

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

ARKANSAS

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE

OPEN RECORDS AND MEETINGS LAWS IN

ARKANSAS

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Previously Titled
Tapping Officials' Secrets

Published by The Reporters Committee for Freedom of the Press
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Production of the sixth edition of this compendium was possible
due to the generous financial contributions of:
The Stanton Foundation

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ISBN: 1-58078-203-5

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Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

The Arkansas Freedom of Information Act (“FOIA”), Ark. Code Ann. § 25-19-101 to 25-19-109, was enacted in 1967 at the behest of Governor Winthrop Rockefeller and the state’s journalism community. At his last press conference, Governor Rockefeller described the FOIA as his “proudest achievement” in office.

Prior to the act’s passage, Arkansas law regarding access to government records and meetings was not well developed. While scattered sections of the Arkansas code provided for public inspection of certain records, there existed no comprehensive provision permitting access to documents held by state or local bodies. Nor was the common law much help, for the judicial decisions dealt principally with election records required by statute to be open to the public. Two cases, however, took a surprisingly broad view of the common law right of access to records. *Collins v. State*, 200 Ark. 1027, 143 S.W.2d 1 (1940); *Republican Party of Arkansas v. State ex rel. Hall*, 240 Ark. 545, 400 S.W.2d 660 (1966).

With respect to open meetings, state common law prior to enactment of the FOIA was nonexistent, but constitutional and statutory provisions afforded some access. Article V, Section 13 of the Arkansas Constitution of 1874, which remains in effect today, provides that “sessions of each house and of committees of the whole shall be open, unless when the business is such as ought to be kept secret.” The secrecy exception is obviously large enough to swallow the rule of openness, and the provision does not apply to legislative committees, state agencies, or local government bodies. The first open meetings statute, passed in 1947 and amended in 1949, did not extend beyond the state level and had various other shortcomings. A broader statute reaching such political subdivisions as cities, counties, and school districts was passed in 1953, but it contained a broad exception permitting closed meetings and penalty provisions applicable only in the event of willful violations. As a result, it, too, was relatively ineffective.

Several factors coalesced in the mid-1960s to bring about enactment of the FOIA: a campaign by state journalists, notably the Little

Rock chapter of Sigma Delta Chi; a study by the Arkansas Legislative Council comparing state access laws with those of other jurisdictions; controversial closed meetings by government bodies; unfavorable Attorney General’s opinions interpreting the 1953 open meetings statute; organizational efforts by the state Republican Party, including successful litigation to obtain access to voting records; the *Hall* case cited above, in which the Arkansas Supreme Court indicated its willingness to recognize an expansive common law right of access to public records; and the election of Winthrop Rockefeller as governor.

The bill that became the Arkansas FOIA was drafted by the Little Rock chapter of Sigma Delta Chi and was based in part on statutes in other states and a model act prepared by the national Sigma Delta Chi organization. Governor Rockefeller signed the bill into law — Act 93 of 1967 — on Valentine’s Day, commenting that “this is an historic bill, and it may well be a model bill for other states.” The FOIA has been amended sixteen times since its enactment, most recently in 2001. None of the amendments has significantly weakened the act, and many were in response to judicial decisions or to specific problems that were not anticipated when the FOIA was initially passed. Act 1653 of 2001 addressed access to electronic records and provided welcome clarity with respect to other issues.

On numerous occasions, the General Assembly has enacted separate statutes creating specific exemptions rather than amend the FOIA itself. For example, in 1987 the legislature passed a statute designed to overturn an Arkansas Supreme Court decision holding that certain corporate tax records were not exempt from disclosure under the FOIA. *See Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). A bill amending the Tax Procedure Act to exempt from public disclosure “all tax returns, . . . whether filed by individuals, corporations, partnerships or fiduciaries,” was passed over the vocal opposition of the news media. This provision was amended in 1991 to permit access to records that reflect the name of a taxpayer and the amount of any tax credit, rebate, discount, or commission for the collection of a tax received by the taxpayer under specified state tax statutes. *See Ark. Code Ann. § 26-18-303*.

In 1999, the legislature created the Electronic Records Study Commission to examine the Arkansas Freedom of Information Act and recommend amendments to update the FOIA for the electronic age. The commission completed its work in time for the 2001 session of the General Assembly, and the vast majority of the commission’s recommendations, as variously amended during the legislative process, were enacted into law by Act 1653 of 2001. These changes clarify the FOIA on many, though certainly not all, issues surrounding electronic access. *See infra* part III.

For additional information about the Arkansas FOIA, see the following sources: Office of the Attorney General, *Arkansas Freedom of Information Handbook* (11th ed. 2003); Watkins & Peltz, *The Arkansas Freedom of Information Act* (M&M Press, 4th ed. 2004); Brooks, “Adventures in Cyberspace: Computer Technology and the Arkansas Freedom of Information Act,” 17 UALR L.J. 417 (1995); Watkins, “Access to Public Records under the Arkansas Freedom of Information Act,” 37 Ark. L. Rev. 741 (1984); Watkins, “Open Meetings under the Arkansas Freedom of Information Act,” 38 Ark. L. Rev. 268 (1984); Watkins, “The Arkansas Freedom of Information Act: Time for a Change,” 44 Ark. L. Rev. 535 (1991); Watkins, “Adventures in FOIA Land, 1999 Ark. L. Notes 111; Note, 1 UALR L.J. 230 (1978); Note, 40 Ark. L. Rev. 899 (1987); Note, 12 UALR L.J. 423 (1989-90); Note, 13 UALR L.J. 725 (1991).

Open Records

I. STATUTE — BASIC APPLICATION

A. Who can request records?

1. Status of requestor.

“[A]ny citizen of the State of Arkansas” may make a request. Ark. Code Ann. § 25-19-105(a)(1). However, incarcerated felons may not obtain records of the Department of Correction and the Department of Community Correction. Otherwise, the term “citizen” includes a corporation doing business in the state. *Arkansas Hwy. & Transp. Dep’t v. Hope Brick Works Inc.*, 294 Ark. 490, 744 S.W.2d 711 (1988). This approach would also include partnerships and other unincorporated associations doing business in the state. Indeed, the Supreme Court has said that “anyone who requests information is entitled to it.” *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998) (emphasis added). In the *Bryant* case, the Court held that a public official, in his official capacity, is a “citizen” for purposes of Section 25-19-105(a)(1). See also Ark. Op. Att’y Gen. No. 98-174 (civil service commissioners may obtain access to personnel and employee evaluation records under the FOIA). An agency may require identification showing name and address or completion of a form on which the requester provides citizenship information. Ark. Op. Att’y Gen. No. 94-235. The Attorney General has opined that a proxy may request records for a non-citizen, as long as that proxy is an Arkansas citizen. See Ark. Op. Att’y Gen. Nos. 2008-191, 97-071, 96-190.

2. Purpose of request.

A requester’s purpose or motive in seeking access to records is usually immaterial. *E.g.*, Ark. Op. Att’y Gen. Nos. 2003-325. See also *Furman v. Holloway*, 312 Ark. 378, 849 S.W.2d (1993) (rejecting argument that inmate had to show “particularized need” to inspect Department of Correction records, where neither statute governing access to those records nor administrative regulation contained such a requirement). However, the requester’s purpose for seeking access is apparently relevant when he or she seeks personnel records, which are exempt to the extent that their disclosure would cause a clearly unwarranted invasion of personal privacy. Ark. Code Ann. § 25-19-105(b)(12). See *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998) (requester’s “sole reason” for seeking access to home addresses of police officers was to “utilize a cheaper method of obtaining service of process on the officers” in a civil rights action, and this purpose “has little or nothing to do” with learning about “what [the] government is up to”); Ark. Op. Att’y Gen. No. 2001-091 (in applying personnel records exemption, custodian “may consider the purpose for which [the information] was requested and whether that purpose is consistent with the purposes of the FOIA”); Ark. Op. Att’y Gen. No. 98-152 (suggesting that employee’s home address and names of family members are exempt where information is requested for purpose of harassment or causing harm).

3. Use of records.

Nothing in the FOIA restricts the subsequent use of information obtained under the act. Ark. Op. Att’y Gen. No. 84-127.

B. Whose records are and are not subject to the act?

1. Executive branch.

a. Records of the executives themselves.

Records of a “public official or employee” and a “governmental agency” are covered by the FOIA. Ark. Code Ann. § 25-19-103(5)(A). This definition includes executive branch agencies and officials. *E.g.*, *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987) (state agency); *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975) (state university board of trustees); Ark. Op. Att’y Gen. Nos. 99-407 (advisory council established by statute within Department of Human Services), 99-377 (investment committee created by statute and com-

posed of government officials), 95-023 (state licensing agency). By its terms, the act is not limited to records of elected officials. Ark. Op. Att’y Gen. No. 99-040.

b. Records of certain but not all functions.

Only those records that “constitute a record of the performance or lack of performance of official functions” are public records. Ark. Code Ann. § 25-19-103(5)(A). Records “maintained in public offices or by public employees within the scope of their employment” are presumed to be public records. *Id.* See also *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718, *opinion after remand*, 371 Ark. 217, 264 S.W.3d 465 (2007) (requiring trial court to conduct an *in camera* review of all e-mails of a county employee to determine if e-mails were public records under the FOIA).

2. Legislative bodies.

Records of a “public official or employee” and a “governmental agency” are covered by the FOIA. Ark. Code Ann. § 25-19-103(5)(A). This definition includes the General Assembly, legislators, legislative committees, city councils, and other bodies with legislative powers. *E.g.*, *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (city council); Ark. Op. Att’y Gen. Nos. 96-123 (county quorum court), 84-091 (legislative committees). The definition might not include advisory bodies. Ark. Op. Att’y Gen. No. 2006-059 (Chancellor Search Advisory Committee). However, a task force that discusses official business of the larger governing body and will provide information upon which the governing body “could foreseeably take action” is included in the definition of a “governmental agency.” Ark. Op. Att’y Gen. No. 2006-194 (HVAC-Plumbing Examining Committee Recommendation Feasibility Joint Task Force).

3. Courts.

Records of a “public official or employee” and a “governmental agency” are covered by the FOIA. Ark. Code Ann. § 25-19-103(5)(A). While this definition reaches judges and the courts, application of the FOIA to the judicial branch would violate the separation of powers doctrine. *Arkansas Newspaper Inc. v. Patterson*, 281 Ark. 213, 662 S.W.2d 826 (1984); Ark. Op. Att’y Gen. No. 90-217. *But see* Ark. Op. Att’y Gen. No. 95-031. Although the public has a common-law right of access to judicial records, the courts have inherent authority to seal them in narrow circumstances, and statutes or court rules may also authorize closure. See *Arkansas Best Corp. v. General Electric Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994); *Arkansas Dep’t of Human Services v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994).

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

Records of “any . . . agency wholly or partially supported by public funds or expending public funds” are subject to the FOIA. Ark. Code Ann. § 25-19-103(5)(A). Thus, the act applies to nongovernmental entities that receive public funds. *E.g.*, *Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 S.W.2d 258 (1981), *app. dism’d*, 455 U.S. 931 (1982) (athletic conference); *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985) (nonprofit corporation that received federal funds); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990) (law firms hired by city); *Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board*, 72 Ark. App. 37, 32 S.W.3d 60 (2000) (volunteer fire department); Ark. Op. Att’y Gen. Nos. 2000-260 (county economic development corporation), 95-273 (area agency on aging, a nonprofit corporation funded by the state and the federal government), 94-001 (nonprofit rural water association that had received government grant), 92-205 (same), 87-448 (industrial development corporation funded by local governments).

Even when a private entity’s records might be subject to disclosure under the FOIA, that private entity alone cannot be sued under the Act. *Nabholz Construction Corp. v. Contractors for Public Protection Ass’n*,

371 Ark. 411, 266 S.W.3d 689 (2007). Instead, the request must be directed to the public agency or entity covered by the Act. *Id.* However, a “simple ‘hand-off’ of documents” to private entities will not allow public agencies and entities to circumvent the FOIA by claiming the documents are not in their control. *Id.* at 419, 266 S.W.3d at 694.

(1) However, the mere receipt of public funds is not sufficient to bring a private entity within the FOIA; rather, the question is whether the private group carries on “public business” or is otherwise intertwined with the activities of government. *City of Fayetteville v. Edmark, supra*; Ark. Op. Att’y Gen. Nos. 2001-352, 2001-324, 2001-069, 2000-039, 99-090, 98-139, 97-148, 96-123, 96-116, 96-013, 94-023, 92-205. Compare *Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board, supra* (FOIA applies to volunteer fire department that received fees from public fire protection district, as well as governmental loans, and “performed a service routinely provided by government”), with *Sutton v. Ballet Arkansas Inc.*, CIV 00-3066 (Pulaski County Cir. Ct. 2000) (ballet company that received some financial support from the state and county was not subject to the FOIA because its activities “do not appear to be intertwined to a government function so much that its activities are tantamount to government action”).

(2) A private entity that receives public funds for services rendered to a government agency is subject to FOIA when the services could have been performed by public employees. *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995) (accounting firm); *City of Fayetteville v. Edmark, supra* (law firm); *Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board, supra* (volunteer fire department). See, e.g., Ark. Op. Att’y Gen. Nos. 2008-154 (school bus contractor), 2005-067 (volunteer fire department), 2004-223 (nonprofit corporation that operates county hospital), 2000-260 (nonprofit economic development corporation that receives sales tax revenue), 2000-039 (nonprofit corporation that provides services for developmentally disabled individuals), 99-350 (probation records maintained by private contractor working for a municipal judge), 96-372 (volunteer fire department), 97-141 (attorney who contracted with county to collect court-imposed fines), 96-185 (private company that operates state prison), 96-116 (nonprofit corporation that leases hospital facility from county), 95-273 (area agency on aging, a nonprofit corporation, operates under close supervision and direction from the government and performs functions that would otherwise be performed by the government), 95-121 (chamber of commerce that provides services to city advertising and promotion commission), 94-023 (chamber of commerce engaged in economic development on city’s behalf), 92-220 (nonprofit corporation that operated public access cable channel under contract with city). Compare Ark. Op. Att’y Gen. Nos. 96-185 (construction company that builds state prison is not subject to FOIA), 95-353 (FOIA does not apply to nonprofit corporation that receives public funding to operate aerospace education center, where neither the corporation’s budget nor activities were subject to review by any government body), 83-163 (private hospital that receives Medicare and Medicaid payments is not subject to FOIA).

(3) The FOIA will generally be inapplicable to a private entity that sells supplies, equipment, and other products to a government agency. For example, the records in possession of a bank concerning credit cards issued to state employees for travel expenses probably would not be subject to disclosure under the FOIA. Ark. Op. Att’y Gen. No. 2003-064. With respect to services, there is little concern that government might circumvent the FOIA by hiring private contractors. However, this concern is not present when goods are involved, since government cannot produce all of the goods it needs to function and, as a practical matter, has no choice but to purchase materials from the private sector. Ark. Op. Att’y Gen. No. 96-123.

(4) Direct receipt of public funds by the private organization is necessary to trigger the FOIA. Indirect support, such as the use of public property without charge, is not sufficient. *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993); Ark. Op. Att’y Gen. Nos. 97-148, 96-267, 96-196, 96-116, 95-077. A private entity receiving federal funds (as opposed to state funds) is subject to the Arkansas FOIA. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). See also Ark. Op. Att’y Gen. No. 2007-192.

(5) A private organization that receives partial financial support from government is partially bound by FOIA requirements. Thus, the act applies only to records relevant to the task for which a private contractor is hired or a nonprofit corporation receives a government grant. *City of Fayetteville v. Edmark, supra*; Ark. Op. Att’y Gen. Nos. 2007-192, 2001-364, 96-290, 96-267, 96-185, 95-121.

(6) Records created or received by a private organization that no longer receives public funds after termination of such support are not subject to the FOIA, while records created or received during the funding period remain open to the public on a continuing basis. Ark. Op. Att’y Gen. Nos. 2007-210, 99-090, 99-157, 94-023, 92-220, 88-004.

b. Bodies whose members include governmental officials.

Shortly after the FOIA’s passage, the Attorney General suggested that the act applies to a private entity whose board of directors includes government officials. Ark. Op. Att’y Gen. (April 16, 1971). That position is no longer tenable in light of the Supreme Court’s holding that only the direct receipt of public funds by a private organization triggers the act. *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993).

5. Multi-state or regional bodies.

Multistate or regional bodies are subject to the FOIA if they are supported by public funds. See e.g., Ark. Op. Att’y Gen. No. 89-372 (regional organizations); Inf. Att’y Gen. Op. (August 31, 1987) (bi-state criminal justice center).

As always, a separate, specific statutory mandate of confidentiality may supersede application of the FOIA. For example, the Interstate Commission for Adult Offender Supervision, created by interstate compact, is authorized to adopt by-laws that “establish conditions and procedures under which the [commission] shall make its information and official records available to the public for inspection or copying.” The commission “may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary rights” and “may enter into agreements with law enforcement agencies to receive or exchange information or records subject to nondisclosure and confidentiality provisions.” Ark. Code Ann. § 12-51-301(e)(3).

6. Advisory boards and commissions, quasi-governmental entities.

Advisory boards and committees are subject to the FOIA if they are directly supported by public funds. Ark. Op. Att’y Gen. Nos. 99-407, 95-128, 84-091.

C. What records are and are not subject to the act?

1. What kind of records are covered?

All records “required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions” are public records. Ark. Code Ann. § 25-19-103(5)(A). Opinions issued by an agency that are not required by statute to be kept as records can constitute records “otherwise kept” and be subject

to disclosure. See *Ryan & Co. AR, Inc. v. Weiss*, 371 Ark. 43, 263 S.W.3d 489 (2007) (gross receipt tax opinions issued by Department of Finance & Administration subject to disclosure with redaction of identifying information). Records “maintained in public offices or by public employees within the scope of their employment” are presumed to be public records. *Id.* In *Orsini v. Beck*, No. 98-1011, 2000 WL 426568 (Ark. 2000), the Supreme Court held that law library logs kept by a Department of Correction facility, which were “maintained by the prison to monitor the use of the library,” were presumed to be public records under Section 25-19-103(5)(A). See also *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989) (ballots recording individual votes of members of governing body “obviously constitute a record of the performance or lack of performance of official functions”), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); Ark. Op. Att’y Gen. Nos. 97-244 (customer-specific records of municipal water system are public records), 97-406 (records of inmate telephone calls, which are routinely taped by prison officials, are public records within the meaning of the FOIA), 93-002 (document “proposing a course of action” by the action is within statutory definition).

(1) The FOIA covers both records originated by an agency and those received by the agency from third parties. *Arkansas Dep’t of Finance & Admin. v. Pharmacy Associates Inc.*, 333 Ark. 451, 970 S.W.2d 217 (1998); Ark. Op. Att’y Gen. Nos. 2000-220, 97-091, 87-415, 85-100. See also *Byrne v. Eagle*, 319 Ark. 587, 892 S.W.2d 487 (1995); *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986); *Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 S.W.2d 258 (1981), *app. dism’d*, 455 U.S. 931 (1982). Under a 1997 amendment to the FOIA, a settlement agreement entered into by a state agency at the conclusion of an investigation in pursuit of civil penalties “shall be deemed a public document” for purposes of the act. Ark. Code Ann. § 25-19-105(h). Exception is made for settlement agreements “involving any state tax covered by the Arkansas Tax Procedure Act, § 26-18-101 et seq.” *Id.*

(2) Under a 2001 amendment, “software acquired by purchase, lease, or license” is expressly excluded from the FOIA’s definition of “public record.” Ark. Code Ann. § 25-19-103(5)(B) (added by Act 1653 of 2001). Even before this amendment, it was doubtful that software fell within the definition, which provides that a record must reflect “the performance or lack of performance of official functions.” *Id.* § 25-19-103(5)(A). Moreover, if software had been considered a public record, it would most likely have been covered by the FOIA’s exemption for records which, if disclosed, “would give advantage to competitors.” *Id.* § 25-19-105(b)(9)(A).

(3) A record is subject to the act if it is in the physical possession or administrative control of an agency. See *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). When a private entity performs work for a public entity, the public entity cannot “hand off” its records to the private entity in an attempt to circumvent the FOIA. *Nabholz Construction Corp. v. Contractors for Public Protection Ass’n*, 371 Ark. 411, 266 S.W.3d 689 (2007).

(a) With respect to records physically located at an agency, the phrase “performance or lack of performance of official functions” limits the act’s reach, as does the “scope of employment” language. These terms suggest that personal notes and records of public employees are not subject to disclosure. Ark. Op. Att’y Gen. No. 91-374. See also Ark. Op. Att’y Gen. Nos. 2005-095 (personal e-mail created on public computer during working hours may be shielded from disclosure if shown to be personal in nature), 97-145 (records of faculty senate at state university are not public records unless the senate is “part of the official policy development process” at the institution). Records must have a “substantial nexus” with the government’s activities to classify as public

records subject to FOIA. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718, *opinion after remand*, 371 Ark. 217, 264 S.W.3d 465 (2007) (requiring trial court to conduct an *in camera* review of all e-mails of a county employee to determine if e-mails were public records under the FOIA).

(b) Because the act applies to records over which the agency has administrative control or constructive possession, the agency is obligated to acquire such records in response to an FOIA request. Costs incurred in obtaining the records must be borne by the agency, not the requester. *Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004) (employee’s personal check, used to pay public expense, in possession of private bank); *Swaney v. Tilford*, *supra*.

(c) The fact that a public record is maintained outside the official’s office does not exempt it from the FOIA. Ark. Op. Att’y Gen. No. 2000-220 (constituent’s letter to an alderman, sent to the latter’s home and seeking some official action, is a public record).

2. What physical form of records are covered?

The physical form of the record is unimportant, for the FOIA applies to “writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium.” Ark. Code Ann. § 25-19-103(5)(A). Act 1653 of 2001 added the phrase “electronic or computer-based information” to emphasize that the FOIA applies to such records, even though the prior version of the act was broad enough to cover them. See, e.g., *Blaylock v. Staley*, 293 Ark. 26, 732 S.W.2d 152 (1987) (computer tapes); Ark. Op. Att’y Gen. Nos. 2000-096, 99-018 (electronically stored e-mail). *But see Nolan v. Little*, 359 Ark. 161, 196 S.W.3d 1 (2004) (refusing to apply FOIA to seed sample, stored for testing by the State Plant Board, regardless of any “genetic information” the seed contained, where extracting information would require destruction of sample); Ark. Op. Att’y Gen. No. 91-323 (recording of executive session may not be a “record” for FOIA purposes, since it can be viewed as “the embodiment of the meeting”).

(1) The FOIA applies only to existing records, *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995), and an agency “is not required to compile information or create a record” in response to a request. Ark. Code Ann. § 25-19-105(d)(2)(C) (added by Act 1653 of 2001). Similarly, there is no requirement for an agency “to answer interrogatories or to otherwise provide raw information.” Ark. Op. Att’y Gen. No. 2000-305.

(2) Nothing in the FOIA requires an agency to maintain records in a certain medium or format. Ark. Op. Att’y Gen. No. 97-030. Indeed, the act “does not itself provide that any particular records shall be kept.” *McMahan v. Board of Trustees of the Univ. of Arkansas*, 255 Ark. 108, 499 S.W.2d 56 (1973). However, a record that exists in multiple media or formats must be made available on request “in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian’s existing software.” Ark. Code Ann. § 25-19-105(d)(2)(B) (added by Act 1653 of 2001).

3. Are certain records available for inspection but not copying?

As amended by Act 1653 of 2001, the FOIA gives citizens the right to “inspect, copy, or receive copies of public records.” Ark. Code Ann. § 25-19-105(a)(2)(A). Upon payment of any required fees, the agency must furnish copies if it has the necessary equipment. *Id.* § 25-19-105(d)(2)(A). Previously, public records were available for only “inspection and copying,” and there was no obligation on the part of the agency to provide copies or to make available duplicating equipment.

D. Fee provisions or practices.

1. Levels or limitations on fees.

Unless a specific statutory provision authorizes a higher fee, “any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.” Ark. Code Ann. § 25-19-105(d)(3)(A)(i) (added by Act 1653 of 2001). The custodian may also charge “the actual costs of mailing or transmitting the record by facsimile or other electronic means.” *Id.* § 25-19-105(d)(3)(A)(ii). An itemized breakdown of all charges must be provided to the requester *Id.* § 25-19-105(d)(3)(B).

2. Particular fee specifications or provisions.

a. Search.

Ark. Code Ann. § 27-50-909(a)(2) (Office of Driver Services may charge \$10.00 to employers or prospective employers or \$7.00 to other citizens, an amount set by Ark. Code Ann. § 27-23-117, for search of drivers’ records).

b. Duplication.

Ark. Code Ann. § 7-5-109(b) (county clerk may charge a fee for the reproduction of voter registration lists, based on cost of reproduction); § 7-5-109(c) (setting fee for computerized lists of registered voters from \$10 to \$50, depending on the number of voters on the list); § 14-55-402(b) (city clerk may charge for copies of ordinances at same rate allowed circuit clerks for copies); § 21-6-202(a)(7) (\$0.80 per page for copies of records of Secretary of State); § 21-6-202(a)(8) (Secretary of State may set fee for copies of maps and similar documents, based on clerical labor and paper costs); § 21-6-401(c)(3) (\$0.50 per page for copies of Supreme Court records); § 21-6-402(11) (circuit clerks may charge \$1.50 per page for copies of transcripts); § 27-19-406(b) (\$0.50 per page for abstracts of driver records under Motor Vehicle Safety Responsibility Act); § 27-53-210(b)(1) and § 27-53-210(c)(1) (\$10.00 for copy of state and local law enforcement motor vehicle accident report).

3. Provisions for fee waivers.

As amended by Act 1653 of 2001, the FOIA provides that “[c]opies may be furnished without charge or at a reduced charge if the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest.” Ark. Code Ann. § 25-19-105(d)(3)(A)(iv).

4. Requirements or prohibitions regarding advance payment.

“If the estimated fee exceeds twenty-five dollars (\$25.00), the custodian may require the requester to pay that fee in advance.” Ark. Code Ann. § 25-19-105(d)(3)(A)(iii) (added by Act 1653 of 2001).

5. Have agencies imposed prohibitive fees to discourage requesters?

Practices under the prior law, which neither required copying nor addressed copying fees, do not suggest that agencies have imposed prohibitively high copying charges to discourage requesters. A 1999 survey by media organizations revealed that charges for document copies ranged from free to \$1.00 per page. See *The FOIArkansas Project* (1999), available online at <http://www.FOIArkansas.com>. Earlier, one small city attempted to set fees for copying topographical maps at a level above the actual cost of duplication in an effort to recoup the cost of developing the records, to defray the cost of maintaining and upgrading them, and to reflect their perceived commercial value. See “City Can’t Profit from Sale of Documents, Judge Says,” *Morning News of Northwest Arkansas* (Oct. 19, 1995), p. 3A.

E. Who enforces the act?

1. Attorney General’s role.

The Attorney General over the years has issued hundreds of opinions interpreting the FOIA. These are advisory opinions, not binding on Arkansas courts. As a practical matter, Arkansas courts frequently cite to Attorney General opinions when reaching FOIA decisions. The Attorney General is authorized by statute to render legal opinions at the request of certain public officials, including members of the General Assembly, all state boards and commissions, the heads of executive departments, and prosecuting attorneys. Ark. Code Ann. § 25-16-706. Furthermore, the FOIA itself provides for Attorney General opinions in cases involving personnel and job evaluation records: “Either the custodian, requester, or the subject of the records may immediately seek an opinion from the Attorney General, who, within three (3) working days of receipt of the request, shall issue an opinion stating whether the decision is consistent with this chapter. In the event of a review by the Attorney General, the custodian shall not disclose the records until the Attorney General has issued his opinion.” Ark. Code Ann. § 25-19-105(c)(3)(B).

The Attorney General also has a power of enforcement in case of FOIA non-compliance. The courts have regarded the Attorney General as a “citizen” entitled to employ the FOIA. *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998). Thus the Attorney General may file a repeat request denied to another citizen, and if the request is again denied, the Attorney General may bring a civil suit under the FOIA, effectively standing in the shoes of the original requester.

2. Availability of an ombudsman.

There is no FOIA ombudsman.

3. Commission or agency enforcement.

No commission or agency is charged with FOIA enforcement.

F. Are there sanctions for noncompliance?

The FOIA provides for both criminal and civil enforcement. The FOIA’s criminal sanctions are found in Section 25-19-104, which provides that “[a]ny person who negligently violates any provisions of this [act] 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. Ark. Code Ann. § 5-4-104, -201, -401. The FOIA’s civil process is found in Section 25-19-107 and permits civil suits to enforce the FOIA. Section 25-19-107(c) empowers courts to find guilty of contempt persons who fail to comply with court orders, and Section 25-19-107(d) allows an award of attorney fees to a “substantially prevail[ing] plaintiff” unless the court finds that the position of the defendant was substantially justified or that other circumstances make an award of these expenses unjust.”

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

a. General or specific?

The FOIA exempts specified records and contains a “catch-all” exemption that incorporates confidentiality provisions of other statutes. Ark. Code Ann. § 25-19-105(a)-(c). If a record does not fall squarely within an exemption, it must be disclosed. Exemptions are to be narrowly construed, and when the scope of a given exemption is unclear, it will usually be interpreted in a manner favoring disclosure. *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000); *Arkansas Dep’t of Finance & Admin. v. Pharmacy Associates Inc.*, 333 Ark. 451, 970 S.W.2d 217 (1998); *Legislative Joint Auditing Committee v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987); *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). However, courts faced with a question of statutory interpreta-

tion will also use a “common sense” approach that balances the public interest in disclosure and the need for confidentiality. *Byrne v. Eagle*, 319 Ark. 587, 892 S.W.2d 487 (1995); *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992). The location of records is irrelevant with respect to the application of particular exemptions. Ark. Op. Att’y Gen. Nos. 2001-172, 2000-257, 2000-225, 97-356, 92-237, 91-323.

b. Mandatory or discretionary?

The act’s exemptions are mandatory. See Ark. Code Ann. § 25-19-105(b) (records in exempt categories “shall not be deemed to be made open to the public”). Thus, an agency may not disclose records that fall within an exemption absent a court order, subpoena, or written consent of the person whose rights are protected by the exemption. Ark. Op. Att’y Gen. Nos. 99-334, 91-374, 91-323.

c. Patterned after federal Freedom of Information Act?

Although the exemptions are not patterned on the federal FOI act, there is some common ground. In those situations, federal case law will likely be persuasive. *E.g.*, *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998) (citing federal cases in construing exemption for personnel records, which are exempt only to the extent that their disclosure would constitute a “clearly unwarranted invasion of personal privacy”); *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992) (same).

2. Discussion of each exemption.

(1) *State income tax records.* Ark. Code Ann. § 25-19-105(b)(1). This exemption covers more than just income tax returns of individuals. See, *e.g.*, Ark. Op. Att’y Gen. No. 91-093 (payroll records indicating amount withheld from an employee’s paycheck for state income taxes). However, it does not apply to records pertaining to other state taxes, such as the sales tax, or to tax records of political entities other than the state. Some of these other tax records are exempt under other statutes. *E.g.*, Ark. Code Ann. § 26-18-303 (forbidding disclosure of state tax records maintained by Department of Finance & Administration, with certain enumerated exceptions).

(2) *Medical, adoption, and education records.* Ark. Code Ann. § 25-19-105(b)(2).

