

OVERVIEW OF FOUR AREAS OF ARKANSAS' FREEDOM OF INFORMATION ACT (FOIA) STATUTE

1. PUBLIC MEETINGS

What the FOIA says:

A “public meeting” is defined as the “*formal* gathering together, in a special or regular gathering, of a governing body, whether in person or remotely.” Ark. Code Ann. § 25-19-103(13)(A).

The definition of a “public meeting” does *not* include “a gathering together, whether in person or remotely, of the members of a governing body *to discuss* the settlement of a cause of action in a court ordered-alternative dispute resolution process, including without limitation a settlement conference or mediation.” Ark. Code Ann. § 25-19-103(13)(B).

The above definition of a “public meeting” does not embrace an informal gathering. An “informal gathering” is defined to mean “the gathering of two (2) or more members of a governing body outside of a public meeting.” Ark. Code Ann. § 25-19-103(8).

2. COMMUNICATIONS OUTSIDE OF A PUBLIC MEETING

What does the FOIA say about members of a governing body communicating with one another or with staff or an agent of the governing body outside of a public meeting?

1. He or she *cannot* participate in a communication with a staffer or an agent of the governing body (e.g., attorney of governing body) or another member of the governing body (written, oral, electronic, or otherwise) that is a *poll*. Ark. Code Ann. § 25-19-106(f)(1)(A).

What is a “poll?” A poll is a series of communications:

(A) Between:

- (i) One (1) or more persons paid by a public entity or agents or employees of that public entity; and
- (ii) One (1) or more members of the governing body of that public entity;

(B) Concerning any matter on which official action will foreseeably be taken by the governing body;

(C) To determine:

- (i) How the member of the governing body intends to vote; or
- (ii) Whether the member of the governing body supports or opposes certain proposed action by the governing body;

and

(D) For the purpose of exercising a responsibility, authority, power, or duty of the governing body. Ark. Code Ann. § 25-19-103(11).

2. He or she *cannot* engage in a “deliberation” with another member of the governing body. Ark. Code Ann. § 25-19-106(g).

“Deliberation” means an exchange of information or opinion between two (2) or more members of a governing body that: (A) seeks, discloses, or inquires about a decision by a member of the governing body concerning any matter on which official action will foreseeably be taken by the governing body or (B) solicits, discloses, or inquires about the support or opposition of a member of the governing body concerning any matter on which official action will foreseeably be taken by the governing body. Ark. Code Ann. § 25-19-103(4).

Examples of Violative “Deliberation” Communications:

Example One

Governing Body Member One: “You comfortable with that big Penske contract?”

Governing Body Member Two: “Yes, I think I’m good with it.”

Example Two

Governing Body Member One's response to a social media post on a site to which other governing body members have access: "I'm generally against long term contracts, but I pledge to fully study the Penske contract and do what is in the best interest of our City and its citizens."

3. He or she *cannot* communicate with another member of the governing body about a matter on which official action will foreseeably be taken by the governing body. Ark. Code Ann. § 25-19-106(f)(2)(A).
4. He or she *can* participate in a communication with anyone that deals with ministerial acts, like scheduling a public meeting or setting the agenda for a public meeting. Ark. Code Ann. § 25-19-106(f)(1)(B)(i).
5. He or she *can* communicate with a staffer or agent of the governing body or another member of the governing body about background and nondecisional information on a topic to be taken up by the governing body. Ark. Code Ann. § 25-19-106(f)(1)(C)(i) and (2)(B). "Background and nondecisional information" is defined to mean any information that is *not* "deliberation." Ark. Code Ann. § 25-19-103(1).
6. He or she *cannot* communicate with a staffer in such a way that the communication functionally conducts substantive business of the governing body concerning any matter on which official action would foreseeably be taken by the governing body. Ark. Code Ann. § 25-19-106(f)(1)(A)(ii).

Example of Violative Communication:

Email from a staffer to members of governing body that says, "Okay, please let me hear back from you before this Friday if you have any concerns about my signing the contract on the Penske matter."

What does the FOIA say about staffers or agents of the governing body communicating with a member of a governing body outside of a public meeting?

1. A staffer or agent of a governing body *cannot* communicate to a member of the governing body how another member of the governing body intends to vote or whether he or she is supportive of or opposes a certain proposed action by the governing board. Ark. Code Ann. § 25-19-106(f)(1)(C)(ii).

What civil remedy exists if a member of a governing body is found to have violated the above FOIA rules about communications and deliberations outside of a public meeting?

1. A circuit court can invalidate any action the governing body took that is the direct or indirect result of the prohibited communication or deliberations that occurred in an informal meeting. Ark. Code Ann. § 25-19-106(i)(2).

3. NOTICES REQUIRED TO CONDUCT PUBLIC MEETINGS

Regular Meetings

Notice of the time and place of each *regular* public meeting shall be furnished to anyone who requests the information. The notice must be given at least three (3) days before the meeting takes place. Additionally, the time, place, most current agenda, and a link to any online participatory platform that may be used during the meeting, must be published online if the governing body maintains a website or social media page. Ark. Code Ann. § 25-19-106(b).

Special or Emergency Meetings

At least two (2) hours notice of the time and place of each *emergency or special* public meeting shall be furnished (by the person calling the meeting) to:

- i. the newspapers, radio stations, and television stations located in the county in which the meeting is to be held; and
- ii. any news media located elsewhere which covers regular meetings of the Commission and that have requested to be so notified of emergency or special meetings.

Additionally, at least two (2) hours before the emergency or special meeting, the time, place, most current agenda, and a link to any online participatory platform that may be used during the meeting, must be published online if the governing body maintains a website or social media page. Ark. Code Ann. § 25-19-106(b).

4. **PENALTIES**

Any person who negligently violates any of the provisions of the FOIA shall be guilty of a Class C misdemeanor. Ark. Code Ann. § 25-19-104. A Class C misdemeanor is punishable by up to 30 days in jail and a \$500 fine. Ark. Code Ann. §§ 5-4-201(b)(3) & 401(b)(3).

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