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IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DIVISION
CIVIL DIVISION

JUNE BRADSHAW **PLAINTIFF**

v. **NO. CV-16-** CV-16 1053

FORT SMITH SCHOOL DISTRICT and
FORT SMITH PUBLIC SCHOOLS BOARD OF EDUCATION **DEFENDANTS**

COMPLAINT

Comes now the Plaintiff, June Bradshaw, and for her cause of action against the Defendants, Fort Smith School District and Fort Smith Public Schools Board of Education, states:

1. Plaintiff June Bradshaw is an adult citizen of the State of Arkansas, whose address is within the city limits of Fort Smith, Sebastian County, Arkansas and who pays taxes that support the Fort Smith Public Schools.

2. This is an appeal from a denial of rights under the Arkansas Freedom of Information Act ("AFOIA") pursuant to Ark. Code Ann. § 25-19-107(a).

3. This cause of action seeks declaratory and other relief. This Court has subject matter jurisdiction over the Complaint for declaratory relief pursuant to Arkansas law.

4. Defendant Fort Smith School District is a political corporation organized under the laws of the State of Arkansas.

5. Defendant Fort Smith Public Schools Board of Education is the governing body of the Fort Smith School District.

6. On September 20, 2016, an election was held for the purpose of electing members of the Fort Smith Public Schools Board of Education.

7. On September 29, 2016, Defendant Fort Smith Public Schools Board of Education met as a committee of the whole and discussed a potential slate of officers for the upcoming school year. Plaintiff does not allege that this meeting violated AFOIA.

8. On October 8, 2016, Board Member Jeannie Cole sent an email to the members of Defendant Fort Smith Public Schools Board of Education. In that email, Cole stated that she would not be willing to serve as Vice President of the Board of Education. See email thread attached as Exhibit A.

9. In a subsequent email on October 10, 2016, Board Member Deanie Mehl "request[ed] that board members suggest a new slate of officer." See Exhibit A.

10. In a subsequent email on October 11, 2016, Board Member Wade Gilkey suggested a new slate of officers, replacing Jeannie Cole with Board Member Susan McFerran. See Exhibit A.

11. Subsequent emails through October 13, 2016, hosted a discussion of the slate, resulting in another change to the slate, discussion of the reasons for the change, and consensus of the board members to accept the slate. In one email, Board Member Deanie Mehl referred to herself as "the chair," as if the email thread were a meeting. See Exhibit A.

12. The slate of officers proposed in the email thread was adopted at the regularly scheduled Board meeting on October 24, 2016.

13. The legislative intent statement of AFOIA states that "[i]t is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy." Ark. Code Ann. § 25-19-102.

14. AFOIA provides that, "Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all [...] school districts [...] shall be public meetings." Ark. Code Ann. § 25-19-106 (a).

15. The Arkansas Supreme Court, in interpreting AFOIA, has held that:

> When the General Assembly used the expression "to learn and report *fully* [emphasis in original] the activities of their public officials", it meant not only the action taken on particular matters, but likewise the reasons for taking that action. Actually, public knowledge of the reasons can well result in a board decision being more acceptable or palatable; to the contrary, decisions rendered in secret, the reasons not being known, can well result in perhaps unjustified criticism of a board. Is not the public entitled to know *why* a board adopts certain rules or regulations? The "why" is the essence of the action taken.

Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 75; 522 S.W.2d 350, 353 (1975).

16. The Arkansas Supreme Court has also held that a "meeting," within the meaning of AFOIA, is any gathering of a governing body at which the body discusses official business on which foreseeable action might be taken. *El Dorado Mayor v. El Dorado Broadcasting Co.*, 260 Ark. 821, 824; 544 S.W.2d 206 (1976).

17. Arkansas Attorney General Mike Beebe issued an opinion outlining how email communications likely violate AFOIA. See Arkansas Attorney General Opinion 2005-166, attached as Exhibit B. In this instance, public business was discussed and a meeting was held in the email thread which was never provided to the public or even suggested at any subsequent meeting of the School Board. Sebastian County Prosecutor Daniel Shue has sent a letter to the Defendants in order to attempt to prevent repeated violations of the AFOIA. See Exhibit C.

