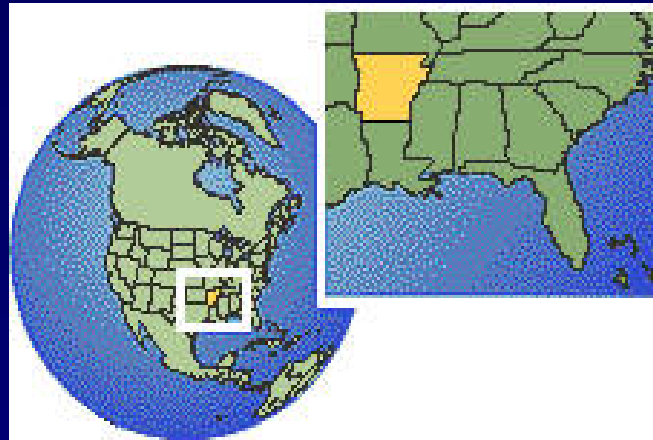
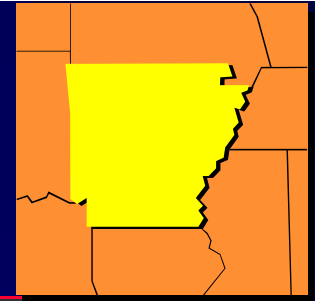


# Freedom of Information Act (FOIA)



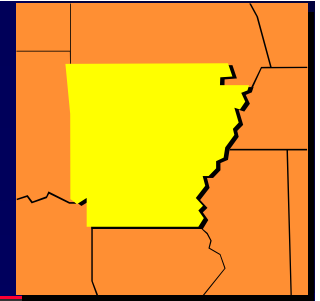
Office of General Counsel  
Arkansas Department of Health  
(501) 661-2878

# Arkansas FOIA



- 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.”

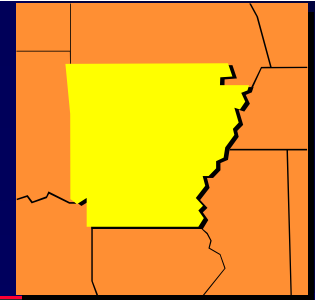
# Legislative Intent



- 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))

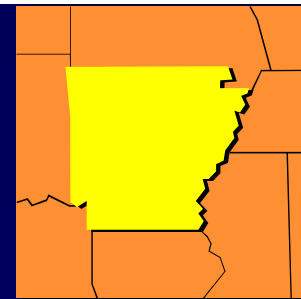


# Scope of the FOIA



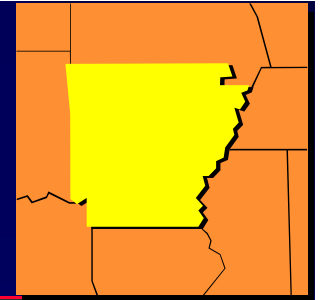
- Requires most meetings of “governing bodies” to be open to the public;
- Allows the public to inspect and receive copies of public records of governmental agencies unless the law makes an exception for them;
- Can apply to meetings and records of private organizations if they receive public funding.

# 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.)

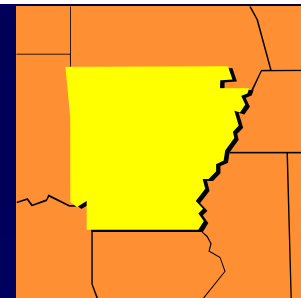
# Public Meetings



- 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 open 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, must be open to the public
- Act is triggered even if no official action is taken.

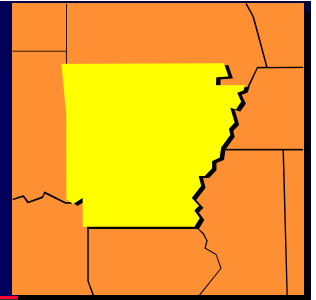
# Open Public Meetings

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”

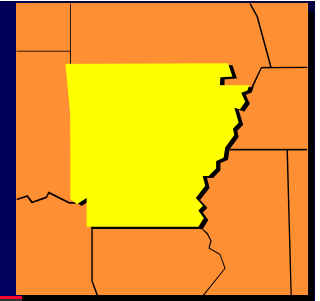
# How many members make a meeting?