(a) The exemption for “medical records” is limited to specific medical information about individuals, such as test results, employee health reports, and workers’ compensation records that reflect the nature and cause of an injury. Ark. Op. Att’y Gen. Nos. 95-262, 87-135, 87-070. The records must be related to the treatment or diagnosis of a medical condition. Ark. Op. Att’y Gen. Nos. 2000-232, 2000-226, 99-110, 99-042, 98-261, 98-202, 96-203, 91-374. Consequently, records that identify persons who received money from a county indigent care fund do not qualify. Ark. Op. Att’y Gen. No. 89-147, nor do hospital billing records. Ark. Op. Att’y Gen. No. 91-208. Also, statements by medical personnel to law enforcement officers will typically not be exempt. Ark. Op. Att’y Gen. No. 99-110. Ambulance records that include the patient’s medical history and a paramedic’s evaluation are exempt, as are home health care records. Ark. Op. Att’y Gen. Nos. 99-110, 96-203. Autopsy reports prepared by the State Medical Examiner are not considered medical records; however, these records are confidential under Ark. Code Ann. § 12-12-312(a) so long as they remain in the possession of the state crime lab. Once they leave the custody of the crime lab, however, the reports are subject to the FOIA unless another exemption, such as the act’s law enforcement exemption, Ark. Code Ann. § 25-19-105(b)(6), is applicable. See Ark. Op. Att’y Gen. Nos. 2001-100, 99-110, 97-294, 87-353. If the autopsy report is prepared by someone other than the State Medical Examiner, the crime lab confidentiality statute would not apply. Ark. Op. Att’y Gen. Nos. 97-294 (autopsy report that was never in possession of crime lab is subject to disclosure), 87-135 (autopsy report of coroner qualified to conduct post mortem tests is available under FOIA unless otherwise exempted).

(b) There are apparently no cases construing the exemption for adoption records; the Supreme Court has simply recognized that it exists. *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994). In 1978, the Attorney General opined that the exemption did not apply to records containing the names and addresses of foster families. Ark. Op. Att’y Gen. No. 78-108. However, another statute exempts records compiled or received by a state agency in placing a child for adoption, including foster care records. Ark. Code Ann. § 9-28-407(h) (as amended by Act 1211 of 2001). This statute and others dealing specifically with adoption records are independent exemptions to the FOIA. See, *e.g.*, Ark. Code Ann. § 9-9-217, 9-9-406, 9-9-506.

(c) As amended by Act 1653 of 2001, Section 25-19-105(b)(2) exempts “education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of [that act].” Previously, the FOIA used the term “scholastic records,” which may have been narrower in scope than the definition of “education records” in FERPA. The 2001 amendment makes the exemption coextensive with FERPA, which defines “education records” as “records, files, documents and other materials which . . . contain information directly related to a student; and . . . are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A). See Ark. Op. Att’y Gen. No. 2001-154 (name of student and other personally identifying information in letter is within the FERPA definition and thus exempt from disclosure under Section 25-19-105(b)(2)).

Certain records are excluded from the FERPA definition, *e.g.*, records of instructional personnel and records created by a law enforcement unit of the institution or agency for law enforcement purposes. *Id.* § 1232g(a)(4)(B). Moreover, so-called “directory information” — a student’s name, address, telephone number, date and place of birth, major field of study, participation in school activities and sports, weight and height of members of athletic teams, degrees and awards received, and other schools attended — is not covered by the act, although a student may specifically request that the institution or agency not disclose such information without his or her prior consent. *Id.* § 1232g(a)(5)(A) & (B). Under a 1998 amendment, some disciplinary records of students at institutions of postsecondary education may be disclosed. *Id.* § 1232g(b)(6).

(3) *Historical and archeological files.* Ark. Code Ann. § 25-19-105(b)(3). This provision exempts the “site files and records maintained by the Arkansas Historic Preservation Program and the Arkansas Archeological Survey.” It was apparently designed to prevent the disclosure of information that would create a risk of destruction or harm to historic sites or objects. Ark. Op. Att’y Gen. No. 86-213.

(4) *Grand jury minutes.* Ark. Code Ann. § 25-19-105(b)(4). This exemption states only that grand jury “minutes” are not to be disclosed and may therefore not apply to other grand jury records. The term “minutes” apparently includes any record reflecting what transpired before the grand jury, including documentary evidence received and a summary or verbatim transcript of testimony. See *Davis v. Kirby*, 244 Ark. 142, 424 S.W.2d 149 (1968). However, the grand jury’s use of a public record in deliberations does not affect its status as a public document. See *Collins v. State*, 200 Ark. 1027, 143 S.W.2d 1 (1940).

(5) *Judicial and quasi-judicial drafts.* Ark. Code Ann. § 25-19-105(b)(5). This provision, which exempts “[u]npublished drafts of judicial or quasi-judicial opinions,” is designed to shield draft opinions of the courts and those administrative agencies that act in a quasi-judicial capacity. However, it does not extend to other types of preliminary materials prepared by agencies, such as proposals, draft guidelines, or memoranda. Ark. Op. Att’y Gen. No. 91-175.

(6) *Law enforcement records.* Ark. Code Ann. § 25-19-105(b)(6). This exemption applies to “[u]ndisclosed investigations by law enforcement

agencies of suspected criminal activity. For a more thorough discussion, see part IV.N.4, *infra*, of this outline.

(7) *Unpublished memoranda, working papers, and correspondence.* Ark. Code Ann. § 25-19-105(b)(7). This provision exempts “[u]npublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Judges, and the Attorney General.”

(a) The exemption applies to records of the specified officials, their staffs, and outside consultants. *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992). *But see Legislative Joint Auditing Committee v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987) (working papers of employees of a legislative committee are not within the exemption); Ark. Op. Att’y Gen. No. 95-128 (research files and rough drafts of the governor’s advisory committee on the state constitution are not working papers of the governor). It is clear that the working papers, memoranda, and correspondence of state administrative agencies, cities, counties, and school districts are not exempt. *Arkansas Hwy. & Transp. Dep’t v. Hope Brick Works Inc.*, 294 Ark. 490, 744 S.W.2d 711 (1988). The exemption is applicable to records of the Lieutenant Governor generated during his or her service as acting governor, but not otherwise. Ark. Op. Att’y Gen. No. 95-277.

(b) With respect to the Governor, the Attorney General has opined that the exemption “should not be construed to apply to the work product of all executive branch employees, even when they are working on projects of interest to the Governor.” If that were the case, “the FOIA would, in effect, become inapplicable to the executive branch of government.” Rather, the exemption should apply “only if it is established, as a factual matter, that the individuals who generated the documents work for the Governor and serve in a representative capacity or relationship similar to that served by members of the Governor’s staff such that the case of *Bryant v. Mars* will support the exemption.” Ark. Op. Att’y Gen. No. 97-369. In *Bryant*, the Supreme Court held that the exemption applied to the working papers of Assistant Attorneys General and consultants retained by the Attorney General’s Office.

(c) Although unpublished memoranda, working papers, and correspondence are not available under the FOIA from an official or staff member covered by the exemption, the same documents are not exempt when in the hands of a person to whom the exemption does not apply. Ark. Op. Att’y Gen. Nos. 95-128, 93-166, 92-346. The term “unpublished” is given its usual meaning, *i.e.*, “issued, put into circulation, or made publicly known.” Ark. Op. Att’y Gen. No. 92-129 (letter from state senator to deputy prosecutor in regard to criminal defendant was published and thus not within exemption).

(d) Except for the Attorney General, his or her staff, and outside consultants, the exemption does not apply to litigation files and similar records of lawyers who represent government bodies, such as city and county attorneys, law firms retained by cities and school districts, and staff counsel at state agencies. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); *Arkansas Hwy. & Transp. Dep’t v. Hope Brick Works Inc.*, *supra*. Neither the attorney-client privilege nor the work-product doctrine create exemptions to the FOIA. *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987). However, documents of some government attorneys might be protected from disclosure by another statute. *E.g.*, Ark. Code Ann. § 23-42-207(b)(2) (work product and other communications of Securities Commissioner and staff lawyers are confidential).

(8) *Court orders and rules.* Ark. Code Ann. § 25-19-105(b)(8). Under this provision, a record is exempt from the FOIA if “protected from disclosure by order or rule of court.” *See, e.g., Arkansas Newspaper Inc. v. Patterson*, 281 Ark. 213, 662 S.W.2d 826 (1984) (court order sealing judicial records to prevent prejudicial pretrial publicity); *Gannett River*

States Pub. Co. v. Arkansas Judicial Discipline & Disability Comm’n, 304 Ark. 244, 801 S.W.2d 292 (1990) (Supreme Court rules providing for confidentiality of records of judicial discipline commission); Ark. Op. Att’y Gen. No. 90-217 (rules governing records of Supreme Court committee on professional conduct).

(a) Without this exemption, the FOIA would likely be unconstitutional as applied to the courts. *See Arkansas Newspaper Inc. v. Patterson*, *supra* (exemption “prevents any entanglement in the separation of powers doctrine”).

(b) The order or rule must specifically require confidentiality. In *Scott v. Smith*, 292 Ark. 174, 728 S.W.2d 515 (1987), the Supreme Court held that Rule 502 of the Rules of Evidence (the attorney-client privilege) and Rule 26(b)(3) of the Rules of Civil Procedure (the work-product doctrine) do not fall within this exemption, since neither deals directly with the question of disclosure under the FOIA.

(c) A trial court has “inherent authority to protect the integrity of the court in actions pending before it” and may issue “appropriate protective orders” exempting records from the FOIA. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). For example, a trial court may seal documents filed with the court to prevent prejudicial pretrial publicity, *Arkansas Newspaper Inc. v. Patterson*, *supra*, and enter an order forbidding disclosure of police files to protect a criminal defendant’s right to a fair trial. *Arkansas Gazette Co. v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284 (1990). A trial court hearing an FOIA case must “give credit” to protective orders issued by another court but may not use this exemption to enter its own order preventing access to records that would otherwise be available for public inspection. *City of Fayetteville v. Edmark*, *supra*.

(9)(A) *Competitive advantage.* Ark. Code Ann. § 25-19-105(b)(9)(A). This exemption covers “[f]iles which, if disclosed, would give advantage to competitors or bidders.” It protects trade secrets and other proprietary information collected by governmental entities in the course of their activities and may, in some circumstances, shield records which, if made public, would put government itself at a competitive disadvantage. A state agency may assert this exemption on behalf of the person who submitted the information at issue to the agency. The exemption neither excludes documents “owned by the state” nor requires the state “to possess a proprietary interest in the [records] for the exception to apply[.]” *Arkansas Dep’t of Finance & Admin. v. Pharmacy Associates Inc.*, 333 Ark. 451, 970 S.W.2d 217 (1998). The party resisting disclosure bears the burden of proof. *Gannett River States Pub. Co. v. Arkansas Industrial Development Comm’n*, 303 Ark. 684, 799 S.W.2d 543 (1990).

(a) Although the exemption does not use the term “trade secrets,” disclosure of such information would plainly give advantage to competitors or bidders. *See Miller v. Fairfield Bay Inc.*, 247 Ark. 565, 446 S.W.2d 660 (1969) (describing trade secret as a formula, method or device “that gives one an advantage over competitors”). In deciding whether a record contains a trade secret, courts will likely look for guidance to cases interpreting the Trade Secrets Act, Ark. Code Ann. § 4-75-601 to -607. *See, e.g., Allen v. Jobar Inc.*, 308 Ark. 45, 823 S.W.2d 824 (1992) (equipment designs and customer lists are both trade secrets). If a record is determined to be a trade secret, competitive harm should be presumed and the record deemed exempt. *See Ark. Op. Att’y Gen. No. 95-106.*

(b) If the information is not a trade secret, exemption applies if it can be shown that public disclosure is “likely to cause substantial harm to [the] competitive position” of the person or entity that has provided commercial or financial information to the agency. *Arkansas Dep’t of Finance & Admin. v. Pharmacy Associates Inc.*, *supra*, quoting *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). *Compare Leathers v. W.S. Compton Co. Inc.*, 316 Ark. 10, 870 S.W.2d 710 (1994) (interpreting an identical tax code provision that was based on the FOIA as

requiring confidentiality if disclosure of certain tax records would give *any* advantage to a competitor). The exemption also applies if disclosure of the records would impair the government's ability to obtain the information in the future. Ark. Op. Att'y Gen. Nos. 97-071, 93-254, 87-473.

(c) The Attorney General has emphasized that “[e]very business has its unique characteristics which, if revealed, may or may not give advantage to a competitor.” Ark. Op. Att'y Gen. No. 87-194. This determination is made on a case-by-case basis, with the submitter having the burden of proof. Ark. Op. Att'y Gen. Nos. 97-071, 94-015, 91-390. *See, e.g.*, Ark. Op. Att'y Gen. Nos. 98-026 (records obtained by Livestock & Poultry Commission from poultry companies pursuant to federal requirements probably fall within the exemption, because “the nature of the information . . . appears to be particularly susceptible to misuse by competitors”), 96-363 (amount of tax credit and identity of recipients under low income housing program are probably not exempt, once the building has been placed in service and the final tax credit determined), 96-301 (submissions by professionals being considered for work on county project may be exempt), 96-229 (policy and procedure manual prepared by firm working under contract with state agency is probably not exempt), 95-414 (records reflecting hotel and restaurant taxes paid by specific business entity may be exempt), 95-106 (contracts and other documents detailing the delivery of services or supplies may be exempt), 94-015 (customer lists are exempt), 93-254 (customer lists and records that reflect pricing structure are exempt), 92-156 (payroll records and wage rates may be exempt), 88-113 (exemption not likely to apply to records of Arkansas Forestry Commission pertaining to farming operations of individual landowners), 88-065 (customer lists are exempt), 87-259 (city tax records based on gross receipts or sales could qualify), 87-194 (county tax assessment records might be exempt), 84-127 (information submitted by utilities to Public Service Commission are not exempt), 84-042 (financial reports obtained by Transportation Commission in regulating common carriers are not exempt), 83-190 (financial data furnished to Arkansas Economic Development Commission in connection with grant application may be exempt), 82-148 (records of exploratory activities gathered by the Commission on Pollution Control and Ecology are exempt).

(d) Unlike the federal FOI act, which exempts “trade secrets and commercial or financial information *obtained from a person*,” the Arkansas exemption appears to apply to *any* record, regardless of its source, if its disclosure would give advantage to a competitor. In some circumstances, government entities, as well as private organizations subject to the FOIA, could well be placed at a competitive disadvantage if records that they have generated are made public. Thus a circuit court held the exemption applicable to certain fund-raising activities of a state university that competes with other colleges for donations from the private sector. *Arkansas Times Ltd. P'ship v. University of Arkansas*, No. CV-2002-7175 (Pulaski County Cir. Ct. 2002). *See also* Ark. Op. Att'y Gen. Nos. 97-048 (exemption could apply to records of state university hospital), 95-108 (exemption is potentially applicable where disclosure of records would have adverse competitive impact on a city).

(e) A brief passage in *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990), suggests that the competitive advantage exemption applies only if a competitor requests the records. Under this interpretation, an agency could not invoke the exemption when the news media files an FOIA request. Surely this is not the law, for the issue is not the identity of the requester but whether competitors would benefit if the information becomes public. An earlier decision, *Gannett River States Pub. Co. v. Arkansas Industrial Development Comm'n*, *supra*, reflects proper application of this exemption. There a newspaper sought access to agency records concerning a company that planned to locate a steel mill in the state. In remanding the case for further proceedings, the

Supreme Court held that the trial judge should examine the records *in camera* and make evidentiary findings as to whether their disclosure would give advantage to the company's competitors.

(f) Insofar as harm to bidders is concerned, the exemption is designed to protect the integrity of the bidding process for government contracts. Obviously, a potential bidder should not be able to obtain, prior to the deadline for submission, a copy of bids already filed. But even after the bids have been opened, disclosure of financial information may have an adverse impact if it is so detailed that other companies could use it to estimate the successful bidder's costs and thus possibly undercut his bids on future projects. *Arkansas Dep't of Finance & Admin. v. Pharmacy Associates Inc.*, *supra*. Moreover, disclosure of a bidder's confidential financial information “would have the effect of diminishing the prospect of original and candid bids in the future.” *Id.* The exemption could also come into play apart from the bidding process itself. *See, e.g.*, Ark. Op. Att'y Gen. No. 92-156 (wage rate information obtained by labor department from companies that had participated in sealed bidding might be exempt).

(9)(B) *Arkansas Economic Development Commission*. Ark. Code Ann. § 25-19-105(b)(9)(B). This provision, which was intended to further the state's interest in economic development, covers records maintained by the commission relating to “any business entity's planning, site location, expansion, operations, or product development and marketing,” unless the business entity consents to disclosure. The exemption remains applicable when the commission furnishes the records to another public entity. Ark. Op. Att'y Gen. No. 95-108. However, similar records of city or county economic development agencies do not fall within the exemption. *Id.* Other commission records are exempt under specific statutes. *E.g.*, Ark. Code Ann. § 15-4-606 (applications and related documents submitted under Industrial Revenue Bond Law). A comprehensive statutory system for the development of economic “super projects,” *id.* § 15-4-3201 to -3224, extends the AEDC privilege to certain state and local entities insofar as they handle and prepare records pursuant to their “powers, duties, and obligations” under the system, *id.* § 15-4-3222.

(10) *Undercover law enforcement officers*. Ark. Code Ann. § 25-19-105(b)(10). This exemption protects the “identities of law enforcement officers currently working undercover with their agencies and identified in the Arkansas Minimum Standards Office as undercover officers.” By its own terms, the exemption does not cover records of the number of undercover officers that a law enforcement agency has listed. Moreover, it does not apply to former undercover officers who are no longer employed. Ark. Op. Att'y Gen. No. 96-005.

(11) *Computer Security Measures*. Ark. Code Ann. § 25-19-105(b)(11). Added by Act 1653 of 2001, this exemption covers “[r]ecords containing measures, procedures, instructions, or related data used to cause a computer or a computer system or network, including telecommunication networks, or applications thereon, to perform security functions, including, but not limited to, passwords, personal identification numbers, transaction authorization mechanisms, and other means of preventing access to computers, computer systems or networks, or any data residing therein.” *See* Ark. Op. Att'y Gen. No. 2003-064 (opining that credit card account numbers and agency identification numbers are exempt because their disclosure could “result in the type of security breach that this exemption was apparently intended to prevent”).

(12) *Personnel and evaluation records*. Ark. Code Ann. § 25-19-105(b)(12) & (c)(1). Under subsection (b)(12), personnel records are exempt from the FOIA “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.” If, however, the personnel records in question are “employee evaluation or job performance records,” a different standard applies. Subsection (c)(1) provides that such records are open for public inspection only if a final administrative decision has been made to terminate or suspend the employee, the evaluation records formed a basis for that decision, and there is a “compelling public interest” in disclosure. Under Ark. Code Ann.

§ 25-19-105(c)(2), an employee or former employee has the right to examine his or her own personnel and evaluation records, even though they are exempt from disclosure to the public. However, this special right of access does not apply to records exempt from disclosure by virtue of the FOIA or another statute, Ark. Op. Att’y Gen. No. 98-223, or records concerning another employee that may have been placed in the requester’s own personnel file, unless they can also be characterized as personnel, evaluation, or job performance records of the requester. *See* Ark. Op. Att’y Gen. Nos. 2000-058, 95-131.

(a) Personnel Records

(i) Although there is no definition in the FOIA, the Attorney General has consistently taken the position that the term “personnel records” includes virtually all records pertaining to individual employees and former employees, with the exception of evaluation and job performance records. Ark. Op. Att’y Gen. Nos. 2001-152, 2000-257, 2000-232, 2000-130, 99-244, 99-148, 99-042, 99-040. *See, e.g., Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992) (records of police promotional examination); Ark. Op. Att’y Gen. Nos. 2001-152 (unsolicited complaints about public school employee), 2001-120 (travel records), 99-147 (exit interview documents), 99-040 (change of status forms, memorandum reflecting employee transfer, emergency contact form, letters reflecting conditions of employment and standard probationary period), 98-223 (records that employee is required to prepare, complete, and sign as part of his or her departure from service), 98-126 (time cards), 98-001 (complaint alleging sexual harassment), 97-331 (pension and employee benefit records), 97-034 (list of employees who attended firearms training course), 97-070 (worker’s compensation documents, grievance records), 96-205 (salary history), 96-142 (resumes, interview notes, letters of recommendation, transfer records, insurance forms, legal documents), 96-088 (letter of resignation), 95-256 (pre-employment background investigation), 92-132 (records reflecting vacation time and sick leave), 91-003 (leave records), 90-335 (lists of names and addresses of employees), 88-224 (payroll records). *Compare* Ark. Op. Att’y Gen. No. 94-391 (college administrator’s letter in response to a complaint filed with an accrediting body is not a personnel record, even though it mentions an employee). Documents that contain information about employees of other agencies are apparently not considered personnel records for purposes of the exemption. *See* Ark. Op. Att’y Gen. No. 92-145 (teacher employment contracts maintained in office of county treasurer, as required by statute, are not personnel records). Records that do not pertain to individual employees, but rather discuss the employees as a group, are not covered by the exemption. Ark. Op. Att’y Gen. No. 96-258.

(ii) Whether the records of unsuccessful job applicants are personnel records remains an open question. In the past, the Attorney General’s Office has taken the position that records of job applicants are not personnel records because potential employees are not personnel. *E.g.,* Ark. Op. Att’y Gen. Nos. 98-102, 90-248. More recent opinions, however, treat the question as open. Ark. Op. Att’y Gen. Nos. 2005-004 n.1, 99-002. Two circuit courts have split on the issue. If the applicant is successful, his or her job application, resume, and related materials are clearly personnel records. Ark. Op. Att’y Gen. Nos. 2005-004, 97-042, 96-190, 95-244, 95-113, 94-187. The same is true for applicants for promotion or for a different government position. Ark. Op. Att’y Gen. Nos. 2005-004, 96-142, 88-133.

(iii) Certain personnel records—such as medical and scholastic records, state income tax records, and the home addresses of non-elected state employees—are confidential by virtue of other FOIA exemptions. *See, e.g.,* Ark. Op. Att’y

Gen. Nos. 2001-169, 2001-080, 2000-257, 2000-168, 99-042, 98-261, 98-202, 98-173, 98-146, 98-101, 97-190, 96-222, 95-244, 94-319, 94-198, 92-191. Federal tax withholding information (income tax, FICA) is exempt as a matter of federal law. Ark. Op. Att’y Gen. Nos. 96-363, 91-093. Personnel records that would otherwise be disclosable are exempt if they are being used in an ongoing criminal investigation. Ark. Op. Att’y Gen. Nos. 97-079, 95-351, 93-055.

(iv) The test for determining whether personnel records are exempt is objective, and the fact that the employee may consider release of the information invasive of his or her privacy is not relevant. Ark. Op. Att’y Gen. Nos. 2005-058, 2003-027, 2001-169, 98-152, 98-101, 98-001, 97-079, 97-034, 96-222, 96-193. In *Young v. Rice*, *supra*, the Supreme Court made plain that a two-step balancing process is to be employed, with the scales tipped in favor of disclosure. The Court subsequently refined this approach in *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998).

A. The first issue is whether the information is of a personal or intimate nature sufficient to give rise to a substantial privacy interest. If that is so, the issue becomes whether that privacy interest is outweighed by the public’s interest in disclosure. *Young v. Rice*, *supra*. The Attorney General has opined that there is no need to proceed to the second step if the privacy interest is de minimis. Ark. Op. Att’y Gen. Nos. 95-220, 95-169, 93-131. A substantial privacy interest, the Court said in *Young*, exists in records that reveal “the intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.” Such a privacy interest can exist even if the subject of the records is deceased, although in some cases the individual’s death may affect the outcome of the balancing process. Ark. Op. Att’y Gen. Nos. 96-368.

B. In *Stilley v. McBride*, *supra*, the Supreme Court held that the “public interest” inquiry requires a determination that the records at issue would shed some light on the workings of government, since the purpose of the FOIA is to enable citizens to learn “what their government is up to.” That purpose is not served by disclosure of information about private citizens that reveals little or nothing about an agency’s own conduct.

C. The Supreme Court concluded in *Young v. Rice*, *supra*, that tape recordings made of candidates during a police department promotional examination were exempt, pointing out that disclosure would reveal “embarrassing behaviors,” and could “subject the candidates to embarrassment,” and could “perhaps threaten their future employment.” Similarly, the Court held in *Stilley v. McBride*, *supra*, that records showing the home addresses of police officers were exempt. In that case, an attorney sought access to the records so that he could mail the summons and complaint to two officers against whom he had filed a civil rights action. The Court determined that the officers’ privacy interests were substantial, since officers expect that they and their families will be safe at home. Also, disclosure of home addresses might subject the officers to harassment. On the other hand, there was little public interest in disclosure. The attorney’s “sole reason for requesting [the] addresses was to utilize a cheaper method of obtaining service of process on the officers,” and this reason “has little or nothing to do with learning or reporting the officers’ activities.” Because the privacy interests were substantial and the public interest non-existent, the requested records were exempt from disclosure.

D. The Attorney General has frequently employed the balancing test. *See, e.g.*, Ark. Op. Att’y Gen. Nos. 2000-258 (applying *Young* under factual circumstances similar to those in that case), 98-097 (names and addresses of retired public employees are exempt), 96-088 (employee’s letter of resignation was exempt where it set forth personal reasons for the decision and did not contain any details about the operation of the agency). *Compare* Ark. Op. Att’y Gen. Nos. 98-131 (because “the identity of public employees is ordinarily a matter of significant public interest,” identification photos of employees will not usually be exempt), 97-331 (disclosure of former mayor’s pension records would not constitute a clearly unwarranted invasion of personal privacy), 95-167 (letter of resignation that reflects salary information is not exempt), 94-119 (privacy interest of the former president of state university was outweighed by the public’s interest in the circumstances of his termination), 89-077 (letter stating employee’s reasons for resigning were not sufficiently personal in nature to trigger exemption).

(v) The following personnel records have been deemed exempt by the Attorney General: Social Security numbers; marital status and similar family information, citizenship status and religious affiliation; welfare payments, payroll deductions, credit union statements, employee benefit information, and other personal financial records; insurance coverage; individual scores on promotional exams and other tests; a state university’s personnel action form; the photograph of a former undercover police officer; letters of resignation that contain information of a “personal and intimate nature”; and, in some situations, the reasons a teacher prefers to be assigned to a particular school. *See, e.g.*, Ark. Op. Att’y Gen. Nos. 2002-160, 2000-257, 2000-168, 2000-159, 2000-122, 2000-119, 99-360, 99-002, 98-296, 98-126, 98-122, 97-331, 97-286, 97-189, 97-177, 97-079, 97-063, 97-033, 96-308, 96-205, 96-134, 96-088, 96-005, 95-220, 95-169, 95-113, 95-110, 94-198, 93-185, 93-131, 93-105, 93-079, 93-076, 92-266, 92-191, 92-089, 90-295.

(vi) By contrast, the Attorney General has concluded that the following are not exempt: names and race of employees; birth certificates; date and place of birth; job applications, resumes, and references; employment history and military service records; fingerprint cards; identification photos; records reflecting arrests or convictions; background investigations; confirmation that psychological evaluation found law enforcement officer fit for service; educational background, training, and certification; letters of appreciation; membership in civic, professional, or social organizations; job titles and salary information; employment contracts; records indicating vacation time, sick leave, or other absences; travel records submitted for reimbursement; an unsolicited letter of complaint about an employee; applications for promotion and records relating to promotion; terms of a settlement releasing an employee from his contract; a letter advising employee of his removal from active duty but not including the reasons therefor; letters of resignation that contained no personal information; retirement notices. *See, e.g.*, Ark. Op. Att’y Gen. Nos. 2002-159, 2001-122, 2001-120, 2001-080, 2000-175, 2000-168, 2000-130, 2000-122, 99-054, 99-035, 99-016, 99-015, 99-007, 98-281, 98-202, 98-131, 98-130, 98-122, 98-101, 98-001, 97-286, 97-190, 97-177, 97-079, 97-063, 97-042, 97-034, 97-033, 97-032, 96-269, 96-257, 96-205, 96-190, 96-142, 96-134, 95-256, 95-220, 95-169, 95-167, 95-151, 95-113, 95-080, 95-070, 95-012, 94-337, 94-319, 94-178, 94-113, 93-407, 93-185, 93-131, 93-114, 93-105, 93-076, 92-247, 92-291, 92-132, 91-351, 91-003, 90-335, 90-023, 89-077, 88-133, 88-078.

(vii) As amended in 2001, the FOIA exempts “[h]ome addresses of nonelected state employees contained in employer records,” although the custodian of the records must, on request, “verify an employee’s city or county of residence or address on record.” Ark. Code Ann. § 25-19-105(b)(13). This exemption does not apply to other public employees, such as those who work for cities and school districts. Prior to *Stilley v. McBride*, *supra*, the Attorney General took the position that unlisted home addresses of public employees are exempt from disclosure, but that listed addresses are not. *E.g.*, Ark. Op. Att’y Gen. No. 93-403. Post-*Stilley* opinions recognize that even listed addresses might be exempt, because the information can be used to harass and disclosure does not further the purposes of the FOIA. *E.g.*, Ark. Op. Att’y Gen. Nos. 2001-148, 2000-257, 99-040. However, these opinions also state that the information is not exempt unless the employee in question has a “heightened privacy interest.” That is the case, for instance, with respect to law enforcement officers, *see* Ark. Op. Att’y Gen. No. 2000-168, and perhaps to public school personnel. *See* Ark. Op. Att’y Gen. Nos. 2002-169, 2002-158, 2001-148. But a heightened privacy interest requirement seems inconsistent with *Stilley*. Because the home address of any public employee — whether he or she be a file clerk or a police officer — does not shed any light whatsoever on the workings of government, it is arguably exempt under that decision even if the employee’s privacy interest cannot be described as “heightened.”

(b) Employee Evaluation Records

(i) Subsection (c)(1) does not provide a definition of “employee evaluation or job performance records,” but it does state that “preliminary notes and other materials” associated with the evaluation process are included. Thus, the provision exempts not only the end product, i.e., the evaluation itself, but also other records from which the evaluation was prepared. *See* Ark. Op. Att’y Gen. Nos. 2001-047 (evaluations of school administrator by faculty and staff), 96-256 (formal evaluation), 96-046 (evaluation appraisal forms), 95-258 (quarterly performance reports), 92-089 (“dock status” memorandum), 90-295 (memoranda and notes). Evaluation scores are also exempt. Ark. Op. Att’y Gen. Nos. 96-205, 94-194. The records must be “created by or at the behest of the employer” for use in the evaluation process. Ark. Op. Att’y Gen. No. 2001-147. Thus, faculty evaluations performed by a student government association and not used in the university’s evaluation process are not exempt. Ark. Op. Att’y Gen. No. 90-086.

(ii) The term “job performance record” has been interpreted as any record relating to an employee’s performance or lack of performance on the job. Ark. Op. Att’y Gen. Nos. 2001-149, 2000-335, 2000-257, 2000-130, 99-360, 99-244, 98-296, 97-190, 94-306. This definition covers a variety of records. *E.g.*, Ark. Op. Att’y Gen. Nos. 2001-147 (documents pertaining to high school football coach’s recruiting of student athlete), 2000-257 (sheriff’s investigation into deputy’s intimate relationship with prisoner), 2000-175 (transcripts of interviews conducted during investigation into employee’s conduct), 2000-166 (grievance records filed in response to supervisor’s comments concerning employee’s job performance), 99-289 (written reprimands, letters of caution, documents upon which a recommendation for dismissal was based, and letters related to promotions and demotions), 98-006 (records of disciplinary actions less severe than suspension or termination), 98-001 (witness statements taken as part of investigation into allegation of sexual harassment), 97-415 (memorandum setting out basis for suspension and records created as part of inquiry into misconduct leading to the suspension), 97-261 (document containing incidents that led to employee’s termination), 97-190

(letter of warning to employee), 97-081 (records of police department internal affairs investigation), 97-063 (notice of termination, employee's response and request for hearing, employee's work history), 96-324 (records created as part of inquiry into alleged employee misconduct), 95-326 (records on which suspension of ambulance driver was based), 95-171 (letter of termination that includes reasons for the decision), 95-109 (memorandum explaining employee's demotion), 94-127 (records of investigation into alleged wrongdoing), 94-110 (records of previous suspension), 93-105 (records of faculty member's promotion), 93-076 (incident reports), 93-055 (letter recommending termination, letter of reprimand, and other disciplinary records), 92-319 (internal affairs investigation of police officer), 92-247 (notice to terminate teacher and records collected or created as part of investigation leading to that decision), 92-207 (letter of caution to jail employee and other records concerning investigation into an incident at the facility), 92-191 (records reflecting prior suspensions, without pay, of employee who was subsequently terminated), 91-303 (written reprimand), 91-003 (records concerning state agency's investigation into alleged misconduct by employee), 88-162 (records of inquiry into charges of sexual harassment and resulting reprimand), 88-097 (documents on which recommendation for dismissal of teachers was based).

