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Attorney General

# The **Freedom** of Information Act

Made Simple.

# Legislative Intent

A.C.A. § 25-19-102

- to ensure that electors are **fully advised** of the activities and decisions of their public officials
- liberally construed in favor of **openness**
- exceptions are narrowly construed

# FOIA **Overview**—3 Step Approach

- Step 1: Is entity covered?

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- Step 1: Is entity covered?
- Step 2: Is the record/meeting covered?
- Step 3: Are there any exemptions?

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- Some **private** entities
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  - Examples
    - Busing
    - Buildings

# The Freedom of Information Act

Step 2: Is the meeting covered?

Identifying  
a meeting

- definition
- types

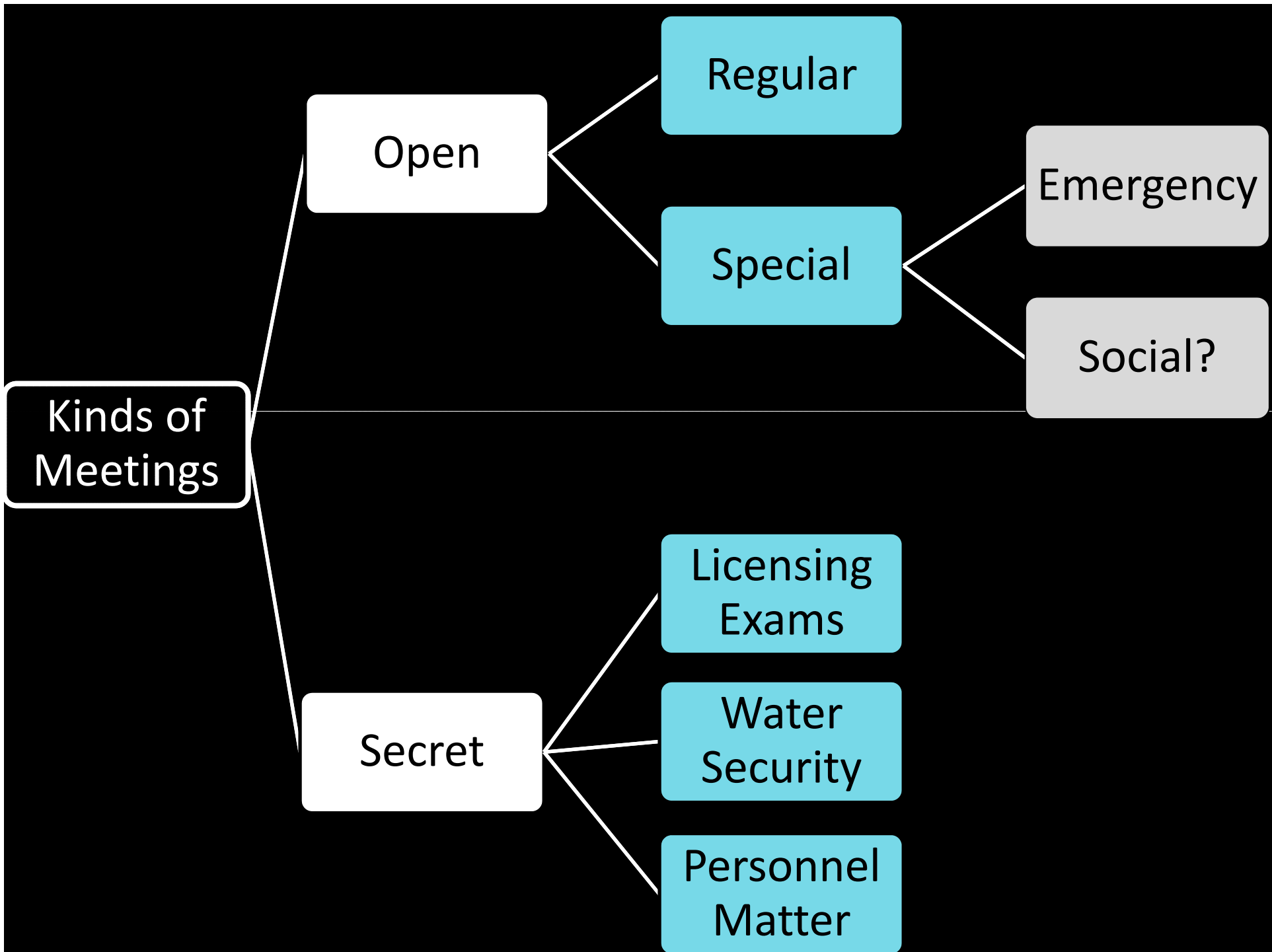
Requirements

- notice requirements
- attendance

Step 2: Is the meeting covered?

# What is a “meeting”?—definition

- A.C.A. 25-19-106(a): “all meetings, formal or informal, special or regular, of the governing bodies of all municipalities [and] counties...shall be public meetings.”
  - In other words: “All meetings are public meetings.”
  - But what’s a ‘meeting’?
- What’s a governing body?
  - It’s a body that can make decisions



# How many make a meeting?

- no quorum required
- any particular number?
- no polling or secret telephone conferences

# Social Gatherings/Conferences?

- Not a “meeting” if discussion of government business at the social gathering is **incidental** and intermittent (Op.95-020)



- Probably not a “meeting” if **governing body** has no control over the conference, function, or proceeding (Op. 94-131)

# Are **e-mails** meetings? (Op. 2005-166)

- Usually not
- But they could be—depends on all the facts

