

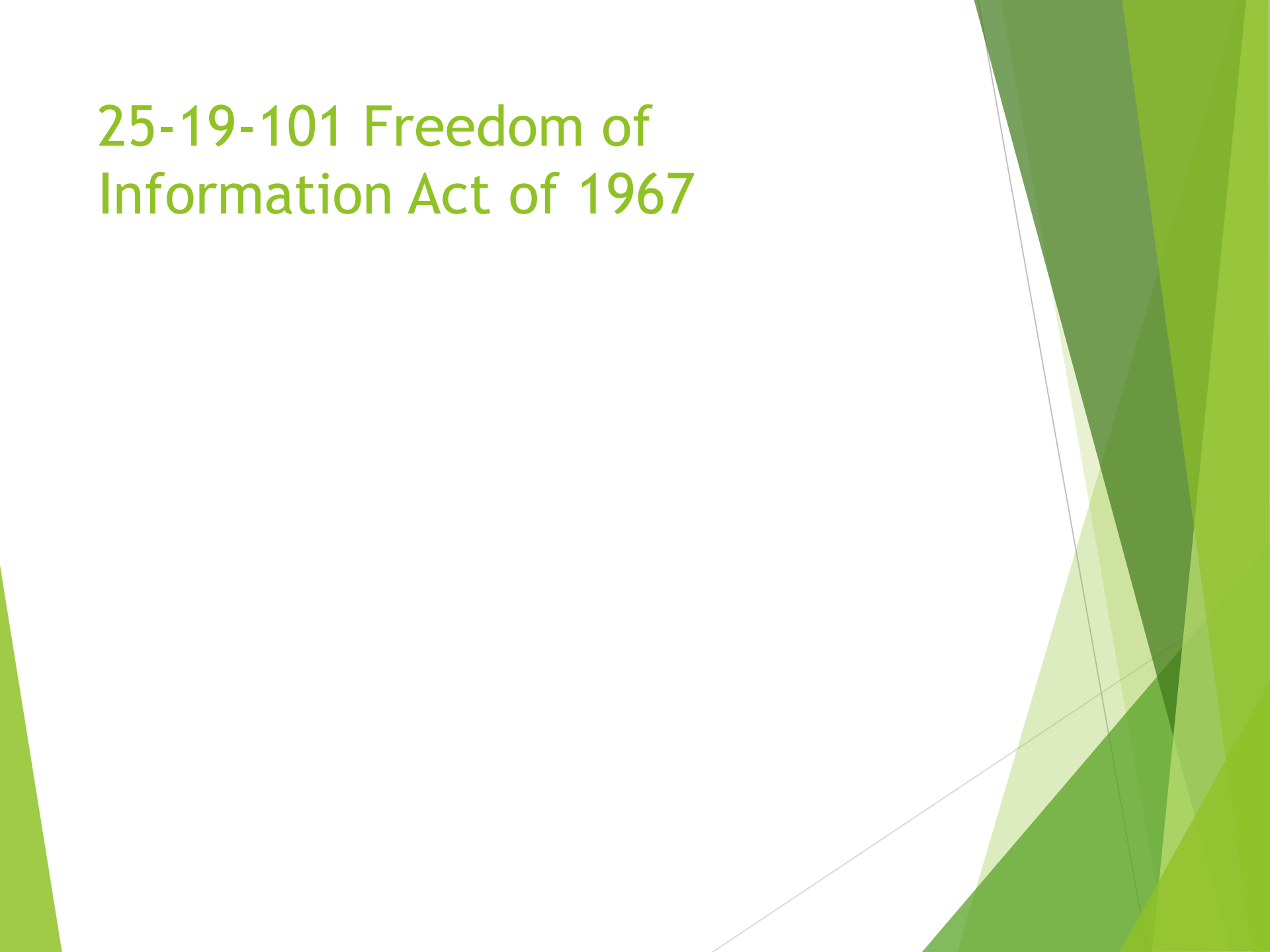
# FOI: Open Meeting Law and Executive Session

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# Overview

- ▶ FOI Law
  - ▶ Public Records
    - ▶ Student Records
  - ▶ Open Meetings Law
    - ▶ Executive Session

# 25-19-101 Freedom of Information Act of 1967



# 25-19-105

- ▶ All public records shall be open to inspection and copying by any citizen of the State of Arkansas during regular business hours of the custodian of the records.