18. The email communications of Defendant Fort Smith Public Schools Board of Education between October 8 and 14 violated AFOIA in that: (a) business was transacted in a series of emails constituting a meeting under FOIA out of public view in contravention of Ark.

Code Ann. § 25-19-106 (a); and (b) the public was deprived of its right to observe the reason for the slate of officers proposed and subsequently approved with no debate, in contravention of the principle announced in *Pickens*, supra.

19. In adopting AFOIA, the Arkansas legislature intended that AFOIA should be liberally construed to achieve the intent of the act. The intent of AFOIA was to establish the right of the public to be fully apprised of the conduct of public business. Such statute is to be interpreted most favorably to the public. *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998); Ark. Code Ann. § 25-19-102.

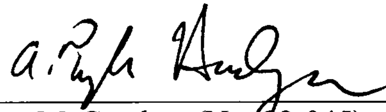
20. The Court should declare that the emails of October 8 through 14, 2016, constituted a meeting which was not public and for which no notice was given.

21. The Court should further enjoin the Defendants conducting public business through a series of emails without providing the public with notice of the emails and giving the public the opportunity to provide input in the emails.

Prayer for Relief

WHEREFORE, the Plaintiff, June Bradshaw, prays that the Court grant the relief requested herein; that the fact-finder declare that the emails of October 8 through 14, 2016, constituted a meeting which was not public and for which no notice was given; that the Court enjoin the Defendants from conducting business out of the public view through private emails; for such other relief as is requested herein; for costs; for attorney's fees; and for such other relief as is just and proper.

Respectfully submitted,



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Service of any documents by e-mail will not be received by counsel for the Plaintiff unless copied to pam@mccutchenlawfirm.com

Nadine Brooks <nbrooks@fortsmithschools.org>

RE: 2016-17 Board Officers

Wade Gilkey <mgilkey@shelterinsurance.com> Thu, Oct 13, 2016 at 10:36 AM
To: Talicia Richardson <taliciarichardson@gmail.com>, Virginia Mehl <kdmehl@aol.com>
Cc: Bill Hanesworth <wchanesworth@littlefieldoil.com>, Yvonne Keaton-Martin <foxynana9@att.net>, Susan McFerran <susanmcf5@aol.com>, Jeannie Cole <jeannie@thecolefamily.com>, Gordon Floyd <gfloyd@fortsmithschools.org>, Zena <zfeather@fortsmithschools.org>, Nadine <nbrooks@fortsmithschools.org>

I agree with the current proposed slate of officers.

From: Talicia Richardson [mailto:taliciarichardson@gmail.com]
Sent: Thursday, October 13, 2016 10:09 AM
To: Virginia Mehl
Cc: Bill Hanesworth; Yvonne Keaton-Martin; Susan McFerran; Wade Gilkey; Jeannie Cole; Gordon Floyd; Zena; Nadine
Subject: Re: 2016-17 Board Officers

Greetings everyone,

As the newest member, I am in support of continuity, as well as experience, with our officers during this very important time. Personally speaking, the knowledge they possess in their role and parliamentarian procedures will allow others with less than 2 years of experience in a school board role to become properly trained and accumulated.

Thanks, **Talicia**

On Thu, Oct 13, 2016 at 8:55 AM, Virginia Mehl <kdmehl@aol.com> wrote:

Good Morning!

Based on the comments made last night the tentative slate of officers appears to be as follows:

Deanie Mehl - President

Susan McFerran - Vice President

Yvonne Keaton-Martin - Secretary

The chair welcomes any additional comments on this subject. I do agree with Bill, our focus must be the selection of a new superintendent and the possible millage increase. DM

On Oct 12, 2016, at 8:54 PM, Bill Hanesworth <wchanesworth@littlefieldoil.com> wrote:

To all , I am ok with Yvonne staying in place as

Sect . As mentioned in my email we need to be focused on the legacy of our district and this board as we chose a new leader . That is my single focus !! BH

Sent from my iPhone

On Oct 12, 2016, at 8:45 PM, Yvonne Keaton-Martin <foxynana9@att.net> wrote:

If the ASBA information that Susan sent is correct then my term as secretary is still place for another year. Just saying.
Sent from my iPhone

On 11, 2016, at 7:47 PM, Susan McFerran <susanmcf5@aol.com> wrote:
The.