(iii) A document does not constitute a job performance record merely because it discusses the general duties of an employee or reflects some aspect of how an employee is doing in his or her job. A previously prepared document or an unsolicited letter of complaint about an employee is not transformed into a job performance record by virtue of a subsequent investigation. However, these documents are personnel records covered by Ark. Code Ann. § 25-19-105(b)(12). Ark. Op. Att'y Gen. Nos. 2001-123, 2000-175, 2000-174, 2000-166, 2000-058, 99-339, 99-026, 98-001, 97-342, 97-081, 96-257.

(iv) Evaluations of persons other than employees, such as members of a school board, are not covered. Ark. Op. Att'y Gen. No. 87-361. In that opinion, the Attorney General relied on the common law definition of employee, which would exclude independent contractors. If an agency has legitimately obtained for its use copies of evaluations or job performance records of employees at another agency, the exemption is applicable with respect to those copies. Ark. Op. Att'y Gen. Nos. 2000-279, 2000-257.

(v) Evaluation or job performance records are open for public inspection "only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure." Ark. Code Ann. § 25-19-105(c)(1). If one or more of these conditions are not met, the records are exempt. Ark. Op. Att'y Gen. Nos. 2000-257, 2000-166, 2000-130, 2000-122, 2000-059, 99-244, 99-148, 99-147, 99-042, 99-041, 98-075, 98-006, 98-001, 97-154.

A. The records are exempt if there has been no suspension or termination, if the employee resigned, or if he or she was reprimanded, demoted, placed on probation, or given a letter of caution. Ark. Op. Att'y Gen. Nos. 2000-175, 98-296, 98-188, 97-176, 97-079, 97-063, 94-306, 92-266, 92-207, 91-324, 91-303, 90-295, 88-094. Similarly, the non-renewal of an employee's contract at the end of its term does not constitute a termination. Ark. Op. Att'y Gen. No. 2001-125. Moreover, the fact that an employee resigned under pressure does not necessarily amount to a constructive termination. Ark. Op. Att'y Gen. No. 2005-094, 2004-219,

2005-164, 2002-235, 2001-246, 2001-184, 98-188, 97-063. Even if the employee has been terminated, the records are exempt until the effective date of the termination. Ark. Op. Att'y Gen. No. 95-242.

B. Also, the records are exempt if the employee has administrative remedies available, if a decision to suspend him has been overturned, or if the employee has been reinstated and placed on probation. Ark. Op. Att'y Gen. Nos. 2005-181, 2005-160, 2002-263, 2002-158, 2000-224, 99-361, 97-415, 97-176, 97-063, 95-171, 91-296, 91-180, 88-308. The term "final administrative resolution" means the final decision-making step taken by the employing entity, regardless of the bureaucratic level at which the decision is made. Ark. Op. Att'y Gen. No. 2005-181, 98-006, 94-306, 91-003. If no review is sought, the initial decision is final. Ark. Op. Att'y Gen. Nos. 98-006, 90-292.

C. Even if the records formed a basis for a final decision to suspend or terminate the employee, they remain exempt unless there is a "compelling public interest" in disclosure. This test is more rigorous than the "clearly unwarranted invasion of personal privacy" standard that applies to other personnel records. Moreover, the mere fact that an employee has been terminated or suspended does not mean that the records should be made public. Ark. Op. Att'y Gen. Nos. 99-361, 99-148, 99-041, 98-122, 97-415, 95-242. Whether there is a compelling public interest in disclosure of these records turns on several factors, including the nature of the infraction that led to suspension or termination, the existence of a public controversy related to the agency and its employees, and the employee's rank within the agency. Ark. Op. Att'y Gen. Nos. 99-361, 99-148, 99-147, 99-041, 98-122, 98-006. There is a compelling interest in disclosure of records that reflect employee conduct that is illegal, undermines the public trust, or compromises public safety. Ark. Op. Att'y Gen. Nos. 2001-147, 99-361, 98-210, 97-415, 97-400, 97-261, 97-190, 97-081, 97-079, 94-312, 94-119, 92-247, 92-089, 92-075, 91-296, 89-073. "[T]he balance tips in favor of disclosure where the allegations involve sexual misconduct by a manager directed toward a worker." Ark. Op. Att'y Gen. No. 2002-095, *accord* Ark. Op. Att'y Gen. Nos. 2005-032, 2004-012. Also, a compelling interest is more likely to be found when a high-level employee is involved than when the records of rank-and-file workers are at issue. Ark. Op. Att'y Gen. Nos. 2004-012 (mayor), 96-258 (vice president of Arkansas Development Finance Authority), 95-242 (second-highest salaried employee in city government), 95-109 (director of Arkansas Arts Council), 94-119 (university president). By contrast, the Attorney General concluded that the test was not met with respect to suspension letters sent to rank-and-file employees while an investigation was in progress. The letters would not accurately inform the public about the employees' conduct because more information was being collected, and the end result of the investigation was a determination that no further disciplinary action was warranted. Ark. Op. Att'y Gen. No. 2000-242. This is not to say, however, that records of low-level employees will always be exempt. *See, e.g.*, Ark. Op. Att'y Gen. No. 98-075 (records of police officers suspended or terminated for driving accidents are not exempt, since the public "clearly has an interest in the cautious driving of its law enforcement officers in emergency situations").

(13) *Home Addresses of State Employees*. Ark. Code Ann. § 25-19-105(b)(13). This provision, added by Act 1653 of 2001 (and Act 1336, which contained identical language), and amended in 2003, exempts

“[h]ome addresses of non-elected state employees, non-elected municipal employees, and non-elected county employees contained in employer records.” However, the custodian “shall verify an employee’s city or county of residence or address on record on request.” The State Employees Association pushed strongly for this exemption, which before 2003 applied only to state employees. Arguably, however, the home address of a public employee may be exempt under the FOIA’s exemption for personnel records. See Part II.A.2.m of this outline.

(14) *Licensing Examinations.* Ark. Code Ann. § 25-19-105(b)(14). Added by Act 1259 of 2001, this exemption applies to “[m]aterials, information, examinations, and answers to examinations utilized by boards and commissions for purposes of testing applicants for licensure by state boards or commissions.” Statutes with similar provisions had previously been enacted with respect to particular licensing agencies. *E.g.*, Ark. Code Ann. § 17-86-204(d) (licensing examinations of State Board of Massage Therapy).

(15) *Military Discharge Records.* In 2003, the General Assembly added to the FOIA an exemption for “[m]ilitary service discharge records or DD Form 214, the Certificate of Release or Discharge from Active Duty . . . , filed with the county recorder as provided under § 14-2-102.” This exemption, which appears in Section 25-19-105(b)(15), covers such records “for veterans discharged from service less than seventy (70) years from the current date.” Access is permitted to the veteran and his or her spouse and children. The exemption was prompted by legislative concern about identity theft. Pursuant to a subsequent act of 2005, a veteran may seek a court order to withdraw a discharge record from court files. Ark. Code Ann. § 14-2-102(c)(4).

(16) *Public Water System Security Records.* In 2003, the General Assembly added an exemption for records “relating to security for any public water system.” This provision was deemed necessary because information “could be obtained for terroristic purposes, including contamination and destruction of public water systems.” The exemption includes in its scope “analyses, investigations, studies, reports, recommendations, requests for proposals, drawings, diagrams, blueprints, and plans,” as well as risk and vulnerability assessments, plans and proposals for preventing and mitigating security risks, records pertaining to emergency response and recovery, security plans and procedures, and “[a]ny other records containing information that, if disclosed, might jeopardize or compromise efforts to secure and protect the public water system.” The exemption by its terms expires on July 1, 2013, but may be renewed by the General Assembly.

(17) *Licenses to carry concealed handgun.* Records concerning “the issuance, renewal, expiration, suspension, or revocation of a license to carry a concealed handgun” for both current and past licensees are exempt from the FOIA. Ark. Code Ann. § 25-19-105(b)(19). However, the name and zip code for an applicant, licensee, or past licensee “may be released upon request by a citizen of Arkansas.” Ark. Code Ann. § 25-19-105(b)(19)(C).

(18) *Settlement Agreements in Tax Cases.* Under a 1997 amendment to the FOIA, a settlement agreement reached “at the conclusion of any investigation conducted by a state agency in pursuit of civil penalties . . . shall be deemed a public document” for purposes of the act. Ark. Code Ann. § 25-19-105(h). However, exception is made for settlement agreements “involving any state tax covered by the Arkansas Tax Procedure Act.” *Id.*

B. Other statutory exclusions.

(1) *In general.* The FOIA also contains a “catch-all” provision that incorporates by reference other statutes that expressly provide for nondisclosure. Ark. Code Ann. § 25-19-105(a)(1) (records are open to inspection “[e]xcept as otherwise specifically provided by . . . laws enacted to provide otherwise.”) In order to fall within this provision, a statute must specifically provide for nondisclosure. *Troutt Brothers Inc. v. Emison*, 311 Ark. 27, 841 S.W.2d 604 (1992); *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). However, the statute need not refer to

the FOIA by name or statute number in order to qualify as an exemption. Ark. Op. Att’y Gen. No. 97-278. See, *e.g.*, *Byrne v. Eagle*, 319 Ark. 587, 892 S.W.2d 487 (1995) (loan guarantee applications filed with the Arkansas Development Finance Authority are exempt by virtue of Ark. Code Ann. § 15-5-409, which does not mention the FOIA). The catch-all provision reaches several dozen state statutes and is also broad enough to encompass federal statutes. See Ark. Op. Att’y Gen. No. 94-265 (a record prepared by a federal agency and sent to a state agency is not subject to disclosure if it is exempt under the federal FOIA and the federal agency has asserted the exemption). Moreover, by virtue of the Supremacy Clause, a federal confidentiality requirement supersedes a state disclosure statute. Ark. Op. Att’y Gen. Nos. 96-363, 91-093.

(2) *Adoption.* Ark. Code Ann. § 9-9-217 (adoption records); § 9-9-406 (records of subsidized adoptions); § 9-9-506 (voluntary adoption registry); Ark. Code Ann. § 9-28-407(h) (records compiled or received by a state agency engaged in placing a child for adoption, including foster care and protective services records).

(3) *Education.* Ark. Code Ann. § 6-15-415 (records containing identifiable scores of students on basic competency test); § 6-15-503 (home schooling records); § 6-17-407 (superintendent’s investigation of alleged misconduct by school employees); § 6-17-410, 6-17-411 (criminal background checks of prospective teachers); § 6-17-414 (criminal background checks of applicants for noncertified staff positions at public schools); § 6-17-603 (scores on state teacher test); § 6-41-218 (evaluations of handicapped children); § 12-12-515 (child abuse information received from Department of Human Services).

(4) *Health and Medical.* Ark. Code Ann. § 16-46-105 (records of hospital medical review committees); § 17-80-106 (records compiled pursuant to investigation by various licensing agencies for health care professionals); § 17-90-508 (records of State Board of Optometry pertaining to impaired optometrists); § 17-92-707 (records of State Board of Pharmacy with respect to pharmacists impaired by chemical dependency); § 17-95-104 (reports of physician misconduct submitted to State Medical Board); § 17-95-107 (physician credentialing information obtained by State Medical Board); § 17-95-304 (records compiled pursuant to investigation by State Medical Board); § 20-7-305 (information collected pursuant to Health Data Clearing House Act that identifies individual patients, health care providers, institutions, or health plans, and patient-identifying information collected by Department of Health or Arkansas Center for Health); § 20-9-221 (Department of Health records concerning hospitals and nursing homes); § 20-9-304 (certain records of State Board of Health); § 20-10-210 (certain records of Office of Long Term Care); § 20-10-228 (records involving inspections of licensees by Office of Long Term Care); § 20-10-811 (records involving inspections of home health care agencies by Division of Health Care Facility Services); § 20-13-806 (records of Department of Health under Trauma System Act); § 20-14-506 (personally identifiable information in program for disabled children); § 20-15-203 (Cancer Registry of Arkansas); § 20-16-207 (certain records of Arkansas Reproductive Health Monitoring System); § 20-16-504 (venereal disease records of Department of Health’s Division of Health Maintenance); § 20-16-507 (records that could identify or be used to identify women tested during pregnancy); § 20-17-618 (organ donor registry); § 20-18-304, 20-18-305 (birth certificates, death certificates, other vital records); § 20-18-704 (putative father registry); § 20-27-1706 (records collected by Child Death Review Panel); § 20-46-103 (certain records of State Board of Health, Arkansas Medical Society); § 20-46-104 (certain records of State Hospital); § 20-78-704 (records of Prenatal & Early Childhood Nurse Home Visitation Program administered by Department of Health).

(5) *Insurance.* Ark. Code Ann. § 11-9-106 (active investigatory files of Insurance Department’s workers compensation fraud unit); § 23-61-107 (data and reports provided Insurance Commissioner by National Association of Insurance Commissioners); § 23-61-205 (examination and investigation reports of Insurance Commissioner); §

23-61-207 (working papers of Insurance Commissioner); § 23-62-404 (summary of basis for Insurance Commissioner's decision refusing to issue reinsurance intermediary license); § 23-63-517 (material obtained by Insurance Commissioner under Insurance Holding Company Regulatory Act); § 23-66-507 (documents pertaining to insurance fraud investigations); § 23-67-212 (trade secrets and proprietary information submitted by insurers in connection with rate regulation); § 23-79-511 (records of Comprehensive Health Insurance Pool); § 27-14-414 ("all data and information" received by the Vehicle Insurance Database within the Revenue Division of the Department of Finance and Administration)

(6) *Judicial*. Ark. Code Ann. § 16-10-404 (records of Judicial Discipline & Disability Commission).

(7) *Juveniles*. Ark. Code Ann. § 9-27-309 (juvenile court records); § 9-27-347 (probation reports); § 9-27-502 (competency evaluations); § 9-28-208 (court's report on juvenile committed to Division of Youth Services); § 16-87-216 (records of Juvenile Ombudsman Division of Arkansas Public Defender Commission); § 16-90-601 to -603, -605 (expunging records of minor non-violent first offenders and minor felony offenders subsequently pardoned).

(8) *Law Enforcement*. Ark. Code Ann. § 5-55-104 (records obtained by Attorney General, prosecuting attorney, or Department of Human Services under Medicaid Fraud Act); § 12-10-317 (subscriber information regarding "911" calls); § 12-12-211, 12-12-212, 12-12-1008 to -1011 (Arkansas Crime Information Center); § 12-12-312 (records of State Medical Examiner and crime laboratory, including autopsy reports); § 12-12-913 (information regarding sex and child offenders); § 12-12-1003 (criminal history information collected and maintained by Arkansas Crime Information Center); § 12-12-1114, 12-12-1115 (DNA information submitted to state crime laboratory); § 12-27-113 (inmate records of Department of Correction); § 12-12-1717 (records concerning abused adults), § 12-27-137 (emergency preparedness plans of Department of Correction); § 14-15-304 (records gathered and created during coroner's investigation, prior to issuance of final report; medical information remains exempt, except as disclosed in the final report); § 16-82-101 (results of mandatory HIV tests performed on persons convicted of sexual offenses); § 16-85-408 (indictment issued against person not confined); § 16-90-605 (expunging records relating to a conviction for which a person has received a pardon); § 16-90-1104 (law enforcement agency shall not disclose information identifying victim of sex crime, which certain exceptions); § 16-90-1110 (address and telephone number of crime victim or immediate family member); § 16-93-202 (presentence reports, parole reports, and supervision histories); § 16-93-303 (expunging records of first offenders); § 20-77-907 (records obtained by Department of Human Services and the Attorney General pursuant to Medicaid Fraud False Claims Act).

(9) *Library*. Ark. Code Ann. § 13-2-703, 13-2-704 (library patron records).

(10) *Local Government*. Ark. Code Ann. § 14-14-110 (county records involving personal privacy).

(11) *Motor Vehicles*. Ark. Code Ann. § 17-1-104 (name, address, and Social Security number on application for noncommercial driver's license); § 27-14-412 (motor vehicle registration records); § 27-14-414 ("all data and information" received by the Vehicle Insurance Database within the Revenue Division of the Department of Finance and Administration); § 27-19-510 (accident report filed by drivers); § 27-50-906, 27-50-907 (records of convictions of moving traffic violations).

(12) *State Government*. Ark. Code Ann. § 2-7-202 (records received by Arkansas Farm Mediation Office); § 2-20-407 (certain records filed with Arkansas Soybean Promotion Board); § 4-28-403 (donor lists obtained by Attorney General from charitable organizations); § 10-3-305 (records of Legislative Council); § 10-4-422 (working pa-

pers of Division of Legislative Audit); § 11-2-204 (records of Mediation and Conciliation Service); § 11-9-409 (identity of employee may not be disclosed as part of job safety information system); § 11-9-905 (self-insurance reports submitted to Workers' Compensation Commission); § 11-10-314 (certain records of Employment Security Department); § 11-10-902 (information on new employees submitted by employers to the Employment Security Department); § 15-4-606 (applications and related documents submitted to Arkansas Economic Development Commission under Industrial Revenue Bond Law); § 15-4-1226 (records obtained by State Bank Department concerning county and regional industrial development companies); § 15-5-409 (applications and supporting documents submitted to Arkansas Development Finance Authority under bond guarantee program); § 15-72-805 (reports submitted to Arkansas Energy Office under Emergency Petroleum Set-Aside Act); § 16-90-711 (certain records submitted by claimants to Crime Victims Reparations Board); § 17-1-104 (Social Security numbers of persons applying for occupational, business, or professional licenses); § 17-14-205 (sample appraisals and other work papers submitted to Appraiser Licensing and Certification Board); § 17-27-313 (criminal background checks of applicants for professional counselor's license); § 17-86-204 (licensing examinations of State Board of Massage Therapy); § 17-90-101 (reports of malpractice claims submitted by optometrists to State Board of Optometry); § 17-90-508 (records of State Optometry Board pertaining to impaired optometrists); § 17-97-312 (criminal background checks of applicants for psychologist's license); § 17-103-307 (criminal background checks of applicants for social worker's license); § 18-28-220 (documents and working papers obtained or compiled by State Auditor and his or her staff in conducting examination under Unclaimed Property Act); § 19-4-105 (audit documentation and preliminary draft of audit reports by Office of Internal Audit, as well as the final report prior to its presentation to the Governor and the state's chief fiscal officer); § 19-11-235 (information furnished by bidders under Arkansas Purchasing Law); § 19-11-711 (procurement information); § 20-13-1113 (criminal background checks of applicants for EMT certification); § 20-76-433 (records identifying persons participating in programs administered by the Department of Human Services); § 21-11-104 (names of employees who make suggestions under State Employee Suggestion System); § 21-15-105 (criminal background checks of state employees whose work requires direct contact with children); § 23-2-316 (Public Service Commission may withhold records in the public interest); § 23-42-207 (records of State Securities Commissioner, including trial preparation materials of staff attorneys); § 24-4-1003 (records of individual members of State Public Employee Retirement System and Teacher Retirement System).

(13) *Taxes*. Ark. Code Ann. § 26-18-303 (state tax records filed with Department of Finance & Administration, with certain enumerated exceptions); § 26-51-813 (income tax records and returns); § 26-54-105 (corporate franchise tax reports). The following non-tax information is available from franchise tax reports: the name and address of the corporation; the names of its president, vice president, secretary, treasurer, and controller; the total authorized capital stock with par value; the total issued and outstanding capital stock with par value; and the state of incorporation. Ark. Code Ann. § 26-18-303(b)(14), 26-54-105(h). In certain circumstances, the identities of delinquent sales taxpayers must be affirmatively published on the Internet. Ark. Code Ann. § 26-18-303(b)(18).

(14) *Trade Secrets, Financial Information*. Ark. Code Ann. § 2-16-418 (trade secrets and financial information submitted to State Plant Board); § 4-75-605 (records in judicial proceedings); § 4-88-111 (trade secrets and other records obtained by Attorney General's office); § 8-4-207, 8-4-308, 8-7-811, 8-7-909 (trade secrets obtained by Commission on Pollution Control & Ecology and Department of Environmental Quality); § 8-7-1012 (records submitted to Department of Labor to substantiate trade secret claim under Public Employees' Chemical Right to Know Act); § 12-10-318 (proprietary information submitted to CMRS Emergency Telephone Services Board); §

15-4-606 (applications and related documents submitted to Arkansas Economic Development Commission under Industrial Revenue Bond Law); § 15-4-1226 (records obtained by State Bank Department concerning county and regional industrial development companies); § 15-5-409 (loan guarantee applications filed with Arkansas Development Finance Authority); § 17-25-304 (financial records provided to Contractors Licensing Board); § 23-2-316 (proprietary information or trade secrets of regulated utilities submitted to Public Service Commission); § 23-42-207 (financial records of broker-dealers and investment advisers regulated by Securities Commissioner, and trade secrets of any person); § 23-46-101 (bank examination records and reports); § 23-51-187 (certain records of State Bank Department concerning trust companies); § 23-67-212, 23-67-219 (trade secrets and proprietary information filed with Insurance Commissioner).

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

Common Law Exemptions. Only the legislature can exempt records from the FOIA, and the courts are not free to fashion their own exemptions via the common law. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). However, public access to judicial records is governed by the common law, and the courts have inherent authority to seal their records under narrow circumstances. *See Arkansas Best Corp. v. General Electric Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994); *Arkansas Dep't of Human Services v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994).

Administrative Regulations. Agencies may not exempt records by regulation unless expressly given that power by statute. Ark. Op. Att'y Gen. No. 92-025. *See, e.g.*, Ark. Code Ann. § 14-51-301(b)(2)(B) & (9) (A) (municipal civil service commissions shall adopt rules protecting examinations from disclosure and copying); § 15-4-1226(b)(4) (Securities Commissioner may “[c]lassify as confidential” certain records obtained in connection with an investigation of a county or regional industrial development company); § 20-76-433(a)(1)(A) (records identifying persons participating in programs administered by the Department of Human Services “may be disclosed only as expressly authorized by law or regulation creating or implementing such programs”); § 23-2-316(b)(1) (Public Service Commission may restrict access to records “in the interest of the public” or, as to proprietary facts or trade secrets, “in the interest of the utility”). *See also* Ark. Code Ann. § 12-27-113(e)(2)(A) (disclosure of information in Department of Correction inmate records is unlawful “except as authorized by administrative regulation”). Administrative regulations, like statutes exempting records from the FOIA, must specifically provide for non-disclosure and will be construed narrowly by the courts. *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000).

Constitutional Right to Privacy. Although the FOIA provides some protection for privacy interests in the context of personnel records, it lacks a general exemption for records which, if disclosed, would constitute an invasion of personal privacy. However, the Arkansas Supreme Court has recognized a federal constitutional right to privacy which in some cases may prevent access under the FOIA. This right applies to matters that a person wants to keep and has kept private, can be kept private but for the challenged governmental action in disclosing the information, and would be harmful or embarrassing to a reasonable person if disclosed. If this test is satisfied, the question is “whether the governmental interest in disclosure under the [FOIA] outweighs the [individual’s] privacy interest in the nondisclosure of the personal matters.” *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). *See Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718, *opinion after remand*, 371 Ark. 217, 264 S.W.3d 465 (2007) (recognizing a private individual’s standing to assert a privacy interest in the disclosure of e-mails, requiring trial court to conduct an *in camera* review of all e-mails a county employee exchanged with the private individual to determine if e-mails were public records under the FOIA, and affirming trial court’s ruling that the private individual had no expectation of privacy in the e-mails). *See also* Ark. Op.

Att’y Gen. Nos. 2008-071, 98-260, 96-363, 96-308, 96-161, 93-356, 92-025, 91-208, 90-324.

D. Are segregable portions of records containing exempt material available?

Yes. Under Ark. Code Ann. § 25-19-105(f)(1), added by Act 1653 of 2001, “[n]o 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.” Moreover, “[a]ny reasonably segregable portion of a record shall be provided after deletion of the exempt information.” *Id.* § 25-19-105(f)(2). 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.” *Id.* § 25-19-105(f)(3). All costs incurred in separating exempt from non-exempt information are to be borne by the custodian of the records. *Id.* § 25-19-105(f)(4).

With respect to electronic records, any equipment or software acquired by an agency after July 1, 2001, “shall be in full compliance with the requirements of this section and shall not impede public access to records in electronic form.” *Id.* § 25-19-105(g). This provision was added to prevent agencies from purchasing or leasing computer equipment and software that cannot separate exempt and non-exempt information commingled in databases and other electronic records.

E. Homeland Security Measures.

The FOIA was modified with a public water security records exemption in response to concerns about terrorism. *See supra* part II.A.2.r. Other exemptions from the FOIA may be effected through other statutes.

III. STATE LAW ON ELECTRONIC RECORDS

Until its amendment in 2001, the FOIA did not expressly mention electronic records. However, it applied to “data compilations in any form,” and this provision reached electronic records. *See, e.g., Blaylock v. Staley*, 293 Ark. 26, 732 S.W.2d 152 (1987). *See also* Ark. Op. Att’y Gen. No. 99-018 (electronically stored e-mail messages are public records), 97-115 (FOIA applies to “computerized information”). In 1999, the General Assembly created the Electronic Records Study Commission to study public access to electronic information and recommend amendments to the FOIA for consideration by the legislature in 2001. The bill drafted by the ERSC formed the basis for Act 1653 of 2001, which included “electronic or computer-based information” within the FOIA’s definition of public record, Ark. Code Ann. § 25-19-103(5)(A), and made other changes to facilitate public access to data in electronic form.’

A. Can the requester choose a format for receiving records?

Yes. A citizen “may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian’s existing software.” Ark. Code Ann. § 25-19-105(d)(2)(B) (added by Act 1653 of 2001).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

Not as a matter of right. However, the 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.” Ark. Code Ann. § 25-19-109(a)(1) (added by Act 1653 of 2001). Custodians are encouraged to do so when “the cost and time involved in complying with the requests are relatively minimal.” *Id.* § 25-19-109(a)(2).

C. Does the existence of information in electronic format affect its openness?

No. As amended by Act 1653 of 2001, the FOIA defines the term “public record” to include “electronic or computer-based informa-

tion.” Ark. Code Ann. § 25-19-103(5)(A). Thus, the question is whether the record is exempt from disclosure, not whether it is maintained in electronic form. However, the form of the record may affect the application of an exemption. For example, in *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992), the Supreme Court recognized that an individual’s privacy interest in a tape recording is greater than his or her privacy interest in a transcript of that recording.

D. How is e-mail treated?

Because a public record is defined to include “electronic or computer-based information,” Ark. Code Ann. § 25-19-103(5)(A), the FOIA reaches electronic mail. Ark. Op. Att’y Gen. No. 2001-305. This was also the case prior to the 2001 amendment revising the definition to include this information, because the act reached “data compilations in any form.” See Ark. Op. Att’y Gen. Nos. 2000-096, 99-018 (electronically stored e-mail is public record).

1. Does e-mail constitute a record?

Yes. As amended by Act 1653 of 2001, the FOIA defines the term “public record” to include “electronic or computer-based information.” Ark. Code Ann. § 25-19-103(5)(A). A court may review e-mails *in camera* to decide whether they involve a public matter. If the e-mails do concern a public matter, they are considered to be a public record under the FOIA. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007).

2. Public matter on government e-mail or government hardware

Public matters on government e-mail are considered to be public records and are subject to the FOIA if there is a sufficient nexus between the e-mail messages and the activities of a government entity. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007).

3. Private matter on government e-mail or government hardware

Not all email on a government computer is considered to be a public record. Although the FOIA carries a presumption that a record is a public record, the facts giving rise to an e-mail message can be examined on a case-by-case basis. The trial court may conduct an *in camera* review to determine whether an e-mail concerns a matter of purely private concern or there is a substantial nexus between the e-mail and the activities of a government entity. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007). The Attorney General has opined that a personal e-mail created on a work computer during work hours will not be subject to disclosure if it is shown to be personal in nature. Ark. Op. Att’y Gen. No. 2005-095.

4. Public matter on private e-mail

An e-mail concerning a public matter that has been sent to the private email address of a government official is subject to disclosure under the FOIA because the statute does not specify that it only applies to messages sent to or received from government e-mail addresses. *Bradford v. Director, Employment Security Department*, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

5. Private matter on private e-mail

If an e-mail message concerns a private matter or is personal in nature, it is not subject to disclosure under the FOIA.

E. How are text messages and instant messages treated?

1. Do text messages and/or instant messages constitute a record?

Although there have been no decisions by Arkansas courts nor any Attorney General opinions concerning text messages, the FOIA defines the term “public record” to include “electronic or computer-based information.” Ark. Code Ann. § 25-19-103(5)(A). Presumably,

therefore, text messages would constitute a record.

2. Public matter message on government hardware.

Although there have been no decisions by Arkansas courts nor any Attorney General opinions concerning text messages, the FOIA defines the term “public record” to include “electronic or computer-based information.” Ark. Code Ann. § 25-19-103(5)(A). Therefore, text messages presumably constitute a record, and would probably be subject to the same analysis as e-mails, another type of “electronically or computer-based” type of information. E-mails concerning public matters on a government e-mail account are public records. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007). Therefore, text messages concerning public matters on government hardware are probably subject to disclosure.

3. Private matter message on government hardware.

Although there have been no decisions by Arkansas courts nor any Attorney General opinions concerning text messages, the FOIA defines the term “public record” to include “electronic or computer-based information.” Ark. Code Ann. § 25-19-103(5)(A). Therefore, text messages presumably constitute a record, and would probably be subject to the same analysis as e-mails, another type of “electronically or computer-based” type of information. E-mails concerning private matters on a government e-mail account are not public records. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007), so text messages concerning private matters on government hardware are probably not subject to disclosure.

4. Public matter message on private hardware.

Although there have been no decisions by Arkansas courts nor any Attorney General opinions concerning text messages, the FOIA defines the term “public record” to include “electronic or computer-based information.” Ark. Code Ann. § 25-19-103(5)(A). Therefore, text messages presumably constitute a record, and would probably be subject to the same analysis as e-mails, another type of “electronically or computer-based” type of information. E-mails concerning public matters on a private e-mail account are public records. *Bradford v. Director, Employment Security Department*, 83 Ark. App. 332, 128 S.W.3d 20 (2003). Therefore, text messages concerning public matters on private hardware are probably subject to disclosure.

5. Private matter message on private hardware.

If a text message concerns a private matter or is personal in nature, it is not subject to disclosure under the FOIA.

F. How are social media postings and messages treated?

There is no statutory or case law addressing this issue, but the FOIA defines a “public record” to include “electronic or computer-based information.” Ark. Code Ann. § 25-19-103(5)(A).

G. How are online discussion board posts treated?

There is no statutory or case law addressing this issue, but the FOIA defines a “public record” to include “electronic or computer-based information.” Ark. Code Ann. § 25-19-103(5)(A).

H. Computer software

1. Is software public?

No. The definition of public records does not include “software acquired by purchase, lease, or license.” Ark. Code Ann. § 25-19-103(5)(B).

2. Is software and/or file metadata public?

There is no statutory or case law addressing this issue.

I. How are fees for electronic records assessed?

In general, the fee for records cannot exceed the cost of reproduction. Ark. Code Ann. § 25-19-105(d)(3)(A)(i). The custodian of the

records cannot charge for the cost of personnel time when the records are being retrieved rather than customized or converted to a particular format. Ark. Op. Att’y Gen. No. 2006-093.