# What if the meeting is covered? (Part 1)

## Notice Requirements

- Regular Meetings:
  - (1) time and place must be given to
  - (2) anyone who asks
- Special/Emergency Meetings:
  - (1) time, place and date – 2 hours in advance
  - (2) to news media
    - (a) in the county where the meeting's held, and
    - (b) located elsewhere that cover the regular meetings
  - (3) that have asked to be notified

# What if the meeting is covered? (Part 2)

- **Attendance** not participation at meetings
- 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.”
- Public must be able to see how each individual member voted.

# The Freedom of Information Act

Step 3: Meetings Exemptions.

## Kinds of Exceptions

- licensing exams
- water security
- personnel matters

## Procedure for using an exception

- notice
- announcement
- limited attendance

Step 3: Meetings Exemptions.

# Personnel Matters

- **only** for hiring, firing, appointing, promoting, demoting, disciplining, or resigning of public officer or employee



# Exec. Session—Procedure

- Notice requirements still apply.
- Must announce specific purpose before going in.
- Who may attend?
  - governing body, the top administrator, immediate supervisor, employee, and employee/person being interviewed for top administrative position.
  - Not attorney
  - No one other than members of governing body have right to attend.
- Must vote in public afterward or action is void.
- Other specific state laws may allow private meetings

# Enforcement

Action only **invalidated** if:

- Plaintiff has given the body a chance to hold a meeting that conforms;
- Remedy is sought to vindicate public as opposed to private interest;
- The FOIA violation was substantial; and
- The defendant *knowingly* violated the Act .

# The Freedom of Information Act

Step 2: Is the record covered?

