apprentice Info. Sys., 2019 Ark. 146, at 5, 544 S.W.3d 39, 43
481 A.C.A § 25-19-103(3) & (4)
482 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").
483 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.

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.

Keep in mind: You can agree to provide data in a format that is not necessarily "readily convertible."[484] 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."[485] 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."[486] 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.[487]

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.[488] 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.

484 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.
485 A.C.A § 25-19-105(d)(2)(C).
486 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."
487 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.
488 A.C.A § 25-19-105(e)

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.

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."[489] 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.[490]

FOIA defines which specific costs you can legally charge to the requester: "Any fee for copies shall not exceed the actual costs of reproduction."[491] Those "actual costs of reproduction" do not include every possible cost a city has related to fulfilling a FOIA request.[492] 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;[493]
- supplies, equipment and maintenance; and
- mailing or transmitting the record by facsimile or other electronic means.[494]

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.[495] 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.[496] 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.[497] 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.[498] 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.[499]

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

489 A.C.A § 25-19-105(d)(3)(a)(i)

490 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.

491 A.C.A § 25-19-105(d)(3)(a)(i)

492 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.

493 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).

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

495 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").

496 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."

497 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").

498 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).

499 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.

the city.[500] 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.[501]

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.[502] 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.[503]

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.[504]

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.[505] 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."[506]

The provision encourages custodians to customize or compile data, particularly when doing so is not expensive or time-consuming.[507] However, this is different from reproduction of records. Rather, it is a situation where the custodian and requester reach an agreement.[508] 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."[509] 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."[510]

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.[511] Here's what to know:

500 A.C.A § 25-19-105(d)(3)(A)(v)
501 A.C.A § 25-19-105(f)
502 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.
503 A.C.A § 27-53-210(c)
504 Ark. Op. Att'y Gen. No. 2006-093
505 A.C.A § 25-19-109
506 A.C.A § 25-19-109
507 A.C.A § 25-19-109(a)(2)
508 Ark. Op. Att'y Gen. No. 2009-186
509 A.C.A § 25-19-109
510 A.C.A § 25-19-109
511 A.C.A § 25-19-109

- If fulfilling the request will take less than three hours, there's no charge.
- 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.[512] More specifically, the FOIA now requires a written response in the following situations:[513]

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."[514] This is perhaps the most important takeaway from our discussion of FOIA and public records:

512 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."

513 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."

514 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.[515] 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.[516] 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.[517]

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."[518] 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."[519] The custodian should note how much information was deleted, ideally on the document itself where the custodian made the deletion.[520] Also, always remember the city or town has to cover the cost of the separation.[521]

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:

515 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."

516 A.C.A § 25-19-105(b)(1)–(2)

517 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.").

518 A.C.A § 25-19-105(f)(1)

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

520 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.").

521 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"[522]
2. Undercover officers: "The identities of law enforcement officers currently working undercover with their agencies"[523]
3. Confidential informants: "Information that could reasonably be used to identify "a confidential informant helping the government with a criminal investigation[524]

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."[525] 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]."[526]

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.[527] Since evaluating this exception 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.[528] 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

522 A.C.A § 25-19-105(b)(6)
523 A.C.A § 25-19-105(b)(10)
524 A.C.A § 25-19-105(b)(25)
525 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)).
526 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)).
527 Dep't of Ark. State Police v. Keech Law Firm, P.A., 2017 Ark. 143, 516 S.W.3d 265 (2017)
528 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.

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.[529]

Even if the investigation is open and ongoing, the exemption still only applies if the records are "sufficiently investigative."[530] "The mere fact that records relate somehow to an ongoing criminal information will not, alone, support withholding nonexempt public records."[531] 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.[532]

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.[533] 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.[534]

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.[535] 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.[536] Finally, the individual must be a confidential informant, a confidential source, or whose assistance was given "under the assurance of confidentiality."[537]

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.

529 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.

530 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.").

531 Ark. Op. Att'y Gen. No. 2022-006

532 Ark. Op. Att'y Gen. No. 2006-094

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

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

535 A.C.A § 25-19-105(b)(25)(A)

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

537 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.[538] 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.[539] The court put it this way: "knowing who is not undercover would reveal that the officers whose photographs were not released are undercover."[540]

2. Competitive Advantage and Trade Secrets

Hacking and cyber attacks targeting local and state governments are on the rise.[541] 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.[542] 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.[543] 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.[544] 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.[545] 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.[546]

"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.[547] Like the examples for public water systems, the

538 A.C.A § 25-19-105(b)(10)

539 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.

540 Racop, 2022 Ark. 17, at 5–6, 638 S.W.3d at 4

541 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.