# What if there is a FOI records request?

- ▶ Superintendent is “custodian of records” for everything at school
- ▶ Arkansas citizens; if out of state, can ignore
- ▶ Mail, phone, email requests
- ▶ Disclose, unless clearly exempt
- ▶ If mixed, **redact** information that is exempt from disclosure, and recopy.
- ▶ “Redact” is a fancy word that means cover up with Sharpie or white-out.

# When is the superintendent NOT the custodian of records

- ▶ When the place the record is stored isn't school property
  - ▶ Your cell phone's stored text messages
  - ▶ Your computer
  - ▶ Your work email address you use for school board business
- ▶ If this is the case, YOU will get the request, and YOU will be in trouble if you do not timely comply!

# What are the limits?

- ▶ Documents that do not exist do not have to be created for a FOI request
- ▶ No right under FOI to force individuals to answer questions or write essays
- ▶ Cannot refuse even a duplicate request or one with impure motives

# What can be charged?

- ▶ “shall not exceed actual costs of reproduction”
- ▶ Can't charge for labor
- ▶ Can give it away for free (but don't!)
  - ▶ The AR Constitution forbids using school funds or school property for non-school related purposes
- ▶ Can require payment in advance of handoff if \$25+



# How fast?

- ▶ Immediately, if possible. Right away.
- ▶ Total myth that you always have “3 days.”
- ▶ If item is “in active use or storage” this has to be certified to the requestor, in writing and time within 3 business days in which record will be made available
- ▶ That it is on the internet or available somewhere else doesn't mean you can refuse
- ▶ Yes, you have to make copies if they want them

# FOI exemptions

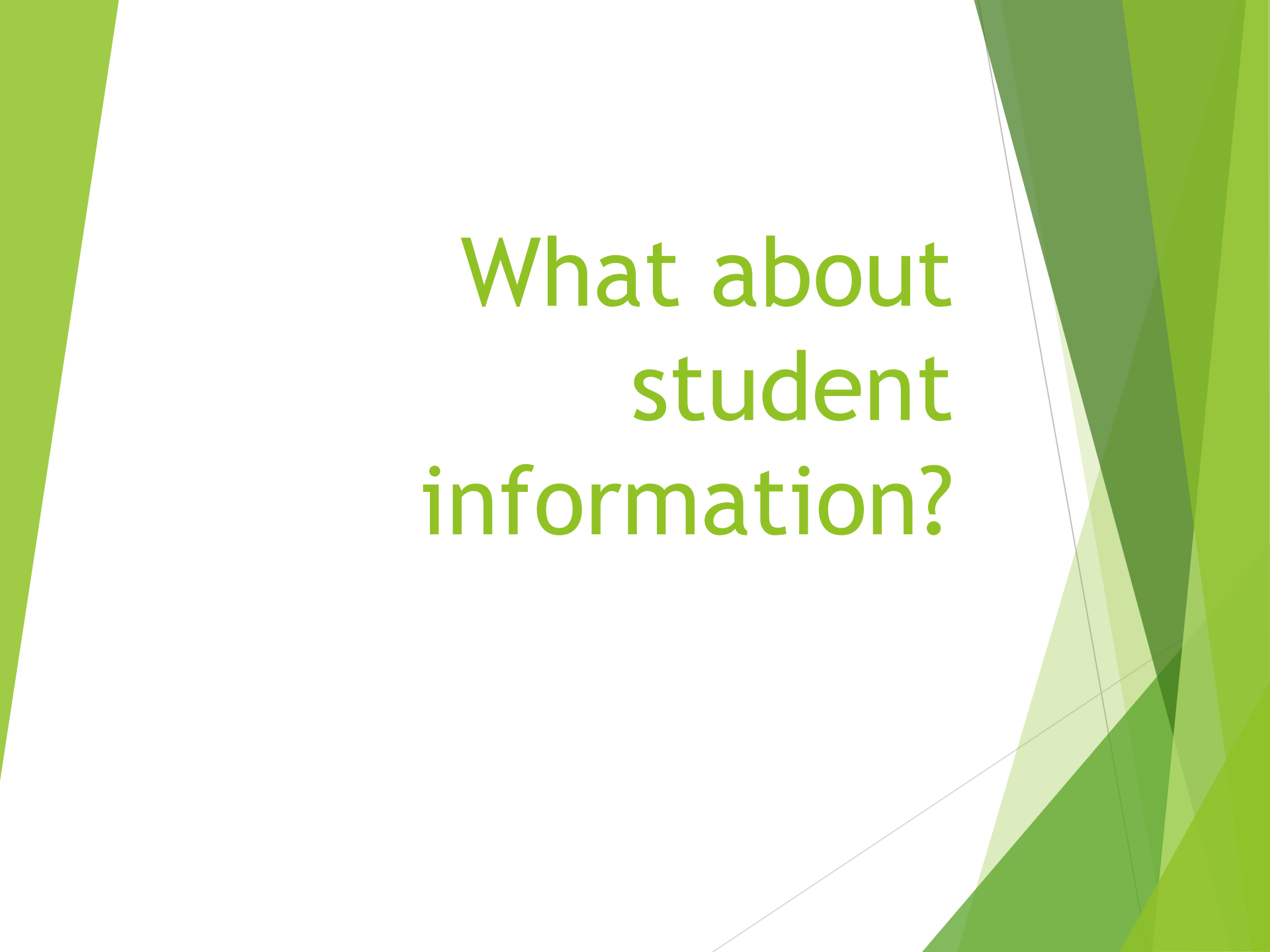
- ▶ Key exemptions:
- ▶ “personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy”
- ▶ Medical records (including sick leave)
- ▶ Employee evaluations (includes write ups)