The custodian of the records may charge the requestor for personnel time in compiling, summarizing, or tailoring electronic data if the personnel time involved is more than two hours. Ark. Code Ann. § 25-19-109(b). The charge cannot exceed the salary of the lowest paid employee or contractor who has the ability to complete the request. *Id.* § 25-19-109(b)(2). This refers to the salary of the actual contractor who does the work, not the lowest paid employee of that contractor. Ark. Op. Att’y Gen. No. 2004-023. The custodian must also provide an “itemized breakdown” of the charges. *Id.* § 25-19-109(c).

J. Money-making schemes.

1. Revenues.

The FOIA prevents any custodian from making a profit for complying with FOIA requests. Under most circumstances, the custodian of the records may charge a fee that does not “exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.” Ark. Code Ann. § 25-19-105(d)(3)(A)(i). If the public record is in an electronic format and needs to be compiled, summarized, or converted to another form to comply with the request, the custodian may charge the requestor for the personnel time associated with the task if that time exceeds two hours. However, “The charge for personnel time 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.” Ark. Code Ann. § 25-19-109(b)(2).

2. Geographic Information Systems.

Arkansas does have a Geographic Information Systems Board, but there is currently no law outside the FOIA limiting or charging for public access to the GIS information.

K. On-line dissemination.

The FOIA requires that a “state agency, board, or commission” make certain records “publicly accessible, without charge, in electronic form via the Internet.” Ark. Code Ann. § 25-19-108(b)(1). The custodian may respond to a FOIA request by directing the requestor to the specific Internet location of the information. Ark. Code Ann. § 25-19-108(b)(2).

There are five types of information that agencies, boards, and commissions must make available on the Internet. The first category of information is “[a] description of its organization, including central and field offices, the general course and method of its operations” as well as the organization’s “established locations” and contact information for those locations, including “telephone numbers and street, mailing, electronic mail, and internet addresses and the methods by which the public may obtain access to public records.” Ark. Code Ann. § 25-19-108(a)(1).

The second type of information that the organization must provide is “[a] list and general description of its records, including computer databases.” Ark. Code Ann. § 25-19-108(a)(2).

The third type of information that the organization must provide is “[i]ts regulations, rules of procedure, any formally proposed changes, and all other written statements of policy or interpretations formulated, adopted, or used by the agency, board, or commission in the discharge of its functions.” Ark. Code Ann. § 25-19-108(a)(3)(A). Only items “that directly affect procedure and decision-making” are included in this category. Ark. Code Ann. § 25-19-108(a)(3)(B)(i). The FOIA exempts the following types of information from this rule: “[p]ersonnel policies, procedures, and internal policies” and “[s]urveys, polls, and fact-gathering for decision-making.” Ark. Code Ann. § 25-19-108(a)(3)(B)(ii)–(iii). Additionally, “[s]tatistical data furnished to a

state agency shall be posted only after the agency has concluded its final compilation and result.” Ark. Code Ann. § 25-19-108(a)(3)(B)(iv).

The fourth type of information that the organization must make available online is “[a]ll documents composing an administrative adjudication decision in a contested matter, except the parts of the decision that are expressly confidential under state or federal law.” Ark. Code Ann. § 25-19-108(a)(4).

Finally, all records that the organization determines are or will likely become “the subject of frequent requests” must be provided on the Internet, “regardless of medium or format.” Ark. Code Ann. § 25-19-108(a)(5).

IV. RECORD CATEGORIES — OPEN OR CLOSED

A. Autopsy reports.

Autopsy reports prepared by the State Medical Examiner are not considered medical records; however, these records are confidential under Ark. Code Ann. § 12-12-312(a) so long as they remain in the possession of the state crime lab. Once they leave the custody of the crime lab, however, the reports are subject to the FOIA unless another exemption, such as the act’s law enforcement exemption, Ark. Code Ann. § 25-19-105(b)(6), is applicable. *See* Ark. Op. Att’y Gen. Nos. 2001-100, 99-110, 97-294, 87-353. If the autopsy report is prepared by someone other than the State Medical Examiner, the crime lab confidentiality statute would not apply. Ark. Op. Att’y Gen. Nos. 97-294 (autopsy report that was never in possession of crime lab is subject to disclosure), 87-135 (autopsy report of coroner qualified to conduct post mortem tests is available under FOIA unless otherwise exempted).

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

There is no statutory or case law addressing this issue.

1. Rules for active investigations.

There is no statutory or case law addressing this issue.

2. Rules for closed investigations.

There is no statutory or case law addressing this issue.

C. Bank records.

Certain records of the State Bank Department “shall be confidential and shall not be exhibited or revealed to the public,” including bank examination reports filed with the department, records reflecting information obtained from bank examinations, reports revealing “facts concerning a financial institution, a capital development corporation, or [their] customers,” and personal financial statements submitted to the department. Ark. Code Ann. § 23-46-101(a). Similar provisions apply to records of the State Bank Department concerning trust companies. Ark. Code Ann. § 23-51-187. Banking records of government bodies and other entities subject to the FOIA are generally open. *See* Ark. Op. Att’y Gen. No. 91-051. *Compare* Ark. Op. Att’y Gen. No. 2003-064 (records in possession of a bank concerning credit cards issued to state employees for travel expenses probably would not be subject to disclosure under the FOIA).

D. Budgets.

Records and communications concerning the budget of a public entity are almost certainly public records and subject to disclosure. *See* Ark. Op. Att’y Gen. Nos. 2006-096 (sheriff’s budget), 2000-150 (Game and Fish Commission’s budget).

E. Business records, financial data, trade secrets.

This information is potentially exempt by virtue of the FOIA exemption for records which, if disclosed, “would give advantage to competitors or bidders.” Ark. Code Ann. § 25-19-105(b)(9)(A). Insofar as

individual financial records are concerned, the constitutional right to privacy may prohibit disclosure. *See* Ark. Op. Att’y Gen. Nos. 96-363, 90-324, 87-415. Other statutes exempt information of this type in the hands of various state agencies. *E.g.*, Ark. Code Ann. § 2-16-418 (trade secrets and financial information submitted to State Plant Board); § 4-88-111 (trade secrets obtained by consumer protection division of Attorney General’s office); § 8-4-207, 8-4-308, 8-7-811 & 8-7-909 (trade secrets obtained by Commission on Pollution Control & Ecology and Department of Environmental Quality); § 8-7-1012 (records submitted to Department of Labor to substantiate a trade secret claim under Public Employees’ Chemical Right to Know Act); § 12-10-318 (proprietary information submitted to CMRS Emergency Telephone Services Board); § 15-4-606 (applications and related documents submitted to Arkansas Economic Development Commission under Industrial Revenue Bond Law); § 15-4-1226 (records obtained by State Bank Department concerning county and regional industrial development companies); § 15-5-409 (loan guarantee applications filed with Arkansas Development Finance Authority); § 17-25-304 (financial records provided to Contractors Licensing Board); § 23-2-316 (proprietary information or trade secrets of utilities regulated by Public Service Commission); § 23-42-207 (financial records of broker-dealers and investment advisers regulated by Securities Commissioner, and trade secrets of any person); § 23-67-212, 23-67-219 (trade secrets and proprietary information filed with Insurance Commissioner). In judicial proceedings, courts may seal records to protect trade secrets. Ark. Code Ann. § 4-75-605.

F. Contracts, proposals and bids.

By statute, any contract between a state agency and any entity “shall be deemed a public record.” Ark. Code Ann. § 25-18-501. It is not clear whether the legislature intended that such contracts be open to public inspection or that they simply be included within the definition of “public record” that appears in the FOIA. *See* Ark. Code Ann. § 25-19-103(5)(A). The former seems most likely, since the definition of “public record” is broad enough to cover such contracts. If that interpretation is correct, the contracts would not be subject to any of the statutory exemptions from disclosure.

Contracts with other government bodies — such as cities, counties, and school districts — are not affected by Section 25-18-501 and could be exempt under certain circumstances. If, for example, the contracts contain detailed financial information, they may fall within the FOIA exemption for “files which, if disclosed, would give advantage to competitors or bidders.” Ark. Code Ann. § 25-19-105(b)(9)(A). The same is true with respect to proposals containing financial information, no matter what government entity is involved.

Insofar as bids are concerned, Section 25-19-105(b)(9)(A) is designed to protect the integrity of the bidding process for government contracts. Obviously, a potential bidder should not be able to obtain, prior to the deadline for submission, a copy of bids already filed. But even after the bids have been opened, disclosure of financial information may have an adverse impact if it is so detailed that other companies could use it to estimate the successful bidder’s costs and thus possibly undercut his bids on future projects. *Arkansas Dep’t of Finance & Admin. v. Pharmacy Associates Inc.*, 333 Ark. 451, 970 S.W.2d 217 (1998). Moreover, disclosure of a bidder’s confidential financial information “would have the effect of diminishing the prospect of original and candid bids in the future.” *Id.* The exemption could also come into play apart from the bidding process itself. *See, e.g.*, Ark. Op. Att’y Gen. No. 92-156 (wage rate information obtained by labor department from companies that had participated in sealed bidding might be exempt).

G. Collective bargaining records.

There is no specific exemption in the FOIA for these records, and the act’s personnel exemption cannot be stretched so far as to reach them. Statutes regarding labor and industrial relations are also silent on the issue. However, the records of the State Mediation and Con-

ciliation Service are expressly made confidential, Ark. Code Ann. § 11-2-204, as are records obtained from employers or employees by the Employment Security Division of the Department of Labor. Ark. Code Ann. § 11-10-314.

H. Coroners reports.

Records gathered and created during the course of a coroner’s investigation are exempt until the coroner’s final report is issued. However, medical information remains exempt, except as quoted in the final report. Ark. Code Ann. § 14-15-304.

I. Economic development records.

Any files that might “give advantage to competitors or bidders” if disclosed and records maintained by the Arkansas Economic Development Commission that are “related to any business entity’s planning, site location, expansion, operations, or product development and marketing” are exempt from disclosure under the FOIA unless the business entity grants approval for release. Ark. Code Ann. § 25-19-105(b)(9)(A). The exemption does not apply to records of “expenditures or grants made or administered by the commission” that are otherwise disclosable. *Id.* § 25-19-105(b)(9)(B). The Attorney General has opined that local offices of Economic Development are not included by this exemption, though records maintained by those offices might be covered by the “competitive disadvantage” exemption in § 25-19-105(b)(9). Ark. Op. Att’y Gen. No. 95-108.

J. Election records.

Arkansas election law received an overhaul in 1995 to bring the state into compliance with the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg, *et seq.* Applications and statements of absentee voters are maintained by the county clerk and open to the public. Ark. Code Ann. § 7-5-408(b), 7-5-416(b)(1)(F).

’Campaign contribution reports, which must be filed by candidates, are open to the public and must be posted on the Secretary of State’s web site. *Id.* § 7-6-214.

1. Voter registration records.

Voter registration lists are open. Ark. Const. amend. 51, § 14; Ark. Code Ann. § 7-5-109. *See Blaylock v. Staley*, 293 Ark. 26, 732 S.W.2d 152 (1987); Ark. Op. Att’y Gen. No. 94-218. However, information relating to the place where a person registered to vote, submitted a voter registration application, or updated his or her voter registration records is confidential and exempt from the FOIA, as is information relating to a declination to register to vote. Ark. Const. amend. 51, § 8(e). Moreover, the agencies through which persons may register to vote, such as a state revenue office or a public assistance agency, may not disclose voter registration information. *Id.* § 5(c)(4)(E).

2. Voting results.

Voter lists reflecting those persons who voted in an election are open to the public. Ark. Code Ann. § 7-5-317(a). *See Whorton v. Gaspard*, 239 Ark. 715, 393 S.W.2d 773 (1965) (decided under prior law). The results at a given polling place, as well as the overall results as certified by the county board of election commissioners, are also public records. *See* Ark. Code Ann. § 7-5-317, 7-5-527, 7-5-615 & 7-5-701. The ballots themselves are to be kept confidential absent a court order in connection with an election contest or criminal prosecution. *Id.* § 7-5-702(c).

K. Gun permits.

Records concerning “the issuance, renewal, expiration, suspension, or revocation of a license to carry a concealed handgun” for both current and past licensees are exempt from the FOIA. Ark. Code Ann. § 25-19-105(b)(19). However, the name and zip code for an applicant, licensee, or past licensee “may be released upon request by a citizen of Arkansas.” Ark. Code Ann. § 25-19-105(b)(19)(C).

L. Hospital reports.

The FOIA itself exempts “medical records.” Ark. Code Ann. § 25-19-105(b)(2). Hospital records can clearly fall within this exemption. See Ark. Op. Att’y Gen. No. 91-374. Other statutes may also come into play. See e.g., Ark. Code Ann. § 17-95-104(d) (reports of physician misconduct submitted by hospital to State Medical Board are confidential); § 17-95-107(d)(4) (physician credentialing information obtained by State Medical Board); § 20-9-221(a) (information about health care facilities received by State Department of Health “shall not be disclosed publicly in such manner as to identify individuals or institutions except in a proceeding involving . . . licensing or revocation of a license”), § 20-9-304(a) (reports, memoranda, and other data of hospital staff committees used in the course of medical studies for purpose of reducing morbidity or mortality “shall be strictly confidential and shall be used only for medical research”), § 20-46-104(b) (records of State Hospital are confidential). Records and reports of hospital medical review committees are also exempt from disclosure. Ark. Code Ann. § 16-46-105(a). The previous version of this statute was held insufficiently specific to qualify as an FOIA exemption, *Baxter County Newspapers Inc. v. Medical Staff of Baxter Gen. Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981), but the amended statute passes muster. Ark. Op. Att’y Gen. No. 2000-271. Nonprofit corporations that lease county hospitals are not subject to the FOIA unless they receive direct public funding other than Medicare and Medicaid payments. Ark. Op. Att’y Gen. Nos. 2004-233, 97-148, 96-116, 83-163.

M. Personnel records.

The FOIA exempts personnel records “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.” Ark. Code Ann. § 25-19-105(b)(12). However, employee evaluation and job performance records are open to the public “only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.” Ark. Code Ann. § 25-19-105(c)(1). For a more thorough discussion, see Part II.A.2(13) of this outline.

1. Salary.

Information concerning a public employee’s salary is not exempt from disclosure. See, e.g., Ark. Op. Att’y Gen. Nos. 2006-154, 2005-051, 2003-298, 2002-087. Public employees’ salary history, including the dates upon which salary increases were effective are also subject to disclosures. Ark. Op. Att’y Gen. No. 96-205. Documents detailing the reasons for a salary adjustment might be exempt from the FOIA if they could be considered evaluation or job performance records. Ark. Op. Att’y Gen. No. 2002-159.

2. Disciplinary records.

Employee evaluation and job performance records are open to the public “only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.” Ark. Code Ann. § 25-19-105(c)(1). The Attorney General has found disciplinary records to be evaluation and job performance records, so such records are only subject to disclosure if they form the basis for suspension or termination and the disclosure would be warranted by a compelling public interest. See, e.g., Ark. Op. Att’y Gen. Nos. 98-006 (involving records of disciplinary actions less severe than suspension or termination), 93-005 (involving letter recommending termination, letter of reprimand, and other disciplinary records).

3. Applications.

If the applicant is successful, his or her job application, resume, and related materials are clearly personnel records. Ark. Op. Att’y Gen. Nos. 2005-004, 97-042, 96-190, 95-244, 95-113, 94-187. The same is true for applicants for promotion or for a different government posi-

tion. Ark. Op. Att’y Gen. Nos. 2005-004, 96-142, 88-133. Whether the records of unsuccessful job applicants are personnel records remains an open question. In the past, the Attorney General’s Office has taken the position that records of job applicants are not personnel records because potential employees are not personnel. E.g., Ark. Op. Att’y Gen. Nos. 98-102, 90-248. More recent opinions, however, treat the question as open. Ark. Op. Att’y Gen. Nos. 2008-039 2005-004 n.1, 99-002.

4. Personally identifying information.

Personally identifying information is not generally exempt from disclosure. See, e.g., Ark. Op. Att’y Gen. Nos. 98-131 (identification photos of employees will not usually be exempt). Personnel records are exempt only “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.” Ark. Code Ann. § 25-19-105(b)(12). The fact that the employee may consider release of the information invasive of his or her privacy is not relevant. Ark. Op. Att’y Gen. Nos. 2005-058, 2003-027, 2001-169, 98-152, 98-101, 98-001, 97-079, 97-034, 96-222, 96-193. Some personally identifying information is closed. See, e.g., Ark. Code Ann. § 25-19-105(b)(13) (home addresses of non-elected employees), Ark. Op. Att’y Gen. Nos. 2007-064 (dates of birth), 2007-025 (driver’s license numbers), 2006-035 (Social Security numbers).

5. Expense reports.

Reimbursement forms are considered to be personnel records and are subject to disclosure under the FOIA, so long as information that would invade the employee’s privacy, such as a driver’s license number, is redacted. Ark. Op. Att’y Gen. Nos. 2003-135, 2001-120.

6. Other.

For a more thorough discussion concerning other types of personnel records, see Part II.A.2(13) of this outline.

N. Police records.

The FOIA exempts “[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity.” Ark. Code Ann. § 25-19-105(b)(6). The exemption applies only to those agencies that investigate suspected criminal activity under the state penal code and have enforcement powers. *Legislative Joint Auditing Committee v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987). A record must be investigative in nature to fall within the exemption, *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991), and only records of “ongoing criminal investigations” are exempt. *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990); *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). For discussion, see Part II.A.2.f of this outline. An exemption added to the FOIA in 1993 protects the “identities of law enforcement officers currently working undercover with their agency and identified in the Arkansas Minimum Standards Office as undercover officers.” Ark. Code Ann. § 25-19-105(b)(10)(A).

Additionally, personnel records that would otherwise be disclosable are exempt if they are being used in connection with an ongoing criminal investigation. Ark. Op. Att’y Gen. Nos. 97-079, 95-351, 93-300, 93-055. The same is true with respect to attorney work product of the prosecutor. Ark. Op. Att’y Gen. No. 99-110.

1. Accident reports.

All traffic accident reports are open to public inspection. Ark. Code Ann. § 27-53-305.

2. Police blotter.

No case or statute specifically references a police blotter in relation to the FOIA. Information that would be contained in such a report—such as arrest records, jail logs, and incident reports—are subject to disclosure under the FOIA when they are not clearly investigative. *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991).

3. 911 tapes.

Recordings made of 911 calls are subject to disclosure under the FOIA. Ark. Op. Att’y Gen. No. 94-100. Subscriber information, including names, telephone numbers, and addresses, of 911 callers that is provided by service providers to the 911 system is confidential and is not subject to the FOIA. Ark. Code Ann. § 12-10-317(a)(2).

4. Investigatory records.

a. Rules for active investigations.

There is an exemption for “undisclosed investigations by law enforcement agencies of suspected criminal activity.” Ark. Code Ann. § 25-19-105(b)(6). A record must be investigative in nature to fall within the exemption. Arrest reports, jail logs, incident reports, and shift sheets do not qualify, *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991), nor do arrest disposition reports maintained by jails. Ark. Op. Att’y Gen. No. 92-207. Similarly, accident reports, traffic citations, dispatch logs, and records reflecting results of blood alcohol tests in DWI cases are not exempt. Ark. Op. Att’y Gen. Nos. 96-070, 87-319, 87-115, 86-020. By contrast, the *Hengel* case indicates that information such as an officer’s speculation about a suspect’s guilt, his or her views as to the credibility of witnesses, and statements by informants fall within the exemption. See also Ark. Op. Att’y Gen. No. 99-110 (exemption applies to opinions and impressions of investigating officer). The Supreme Court has suggested, without deciding, that records generated as a result of intelligence or surveillance activity unrelated to a specific crime fall within the exemption. *Johninson v. Stodola*, 316 Ark. 423, 872 S.W.2d 374 (1994) (police records of gang membership).

Furthermore, the exemption applies only to those agencies that “investigate suspected criminal activity under the state penal code and have enforcement powers.” *Legislative Joint Auditing Committee v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987) (holding exemption inapplicable to joint auditing committee of the legislature). See also Ark. Op. Att’y Gen. Nos. 87-135 (exemption includes coroners), 84-139 (exemption applies to Employment Security Division), 80-149 (exemption does not apply to Commission on Human Resources).

b. Rules for closed investigations.

Only records of “ongoing criminal investigations” are exempt. *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990) (criminal investigation was ongoing for FOIA purposes even though charges had been filed against one of several suspects).

If an investigation has been concluded, the exemption no longer applies and the records are open. *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). That the records may contain names of confidential informants or other sensitive information is irrelevant. Ark. Op. Att’y Gen. No. 90-305. Records concerning investigation of a juvenile are open after the investigation is completed, provided that the juvenile has not been arrested. Ark. Op. Att’y Gen. No. 98-151.

An investigation is not ongoing when a police department has closed the case by “administrative action,” *McCambridge v. City of Little Rock*, *supra*, or when a prosecuting attorney decides not to pursue criminal charges. Ark. Op. Att’y Gen. No. 99-110. Otherwise, it is not clear when an investigation is considered at an end for FOIA purposes. Compare Ark. Op. Att’y Gen. Nos. 88-055 (investigation is closed when law enforcement agency turns case over to the prosecutor), 89-101 (investigation is open until trial is completed or statute of limitations has run), 89-311 (investigation is closed when case “proceeds to trial”), 90-305 (investigation ends when charges are filed). The Attorney General has opined that “there is no bright line rule,” and the point of closure may be marked by any of the defendant’s arrest, the completion of trial, the conclusion of appeal, or another event. Ark. Op. Att’y Gen. No. 2002-303. To the extent that this issue turns on the facts of a given case, it is a question for the trial court. *Martin v. Musteen*, *supra*.

The exemption applies to copies of records in police files when the originals have been forwarded to another law enforcement agency that is continuing the investigation. Ark. Op. Att’y Gen. Nos. 98-127, 92-237.

5. Arrest records.

Arrest records generally must be disclosed. *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991). An order of expungement or an order to seal a record does exempt an arrest report from the FOIA. See Ark. Op. Att’y Gen. No. 2004-049; Ark. Code Ann. § 16-90-903. Arrest records of juveniles are exempt from the FOIA unless the disclosure is authorized by a written order of the court or the arrest results in the juvenile’s being formally charged with a felony. Ark. Code Ann. § 9-27-309(j).

6. Compilations of criminal histories.

Criminal histories are compiled and maintained by the Arkansas Crime Information Center, and they are exempt from the FOIA. Ark. Code Ann. § 12-12-1003(e).

7. Victims.

The address and telephone number for victims and their immediate families are not subject to disclosure. Ark. Code Ann. § 16-90-1110. The identities of victims of sex crimes are exempt from the FOIA. Ark. Code Ann. § 12-12-913(e)(2).

8. Confessions.

There is no statutory or case law that directly addresses confessions. However, because the only records that qualify for the open-investigation exception are documents that are investigative in nature, *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991), a confession contained in a document that is subject to disclosure, such as an arrest report, probably would not be exempt from the FOIA.

9. Confidential informants.

Statements of confidential informants contained in records for closed investigations are subject to the FOIA. *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). The Arkansas Supreme Court has also indicated that, absent legislative action, the identities of confidential informants from closed investigations should not be protected. *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990). The Attorney General has opined that any information relating to a confidential informant must be disclosed if the investigation is closed. Ark. Op. Att’y Gen. No. 2006-158.

10. Police techniques.

Unless the technique or manual fits into the “open investigation” exception, the Attorney General has opined that it is subject to disclosure. Ark. Op. Att’y Gen. No. 85-134. Furthermore, any training manuals located in a police officer’s personnel file is subject to the FOIA. Ark. Op. Att’y Gen. No. 2008-046.

Sections of the Department of Correction’s procedures dealing with emergency situations are exempt from the FOIA. Ark. Code Ann. § 12-27-137(a).

11. Mug shots.

There is no statutory or case law on this issue. Because there is no specific statutory provision prohibiting the release of mug shots, they would likely be subject to disclosure because the FOIA is to be interpreted liberally, and exemptions must be specific. *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991). Inmate records created by the Department of Corrections are exempt from the FOIA, so a mug shot taken for such records would be exempt. Ark. Code Ann. § 12-27-113.

12. Sex offender records.

Information collected by the Sex Offender Assessment Committee

is generally exempt from the FOIA. Ark. Code Ann. § 12-12-913(e)(2). However, certain information shall be published on the website for the State of Arkansas for sex offenders who are classified as Level 3 or 4 offenders or who were at least eighteen years old at the time of their crime and the victim was fourteen years old or younger. The following information that must be made public:

- (i) The sex offender's complete name, as well as any alias;
- (ii) The sex offender's date of birth;
- (iii) Any sex offense to which the sex offender has pleaded guilty or nolo contendere or of which the sex offender has been found guilty by a court of competent jurisdiction;
- (iv) The street name and block number, county, city, and zip code where the sex offender resides;
- (v) The sex offender's race and gender;
- (vi) The date of the last address verification of the sex offender provided to the Arkansas Crime Information Center;
- (vii) The most recent photograph of the sex offender that has been submitted to the center; and
- (viii) The sex offender's parole or probation office.

Ark. Code Ann. § 12-12-913(j).

13. Emergency medical services records.

There is an exemption within the FOIA for medical records and another statutory exception for subscriber information provided by a 911 system. Ark. Code Ann. § 25-19-105(b)(2), 12-10-317(a)(2). Information contained within those categories would be exempt from disclosure, but other information contained within the records probably would not be. *See* Ark. Op. Att'y Gen. No. 2002-064.

O. Prison, parole and probation reports.

Inmate records created by the Department of Corrections are exempt from the FOIA. Ark. Code Ann. § 12-27-113(e)(2).

The parole board must make public its recommendation for parole. Ark. Code Ann. § 16-93-206. However, there is no statutory or case law concerning whether subsequent parole reports are subject to the FOIA.

Probation files that are not part of expunged records are open under the FOIA. Ark. Op. Att'y Gen. No. 99-350.

P. Public utility records.

Records relating to the security of a public water system are closed. Ark. Code Ann. § 25-19-105(b)(18).

Records relating to individual customers' usage from a public utility are open, and personal information contained in those records probably cannot be redacted. Ark. Op. Att'y Gen. No. 2009-060.

Q. Real estate appraisals, negotiations.

1. Appraisals.

Appraisals performed by the condemning authority for the purposes of an eminent domain action are open. Ark. Op. Att'y Gen. No. 80-21. Real estate appraisals conducted for the purposes of assessing property taxes are also open. Ark. Code Ann. § 26-26-1307.

2. Negotiations.

There is no statutory or case law involving written records of real estate negotiations. However, there is no provision allowing for closed meetings of public officials for the purpose of negotiating the purchase of real estate. When the General Assembly was debating the FOIA in 1967, an amendment was offered in the House to permit executive ses-

sions for negotiations involving the purchase of real estate. The House initially agreed to the amendment but subsequently changed its mind and expunged the vote. Ark. Legis. Digest, 66th General Assembly, at 87, 91 (1967). During the 2001 legislative session, a bill that would permit closed meetings for discussing "the purchase, sale or lease of real property" died in committee. *See* S.B. 589, 83d General Assembly (May 14, 2001); *see also Harris v. City of Ft. Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004).

3. Transactions.

There is no statutory or case law involving the disclosure of records concerning real estate transactions.

4. Deeds, liens, foreclosures, title history.

Deeds to state property are filed in the office of the Commissioner of State Lands and are considered public records. Ark. Code Ann. § 22-5-411. Liens on real property are public records once they are filed. Ark. Code Ann. § 18-40-102.

Although a county clerk does not have to perform a lien search under the FOIA, such records must be made available for citizens to inspect. Ark. Op. Att'y Gen. No. 90-261.

5. Zoning records.

Municipal zoning boards are required to keep records of all findings and decisions, and those are considered public records. Ark. Code Ann. § 14-56-407, -416.

R. School and university records.

1. Athletic records.

The FOIA exempts "education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of [that act]." Ark. Code Ann. § 25-19-105(b)(2). The FERPA includes a student's participation in sports to be "directory information" that may be published. 20 U.S.C. § 1232g(a)(5).

"Stat sheets" that detail the scoring at athletic events are subject to disclosure if high-school students' names and identifying information are redacted. Ark. Op. Att'y Gen. No. 2001-150.

2. Trustee records.

Records of a "public official or employee" and a "governmental agency" are covered by the FOIA. Ark. Code Ann. § 25-19-103(5)(A). Governing bodies include boards of trustees of state universities. *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975). Their records are, therefore, subject to disclosure.

3. Student records.

Most student records are exempt from the FOIA. The statute exempts "education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of [that act]." Ark. Code Ann. § 25-19-105(b)(2). Under the FERPA, education records include "records, files, documents, and materials which contain information directly related to a student." 20 U.S.C. § 1232g(a)(4)(A). Grade transcripts in possession of the educational entity are student records and are exempt from disclosure. Ark. Op. Att'y Gen. No. 2003-231.

The exceptions to that rule include information kept by a campus law enforcement unit for the purpose of law enforcement; records maintained by a physician, psychiatrist, psychologist, or other recognized professional in the treatment of the student; or directory information, which includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the

most recent previous educational agency or institution attended by the student. 20 U.S.C. § 1232g(a)(4)(A)-1232g(a)(5).

FERPA does not prohibit a university from disclosing information concerning certain violent crimes and nonforcible sex offenses if the university determines that “the student committed a violation of the institution’s rules or policies with respect to [the] offense.” The perpetrator’s name, the offense, and the sanction imposed can all be disclosed. 20 U.S.C. § 1232g(b)(6)(B)-(C). This information is also not exempt from disclosure under the FOIA. Ark. Op. Att’y Gen. No. 2001-046.

FERPA is limited to records that identify a student personally, and such records can be disclosed if the student’s personally identifying information is redacted. *See* Ark. Op. Att’y Gen. No. 2001-154.

Because the FERPA applies only to education records kept by schools, colleges, and a few other agencies, student records—such as transcripts—that are kept as part of an employee’s personnel file are subject to disclosure if there would be no clearly unwarranted invasion of personal privacy. Ark. Code Ann. § 25-19-105(b)(12).

4. Other.

Several statutes exempt certain types of educational records from disclosure. *See, e.g.*, Ark. Code Ann. § 6-15-415 (records containing identifiable scores of students on basic competency test); § 6-15-503 (home schooling records); § 6-17-407 (superintendent’s investigation of alleged misconduct by school employees); § 6-17-410, 6-17-411 (criminal background checks of prospective teachers); § 6-17-414 (criminal background checks of applicants for noncertified staff positions at public schools); § 6-17-603 (scores on state teacher test); § 6-41-218 (evaluations of handicapped children); § 12-12-515 (child abuse information received from Department of Human Services).

Additionally, the Attorney General has opined that a “Notice of Intent to Homeschool” form is exempt from the FOIA. Ark. Op. Att’y Gen. No. 2004-018.

S. Vital statistics.

1. Birth certificates.

Birth certificates are exempt from the FOIA. They can only be disclosed for research purposes, and the disclosure of information that would identify a person or an institution can only be obtained upon a written request and with an agreement providing for the confidentiality of the information. Ark. Code Ann. § 20-18-304(a).

2. Marriage & divorce.

Marriage and divorce records are exempt from the FOIA. They can only be disclosed for research purposes, and the disclosure of information that would identify a person or an institution can only be obtained upon a written request and with an agreement providing for the confidentiality of the information. Ark. Code Ann. § 20-18-304(a).

3. Death certificates.

Death certificates are exempt from the FOIA. They can only be disclosed for research purposes, and the disclosure of information that would identify a person or an institution can only be obtained upon a written request and with an agreement providing for the confidentiality of the information. Ark. Code Ann. § 20-18-304(a).

4. Infectious disease and health epidemics.

The Arkansas Department of Health and Human Services maintains reports of positive HIV and AIDS tests. Those records are exempt from the FOIA. Ark. Code Ann. § 20-15-904. Records of healthcare-acquired infections collected by the Arkansas Department of Health and Human Services are exempt from the FOIA. Ark. Code Ann. § 20-9-1206. The records maintained by the Cancer Registry of Arkansas are also exempt from disclosure. Ark. Code Ann. § 20-15-203.

