

# DAILY & WOODS

A PROFESSIONAL LIMITED LIABILITY COMPANY  
ATTORNEYS AT LAW

KMW BUILDING  
58 SOUTH SIXTH STREET  
P.O. BOX 1446  
FORT SMITH, AR 72902  
TELEPHONE (479) 782-0361  
FAX (479) 782-6160

www.dailywoods.com

JAMES E. WEST  
OF COUNSEL

HARRY P. DAILY (1886-1965)  
JOHN P. WOODS (1886-1976)  
JOHN S. DAILY (1912-1987)  
BEN CORE (1924-2007)

WRITER'S E-MAIL ADDRESS  
JCanfield@DailyWoods.com

JERRY L. CANFIELD, P.A.  
THOMAS A. DAILY, P.A.  
WYMAN R. WADE, JR., P.A.  
DOUGLAS M. CARSON, P.A.  
C. MICHAEL DAILY, P.A. † ●  
COLBY T. ROE, P.A.  
MICHAEL A. LAFRENIERE

† Also Licensed in Oklahoma  
● Also Licensed in Wyoming & North Dakota

March 30, 2018

Ellen Kreth, Chair  
Arkansas Freedom of Information Act Task Force  
Madison County Record  
Drawer A  
Huntsville, AR 72740

Via Electronic Mail [ekreth@sbcglobal.net](mailto:ekreth@sbcglobal.net)  
& First Class

Re: Presentation of the City of Fort Smith to the Arkansas Freedom of Information Act Task Force

Dear Ms. Kreth:

The City of Fort Smith ("Fort Smith") submits this letter and the enclosed presentation of information to the Arkansas Freedom of Information Act Task Force ("Task Force"). As noted below, we are copying the other members of the Task Force via electronic mail. Fort Smith respectfully requests the opportunity to comment on the presentation at an appropriate time during the April 9, 2018 meeting of the Task Force.

This letter is intended as a summary of the information contained in Fort Smith's attached presentation. The attached presentation includes multiple pages of several previously prepared documents. We hope the summary in this letter will be helpful in efficiently reviewing Fort Smith's presentation of information and in understanding Fort Smith's request of the Task Force.

Fort Smith requests the Task Force to recommend to the General Assembly the inclusion of a definition of the term "meetings" as used in the open public meetings provisions of the Arkansas Freedom of Information Act ("FOIA"). Fort Smith's proposed statutory definition of "meetings" is found at pages 1 of 2 of Fort Smith's presentation. The proposed definition is not intended to "undo" any Arkansas Supreme Court application of the FOIA. The proposed definition is intended to apply the meetings requirements to meetings of a "quorum" of governing bodies.

To make the presentation more readable and less like a legal document, statutory and judicial decision citations are minimized by referring to the Arkansas Freedom of Information Act as "FOIA" and referring to judicial decisions by references (usually the name of one of the parties) listed at Pages 3-4 of the City's presentation with full statutory and case law citations.

## FOIA CONTAINS NO MEANINGFUL DEFINITION OF “MEETINGS.”

Unlike the sunshine laws of most states, FOIA contains no meaningful definition of “meetings.” The definition in FOIA merely states that “public meetings” “means the meetings of . . . any political subdivision of the state, including municipalities. . . .” Subsequently, FOIA makes clear that meetings include all formal or informal meetings. The absence of definition is discussed in an affidavit of Little Rock City Attorney, Thomas Carpenter, filed in Fort Smith based litigation now on appeal to the Arkansas appellate courts. Mr. Carpenter’s affidavit with exhibits is provided at pages 5 through 21 of the attached presentation of information.

In the absence of a meaningful statutory definition of “meetings,” the decisions of the Arkansas Supreme Court provide meaning to the term “public meetings.” Thus, understanding of “meetings” under FOIA is developed from time to time by decisions applying the open meeting requirement to the particular facts of decided cases. The Arkansas Supreme Court in its McCutchen decision identified five prior decisions, decided on dates ranging from 1976 to 2007, which give meaning to “meetings” in the context of each case. McCutchen, decided in 2012, is a sixth Supreme Court decision during a thirty-six year period providing guidance.

Instead of always providing clarity, the decisions sometimes spawn even further litigation. Speculation regarding the 2004 Harris decision resulted in the 2007 MacSteel and 2012 McCutchen decisions. Contrasted to the Harris decision finding an informal meeting from serial contact with board members “to obtain approval of action to be taken by the Board as a whole,” McCutchen determined serial contact of a city administrator with board members to discuss future legislation (as to which two members indicated preliminary approval and two indicated preliminary disapproval) was not a meeting under the FOIA because the purpose of the administrator’s contact “was to provide background information.” Despite the McCutchen determination that non-decisional, pre-meeting sharing of background information is not a meeting, Fort Smith citizens, in Wade, now assert non-decisional email exchanges among board members constitute a meeting. Litigation continues.

The Arkansas Freedom of Information Handbook, co-sponsored by the Arkansas Attorney General’s office and the Arkansas Press Association, with others, acknowledges this uncertainty regarding the definition of meetings. In answering the question “[w]hat is a meeting?” the Handbook notes that an informal meeting of two members to discuss business “may be subject to the FOIA . . . [t]his question will turn on the facts of each case.”