ASBA recommends that officers stay in place at least 3 years. I, too, am sorry Jeannie has chosen not to serve as VP. I'm happy to serve in that capacity if that's what the board would like for 2016-2017.

Susan McFerran

Sent from my iPhone

On Oct 11, 2016, at 4:26 PM, Wade Gilkey <mgilkey@shelterinsurance.com> wrote:

I'm sorry to hear that Jeannie didn't want to serve as our Vice President. I would like to present a new slate of officers that integrates newer board members into the officer rotation, while maintaining consistency at the top during this period of transition.

Deanie Mehl-- President

Susan McFerran – Vice President

Bill Hanesworth – Secretary

Thank you for your time and consideration,

Wade Gilkey

From: John Mehl [mailto:kdmehl@aol.com]
Sent: Monday, October 10, 2016 11:36 AM
To: Jeannie Cole
Cc: Yvonne Keaton-Martin; Susan McFerran; Bill Hanesworth; Wade Gilkey; Talicia Richardson; Dr. Floyd; Zena; Nadine
Subject: Re: 2016-17 Board Officers

Good morning,

Ms. Cole has indicated that she is not willing to serve as the Vice-president of the board for the coming year; consequently, the slate of officers proposed by Ms. McFerran at the committee meeting on September 29th is no longer valid. At this time, I am requesting that board members suggest a new slate of officers.

Again be sure when you respond to this email that you use the "reply all" indication. Deanie

Sent from my iPhone

On Oct 8, 2016, at 3:47 PM, Jeannie Cole <jeannie@thecolefamily.com> wrote:

> Fellow FSPS Board Members,
>
> Since we must vote on the 2016-17 officers at our October meeting, I wanted to give you notice that I prefer not to accept the Vice Presidency for an additional year. I was taken aback at the committee meeting when this was proposed, so I was not prepared to voice or defend my position. But all my leadership training was whispering in my ear that keeping the same officers for an additional year is not in the district's best interest. I don't believe this would be healthy for the Board for the following reasons:
>
> - For as long as I am aware, the Fort Smith Board of Education has selected a new set of officers each year. It has been our tradition for a board member to be appointed to the new secretary position, the outgoing secretary to move up to VP, the outgoing VP to move up to President, the outgoing President to rotate off of the officer rotation for the upcoming year - and perhaps to return to the officer rotation a few years later after others have had the opportunity to serve.
> - With 3 year terms, it is important that we keep that rotation. It is not only tradition, but it keeps leadership growing and moving forward. Some districts have 5 year terms, and perhaps it is not as essential that they keep rotating officers every year, but with 3 year terms, I believe that is the healthiest way to develop leadership.
> - Why is leadership development important? Because we have such short terms. Let's think through a possible scenario if we keep the same officers for the 2016-17 year that we currently have. Yvonne, Deanie and my terms end September 2017. I believe I have heard both Deanie and Yvonne say this will be their last term - that they currently were not planning to run for another 3 year term. If that is the case, and I do not get re-elected or just choose not to run myself, then that would mean for the 2017-18 school year, there would be 3 brand new board members and 4 fairly new board members

who have never held an officer position. And this scenario could happen in the future if we do not stick with our standard.

- Perhaps this past year was an exception and we did best by not changing officers, but to do so again could send the message to some that we are in crisis mode. I do not believe that to be the case. We have got to move on and look forward.
- The Secretary position is fairly easy, but it does require signing a number of documents - sometimes coming in on short notice to sign something with a short deadline. The Vice President also signs documents and must be prepared to chair a general or committee of the whole meeting - sometimes with very little notice. As Vice President over the years, I have chaired a number of meetings that I did not know before hand that I would be chairing. Yes, parliamentary procedure skills are essential. The Presidency position requires quite a bit more time than a standard board member - many documents to sign, many documents to digest so they can be fairly presented, speaking for the Board to the public and media, public appearances at schools and other events, and taking the heat when someone is upset, etc. No, I am not trying to talk anyone out taking an officer position, but the positions should not be taken lightly.