542 A.C.A § 25-10-105(b)(11)

543 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.

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

545 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."

546 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).

547 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

list is 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."[548]

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.[549] The exempt personal information includes without limitation:

- Home and mobile telephone numbers;
- Personal email address;
- Home and business address; and
- Customer usage data. [550]

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."[551] Disclosing the information is also allowed if requested by certain present or past utility providers "for the purpose of facilitating a shared billing arrangement."[552] 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.

548 A.C.A § 25-19-105(b)(18)(B)(iv)

549 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.

550 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?"

551 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.

552 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.[553]

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.[554] We should make something clear from the start—the FOIA has different exemptions for distinct types of employment records.[555] 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."[556] 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.[557] However, when it comes to employment records, a document can't be both a personnel record and an evaluation or job performance record.[558]

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.[559] 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)[560]
- Education records (Op. Att'y Gen 2005-113)[561]

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

553 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.

554 See Section III, Chapter 2 of Civilpedia, "Employment Law."

555 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.

556 Ark. Op. Att'y Gen. No. 2020-008

557 Ark. Op. Att'y Gen No. 2020-063

558 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.

559 A.C.A § 25-19-105(b)(12)

560 Id.

561 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.[562]

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.[563]

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.[564] 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.[565]

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."[566] In other words, these kinds of records are a supervisor's review of an employee's job duties in order to evaluate them.[567] 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.[568] 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."[569] 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.[570] The test is tied

562 See Ark. Op. Att'y Gen. No. 2023-086.
563 A.C.A § 25-19-105(b)(13)
564 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.
565 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).
566 Remember, the record can be created at the behest of the employer. That is, the employer orders or asks someone else to create it.
567 Hall, 2012 Ark. 66, at 6, S.W.3d at 391
568 Ark. Op. Att'y Gen. Nos. 2023-085; 2005-194
569 Ark. Op Att'y Gen. No. 2023-077
570 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."[571]

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.[572] 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.[573]

- 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.[574] 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.[575] Suspension and termination letters that contain the reasons for that action are also employee evaluation records.[576] Suspension letters 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.

571 A.C.A. § 25-19-105(b)(12); Young v. Rice, 308 Ark. 593, 826 S.W.2d 252 (1992)
572 Young, 308 Ark. at 598, 826 S.W.2d at 255
573 Id.
574 Ark. Op. Att'y Gen. Nos. 2023-086; 2020-063
575 Ark. Op. Att'y Gen. No 2015-057; Thomas, 2012 Ark. 66, at 9–10, 399 S. W.3d. at 392–93)
576 Ark. Op. Att'y Gen. No. 2023-086.

"Mixed Records"

Sometimes, a FOIA request might ask for "mixed records."[577] 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.[578]

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.[579]

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.[580] 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.[581] 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].[582]

Additionally, the Act also prohibits any re-disclosure of this information by law enforcement, a prosecuting attorney or a court.[583] The non-disclosure mandate of this Act applies to local law enforcement agencies that conduct child maltreatment investigations.[584] 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*.[585] 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 interpreted most favorably to the public interest of having public business performed in an open and public manner."[586]

577 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.
578 Ark. Op. Att'y Gen. Nos. 2023-086; 2020-037
579 Ark. Op. Att'y Gen. Nos. 2022-006; 2023-086
580 A.C.A § 25-19-105(a)(1)(A)
581 A.C.A §§ 12-18-101 to -1011
582 A.C.A § 25-18-104(a)
583 A.C.A § 25-18-104(b)
584 Ark. Op. Att'y Gen. No. 2016-068
585 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)
586 Harris v. City of Fort Smith, 359 Ark. 355, 350, 197 S.W.3d 461, 646 (2004)

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."[587] 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."[588]

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."[589]

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."[590]

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 action.[591] For example, a vote on whether to buy a new fire truck will be taken at the next city

587 A.C.A § 25-19-106(a)
588 Harris v. City of Fort Smith, 359 Ark. 355, 350, 197 S.W.3d 461, 646 (2004)
589 Mayor & City Council of El Dorado v. El Dorado Broad. Co., 260 Ark. 821, 824, 544 S.W.2d 206, 208 (1976)
590 City of Fort Smith v. Wade, 2019 Ark. 222, at 7, 578 S.W.3d 276, 280
591 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.

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.[592] 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.[593]

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."[594]
>
> 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,[595] 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 . . . 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

592 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."

593 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. 355, 365, 197 S.W.3d 461, 467 (2004).

