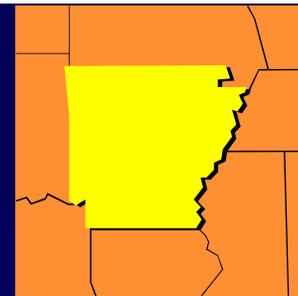


Freedom of Information Act (FOIA)



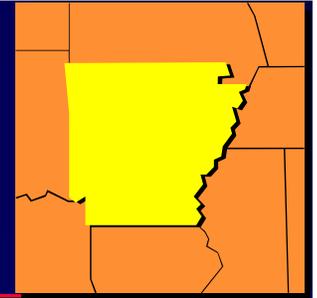
Rick D. Hogan, J.D., MPH
General Counsel
Arkansas Department of Health

Guides to Interpretation



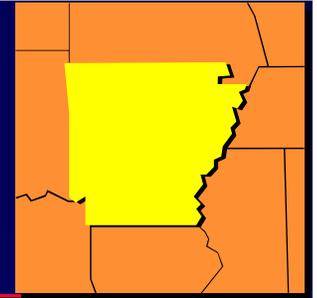
- Freedom of Information Handbook (12th Edition)
- Watkins and Peltz, Arkansas Freedom of Information Act (5th Edition, 2009)
- Attorney General's Website [www.arkansasag.gov]

History of the FOIA



- Arkansas Freedom of Information Act initially adopted in 1967
 - Codified at Arkansas Code Annotated 25-19-101 et seq.
 - Covers two broad areas:
 - ◆ Public meetings
 - ◆ Public records
 - Amended to specifically include “Electronic or Computer-Based Information or data compilations in any medium.”

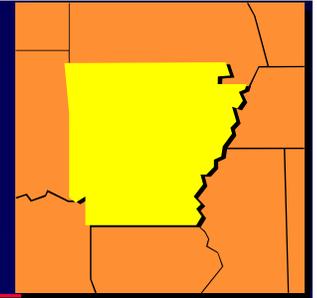
Legislative Intent



- A.C.A. § 25-19-102
 - To insure that electors or their representatives are fully advised of the activities and decisions of their public officials
 - Case law sets forth liberal interpretation rule (*Laman v. McCord*, 245 Ark. 401 (1968))
 - Exemptions to be narrowly construed (*Bryant v. Mars*, 309 Ark. 480 (1992); *Orsini v. State*, 340 Ark. 665 (2000))

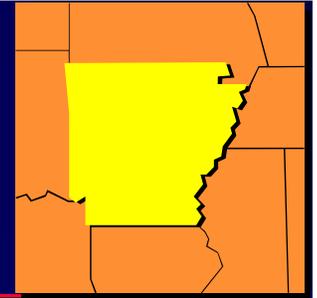


Scope of the FOIA



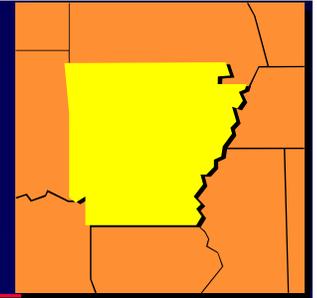
- Requires most meetings of “governing bodies” to be open to the public;
- Allows the public to inspect and receive copies of public records of governmental agencies unless the law makes an exception for them;
- Can apply to meetings and records of private organizations if they receive public funding.

FOIA DOES NOT REQUIRE:



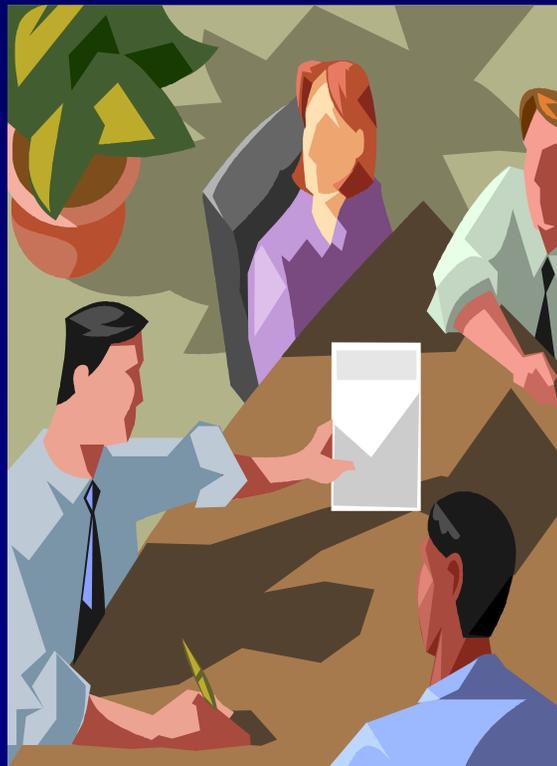
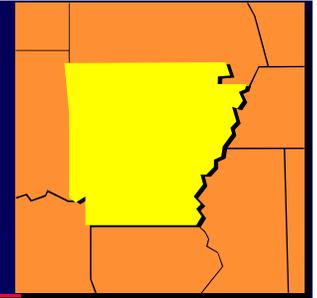
- Citizen participation at meetings (just attendance)
 - (But see A.C.A. § 14-14-109(b), requiring county boards to afford citizens “a reasonable opportunity to participate prior to the final decision.”)
- Any Particular time period for record retention
 - (But see A.C.A. §§ 25-18-601 to -605 concerning records retention by “state agencies.”)
 - (and county records retention requirements at A.C.A. §§ 13-4-301 to -308.)

