

Freedom of Information Act and Ethics – Laws, Best Practices, and Beyond

**Presented by Kristen Craig Garner
ASBA Staff Attorney**

Goals

- **Brief overview of relevant laws**
- **This is by necessity brief and incomplete**
- **Important you get additional training**
- **Trying to protect you from embarrassment or negative press treatment**
- **Consider re-taking this content; many board members repeat it annually**

Freedom of Information

Overview

- **Public Records (mostly not your responsibility with exception of emails)**
- **Legal and illegal board meetings**
 - **Executive sessions in this context**

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

25-19-101 Freedom of Information Act of 1967

ACA 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 you get a FOI records request?

- Superintendent is “custodian of records”
- 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.**

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!)
- Can require payment in advance of handoff if \$25+

How fast?

- **Immediately, if possible**
- **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 (sick leave)
- Employee evaluations (includes write ups)
- Student records

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!

Act 1028 of 2019

- Starting July ___, 2019, at a minimum, all school board meeting must be sound recorded, and these recordings retained for at least 1 year
- Doesn't apply to executive sessions

Who are “the media” for FOI notification?

- 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

FOI

- Default: government meetings are held in public.
- Exception: The law 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

Text Messages

- Text messages can be FOI'd
- Doesn't matter it is your personal device
- Might want to review your phone settings-iPhone default for text message retention is "forever."

FOI: This really happened. Recently.

- Board members discussed in text messages they wanted X teacher to get vacant library/media position. They like X. Everybody likes X.
 - Communication between board members (two is enough!) on board business is an illegal meeting under FOI law and decided cases.
- Y teacher (who didn't get position) and her lawyer FOI'd board for all emails and text messages. (Lawyer has now filed suit against board for FOI violation.)
- Y teacher won't get job, but this is embarrassing.
- Let's review our iPhone settings.
- Let's not text between board members about board business

Regular vs. Special Meetings

- **Regular is your scheduled, predictable monthly meeting**
- **Special is any other meeting of the board**
- **Must give 2 hours advance notice to media of special board meetings**

Notification

- **Media = public**
- **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.

Table Talk

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

24 Hours?

6 Hours?

2 Hours?

Lawful reasons to go into executive session

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

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 and constitutes overreaching by the board; however, it doesn't violate Arkansas FOI law.**

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.”

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.

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.**

ETHICS

Statutory Ethics for School
Board Members, School
Employees and School
Administrators

This presentation: Statutory Ethics

- **Arkansas Code Annotated 6-24-101 through 6-24-120**
- **Originally enacted in 2001**

General Rules

- Applies to school districts, co-ops, charter schools
- No “insider” deals, sales, purchases
- No “buddy” transactions
- Strict rules prohibit most hiring of school board members’ relatives except in extraordinary circumstances
- There is a provision where a local board can grant permission for some transactions; others must be given by the Commissioner of Education

Wait--- “Permission?”

- A board can “grant permission” for an otherwise prohibited transaction.
- This takes the form of a board resolution, and makes the case in that format. (More on this later)
- A majority of the board must vote to create this resolution
- Depending on the dollar amount and situation, it is either filed locally (local resolution) or sent to the Commissioner of Education at ADE and the board waits for permission to come from there.

Hang on—how do you even know there is a conflict?

- In the ADE rules (Arkansas Department of Education Rules and Regulations Governing Ethical Guidelines and Prohibitions for Educational Administrators, Employees, Board members and Other Parties, March 2014) there are supplemental forms.
- Form A is a notification form, putting board members and employees on notice that they have a duty to disclose relationships with vendors or potential vendors.
- Form B is the disclosure form where relationships with vendors are detailed.
- Form C is the fill-in-the-blank resolution form for board adoption.

Definitions are important in this law!

Administrator means any superintendent or assistant superintendent or his or her equivalent, school district treasurer, business manager or any other individual directly responsible for entity-wide purchasing.

- This is a counter intuitive definition, that could **include** an athletic director and food service director, and **exclude** a principal or other person widely regarded as an “administrator.”