- 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).

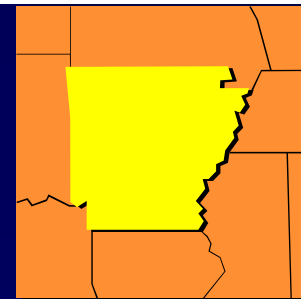


# Social Gatherings/Conferences



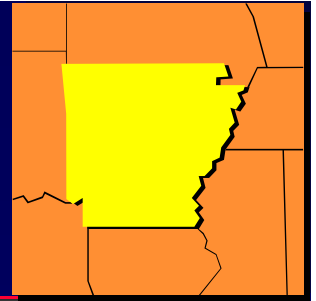
- Considered a “meeting?”
  - Not if any discussion of government business at the social gathering is incidental and intermittent (Op.95-020)
  - Maybe not if the governing body has no control over the conference, function, or proceeding (Op. 94-131)

# 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)

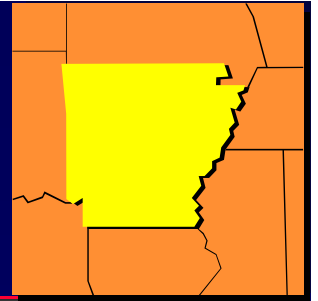


## A.C.A. § 25-19-106(b)(1)

- 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)
  
- Must publish the date, time, and location of any meeting and hearing open to the public at [www.arkansas.gov](http://www.arkansas.gov) at least 3 days before the meeting.
  - Doesn't apply to emergency or special meetings.

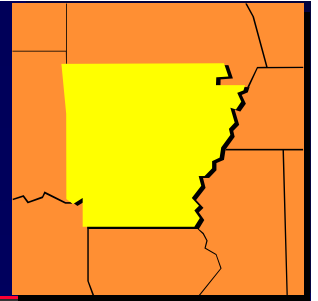


# Open Public Meetings (Notice)

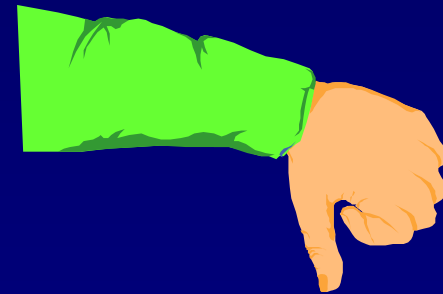


- A.C.A. § 25-19-106(b)(2)
  - In the event of **emergency or special meetings**, the person calling the meeting shall notify the representatives of the newspapers, radio stations, and television stations, if any, located in the county in which the meeting is to be held and any news media located elsewhere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

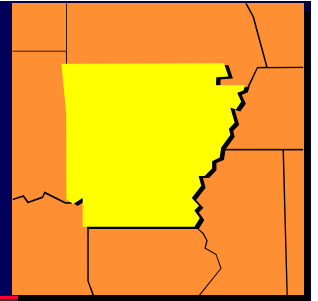
# Exceptions to Open Meetings (Private Meetings)



- 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).