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

595 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).

council."[596] So, meeting after Sunday school is not considered a public meeting under the FOIA unless city business is being discussed.[597]

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."[598]

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."[599]

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) Meetings[600]

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.[601] 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 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."[602] You may ask, "Our local radio station

596 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.").

597 "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.

598 Ark. Op. Att'y Gen. No. 80-16

599 A.C.A § 25-19-106

600 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.

601 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.

602 A.C.A § 25-19-106(b)(2)

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."[603] 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. [604] 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.

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.[605] 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.

603 A.C.A § 25-19-106(c)(1)(A)

604 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.

605 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."

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."[606]

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."[607] There are many ways to meet this legal requirement. The recording could be (1) sound only, (2) a video recording with 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.

606 A.C.A § 25-19-106(3)
607 A.C.A § 25-19-106(d)(1)

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.[608] 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.[609]

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 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.

608 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)

609 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.

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."[610] *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 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

610 A.C.A § 25-19-105(a)(12)

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.[611]

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.

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.[612]

611 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."

612 A.C.A § 5-2-202(4)

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 GOVERNMENT[613]

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

A. Yes.[614]

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.[615]

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

A. Yes.[616]

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

A. Yes.[617]

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

A. Yes.[618]

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.[619]

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

A. Yes.[620]

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

A. No.[621]

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

A. No.[622]

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

A. Possibly.[623] 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.[624]

---

613 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.
614 Op. Att'y Gen. No. 97-067
615 A.C.A § 25-19-106(c)(2)(A); Op. Att'y Gen. No. 97-067
616 A.C.A § 25-19-106(c)(6); Op. Att'y Gen. No. 2015-024
617 A.C.A § 25-19-105(b)(20); Op. Att'y Gen. 2015-056
618 Ops. Att'y Gen. 98-174, 88-058
619 Op. Att'y Gen. No. 2002-161
620 Ops. Att'y Gen. 2003-289, 95-227
621 A.C.A § 25-19-106; Op. Att'y Gen. 95-098
622 Op. Att'y Gen. 96-269
623 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.
624 Op. Att'y Gen. 99-018

IN GENERAL[625]

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.[626]

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.[627]

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.

---

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

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

627 Op. Att'y Gen. 2008-071

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.[628]

628 A.C.A § 25-19-104

AGENCIES GENERALLY[629]

I. MEETINGS

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

A. Generally, yes.[630]

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).[631]

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

A. Yes.[632]

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.[633]

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

A. No.[634]

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.[635]

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.[636]

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.[637]

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.[638]

Q. Who may ask for an executive session?

A. Only a member of the governing body.[639]

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.[640]

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

A. Yes.[641]

---

629 These questions, answers and citations come from pages 35–40 of The Arkansas Freedom of Information Handbook, 20th Edition (2022).
630 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.
631 Op. Att'y Gen. 2014-124
632 Op. Att'y Gen. 95-098
633 Op. Att'y Gen. 95-020
634 Ops. Att'y Gen. 96-372, 95-360, 87-420; Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968)
635 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)
636 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
637 Op. Att'y Gen. 95-308
638 Ops. Att'y Gen. 97-016, 92-124; Depoyster v. Cole, 298 Ark. 203, 766 S.W.2d 606 (1989)
639 Ops. Att'y Gen. 96-009, 87-478
640 Op. Att'y Gen. 2000-096
641 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.[642]

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.[643]

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.[644]

Q. Are citizens entitled to videotape public meetings?

A. Yes, as long as the videotaping does not disrupt the meeting.[645] Public meetings must be recorded to capture at least audio and in a way that can be reproduced upon request.[646]

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.[647]

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.[648]

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.[649]

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.[650]

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."[651] In the event of emergency or special meetings, the person calling the meeting shall notify representatives of the media who have requested notice.[652]

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.[653] 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.[654] Nevertheless, the email messages likely would be subject to disclosure as a "public record."

642 Ops. Att'y Gen. 2009-077, 93-403
643 Ops. Att'y Gen. 2006-059, 93-403, 91-070
644 Op. Att'y Gen. 2006-152
645 Op. Att'y Gen. 2012-022
646 A.C.A § 25-19-106(d)
647 See Op. Att'y Gen. 2006-152
648 Ops. Att'y Gen. 2000-251, 91-323
649 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)
650 Op. Att'y Gen. 2012-022
651 A.C.A § 25-19-106(a); Op. Att'y Gen. 84-91
652 A.C.A § 25-19-106(b)(2)
653 City of Ft. Smith v. Wade, 2019 Ark. 222, 578 S.W.3d 276
654 Op. Att'y Gen. 2005-166

The Civilpedia Handbook

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

Rev. 6/20/2024