



STATE OF ARKANSAS  
THE ATTORNEY GENERAL  
DUSTIN MCDANIEL

Opinion No. 2014-124

November 19, 2014

The Honorable Linda P. Chesterfield  
State Senator  
#12 Keo Drive  
Little Rock, Arkansas 72206

Dear Senator Chesterfield:

You have asked for my opinion regarding the following two questions on the Freedom of Information Act (FOIA):

1. Under Arkansas law, when the state board of a state agency appoints (or nominates) a committee/subcommittee to serve in any capacity, is the committee/subcommittee and any actions taken by it or its members subject to the FOIA?
2. Under Arkansas law, when the state board of a state agency appoints (or nominates) a committee/subcommittee to serve in any capacity, are the committee/subcommittee meetings open to the public?

**RESPONSE**

I must start by clarifying your first question. The FOIA applies to all government organizations, including groups created by or from such organizations. Strictly speaking, therefore, a committee or subcommittee of a state agency is “subject to the FOIA.” Your first question seems to be asking whether such a group’s records qualify as “public records” under the FOIA. And your second question is whether such a group’s meetings qualify as “public meetings” under the FOIA.<sup>1</sup>

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<sup>1</sup> Because you do not ask, I will not address any potential records exemptions or meetings provisions that might allow the meetings to be held in closed session (i.e. an “executive session”).

There are three general types of groups created by or from a public organization. Depending on the facts, the FOIA applies differently to each type:

- **Type 1—complete subgroup.** This type of group is composed entirely of members from the parent, governing body. The records and meetings of a complete subgroup are both subject to the FOIA.<sup>2</sup> So, if you are asking about a complete subgroup, then the answer to both your questions is “yes.”
- **Type 2—partial subgroup.** This type of group is composed of more than one member of the parent body together with members from outside the governing body. The records of a partial subgroup are subject to the FOIA.<sup>3</sup> Whether a partial subgroup’s meetings are subject to the FOIA ordinarily depends on the nature of the group’s decision-making authority, which is explained more fully below. So, if you are asking about a partial subgroup, then the answer to your first question is “yes,” and the answer to your second question depends on the analysis below.
- **Type 3—outside group.** This type of group has no members of the parent body and is composed entirely of members who are selected from outside the parent body. The records of an outside group that was created by the parent, governmental body are subject to the FOIA.<sup>4</sup> Whether a partial subgroup’s meetings are subject to the FOIA depends on the nature of the

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<sup>2</sup> This is because the Type 1 group, which essentially is the parent body on a smaller scale, is itself a governmental body. *See generally Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975); John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 77–79*, 84 (Arkansas Law Press, 5th ed., 2009) (“In...*Pickens*, the Court held that committees made up of members of a governing body must meet in public, even if they possess only the power to make recommendations.”); Op. Att’y Gen. Nos. 2003-170 (“The meetings of a subcommittee made up wholly of members of the governing body must be held in public.”), 98-169 (“If the parent body is subject to the FOIA’s open meeting requirements, the same requirement attaches to meetings of subgroups of the governing body.”).

<sup>3</sup> This is because the Type 2 group, like most groups created by or from public governing bodies, is supported in whole or part by public funds and is intertwined with public business. *E.g.* Watkins & Peltz, *supra* note 2, at 82 (“Because advisory bodies established by government agencies generally receive direct public funding for their activities and are involved in matters of public concern, their records are subject to the act.”).

<sup>4</sup> *Id.*

group's decision-making authority, which is explained more fully below. So, if you are asking about an outside group, the answer to your first question is "yes," and the answer to your second question depends on the analysis below.