V. PROCEDURE FOR OBTAINING RECORDS

A. How to start.

1. Who receives a request?

The request should be directed to the “custodian” of the records. Ark. Code Ann. § 25-19-105(a)(2)(A). The term “custodian” is defined as “the person having administrative control of that record,” but it does not include “a person who holds public records solely for the purposes of storage, safekeeping, or data processing for others.” *Id.* § 25-19-103(1)(A) & (B) (added by Act 1653 of 2001). Under this definition, an agency’s chief administrator should be considered the custodian, since he or she has ultimate control over its records. Some agencies have adopted regulations implementing the FOIA, though they are not required to do so. Any such rules should be consulted for guidance as to where particular records are maintained and to whom an FOIA request should be made. In some cases, that information is available online. *E.g.*, Department of Environmental Quality, <http://www.adeq.state.ar.us>.

If the person to whom the request is directed is not the custodian of the records, he or she “shall so notify the requester and identify the custodian, if known to or readily ascertainable by” the person who receives the request. Ark. Code Ann. § 25-19-105(a)(3) (added by Act 1653 of 2001).

2. Does the law cover oral requests?

a. Arrangements to inspect & copy.

As amended in 2001, the FOIA provides that a request may be made “in person, by telephone, by mail, by facsimile transmission, by electronic mail, or by other electronic means provided by the custodian.” Ark. Code Ann. § 25-19-105(a)(2)(B). If the request is made orally in person or by telephone, there is no requirement that the requester provide a written version. Ark. Op. Att’y Gen. No. 2006-104. Agency regulations requiring written requests are contrary to the FOIA. Ark. Op. Att’y Gen. Nos. 2001-052, 96-354. However, even if the request is made in person, a written request is advisable because it provides a record of the request in the event that litigation is necessary.

Requests by telephone or in person must be made during “the regular business hours of the custodian.” Ark. Code Ann. § 25-19-105(a)(1). Despite the statutory language, a Supreme Court opinion suggests that the term “regular business hours” refers to the hours that the agency usually operates, not to the office hours of the custodian. *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991). However, the *Hengel* decision should be limited to its facts — there the request involved records kept at a city jail, which was open around the clock. A different result should follow if the records at issue are maintained by the police (or any other agency that keeps long hours) in an office that is open only from 8:00 a.m. to 5:00 p.m. As the Attorney General has observed, “the text of [Section 25-19-105(a)(1)] reflects only a legislative intention to make public records available at times when public employees are or should be present to locate and identify them.” Ark. Op. Att’y Gen. No. 2001-086.

b. If an oral request is denied:

(1). How does the requester memorialize the refusal?

If an oral request is denied, there is no requirement that the requester memorialize the refusal, but such documentary evidence is advisable because it provides a record of the refusal in the event that litigation is necessary.

(2). Do subsequent steps need to be in writing?

No, but such documentary evidence is advisable because it provides a record of the steps taken in the event that litigation is necessary.

3. Contents of a written request.

a. Description of the records.

Whether written or oral, a request “shall be sufficiently specific to enable the custodian to locate the records with reasonable effort.” Ark. Code Ann. § 25-19-105(a)(2)(C) (added by Act 1653 of 2001). This provision is essentially a codification of Attorney General’s opinions construing the prior version of the statute, which was silent on the question. *See, e.g.*, Ark. Op. Att’y Gen. Nos. 2000-271, 96-354, 90-261. The request should clearly state that records are being sought under the FOIA, for some agencies receive few FOIA requests and may be unfamiliar with the act.

b. Need to address fee issues.

As amended by Act 1653 of 2001, the FOIA gives citizens the right to “inspect, copy, or receive copies of public records.” Ark. Code Ann. § 25-19-105(a)(2)(A). Upon payment of any required fees, the agency must furnish copies if it has the necessary equipment. *Id.* § 25-19-105(d)(2)(A). Unless a specific statutory provision authorizes a higher fee, “any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.” *Id.* § 25-19-105(d)(3)(A)(i). The custodian may also charge “the actual costs of mailing or transmitting the record by facsimile or other electronic means.” *Id.* § 25-19-105(d)(3)(ii). An itemized breakdown of all charges is required, *id.* § 25-19-105(d)(3)(B), and the custodian may require advance payment if the estimated fee exceeds \$25.00. *Id.* § 25-19-105(d)(3)(A)(iii).

To guard against unexpectedly high charges, a requester should include in his letter a “ceiling” for copying costs he is willing to pay, along with a request that the agency contact him if it appears that the ceiling will be exceeded. Also, the requester may be able to obtain a fee waiver. As amended by Act 1653 of 2001, the FOIA provides that “[c]opies may be furnished without charge or at a reduced charge if the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest.” Ark. Code Ann. § 25-19-105(d)(3)(A)(iv).

There is no charge if the requester simply wishes to inspect the records or make copies with his or her own equipment. However, the requester has no right to remove the records from the custodian’s office in order to copy them. *See Blaylock v. Staley*, 293 Ark. 26, 732 S.W.2d 152 (1987); Ark. Op. Att’y Gen. Nos. 2001-052, 95-355, 95-327.

c. Plea for quick response.

Requesters will seldom have occasion to seek expedited treatment. The FOIA appears to contemplate immediate access during the regular business hours of the custodian, unless the records are in active use or storage. *See* Ark. Code Ann. § 25-19-105(a)(1) & (e); *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991). Records in active use or storage must be made available within three working days of the FOIA request. Ark. Code Ann. § 25-19-105(e). However, the custodian has a “reasonable time” to respond to the request if the records are voluminous or if they must be reviewed to decide whether an exemption applies. Ark. Op. Att’y Gen. Nos. 2000-059, 99-157, 98-223, 96-354, 94-225.

d. Can the request be for future records?

Requests for records that might be created at some point in the future are unlikely to be honored because the FOIA applies only to existing records. *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995).

B. How long to wait.

1. Statutory, regulatory or court-set time limits for agency response.

Access to records apparently must be granted immediately unless the records are in active use or storage, in which case they must be

made available within three working days of the request. Ark. Code Ann. § 25-19-105(e). While the FOIA contemplates immediate access, the custodian has a “reasonable time” to respond to the request if the records are voluminous or if they must be reviewed to decide whether an exemption applies. Reasonableness is determined on a case-by-case basis, and an agency policy that all responses will be made in three working days is contrary to the act. Ark. Op. Att’y Gen. Nos. 2000-059, 99-157, 98-223, 96-354, 94-225.

(1) As a practical matter, records at most agencies (except those set up to handle “over-the-counter” requests, such as the circuit clerk’s office) will be in either active use or storage, thus triggering the provision allowing the agency three working days to make them available. Records are in active use if, at the time of the FOIA request, they are “being utilized by agency employees in the performance of their official functions or duties.” Records are in storage if, at the time of the request, they are “located in a place which makes immediate access impossible or impractical.” Ark. Op. Att’y Gen. No. 94-225. The location of the unit in which the records are stored is of no significance. Ark. Op. Att’y Gen. No. 98-223.

(2) Requests for personnel records and employee evaluation records must be acted upon with 24 hours of the custodian’s receipt of the request. During that same period, the custodian must notify the person about whom the records are maintained that a request has been made. The custodian, requester, or subject of the records may “immediately” seek an Attorney General’s opinion as to whether the records are exempt from disclosure. Ark. Code Ann. § 25-19-105(c)(3)(A) & (B). The statute requires the Attorney General to issue an opinion within three working days, and the records should not be disclosed until an opinion is handed down. Ark. Op. Att’y Gen. No. 93-300. If no request for an Attorney General’s opinion is made, the custodian should wait an additional 48 hours (72 hours from receipt of the FOIA request) before releasing the records. Ark. Op. Att’y Gen. Nos. 99-168, 97-008.

(3) If the request is likely to be controversial or covers a large number of records, the requester should consider allowing the agency additional time or negotiating for the immediate release of some records and access to others on a delayed basis. The deadline of three working days will simply be unrealistic in some cases. *See* Ark. Op. Att’y Gen. No. 2000-059 (if a search will take some time because the requested records are voluminous or it is necessary for the custodian to obtain legal advice as to whether some records may be exempt from disclosure, the custodian should be afforded a “reasonable amount of time” to comply with the request, even if more than three working days are necessary).

2. Informal telephone inquiry as to status.

Negotiation is advisable prior to filing a lawsuit, especially in light of the very short response period. Thus, a telephone inquiry after the deadline has passed as to the status of the request would not be inappropriate. The FOIA itself is silent on the matter. Whether such an inquiry is advisable will turn largely on the agency involved and the requester’s experience with the agency.

3. Is delay recognized as a denial for appeal purposes?

If the deadline is not met, the requester can seek immediate judicial relief, since the agency’s failure to respond promptly is presumably a denial of “the rights granted to him” by the FOIA. Ark. Code Ann. § 25-19-107(a).

4. Any other recourse to encourage a response.

In some situations, involving the Attorney General’s Office might resolve the matter. With respect to personnel and evaluation records, the FOIA allows (but does not require) the person making the request, the custodian of the records, or the person about whom the

records are maintained to seek an opinion from the Attorney General. Ark. Code Ann. § 25-19-105(c)(3)(B) & (C). Otherwise, only the officials specified by statute (e.g., legislators, prosecuting attorneys, and heads of state agencies) may request formal opinions. Ark. Code Ann. § 25-16-706. However, legislators often request opinions on behalf of their constituents. In addition, the Attorney General's Office will answer questions about the FOIA. Calls should be directed to the opinions section at (501) 682-5086 or toll-free at 1-800-482-8982. In some cases, the Attorney General might be persuaded to request the same records and, upon denial of that request, bring an action under the FOIA to force disclosure. See *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998).

C. Administrative appeal.

Nothing in the FOIA addresses an administrative appeal within the agency from a denial of the request. Because there are no specified administrative procedures to exhaust, the initial denial should be treated as final for purposes of judicial review. See Ark. Code Ann. § 25-19-107(a) (citizen denied rights under FOIA “may appeal immediately from the denial”). Exhaustion of administrative remedies is not necessary in FOIA cases unless declaratory relief is sought. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

1. Time limit.

There is no time limit set out in the statute. Instead, a citizen “may appeal immediately from the denial.” Ark. Code Ann. § 25-19-107(a). Accordingly, the general five-year statute of limitations presumably applies. See Ark. Code Ann. § 16-56-115.

2. To whom is an appeal directed?

The appeal can be taken to the Pulaski County Circuit Court. If the defendant is the State of Arkansas, a state agency or department, or a state institution, then the appeal can be taken in the circuit court located in the plaintiff's residence. If the defendant is a private organization or an agency of a county, municipality, township, or school district, then the appeal may be taken in the circuit court in the jurisdiction where the defendant is situated. Ark. Code Ann. § 25-19-107(a).

a. Individual agencies.

There is no appeal within individual agencies, and exhaustion of administrative remedies is not necessary in FOIA cases unless declaratory relief is sought. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

b. A state commission or ombudsman.

There is no FOIA ombudsman or state commission.

c. State attorney general.

When personnel or evaluation records are at issue, the FOIA allows (but does not require) the person making the request, the custodian of the records, or the person about whom the records are maintained to seek an opinion from the Attorney General. Ark. Code Ann. § 25-19-105(c)(3)(B) & (C).

3. Fee issues.

Because there is no administrative appeal, any claims regarding fees charged for records would be filed in the same court as discussed in V.C.2, *supra*.

4. Contents of appeal letter.

a. Description of records or portions of records denied.

There is no administrative appeal process from the denial of a request. See part V.D.4, *infra*, for the issues that a court will address and see part V.D.5, *infra*, for the appropriate pleading format.

b. Refuting the reasons for denial.

There is no administrative appeal process from the denial of a request.

5. Waiting for a response.

There is no administrative appeal process from the denial of a request.

6. Subsequent remedies.

There is no administrative appeal process from the denial of a request. See part V.D.8, *infra*, for the remedies that are available.

D. Court action.

1. Who may sue?

“Any citizen denied the rights granted him by [the FOIA] may appeal immediately from the denial.” Ark. Code Ann. § 25-19-107(a). The Attorney General, acting in his official capacity, is a “citizen” for purposes of this provision. *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998). Consequently, the Attorney General can request the same records that have been sought unsuccessfully by someone else and, upon denial of that request, bring an action under the FOIA to force disclosure.

2. Priority.

The FOIA requires the court to “fix and assess a day the petition is to be heard” within seven days of its filing. Ark. Code Ann. § 25-19-107(b). This provision is probably unenforceable in light of a court's inherent authority to control its docket. See *McConnell v. State*, 227 Ark. 988, 302 S.W.2d 805 (1957). In *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000), the Supreme Court left open the question whether Section 25-19-107(b) “requires that a hearing be set within seven days of the FOIA request or actually conducted within that time frame,” since the circuit court did neither. However, the Court emphasized that “this section of the FOIA sets a policy in favor of expeditious hearings on all FOIA requests.”

3. Pro se.

While a litigant may represent himself in an FOIA case, as in any other civil action, proceeding *pro se* is not advisable. See *Dauer v. Ponder*, 274 Ark. 166, 623 S.W.2d 3 (1981) (FOIA plaintiff who chose to represent himself “necessarily must succeed or fail on [his] knowledge or ability”). Arkansas procedural rules are not particularly user-friendly. For example, rather than allow the simplified “notice pleading” used in the federal courts, Arkansas remains a “fact pleading” jurisdiction. *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981) (explaining Ark. R. Civ. P. 8(a)).

4. Issues the court will address:

a. Denial.

With respect to the denial of FOIA requests, the principal question litigated has been whether particular records are exempt from disclosure. In *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000), the Supreme Court held that “a hearing is required under § 25-19-107(b) for the circuit court to determine whether the requested [records] . . . qualify for exemption,” and that the court may examine the records *in camera* to make this determination. See also *Gannett River States Pub. Co. v. Arkansas Industrial Development Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990); *Jobninson v. Stodola*, 316 Ark. 423, 872 S.W.2d 374 (1994). Another issue that has arisen with some frequency is whether a particular entity is subject to the FOIA. See, e.g., *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993); *Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board*, 72 Ark. App. 37, 32 S.W.3d 60 (2000).

b. Fees for records.

As amended in 2001, the FOIA expressly provides that unless an-

other statute authorizes a higher fee, “any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.” Ark. Code Ann. § 25-19-105(d)(3)(A)(i). Also, the custodian must provide an itemized breakdown of all charges. *Id.* § 25-19-105(d)(3)(B). Copying fees imposed by the agency could be challenged in court as exceeding the “actual costs of reproduction.”

c. Delays.

A court could be called upon to decide whether delay on the part of an agency is tantamount to a denial of access, but this issue has not arisen in reported cases. If non-exempt public records are in “active use or storage,” the custodian has three working days to make them available for inspection and copying. Ark. Code Ann. § 25-19-105(e). An FOIA suit filed prior to the expiration of this period is premature. *Hamilton v. Simpson*, 67 Ark. App. 173, 993 S.W.2d 501 (1999).

d. Patterns for future access (declaratory judgment).

A declaratory judgment may be appropriate in an action brought under the FOIA. *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975). However, a party seeking declaratory relief must exhaust administrative remedies. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). A court has discretion in deciding whether to entertain an action for declaratory judgment, *Jessup v. Carmichael*, 224 Ark. 230, 272 S.W.2d 438 (1954), and the presence of factual issues may make the case unsuitable for declaratory relief. *See Bankers & Shippers Ins. Co. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983).

5. Pleading format.

The normal rules of pleading that govern civil cases presumably apply in FOIA suits. *See generally* Rule 8, Ark. R. Civ. P. Arkansas is a “fact pleading” jurisdiction with requirements more stringent than those applicable in federal court. *See Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981) (explaining Ark. R. Civ. P. 8(a)). More informal pleading may be permissible in FOIA cases, however, because the act refers to a “petition” that is to be filed in an “appeal” to the appropriate circuit court. Ark. Code Ann. § 25-19-107(a) & (b). There being no reported cases on this point, an FOIA plaintiff should follow the general pleading rules. *Cf. Dauer v. Ponder*, 274 Ark. 166, 623 S.W.2d 3 (1981).

6. Time limit for filing suit.

The FOIA contains no such time limit. Accordingly, the general five-year statute of limitations presumably applies. *See* Ark. Code Ann. § 16-56-115.

7. What court.

An FOIA suit must be brought in Pulaski County Circuit court or the circuit court of the judicial district in which the plaintiff resides if a state agency is involved. If any other government body or a private entity is involved, venue is proper only in the circuit court of the judicial district in which the entity is located. Ark. Code Ann. § 25-19-107(a); *ACORN v. Jackson*, 263 Ark. 67, 562 S.W.2d 589 (1978).

8. Judicial remedies available.

a. Any citizen “denied the rights granted to him” by the FOIA may appeal to the appropriate circuit court, which may issue “orders” to redress the denial. Failure to comply with such an order constitutes contempt of court. Ark. Code Ann. § 25-19-107(a), (c). Using this broad remedial power, a circuit court may direct an agency to produce records for inspection and copying or to charge a copying fee that does not exceed the actual costs of reproduction.

b. Declaratory relief may be granted in FOIA cases. *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975). However, a party must exhaust administrative remedies prior to seeking such relief. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). A court has discretion in deciding whether to entertain an action for declaratory judgment, *Jessup v. Carmichael*, 224 Ark. 230, 272 S.W.2d 438 (1954), and the presence of factual issues may make the case unsuitable for declaratory relief. *See Bankers & Shippers Ins. Co. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983).

c. In light of Constitutional Amendment 80, which merged law and equity and abolished the state’s separate chancery courts as of July 1, 2001, a circuit court may also grant an injunction or employ other equitable remedies. Prior to merger, circuit courts lacked power to issue injunctions, *Arkansas Game & Fish Comm’n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001), but chancery courts had granted injunctive relief in FOIA cases. *E.g., Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). An injunction will not be issued when there is an adequate remedy at law. *E.g., Wilson v. Pulaski Association of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). Because Ark. Code Ann. § 25-19-107 arguably provides such a remedy in FOIA cases, injunctive relief may be inappropriate.

d. Plaintiffs in FOIA cases have also asked circuit courts to issue a writ of mandamus. The general rule is that mandamus will not lie when another adequate remedy exists. *Kemp-Bradford VFW Post 4764 v. Wood*, 262 Ark. 168, 554 S.W.2d 344 (1977). Because adequate relief may be obtained under Ark. Code Ann. § 25-19-107, mandamus seems inappropriate in FOIA cases. However, the Supreme Court has expressly held that mandamus is appropriate when the plaintiff seeks to force a governing body to hold an open meeting. *Arkansas State Police Comm’n v. Davidson*, 252 Ark. 137, 477 S.W.2d 852 (1972). The remedy has also been employed in cases involving access to records, although its propriety in that situation has not been addressed. *E.g., McMahan v. Board of Trustees*, 255 Ark. 108, 499 S.W.2d 56 (1973). If the circuit court fails to act in an FOIA case, the plaintiff may petition the Supreme Court for a writ of mandamus. *Boyd v. Keith*, 330 Ark. 626, 954 S.W.2d 942 (1997).

e. Language in Ark. Code Ann. § 25-19-107(a) suggests that FOIA suits may be brought against state agencies, but such actions may be considered suits against the state and thus barred under Article V, § 20 of the state constitution. A suit is not barred, however, if the state would incur no financial obligation were the plaintiff to prevail; thus, an FOIA action against a state agency is permissible if the plaintiff waives costs and expenses. *Commission on Judicial Discipline & Disability v. Digby*, 303 Ark. 24, 792 S.W.2d 594 (1990). Other entities — such as cities, counties, school districts, and private organizations supported by public funds — may be sued directly. Officials of these entities, as well as state officials, may also be named as FOIA defendants.

f. Although the FOIA itself does not speak directly to a right of action to enjoin the disclosure of records, such “reverse-FOIA” suits are not unknown in the state. *E.g., McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). These suits seem justifiable, particularly in view of the fact that FOIA exemptions are mandatory rather than discretionary. Moreover, the act appears to contemplate such “reverse” litigation in at least one situation, *i.e.*, when personnel or evaluation records are involved. *See* Ark. Code Ann. § 25-19-105(c)(3).

9. Litigation expenses.

Under a 1987 amendment, attorneys’ fees and other “litigation expenses” are now available to a party who has “substantially prevailed” in an FOIA case. A fee award is discretionary, not mandatory. Ark. Code Ann. § 25-19-107(d). If the plaintiff prevails, the court may decline to assess fees and costs against the defendant if it finds that the defendant’s position was “substantially justified” or that “other circumstances make an award of these expenses unjust.” *Id.* If the defen-

dant prevails, the court may make a fee award only upon a finding that the plaintiff initiated the action “primarily for frivolous or dilatory purposes.”

a. Attorney fees.

A fee award to a successful plaintiff is not necessary in every case and is generally inappropriate unless the plaintiff “substantially prevailed” on the FOIA claim and the defendant’s actions were “substantially justified.” *City of Little Rock v. Carpenter*, 374 Ark. 551, 288 S.W.3d 647 (2008). See also *Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006). For many years, a finding that the defendant had acted arbitrarily or in bad faith was required, *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), but that standard was overruled in the *Harris* case. Additionally, an award of fees and costs is inappropriate when the plaintiff files suit without giving the custodian sufficient time to locate the records. *Hamilton v. Simpson*, 67 Ark. App. 173, 993 S.W.2d 501 (1999). A defendant may recover attorneys’ fees and costs only if it substantially prevails and the action was initiated “primarily for frivolous or dilatory purposes.” Ark. Code Ann. § 25-19-107(d)(2).

Attorneys’ fees and costs may not be assessed against the State or any of its agencies or departments, Ark. Code Ann. § 25-19-107(d), though by statute, such an award may be made against the State in FOIA cases involving the Hazardous Waste Management Act, Ark. Code Ann. § 8-7-204(j). The Court of Appeals has held in *George v. Department of Human Services*, 88 Ark. App. 135, 195 S.W.3d 399 (2004), that state officers and employees are within the statute’s exemption from fees for state departments and agencies. A suit against a state officer or employee in his or her official capacity is equivalent to a suit against the state agency or department for which the named defendant works. The court reasoned that an officer or employer may only be sued in an official capacity, because he or she has administrative control over public records only in an official capacity. This reasoning might be mistaken, as it flies in the face of the plain language of the FOIA. Cf. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (explaining that an individual-capacity action under 42 U.S.C. § 1983 “seek[s] to impose individual liability upon a government officer for actions taken under color of state law”). The criminal penalties of the FOIA pertain to state officers and employees; had the legislature intended to immunize them against civil remedies, it could have done so.

b. Court and litigation costs.

The FOIA provides for recovery of “litigation expenses” in addition to attorneys’ fees. Ark. Code Ann. § 25-19-107(d). A trial court has the discretion to award those costs if the plaintiff “substantially prevails” and the defendant’s actions were “substantially justified.” *City of Little Rock v. Carpenter*, 374 Ark. 551, 288 S.W.3d 647 (2008).

10. Fines.

The FOIA contains no provisions for civil penalties or forfeitures. However, a person who negligently violates the FOIA is guilty of a misdemeanor and can be fined up to \$500. Ark. Code Ann. § 25-19-104.

11. Other penalties.

Negligent violation of the FOIA is a criminal offense, a misdemeanor. Upon conviction, the defendant can be punished by a fine of no more than \$100, a jail term of up to 30 days, or both. Ark. Code Ann. § 25-19-104. Criminal prosecutions for FOIA violations are relatively infrequent but do occur. For example, the mayor of Hartford was convicted in Greenwood Municipal Court for participating in discussions about matters other than personnel issues during an executive session of the city council. The municipal court ordered the mayor to read the FOIA and to attend a seminar on the act. See “Judge rules mayor ran afoul of FOI,” *Southwest Times Record* (July 20, 2000). The FOIA formerly expressly allowed sentences of “appropriate public service or education, or both,” alternatively to fine or jail term, but that language

was deleted with implementation of a legislative overhaul of criminal code provisions in 2005.

12. Settlement, pros and cons.

As is the case in any litigation, settlement of an FOIA suit may be advisable under some circumstances, and a requester may be able to obtain the desired records without litigation. One consideration is whether an appeal might set an adverse precedent. In FOIA cases the Arkansas courts have generally struck the balance in favor of disclosure.

E. Appealing initial court decisions.

1. Appeal routes.

Under the Court’s present rules, the appeal may be heard in the first instance by the Court of Appeals. Unless a case poses a question of state constitutional law or falls into certain categories not relevant here, appellate jurisdiction lies initially in the Court of Appeals. Rule 1-2(a), Ark. Sup. Ct. R. However, any appeal is subject to reassignment by the Supreme Court, which will consider such factors as whether the case suggests a need to clarify the law or presents an issue of first impression, a question of statutory interpretation, an issue of substantial public interest, or an issue on which there is a perceived inconsistency among prior decisions. Rule 1-2(b), Ark. Sup. Ct. R.

2. Time limits for filing appeals.

Notice of appeal must be filed with the clerk of the trial court within 30 days of the entry of judgment, unless a post-trial motion is filed. In that event, the notice of appeal must be filed within 30 days of the trial court’s disposition of the motion or within 30 days of the date on which the motion is deemed denied by operation of law. Rules 3 & 4, Ark. R. App. P-Civ. The record on appeal must be filed with the clerk of the Supreme Court within 90 days of the filing of the notice of appeal, though an extension of time may be obtained from the trial court. Rule 5, Ark. R. App. P-Civ.

3. Contact of interested amici.

The following organizations have historically had a strong interest in the FOIA: Arkansas Chapter, Society of Professional Journalists, P.O. Box 1325, Little Rock, AR 72203; Arkansas Press Association, 411 S. Victory, Little Rock, AR 72201; Arkansas Press Women, c/o Brenda Blagg, 838 Birwin St., Fayetteville, AR 72703; Arkansas Associated Press Managing Editors Association and Arkansas Associated Press Broadcasters Association, c/o Associated Press, 10802 Executive Center Dr., Suite 100, Little Rock, AR 72211-4377; Arkansas Broadcasters Association, 2024 Arkansas Valley Dr., Suite 403, Little Rock, AR 72212. Also, the Reporters Committee for Freedom of the Press files *amicus* briefs in cases involving significant press issues before a state’s highest court.

F. Addressing government suits against disclosure.

The FOIA itself does not speak directly to a right of action to enjoin the disclosure of records. However, such “reverse-FOIA” suits are not unknown in the state. *E.g., McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). Nor are suits by a government agency to avert disclosure. For example, in *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986), the state revenue commissioner sought a declaratory judgment that certain tax records were not subject to the FOIA. An agency could presumably do the same thing with respect to records allegedly protected by the competitive advantage exemption. *Arkansas Dep’t of Finance & Admin. v. Pharmacy Associates, Inc.*, 333 Ark. 451, 970 S.W.2d 217 (1998) (agency may assert this exemption on behalf of the person who submitted the information). As a matter of procedure, one who seeks declaratory relief also may ask for an injunction, and one who obtains a declaratory judgment may later ask that it be enforced by injunction. See Ark. Code Ann. § 16-111-110.

Open Meetings

I. STATUTE — BASIC APPLICATION.

A. Who may attend?

Because the FOIA provides that meetings “shall be public,” Ark. Code Ann. § 25-19-106(a), it appears that anyone may attend, including representatives of the news media. However, only an Arkansas citizen may bring an action under the FOIA claiming a violation of the act. Ark. Code Ann. § 25-19-107(a). *See* Ark. Op. Att’y Gen. No. 97-016.

B. What governments are subject to the law?

1. State.

The FOIA applies to the “governing bodies” of “all boards, bureaus, commissions, or organizations of the State of Arkansas.” Ark. Code Ann. § 25-19-106(a). *See, e.g., Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975) (board of trustees of state university). A group that has ultimate decision-making or policy-making authority is a governing body. Ark. Op. Att’y Gen. Nos. 2003-170, 2002-092, 2000-260, 99-407, 98-169, 96-074, 91-288. If decision-making authority has been delegated by the governing body to a committee or other group, the open meetings requirement goes along with the delegation. *Baxter County Newspapers Inc. v. Medical Staff of Baxter Gen. Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981); Ark. Op. Att’y Gen. Nos. 2002-092, 98-103.

2. County.

The “governing bodies of all . . . counties” are subject to the act. Ark. Code Ann. § 25-19-106(a). *See* Ark. Op. Att’y Gen. Nos. 2000-260 (county economic development corporation), 2000-287 (county board of equalization is subject to FOIA’s open meeting requirement). Grand juries are expressly excluded. Ark. Code Ann. § 25-19-106(a).

3. Local or municipal.

The act applies to “the governing bodies of all municipalities, . . . townships, and school districts,” as well as to the governing bodies of private entities “supported wholly or in part by public funds or expending public funds.” Ark. Code Ann. § 25-19-106(a). *See, e.g., Yandell v. Havana Bd. of Educ.*, 266 Ark. 434, 585 S.W.2d 927 (1979) (school board); *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (city council); Ark. Op. Att’y Gen. Nos. 97-178 (municipal water commission), 97-016 (levee district board), 96-016 (city library board, water and sewer commission), 95-377 (municipal planning commission), 94-339 (screening committee appointed by school board), 88-058 (municipal civil service commission).

C. What bodies are covered by the law?

1. Executive branch agencies.

a. What officials are covered?

The FOIA applies to the “governing bodies” of state agencies and local entities that carry out executive functions. Ark. Code Ann. § 25-19-106(a). *E.g., Arkansas State Police Comm’n v. Davidson*, 253 Ark. 1090, 490 S.W.2d 788 (1973) (commissioners of state agency); Ark. Op. Att’y Gen. No. 90-216 (“control group” for multi-jurisdictional drug task force).

b. Are certain executive functions covered?

The mayor is considered a member of the city council for FOIA purposes. Ark. Op. Att’y Gen. Nos. 97-057, 96-067, 95-227.

c. Are only certain agencies subject to the act?

The act is not applicable to meetings of agency staff or employees. *National Park Medical Center Inc. v. Arkansas Dep’t of Human Services*, 322 Ark. 595, 911 S.W.2d 250 (1995). *See also* Ark. Op. Att’y Gen.

Nos. 2000-111 (meeting between school board member and superintendent of schools), 79-169 (school district administrators), 77-035 (university administrators). Similarly, the FOIA does not reach meetings of various officials who do not constitute a governing body. *See, e.g., Ark. Op. Att’y Gen. Nos. 97-202* (justices of peace, state representatives, county officials), 96-074 (meeting of representatives of three different agencies), 87-288 (meeting of county judge, sheriff, county clerk, circuit clerk, and county assessor), 84-207 (school administrators and state auditors).

2. Legislative bodies.

The Attorney General has indicated that the General Assembly and its committees are subject to the FOIA. Ark. Op. Att’y Gen. No. 84-091. However, the Constitution expressly provides that “sessions of each house and of committees of the whole shall be open, unless when the business is such as ought to be kept secret.” Ark. Const. art. V, § 13. This provision is a broad exception to the FOIA, but applies only to both houses and to “committees of the whole” and thus apparently does not reach other legislative committees. *See* Ark. Op. Att’y Gen. No. 84-091. All meetings of the Legislative Council, a committee created by statute, “shall be open to the public, except in those instances in which the Council feels it is necessary to go into executive session.” Ark. Code Ann. § 10-3-305(a).

Other legislative bodies, such as a city council and county quorum court, are clearly subject to the open meeting requirement. *E.g., Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (city council).

3. Courts.

(1) The Attorney General has opined that the Supreme Court, a multi-member body with rulemaking and other supervisory powers over the judicial branch, is subject to the FOIA. Ark. Op. Att’y Gen. No. 84-091. However, application of the act to the Court would run afoul of the separation of powers doctrine. *See Arkansas Newspapers Inc. v. Patterson*, 281 Ark. 213, 662 S.W.2d 826 (1984). Thus, the Court may exempt itself from the FOIA by adopting rules that provide for closed meetings. Ark. Op. Att’y Gen. No. 90-217.