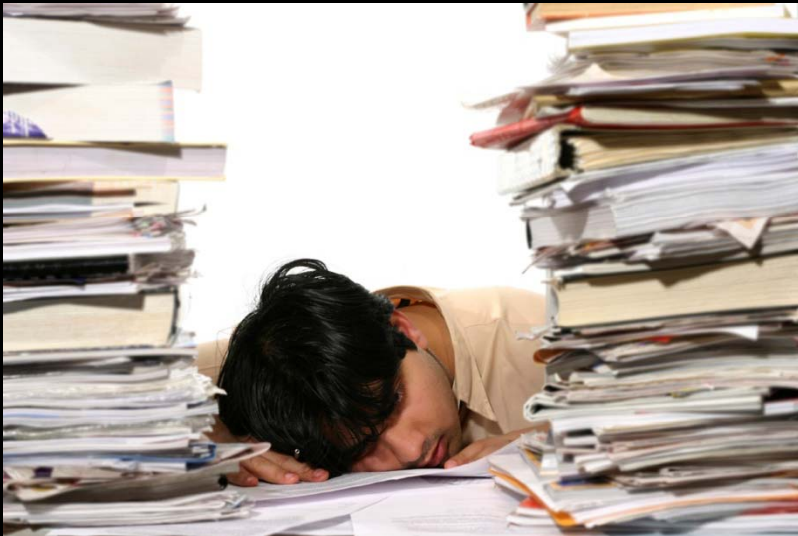
# The **Freedom** of Information Act

Definition & Rule

Step 2: Is the record covered?

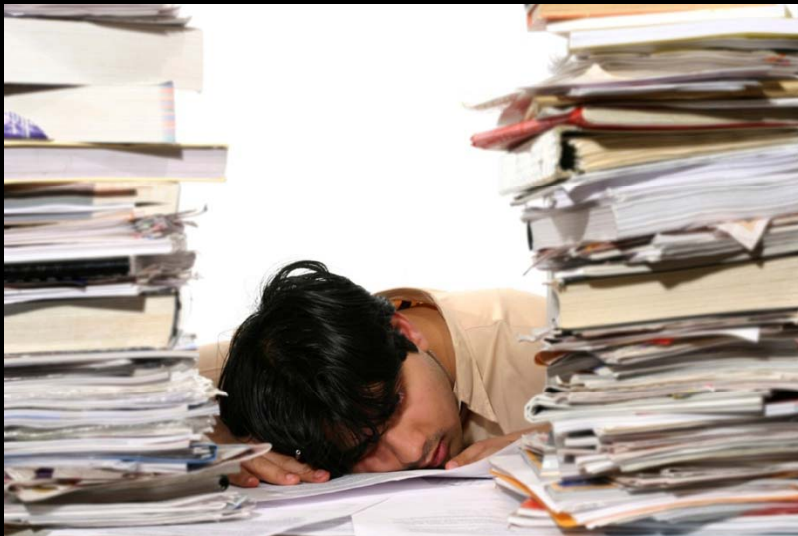
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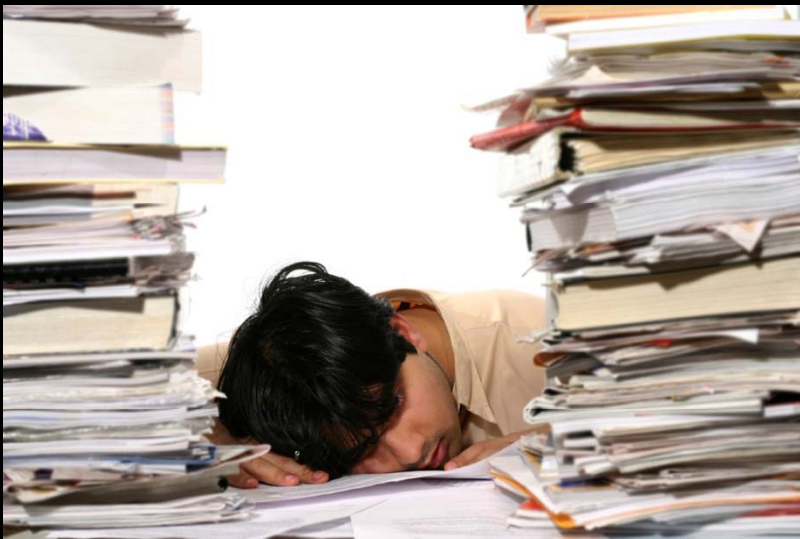
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  - (2) are kept
  - (3) that constitute a record of the performance or lack of performance of official functions
- Examples: emails, job applications, personnel files, some job evaluations