## THE LACK OF A “MEETINGS” DEFINITION HAS ADVERSE EFFECTS ON THE PUBLIC.

This ad hoc development of understanding of FOIA “meetings” over decades creates uncertainty. The McCutchen trial court found that Fort Smith administrative officials, board members and citizens are unclear as to application of the FOIA public meetings provision to mere exchanges of information, and that the uncertainty adversely affects the performance of administrative officials and chills the speech of the governing body.

Arkansas public officials and citizens, including those in Fort Smith, are faced with a public meetings requirement which they overwhelmingly support yet do not know how to apply. The situation is comparable to motorists faced with a legislative mandate “not to exceed the speed limit,” followed not by a posted speed limit but silence and case-by-case determinations by police officers and judges.

Fort Smith respectfully requests the attention of the members of the Task Force to presentation pages 22 through 36. The document is the Statement of Case and the initial nine pages of the Argument section of Fort Smith’s Brief in McCutchen. The document chronicles the development of FOIA “meetings” uncertainty and litigation in Fort Smith.

The absence of a meaningful “meetings” definition creates uncertainty which chills valuable speech in the local legislative process. Justice John Fogleman, dissenting in El Dorado, noted that prohibiting any two or fewer than a quorum of board members from privately discussing proposed legislation deprives society of small group bantering of ideas, pursuing tangential thoughts and testing conclusions by postulating extreme applications. Speech - possible in various social and academic situations - is denied to society because of the dynamics of a scheduled public meeting. Justice Fogleman explained that open meetings requirements may be an impediment to free exchange of ideas because of “fear of benefitting special interests, harming reputations, inviting pressure from social interests, creating a public image of ignorance by searching questions, producing demagogic oratory, exposing disagreements of subordinates with policy determinations they must administer, or ‘freezing’ members into public expressed opinions they might well prefer to abandon”. Such speech is not prohibited to executive officials, judicial officials or legislators in national and state forums – such restrictions are only urged for local legislators in Arkansas. In Fort Smith, the McCutchen trial court found the “uncertainty with reference to the Arkansas FOIA has had and continues to have a chilling effect on [public officials], as well as members of the public, with reference to speech concerning the everyday activities of the City of Fort Smith. . . .”

The uncertainty regarding FOIA “meetings” also results in harmful and unnecessary stigmatization of volunteer local officials and others. For example, the Wade litigation factual record involves the prosecutor’s release to news media of video of sheriff’s department investigative interviews of some Fort Smith directors and city administrator. A local television station immediately broadcast portions of the video showing directors and the city administrator being interviewed by a sheriff’s deputy in an interrogation room.

Litigation resulting from the uncertainty regarding FOIA “meetings” results in public and private expenditures for legal expenses and consumes judicial resources. In Harris, the Supreme Court found an informal meeting had occurred via serial contact to obtain a decision, but the Supreme Court denied recovery of attorneys fees to the citizen who brought the action finding Fort Smith’s (and Little Rock’s) practice of serial one-on-one contact was substantially justified because there was no clear statutory language or prior judicial decision prohibiting the practice.

THE ARKANSAS SUPREME COURT HAS INDICATED THAT THE UNCERTAINTY  
CAUSED BY LACK OF MEANINGFUL DEFINITION SHOULD BE TAKEN TO THE  
GENERAL ASSEMBLY.

The periodic decisions of the Arkansas Supreme Court refining the FOIA concept of “meetings” do not resolve the uncertainty. By their nature, the decisions of the Supreme Court are limited to the facts of the case being decided. In McCutchen, pre-meeting sharing of background information was determined not to be a meeting because it did not involve decision making as in Harris; however, the decision has not prevented the Wade litigation because, in Wade, the pre-meeting information sharing was by members of the board rather than the city administrator as in McCutchen. Only a well stated statutory definition of “meetings” can deal effectively with the current uncertainty and the constitutional concerns resulting therefrom.

Faced with the McCutchen contentions that the FOIA barred pre-meeting information sharing (contentions rejected by the Supreme Court), Fort Smith asserted unconstitutionality of the public meeting provisions of the FOIA. The Sebastian County Circuit Court agreed with many of Fort Smith’s constitutional contentions arising from the uncertainty of definition of “meetings” in FOIA. On appeal, the Arkansas Supreme Court stated:

After reviewing the circuit court’s findings of facts and conclusions of law regarding the constitutionality of the FOIA’s open-meetings provision and criminal provision, which were entered at appellees’ urging, it is evident to this court that appellees have an argument with the legislature, but not one that amounts yet to a case or controversy that should be decided by a court.

The Court is correct, the difficulty is the absence of a legislative definition of “meetings.” In McCutchen, the Court said “[i]nstead of taking their argument to the legislature, appellees [Fort Smith and some of its officials and citizens] sought – and received – a legal opinion from the circuit court rather than the resolution of an actual controversy.” The Supreme Court thus declined to decide the constitutional issues presented in McCutchen and indicated that the issues should be “taken to the legislature.”

Fort Smith appreciates the creation of this Task Force providing the opportunity to do so. Fort Smith’s August 26, 2014 letter, presentation pages 37 through 40, attempted to promote a discussion of this issue. No discussion followed. Fort Smith respectfully requests the Task Force to now bring this issue to the attention of the General Assembly.

FAILURE TO ACT WILL ENHANCE THE RISK OF DIMINUTION OF FOIA’S VALUABLE  
PUBLIC SERVICE AS THE RESULT OF FUTURE CONSTITUTIONAL CHALLENGES.