Public Meetings



- What meetings must be public?
- A.C.A. § 25-19-103(4) defines public meetings as “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”
- A.C.A. § 25-19-106(a) establishes the opening meeting requirement:
 - “**All** meetings, formal or informal, special or regular” of the “governing bodies” of cities, counties, school districts, state entities, and some private entities
- Act is triggered even if no official action is taken.

Private Entities

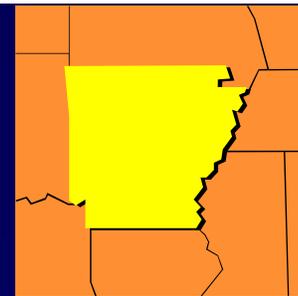


Can be subject to the Act if:

- 1) In receipt of direct public funding (whole or partial funding, *Sebastian Co. Chapter of American Red Cross v. Weatherford*, 311 Ark. 656 (1993)); and
- 2) Activities are of public concern and intertwined with those of the government
- -Indirect public support not sufficient to trigger Act
- -Partial funding of discrete activity requires openness only as to activity funded (*City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990)).

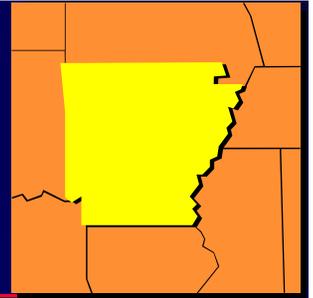
Open Public Meetings

A.C.A. § 25-19-106(a)



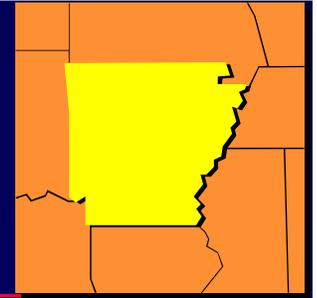
- Only applies to “Governing Bodies” with decision-making power
- Subcommittees of governing bodies are covered, as are any other committees with delegated power to decide *Ark. Gazette Co. v. Pickens*, 258 Ark. 69 (1975) & Op. 2002-092)
- Does not apply to staff meetings (*Nat’l. Park Med. Ctr. v. Ark. DHS*, 322 Ark. 595 (1995))
- Or to advisory bodies unless de facto governing body; Op. 2006-059 (but records are subject)
- Advisory committees composed partially of board members might be covered (Op. 2000-260)
- A specific statute may govern particular meetings
- Records may be open but meetings closed, if not a “governing body”

How many members make a meeting?



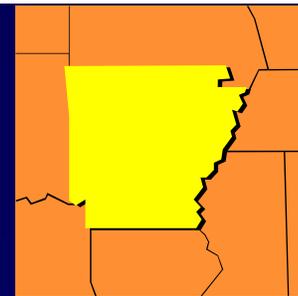
- Quorum not required (*El Dorado Mayor v. El Dorado Broadcasting*, 260 Ark. 821 (1976)).
- 3 members to discuss government business, must comply.
- 2 members can be a meeting depending on the facts; “polling” or pre-meeting conferencing before a vote is covered *Harris v. City of Fort Smith* (197 S.W.3d 461 (2004)).
- Telephone conferences are permissible if proper procedures are followed and notice is given (*Rehab Hosp. Services Corp. v. Delta-Hills Health Systems Agency*, 284 Ark. 397 (1985)).
- There is a right to know how officials vote – no secret ballots *Depoyster v. Cole*, 298 Ark 203 (1984).