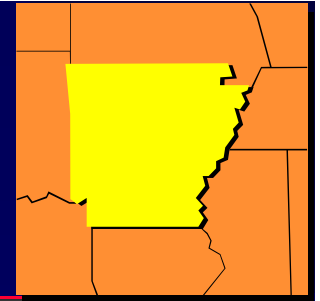


## Action taken at an illegal meeting will not be invalidated unless:

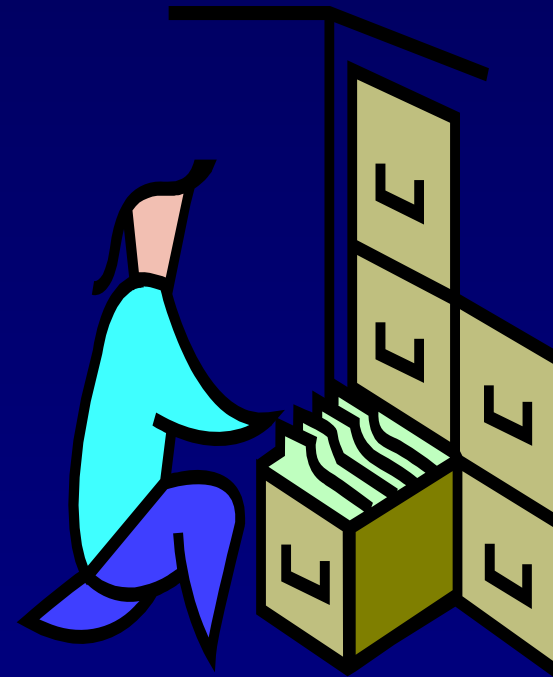


- 1) Plaintiff has given the body a chance to hold a meeting that conforms;
- 2) Remedy is sought to vindicate public as opposed to private interest;
- 3) The FOIA violation was substantial; and
- 4) The defendant knowingly violated the Act (*Rehab Hospital Services Corp. v. Delta-Hills Health Systems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

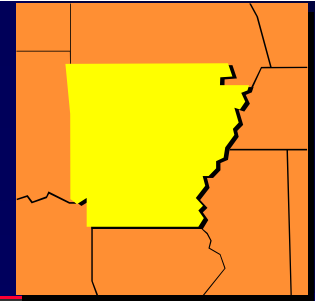
# Public Records



- Definition of Public Records
- A.C.A. 25-19-103(5)(A)
  - “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 which “constitute a record of the performance or lack of performance of official functions....”
  - **Excludes software acquired by purchase, lease or license.**



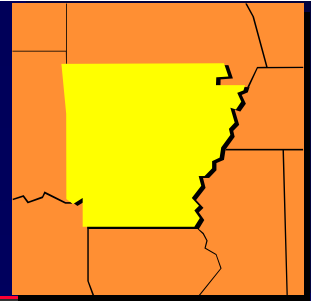
# Public Records (con't)



- All records maintained in public offices or by public employees within the scope of their employment are presumed to be public records. A.C.A. 25-19-103(5)(A).
- The presumption can be rebutted if the record does not reflect the “performance or lack of performance of official functions.” Op. 2005-095.
- Whether a particular record is a “public record” depends upon its content. *Pulaski County v. Arkansas Democrat-Gazette* (Ark. Sup. Ct. 07-669, July 20, 2007).
- If challenged, a court must make an “in camera” or private “in chambers” review to determine whether the records are “public records.” *Id.*

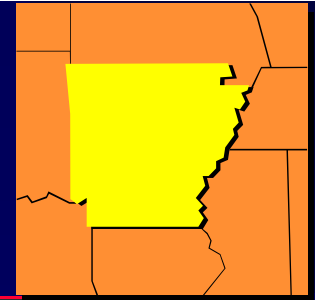


# Access to Public Records A.C.A. 25-19-105



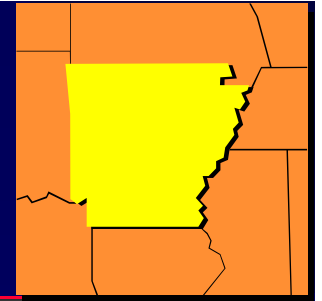
- Unless exempt “ . . . All public records shall be open to inspection and copying by any citizen during regular business hours....”

# Scope



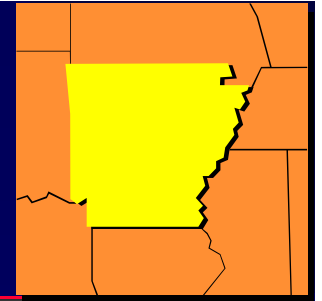
- The FOIA covers “records” not “information”
- An agency need not create new records to comply
- If records are part public and part exempt, redact exempt material and provide the rest
- E-mails or letters sent to private e-mail addresses or private residences of public officials are subject to FOIA 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.
- A public entity can be the custodian of public records even if it does not have physical possession of them, as long as it has “administrative control” of the records. A.C.A. 25-19-103(1)(A). *Fox v. Perroni*, 358 Ark. 251 (2004).