The only remaining question is whether the meetings of a partial subgroup and an outside group (respectively) are considered "public meetings" under the FOIA. Partial subgroups and outside groups can be classified as either "governing bodies" or "advisory bodies." The FOIA's open-meetings provisions only apply to "governing bodies": "[A]ll meetings, formal or informal, special or regular, of the *governing bodies* of all...organizations of the State of Arkansas...shall be public meetings."<sup>5</sup> Neither the FOIA nor Arkansas's appellate courts have addressed what it means to be a "governing body." Nevertheless, this office (and the leading commentators on the FOIA) have consistently opined that a governing body is one with decision-making authority.<sup>6</sup>

Type 2 and Type 3 groups can have decision-making authority that is either delegated or de facto. An example of the former would be where a search committee was delegated the authority to whittle the entire pool of candidates for a position down to a shorter list and submit the short list to the parent body for its decision from among the remaining candidates.<sup>7</sup> An example of the latter would be where, though no formal decision-making authority was delegated to a Type 2

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<sup>5</sup> A.C.A. § 25-16-106(a) (emphasis added); Op. Att'y Gen. 2006-059.

<sup>6</sup> See Op. Att'y Gen. No. 2006-059; Watkins & Peltz, *supra* note 2, at 74–85.

<sup>7</sup> Op. Att'y Gen. No. 94-339; *Baxter County Newspapers, Inc. v. Medical Staff of Baxter General Hosp.*, 273 Ark. 511, 622 S.W.2d 495 (1981) (holding that a committee composed of members entirely outside the parent, governing body must hold open meetings because the committee had been delegated the authority to determine whether doctors could practice at the hospital); Watkins & Peltz, *supra*, at 84, n175 (Note: in this footnote the professors treat a search committee as a "de facto" governing body "if it has the power to screen candidates from review by the purported final decision-maker." If the committee has such "power," then it must have been *delegated* by the parent body. Accordingly, it is probably more accurate to consider such a committee as having *delegated* authority, not de facto authority. Of course, a similar committee could lack such a delegated power in law (de jure), but have it in fact (de facto) if the parent body automatically accepted the group's short list).

or 3 group upon its creation, the group's recommendations are "rubber-stamped" by the parent entity.<sup>8</sup>

If a Type 2 or 3 group lacks decision-making authority (whether delegated or de facto) then it is considered an "advisory body," which means that it exists only to make recommendations, collect information, or give advice. The upshot of a group being classified as an "advisory body" is that, though its records are subject to the FOIA, its meetings are not.<sup>9</sup> Two leading commentators on the FOIA note that, though this result is "seemingly contradictory," it is required by the language of the FOIA:

Insofar as records are concerned, the Arkansas courts need not draw a line between a governing body and one that is merely advisory, for the FOIA applies to the records of any entity "wholly or partially supported by public funds or expending public funds." Because advisory bodies established by government agencies [which are the only type under consideration in this opinion] generally receive direct public funding for their activities and are involved in matters of public concern, their records are subject to the act.... A different result is required with respect to the meetings of advisory committees, because the FOIA's open meeting provisions apply only to "governing bodies."<sup>10</sup>

In summary, if you are asking about a complete subgroup, then the answer to your two questions is "yes." If you are asking about either a partial subgroup or an outside group, then the answer to your first question (i.e., whether the records are

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<sup>8</sup> See, e.g., Op. Att'y Gen. No. 2003-170, 98-169, 92-241; Watkins & Peltz, *supra* note 2, at 83-84. This is, clearly, a highly factual inquiry. Yet it is important to note that such an inquiry looks to the *manner* in which the parent group reviews (or fails to review) the recommendations, not the mere fact that the parent group reaches the same *conclusion* as the Type 2 or 3 group.

<sup>9</sup> There is one potential exception to this rule when it comes to Type 2 groups. This office has occasionally opined that if the Type 2 group is composed of a "significant number" of members of the parent body, then the group would have to hold open meetings. But this is not because the group was a numerically distinct governing body—advisory bodies simply are not "governing bodies." Rather, the basis for this conclusion is that the group's meetings would essentially be a meeting of the parent body. Though such a scenario is probably rare, it is possible. And this office has noted it. See Op. Att'y Gen. Nos. 2000-260, 2003-170, 2006-194.

<sup>10</sup> Watkins & Peltz, *supra* note 2, at 81-82 (internal citations omitted).

covered) is “yes”; and, with the possible exception mentioned in note nine, the answer to your second question (i.e., whether the meetings are covered) depends on the nature of the group’s decision-making authority.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,



DUSTIN MCDANIEL  
Attorney General

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