# Redaction List

- ▶ Social security numbers
- ▶ Unlisted phone numbers
- ▶ Personal (nothing to do with the job) or family information
- ▶ Academic transcripts are 100% non-disclosable

# Some things feel private, but are not!

- ▶ Salary information is 100% open to the public
- ▶ Signature
- ▶ No such thing as a “confidential” job application or letter of recommendation, but some information inside it may be exempt

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What about  
student  
information?

# Student Information

- ▶ Governed by Federal Law
- ▶ Family Educational Rights and Privacy Act or FERPA
- ▶ Look for the policy on this in your student handbook
- ▶ Parents control disclosure of information; can “opt out” on form

# FERPA

- ▶ Most parents do not opt out by returning opt out form (but check those forms!)
- ▶ Parents can opt out for military recruiters, but disclose to all others
- ▶ “Directory Information” can be disclosed to non-parent requestors without parental permission if no opt out on file

# Typical Definition of “Directory Information”

From our model policy 4.12

“Directory information” includes, but is not limited to, a student’s name, address, telephone number, electronic mail address, photograph, date and place of birth, dates of attendance, his/her placement on the honor role (or the receipt of other types of honors), as well as his/her participation in school clubs and extracurricular activities.



# But what about parents?

- ▶ Parents can have any official education record concerning their own child
- ▶ A parent is a parent is a parent
- ▶ Mom can't call and veto divorced Dad's access to student records—this would take a court order addressed to the school.

# Do not!

- ▶ Do not disclose academic information such as test scores or proficient/not proficient
- ▶ Do not disclose anything about special education
- ▶ Do not disclose anything about free or reduced price lunch status
- ▶ You do not have to create records that do not exist, like lists that meet certain criteria

# Open Public Meeting Law

# 25-19-106

- ▶ Except as otherwise specifically provided by law, all meetings, formal and 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, supported wholly or in part by public funds or expending public funds, shall be public meetings.

# Freedom of Information Law and Meeting Compliance

- ▶ Mostly, superintendents are expected to do this (and what does that really mean?)
- ▶ FOI law says all board meetings must be held in public A.C.A. 25-19-106
- ▶ AR law says any meeting to do with personnel must take place after 5:00 PM. A.C.A. 6-13-619
- ▶ New law: all board meetings must be audio recorded, retained for 1 year (Act 1028 of 2019)
- ▶ (A “work session” or a “retreat” is still a board meeting)

# Who are “the media” for FOI notification?

- ▶ This is a retro, print media world—internet news outlets or bloggers have zero right to be notified
- ▶ In county where meeting will be held, newspapers, radio stations and TV stations
- ▶ If media outside of the county attend your meetings, they must be notified too.
- ▶ Individuals cannot force you to notify them
- ▶ Notification should create proof of notification such as fax confirmation

# What about (((OOPS!)))

What if you mess this up or forget or do it wrong?