Definitions, continued

Contract means any transaction or agreement for the purchase, lease, transfer or use of real property or personal property or personal or professional services

- This is a “lawyer” definition of contract, includes formal written contracts as well as informal “call now, expected to pay later” agreements
- Includes deposits, investments
- Includes both buying and selling (think of surplus property, or used vehicles)

Definitions, continued

- **Family means**
 - Spouse
 - Children, including step-children
 - Parents, and parents-in-law
 - Siblings, siblings of your spouse
 - Anyone who lives in your house or your spouse's house
 - Your agent (person who acts for you) or your spouse's agent

More on “Family”

- Family does NOT include
 - Siblings-in-law by marriage
 - Grandchildren or grandparents
 - Cousins
 - Nieces, nephews
 - Aunts, uncles

If these people do not live in the house with a board member or administrator, you can do business with them. If they are related to (but don't live with) a board member, they can be hired.

Definitions, continued

- **Financial Interest means 5% or greater ownership, OR officer/director/trustee/partner OR top level management OR compensation based in whole or in part from transactions with the school district**
- **Directly interested means receiving compensation or other benefits personally or to an individual's household from the person, business or entity contracting with the school district**

Application

Family means

- Spouse
- Children, including step-children
- Parents, and parents-in-law
- Siblings, siblings of your spouse
- Anyone who lives in your house or your spouse's house
- Your agent (person who acts for you) or your spouse's agent

Mary is a school board member. Her roommate, Sylvia, who is no blood relation to Mary, is interested in working for the school district.

Is there a problem with this?

Application

Directly interested means receiving compensation or other benefits personally or to an individual's household from the person, business or entity contracting with the school district.

Joanne is the secretary in the high school office. Her husband is a licensed plumber. Would she be considered to be “directly interested” if her husband provides professional services and then bills the school district?

(Not talking about spring “rehire” ritual)

NEW EMPLOYMENT HIRES

Hiring Family Members

Family member of:	Promote or New Position for Existing District Employee?	New Hire?
School employee	No restrictions	No restrictions
“Administrator”	Unless to business manager/bookkeeper	Unless to business manager/bookkeeper
Board Member	Local resolution if pay change less than \$2500; if over \$2500 then must have Commissioner approval (probably yes)	Local approval if pay under \$5,000; if pay will be in excess of \$5000, must have Commissioner approval (probably no unless strong case)

Doing Business with Insiders

	Local Resolution Passed and Filed (Auditor will check these)	Resolution Passed and Sent to Commissioner to approve/disapprove
Business with School Employee or Family	Up to \$10,000	\$10,000 or over
Business with School Board Member or Family	Up to \$10,000	\$10,000 or over
Business with "Administrator" or Family	Never	Commissioner has no power to approve

New Hires: Family of board members

- **Can work for 30 days in a fiscal year as a substitute with a policy to that effect.**
- **Cannot work and make more than \$5000, without a Commissioner approved.**
- **SubTeach or similar staffing agency OK, doesn't count (because pay comes from staffing agency)**

Promotion/Contract change of board member's family member

- Resolution sent to commissioner and wait for permission to be granted or denied if position change would result in net salary change of greater than \$2500
- Usually, if district has advertised, done a good search, and can make a good case for promoting the best applicant, permission is granted

Resolution Process

- You do this when you are ready to make the otherwise prohibited hire
- You do this when the low bidder is otherwise prohibited to do business with the district
- Do this **BEFORE** you create a contract

Doing Business with a Board Member

- **Resolution** is required for any business transaction once elected. Dollar amount in fiscal year or per transaction determines whether it gets filed or goes to Commissioner at ADE.
- If new board member is current vendor or service provider, stop using/no new transactions until a resolution is approved or permission from commissioner is granted, as applicable.
- Usually, when bids have been taken or permission is being sought to use board member when he/she is low bidder, permission is granted.

About that resolution . . .

- **Board can choose whether or not to seek permission for the hire or transaction. The board cannot get in trouble for declining to pass a resolution.**
- **Law specifies that interested board member must leave board room for entire discussion and cannot vote on this matter.**
- **Before the board member leaves, check to ensure there will still be a quorum sufficient to continue the meeting. (ACA 6-13-619)**

Resolution Process

- In the absence of the board member with a conflict of interest, the remaining board discusses and creates a resolution (see rules, form C).
- The drafting of the resolution must take place in open session
- Typically, the superintendent will have prepared a draft.

RESOLUTION EXAMPLE

Hypothetical Resolution

WHEREAS the Do Right School District Board of Directors met in a regular, open and properly called board meeting on July 1, 2015 in Pretty Town, Arkansas.

WHEREAS, five board members were present, a quorum was called by the chair.

