

WHAT'S IN IT FOIA: ARE YOU VIOLATING THE ARKANSAS FREEDOM OF INFORMATION ACT?

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Although the Arkansas Freedom of Information Act ("FOIA") has been around for a while, it still creates a lot of confusion. Because even a negligent violation of FOIA could subject the violator to a monetary fine, jail time or community service, it pays to know what's in FOIA.

In general, (1) all "public records" are subject to inspection and copying by any Arkansas citizen during the regular hours of the custodian of records and (2) all meetings of "...organizations of the State of Arkansas supported wholly or in part by public funds" must be public and the public must receive notice prior to their occurrence.

"Public records" are generally any information "required by law to be kept or otherwise kept that show the performance or non-performance of any governmental agency or other agency wholly or partially supported by public funds." Debate typically centers on what are "public records" and what is support by "public funds."

Courts will interpret "public records" broadly and they could include customer lists, intra-office e-mails, contracts, invoices, board minutes and other records. Information that an agency does not want to disclose and that it is not required by law to keep should be discarded.

"Agencies...supported by public funds" includes city waterworks, regional water distribution districts, public water authorities, public facilities boards and even private non-profit rural water associations if they receive federal, state or local loans or grants.

Generally, all meetings of the "governing body" of an entity subject to FOIA must be public and publicly advertised. The governing body includes any group with decision-making authority and may even include groups with only the authority to make recommendations to the governing body, like a sub-committee or working group. Even informal meetings without a quorum between members of the governing body could be subject to FOIA's notice and open meeting requirements.

Questions often arise whether a water association's customer list is subject to FOIA. The Attorney General has opined that agencies subject to FOIA must provide at least names, addresses and listed phone numbers of customers.

There is no attorney-client privilege for agencies covered by FOIA. Both attorneys and their water provider client's often forget that their casual e-mails, memos and other correspondence are not private. Attorney's and their water provider clients should always prepare written communications with the thought that they may appear in open court one day. Information that the parties wish to remain private and that is not exempt from FOIA should be communicated orally unless otherwise requested to be in writing.

In the 2003 legislative session, the General Assembly exempted records containing information relating to the security of a "public water system" from public disclosure in response to increased terrorism threats.

In addition to the security exemption, there are several exceptions to FOIA's coverage, but, when in doubt, a water provider should consult with its lawyer or disclose the information.

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