Social Gatherings/Conferences



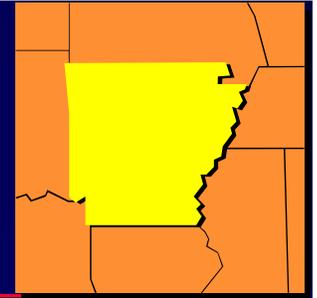
- Considered a “meeting?”
 - Not if any discussion of government business at the social gathering is incidental and intermittent (Op.95-020)
 - Maybe not if the governing body has no control over the conference, function, or proceeding (Op. 94-131)

Can E-mail be a meeting? (Op. 2005-166)



- Electronically stored e-mail messages are public records and “ordinarily” do not evidence a meeting – generally analogous instead to written correspondence.
- But possibility exists for violating the FOIA with “sequential or circular series of communications.” (*Harris v. City of Fort Smith*, 197 S.W.3d 461 (2004))
- Other states distinguish mere informational correspondence or “passive receipt of e-mail” from communications designed to elicit substantive discussion.
- Factual question in each instance as to whether violation occurred. Consider substance of the e-mail and presence or absence of interaction among the governing body members.

Open Public Meetings (Notice)

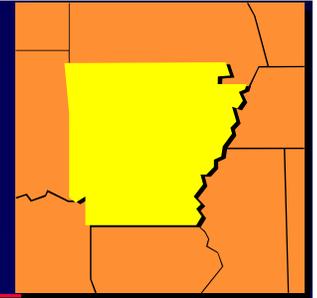


A.C.A. § 25-19-106(b)(1)

- The time and place of each regular meeting shall be furnished to anyone who requests the information.
 - No one entitled to notice unless requested (*Elmore v. Burke*, 337 Ark. 235 (1999))
 - No particular form of notice required, but must be calculated to give actual notice (Op. 96-074)
 - Exception: School boards must publish notice of regular meetings on web (10 days prior to regular meeting; 24 hours prior to a rescheduled regular meeting, A.C.A. § 6-13-619.)

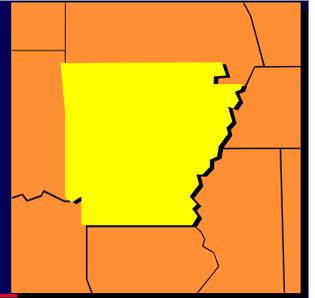


Open Public Meetings (Notice)

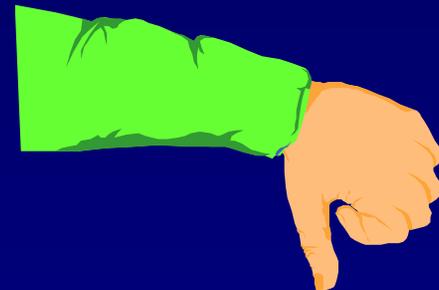


- A.C.A. § 25-19-106(b)(2)
 - In the event of **emergency or special meetings**, the person calling the meeting shall notify the representatives of the newspapers, radio stations, and television stations, if any, located in the county in which the meeting is to be held and any news media located elsewhere which cover regular meetings of the governing body **and which 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.

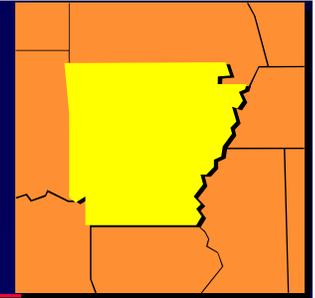
Exceptions to Open Meetings (Private Meetings)



- Executive sessions for certain personnel issues
 - Only for the purpose of considering employment, appointment, promotion, demotion, disciplining or resignation of a public officer or employee
- Executive sessions of State Boards to prepare licensure test questions and administer the tests. (2001 law).
- Executive session for purposes of considering, evaluating or discussing matters pertaining to public water system security (2003 law, amended 2007; July 1, 2009 sunset).



Executive Sessions (Con't.)

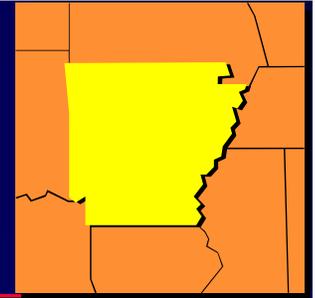


The provision for executive sessions is permissive. (Exception: A.C.A. § 14-14-109 authorizes the officer or employee to request an open meeting.)



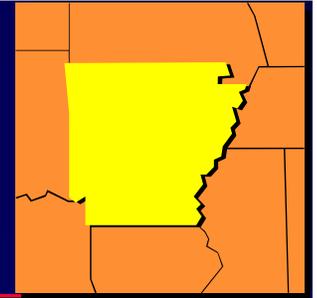
- A governing body may vote to hold an executive session on personnel matters, but is not required to do so.
- A governing body may meet in executive session to screen and review applicants for employment (but must consider individual applicants, not policies. Op. 93-403).