I trust we will think this through and come to a good decision for our students. Please "reply to all" if you have additional thoughts to share.

Jeannie Cole, Vice President
Fort Smith Board of Education

Opinion No. 2005-166

November 8, 2005

The Honorable Robbie Wills
State Representative
Post Office Box 306
Conway, AR 72033-0306

Dear Representative Wills:

You have requested my opinion concerning the potential applicability of the Arkansas Freedom of Information Act ("FOIA")[1] under the following two hypothetical scenarios:

> Fact pattern (a): Prior to a city council meeting in a first-class city, the city attorney sends an e-mail message to the city council members. The message provides the aldermen with general information on the process involving a referendum of a city ordinance and the process of setting the date for the referendum election. The attorney advises the aldermen that the city council has the power to set the date of the referendum election, even if the date set by the city council differs from the election date specified in the referendum petition. The message also specifically discusses the zoning impact if the referendum election successfully overturns the city council's action that was the subject of the referendum petition. The city attorney conspicuously advises the members that the message does not constitute a meeting and that the aldermen should not reply to any other members, individually or as a group. The city attorney also sends the e-mail message to members of the media.

[1] A.C.A. §§ 25-19-101 through -109 (Repl. 2002, Supp. 2003, & Acts 259, 1994, and 2003 of 2005).

> Fact pattern (b): Prior to a city council meeting in a first-class city, the mayor sends an e-mail message simultaneously to all city council members. Members of the media were not copied on the message. The message contains information updating the members on details of a rezoning ordinance referendum. The mayor advises the members that he wants to set an election as soon as possible and explains his reasoning. The mayor does not ask for any response from the aldermen and it is not known whether any members responded. At the subsequent city council meeting, the city council approves the mayor's request on the election timing.

Your specific questions in this regard are as follows:

> 1. Does either of the e-mail communications described in Fact Pattern (a) and (b) constitute a violation of the open meetings provision (Ark. Code Ann. § 25-19-106) of the Freedom of Information Act?
>
> 2. Under what circumstances will an e-mail communication constitute a violation of the open meetings provision of (Ark. Code Ann. § 25-19-106) of the Freedom of Information Act?

RESPONSE

A definitive answer to these questions ultimately depends upon the line between legal correspondence and illegal "meetings" in the context of electronic communications, a matter that remains uncertain under the Arkansas FOIA. As discussed below, some jurisdictions draw the line based upon the presence or absence of some exchange among the members of the governing body, concluding that the passive receipt of information does not give rise to a violation. While I believe our court might be receptive to this approach, the issue remains open. I must also note that regardless of the applicable test, it would also be necessary to consider all of the surrounding facts and circumstances in order to determine whether there was a violation in any particular instance.

I am therefore unable to conclusively respond to your questions. I can, however, discuss the general legal principles that might influence or guide our court's review of the matter. Your hypothetical scenarios also prompt me to issue a note of caution that the sender of the e-mail and the council risk being found in violation

of the FOIA if there is any indication that the public was prevented from monitoring and observing the council's discussion of public business.

DISCUSSION

As an initial matter, it seems well-established that an e-mail message, like a letter, although subject to disclosure as a "public record" (*see* A.C.A. § 25-19-103(5)(A) and -105), ordinarily does not evidence a "meeting." *See* Ark. Op. Att'y Gen. 2003-048 and Watkins and Peltz, The Arkansas Freedom of Information Act (m & m Press, 4th ed., 2004) at 290. The FOIA defines "public meetings" in relevant part as "the meetings of...any political subdivision of the state, including municipalities.". A.C.A. § 25-19-103(4) (Supp. 2003). Although this circular definition is not particularly helpful, the Arkansas Supreme Court has held that a "meeting" for purposes of the FOIA is any gathering of a governing body at which the body discusses official business on which foreseeable action might be taken. *El Dorado Mayor v. El Dorado Broadcasting Co.*, 260 Ark. 821, 824, 544 S.W.2d 206 (1976). It seems clear under this formulation that an e-mail message sent from either the city attorney or the mayor to members of the council ordinarily would not constitute a meeting because it would not evidence a gathering.