(a) Committees established by the Supreme Court, such as the Court’s committee on professional conduct, must apparently follow the FOIA’s open meeting provisions, at least insofar as they exercise delegated authority. Ark. Op. Att’y Gen. No. 84-091. However, the Court may by rule provide for closed sessions. Ark. Op. Att’y Gen. No. 90-217.

(b) Other state courts are not subject to the FOIA’s open meeting requirement. The Court of Appeals lacks judicial rulemaking authority, and single-judge trial courts are not “bodies” that can hold “meetings.” Under another statute, however, the “sittings of every court shall be public, and every person may freely attend the sittings of every court.” Ark. Code Ann. § 16-10-105. *See, e.g., Taylor v. State*, 284 Ark. 103, 679 S.W.2d 797 (1984); *Shiras v. Britt*, 267 Ark. 97, 589 S.W.2d 18 (1979). There is also a qualified right of access to judicial proceedings under the First Amendment. *E.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

(2) Grand juries are expressly excluded from the list of entities subject to the open meeting requirement. Ark. Code Ann. § § 25-19-103(4), 25-19-106(a).

4. Nongovernmental bodies receiving public funds or benefits.

(1) The FOIA applies to meetings of the governing bodies of private organizations “supported wholly or in part by public funds or expending public funds.” Ark. Code Ann. § § 25-19-103(4), 25-19-106(a). *See, e.g., North Central Ass’n of Colleges & Schools v. Troutt Bros. Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977) (educational accrediting organization); *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985) (nonprofit corporation that

received federal funds); *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989) (private body that regulates high school sports), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006).

(2) The mere receipt of public funds is not sufficient to bring a private entity within the FOIA; rather, the question is whether the private group carries on “public business” or is otherwise intertwined with the activities of government. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); Ark. Op. Att’y Gen. Nos. 2001-069, 2000-039, 99-090, 98-139, 97-148, 96-123, 96-116, 96-013, 94-023, 92-205. *Compare Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board*, 72 Ark. App. 37, 32 S.W.3d 60 (2000) (FOIA applies to volunteer fire department that received fees from public fire protection district, as well as governmental loans, and “performed a service routinely provided by government”), *with Sutton v. Ballet Arkansas Inc.*, CIV 00-3066 (Pulaski County Cir. Ct. 2000) (ballet company that received some financial support from the state and county was not subject to the FOIA because its activities “do not appear to be intertwined to a government function so much that its activities are tantamount to government action”).

(a) A private entity that receives public funds for services rendered to a government agency is subject to FOIA when the services could have been performed by public employees. *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995) (accounting firm); *City of Fayetteville v. Edmark*, *supra* (law firm); *Kristen Investment Properties v. Faulkner County Waterworks & Sewer Public Facilities Board*, *supra* (volunteer fire department). *See, e.g.*, Ark. Op. Att’y Gen. Nos. 2000-260 (nonprofit economic development corporation that receives sales tax revenue), 2000-039 (nonprofit corporation that provides services for developmentally disabled individuals), 99-350 (probation records maintained by private contractor working for a municipal judge), 97-148 (nonprofit corporation that leases hospital facility from county), 96-185 (private company that operates state prison), 96-116 (nonprofit corporation that leases hospital facility from county), 95-273 (area agency on aging, a nonprofit corporation, operates under close supervision and direction from the government and performs functions that would otherwise be performed by the government), 95-121 (chamber of commerce that provides services to city advertising and promotion commission), 94-023 (chamber of commerce engaged in economic development on city’s behalf), 92-220 (nonprofit corporation that operated public access cable channel under contract with city). *Compare* Ark. Op. Att’y Gen. Nos. 96-185 (construction company that builds state prison is not subject to FOIA), 95-353 (FOIA does not apply to nonprofit corporation that receives public funding to operate aerospace education center, where neither the corporation’s budget nor activities were subject to review by any government body), 83-163 (private hospital that receives Medicare and Medicaid payments is not subject to FOIA).

(b) The FOIA will generally be inapplicable to a private entity that sells supplies, equipment, and other products to a government agency. With respect to services, there is little concern that government might circumvent the FOIA by hiring private contractors. However, this concern is not present when goods are involved, since government cannot produce all of the goods it needs to function and, as a practical matter, has no choice but to purchase materials from the private sector. Ark. Op. Att’y Gen. No. 96-123.

(3) Direct receipt of public funds by the private organization is necessary to trigger the FOIA. Indirect support, such as the use of public property without charge, is not sufficient. *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993); Ark. Op. Att’y Gen. Nos. 97-148, 96-267, 96-196, 96-116, 95-077.

(4) A private organization that receives partial financial support from government is partially subject to the FOIA. The act applies only to meetings of the organization’s governing body that are relevant to the task for which it has been hired by government or has been given a government grant. Ark. Op. Att’y Gen. Nos. 96-290, 94-023.

(5) Meetings of the governing body of private organization held after its public funding has come to an end are not covered by the FOIA. Ark. Op. Att’y Gen. No. 94-023. However, FOIA application does not abate simply because a private contractor refuses to accept public funds, absent contract termination or legislative action. Ark. Op. Att’y Gen. No. 2004-223.

5. Nongovernmental groups whose members include governmental officials.

Shortly after the FOIA’s passage, the Attorney General suggested that the act applies to a private entity whose board of directors includes government officials. Ark. Op. Att’y Gen. (April 16, 1971). That position is no longer tenable in light of the Supreme Court’s holding that only the direct receipt of public funds by a private organization triggers the act. *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993).

6. Multi-state or regional bodies.

The meetings of multistate or regional bodies must be held in accordance with the FOIA, as must a joint meeting of two governing bodies. Ark. Op. Att’y Gen. No. 85-173; Inf. Att’y Gen. Op. (Aug. 31, 1987).

Under Act 253 of 2001, the Interstate Commission for Adult Offender Supervision created by interstate compact must give public notice of all its meetings, which “shall be open to the public, except as set forth in the rules or as otherwise provided in the compact.” The commission and any of its committees “may close a meeting to the public where it determines by two-thirds vote” that an open meeting would be “likely” to: relate to internal personnel practices; disclose trade secrets or other confidential information; involve accusing someone of a crime or the formal censure of a person; disclose information of a personal nature which, if made public, would constitute a clearly unwarranted invasion of personal privacy; disclose investigatory records compiled for law enforcement purposes; disclose records relating to the commission’s regulation or supervision of an entity; disclose information which, if made public, would endanger the life of a person or the stability of a regulated entity; or relate to the commission’s issuance of a subpoena or its participation in a civil action or proceeding. Act 253 of 2001.

7. Advisory boards and commissions, quasi-governmental entities.

Because groups that simply render advice lack final decision-making authority, they are not governing bodies and their meetings are not subject to the FOIA. Ark. Op. Att’y Gen. No. 2007-224 (curriculum review committee). If, however, an advisory group’s recommendations are automatically accepted or “rubber-stamped” by its parent entity, then it is a *de facto* governing body and must comply with the act. Ark. Op. Att’y Gen. Nos. 2000-260, 2000-251, 99-407, 98-169, 98-113, 96-074, 91-288.

A county circuit court in 2004 ruled an appointed task force at the University of Arkansas, Fayetteville, a merely advisory body not subject to FOIA open meeting requirements. The court rejected arguments that University System trustees would “rubber-stamp the task force’s recommendations.” Chris Branam, *Judge Dismisses Student’s Suit*, Arkansas Democrat-Gazette, Mar. 4, 2004 (digital archive). Trustees ultimately approved unanimously a student government overhaul endorsed by the task force. Chris Branam, *UA Trustees Transfer Power Over Student Government Group to Chancellor*, Arkansas Democrat-Gazette, Apr. 20, 2004 (digital archive).

8. Other bodies to which governmental or public functions are delegated.

If decision-making authority has been delegated by the governing body to a particular group, the open meetings requirement goes along with the delegation. *Baxter County Newspapers Inc. v. Medical Staff of Baxter Gen. Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981). For example, a committee appointed by a school board to screen candidates for superintendent is a governing body, since it has been assigned the task of eliminating candidates from consideration. Ark. Op. Att’y Gen. No. 94-339.

9. Appointed as well as elected bodies.

The fact that a body is appointed rather than elected is immaterial for FOIA purposes; rather, the question is whether it is a “governing body.” See *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975) (board of trustees at state university; members appointed by the governor); Ark. Op. Att’y Gen. Nos. 96-016 (municipal water and sewer commission, library board; members appointed by the city council), 95-377 (municipal planning commission; members appointed by the city council), 94-339 (committee appointed by school board).

D. What constitutes a meeting subject to the law.

The FOIA does not apply to meetings, functions, or events attended by members of a particular governing body and over which they have no control. *E.g.*, Ark. Op. Att’y Gen. No. 94-131 (an arbitration hearing attended by members of a school board is not a meeting for FOIA purposes, since it is not subject to the board’s control).

1. Number that must be present.

a. Must a minimum number be present to constitute a “meeting”?

The FOIA is silent as to the number of members of the governing body that must be present for the meeting to be subject to the act. The Arkansas Supreme Court has held that the FOIA applies to meetings of less than a quorum of the governing body and to committee meetings. See *Mayor of El Dorado v. El Dorado Broad. Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976). According to the Attorney General, the “number of attendees at a meeting is not, in and of itself, dispositive,” and the relevant inquiry is “the extent to which the facts suggest potential evasion of the FOIA.” Ark. Op. Att’y Gen. No. 99-018. For example, “successive meetings of two members prior to action by the governing body” could be viewed as an attempt to “avoid public discussion” and would likely trigger the act. However, “[i]f the two members meet alone, and there is no evidence that the FOIA is being circumvented,” then such a meeting would likely fall outside the act. This is so even though government business is discussed. *Id.* See also Ark. Op. Att’y Gen. No. 99-014 (it would be unreasonable to suggest that a meeting for FOIA purposes occurs every time school board members gather for a tour of the school, but discussion during the tours of matters likely to come before the board would trigger the act). Meetings at which government business is not discussed, or social functions where the discussion of such business is intermittent and incidental, are not subject to the FOIA. Ark. Op. Att’y Gen. Nos. 95-020, 93-355.

A statute governing county election commissioners provides that “any meeting of two or more” commissioners shall be held pursuant to the FOIA “when official business is conducted.” Ark. Code Ann. § 7-4-105(b). There are only three such commissioners and the presence of two is required for a quorum.

As a general matter, there is no “meeting” for FOIA purposes when one member of a governing body meets with an employee who is not a member. For example, discussions between a school board member and the superintendent of schools are not covered by the act. However, a series of meetings between the superintendent and each board member held for the purpose of making decisions out of the public eye violates the FOIA. Ark. Op. Att’y Gen. No. 2000-111. See also *Harris*

v. City of Ft. Smith, 359 Ark. 355, 197 S.W.3d 461 (2004); *Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency*, *supra*.

b. What effect does absence of a quorum have?

It is settled that a quorum of the governing body need not be present for the meeting to be subject to the FOIA. *Mayor v. El Dorado Broad. Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976); Ark. Op. Att’y Gen. No. 95-098.

2. Nature of business subject to the law.

a. “Information gathering” and “fact-finding” sessions.

Because the FOIA applies to “informal” meetings, no official action need occur at a meeting to trigger the act. Accordingly, unofficial meetings to discuss matters which may come before the governing body and “work sessions” to gather information or consider recommendations are subject to the act. *Mayor v. El Dorado Broad. Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976); Ark. Op. Att’y Gen. Nos. 97-080, 96-328, 95-308, 95-098, 93-299, 91-225, 91-175, 80-016. *But see Arkansas Oklahoma Gas Corp. v. MacSteel Division of Quanex*, 370 Ark. 481, 262 S.W.3d 147 (2007) (county judge contacting members of quorum court to ensure they understood the next meeting’s agenda did not constitute a meeting).

b. Deliberations toward decisions.

Deliberations of the governing body must be held in public, since the FOIA entitles the public to learn not only of action taken on particular matters, but also the reasons for such action. *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975); Ark. Op. Att’y Gen. Nos. 91-175, 80-016. The FOIA reaches every step in the decision-making process, not simply the point at which the decision is announced. Ark. Op. Att’y Gen. No. 95-098. One member of the quorum contacting other members to ensure that they understand the meeting agenda is not considered to be deliberations subject to the FOIA. *Arkansas Oklahoma Gas Corp. v. MacSteel Division of Quanex*, 370 Ark. 481, 262 S.W.3d 147 (2007).

3. Electronic meetings.

a. Conference calls and video/Internet conferencing.

A telephone meeting must be conducted in accordance with the FOIA. Such a meeting is permissible if sufficient safeguards are employed, such as proper notice and the availability of telephones for the public and press. Thus, an agency might arrange a conference call among members of its board, with a speaker phone set up in a meeting room where members of the public and press may listen to the proceedings. Ark. Op. Att’y Gen. Nos. 2000-102, 2000-096. However, polling individual members of the governing body one-by-one without such safeguards violates the act. *Harris v. City of Ft. Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004); *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). See also Ark. Op. Att’y Gen. Nos. 2004-359, 99-018, 94-167. *But see Arkansas Oklahoma Gas Corp. v. MacSteel Division of Quanex*, 370 Ark. 481, 262 S.W.3d 147 (2007) (county judge contacting members of quorum court to ensure they understood the next meeting’s agenda did not constitute a meeting).

A telephone conversation between two members of a governing body to discuss official business does not run afoul of the FOIA if there are not “successive conversations suggesting circumvention of the open meeting requirement.” Ark. Op. Att’y Gen. No. 99-018. Such circumvention might occur when “[s]erial telephone conversations” among members of the governing body have taken place. *Id.*

b. E-mail.

An exchange of e-mail messages or faxes is not a meeting, since these activities are analogous to written correspondence. Ark. Op. Att’y Gen. Nos. 2000-096, 99-018. However, a real-time, interactive

communication via a local network or the Internet, including “sequential or circular” e-mails, could probably constitute a meeting for FOIA purposes. Ark. Op. Att’y Gen. Nos. 2008-055, 2005-166. Such a “virtual” meeting is analogous to a telephone conference call, not to written correspondence. To comply with the FOIA, the governing body would be required to allow the public to monitor the electronic discussion, e.g., by logging on to the computer network. Ark. Op. Att’y Gen. No. 2000-096.

c. Text messages.

There is no statutory or case law concerning text messages, specifically, but the Attorney General has opined that sequential electronic discussions could be considered meetings under the FOIA. Ark. Op. Att’y Gen. No. 2008-055.

d. Instant messaging.

There is no statutory or case law concerning instant messaging, specifically, but the Attorney General has opined that sequential electronic discussions could be considered meetings under the FOIA. Ark. Op. Att’y Gen. No. 2008-055. Public access to such meetings could be gained by logging onto the computer network. *Id.*

e. Social media and online discussion boards.

There is no statutory or case law concerning social media and online discussion boards, specifically, but the Attorney General has opined that sequential electronic discussions could be considered meetings under the FOIA. Ark. Op. Att’y Gen. No. 2008-055. Public access to such meetings could be gained by logging onto the computer network. *Id.*

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

The FOIA applies to “all meetings, formal or informal, special or regular.” Ark. Code Ann. § 25-19-106(a). There is no definition of “regular” meetings; in practice, however, the term apparently refers to regularly scheduled meetings of governing bodies. Ark. Op. Att’y Gen. No. 93-299.

b. Notice.

(1). Time limit for giving notice.

The FOIA does not establish a time requirement for notice of regular meetings. However, the governing body “must give notice within a period of time that is reasonably sufficient to allow [persons] who have requested notice to arrange to attend the meeting.” Ark. Op. Att’y Gen. No. 98-033. *See also* Ark. Op. Att’y Gen. (Mar. 1, 1971) (six days advance notice is acceptable). The FOIA does not specify the form that the notice must take. Whether a particular form (e.g., e-mail, fax, voice-mail) satisfies the act must be determined on a case-by case basis. Ark. Op. Att’y Gen. No. 96-074.

(2). To whom notice is given.

Notice must be furnished to anyone who requests it. Ark. Code Ann. § 25-19-106(b)(1). A person is entitled to notice only if he so requests. *Elmore v. Burke*, 337 Ark. 235, 987 S.W.2d 730 (1999); *Nance v. Williams*, 263 Ark. 237, 564 S.W.2d 212 (1978). Organizations as well as individuals may request notice. Ark. Op. Att’y Gen. (Mar. 1, 1971). A request for notice may be made orally or in writing. Ark. Op. Att’y Gen. No. 99-157.

(3). Where posted.

The FOIA does not require that notice of a meeting be posted or that an agency purchase newspaper advertising to inform the public of a meeting. However, other statutes, city ordinances, or administrative regulations may impose this requirement on a particular agency. Ark. Op. Att’y Gen. No. 81-30; Ark. Op. Att’y Gen. (Mar. 4, 1969).

(4). Public agenda items required.

The FOIA does not require that an agenda or listing of subjects to be considered at the meeting be included in the notice. Ark. Op. Att’y Gen. Nos. 2001-012, 98-033. However, other statutes, ordinances, or regulations may impose such a requirement upon particular governing bodies.

(5). Other information required in notice.

The “time and place” of the meeting must be stated in the notice. Ark. Code Ann. § 25-19-106(b)(1). A schedule of upcoming meetings is sufficient. Ark. Op. Att’y Gen. No. 2005-167; Ark. Op. Att’y Gen. (Oct. 4, 1971). A meeting must not be set at a time that would effectively avoid the public meeting requirement of the FOIA. Ark. Op. Att’y Gen. Nos. 96-317, 95-308, 92-162. If the location of the meeting has changed since notice was given, a second notice containing the correct information is required. Ark. Op. Att’y Gen. No. 97-327.

(6). Penalties and remedies for failure to give adequate notice.

If proper notice is not given, action taken at the meeting may be subject to invalidation. *See Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

c. Minutes.

(1). Information required.

Nothing in the FOIA requires a governing body to keep minutes of its proceedings, though several other statutes place that duty upon particular entities. *E.g.*, Ark. Code Ann. § § 14-14-903(a) (county quorum court), 17-82-205(e) (State Board of Dental Examiners).

(2). Are minutes public record?

If minutes or similar records are kept or a tape recording of the meeting is made, these materials are open to the public. Ark. Op. Att’y Gen. Nos. 87-284, 86-316.

The press and public have a right to ascertain how each member of the governing body voted on a particular question, no matter what method of voting is employed. If a ballot is used, each ballot must be signed by the member casting it and made available for public inspection. *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); Ark. Op. Att’y Gen. Nos. 92-124, 88-171. If an initial vote is later expunged and another vote taken, ballots from the first vote must also be made available. Ark. Op. Att’y Gen. No. 74-072.

2. Special or emergency meetings.

a. Definition.

As is the case with regular meetings, the FOIA does not define special or emergency meetings. Anything other than a regular meeting would apparently fall into this category. If, for example, a city council adjourned a regular meeting only to reconvene moments later, the new meeting would be a special meeting. Ark. Op. Att’y Gen. Nos. 98-104, 95-308, 93-308, 93-299.

b. Notice requirements.

(1). Time limit for giving notice.

Notice must be given at least two hours prior to the emergency or special meeting. Ark. Code Ann. § 25-19-106(b)(2). *See* Ark. Op. Att’y Gen. Nos. 95-308, 93-299. The FOIA does not specify the form that the notice must take. Whether a particular form (e.g., e-mail, fax, voice-mail) satisfies the act must be determined on a case-by case basis. Ark. Op. Att’y Gen. No. 96-074. For example, a notice for a 7:00 a.m. meeting, faxed during the night, is not sufficient if the sender is aware that no one will be present to receive the fax at the time that it is sent. *Id.* Verbal notice at an earlier public meeting is adequate only if representatives of all media who are entitled to notice are present. *Id.*

(2). To whom notice is given.

Notice must be given to news media located in the county where the meeting is to be held and to news media located elsewhere which cover regular meetings of the governing body. Ark. Code Ann. § 25-19-106(b)(2). See Ark. Op. Att’y Gen. No. 96-074. A request for such notice is necessary. *Elmore v. Burke*, 337 Ark. 235, 987 S.W.2d 730 (1999); *Nance v. Williams*, 263 Ark. 237, 564 S.W.2d 212 (1978). A request for notice may be made orally or in writing, Ark. Op. Att’y Gen. No. 99-157, and repeated requests are not required. Ark. Op. Att’y Gen. No. 97-327.

(3). Where posted.

The FOIA does not require that notice of a meeting be posted or that an agency purchase newspaper advertising to inform the public of a meeting. However, other statutes, city ordinances, or administrative regulations may impose this requirement on a particular agency. Ark. Op. Att’y Gen. No. 81-30; Ark. Op. Att’y Gen. (Mar. 4, 1969).

(4). Public agenda items required.

The FOIA does not require that an agenda or listing of subjects to be considered at the meeting be included in the notice, Ark. Op. Att’y Gen. No. 98-033, but other statutes, ordinances, or regulations may impose such a requirement upon particular governing bodies.

(5). Other information required in notice.

The notice must contain the “time, place, and date” of the meeting. Ark. Code Ann. § 25-19-106(b)(2). The meeting must not be set at a time that would “effectively avoid the public meeting requirement of the FOIA.” Ark. Op. Att’y Gen. No. 92-162. See also Ark. Op. Att’y Gen. Nos. 95-308, 93-299. If the location of the meeting has changed since notice was initially given, a second notice containing the correct information is required at least two hours before commencement of the meeting. Ark. Op. Att’y Gen. No. 97-327.

(6). Penalties and remedies for failure to give adequate notice.

If proper notice is not given, action taken at the meeting may be subject to invalidation. See *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

c. Minutes.**(1). Information required.**

Nothing in the FOIA requires a governing body to keep minutes of its proceedings, though several other statutes place that duty upon particular entities. *E.g.*, Ark. Code Ann. § 14-14-903(a) (county quorum court), 17-82-205(e) (State Board of Dental Examiners).

(2). Are minutes a public record?

If minutes or similar records are kept or a tape recording of the meeting is made, these materials are open to the public. Ark. Op. Att’y Gen. Nos. 87-284, 86-316.

The press and public have a right to ascertain how each member of the governing body voted on a particular question, no matter what method of voting is employed. If a ballot is used, each ballot must be signed by the member casting it and made available for public inspection. *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); Ark. Op. Att’y Gen. Nos. 97-016, 92-124, 88-171. If an initial vote is later expunged and another vote taken, ballots from the first vote must also be made available. Ark. Op. Att’y Gen. No. 74-072.

3. Closed meetings or executive sessions.**a. Definition.**

An executive session is permissible when the FOIA or another statute so provides. Ark. Code Ann. § 25-19-106(a) & (c). The FOIA itself contains three exemptions. First, a governing body may hold a closed

meeting “for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.” Ark. Code Ann. § 25-19-106(c)(1). Second, state boards and commissions may meet in executive session “for purposes of preparing examination materials and answers to examination materials . . . for licensure” and to administer the examinations. *Id.* § 25-19-106(c)(5)(A) & (B) (added by Act 1259 of 2001). Third, “any public agency may meet in executive discussion for the purpose of considering, evaluating, or discussing matters pertaining to public water system security.” *Id.* § 25-19-106(c)(6)(A) (added by Act 763 of 2003).

There are statutes that prohibit certain governing bodies from meeting in an executive session. See, *e.g.*, Ark. Code Ann. § 13-3-203 (Black History Commission), 14-201-122 (municipal utility commission), 24-7-304 (board of trustees of Arkansas Teacher Retirement System).

b. Notice requirements.

The notice requirements for regular and special or emergency meetings also apply to meetings which will be closed to the public in whole or in part under an exception to the FOIA. Ark. Op. Att’y Gen. No. 99-157; Ark. Op. Att’y Gen. (Nov. 22, 1971).

(1). Time limit for giving notice.

The FOIA does not establish a time requirement for notice of regular meetings. However, the governing body “must give notice within a period of time that is reasonably sufficient to allow [persons] who have requested notice to arrange to attend the meeting.” Ark. Op. Att’y Gen. No. 98-033. See also Ark. Op. Att’y Gen. (Mar. 1, 1971) (six days advance notice is acceptable). For special or emergency meetings, notice must be given to news organizations that have requested notification at least two hours in advance. Ark. Code Ann. § 25-19-106(b)(2). The FOIA does not specify the form that the notice must take. Whether a particular form (*e.g.*, e-mail, fax, voicemail) satisfies the act must be determined on a case-by case basis. Ark. Op. Att’y Gen. No. 96-074. For example, a notice for a 7:00 a.m. meeting, faxed during the night, is not sufficient if the sender is aware that no one will be present to receive the fax at the time that it is sent. *Id.* Verbal notice at an earlier public meeting is adequate only if representatives of all media who are entitled to notice are present. *Id.*

(2). To whom notice is given.

Notice of regular meetings must be furnished to anyone who requests it. Ark. Code Ann. § 25-19-106(b)(1). A person is entitled to notice only if he or she so requests. *Elmore v. Burke*, 337 Ark. 235, 987 S.W.2d 730 (1999); *Nance v. Williams*, 263 Ark. 237, 564 S.W.2d 212 (1978). Organizations as well as individuals may request notice. Ark. Op. Att’y Gen. (Mar. 1, 1971). For special or emergency meetings, notice must be given to news media located in the county where the meeting is to be held and to news media located elsewhere which cover regular meetings of the governing body. Ark. Code Ann. § 25-19-106(b)(2). See Ark. Op. Att’y Gen. No. 96-074. A request for notice may be made orally or in writing. Ark. Op. Att’y Gen. No. 99-157.

(3). Where posted.

The FOIA does not require that notice of a meeting be posted or that an agency purchase newspaper advertising to inform the public of a meeting. However, other statutes, city ordinances, or administrative regulations may impose this requirement on a particular agency. Ark. Op. Att’y Gen. No. 81-30; Ark. Op. Att’y Gen. (Mar. 4, 1969).

(4). Public agenda items required.

The FOIA does not require that an agenda or listing of subjects to be considered at the meeting be included in the notice, Ark. Op. Att’y Gen. No. 98-033, but other statutes, ordinances, or regulations may impose such a requirement upon particular governing bodies.

(5). Other information required in notice.

For regular meetings, the “time and place” of the meeting must be

stated in the notice. Ark. Code Ann. § 25-19-106(b)(1). A schedule of upcoming meetings is sufficient. Ark. Op. Att’y Gen. (Oct. 4, 1971). The notice for special meetings must contain the “time, place, and date” of the meeting. *Id.* § 25-19-106(b)(2). A meeting must not be set at a time that would “effectively avoid the public meeting requirement of the FOIA.” Ark. Op. Att’y Gen. No. 92-162. *See also* Ark. Op. Att’y Gen. Nos. 96-317, 95-308, 93-299.

(6). Penalties and remedies for failure to give adequate notice.

If proper notice is not given, action taken at the meeting may be subject to invalidation. *See Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

c. Minutes.

(1). Information required.

Nothing in the FOIA requires a governing body to keep minutes of its proceedings, though several other statutes place that duty upon particular entities. *E.g.*, Ark. Code Ann. § 14-14-903(a) (county quorum court), 17-82-205(e) (State Board of Dental Examiners). The minutes must reflect the vote and the decision reached. Ark. Op. Att’y Gen. No. 87-284.

(2). Are minutes a public record?

If minutes or similar records are kept, they are open to the public. Ark. Op. Att’y Gen. Nos. 87-284, 86-316.

d. Requirement to meet in public before closing meeting.

The Attorney General has opined that a governing body holding an executive session must convene in public before retiring to executive session. Only a member of the body may move that an executive session be held. Ark. Op. Att’y Gen. Nos. 96-009, 91-070. If the closed meeting is to be held pursuant to the FOIA’s personnel exemption, it must be preceded by a public meeting at which the “specific purpose” of the executive session is announced. Ark. Code Ann. § 25-19-106(c)(1). Following an executive session, the body must reconvene in public and formally vote on the matter discussed at the closed meeting. Ark. Code Ann. § 25-19-106(c)(4); *Yandell v. Havana Bd. of Educ.*, 266 Ark. 434, 585 S.W.2d 927 (1979); Ark. Op. Att’y Gen. No. 96-052.

e. Requirement to state statutory authority for closing meetings before closure.

Before going into executive session pursuant to the FOIA’s personnel exemption, the governing body must first announce in public the “specific purpose” of the closed meeting. Ark. Code Ann. § 25-19-106(c)(1). If the executive session is held pursuant to another statute, however, then this requirement — which was added to the personnel exemption in 1999 — should not apply. Nonetheless, it is a good idea for governing bodies to state publicly the purpose of any closed meeting, as Attorney General’s opinions have suggested. Ark. Op. Att’y Gen. Nos. 96-052, 96-009, 90-239.

By using the term “specific purpose” in Section 25-19-106(c)(1), the General Assembly made plain that the announcement must reflect why the governing body is invoking the personnel exemption. For example, “we are going into executive session to consider the promotion of an employee” would suffice, since promotion is one of the matters that can be the basis for a closed meeting under the statute. By contrast, a general statement that “we are going into executive session to consider personnel matters” would not satisfy the requirement. An earlier version of the 1999 legislation would have required the governing body to disclose the name of the particular employee, officer or candidate for employment being considered, but this provision was deleted. *See* S.B. 901, 82d General Assembly (March 15, 1999). As a practical matter, the name of the individual under consideration will have to be disclosed if any action is taken by the governing body, which must reconvene in public after the executive session and take a

vote. Ark. Code Ann. § 25-19-106(c)(4).

f. Tape recording requirements.

There is no requirement that executive sessions be tape-recorded; however, the practice has been encouraged. *Commercial Printing Co. v. Rusb*, 261 Ark. 468, 549 S.W.2d 790 (1977); Ark. Op. Att’y Gen. No. 74-078. An audio or video tape may not be a record within the meaning of Section 25-19-103(5)(A) of the FOIA because it can be viewed as “the embodiment of the meeting.” Ark. Op. Att’y Gen. No. 91-323. If a tape is treated as a record, it is generally exempt from disclosure, for otherwise the purpose of allowing executive sessions would be thwarted. *Id.*

F. Recording/broadcast of meetings.

1. Sound recordings allowed.

Members of the press and the public have the right to make audio recordings of meetings, so long as the mechanics of recording are not disruptive. Ark. Op. Att’y Gen. No. 83-213. Similarly, the media have the right to broadcast a meeting “live,” subject to reasonable limitations to prevent disruption or interference with the meeting. Ark. Op. Att’y Gen. No. 77-086.

2. Photographic recordings allowed.

Members of the press and the public have the right to make video recordings of meetings, so long as the mechanics of recording are not disruptive. Ark. Op. Att’y Gen. No. 83-213. Similarly, the media have the right to broadcast a meeting “live,” subject to reasonable limitations to prevent disruption or interference with the meeting. Ark. Op. Att’y Gen. No. 77-086.

G. Are there sanctions for noncompliance?

See infra, part IV.C.8.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

The FOIA itself contains only three exemptions, all specific in character. First, a governing body may hold a closed meeting “for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.” Ark. Code Ann. § 25-19-106(c)(1). Second, state boards and commissions may meet in executive session “for purposes of preparing examination materials and answers to examination materials . . . for licensure” and to administer the examinations. *Id.* § 25-19-106(c)(5)(A) & (B) (added by Act 1259 of 2001). Third, “any public agency may meet in executive discussion for the purpose of considering, evaluating, or discussing matters pertaining to public water system security.” *Id.* § 25-19-106(c)(6)(A) (added by Act 763 of 2003).

Any exemption to the open meetings provision enacted after June 30, 2009 must specifically cite the FOIA. Ark. Code Ann. § 25-19-110.

b. Mandatory or discretionary closure.

The personnel exemption is discretionary rather than mandatory, and a governing body may choose to meet in public on a personnel matter otherwise within the exemption. Ark. Op. Att’y Gen. Nos. 99-157, 96-009, 74-078. The exemption for licensing exam preparation and administration provides that state boards and commissions “may meet” in executive session and is thus permissive in nature. Similarly, the water system security exemption provides that public agencies “may meet” in executive session and is thus permissive in nature.