The constitutional issues facing FOIA in its current form without a meaningful definition of “public meetings” pose a risk of damage to FOIA’s important public service of promoting open, transparent government. No one, and certainly not Fort Smith, doubts the importance of the

FOIA. A finding of the McCutchen trial court, affirmed by the Supreme Court, states:

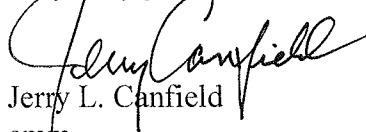
The Fort Smith Board of Directors and Fort Smith administration acknowledge the laudable goals of the FOIA including openness in government subject to the constitutional rights of all citizens. Fort Smith has a long history of compliance with the public records and public meeting requirements of the FOIA. Considerable municipal assets are utilized in complying with the provisions of the FOIA.

Established constitutional principles, including but not limited to fundamental due process, require that legislation must provide to persons of ordinary intelligence fair notice of what is prohibited so that the legislation is not so standardless it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case by case basis. The constitutional void-for-vagueness doctrine requires a criminal statute define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Further, attempts to inhibit speech between two members of a local legislative body regarding governmental business based on asserted application of FOIA are violations of the rights of speech guaranteed by both the Arkansas and United States constitutions. The United States Supreme Court has said that “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech.” The members of local governing bodies do not park their constitutional rights when they enter in to public service. In Arkansas, fundamental due process fairness and rights to speech have been ignored for decades arguably because of broad public acceptance of FOIA’s policy of transparency and defiant opposition to any changes in FOIA. The “not yet” warning of the Arkansas Supreme Court in McCutchen should compel legislative action to correct the uncertainty existing because of a lack of a meaningful, legislative definition of FOIA “public meetings.”

In order to initiate discussion, Fort Smith has proposed a statutory definition of “meetings” for FOIA purposes. However, Fort Smith is not wed to a single, proposed definition. Fort Smith is willing to participate in discussion of other proposed “meetings” definitions. So long as fundamental due process and speech rights of citizens and public officials are protected, Fort Smith urges discussion of various definitions of “meetings,” realizing that the adoption of a statutory definition will help alleviate, at least to some extent, the uncertainty of the current situation.

Thank you for your attention to this matter.

Very truly yours,



Jerry L. Canfield  
cmm

Enclosures

cc: Brian Albright ([balbright@cityhs.net](mailto:balbright@cityhs.net))  
Adam Fogleman ([afogleman@pulaskicounty.net](mailto:afogleman@pulaskicounty.net))  
Jeff Hankins ([jhankins@mac.com](mailto:jhankins@mac.com))  
Mary "Prissy" Hickerson ([phickerson@valornet.com](mailto:phickerson@valornet.com))  
Marci Manley ([mmanley@kark.com](mailto:mmanley@kark.com))  
Rob Moritz ([rmoritz@ucs.edu](mailto:rmoritz@ucs.edu))  
Robert Steinbuch ([resteinbuch@gmail.com](mailto:resteinbuch@gmail.com))  
John E. Tull ([jtull@qgtlaw.com](mailto:jtull@qgtlaw.com))  
Carl Geffken ([cgeffken@fortsmithar.gov](mailto:cgeffken@fortsmithar.gov))

Presentation of Information

Regarding

The Arkansas Freedom of Information Act

To

The Arkansas Freedom of Information Act Task Force

By

The City of Fort Smith, Arkansas

**AMENDMENT TO A.C.A. § 25-19-106(a) TO  
PROVIDE DEFINITION OF “MEETINGS”**

Section 25-19-106(a)(1) Except as otherwise specifically provided by law, all meetings, formal or 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, except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings. The foregoing governing bodies, boards, bureaus, commissions or organizations are collectively identified as “governing bodies” or “governing body” for the purposes of (a)(2) below.

(a)(2) “Meetings” subject to the open public meeting requirements of this Section 25-19-106 are those gatherings of a quorum or more of the members of a governing body, or a committee of a governing body, at which members discuss, receive information regarding or decide issues relating to the official business of that governing body. “Meetings” shall also include any gathering (i) by communication device, specifically including telephone, telegraph or electronic mail, (ii) of individual members with any third party (or series of third parties) conducted in a serial fashion with a quorum or more of the members of the governing body, by which a decision is made on an issue relating to the official business of the governing body. The providing of information in the form of public documents to one or more members of a governing body shall not be deemed a “meeting.” “Meetings” does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, the attendance by a quorum of a governmental body at a regional, state,



or national convention or workshop, ceremonial event, or press conference, or the attendance by a quorum of a governmental body at a candidate forum, appearance, or debate to inform the electorate, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, press conference, forum, appearance, or debate.

[new language underlined]

The Arkansas Freedom of Information Act of 1967, as amended, is referred to a “FOIA.”

A.C.A. § 25-19-103(6) (Supp. 2017) provides:

“Public meetings” means the meetings of any bureau, commission, or agency of the state or any political subdivision of the state, including municipalities and counties, boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds;

A.C.A. § 25-19-106(a) (Supp. 2017) provides:

Except as otherwise specifically provided by law, all meetings, formal or 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, except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings.