# Public Records (con't)—How do you know?

- The content
- The **presumption**:
  - (1) maintained in public offices or by public employees
  - (2) within the scope of their employment

# Public Records (con't)

- The content
- The presumption:
  - (1) maintained in public offices or by public employees
  - (2) within the scope of their employment
- Rebutting the presumption
  - record doesn't reflect the "performance or lack of performance of official functions."
  - Content based

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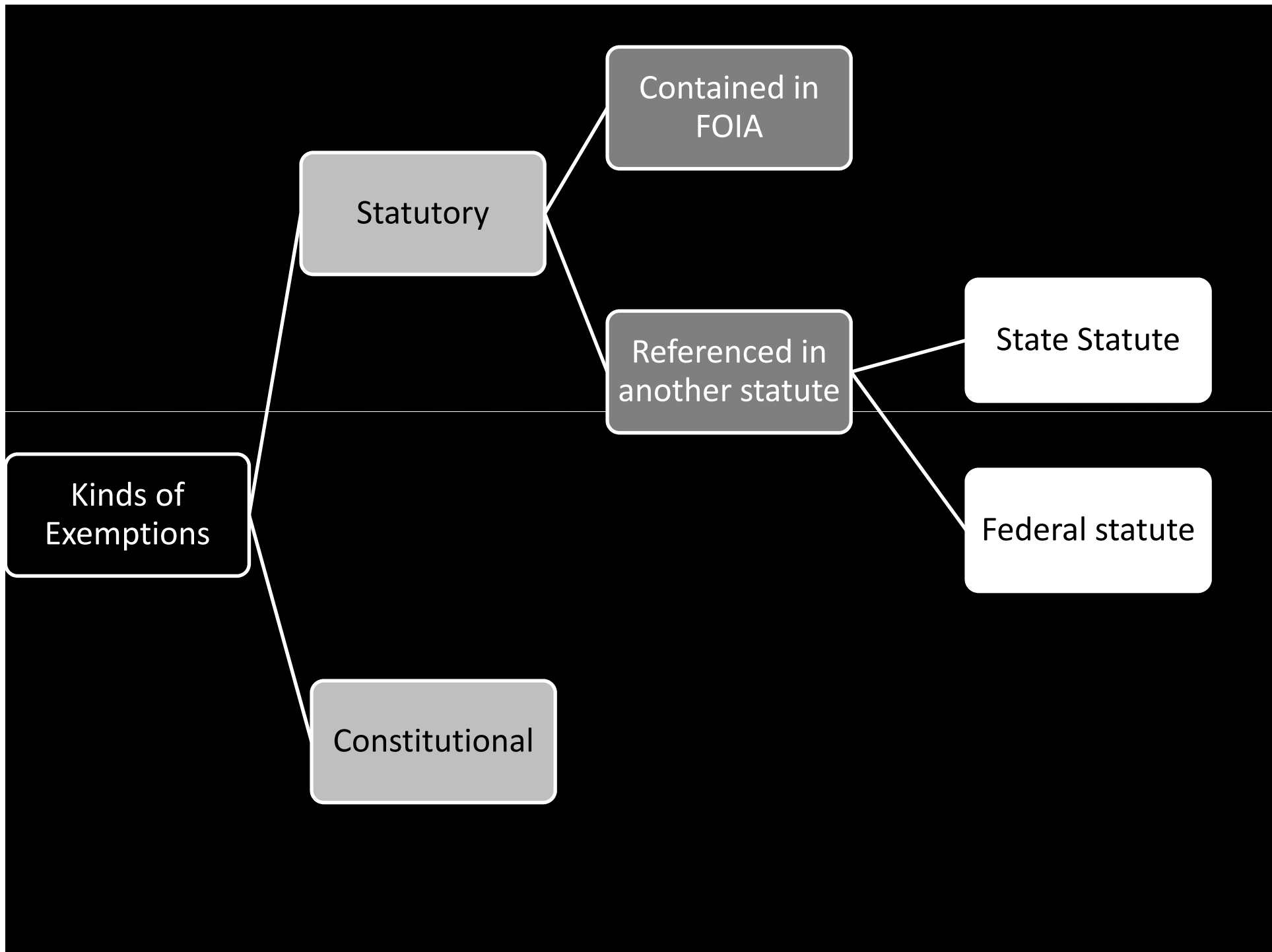
General **rule**:



All “public records” must be **disclosed** unless exempt

# The Freedom of Information Act

Step 3: Records Exemptions.