This represents one end of the spectrum, in my view, the proposition being that the mere use of e-mail does not automatically constitute a meeting. E-mail is generally analogous instead to written correspondence. At the other end is the likelihood of a violation when decisions are made through sequential or circular communications that avoid public discussion of the matter. The court in *Harris v. City of Fort Smith*, No. 04-485 (Ark. Sup. Ct. Nov. 4, 2004), held that that one-on-one discussions by telephone or in person between the city administrator and board members to approve a proposed real-estate purchase violated the FOIA's open-meetings requirement, analogizing to the telephone poll at issue in *Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985)). As with face-to-face meetings and telephone conversations, the potential for circumventing the FOIA open meeting requirement through sequential or circular series of communications also exists with e-mail. *Accord* Ark. Op. Att'y Gen. 1999-018.

Because our court has not had occasion to address a scenario that might fall somewhere in between these two extremes, it is difficult to fully elucidate the circumstances under which e-mail correspondence might amount to an illegal meeting. These decisions and a few others do, however, offer insight into the

court's probable approach to some aspects of the question. In particular, we can glean from the above cases that our court likely ascribes to the view that contemporaneous physical presence is not necessary for a "meeting" to occur.[2] Our court has also affirmed the principle that not only are the ultimate decisions of public bodies intended to be open to the public, but also the deliberations that form the basis for those decisions. This is reflected in the following pronouncement concerning the policy statement of the FOIA:[3]

> When the General Assembly used the expression 'to learn and to report *fully* [emphasis original] the activities of their public officials', *it meant not only the action taken on particular matters, but likewise the reasons for taking that action.* Actually, public knowledge of the reasons can well result in a board decision being more acceptable or palatable; to the contrary, decisions rendered in secret, the reasons not being known, can well result in perhaps unjustified criticism of a board. Is not the public entitled to know why a board adopts certain rules or regulations? The 'why' is the essence of the action taken.

Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 75, 522 S.W.2d 350 (1975) (emphasis added).

It is my opinion that this purpose of opening to the public all steps in the deliberative process may further inform the question whether either of your

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[2] This distinguishes Arkansas from those states with open meeting laws that appear to reflect a concern with the presence or absence of a simultaneous discussion of some kind. For a discussion of this so-called "simultaneity" requirement, *see* J. Connor and J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 Geo. Mason L. Rev. 719 (Spring, 2004). In this regard, I note that the referenced article appears to mischaracterize one of my predecessor's opinions, Ark. Att'y Gen. Op. 1999-018, *supra*, by citing it together with several other attorneys general opinions that have made comparatively unqualified statements regarding the inapplicability of their open meeting statutes to e-mail communications. *See* 12 Geo. Mason L. Rev. at 746. This fails to recognize my predecessor's admonition regarding the potential evasion of the Arkansas FOIA "through sequential or circular series of meetings...." Op. 1999-018 at n. 3. This admonition was borne out by the Arkansas Supreme Court's decision in *Harris, supra*.

[3] The policy statement, contained in A.C.A. § 25-19-102 (Repl. 2002), states in full:

> It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their public officials.

hypothetical scenarios states a FOIA violation. Specifically, I believe it would be important to know what transpired after the e-mail message was sent, and whether there is any suggestion that the public was not able to monitor and observe any deliberations.