References and Citations to  
List of Decisions of Arkansas Supreme Court

<u>Ark. Gazette Co. v. Pickens,</u> 258 Ark. 69, 522 S.W.2d 350 (1975)	( <u>Pickens</u> )
<u>Arkansas Oklahoma Gas Corp. v. MacSteel,</u> 370 Ark. 481, 262 S.W.3d 147 (2007)	( <u>MacSteel</u> )
<u>Arkansas Tobacco Control Bd. v. Sitton,</u> 357 Ark. 357, 166 S.W.3d 550 (2004)	( <u>Sitton</u> )
<u>Davis v. Ross Production Co.,</u> 322 Ark. 532, 910 S.W.2d 209 (1995)	( <u>Ross Production</u> )
<u>Dotson v. City of Lowell,</u> 375 Ark. 89, 289 S.W.3d 55 (2008)	( <u>Dotson v. Lowell</u> )
<u>Finley v. Astrue,</u> 372 Ark. 103, 270 S.W.3d 849 (2008)	( <u>Finley</u> )
<u>Harris v. City of Fort Smith,</u> 359 Ark. 355, 197 S.W.3d 461 (2004)	( <u>Harris v. Fort Smith</u> )

Harris v. City of Fort Smith,  
366 Ark. 277, 234 S.W.3d 875 (2006) (Harris II)

McCutchen v. City of Fort Smith,  
2012 Ark. 452, 425 S.W.3d 671 (2012) (McCutchen)

Mayor of El Dorado v. El Dorado Broadcasting Co.,  
260 Ark. 821, 544 S.W.2d 206 (1976) (El Dorado)

Rehab Hosp. Serv. Corp. v. Delta-Hills Health Systems Agency Inc.,  
285 Ark. 397, 687 S.W.2d 840 (1985) (Rehab Hospital)

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

BRUCE WADE

PLAINTIFF

Vs.

Case No. CV-17-0657

CITY OF FORT SMITH,  
a municipal corporation; KEITH LAU,  
in his official capacity as a City Director of  
the City of Fort Smith; MIKE LORENZ,  
in his official capacity as a City Director of  
the City of Fort Smith; and ANDRE GOOD,  
in his official capacity as a City Director of  
the City of Fort Smith

DEFENDANTS

**AFFIDAVIT OF THOMAS M. CARPENTER**

Before the undersigned notary public, duly qualified and acting for said county and state, appeared Thomas M. Carpenter, to me well known to be the affiant herein, who, after having been duly sworn, states:

1. I, Thomas M. Carpenter, am an adult resident of Little Rock, Arkansas. I am a licensed attorney at law and my Arkansas Bar Number is 77024. I serve as the appointed City Attorney for the City of Little Rock, Arkansas. For more than 32 years, my practice of Arkansas municipal law has involved application of the Arkansas Freedom of Information Act (FOIA) in a municipal government setting.

2. Exhibit "A" to this Affidavit is a list of citations to Arkansas Supreme Court decisions referred to in this Affidavit.

3. I have been familiar with various FOIA issues in Fort Smith since the Harris v. Fort Smith decision in 2004. I provided testimony in the trial court in the Harris II case. I have read

the addenda, abstracts of record and principal briefs of McCutchen and the City of Fort Smith in the McCutchen case. It is my belief and understanding that the following finding in McCutchen (affirmed by the Arkansas Supreme Court) is accurate:

The Fort Smith Board of Directors and Fort Smith administration acknowledge the laudable goals of the FOIA including openness in government subject to the constitutional rights of all citizens. Fort Smith has a long history of compliance with the public records and public meeting requirements of the FOIA.

4. The FOIA contains no meaningful definition of “meetings.” 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). This circular definition is not particularly helpful. In contrast, the attached Exhibit “B” is a list (with citations) to forty (40) states which provide an express definition of “meetings” in their sunshine laws – most defining “meeting” to refer to a gathering of at least a quorum of the members of the subject governing body. In 1975, in Pickens, the Arkansas Supreme Court held the meeting of a committee “subgroup” of the University of Arkansas Board of Trustees to be a “meeting” under the FOIA. The next year, in El Dorado, the Arkansas Supreme Court held that a “meeting” for purposes of the FOIA is any gathering, even informal “group meetings,” of a governing body at which the body discusses official business. These recognitions that the FOIA relates to “gatherings” or “group meetings” are consistent with the cardinal principle of interpretation of statutes – that common meaning be assigned to words in a statute. To me, “meeting” implies a deliberate gathering or assembly of at least two persons for a face to face discussion of particular issues. Even a chance meeting at a social event can become a deliberate discussion if final action is discussed. Multiple witnesses in the McCutchen trial, including the Plaintiffs Mr. McCutchen and Mr. Harris, testified that “meeting” implies an assembly of two or more persons for the purpose of discussion.

5. The Supreme Court's usage of a "gathering" or a "group meeting" of members to define an FOIA "meeting" allowed public governing bodies to operate consistently with the FOIA for many years. The 1985 decision in Rehab Hospital created no difficulty for municipal corporations because we realized that the bylaws of the involved institution allowed board decisions to be made by telephone polling. In contrast, telephone polling has never been approved for municipal governing bodies; rather, the roll call voting requirements for adoption of municipal legislation require face to face gatherings of the members of municipal governing bodies. As indicated in the attached list (Exhibit "C"), thirty-three (33) states have amended their Sunshine Laws to contain express provisions regarding electronic communications. For example, the District of Columbia allows meetings to be held by telephone, video or other electronic means, but expressly legislates that email exchanges between members shall not constitute an electronic meeting. I am aware of limited times formal municipal legislation has been approved to allow one absent elected official, for example while recuperating from surgery, to participate by phone.