Executive Sessions (Con't.)



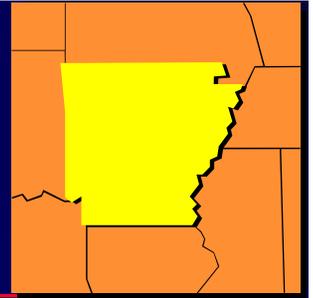
- Notice requirements still apply.
- Must announce specific purpose before going in.
- Who May be Present?
 - Only the governing body and the top administrator, immediate supervisor, and employee may be present in executive session; or person being interviewed for top administrative position.
 - Not attorney (*Laman v. McCord*, 245 Ark. 401 (1968)).
 - No one other than members of governing body have right to attend.
- Cannot meet in executive session for the purpose of conducting an evidentiary hearing (*Ark. State Police Commission v. Davidson*, 253 Ark. 1090 (1973)); but can hear testimony from those persons who are permitted to attend (Op. 97-130).
- Must vote in public afterward or action is void.
- Other specific state laws may allow private meetings, e.g., A.C.A. § 6-17-208 (school board hearing on employee grievance to be “open or closed at the discretion of the employee.”) A.C.A. § 6-18-507 (school board meeting on a student’s suspension or expulsion to be held in executive session if requested by parent or guardian.) A.C.A. § 6-17-1509 (Teacher Fair Dismissal Act hearings are private unless teacher or board requests public).

Trauma Registry Sessions (Con't.)

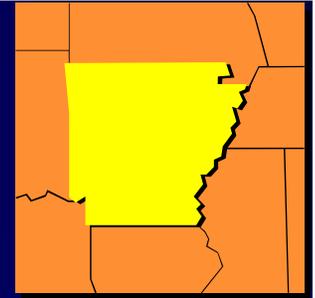


- Ark. Code Ann. §20-13-806 Trauma Registry collection and evaluation of system confidential.
 - Data collected:
 - ◆ Treatment and transportation
 - ◆ Admitted to facility through ER
 - ◆ Admitted through trauma center or
 - ◆ Directly to a special care unit or post-hosp. facility.
 - Records and Reports shall be held confidential with the hospital and department and shall not be made available to the public.
- The department shall require all recipients of sustaining grants to participate in the state-specified Trauma Registry.

Action taken at an illegal meeting will not be invalidated unless:



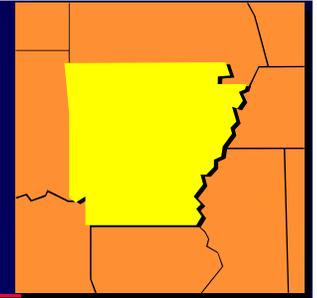
- 1) Plaintiff has given the body a chance to hold a meeting that conforms;
- 2) Remedy is sought to vindicate public as opposed to private interest;
- 3) The FOIA violation was substantial; and
- 4) The defendant knowingly violated the Act (*Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency*, 284 Ark. 397 (1985)).



Understanding the FOIA

Open Records

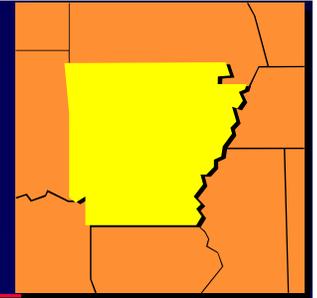
Public Records under the FOIA



- Definition
- Access
- Making FOIA requests
- Compliance
- Exemptions
- Penalties and Enforcement

Step 1: Who is covered?

Government Organizations



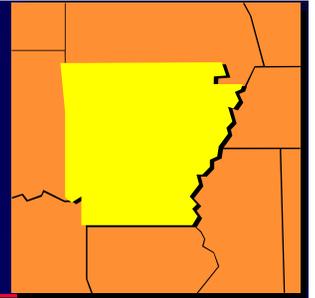
- Government agencies
 - Records: all
 - Meetings: all

- Legislators
 - Records: all (with 3 important exceptions)
 - Meetings: constitutional issue

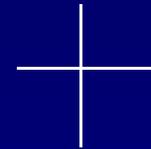
- Courts
 - Records: all, unless protected by court order
 - Meetings: covered by court rules

Step 1: Who is covered?