This leads me to note an approach that has been adopted in several other jurisdictions whose statutes, like our FOIA, do not explicitly address the use of electronic or other technological means of evading open meeting requirements. The Attorney General of Delaware, drawing from a Washington Court of Appeals case, has recognized that a "meeting" can include e-mail correspondence even without an express statutory provision. *See* Del. Op. Att'y Gen. No. 03-IB11 (May 19, 2003). The analysis focuses on the substance of the e-mail and the presence or absence of any interaction among the governing body members. As noted in *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, *supra* at n.2, these jurisdictions distinguish between "informational" correspondence and correspondence designed to elicit substantive discussion." 12 Geo. Mason L. Rev. at 747. The Washington case is illustrative wherein it concludes:

> Thus, in light of the OPMA's [Open Public Meetings Act] broad definition of 'meeting' and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a 'meeting.' In doing so, we also recognize the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. [Footnote omitted.] Thus, we emphasize that *the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'*...[T]he OPMA is not implicated when members receive information about upcoming issues or communicate amongst themselves about matters unrelated to the governing body's business via e-mail.

Wood v. Battleground School District, 107 Wn. App. 550, 564, 27 P.3d 1208 (2001) (emphasis added).

This approach has also been adopted by the Florida Attorney General, as reflected in an opinion addressing a question concerning "the e-mail communication of factual background information from one city council member to other council members." Fla. Op. Att'y Gen. No. 2001-20 (March 20, 2001). Apparently, the city

council in question had a practice of e-mailing the city manager to request background information on agenda items prior to council meetings. All members were provided with the request and the responsive communications, copies of which were placed in a publicly accessible "reading file." The specific question was whether such an "e-mail communication of factual background information" constitutes a meeting "when it does not result in the exchange of council members' comments or responses on subjects requiring council action." *Id.* The answer was no, based on several previous opinions involving the use of memoranda to either recommend certain action or provide information before a public meeting. It was first observed that the Florida statute "applies to any gathering where members deal with some matter on which foreseeable action will be taken by the board[,]" and that "Florida courts have recognized that it is the entire decision-making process that is covered by the [open records act]." *Id.* The ensuing discussion of the memos at issue in the other opinions then provided the basis for the conclusion that the informational e-mails did not amount to a meeting. It was specifically noted regarding one of the memos that it "did not solicit responses from other board members and there was no discussion among the members concerning the memorandum prior to the..meeting, nor was there any exchange of correspondence among the board members concerning the memorandum." *Id.* It was stated regarding the other memo that its use did not violate Florida's open meeting law "so long as no interaction related to the memorandum took place...prior to the public meeting." *Id.*

The Attorney General of Arizona similarly concluded that "a one-way communication by one board member to other members..., with no further exchanges between members, is not a per se violation of the OML [Open Meeting Law]." Ariz. Op. Att'y Gen. No. 105-004, *supra.*[4]

Although our FOIA is not identical to the so-called "sunshine" laws in these states, the similarities compel me to speculate that our court might embrace the general concept that so-called "informational correspondence" (12 Geo. Mason L. Rev., *supra*) or the "passive receipt of e-mail" (*Wood, supra*) does not constitute a "meeting." Whether either of the e-mails you have described constitutes a violation is a question that would likely require evaluation of additional facts. I believe it would be particularly relevant to establish whether there were any responses and,

[4] I note, however, that under Arizona law, "[a]n exchange of facts, as well as opinion, may constitute deliberations under the [Arizona Open Meeting Law." Ariz. Op. Att'y Gen. No. 105-004. According to the Arizona Attorney General, this distinguishes Arizona from states, like Florida, that "permit exchanges of information among a quorum of a public body outside of public meetings." *Id.* at n. 6.

with respect to the second scenario, whether any discussion took place at the meeting where the council approved the mayor's request. If there was little or no discussion, this might suggest that some part of the deliberation on the matter was secret, contrary to the principle espoused in *Pickens, supra.*

In conclusion, therefore, it is my opinion that a violation of the FOIA's open meeting requirement could occur under circumstances involving e-mail communications, but only a finder of fact presented with all the underlying circumstances will be situated to decide the matter. I must also issue a note of caution that there will likely be risks whenever e-mail is used to disseminate information to the members of a governing body concerning the body's official business. Accordingly, I must reiterate my immediate predecessor's caution against any discussion of pending public business outside a public meeting context. *See* Ark. Op. Att'y Gen. 2001-166.