## FOIA Requests – Mode & Specificity



- Requests may be made in person, by telephone, mail, facsimile, electronic mail, or any other electronic means provided by the custodian.
- The request shall be sufficiently specific to enable the custodian to locate the records with reasonable effort.

# FOIA

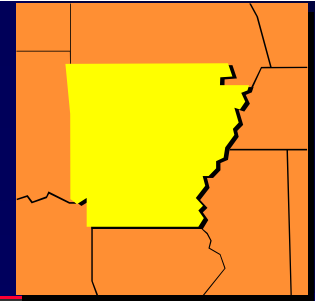


Citizens may request copies in “any medium in which the record is readily available or in any format to which it is readily convertible” with existing software.

- Custodian is still not required to compile information or create a record in response to a request.

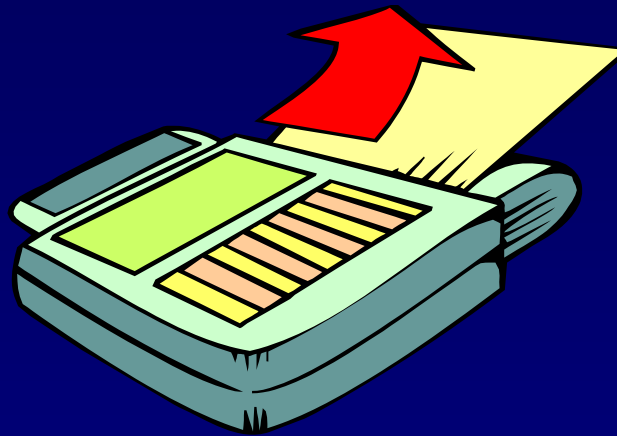
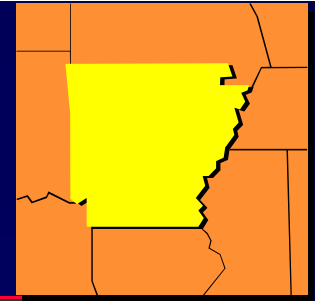


# FOIA Compliance



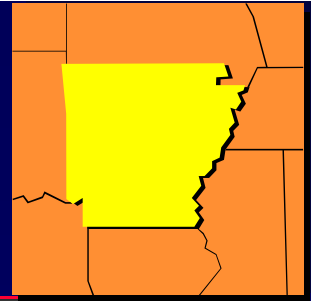
- Requires immediate access unless records are in “active use or storage.”
- If in active use or storage, custodian must certify that fact in writing and set time within 3 working days to provide the records.
- Determine to what extent records are public or non-public; redact exempt portions; and provide the public records.
- An agency that is not the custodian of requested records should identify the proper custodian, if known or readily ascertainable.

# COPIES



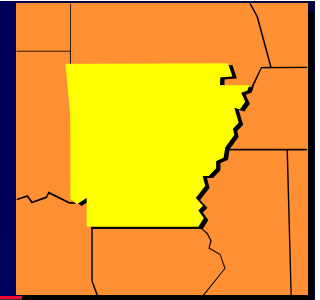
- A citizen may . . . “inspect, copy or receive copies of public records.”

# COPIES (Con't)



- “Upon request and payment of a fee, . . . the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment.”