2. Description of each exemption.

(1) The personnel exemption is limited to consideration of the matters enumerated in Ark. Code Ann. § 25-19-106(c)(1): “employment,

appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.”

(a) The exemption applies only to matters involving individual officers or employees. Ark. Op. Att’y Gen. Nos. 96-371, 94-339, 91-070. Thus, a body may meet in executive session to screen and review applications for a position, Ark. Op. Att’y Gen. Nos. 94-339, 93-403; to consider discharging or disciplining an employee, Ark. Op. Att’y Gen. No. 81-213; to discuss a pay raise or promotion, Ark. Op. Att’y Gen. (June 10, 1974); to review an employee’s performance, if that review may lead to promotion, demotion, or changed compensation, Ark. Op. Att’y Gen. No. 88-058; or to take a non-binding “vote of confidence” with respect to an employee, if the purpose of the meeting is to consider the person’s continued employment or other personnel action. Ark. Op. Att’y Gen. No. 91-280.

(b) By contrast, an executive session to discuss general salary matters, an across-the-board pay increase, or overall performance of employees as a group is not permissible. Ark. Op. Att’y Gen. Nos. 91-070, 77-144. Similarly, a governing body may not meet in closed session to establish criteria for a particular position or to establish procedures for filling a vacancy. Ark. Op. Att’y Gen. No. 87-080.

(c) The exemption applies only to meetings concerning a “public officer or employee.” Elected or appointed public officials plainly fall within the definition, as do paid public employees. *See, e.g.,* Ark. Op. Att’y Gen. Nos. 97-067 (city planning commissioner), 96-016 (appointed member of city board or commission), 85-155 (elected county officials), 81-213 (public school teachers), 79-140 (county judge), 76-141 (state employees). *See also* Ark. Code Ann. § 17-86-202(a)(2) (providing for executive session to consider removal of officer of State Board of Massage Therapy).

(i) A doctor who has privileges at a county hospital is not an employee. *Baxter County Newspapers Inc. v. Medical Staff of Baxter Gen. Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981). Similarly, independent contractors and consultants are not employees. Inf. Att’y Gen. Op. (Nov. 19, 1979).

(ii) Licensed professionals, such as physicians, real estate agents, and attorneys are not within the definition, and meetings of regulatory boards with oversight of such professionals cannot be closed under the personnel exemption. Ark. Op. Att’y Gen. No. 84-091. Similarly, because persons claiming unemployment benefits are not employees of the Employment Security Department, its board of review may not invoke the exemption when considering unemployment claims. Ark. Op. Att’y Gen. No. 2001-040.

(iii) The exemption is also inapplicable to a meeting of a governing body to make appointments to an ad hoc advisory committee composed of persons who are not members of the governing body. Ark. Op. Att’y Gen. No. 74-039.

(d) If an evidentiary hearing is held in connection with a personnel matter (such as the termination or suspension of a public employee), the hearing itself must be open to the public, but the governing body may deliberate in executive session. *Arkansas State Police Comm’n v. Davidson*, 252 Ark. 137, 477 S.W.2d 852 (1972); Ark. Op. Att’y Gen. Nos. 99-100, 85-181.

(e) All members of the governing body, including *ex officio* members, may attend an executive session. Ark. Op. Att’y Gen. Nos. 96-063, 95-227. In addition to the members, only those persons listed in the FOIA may attend an executive session held pursuant to the personnel exemption: the person holding the top administrative position at the agency, department or office involved; the employee’s immediate supervisor; the employee himself; and, in connection with hiring decisions, any person being interviewed for the “top administrative position” within the agency, department, or office. These persons have no right to attend, but may

be present at the discretion of the governing body. Ark. Code Ann. § 25-19-106(c)(2)(A) & (B). *See also* Ark. Op. Att’y Gen. Nos. 2001-286, 97-130, 81-213. The governing body may elicit information from those persons permitted to attend an executive session; if that were not the case, allowing their attendance “would serve little purpose.” Ark. Op. Att’y Gen. No. 97-130.

(i) No one other than the persons included in the statutory list may attend an executive session held pursuant to the personnel exemption. *See, e.g.,* Ark. Op. Att’y Gen. Nos. 97-130 (legal counsel for either the governing body or the employee), 97-067 (candidates for city planning commissioner), 96-269 (candidates for vacant city council position), 91-323 (county employee who could provide information about alleged misdeeds of another employee, unless he or she is that employee’s immediate supervisor or the top administrator of the agency), 88-082 (staff member who is not school superintendent or teacher’s immediate supervisor), 86-036 (discharged employee), 81-227 (police officers involved in investigation of city employees).

(ii) Although the governing body’s attorney cannot attend the executive session, Ark. Op. Att’y Gen. Nos. 97-130, 85-181, a member of the body who serves as its lawyer is entitled to be present. Inf. Att’y Gen. Op. (Feb. 19, 1985).

(f) As amended in 1999, the statutory provision covering the personnel exemption states that “[t]he specific purpose of the executive session shall be announced in public before going into executive session.” Ark. Code Ann. § 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 personnel exemption. For example, “we are going into executive session to consider the promotion of an employee” would suffice, since promotion is one of the matters that can be the basis for a closed meeting. By contrast, a general statement that “we are going into executive session to consider personnel matters” would not satisfy the specificity requirement. An earlier version of the amendatory legislation would have required the governing body to disclose the name of the particular employee, officer or candidate for employment. S.B. 901, 82d General Assembly (March 15, 1999). As a practical matter, the name of the individual being considered will have to be disclosed if any action is taken by the governing body, which must reconvene in public after the executive session and take a vote. Ark. Code Ann. § 25-19-106(c)(4). *See* Ark. Op. Att’y Gen. No. 96-009.

(2) The licensing exam exemption was added by Act 1259 of 2001. It provides that state boards and commissions “may meet in executive session for purposes of preparing examination materials and answers to examination materials which are administered to applicants for licensure. . . .” Ark. Code Ann. § 25-19-106(c)(5)(A). Also, boards and commissions “are excluded from [the FOIA] for the administering of examinations to applicants for licensure.” *Id.* § 25-19-106(c)(5)(B).

(a) Similar provisions had previously been enacted with respect to particular licensing agencies. *E.g.,* Ark. Code Ann. § 17-100-203(a)(3) (allowing executive sessions of Board of Examiners in Speech-Language Pathology and Audiology to “prepare, approve, grade, or administer examinations”).

(b) Unlike the personnel exemption, Section 25-19-105(c)(5) contains no limitations on who may attend the executive session. Therefore, state licensing boards or commissions may allow staff members, consultants, attorneys, and other persons to be present at a closed meeting held pursuant to the exemption.

(3) The water system security exemption was added by Act 763 of 2003. The exemption provides that “any public agency may meet in executive discussion for the purpose of considering, evaluating, or discussing matters pertaining to public water system security.” Ark. Code Ann. § 25-19-106(c)(6)(A). “Public water system” was defined by the

act to “mean[] all facilities composing a system for the collection, treatment, and delivery of water to the general public, including, but not limited to, reservoirs, pipelines, reclamation facilities, processing facilities, and distribution facilities.” Ark. Code Ann. § 25-19-103(6)(A).

(a) According to the emergency clause of the enacting legislation, this exemption was necessary because information “could be obtained for terroristic purposes, including contamination and destruction of public water systems.” Act 763 of 2003, § 4.

(b) The exemption and its companion definition of public water system were to expire on July 1, 2005, but they have been extended to July 1, 2013, by Act 99 of 2011. Ark. Code Ann. § 25-19-103(6)(B), -106(c)(6)(B). They may be extended as well in future legislative sessions.

(c) Unlike the personnel exemption, Section 25-19-105(c)(6) contains no limitations on who may attend the executive session. Therefore, public agencies may allow staff members, consultants, attorneys, and other persons to be present at a closed meeting held pursuant to the exemption.

(d) This FOIA exemption expressly overrides Ark. Code Ann. § 14-116-308(d)(1), which generally prohibits the board of directors of a regional water distribution district from entering executive session at any time. *Accord* Ark. Code Ann. § 14-116-308(d)(2) (added by Act 1210 of 2003). However, Ark. Code Ann. § 14-250-110(d) generally prohibits the board of directors of a wastewater treatment district from entering executive session and was not similarly amended in 2003. Thus one may infer that as a more specific provision, the prohibition on executive sessions by wastewater treatment district boards remains operative. *See* Ark. Op. Att’y Gen. Nos. 97-178 (recognizing principle of statutory interpretation that more specific provision controls over more general provision), 96-016 n.2 (suggesting that wastewater district prohibition controls over later-in-time FOIA exemption for personnel matters, as Attorney General earlier reasoned that regional water distribution district prohibition, before 2003 amendment, controlled over later-in-time FOIA exemption for personnel matters, Ark. Op. Att’y Gen. No. 87-470).

B. Any other statutory requirements for closed or open meetings.

(1) Like the open records provisions of the FOIA, the act’s open meeting section incorporates other statutes that permit or require closed meetings. Under Ark. Code Ann. § 25-19-106(a), meetings must be open to the public “[e]xcept as otherwise specifically provided by law.” The phrase “by law” has been interpreted to mean “by statute,” and the statute must be specific in creating the exemption. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (statute creating an evidentiary privilege for attorney-client communications is not an exemption that would allow a governing body to meet with its attorney in private). *See also* Ark. Op. Att’y Gen. No. 2001-040 (Ark. Code Ann. § 11-10-314(a)(1), which provides that “information obtained by the Director of the Arkansas Employment Security Department . . . shall be held confidential,” does not authorize closed meetings); Ark. Op. Att’y Gen. No. 97-298 (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, neither qualifies as an exemption nor supercedes the FOIA under the Supremacy Clause).

(2) Hundreds of Arkansas statutes make some reference to public hearings or public meetings, but most either state simply that an entity is to conduct its business in public, e.g., Ark. Code Ann. § 23-110-203(a)(1) (Arkansas Racing Commission), or set forth an agency’s obligation to hold meetings without specifying whether they are to be open or closed, e.g., Ark. Code Ann. § 3-2-201(e) (Alcoholic Beverage Control Board). Under these statutes, the FOIA plainly demands an open meeting unless the personnel exemption or another statutory exemption applies.

(3) More than a dozen statutes qualify as exemptions to the FOIA. Also, the constitution specifically gives discretion to both houses of the legislature and committees of the whole to meet in private “when the business is such as ought to be kept secret.” Ark. Const. art. V, § 13. Exemptions enacted after June 30, 2009 must cite the FOIA. Ark. Code Ann. § 25-19-110. Illustrative statutes include:

(a) Ark. Code Ann. § 2-7-202(c) (mediation sessions conducted by Arkansas Farm Mediation Office).

(b) Ark. Code Ann. § 6-18-507(d)(2) (school boards may meet in executive session in student expulsion cases “if requested by the parent or guardian of the student”). *See* Ark. Op. Att’y Gen. Nos. 96-009, 87-478. As amended in 1997, Section 6-18-507 draws a distinction between a suspension from school (dismissal not to exceed 10 days) and an expulsion (dismissal for more than 10 days). The provision for closed meetings appears in paragraph (d), which deals with expulsions. A circuit court has held that the statute “provides for an executive session only in the case of expulsion hearings” and that a school board must meet in public when considering an appeal from a student who has been suspended. *Troutt Brothers Inc. v. Valley View School Dist.*, No. CIV-2000-343(F) (Craighead County Cir. Ct., July 2, 2000).

(c) Ark. Code Ann. § 8-7-1012(c) (administrative hearings conducted by Department of Labor under Public Employees’ Chemical Right to Know Act).

(d) Ark. Code Ann. § 10-3-305(a) (meetings of Legislative Council).

(e) Ark. Code Ann. § 14-14-109(a)(2) (county quorum court meetings involving personnel). *See* Ark. Op. Att’y Gen. No. 97-080.

(f) Ark. Code Ann. § 16-10-404(b)(2) (preliminary proceedings of Judicial Discipline and Disability Commission are confidential, and commission members may deliberate in executive session at the close of public hearings). If a judge waives the statutory right to a closed probable-cause hearing, then the hearing must be public. *Griffen v. Arkansas Judicial Discipline and Disability Comm’n*, 368 Ark. 557, 247 S.W.3d 816 (2007).

(g) Ark. Code Ann. § 16-46-105(a) (meetings of hospital medical review committees are exempt from the FOIA). A previous version of this statute had been held insufficiently specific to qualify as an FOIA exemption, *Baxter County Newspapers Inc. v. Medical Staff of Baxter Gen. Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981), but the amended statute passes muster. Ark. Op. Att’y Gen. No. 2000-271.

(h) Ark. Code Ann. § 17-14-205(b) (disciplinary hearings conducted by Appraiser Licensing and Certification Board).

(i) Ark. Code Ann. § 23-2-316(b) (proceedings of Public Service Commission).

(j) Ark. Code Ann. § 23-42-203(e) (hearings held by Securities Commissioner).

(k) Ark. Code Ann. § 23-51-112(a) (hearings held by Bank Commissioner under Trust Institutions Act must be closed with respect to “a matter made confidential by law”).

(l) Ark. Code Ann. § 23-90-107(b)(3) (meetings of Arkansas Property & Casualty Advisory Association).

(m) Ark. Code Ann. § 25-17-208(b) (meetings to consider certain personnel matters by state boards and commissions whose members receive no compensation). *See* Ark. Op. Att’y Gen. No. 96-317.

(4) If an executive session is held pursuant to one of these statutes, the governing body may presumably permit anyone to attend, unless

the statute provides otherwise. The provisions of Ark. Code Ann. § 25-19-106(c)(2) specifying those persons who may attend a closed meeting apply only to executive sessions under the personnel exemption. *See* Ark. Op. Att’y Gen. No. 96-009. *But see* Ark. Op. Att’y Gen. No. 87-478. Similarly, the requirement that the purpose of the executive session be announced appears only in the statutory provision covering the personnel exemption, Ark. Code Ann. § 25-19-106(c)(1), and is therefore not applicable when the executive session is held pursuant to another statute.

(5) A statute may prohibit executive sessions of any type. *E.g.*, Ark. Code Ann. § 14-250-110(d) (board of directors of wastewater treatment district “shall at no time go into executive session”). *See* Ark. Op. Att’y Gen. No. 87-470 (1988) (interpreting Ark. Code Ann. § 14-116-308(d), since renumbered as § 14-116-308(d)(1) and limited by Act 1210 of 2003, codified as § 14-116-308(d)(2)).

C. Court mandated opening, closing.

Exemptions to the FOIA can be created only by statute. Accordingly, the courts are not free to fashion their own exemptions via the common law. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753. However, a court may presumably order that a meeting be closed in order to protect an individual’s constitutional right to privacy. *See McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). This right is not absolute and must at times yield to societal interests in disclosure. Ark. Op. Att’y Gen. No. 96-009. *See also* Ark. Op. Att’y Gen. No. 87-478 (student’s right to privacy not violated by public hearing).

III. MEETING CATEGORIES — OPEN OR CLOSED.

A. Adjudications by administrative bodies.

1. Deliberations closed, but not fact-finding.

Unless the FOIA or another statute permits a closed session, hearings and deliberations of an administrative body in its quasi-judicial role must be open to the public. Ark. Op. Att’y Gen. Nos. 91-175, 84-091, 79-144. *But see Baxter County Newspapers Inc. v. Medical Staff of Baxter Gen. Hospital*, 273 Ark. 511, 622 S.W.2d 495 (1981) (suggesting that deliberative session may be in private). If the FOIA’s personnel exemption applies, the body’s deliberation may be held in executive session, although the hearing itself must be open to the public. *Arkansas State Police Comm’n v. Davidson*, 252 Ark. 137, 477 S.W.2d 852 (1972); Ark. Op. Att’y Gen. No. 85-181.

2. Only certain adjudications closed, i.e. under certain statutes.

Some statutes expressly allow closed hearings and deliberations, *e.g.*, Ark. Code Ann. § 6-18-507(d)(2) (student expulsion hearing before school board), while others permit executive sessions for deliberations at the close of public hearings. *E.g.*, Ark. Code Ann. § 16-10-404(b)(2) (Judicial Discipline and Disability Commission).

B. Budget sessions.

The FOIA does not exempt meetings at which budget matters are considered. *See* Ark. Op. Att’y Gen. No. 74-28 (state board cannot meet in closed session to decide which of several programs are to be funded). Because the act’s open meetings requirement applies only to governing bodies, a meeting of agency staff to review financial questions or prepare budget recommendations would not be open to the public. Other statutes touching on the issue seem to contemplate that budget sessions of governing bodies will be held in public. *E.g.*, Ark. Code Ann. § § 14-47-123, 14-47-125 (city board of directors).

C. Business and industry relations.

Meetings to discuss attracting new business to the community are not exempt from the FOIA. Ark. Op. Att’y Gen. Nos. 2000-260 (meetings of nonprofit economic development corporation that receives county sales tax revenue to support its activities). Similarly, the governing boards of various state entities established to foster industrial

development would be required to meet in public on such matters. Ark. Op. Att’y Gen. No. 77-145 (FOIA does not exempt meetings of Arkansas Economic Development Commission to “discuss specific confidential prospects”). By statute, however, meetings of “the review committee of the Arkansas Economic Development Commission established for the purpose of giving preliminary review” to applications under the Industrial Revenue Bond Law “shall not be open to the public.” Ark. Code Ann. § 15-4-606(b)(2)(B). This statute also extends confidentiality to meetings of the commission’s staff; as noted previously, however, staff meetings are not subject to the FOIA.

D. Federal programs.

There are apparently no statutory provisions dealing with meetings to discuss federal programs. If, however, federal statutes or regulations demand closed sessions, these provisions will be controlling. Ark. Op. Att’y Gen. No. 85-186 (“federal law will control in the event of conflict with state law”).

E. Financial data of public bodies.

The FOIA does not exempt meetings at which financial issues are considered. *See* Ark. Op. Att’y Gen. No. 74-28 (state board cannot meet in closed session to decide which of several programs are to be funded). Because the act’s open meetings requirement applies only to governing bodies, a meeting of agency staff to review financial questions or prepare budget recommendations would not be open to the public. Other statutes touching on the issue seem to contemplate that budget sessions of governing bodies will be held in public. *E.g.*, Ark. Code Ann. § § 14-47-123, 14-47-125 (city board of directors).

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

Although the FOIA’s “competitive advantage” exemption protects this information when embodied in the form of records, nothing in the act allows a closed session to discuss such matters. Some statutes, however, give agencies broad discretion to safeguard such information and could be read so as to allow closed meetings. *E.g.*, Ark. Code Ann. § 23-2-316(b) (Public Service Commission). Other statutes allow *in camera* judicial proceedings in cases involving trade secrets. *E.g.*, Ark. Code Ann. § § 4-75-605, 4-88-111(c). *See also* Rule 507, Ark. R. Evid.

G. Gifts, trusts and honorary degrees.

Because these matters are not exempted by statute, the meeting must be open to the public. However, the FOIA’s open meetings requirement generally applies only to a “governing body” of an entity subject to the act. Thus, if a state university planned to award an honorary degree, a meeting of administrators to consider the issue and make a recommendation to the university president would not be open to the public, since the administrators do not constitute a governing body.

H. Grand jury testimony by public employees.

Grand juries are expressly excluded from the list of bodies subject to the FOIA’s open meetings requirement. Ark. Code Ann. § 25-19-106(a). There is no exception to this provision that would require a grand jury to meet in public when hearing testimony by or against a public employee.

I. Licensing examinations.

Act 1259 of 2001 amended the FOIA by adding an exemption that allows state boards and commissions to “meet in executive session for purposes of preparing examination materials and answers to examination materials which are administered to applicants for licensure . . .” Ark. Code Ann. § 25-19-106(c)(5)(A). Also, boards and commissions “are excluded from [the FOIA] for the administering of examinations to applicants for licensure.” *Id.* § 25-19-106(c)(5)(B). Similar provisions had previously been enacted with respect to particular licensing agencies. *E.g.*, Ark. Code Ann. § 17-100-203(a)(3) (allowing executive sessions of Board of Examiners in Speech-Language Pathology and

Audiology to “prepare, approve, grade, or administer examinations”).

J. Litigation; pending litigation or other attorney-client privileges.

The FOIA does not permit an executive session to discuss pending litigation, Ark. Op. Att’y Gen. Nos. 96-372, 95-360, and the attorney-client privilege does not qualify as an exemption that would allow such a session. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). Moreover, the governing body’s attorney is not included in the list of persons who may attend an executive session held pursuant to the personnel exemption. Ark. Code Ann. § 25-19-106(c)(2). See Ark. Op. Att’y Gen. No. 85-181. The Attorney General has also opined that a lawyer may not attend an executive session held under the authority of another statute, such as the provision authorizing closed meetings for student disciplinary matters. Ark. Op. Att’y Gen. No. 87-478. This conclusion is highly dubious because Section 25-19-106(c)(2) deals only with those who may attend a closed meeting to discuss personnel matters. If a governing body meets in executive session pursuant to the FOIA’s licensing exemption, Ark. Code Ann. § 25-19-106(c)(5), or a specific statute that qualifies as an FOIA exemption, the body should, in its discretion, be able to permit attorneys (and others) to attend. See Ark. Op. Att’y Gen. No. 96-009 (parents may attend closed school board meeting held for the purpose of discussing a student’s expulsion).

K. Negotiations and collective bargaining of public employees.

1. Any sessions regarding collective bargaining.

If negotiations take place between employee representatives and the staff of a public entity, the FOIA’s open meetings requirement does not apply because a “governing body” is not involved. Ark. Op. Att’y Gen. No. 79-169 (negotiations between school administrators and teacher representatives not subject to FOIA).

2. Only those between the public employees and the public body.

If the negotiations occur at the “governing body” level, the meeting is open. See Ark. Op. Att’y Gen. No. 79-169 (suggesting that negotiations involving at least two members of the governing body). The FOIA’s personnel exemption does not apply to discussions of general salary matters, an across-the-board pay increase, or overall performance of employees. Ark. Op. Att’y Gen. Nos. 91-070, 77-144. Likewise, it should be inapplicable to a collective bargaining session.

L. Parole board meetings, or meetings involving parole board decisions.

The Post Prison Transfer Board must conduct open meetings and make public its findings for each inmate eligible for parole. However, the board’s interviews with inmates may be closed to the public. Ark. Code Ann. § 16-93-206(a)(2) & (3).

M. Patients; discussions on individual patients.

Because matters involving patients are not exempted by statute, the meeting must be open to the public. Keep in mind, however, the FOIA’s open meetings requirement generally applies only to a “governing body” of an entity subject to the act.

N. Personnel matters.

1. Interviews for public employment.

The FOIA exempts meetings at which the “employment [or] appointment . . . of any public officer or employee” is considered. Ark. Code Ann. § 25-19-106(c)(1). Thus, a body may meet in executive session to screen and review applications for a position, Ark. Op. Att’y Gen. Nos. 94-339, 93-403. However, a candidate may be interviewed in a closed meeting only if he or she is being considered for “the top administrative position in the public agency, department, or office in-

volved.” Ark. Code Ann. § 25-19-106(c)(2)(B). Persons applying for lesser jobs apparently cannot be interviewed by the governing body in a closed session.

2. Disciplinary matters, performance or ethics of public employees.

The FOIA’s personnel exemption permits, but does not require, an executive session to consider the “promotion, demotion, [or] disciplining of any public officer or employee.” Ark. Code Ann. § 25-19-106(c)(1). Thus, a governing body may meet in executive session to consider disciplining an employee, Ark. Op. Att’y Gen. No. 81-213; to review an employee’s performance, if that review may lead to demotion or changed compensation, Ark. Op. Att’y Gen. No. 88-058; or to take a non-binding “vote of confidence” with respect to an employee, if the purpose of the meeting is to determine whether disciplinary action will be taken, Ark. Op. Att’y Gen. No. 91-280. Other statutes may also provide for closed meetings. *E.g.*, Ark. Code Ann. § 6-17-208(b)(1)(C)(ii) (school board meeting to hear appeal of employee grievance “shall be open or closed at the discretion of the employee”); § 25-17-208(b) (meetings to consider certain personnel matters by boards and commissions whose members receive no compensation).

3. Dismissal; considering dismissal of public employees.

A governing body may meet in executive session to consider the “employment, appointment . . . or resignation of any public officer or employee.” Ark. Code Ann. § 25-19-106(c)(1). Although the discharge or dismissal of an employee is not specifically mentioned in the act, the Attorney General has opined that such action is “by necessity encompassed in employment, appointment, or resignation.” Ark. Op. Att’y Gen. No. 81-213. Other statutes may also provide for closed meetings. *E.g.*, Ark. Code Ann. § 6-17-1509(c)(2)(A) (school board hearing under Teacher Fair Dismissal Act “shall be private unless the teacher or the board shall request that the hearing be public”); § 25-17-208(b) (meetings to consider certain personnel matters by state boards and commissions whose members receive no compensation).

O. Real estate negotiations.

When the General Assembly was debating the FOIA in 1967, an amendment was offered in the House to permit executive sessions for negotiations involving the purchase of real estate. The House initially agreed to the amendment but subsequently changed its mind and expunged the vote. Ark. Legis. Digest, 66th General Assembly, at 87, 91 (1967). During the 2001 legislative session, a bill to permit closed meetings for discussing “the purchase, sale or lease of real property” died in committee. See S.B. 589, 83d General Assembly (May 14, 2001); see also *Harris v. City of Ft. Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004).

P. Security, national and/or state, of buildings, personnel or other.

Because these matters are not exempted by statute, the meeting must be open to the public. However, the FOIA’s open meetings requirement generally applies only to a “governing body” of an entity subject to the act. The FOIA’s personnel exemption applies only when individual employees are being discussed and thus would not reach a meeting to consider matters such as building or personnel security that affect all employees. See Ark. Op. Att’y Gen. Nos. 91-070, 77-144 (personnel exemption does not apply to general salary matters, an across-the-board pay increase, or overall performance of employees).

Q. Students; discussions on individual students.

A school board may meet in executive session in student expulsion cases if requested by the parent or guardian of the student. Though the board may hear testimony and deliberate in private, it must convene in public to vote. Ark. Code Ann. § 6-18-507(d)(2). See Ark. Op. Att’y Gen. Nos. 96-009, 87-478. This statute provides for an ex-

ecutive session only in the case of expulsion hearings, and a school board must meet in public when considering an appeal from a student who has been suspended. *Trout Brothers Inc. v. Valley View School Dist.*, CIV-2000-343(F) (Craighead County Cir. Ct., July 2, 2000). An executive session is not allowed simply because the school board will consider educational records that are exempt from disclosure under Section 25-19-105(b)(2) of the FOIA. Ark. Att’y Gen. No. 97-298. Moreover, because the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, neither qualifies as an exemption nor supersedes the FOIA under the Supremacy Clause, it does not permit a school board to hold a closed meeting to discuss the records of a particular student or former student. *Id.*

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A. When to challenge.

1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

The FOIA does not provide a procedure by which a citizen may request that the governing body allow him to attend an upcoming meeting, and the act does not require that such a request be made. Moreover, a premeeting request is virtually impossible if the agency does not provide an agenda outlining the topics for discussion and its plan to hold a closed session. As noted above, the FOIA’s notice provisions do not require that an agenda be included with the notice of the meeting. Nonetheless, a citizen wishing to challenge a closed meeting should object as soon as he is aware of the governing body’s intention to hold an executive session. Otherwise, the governing body may be able to argue that the citizen has not exhausted his administrative remedies. Exhaustion is required when a plaintiff requests invalidation of the action taken at the closed meeting or a declaratory judgment. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). If a citizen has advance notice of the planned executive session and its purpose (as would be the case when a detailed agenda is available), he can obviously object prior to the meeting. If rebuffed by the governing body, he can then seek injunctive relief, a declaratory judgment, or possibly a writ of mandamus.

2. When barred from attending.

If the citizen learns of the executive session at the meeting itself (e.g., when the announcement of a closed session is made), prospective relief is out of the question. However, the citizen should register his or her objection and argue that an open meeting is required. If a post-meeting challenge is then made under the FOIA, he or she will have exhausted administrative remedies and may seek a declaratory judgment or invalidation of the action taken at the meeting.

3. To set aside decision.

Action taken by a governing body at a meeting held in violation of the FOIA is subject to judicial invalidation. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

4. For ruling on future meetings.

The court may issue a declaratory judgment that a closed meeting held in a given situation would violate the FOIA and order that future meetings be held in compliance with the act. *See* Ark. Code Ann. § 25-19-107(c); *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975). However, a party must exhaust administrative remedies prior to seeking such relief. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). A court has discretion in deciding whether to entertain an action for declaratory judgment, *Jegley v. Picado*, 349 Ark. 600, 612-13, 80 S.W.3d 332, 337-38 (2002), and the presence of factual issues may make the case unsuitable for declaratory relief. *See Bankers & Shippers Ins. Co. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983).

B. How to start.

1. Where to ask for ruling.

a. Administrative forum.

(1). Agency procedure for challenge.

The citizen should first raise this issue with the governing body itself, thereby preserving the right to sue for a declaratory judgment or invalidation. No procedures are set out in the FOIA, but if time permits, it is advisable that the request for an open meeting be in writing and set forth the reasons why the meeting must be open.

(2). Commission or independent agency.

Arkansas does not have an “FOI Commission” or similar agency.

b. State attorney general.

Advice might also be sought, by telephone if necessary, from the Attorney General’s Office. Calls should be directed to the Opinions Division at (501) 682-5086 or toll-free at 1-800-482-8982. Sometimes an informal evaluation of the situation by the Attorney General’s Office will convince a governing body to open a meeting. However, presentation of the matter to the Attorney General is not required.

c. Court.

If a state agency is involved, an FOIA suit must be brought in Pulaski County circuit court or the circuit court of the judicial district in which the plaintiff resides. If any other government body or a private entity is involved, venue is proper only in the circuit court of the district in which the entity is located. Ark. Code Ann. § 25-19-107(a); *ACORN v. Jackson*, 263 Ark. 67, 562 S.W.2d 589 (1978).

2. Applicable time limits.

The FOIA contains no time limit for challenging an agency’s action. If judicial relief is sought, the general five-year statute of limitations apparently applies. *See* Ark. Code Ann. § 16-56-115. However, if the plaintiff seeks invalidation of the action taken at the closed meeting, it is unlikely that the court would permit this remedy if there has been a considerable passage of time between the meeting and the filing of the suit. *See Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

3. Contents of request for ruling.

The FOIA does not address this issue. However, it is advisable that the request for an open meeting be in writing and set forth the reasons why the meeting must be open.

4. How long should you wait for a response?

The FOIA is silent on the matter. There being no fixed time frame, a reasonableness standard should be used. If the time for the meeting is drawing near and no response for the governing body has been received, immediate judicial relief should be sought. In such circumstances, the court should treat the agency’s failure to respond as a denial and hold that administrative remedies have been exhausted. Alternatively, the court could conclude that exhaustion is not required when there has been undue delay on the part of the agency, for in that situation exhaustion is futile. *See Bell v. Adams*, 243 Ark. 895, 422 S.W.2d 691 (1968).

5. Are subsequent or concurrent measures (formal or informal) available?

No.

C. Court review of administrative decision.

1. Who may sue?

“Any citizen denied the rights granted him by [the FOIA] may appeal immediately from the denial.” Ark. Code Ann. § 25-19-107(a).

2. Will the court give priority to the pleading?

The FOIA requires the court to “fix and assess a day the petition is to be heard” within seven days of its filing. Ark. Code Ann. § 25-19-107(b). This provision is probably unenforceable in light of a court’s inherent authority to control its docket. See *McConnell v. State*, 227 Ark. 988, 302 S.W.2d 805 (1957). In *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000), the Supreme Court left open the question whether Section 25-19-107(b) “requires that a hearing be set within seven days of the FOIA request or actually conducted within that time frame,” as the circuit court had done neither. However, the Supreme Court emphasized that “this section of the FOIA sets a policy in favor of expeditious hearings on all FOIA requests.”