WHEREAS, the Board of Directors received a recommendation to adopt a resolution to enter into a contract with Dewayne Owens to perform dirt work at the site of the new baseball field.

Resolution

Full disclosure of all relationships and interest as required by ACA 6-24-101 et seq. that are relevant to proposed contract:

- Dewayne is the father of Melissa Jones, who is a school board member.

Resolution

Specific facts and reasons for justifying the contract were:

After a three week bid solicitation period, and after reviewing 8 bids, Dewayne Owens was the low bidder by over \$5000, with a bid for \$12,000. The other bids ranged from \$18,500 to \$25,000 for the earth work.

Resolution

The unusual and limited circumstances necessitating the contract are:

- 1) A substantial cost savings will be realized by the school district
- 2) Dewayne Owens can commence work immediately; other bidders could not commence work for two to three months, which would have serious implications for project completion.

Resolution

List of relevant data enclosed supporting the unusual and limited circumstances:

- a) Copy of bid solicitation material;
- b) List of solicited bidders, including names, addresses and phone numbers;
- c) Copies of submitted bids, which include project commencement and completion commitments

Resolution

WHEREAS, Melissa Jones, having declared an interest in the proposed contract, left the meeting prior to the discussion of the contract and did not return to the meeting room until the voting on the contract had been concluded.

WHEREAS, the Board, after serious consideration, moved to approve the contract with Dewayne Owens.

THEREFORE, due to the specific reasons cited above, it is hereby declared to be the intent of the Do Right School District Board of Directors to award this contract to Dewayne Owens.

Resolution

As is required by ACA 6-24-101 et seq., the contract is contingent upon approval by the Commissioner of the Arkansas Department of Education. If approval is denied, this contract approved by the Board would be null and void.

Ed Administrator

Belinda Blevins

Superintendent

Board President

July 1, 2020

July 1, 2020

More on the Resolution Process

- Resolutions are either filed locally and reviewed carefully at the next audit, or (depending on the dollar amount) sent to Commissioner of Education Johnny Key for consideration.
- The resolution, and all relevant supporting information (such as copies of advertisements, bid notices, etc.) are sent to ADE for all transactions with “administrators” and qualifying transactions or hires as required by law.
- Rules state this must be sent certified mail, return receipt requested.

Resolution Process, continued

- **The Commissioner has 20 days from the date of the resolution to approve or disapprove in writing the request.**
- **The Commissioner, inside the 20 days for consideration, may ask for additional information, and will have an additional 20 days to consider the resolution.**

Resolution Process, continued

- If there is no response from the Commissioner, approval is automatic. (Unusual)
- If approval is granted, the approval letter will detail restrictions and limitations.
 - Example, the board may do business with the board member's tee-shirt shop when the tee-shirt shop is the low bidder, and there are at least three other bids.
- The maximum possible time to grant an approval is for 2 years (except for employment contracts).

What doesn't this apply to?

- Donations, volunteer work (except board members/spouses of board members may not be volunteer athletic coaches, new law in '16 (Act 788, amending ACA 6-22-105.)
- Reimbursement of expenses
- Educational awards, recognitions, gifts for “exceptional skill or exemplary contributions” to education

**IS THERE ANYTHING ELSE
THAT IS PROHIBITED?**

YES! ACA 6-24-104(a)

No board member, administrator or employee shall knowingly use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or others.

- Unless you are given an athletic pass, you pay to go to games**
- You pay when you go through the lunch line at school**
- Sometimes, people may try to “comp” you because you are a board member—it is your responsibility to not allow this to happen**

YES! ACA 6-24-104(b)

While serving as a board member, administrator or employee, an individual shall not accept employment, contract or engage in any public or professional activity that a reasonable person would expect might require or induce him or her to disclose any information acquired by the member by reason of his or her official position that is declared by law or regulation to be confidential.

YES! ACA 6-24-104(c)

No board member, administrator, or employee shall knowingly disclose any confidential information gained by reason of his or her position, nor shall the member knowingly otherwise use such information for his or her personal gain or benefit.

Example: Executive Session

Kickbacks and gratuities prohibited

- **ACA 6-24-112**

Worst case: Violation, Prosecution and Found Guilty

- **Felony conviction**
- **Restitution can be ordered**
- **Fine not to exceed \$10,000**
- **Sentence not to exceed 5 years**
- **Board position is vacant upon conviction**

THANK YOU!