

On the Cutting Edge of the Arkansas Freedom of Information Act: 2019 Legislative Changes and Updates



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As is the case seemingly anytime that the General Assembly is called to session, this year they made some notable changes to the Arkansas Freedom of Information Act. Several of those changes went into effect last month, and it would be worthwhile for bodies subject to FOIA to brush up on the new laws.

Recording of Public Meetings. Open public meetings must now be recorded “in a manner that allows for the capture of sound,” and those recordings must be maintained for one year. This new requirement is applicable to all public meetings, which covers “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.” To further determine if this definition covers you, your counsel can refer to opinions written by the Arkansas Attorney General. There are a few notable exceptions, however, including those parts of meetings held in executive session, and those of volunteer fire departments. Also, second-class cities and incorporated towns must comply with this requirement, but they get a pass until July 1, 2020. The bottom line is that the vast majority of those entities subject to FOIA must now record their meetings.

New FOIA Exemptions. With over 40+ exemptions to FOIA already on the books at the start of 2019, this Session added several more to the list. First, there is now a new exemption for undisclosed and ongoing investigations by the ABC Board, Control Division, or Enforcement Division. No doubt in response to concerns about the death penalty in Arkansas over the past several years, there is a new FOIA exemption for “documents, records, or information” that could lead to the identification of any person or entity involved in any way in the State acquiring drugs used for lethal injections. For people who have assisted in criminal investigations, there is now a FOIA exemption for any identifying information “if disclosure of the individual’s identity could reasonably be expected to endanger” them or their family members. This exemption has a broad application, applying to 1) confidential informants, 2) confidential sources, and 3) those whose assistance was provided under assurance of confidentiality. Finally, with a growing interest in medical marijuana in Arkansas, there is a new FOIA exemption for plans, analyses, and reports relating to security for medical marijuana cultivators, dispensaries, and lab processors. This is the same as the current FOIA exemption for public water systems and municipal utilities.

Specifically Not Exempted. In the preceding paragraph we reported that undisclosed and ongoing investigations by the ABC Board, Control Division, or Enforcement Division are now exempt. However, those investigations that have been completed and have been provided to the subject of the investigation are specifically left open to disclosure.

Undercover Law Enforcement Officer Public Records Protection Study. In looking forward to future changes to FOIA, the General Assembly created a focus group consisting of a very specific makeup, and charged the group with determining how to best change FOIA law in the future to protect undercover law enforcement. Specifically, this group seeks to “examine and produce a method of protecting the privacy of active and undercover law enforcement officers in their personal lives” and will respond by issuing recommendations for “exempting certain records regarding the law enforcement officers’ personal information from disclosure” under FOIA. The group will come back during the 2020 Fiscal Session with a final written report of its findings, complete with any proposed legislation for the 2021 Regular Session.

Keeping abreast of the constantly evolving Arkansas Freedom of Information Act is crucial for any subjected organization or person. We recommend not only staying up-to-date on the law, but also examining your record retention policy because it can often make the difference between reasonable responses to FOIA requests and nightmarish responses to FOIA requests. Plus, remember that the most important sentence from the Arkansas Freedom of Information Act (for both drafting and responding to a FOIA request) is this one from Ark. Code Ann. § 25-19-105: “The request shall be sufficiently specific to enable the custodian to locate the records with reasonable effort.”

Sources: Act 568 of 2019; Act 810 of 2019; Act 968 of 2019; Act 1028 of 2019; Act 1012 of 2019; Ark. Code Ann. § 25-19-105; Ark. Code Ann. § 25-19-106.