6. The FOIA predates the development of modern forms of electronic communications such as electronic faxes, electronic email and other electronic messaging. When electronic communications became widely used, legal writers, including the Arkansas Attorney General, commented on whether electronic communications could be "public records" under the FOIA or whether they could constitute a "meeting" under the FOIA. In Opinion No. 2000-096, on March 20, 2000, the Arkansas Attorney General discussed electronic mail and electronically transmitted faxes, concluding they are public records but do not constitute a meeting. By Act 1653 of 2001, the Arkansas General Assembly amended the FOIA specifically to provide that public records include "electronic or computer-based information." Neither then, nor subsequently has the General Assembly amended the public meeting provisions of the FOIA to state that a meeting

could occur by electronic mail communications. The action of the General Assembly in amending the FOIA to include electronic communications as public records without referencing the public meeting provision strongly indicates the General Assembly does not intend that a FOIA meeting can occur by electronic communications. My opinion is supported by the above noted requirement that action of municipalities must be taken at an assembly of the governing body and involves roll call voting on municipal actions. Further, the Arkansas Supreme Court, in cases such as McCutchen, has recognized that action defining the FOIA should continue to be accepted if the General Assembly has had opportunity and has not made changes. There have been at least eight assemblies of the Arkansas General Assembly after it declared electronic communications to be “public records” without indicating email communications could constitute a meeting under the FOIA.

7. In November of 2004, the Arkansas Supreme Court, in Harris v. Fort Smith, held serial contact with individual board members by Fort Smith’s City Administrator to decide and approve a particular municipal action binding on the Board as a whole constituted an informal meeting subject to the FOIA. The Court noted that its decision was made “[u]nder the particular facts of the matter. . .” before the Court. As noted in McCutchen, the decisions of the Supreme Court are authoritative as to the meaning of the FOIA’s undefined “meeting.” Before Harris v. Fort Smith, both Little Rock and Fort Smith had used serial one-on-one discussions with board members to obtain approval of the boards for litigation settlement and similar municipal decisions. Following Harris v. Fort Smith, both Little Rock, and I understand Fort Smith, have abstained from using serial one-on-one discussions with board members to obtain decisions of the board without first holding a noticed public meeting. A potential result of the Harris v. Fort Smith decision includes the unintended consequence that administrative and legal representatives have greater, non-

reviewed authority and that there is less sharing of information with governing bodies.

8. The Harris v. Fort Smith decision is expressed to be based on its facts noting Fort Smith obtained a decision of its board as a whole by the serial, individual contacts. That is, a “meeting” acted and approved a binding commitment. However, after Harris v. Fort Smith, some legal writers, litigants and news media entities have promoted a much more expansive reading of Harris v. Fort Smith suggesting that any pre meeting sharing of information regarding proposed governmental affairs by any form of communication involving two members of a governing body or an administrator with one or more members of a governing body might constitute a meeting under the FOIA.

I have reviewed information which shows that in January, 2006, the Sebastian County Prosecuting Attorney wrote a letter (attached Exhibit “D”) to Fort Smith officials asserting a technical violation of the FOIA based on Harris v. Fort Smith when members of the Fort Smith board of directors circulated emails discussing a governmental matter among themselves with copies to the local newspaper even though no action was taken and no final determination was made. The letter of the Sebastian County Prosecuting Attorney did not discuss the absence in the FOIA of any mention of email as a means of constituting a “public meeting” or that, in half a century, no Arkansas appellate court decision had indicated that an FOIA meeting could occur by email. In 2011, Fort Smith news media suggested an improper FOIA meeting occurred when two board members attended the same gathering of police officers. Exhibit “E.”

The speculation by some that Harris v. Fort Smith might be interpreted to mean all pre-meeting information sharing among governing body members constitutes a FOIA “meeting,” even if commenced, should have ended quickly. The issue was resolved by the Arkansas Supreme Court in the 2005 MacSteel decision. In MacSteel, the Arkansas Supreme Court determined that



pre meeting information sharing between a county judge and members of a quorum court was not a meeting under the FOIA. Those who were contending any pre meeting information sharing was a “meeting” were wrong. The Court approved pre meeting conversations of the county judge with members of the quorum court regarding the items on a meeting agenda.

It seems that in Fort Smith, any such discussion created uncertainty and litigation. As described by the Supreme Court’s McCutchen decision, in 2009, a new city administrator discussed a proposed employee ordinance in a serial fashion with members of the board of directors in advance of a study session at which the topic would be discussed in a public meeting. The local newspaper printed a photograph of the city administrator under a headline saying “FOI Expert Sees Possible City Violation” and a subheadline indicating “‘Serial Meetings’ Not Allowed, Press Association Spokesman Says.” See attached Exhibit “F.”