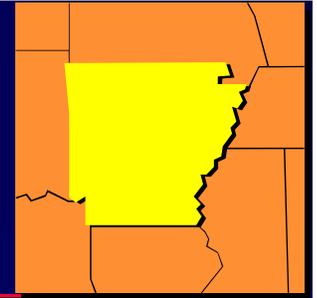
Private Organizations (2 of 2)



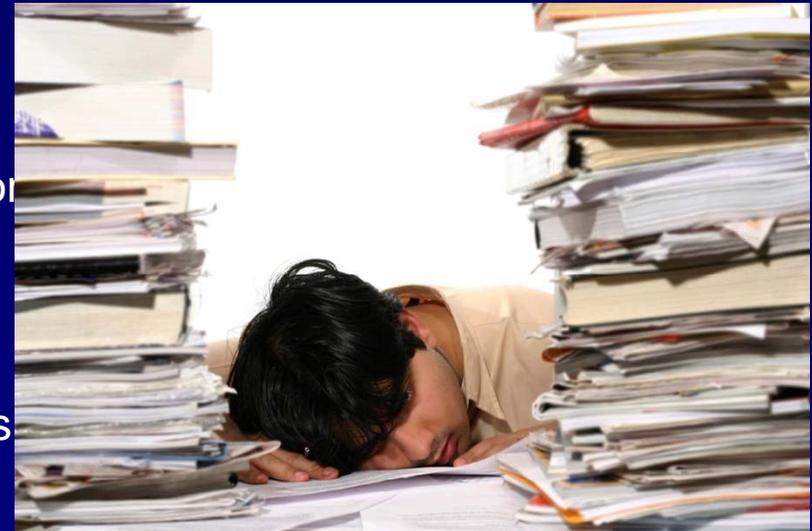
- Public funding + intertwining
- Examples
 - Busing
 - Buildings



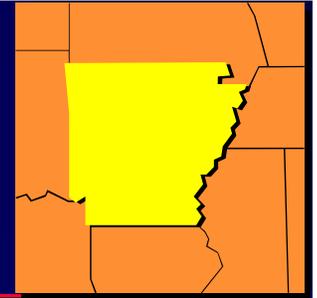
Step 2: Is the *record* covered?



- General rule: all “public records” must be disclosed unless exempt
- What is a “public record”?
 - “Public records are all records public employees or agencies keep within the scope of their employment”
 - Examples: emails, job applications, personnel files, some job evaluations

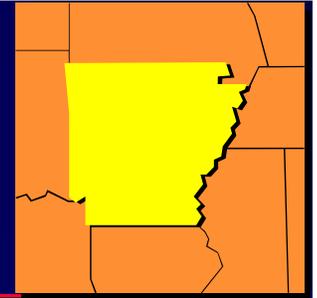


Public Records (con't)



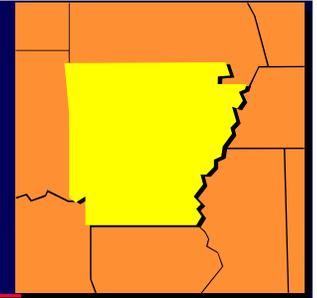
- The presumption:
 - (1) maintained in public offices or by public employees
 - (2) within the scope of their employment
- Rebutting the presumption
 - record doesn't reflect the "performance or lack of performance of official functions."
- Content based
- If challenged, a court must make an "in camera" or private "in chambers" review to determine whether the records are "public records." *Id.*

Scope



- An agency need not create new records to comply
- If records are part public and part exempt, redact exempt material and provide the rest
- E-mails or letters sent to private e-mail addresses or private residences of public officials are subject to FOIA if they involve the public's business. *Bradford v. Director, ESD*, 83 Ark. App. 332, 128 S.W.3d 20 (2003); Opinion 2000-220. Otherwise the FOIA could be circumvented.
- Custodian = "administrative control"

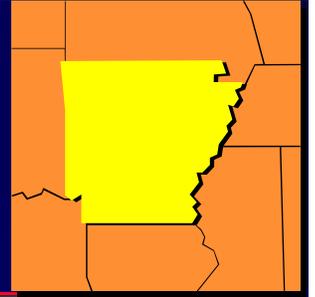
Step 3: *Some records exceptions* *Memoranda, working papers, and* *correspondence*



- Only: Governor; members of legislature; judges on courts of appeal; and Attorney General
- Purpose: promotes the free exchange of thought between and among the three branches of government.



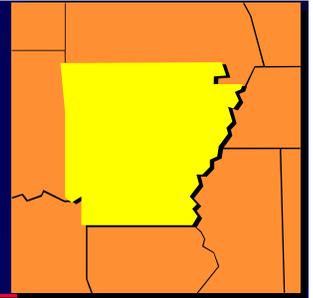
Step 3: *Some records exceptions* *Court orders or rules*



- Rule: a document is exempt if protected from disclosure by court order
 - Otherwise, might be unconstitutional
- The court's order must be specific.