Kinds of Exemptions

Statutory

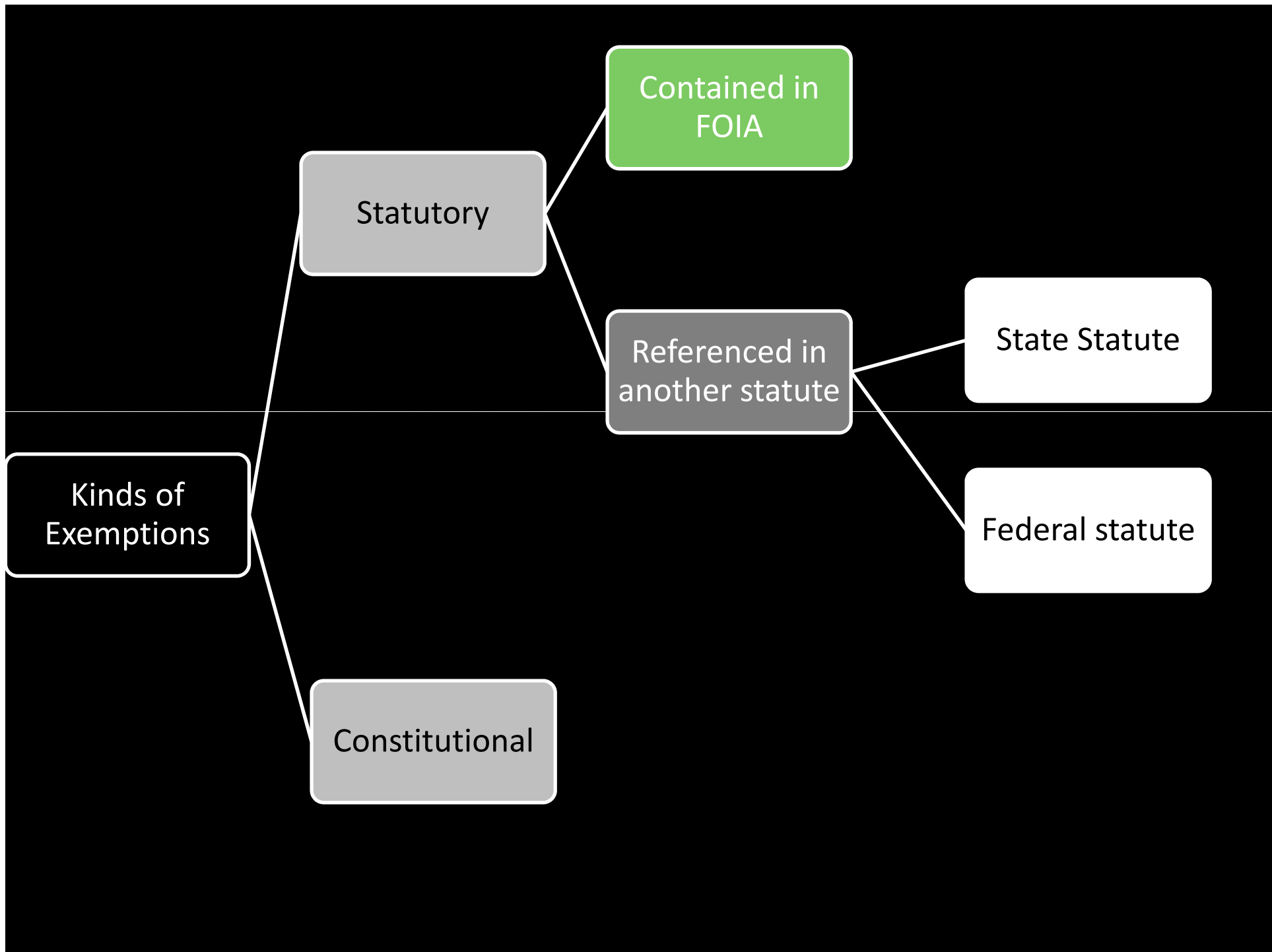
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Referenced in another statute