# (OOPS?!)

- ▶ If FOI notification is not made, entire meeting must be redone; action taken in meeting has no legal effect
- ▶ Law has no legal consequences for failing to modify website, or having a meeting at the wrong time of day



# Executive Session

# Quick Review: FOI

- Makes records available to the public
- Requires government meetings be open to the public; 2 hours notice of special or called meeting
- Provides for executive session – a narrow, legal exception to the law that **all** government meetings be held in public

# First questions about any school board meeting

- ▶ Is this a legal meeting?
- ▶ What does “meeting” mean?
  - ▶ Two or more board members discussing board business is a “meeting” even if there is no quorum
  - ▶ Member-to-member communication can equal a “meeting”
  - ▶ A quorum is necessary to transact board business

# Wait—how can two people talking be a meeting!?!

- ▶ It is true!
- ▶ It takes a quorum to legitimately conduct legally binding board business
- ▶ It only takes TWO board members talking about current or potential board business to be a “meeting” that violates FOI law (because it is unlikely you notified the press two hours in advance that you’d be texting or chatting)

## In other words

- ▶ It takes a quorum for legitimate board business
- ▶ It only takes TWO board members for monkey business!

# Also? What does it look like?

- ▶ Jim and Joe were friends before they ran for school board. They sit together at ball games. They have lunch together.
- ▶ What does this look like to the public? What if a third board member joins them? What does that look like? What will people say?
- ▶ People are always watching, and will always talk about you behind your back when you are a public official like a school board member

# Notification

- ▶ Media = public
- ▶ Time: 2 hours advance notice
- ▶ Newspapers, radio stations and televisions stations in the county where the meeting will be held
- ▶ Also, any newspapers and radio or TV stations that are outside of the county that regularly cover your board meetings and have asked to be notified

# Myths! This is not true:

- ▶ You have to notify “the public” of board meetings by placing an advertisement in the newspaper.
- ▶ You have to notify any individual or group that has asked to be notified.



How much advance notice must be given to the media regarding a special called school board meeting?

24 Hours?

6 Hours?

2 Hours?

# Website notification

- ▶ You are required to use the district's website to notify date/time/place:
  - ▶ of a regular meeting: 10 days before the meeting.
  - ▶ of a rescheduled meeting: 24 hours before the meeting
- ▶ NO website notification requirement for special or called meetings

# Lawful reasons for AR government to go into executive session

- ▶ Employment
- ▶ Appointment
- ▶ Promotion
- ▶ Demotion
- ▶ Disciplining
- ▶ Resignation

of any public officer or employee

# Strike “disciplining”

- Employment
- Appointment
- Promotion
- Demotion
- ~~Disciplining~~
- Resignation

of any public officer or employee

# Why?

- ▶ School boards no longer have the authority to directly discipline school district employees.
- ▶ The Arkansas General Assembly determines what is and what is not the job of school boards.



# Reason 1: Employment

- ▶ This means job performance, as well as the decision to hire someone.
- ▶ This refers to specific individuals, not positions, salaries or policies.
- ▶ Example: You may discuss whether to hire Mary as bookkeeper, but you may not discuss whether to hire a second bookkeeper.

# Reason 2: Appointment

- ▶ Appointment won't come up often, except in the case of a school board vacancy.
- ▶ The board could discuss in executive session the *appointment of a public officer* (board member) without the superintendent present.



## Reason 3: Promotion

## Reason 4: Demotion

- ▶ Promotion is easy and clear: whether to promote a specific employee to a specific position.
- ▶ Demotion is more complicated: to take away money, power or prestige (or contract days), there must first be a partial termination or partial non-renewal with full due process **BEFORE** the board could act or discuss.

Reason 5: ~~Disciplining~~

Reason 6: Resignation

- ▶ Discipline of any employee other than the superintendent is NOT in your board member job description as written by the General Assembly.
- ▶ Resignation (usually there is a letter from the employee) may be discussed in executive session prior to board action to accept the resignation and to release the employee contractually.

FOI isn't your only  
problem!

# A permitted topic under FOI law can *still* get your district sued

- ▶ Other government bodies have more involvement in personnel matters than school boards.
- ▶ School board specific law trumps FOI “permitted to discuss in executive session” law.
- ▶ The role of school boards in employee discipline is limited strictly to serving as a hearing body in a termination or nonrenewal hearing.
- ▶ You should get 100% of your information at the hearing, not from a previous executive session.