Step 3: *Some records exceptions*

Personnel and evaluation records

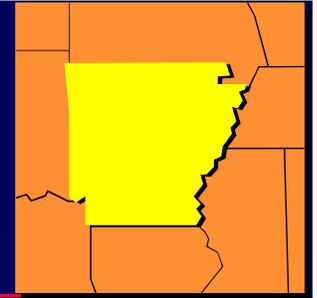


- Evaluation or job performance records
- Must be disclosed if:
 - (1) **Level of discipline**. suspended or terminated
 - (2) **Finality**. Final final administrative resolution of any suspension or termination proceeding
 - (3) **Relevance**. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee; and
 - (4) **Compelling interest**. There is a compelling public interest in the disclosure of the records in question



Step 3: *Some records exceptions*

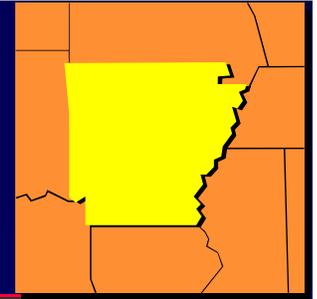
Personnel and evaluation records



■ Personnel records

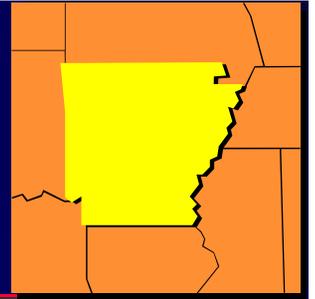
- Definition: virtually all records pertaining to the individual employee that isn't an evaluation record
- Test: exempt if disclosure would constitute a clearly unwarranted invasion of personal privacy

Responding to the Request



- Step 4: Prep & send the record(s)
 - Open for inspection if requested
 - Making the copies
 - ◆ The requester can *require* copies.
 - Charging for copies?
 - ◆ Only “actual costs of reproduction”
 - ◆ That includes mailing or faxing
 - ◆ Doesn't include employee time
 - ◆ \$25 in advance
 - ◆ Itemize it
 - ◆ Voter registration, see 7-5-109

Enforcement

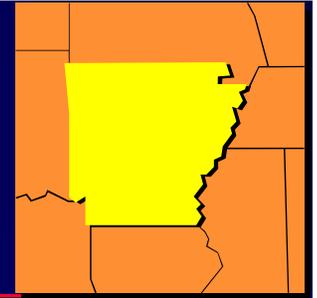


Civil Suits



Class "C" misdemeanor

How to make a FOIA Request

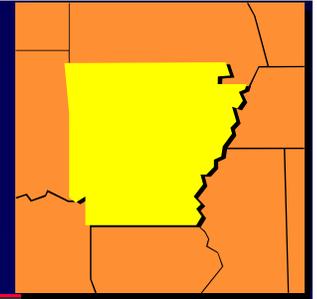


- Mode
 - Any method will do

- Specificity
 - Detailed enough to locate the records with “reasonable effort.”

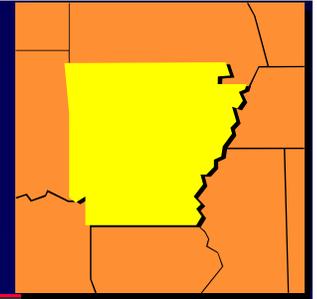
- Medium
 - Any medium in which the record exists or is “readily convertible.”

Responding to the Request



- **Step 1: What's requested?**
 - Is it detailed enough?
 - ◆ If not, get clarification.
 - ◆ Is it a personnel record or employee evals?
 - Where is the record?
 - ◆ 3 Days: If it's in "active use" or "storage," then you've got three days to turn it over.
 - ◆ "Immediately": If the record isn't in active use or storage, then you've got to turn it over immediately.
 - Who's the custodian?

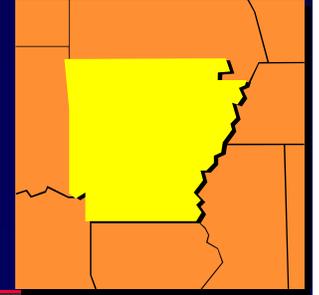
Responding to the Request



- **Step 2: How long to respond?**
 - 3 days if in storage or active use
 - If not, then you've got to disclose it immediately.