In resulting litigation, Joey McCutchen, a Fort Smith attorney and the attorney for the plaintiff in this case, contended that any pre meeting sharing of information among board members violated the Harris v. Fort Smith decision. McCutchen contended that the City’s meeting agenda packages, by which pre meeting information was provided to the board, were improper “meetings.” McCutchen contended that the serial discussions by the city administrator with board members of the subject proposed ordinance, during which two board members preliminary indicated a preference in favor of the proposed legislation and two indicated a preference against the proposed legislation, constituted a “meeting” within the purview of the FOIA. At the study session where the matter was considered, no two members of the board proposed that the item be placed on the agenda of a public meeting for action. The Arkansas Supreme Court unanimously rejected McCutchen’s expansive interpretation of the FOIA and expressly held the administrator’s pre-meeting discussions of the specific legislative proposal in a serial fashion with the board

members was not a “meeting” under the FOIA because, in contrast to Harris v. Fort Smith, the pre-meeting information sharing “was to provide background information” and not “to obtain approval of action to be taken by the Board as a whole.” The focus upon actions or final determinations is a critical aspect missing in the present case before the Court.

The MacSteel and McCutchen decisions make clear that the Harris v. Fort Smith decision should be limited to its fact situation in which action or a binding decision is obtained by the pre-meeting discussion, The FOIA “meeting” provision is not violated by the sharing of pre-meeting information so long as the sharing of information does not result in a pre-meeting determination.

9. It is an established judicial interpretation principle that statutes should be given an interpretation which does not cause the statute to have a constitutional infirmity. Plaintiff’s request for a declaration by this Court (Amended Complaint paragraphs 36 and 48) that the emails attached as Exhibits “C,” “E,” “H,” and “K” to the Amended Complaint constitute “public meetings” under the FOIA creates real constitutional concerns. In the face of the 2001 express amendment of the FOIA to include electronic communications as records without mention of electronic communications as being a means to constitute a “meeting,” a judicial determination that the FOIA can be interpreted as permitting a meeting to be constituted by emails would raise separation of powers and vagueness constitutional issues. That is especially true regarding the criminal sanction in the FOIA. A.C.A. § 25-19-104 provides “[a]ny person who negligently violates any of the provisions of this chapter shall be guilty of a Class C misdemeanor.” Not only is Arkansas among a minority of American jurisdictions which enforce sunshine laws with criminal sanctions, Arkansas has amended its act to provide criminal sanctions on a “negligence” standard, subjecting parties to fines and/or jail time even without “knowingly” or “willfully” intending what is later determined to be a prohibited meeting.

The position that email communications cannot constitute a “meeting” under the FOIA is supported by the principle of separation of legislative and judicial powers under the Arkansas Constitution, the General Assembly’s power to state public policy (Ross Production) and the Supreme Court’s refusal to define terms by processes not known at the time the legislation was written (Finley). Likewise, to interpret the FOIA to prohibit pre meeting information sharing by small groups (less than a quorum) of governing body members implicates free speech rights guaranteed by the First Amendment to the U.S. Constitution and Article 2, §6 of the Arkansas Constitution.

10. In promoting an expansive interpretation of Harris v. Fort Smith, which reading has now been rejected by the Supreme Court in MacSteel and McCutchen, Plaintiff relies on the legislative intent statement in the FOIA (Amended Complaint, paragraph 29) and 1975 language by the Supreme Court in Pickens (Amended Complaint, paragraph 31):

“[w]hen the General Assembly used the expression ‘to learn and to report *fully* [our emphasis] 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 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.”

This language from Pickens was cited verbatim in McCutchen. Yet, in McCutchen, the Supreme Court unanimously held that pre meeting discussion of a proposed ordinance not resulting in a decision or determination is not a meeting under the FOIA.

It is obvious that all the reasons (the “why”) for municipal action cannot be known by the public. The testimony in McCutchen indicates that factors such as the legislator’s upbringing, education, business and social interests and even physical and mental health at the time of decision

obviously impact the legislator's decision. Those matters of background cannot be known by all. The Pickens language regarding the "why" of the decision is not suggesting an absolute right of knowing all background information regarding the decision (McCutchen, page 12). In the legal community, it is clear that MacSteel and McCutchen have shown to be wrong those who assert the Harris v. Fort Smith decision makes pre meeting sharing of information to be a meeting under the FOIA.

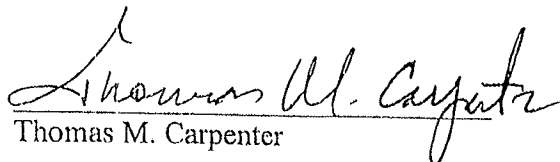
11. I note Plaintiff has referred to (Amended Complaint, paragraph 33) and attached as Exhibit J to the Amended Complaint an opinion of the Arkansas Attorney General dated November 8, 2005. In 2000, the Attorney General opined that email communications might be public records but that they could not constitute a meeting. The 2005 Attorney General opinion noted that the application of the meetings provision of the FOIA to electronic communication "remains uncertain" and has not been decided by the Supreme Court. The 2005 suggestion that emails might be a basis to constitute a meeting is potentially in conflict with the 2000 Attorney General opinion which stated that electronic communications could not constitute a meeting. Dan Shue, the Sebastian County Prosecutor, was a witness in the McCutchen case and testified that such conflicts in Attorney General opinions were expected in his experience, and that it would be "darn difficult" for citizens, and perhaps even members of the Fort Smith Board of Directors, to know what is a "meeting" under the situation which exists with reference to the Arkansas FOIA. See attached Exhibit "G," the testimony of Mr. Shue in McCutchen. The ad hoc development of Attorney General Opinions, sometimes in conflict with each other, merely adds to the uncertainty faced by Arkansas municipal corporations on the issue of application of the "public meeting" provision of the FOIA to pre meeting information sharing among members of a governing body.