Assistant Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

MIKE BEEBE
Attorney General

MB:EAW/cyh

DANIEL SHUE
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November 8, 2016

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Ms. Talicia Richardson
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Fort Smith, AR 72901

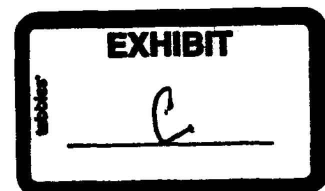
Ms. Jeannie Cole
7410 Oxford Place
Fort Smith, AR 72903

Re: Arkansas Freedom of Information Act
(Arkansas Code Annotated § 25-19-101 et. seq.)

Ladies and Gentlemen:

Enclosed you will find a copy of a series of emails which have been forwarded to me by Attorney Joey McCutchen (see enclosure). Mr. McCutchen obtained the emails by means of a Freedom of Information Act (FOIA) request, and he has expressed concern that this series of email communications was conducted in violation of the Arkansas Freedom of Information Act (FOIA). Please understand that A.C.A. § 25-19-104 provides that "[a]ny person who negligently violates any provisions of this [act] shall be guilty of a Class "C" Misdemeanor", which is why Mr. McCutchen has complained to my office. After viewing the video of the September 29, 2016 school board meeting, the back and forth exchange of emails from October 8, 2016 through October 13, 2016, and the video of the October 24, 2016 school board meeting, along with a careful review of the Arkansas Freedom of Information Act and the relevant law, I believe that a violation of the Freedom of Information Act has occurred. In *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975), the Court observed:

> "When the General Assembly used the expression 'to learn and to report fully the activities of their officials, **it meant not only the action taken on particular**



> **matters, but likewise the reasons for taking that action.** Actually, public knowledge of the reason can well result in a board decision being more acceptable or palatable; to the contrary, decisions rendered in secret, the reasons not being known can well result in perhaps unjustified criticism of a board. Is not the public entitled to know why a board adopts certain rules or regulations? The 'why' is the essence of the action taken." Id at 75.

The Arkansas Freedom of Information Act (FOIA), Arkansas Code Annotated § 25-19-10 to § 25-19-109 (Repl. 2002) is to be liberally interpreted to accomplish the purpose of promoting free access to public information. Further, the Freedom of Information Act is also to be liberally interpreted most favorably to the public interest of having public business performed in an open and public manner. In *Harris v. City of Fort Smith*, 359 Ark. 355 (2004), the Supreme Court of Arkansas held that one-on-one meetings between City Administrator Bill Harding and individual members of the City Board of Directors fell within the purview of the Arkansas Freedom of Information Act. In *Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985), the Court held that a telephone poll of Board members conducted over a three day period violated the Freedom of Information Act, pointing out that there had been neither notice as required by the Act nor the opportunity for the public and press to "attend."

In Arkansas Attorney General Opinion No. 2005-166, the Attorney General noted "I believe it would be important to know what transpired after the email message was sent, and whether there is any suggestion that the public was not able to monitor and observe any deliberations." Arkansas Attorney General Opinion No. 2008-055 noted the possibility that email exchanges between members of a governing body and/or administrators of a school district could constitute a "meeting" for purposes of the open meeting requirements of the FOIA. Synthesizing those two opinions, during the closing moments of the meeting on September 29, 2016, the issue is raised and the last statement made seems to be that the board will "consider it and talk about it at the next meeting." Next comes the exchange of emails from October 8, 2016 through October 13, 2016. Finally, during the October 24, 2016 meeting, the slate of officers is approved. Candidly, the back and forth exchange of emails is informative and most any interested member of the public would appreciate the discussion that occurred, but only if the public had known about it.

The purpose of this letter is to try to ensure that no such FOIA violations occur in the future. This letter should serve as a reminder that the public's right to know must remain inviolate, and that the Arkansas Freedom of Information Act must be strictly complied with at all times and under all circumstances. I appreciate very much the valuable service performed by each of you on behalf of our community, and I am sure your legal counsel would welcome the

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opportunity to discuss this matter with all of you. Thank you for your kind attention and consideration to this matter.

SINCERELY,

DANIEL SHUE
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DS:js
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