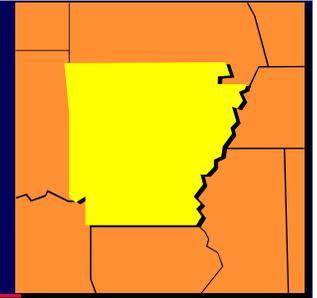


Responding to the Request



- **Step 3: Evaluate the record**
 - Is it a public record?
 - Any exemptions?
 - Any info need to be redacted?
 - ◆ You can't w/hold the document just because there's some exempt info.
 - ◆ Wield the Sharpie.

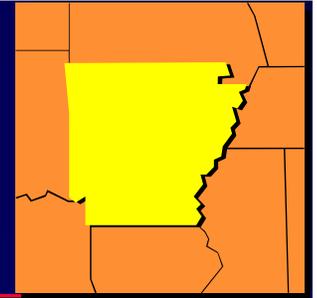
PERSONNEL/EVALUATION RECORDS COMPLIANCE



- Notice Requirements
 - Notify employee and requester within 24 hours of the agency decision
 - Overnight mail notice is required if other notice fails
 - The requester, custodian or subject may request an opinion from the Attorney General
 - Redact any exempt information and provide the records

PERSONNEL RECORDS

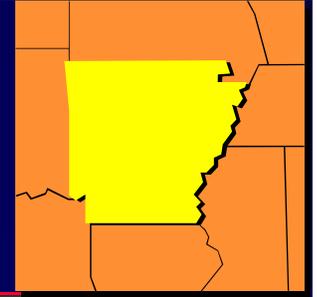
Commonly Exempted Items



- Social Security numbers
- Medical information
- Insurance, pension & benefit information
- Garnishments
- Educational transcripts
- Home phone numbers and addresses
- Date of birth
- Anything else which would cause a clearly unwarranted invasion of privacy

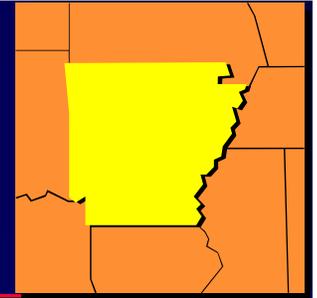
PERSONNEL RECORDS

Common Items Open to Inspection



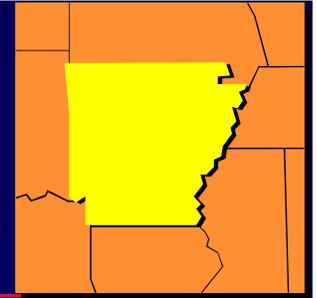
- Name
- Salary information
- Contracts
- Employment applications
- Resumes
- Educational background
- Qualifications
- Leave Records
- Change of status records

Exemptions to Access (con't)



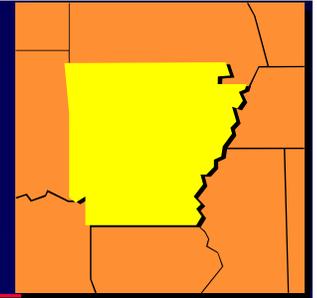
- Examinations for Licensure
 - State agency materials, information, examinations, and answers ... utilized by boards and commissions for ... testing applicants for licensure...
- Military Discharge Records (DD Form 214)
 - A.C.A. 25-19-105 exempts “Military Service discharge records or DD Form 214 for veterans discharged from service less than seventy (70) years from the current date and filed with the county recorder as provided under 14-2-102.”
- Reports, analyses, investigations, and any other records containing information that, if disclosed, might jeopardize or compromise efforts to secure and protect the public water system. A.C.A. 25-19-105(18)(A) & (B).

More exemptions . . .



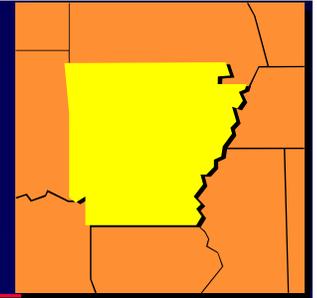
- Vulnerability Assessments submitted by a public water system on or before June 30, 2004 to the EPA for 10 years after submission. 25-19-105(b)(16).
- Records relating to DHS risk or security assessments or regarding compliance with “HIPAA,” the Federal Health Insurance Portability and Accountability Act. (Act 726 of 2007.)