3. Pro se possibility, advisability.

While a litigant may represent himself in an FOIA case, as in any other civil action, proceeding *pro se* is not advisable. See *Dauer v. Ponder*, 274 Ark. 166, 623 S.W.2d 3 (1981) (FOIA plaintiff who chose to represent himself “necessarily must succeed or fail on [his] knowledge or ability”). Arkansas procedural rules are not particularly user-friendly. For example, rather than allow the simplified “notice pleading” used in the federal courts, Arkansas remains a “fact pleading” jurisdiction. *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981) (explaining Ark. R. Civ. P. 8(a)).

4. What issues will the court address?

a. Open the meeting.

If the suit is filed prior to the meeting, the court may order the governing body to hold an open session or issue a declaratory judgment that a closed meeting would violate the FOIA. See Ark. Code Ann. § 25-19-107(c).

b. Invalidate the decision.

If suit is filed after the meeting, the court may invalidate agency action taken at a meeting that was closed in violation of the FOIA or, in some situations, if proper procedures were not followed.

(1) “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.” Ark. Code Ann. § 25-19-106(c)(4). Failure to comply with this provision can lead to invalidation of the action taken in the closed session. *Yandell v. Havana Bd. of Educ.*, 266 Ark. 434, 585 S.W.2d 927 (1979).

(2) The Supreme Court has held that invalidation is also available when a meeting has been closed in violation of the FOIA. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). However, this remedy is not to be employed routinely. *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006). Invalidation is available only if administrative remedies have been exhausted, the plaintiff seeks to vindicate the public interest rather than private concerns, and the FOIA violation is substantial. *Rehab Hospital, supra*.

(3) It is not clear whether invalidation will be available for other types of FOIA violations, such as failure to give notice, inadequate notice, refusal to permit tape-recording of the meeting, or the presence at an executive session of persons other than those specified by statute. However, in *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006), the court held that invalidation was inappropriate where a governing body had used unsigned ballots in voting. Moreover, a pre-*Rehab Hospital* case suggests that allowing unauthorized persons to attend a meeting closed under the FOIA’s personnel exemption is a “procedural technicality” that does not affect the validity of the

governing body’s action. *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977).

c. Order future meetings open.

The court may issue a declaratory judgment that a closed meeting held in a given situation would violate the FOIA and order that future meetings be held in compliance with the act. See Ark. Code Ann. § 25-19-107(c); *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975). However, a party must exhaust administrative remedies prior to seeking such relief. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). A court has discretion in deciding whether to entertain an action for declaratory judgment, *Jessup v. Carmichael*, 224 Ark. 230, 272 S.W.2d 438 (1954), and the presence of factual issues may make the case unsuitable for declaratory relief. See *Bankers & Shippers Ins. Co. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983).

5. Pleading format.

The normal rules of pleading that govern civil cases apparently apply in FOIA suits. See generally Rule 8, Ark. R. Civ. P. Arkansas is a “fact pleading” jurisdiction with requirements more stringent than those applicable in federal court. See *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). More informal pleading may be permissible in FOIA cases, however, because the act refers to a “petition” that is to be filed in an “appeal” to the appropriate circuit court. Ark. Code Ann. § 25-19-107(a) & (b). There being no reported cases on this point, an FOIA plaintiff should follow the general pleading rules. Cf. *Dauer v. Ponder*, 274 Ark. 166, 623 S.W.2d 3 (1981).

6. Time limit for filing suit.

The FOIA contains no time limit for filing a suit challenging the agency’s action. Accordingly, the general five-year statute of limitations apparently applies. See Ark. Code Ann. § 16-56-115. However, if the plaintiff seeks invalidation of the action taken at the closed meeting, it is unlikely that the court would permit this remedy if there has been a considerable passage of time between the meeting and the filing of the suit. See *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

7. What court.

If a state agency is involved, an FOIA suit must be brought in Pulaski County circuit court or the circuit court of the judicial district in which the plaintiff resides. If any other government body or a private entity is involved, venue is proper only in the circuit court of the district in which the entity is located. Ark. Code Ann. § 25-19-107(a); *ACORN v. Jackson*, 263 Ark. 67, 562 S.W.2d 589 (1978).

8. Judicial remedies available.

(1) Invalidation

(a) “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.” Ark. Code Ann. § 25-19-106(c)(4). Failure to comply with this provision can lead to invalidation of the action taken in the closed session. *Yandell v. Havana Bd. of Educ.*, 266 Ark. 434, 585 S.W.2d 927 (1979).

(b) The Supreme Court has held that invalidation is also available when a meeting has been closed in violation of the FOIA. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). However, this remedy is not to be employed routinely. *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), *overruled on other grounds by Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006).

(i) Invalidation is available only if administrative remedies

have been exhausted, the plaintiff seeks to vindicate the public interest rather than private concerns, and the FOIA violation is substantial. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985).

(ii) The scope of the “substantiality” requirement is not certain. In *Rehab Hospital*, a telephone poll of members of the governing body had been conducted without notice and without any arrangements that would have allowed the press and public to “listen in.” Although this was a violation of the FOIA, the court held that it was insubstantial, since the body had previously met in an open session and voted to take the action later discussed and reconfirmed by telephone.

(iii) It is not clear whether invalidation will be available for other types of FOIA violations, such as failure to give notice, inadequate notice, refusal to permit tape-recording of the meeting, or the presence at an executive session of persons other than those specified by statute. However, in *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), overruled on other grounds by *Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006), the court held that invalidation was inappropriate where a governing body had used unsigned ballots in voting. Moreover, a pre-*Rehab Hospital* case suggests that allowing unauthorized persons to attend a meeting closed under the FOIA’s personnel exemption is a “procedural technicality” that does not affect the validity of the governing body’s action. *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977).

(2) Declaratory and injunctive relief are also available. *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975) (declaratory judgment); *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989) (same), overruled on other grounds by *Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); *Yandell v. Havana Bd. of Educ.*, 266 Ark. 434, 585 S.W.2d 927 (1979) (injunction).

(a) In pre-meeting cases, the court can enjoin the body from holding the upcoming meeting in private, or issue a declaratory judgment that a meeting would violate the FOIA.

(b) In post-meeting cases, the court can hold that the meeting was impermissibly closed (or that the FOIA had otherwise been violated) and enjoin the body from holding further meetings not in compliance with the act.

(c) A party must exhaust his administrative remedies before seeking a declaratory judgment. *Rehab Hospital Services Corp. v. Delta-Hills Health Sys. Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). A court has discretion in deciding whether to entertain an action for declaratory judgment. *Jegley v. Picado*, 349 Ark. 600, 612-13, 80 S.W.3d 332, 337-38 (2002), and the presence of factual issues may make the case unsuitable for declaratory relief. See *Bankers & Shippers Ins. Co. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983).

(d) In light of Constitutional Amendment 80, which merged law and equity and abolished the state’s separate chancery courts as of July 1, 2001, a circuit court may grant an injunction or employ other equitable remedies. Prior to merger, circuit courts lacked power to issue injunctions, *Arkansas Game & Fish Comm’n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001), but chancery courts had granted injunctive relief in FOIA cases. E.g., *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). An injunction will not be issued when there is an adequate remedy at law. E.g., *Wilson v. Pulaski Association of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). Because Ark. Code Ann. § 25-19-107 arguably provides such a remedy in FOIA cases, injunctive relief may be inappropriate.

(3) Writs of mandamus have also been sought in FOIA cases involving open meetings. E.g., *Arkansas State Police Comm’n v. Davidson*, 252 Ark. 137, 477 S.W.2d 852 (1972). This remedy would be effective only in a pre-meeting case, however. In addition, mandamus is gener-

ally not available when another adequate remedy exists. *Kemp-Bradford VFW Post 4764 v. Wood*, 262 Ark. 168, 554 S.W.2d 344 (1977).

(4) The circuit court may order the governing body to comply with the FOIA, and a violation of that order constitutes contempt of court. Ark. Code Ann. § 25-19-107(c).

9. Availability of court costs and attorneys’ fees.

(1) Under a 1987 amendment, attorneys’ fees and other “litigation expenses” are now available to a party who has “substantially prevailed” in an FOIA case. A fee award is discretionary, not mandatory. Ark. Code Ann. § 25-19-107(d). If the plaintiff prevails, the court may decline to assess fees and costs against the defendant if it finds that the defendant’s position was “substantially justified” or that “other circumstances make an award of these expenses unjust.” *Id.* If the defendant prevails, the court may make a fee award only upon a finding that the plaintiff initiated the action “primarily for frivolous or dilatory purposes.”

(2) A fee award to a successful plaintiff is not necessary in every case and is generally inappropriate unless the plaintiff substantially prevailed on the FOIA claim and the public officials’ actions were substantially justified. *City of Little Rock v. Carpenter*, 374 Ark. 551, 288 S.W.3d 647 (2008). See also *Harris v. City of Ft. Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006). For many years, a finding that the defendant had acted arbitrarily or in bad faith was required, *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989), but that standard was overruled in the *Harris* case.

(3) A defendant may recover attorneys’ fees and costs only if it substantially prevails and the action was initiated “primarily for frivolous or dilatory purposes.” Ark. Code Ann. § 25-19-107(d)(2).

(4) Attorneys’ fees and costs may not be assessed against the State or any of its agencies or departments, Ark. Code Ann. § 25-19-107(d), though by statute, such an award may be made against the State in FOIA cases involving the Hazardous Waste Management Act, Ark. Code Ann. § 8-7-204(j). The Court of Appeals has held in *George v. Department of Human Services*, 88 Ark. App. 135, 195 S.W.3d 399 (2004), that state officers and employees are within the statute’s exemption from fees for state departments and agencies. A suit against a state officer or employee in his or her official capacity is equivalent to a suit against the state agency or department for which the named defendant works. The court reasoned that an officer or employer may only be sued in an official capacity, because he or she has administrative control over public records only in an official capacity. This reasoning might be mistaken, as it flies in the face of the plain language of the FOIA. Cf. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (explaining that an individual-capacity action under 42 U.S.C. § 1983 “seek[s] to impose individual liability upon a government officer for actions taken under color of state law”). The criminal penalties of the FOIA pertain to state officers and employees; had the legislature intended to immunize them against civil remedies, it could have done so.

10. Fines.

The FOIA contains no provisions for civil penalties or forfeitures. However, a person who negligently violates the FOIA is guilty of a Class C misdemeanor and can be fined up to \$500. Ark. Code Ann. § 5-4-104, 5-4-201, 5-4-401, 25-19-104.

11. Other penalties.

Negligent violation of the FOIA is a criminal offense, a Class C misdemeanor. Ark. Code Ann. § 25-19-104. Upon conviction, the defendant can be punished by a fine of no more than \$500, a jail term of up to 30 days, or both. Ark. Code Ann. § 5-4-104, -201, -401. Criminal prosecutions for FOIA violations are relatively infrequent but do occur. For example, the mayor of Hartford was convicted in Greenwood Municipal Court for participating in discussions about matters other than personnel issues during an executive session of the city council. The municipal court ordered the mayor to read the FOIA

and to attend a seminar on the act. *See* Amy Sherrill, *Judge rules mayor ran afoul of FOI*, Southwest Times Record, July 20, 2000. The FOIA formerly expressly allowed sentences of “appropriate public service or education, or both,” alternatively to fine or jail term, but that language was deleted with implementation of a legislative overhaul of criminal code provisions in 2005.

D. Appealing initial court decisions.

1. Appeal routes.

Until recently, FOIA cases were appealed directly to the Supreme Court. Under the Court’s present rules, the appeal may be heard in the first instance by the Court of Appeals. Unless a case poses a question of state constitutional law or falls into certain categories not relevant here, appellate jurisdiction lies initially in the Court of Appeals. Rule 1-2(a), Ark. Sup. Ct. R. However, any appeal is subject to reassignment by the Supreme Court, which will consider such factors as whether the case suggests a need to clarify the law or presents an issue of first impression, a question of statutory interpretation, an issue of substantial public interest, or an issue on which there is a perceived inconsistency among prior decisions. Rule 1-2(b), Ark. Sup. Ct. R.

2. Time limits for filing appeals.

Notice of appeal must be filed with the clerk of the trial court within 30 days of the entry of judgment, unless a post-trial motion is filed. In that event, the notice of appeal must be filed within 30 days of the trial court’s disposition of the motion or within 30 days of the date on which the motion is deemed disposed of as a matter of law. Rules 3 & 4, Ark. R. App. P. The record on appeal must be filed with the clerk of the Supreme Court within 90 days of the filing of the notice of appeal, though an extension of time may be obtained from the trial court. Rule 5, Ark. R. App. P.

3. Contact of interested amici.

The following organizations have historically had a strong interest in the FOIA: Arkansas Chapter, Society of Professional Journalists, P.O. Box 1325, Little Rock, AR 72203; Arkansas Press Association, 411 S. Victory, Little Rock, AR 72201; Arkansas Press Women, c/o Brenda Blagg, 838 Birwin St., Fayetteville, AR 72703; Arkansas Associated Press Managing Editors Association and Arkansas Associated Press Broadcasters Association, c/o Associated Press, 10802 Executive Center Dr., Suite 100, Little Rock, AR 72211-4377; Arkansas Broadcasters Association, 2024 Arkansas Valley Dr., Suite 403, Little Rock, AR 72212. Also, the Reporters Committee for Freedom of the Press files *amicus* briefs in cases involving significant press issues before a state’s highest court.

V. ASSERTING A RIGHT TO COMMENT.

A. Is there a right to participate in public meetings?

The FOIA “does not grant public participation in governmental meetings, but rather only provides that the public has a right to be informed of the actions of the governmental entity involved.” Ark. Op. Att’y Gen. (June 2, 1969). *See also* Ark. Op. Att’y Gen. No. 93-052. However, other statutes may confer a right of participation. For example, the county quorum court and other county boards required to hold open meetings must “adopt rules for conducting the meeting which afford citizens a reasonable opportunity to participate prior to the final decision.” Ark. Code Ann. § 14-14-109(b). *See* Ark. Op. Att’y Gen. Nos. 2000-106, 99-248, 95-230, 93-299, 93-052. If participation is not allowed when a statute so requires, action taken at the meeting may be subject to invalidation. Ark. Op. Att’y Gen. No. 2000-106.

B. Must a commenter give notice of intentions to comment?

Whenever a citizen has a statutory right to participate in a meeting, the agency can establish local rules regarding comments, as long as the citizen has a reasonable opportunity to participate. Ark. Op. Att’y Gen. Nos. 93-299, 93-052.

C. Can a public body limit comment?

Whenever a citizen has a statutory right to participate in a meeting, the agency can establish local rules regarding comments, as long as the citizen has a reasonable opportunity to participate. *See* Ark. Op. Att’y Gen. No. 93-299. For example, an agency can limit participation to only a specific time period during the meeting. Ark. Op. Att’y Gen. No. 93-052. An agency would violate the FOIA if the circumstances for public participation would allow for only “uninformed comments.” Ark. Op. Att’y Gen. No. 95-230 (discussing complex contracts made with private contractors).

D. How can a participant assert rights to comment?

If an agency allows for public comment, the participant should follow the rules of that agency concerning comments. The agency can establish local rules regarding participation, as long as the citizen has a reasonable opportunity to comment. Ark. Op. Att’y Gen. No. 93-052.

E. Are there sanctions for unapproved comment?

An agency or other entity allowing public comment can conduct its meetings “in an orderly manner” and “be free from unwarranted interference in the conduct of its affairs.” Ark. Op. Att’y Gen. No. 77-86. *See also* Ark. Op. Att’y Gen. No. 93-052. The agency can, therefore, adopt rules that would sanction a person who disrupts a meeting.

Appendix

Model letter for records request.

Custodian of Records

Agency/Address

Re: Request for Public Records under the Arkansas Freedom of Information Act

Dear _____:

By this letter, I hereby request access under the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-101 *et seq.*, to the public records described below. I am a citizen of the State of Arkansas, residing at [address]. If you are not the custodian of these records, please advise me of that person’s name and address.

This request is to [inspect, copy, or receive copies of] the following records: [specify, in as much detail as possible, the records you want; identifying information, such as names, dates, and subject matter, should be included if known.]

I ask that you make these records available for inspection and copying [or provide copies of the records] within three working days of this request, as the Freedom of Information Act requires.

[Insert the following if you want copies of the records.] I would like copies of these records in [specify medium and format, *e.g.*, photocopies, computer diskette with the documents in Microsoft Word]. [The custodian is required to provide copies in the medium in which the record is readily available and in any format to which it is readily convertible with the custodian’s existing software.] I agree to pay for the copies if the fees do not exceed \$____. If the copying charges are likely to be greater than this amount, I request that you contact me before making the copies.

[If copies are sought you may also wish to ask that the agency waive any copying charges.] Because these records are being sought for non-commercial purposes, I also request that you waive your customary copying fees. These records are to be used in connection with [scholarly research, news story, etc.], and waiver of copying fees would be in the public interest.

In the event that any of the requested records contain information exempt from disclosure, the records must be released with the exempt portions deleted. If my request is denied in whole or in part, I ask that you explain the basis for your action and specify the statutory

exemption that provides for nondisclosure of the records or deletion of portions thereof.

Should you have any questions with regard to this request, please contact me at [daytime telephone number]. Thank you for your assistance in this matter.

Sincerely,

[Name]

Statute

Open Records and Meetings

Title 25. State Government

Chapter 19. Freedom of Information Act

§ 25-19-101. Citation

This chapter shall be known and cited as the “Freedom of Information Act of 1967”.

§ 25-19-102. Policy statement

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.

§ 25-19-103. Definitions.

As used in this chapter:

(1)

(A) “Custodian”, with respect to any public record, means the person having administrative control of that record.

(B) “Custodian” does not mean a person who holds public records solely for the purposes of storage, safekeeping, or data processing for others;

(2) “Format” means the organization, arrangement, and form of electronic information for use, viewing, or storage;

(3) “Medium” means the physical form or material on which records and information may be stored or represented and may include, but is not limited to, paper, microfilm, microform, computer disks and diskettes, optical disks, and magnetic tapes;

(4) “Public meetings” means the meetings of any bureau, commission, or agency of the state or any political subdivision of the state, including municipalities and counties, boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds;

(5)

(A) “Public records” means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be 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.

(B) “Public records” does not mean software acquired by purchase, lease, or license;

(6)

(A) “Public water system” means all facilities composing a system for the collection, treatment, and delivery of drinking water to the general public, including, but not limited to, reservoirs, pipelines, reclamation facilities, processing facilities, and distribution facilities.

(B) This subdivision (6) expires on July 1, 2013; and

(7) “Vulnerability assessment” means an assessment of the vulnerability of a public water system to a terrorist attack or other intentional acts intended to substantially disrupt the ability of the public water system to provide a safe and reliable supply of drinking water as required by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188.

§ 25-19-104. Penalty

Any person who negligently violates any of the provisions of this chapter shall be guilty of a Class C misdemeanor.

§ 25-19-105. Examination and copying of public records

- (a)
- (1)
- (A) Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.
- (B) However, access to inspect and copy public records shall be denied to:
- (i) A person who at the time of the request has pleaded guilty to or been found guilty of a felony and is incarcerated in a correctional facility; and
- (ii) The representative of a person under subdivision (a)(1)(B)(i) of this section unless the representative is the person's attorney who is requesting information that is subject to disclosure under this section.
- (2)
- (A) A citizen may make a request to the custodian to inspect, copy, or receive copies of public records.
- (B) The request may be made in person, by telephone, by mail, by facsimile transmission, by electronic mail, or by other electronic means provided by the custodian.
- (C) The request shall be sufficiently specific to enable the custodian to locate the records with reasonable effort.
- (3) If the person to whom the request is directed is not the custodian of the records, the person shall so notify the requester and identify the custodian, if known to or readily ascertainable by the person.
- (b) It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:
- (1) State income tax records;
- (2) Medical records, adoption records, and education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act;
- (3) The site files and records maintained by the Arkansas Historic Preservation Program of the Department of Arkansas Heritage and the Arkansas Archeological Survey;
- (4) Grand jury minutes;
- (5) Unpublished drafts of judicial or quasi-judicial opinions and decisions;
- (6) Undisclosed investigations by law enforcement agencies of suspected criminal activity;
- (7) Unpublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Judges, and the Attorney General;
- (8) Documents that are protected from disclosure by order or rule of court;
- (9)
- (A) Files that if disclosed would give advantage to competitors or bidders and records maintained by the Arkansas Economic Development Commission related to any business entity's planning, site location, expansion, operations, or product development and marketing, unless approval for release of those records is granted by the business entity.
- (B) However, this exemption shall not be applicable to any records of expenditures or grants made or administered by the commission and otherwise disclosable under the provisions of this chapter;
- (10)
- (A) The identities of law enforcement officers currently working undercover with their agencies and identified in the Arkansas Minimum Standards Office as undercover officers.
- (B) Records of the number of undercover officers and agency lists are not exempt from this chapter;
- (11) Records containing measures, procedures, instructions, or related data used to cause a computer or a computer system or network, including telecommunication networks or applications thereon, to perform security functions, including, but not limited to, passwords, personal identification numbers, transaction authorization mechanisms, and other means of preventing access to computers, computer systems or networks, or any data residing therein;
- (12) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (13) Home addresses of nonelected state employees, nonelected municipal employees, and nonelected county employees contained in employer records, except that the custodian of the records shall verify an employee's city or county of residence or address on record upon request;
- (14) Materials, information, examinations, and answers to examinations utilized by boards and commissions for purposes of testing applicants for licensure by state boards or commissions;
- (15) Military service discharge records or DD Form 214, the Certificate of Release or Discharge from Active Duty of the United States Department of Defense, filed with the county recorder as provided under § 14-2-102, for veterans discharged from service less than seventy (70) years from the current date;
- (16) Vulnerability assessments submitted by a public water system on or before June 30, 2004, to the Administrator of the United States Environmental Protection Agency for a period of ten (10) years from the date of submission;
- (17)
- (A) Records, including analyses, investigations, studies, reports, or recommendations, containing information relating to any Department of Human Services risk or security assessment, known or suspected security vulnerability, or safeguard related to compliance with the Health Insurance Portability and Accountability Act of 1996 or protection of other confidential department information.
- (B) The records shall include:
- (i) Risk and security assessments;
- (ii) Plans and proposals for preventing and mitigating privacy and security risks;
- (iii) Emergency response and recovery records;
- (iv) Privacy and security plans and procedures; and
- (v) Any other records containing information that if disclosed might jeopardize or compromise efforts to secure and protect personal health information or other protected department information.
- (C) This subdivision (b)(17) expires on July 1, 2009; and
- (18)
- (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.
- (B) The records shall 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; and
- (v) Any other records containing information that if disclosed might jeopardize or compromise efforts to secure and protect the public water system.
- (C) This subdivision (b)(18) expires on July 1, 2013; and
- (19) Records pertaining to the issuance, renewal, expiration, suspension,

or revocation of a license to carry a concealed handgun, or a present or past licensee under § 5-73-301 et seq., including without limitation all records provided to or obtained by any local, state, or federal governments, their officials, agents, or employees in the investigation of an applicant, licensee, or past licensee and all records pertaining to a criminal or health history check conducted on the applicant, licensee, or past licensee except that:

(A) Information or other records regarding an applicant, licensee, or past licensee may be released to a law enforcement agency for the purpose of assisting in a criminal investigation or prosecution, or for determining validity of or eligibility for a license;

(B) Names of an applicant, licensee, or past licensee may be released as contained in investigative or arrest reports of law enforcement that are subject to release as public records; and

(C) The name and the corresponding zip code of an applicant, licensee, or past licensee may be released upon request by a citizen of Arkansas.

(c)

(1) Notwithstanding subdivision (b)(12) of this section, all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.

(2) Any personnel or evaluation records exempt from disclosure under this chapter shall nonetheless be made available to the person about whom the records are maintained or to that person's designated representative.

(3)

(A) Upon receiving a request for the examination or copying of personnel or evaluation records, the custodian of the records shall determine within twenty-four (24) hours of the receipt of the request whether the records are exempt from disclosure and make efforts to the fullest extent possible to notify the person making the request and the subject of the records of that decision.

(B)

(i) If the subject of the records cannot be contacted in person or by telephone within the twenty-four-hour period, the custodian shall send written notice via overnight mail to the subject of the records at his or her last known address. Either the custodian, requester, or the subject of the records may immediately seek an opinion from the Attorney General, who, within three (3) working days of receipt of the request, shall issue an opinion stating whether the decision is consistent with this chapter.

(ii) In the event of a review by the Attorney General, the custodian shall not disclose the records until the Attorney General has issued his or her opinion.

(C) However, nothing in this subsection shall be construed to prevent the requester or the subject of the records from seeking judicial review of the custodian's decision or the decision of the Attorney General.

(d)

(1) Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy those records shall not be denied to any citizen.

(2)

(A) Upon request and payment of a fee as provided in subdivision (d)(3) of this section, the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment.

(B) A citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian's existing software.

(C) A custodian is not required to compile information or create a record in response to a request made under this section.

(3)

(A)

(i) Except as provided in § 25-19-109 or by law, any fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.

(ii) The custodian may also charge the actual costs of mailing or transmitting the record by facsimile or other electronic means.

(iii) If the estimated fee exceeds twenty-five dollars (\$25.00), the custodian may require the requester to pay that fee in advance.

(iv) Copies may be furnished without charge or at a reduced charge if the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest.

(B) The custodian shall provide an itemized breakdown of charges under subdivision (d)(3)(A) of this section.

(e) If a public record is in active use or storage and therefore not available at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) working days at which time the record will be available for the exercise of the right given by this chapter.

(f)

(1) 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.

(2) Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.

(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.

(4) If it is necessary to separate exempt from nonexempt information in order to permit a citizen to inspect, copy, or obtain copies of public records, the custodian shall bear the cost of the separation.

(g) Any computer hardware or software acquired by an entity subject to § 25-19-103(5)(A) after July 1, 2001, shall be in full compliance with the requirements of this section and shall not impede public access to records in electronic form.

(h) Notwithstanding any Arkansas law to the contrary, at the conclusion of any investigation conducted by a state agency in pursuit of civil penalties against the subject of the investigation, any settlement agreement entered into by a state agency shall be deemed a public document for the purposes of this chapter. However, the provisions of this subsection shall not apply to any investigation or settlement agreement involving any state tax covered by the Arkansas Tax Procedure Act, § 26-18-101 et seq.

§ 25-19-106. *Open public meetings*

(a) Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts and all boards, bureaus, commissions, or organizations of the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings.

(b)

(1) The time and place of each regular meeting shall be furnished to anyone who requests the information.

(2) In the event of emergency or 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 (2) hours before the meeting takes place in order that the public shall have representatives at the meeting.

(c)

(1) Executive sessions will be permitted only for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee. The specific purpose of the executive session shall be announced in public before going into executive session.

(2)

(A) Only the person holding the top administrative position in the public agency, department, or office involved, the immediate supervisor of the employee involved, and the employee may be present at the executive session when so requested by the governing body, board, commission, or other public body holding the executive session.

(B) Any person being interviewed for the top administrative position in the public agency, department, or office involved may be present at the executive session when so requested by the governing board, commission, or other public body holding the executive session.

(3) Executive sessions must never be called for the purpose of defeating the reason or the spirit of this chapter.

(4) 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.

(5)

(A) Boards and commissions of this state may meet in executive session for purposes of preparing examination materials and answers to examination materials that are administered to applicants for licensure from state agencies.

(B) Boards and commissions are excluded from this chapter for the administering of examinations to applicants for licensure.

(6)

(A) Subject to the provisions of subdivision (c)(4) of this section, any public agency may meet in executive session for the purpose of considering, evaluating, or discussing matters pertaining to public water system security as described in § 25-19-105(b)(18).

(B) This subdivision (c)(6) expires on July 1, 2013.

§ 25-19-107. *Aggrieved persons; relief available*

(a) Any citizen denied the rights granted to him or her by this chapter may appeal immediately from the denial to the Pulaski County Circuit Court or to the circuit court of the residence of the aggrieved party, if the State of Arkansas or a department, agency, or institution of the state is involved, or to any of the circuit courts of the appropriate judicial districts when an agency of a county, municipality, township, or school district, or a private organization supported by or expending public funds, is involved.

(b) Upon written application of the person denied the rights provided for in this chapter, or any interested party, it shall be mandatory upon the circuit court having jurisdiction to fix and assess a day the petition is to be heard within seven (7) days of the date of the application of the petitioner, and to hear and determine the case.

(c) Those who refuse to comply with the orders of the court shall be found guilty of contempt of court.

(d)

(1) In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney's fees and other litigation expenses reasonably incurred by

a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified.

(2) 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.

(e)

(1) Notwithstanding subsection (d)(1) of this section, the court shall not assess reasonable attorney's fees or other litigation expenses reasonably incurred by a plaintiff against the State of Arkansas or a department, agency, or institution of the state.

(2)

(A) A plaintiff who substantially prevailed in an action under this section against the State of Arkansas or a department, agency, or institution of the state may file a claim with the Arkansas State Claims Commission to recover reasonable attorney's fees and other litigation expenses reasonably incurred.

(B) A claim for reasonable attorney's fees and litigation expenses reasonably incurred in an action against the State of Arkansas or a department, agency, or institution of the state shall be filed with the commission pursuant to § 19-10-201 et seq. within sixty (60) days of the final disposition of the appeal under subsection (a) of this section.

§ 25-19-108. *Information for public guidance*

(a) Each state agency, board, and commission shall prepare and make available:

(1) A description of its organization, including central and field offices, the general course and method of its operations, and the established locations, including, but not limited to, telephone numbers and street, mailing, electronic mail, and internet addresses and the methods by which the public may obtain access to public records;

(2) A list and general description of its records, including computer databases;

(3)

(A) Its regulations, rules of procedure, any formally proposed changes, and all other written statements of policy or interpretations formulated, adopted, or used by the agency, board, or commission in the discharge of its functions.

(B)

(i) Rules, regulations, and opinions used in this section shall refer only to substantive and material items that directly affect procedure and decision-making.

(ii) Personnel policies, procedures, and internal policies shall not be subject to the provisions of this section.

(iii) Surveys, polls, and fact-gathering for decision-making shall not be subject to the provisions of this section.

(iv) Statistical data furnished to a state agency shall be posted only after the agency has concluded its final compilation and result.

(4) All documents composing an administrative adjudication decision in a contested matter, except the parts of the decision that are expressly confidential under state or federal law; and

(5) Copies of all records, regardless of medium or format, released under § 25-19-105 which, because of the nature of their subject matter, the agency, board, or commission determines have become or are likely to become the subject of frequent requests for substantially the same records.

(b)

(1) All materials made available by a state agency, board, or commission pursuant to subsection (a) of this section and created after July 1, 2003, shall be made publicly accessible, without charge, in electronic form via the Internet.

(2) It shall be a sufficient response to a request to inspect or copy the materials that they are available on the Internet at a specified location, unless the requester specifies another medium or format under § 25-19-105(d)(2)(B).

§ 25-19-109. *Special requests for electronic information*

(a)

(1) At his or her discretion, 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.

(2) Where the cost and time involved in complying with the requests are relatively minimal, custodians should agree to provide the data as requested.

(b)

(1) If the custodian agrees to a request, the custodian may charge the actual, verifiable costs of personnel time exceeding two (2) hours associated with the tasks, in addition to copying costs authorized by § 25-19- 105(d)(3).

(2) The charge for personnel time 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.

(c) The custodian shall provide an itemized breakdown of charges under subsection (b) of this section.

§ 25-19-110. Exemptions

(a) Beginning July 1, 2009, in order to be effective, a law that enacts a new exemption to the requirements of this chapter or that substantially amends an existing exemption to the requirements of this chapter shall state that the record or meeting is exempt from the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b) For purposes of this section:

(1) An exemption from the requirements of this chapter is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records; and

(2) An exemption from the requirements of this chapter is not substantially amended if the amendment narrows the scope of the exemption.