12. In the absence of an FOI statutory definition of "meetings," the decisions of the

Arkansas Supreme Court provide the authoritative guidance as to the meaning of the term. In McCutchen, the Arkansas Supreme Court listed some of its prior decisions interpreting the meaning of “public meeting” under the FOIA. It is obvious to the legal community that such case-by-case formulation of what constitutes a meeting leaves governmental representatives unclear as to meaning in the many situations where no decision has yet been made. For example, this litigation raises the issue of can a meeting be constituted by email? This issue has not been addressed by the Arkansas appellate court. This uncertainty results in adverse public perception for public officials and leaves members of municipal governing bodies subject to criminal stigmatization. As a consequence, those public officials self-censor resulting in chilled speech.

In my opinion, MacSteel and McCutchen clearly indicate the post Harris v. Fort Smith speculation that all pre meeting information sharing among governing body members is a violation of the FOIA is simply wrong. Yet, neither MacSteel nor McCutchen involved email communications circulated among board members and others. As noted above, I believe the General Assembly has made clear that the definition of a public meeting does not refer to one that allegedly occurs by email. Moreover, the noted constitutional concerns with Plaintiff’s requests for judicial determinations favor an interpretation finding that a FOIA meeting cannot be constituted by email and that pre meeting information sharing not resulting in a decision or determination does not constitute a meeting under the FOIA. In any event, no email communication that is not final action or a binding determination should be considered a public meeting.

FURTHER AFFIANT SAYTH NOT.

  
Thomas M. Carpenter

STATE OF ARKANSAS }  
                              } ss  
COUNTY OF PULASKI }

Subscribed to be before me this 1<sup>st</sup> day of November, 2017

Monique Fields  
Pulaski County  
Notary Public AR

Commission Expires 02/09/27  
Commission #12700228

Notary Public

*Monique Fields*

Dated: 11-1-17  
(SEAL)

### States Defining "Meeting"

1. DC Official Code § 2-574(1)
2. Alabama 25 Ala. Code § 36-25A-2(6)
3. Alaska As 44.62.310
4. Arizona A.R.S. § 38.431 (in person or through technological devices)
5. California Cal. Code § 54950-54963 ("congregation of a majority")
6. Colorado C.R.S. § 24-6-402(1)(b) ("any kind of gathering by person, by telephone, electronically, or by other means of communication")
7. Delaware 29 Del. C. § 10002(g) (quorum in person or by videoconferencing)
8. Florida Fla. Stat. § 286.011 (where "official acts are to be taken")
9. Georgia O.C.G.A. § 50-14-1 (quorum)
10. Idaho Idaho Sttat. § 74-202(6) ("convening of a governing body to make a decision or to deliberate toward a decision on any matter")
11. Illinois § ILCS § 120/1 ("any gathering . . . in person . . . by video or audio conference, telephone call, electronic means . . . for discussing public business")
12. Kansas Kans. Stat. § 75-4317a ("majority")
13. Kentucky KRS § 61.805 ("all gatherings")
14. Louisiana L.A. R. S. 42:13 (quorum to deliberate or act; or convening of a quorum to receive information)
15. Maryland Md. Code Ann. § 3-101(g) (quorum to conduct or transact business)
16. Massachusetts Mass. G. L. 30A § 18 (deliberation by a public body – deliberation includes e-mail between or among quorum)
17. Michigan Mich. C. L. 15.262 (quorum to deliberate or render a decision)
18. Mississippi Ms. Code § 25.41-3(b) (assemblage at which official acts may be taken)

19. Missouri Mo. Rev. Stat. § 610.010(5) (public business discussed, decided, or policy formulated in person or electronic means)
20. Montana Mont. Code Ann. § 2-3-202 (quorum to hear, discuss or act whether by corporal or by means of electronic equipment)
21. Nebraska Neb. Code § 84-1409(2) (meeting, formal or informal, to brief, discuss public business, formulate tentative policy or take action)
22. Nevada Nev. R. S. § 241.015(3) (quorum to deliberate or take action)
23. New Hampshire New Hampshire Code 91-A:2(1) (quorum to discuss or act)
24. New Jersey N.J. Rev. Stat. 10-4-8(b) (any gathering of majority to discuss or act on specific public business)
25. New Mexico N.M. Stat. § 10-15-1(B) (quorum for purpose of formulating policy, discussing public business, or taking action)
26. North Carolina N.C. Gen. Stat. § 143.318(d) (gathering any time or place or simultaneous communication by telephone or other electronic means of a majority)
27. North Dakota North Dakota Code § 44-04-17.1 (formal or informal gathering or work session of quorum regarding public business)
28. Ohio Ohio Rev. Code § 121.22 (prearranged gathering of a majority to conduct, transact, deliberate, or discuss public business)
29. Oklahoma 25 Okla. Stat. § 304(2) (majority personally together to conduct business)
30. Oregon 2015 ORS 192.610 (quorum to decide or deliberate)
31. Pennsylvania 65 Pa. C.S. § 703 (prearranged quorum to deliberate or take official action)
32. South Carolina S.C. Code Ann. § 30-4-20 (quorum to discuss or act)
33. South Dakota South Dakota § 1-25-1 (quorum discusses or decides official business)
34. Tennessee Tenn. Code Ann. § 8-44-102 (quorum to decide or deliberate)
35. Texas Texas Gov't Code Ann. § 551-001(4) (deliberation between a



quorum)