Exemptions – Law Enforcement Investigations



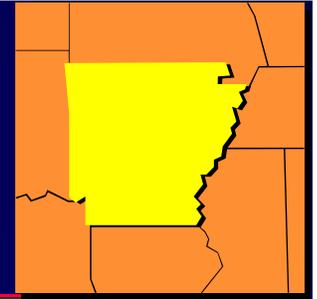
- **“Undisclosed investigations** by law enforcement agencies of suspected criminal activity.”
 - Applies only when criminal investigation is “ongoing.” *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990).
 - Records must be sufficiently investigative to qualify. Arrest reports, jail logs, and shift sheets maintained by police department do not qualify. *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991).
 - “Internal work product” containing details of an investigation such as officers’ speculations and views on suspect’s guilt, credibility of witnesses, informant statements, ballistics reports or laboratory tests are included. *Id.*
 - Court must conduct in camera review before determining exemption. *Johnson v. Stodola*, 316 Ark. 423, 872 S.W.2d 374 (1994).

Exemptions (con't)



- When is an investigation “**closed**?”
 - No bright line rule (Op. 2002-303).
 - Has been held no longer ongoing when closed by “administrative action.” *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).
 - Can remain ongoing even though charges are filed against one of several suspects. *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990).
 - Ultimately a question of fact for court. *Id.*

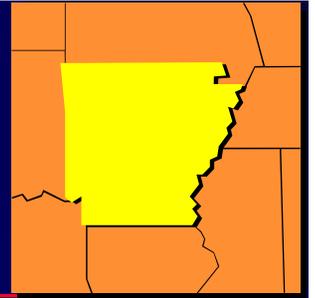
Homeland Security Information Act



- The “Homeland Security Information Act” shields certain terrorism threat assessments, plans, operational policies or procedures, and training developed or maintained by “emergency service agencies.”
- Also shields certain investigative records until after “final adjudication.”
- And records received from federal government and other states and cities if shielded in those jurisdictions.

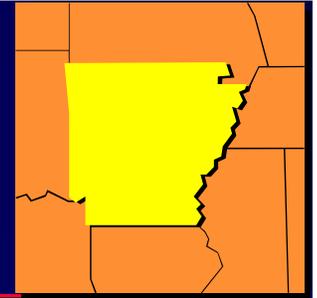


SEGREGATION OF EXEMPT INFORMATION



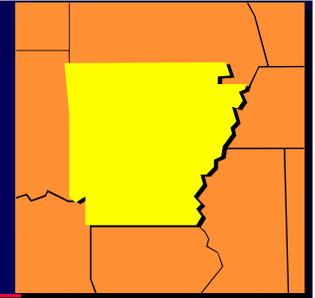
- Mixed info isn't a basis for refusal.
 - “No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.”

SEGREGATION OF EXEMPT INFORMATION (Con't)



- Break out the Sharpie.
 - “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.”
- Custodian bears the cost

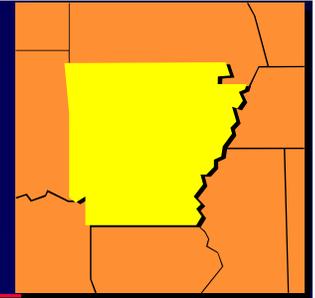
Copy Charges



- Can't exceed "actual costs of reproduction"
- Includes: actual costs of mailing or fax
- Doesn't include: existing agency personnel time for searching, retrieving, reviewing or copying records

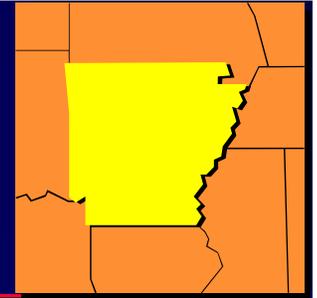


Copy Charges (con't)



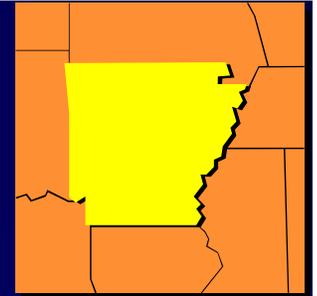
- > \$25 = may require the requester to pay that fee in advance.
- Copies may be furnished without charge or at reduced cost if the custodian determines that the request is primarily noncommercial or that fee reduction is in the public interest.
- Custodian must provide itemized charges.

Copy Charges (con't)



- Special statutes may authorize higher copy charges, for example:
 - Accident reports (A.C.A. § 27-53-210, as amended by Act 2158 of 2005) are \$10.00 plus \$1.50 per page for supplemental reports.
 - Voter registration lists on computer disk or tape (A.C.A. § 7-5-109), from \$10 to \$50, depending on the number of registered voters included. Cost of a printed list may be no more than two cents (\$0.02) per name and address.

QUESTIONS?
Call us Anytime!



Arkansas Department of Health
Office of General Counsel
501-661-2878

Rick D. Hogan 661-2252
Reggie Rogers 661-2609

Arkansas AG's Office
Opinions Department
501-682-5086