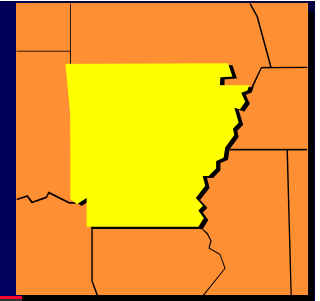
# Exemptions to Access in the FOIA



- State Income Tax Records
  - Individual and Corporate Income Tax Returns
  - Any State Income Tax Record
  - Employee Payroll Withholding
- Medical Records
  - Records containing information relating to the treatment or diagnosis of a medical condition
- Adoption Records
- Education Records, as defined in federal law, “Family and Educational Right to Privacy Act,” 20 USC § 1232g.
- Certain Historical Preservation & Archeological Survey Records
- Grand Jury minutes
- Unpublished drafts of judicial & quasi-judicial opinions
- Unpublished memoranda, working papers & correspondence of certain state officials – Governor, Attorney General, General Assembly members and appellate judges.
- Documents protected from disclosure by order or rule of court. See also Arkansas Supreme Court, Administrative Order #19.

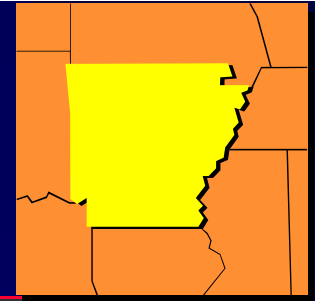


# Exemptions to Access (Continued)



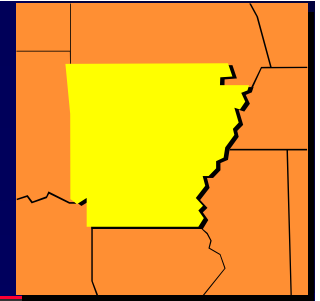
- Files that would give advantage to competitors or bidders
- Certain AEDC Records
- Identities of current undercover officers
  - (identified as undercover at State Minimum Standards Office)
- Records containing measures, procedures, instructions, or related data used to cause a computer ... to perform security functions, including but not limited to, passwords, personal identification numbers . . . and other means of preventing access to computers . . . or any data residing therein
- Non-elected state, county and municipal employees' home addresses are exempt.
- Notwithstanding the exemption, the custodian shall "verify":
  - An employee's city or county of residence
  - Or "address of record" upon request.
- Home addresses of non-elected school district and other employees subject to the FOIA may be exempt under the 25-19-105(b)(12) exemption for personnel records. See *Stilley v. McBride*, 332 Ark. 306 (1998).

# Exemptions to Access (con't)



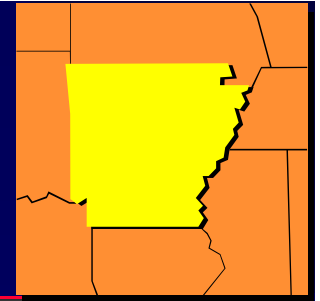
- **Examinations for Licensure**
  - **State agency materials, information, examinations, and answers ... utilized by boards and commissions for ... testing applicants for licensure...**
- **Military Discharge Records (DD Form 214)**
  - **A.C.A. 25-19-105 exempts "Military Service discharge records 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.)