State Statute

Federal statute

Constitutional



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## Step 3: *Some* records exceptions

*Memoranda, **working papers**, and correspondence*

- **Only**: Governor; members of legislature; judges on courts of appeal; and Attorney General



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- Only: Governor; members of legislature; judges on courts of appeal; and Attorney General
- Purpose: promotes the free exchange of thought between and among the three branches of government.



## Step 3: *Some* records exceptions

*Personnel records*

&

*Employee evaluation records*

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- Test: unless doing so constitutes a "clearly unwarranted invasion of personal privacy"

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### *Evaluation records*

- As defined in Attorney General opinions:  
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to evaluate an employee



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# Enforcement



Civil Suits



Class "C" misdemeanor

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- Notice requirements still apply.
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- Who may attend?
  - governing body, the top administrator, immediate supervisor, and employee/person being interviewed for top administrative position.
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# 4 Steps to Evaluate the Request

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- Step 1: What's requested?
- Step 2: How long do you have to respond?
- Step 3: Evaluate the record(s)
- Step 4: Prep and send

# How to **make** a FOIA Request

- Mode
  - Any method will do
- Specificity
  - Detailed enough to locate the records with “reasonable effort.”
- Medium
  - Any medium in which the record exists or is “readily convertible.”

# Evaluating the Request

- **Step 1:** What's requested?
  - Is it detailed enough?
    - If not, get clarification.
    - Is it a personnel record or employee evals?
  - Who's the custodian?

# Personnel/Evaluation Records Compliance

- Notice Requirements
  - Notify employee and requester within **24 hours** of the agency decision
  - Overnight mail notice is required if other notice fails
  - The requester, custodian or subject may request an opinion from the **Attorney General**
  - Redact any exempt information and provide the records

# Evaluating the Request

- **Step 2:** How long do you have to respond?
  - 3 days if in storage or active use
  - Otherwise: immediately



# Evaluating the Request

- **Step 3:** Evaluate the record
  - Public record?
  - Exemptions?
  - Redactions? (wield the Sharpie)

# Responding to the Request

- **Step 4:** Prep & send the record(s)
  - Open for inspection if requested / make copies if asked
- Charging for copies?
  - Scenario 1: Only “actual costs of reproduction”
    - That includes mailing or faxing
    - Doesn't include employee time
    - \$25 in advance
    - Itemize the charges
  - Scenario 2: Act 870—negotiated prices with businesses
  - (Scenario 3: -109 special electronic requests)

## Personnel/Evaluation Records Commonly **Exempted** Items

- Social Security numbers
- Medical info
- Insurance, pension & benefit info
- Tax info & withholdings
- Unlisted home phone numbers
- Home addresses
- Date of birth
- Personal e-mail addresses
- Marital status and info on dependents

# Personnel/Evaluation Records

## Common Items **Open** to Inspection

- Name
- Salary info
- Contracts
- Employment applications
- Resumes
- Educational background
- Work History
- Leave Records
- Letters of recommendation

# Guides to Interpretation

- Freedom of Information Handbook (14<sup>th</sup> ed.)
- Watkins & Peltz, Arkansas Freedom of Information Act (5<sup>th</sup> ed., 2009)
- AG's website [[www.arkansasag.gov](http://www.arkansasag.gov)]

# The Freedom of Information Act

Thank You.