# Don't get tricked!

- ▶ You can legally (per FOI law) discuss things in executive session that will get your district sued.
- ▶ You can be forced to testify as to what was said in executive session.
- ▶ You must understand the difference between “legal” and “a good practice.”

# Discussion Question

- ▶ A school district employee makes a formal request to meet with the school board in executive session to discuss “some concerns.” How should this be handled?

# Answer

- ▶ The board doesn't exist to troubleshoot or negotiate working conditions with individual employees.
- ▶ The grievance process should be followed without deviations or exceptions.
- ▶ Meeting with an employee undermines district administration and will lead to a long line of others seeking the board's attention and involvement.
- ▶ This is a bad idea; however, it doesn't violate Arkansas FOI law.

# Discussion Question

Individual board members have heard concerns in the community about a janitor often seen off campus during work hours. Is there a problem with taking the janitor into executive session to talk to him about this?



# Answer: Don't do it

- ▶ An employee is allowed by FOI law to go into executive session, BUT the General Assembly has removed school boards from the employee supervision business in other specific-to-school-boards laws.
- ▶ The school board ONLY supervises the superintendent, and the superintendent is held accountable for the performance of all employees.

# (So what do you do about the janitor?)

- ▶ The buck stops with the superintendent - ask him in executive session to look into the community perception that the janitor is off task during the work day.

# Going into executive session

- Doesn't have to be on the agenda (no law says it does)
- Doesn't require a vote
- Can do it by consensus
- Must be for a proper purpose (one of the ~~six~~ five reasons)
- Must announce executive session

# How to announce

“We are going into executive session for the purpose of discussing the \_\_\_\_\_ (fill in the blank with one of the five reasons) of a district employee.

“We are going into executive session for the purpose of discussing the resignation of a district employee.”

# Question

Does this statement comply with the law?

“We are going into executive session to discuss personnel.”

Why or why not?

# Who can go with you?

- ▶ Only a candidate for superintendent can be interviewed in executive session.
- ▶ Parents or patrons cannot legally be present in executive session (student expulsion hearings have different laws).
- ▶ Supervisors of an employee being discussed may be present.
- ▶ Superintendent may be present *at your request* on employee matters.

# Who can go with you?

What about your school board attorney?

- ▶ Your school board attorney can be present in a closed-to-the public hearing, but not the board-only deliberation part.
- ▶ Your school board attorney cannot be present in executive session because he is not your employee, and you are not discussing his subordinate.

Does the  
superintendent  
have RIGHTS to  
go into Executive  
Session?



# Who has a legal right to be in executive session, as a guest?

- ▶ Only school board members!
  - ▶ The superintendent *may* be present (but has no right to be present, even if he/she is being discussed).
  - ▶ The employee *may* be present (but has no right to be present, even if he/she is being discussed).
  - ▶ The immediate supervisor of an employee may be present (but has no right to be present)
  - ▶ Any legal “guest” can be asked to leave executive session.

# Dos and Don'ts

## DO:

- ▶ Trust fellow board members to keep what is said confidential.
- ▶ Frankly and openly discuss the situation for the good of the district.
- ▶ Stay on topic; 100% of the executive session needs to be about the reason you announced.

## DON'T

- ▶ Vote. All votes must take place in open session.
- ▶ Nonbinding polls are ok.
- ▶ Take written notes.
- ▶ Make recordings.
- ▶ Talk about what was said inside, later outside the executive session. Breach of confidentiality could lead to felony criminal charges!

# What if there is inappropriate sharing?

- ▶ A.C.A. 6-24-104: “No board member, administrator or employee shall knowingly disclose any confidential information gained by reason of his or her position.

# Inappropriate Sharing

- ▶ A.C.A. 6-24-115: “Any board member, administrator, employee or nonemployee who shall knowingly violate the provisions of this chapter shall be guilty of a felony.
- ▶ A.C.A. 6-24-117: “If a board member is found guilty of violating the provisions of this chapter, the board member shall immediately cease to be a board member.”

# After an executive session

- ▶ Did you decide to do something? Then make a motion and take a vote about it.
- ▶ Was no decision made? Then state in open session, “No decisions were reached in executive session, and no action will be taken.”

# What if you forget to take a vote?

- ▶ If a vote is not taken after a decision is made, the decision is not valid or enforceable.
- ▶ All decisions have to be voted on in OPEN session for them to have legal force.

Questions?



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**Thank You!**