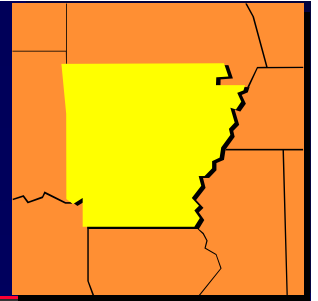
# Homeland Security Information Act



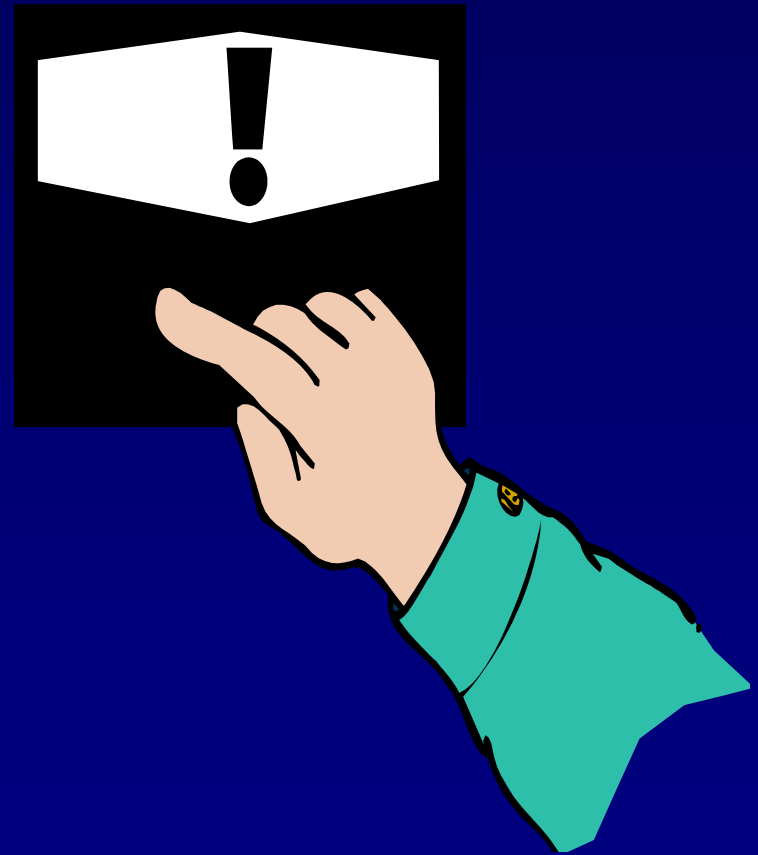
- The “Homeland Security Information Act” shields certain terrorism threat assessments, plans, operational policies or procedures, and training developed or maintained by “emergency service agencies.”
- Also shields certain investigative records until after “final adjudication.”
- And records received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



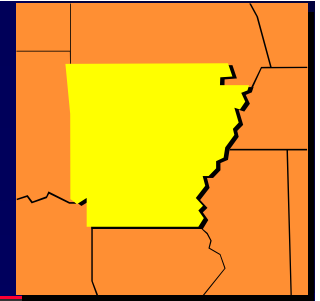
# Exemptions Not Contained in the FOIA



- Exemptions in other State Statutes.
- Exemptions in federal law.
- Constitutional right to privacy
  - (*McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989)).



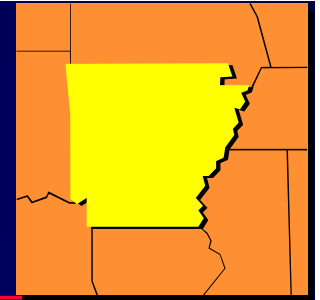
# Penalties and Enforcement



- A.C.A. 25-19-104 (Criminal Penalty)

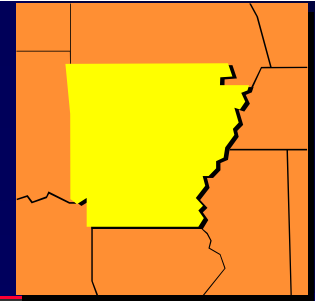
- Negligent violation is a Class “C” misdemeanor. See Act 1994 of 2005, Sec. 413.
- Former specific language authorizing public service or education or both repealed. Act 1994 of 2005, Sec. 413.

# Penalties and Enforcement



- A.C.A. 25-19-107 (Civil Judicial Enforcement)
  - Any citizen denied their FOIA rights may appeal to circuit court

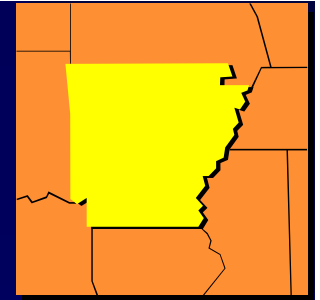
# Attorneys' Fees May be Awarded



- Against a defendant where the plaintiff substantially prevails unless the position of the defendant was substantially justified, or other circumstances would make an award unjust.
- Against a plaintiff where the defendant substantially prevails only if the action was initiated primarily for frivolous or dilatory purposes.
- No attorneys' fees may be awarded against the State or any of its departments or agencies (sovereign immunity concerns).



QUESTIONS?  
Call us Anytime!



Rick D. Hogan 661-2252  
Reggie Rogers 661-2609  
Elizabeth Pitman 280-4034