36. Utah Utah Stat. § 2-4-103(6)(a) (quorum to discuss, receive comments or act)
37. Washington Wash. Rev. Code 42.30.020(4) (where action is taken)
38. West Virginia W. Va. Code § 6-9A-2 (quorum to decide or deliberate – may meet by telephone conference or other electronic means)
39. Wisconsin Wisc. Stat. § 19.82(2) (convening for purpose of exercising responsibilities; presumed to be meeting if ½ or more present)
40. Wyoming Wyo. Stat. § 16-4-402(a)(iii) (quorum called to discuss, deliberate or present information or taking action regarding public business)

States with Statutes Discussing Modern Forms of Communication

1. DC                      Official Code § 2-577  
\*e-mail exchanges between members of a public body do not constitute an electronic meeting.
2. Alabama                      25 Ala. Code § 36-25A-5(1) (electronic communications)
3. Alaska                      As 44.62.312 (teleconferencing)
4. Arizona                      A.R.S. § 38-431 (technological devices)
5. California                      Cal. Code § 54950-54963 (teleconference or "series of communications of any kind")
6. Colorado                      C.R.S. 24-6-402(1)(b) ("in person, by telephone, electronically, or by other means of communication")
7. Delaware                      29 Del. C. § 10002(g) (videoconferencing)
8. Illinois                      § ILCS § 120/1 (video or audio conference, telephone call, electronic means)
9. Kansas                      Kan. Stat. § 75-4317a ("in person . . . telephone or any other medium for interactive communication by a majority")
10. Kentucky                      KRS § 61.805 ("teleconferences")
11. Louisiana                      La. R.S. 42:14 (prohibited from proxy voting procedure, secret balloting)
12. Massachusetts                      Mass. G.L. 30A § 18 (oral or written communication, including e-mail, between or among a quorum)
13. Minnesota                      Minn. Stat. 13D.021 (telephone or other electronic means)
14. Mississippi                      Ms. Code § 25-41-3(b) (use of video or teleconference devices)
15. Missouri                      Mo. Rev. Stat. § 610.010(5) (conference call, video conference, internet chat, or internet message board)
16. Montana                      Mont. Code Ann. § 2-3-202 (by means of electronic equipment)
17. Nebraska                      Neb. Code § 84-1409(3) (video conferencing)

18. Nevada Nev. R.S. § 241.015(3) (electronic communication)
19. New Hampshire New Hampshire Code 91-A:2(1) (telephone or electronic communication or any other manner that allows for contemporaneous communication)
20. New Jersey N.J. Rev. Stat. 10-4-8(b) (“communication equipment”)
21. New Mexico N.M. Stat. § 10-15-1(c) (meet by conference telephone or other similar communications equipment)
22. New York N.Y. Pub. Off. L. § 102 (video conferencing)
23. North Carolina N.C. Gen. Stat. § 143.318(d) (simultaneous communication by conference telephone or other electronic means)
24. North Dakota North Dakota Code § 44-01-17.1 (in person or electronic means such as telephone or video conference)
25. Oklahoma 25 Okla. Stat. § 307.1 (teleconferences allowed for limited public bodies)
26. South Carolina S.C. Code Ann. § 30-4-20 (meet by means of electronic equipment)
27. South Dakota South Dakota § 1-25-1 (any audio, video, or electronic medium, including the internet where information is exchanged is a teleconference)
28. Tennessee Tenn. Code Ann. § 8-44-108 (may, if necessary to get quorum, meet by electronic or other means of communication)
29. Texas Texas Gov’t Code Ann. § 551.001(8) (video conference through telephone, data network or internet)
30. Utah Utah Stat. § 2-4-103(5) & (6) (electronic meeting by e-mail, instant messaging, texting, e-chat, any other electronic communication)
31. Vermont 1 V.S.A. § 312(2) (members of public body may attend by electronic or other means)
32. Virginia Va. Code § 2-3707 (no meeting via electronic means unless allowed by statute)
33. West Virginia W. Va. Code § 6-9A-2 (meetings may be by telephone conference)

or other electronic means)

## STATEMENT OF CASE

The City of Fort Smith ("Fort Smith") has a population exceeding 86,000 and an annual budget in excess of \$200 million. Ab. 53. Fort Smith is organized under the city administrator form of government with a mayor, seven person legislative board and 850 administrative employees serving under the city administrator. Ab. 50 and 53; Add. 102 (Findings 6-7).

Fort Smith's board meets in regular, study and special meetings pursuant to local ordinances and in conformance with the Arkansas Freedom of Information Act ("FOIA"). Ab. 52-53; Add. 104 (Findings 14-15). Typically, at regular meetings, the board considers 3 to 7 regular items of business and 10 to 25 consent agenda items of business. Ab. 55. Prior to each meeting, the administrator provides to individual board members an agenda and informational package of documents containing a briefing report as to each item and a draft resolution or ordinance for each item. Ab. 54-56; Add. 103-04 (Findings 11-13).

A newly hired city administrator undertook an evaluation of hire/fire authority regarding some department heads; prepared a memorandum and other documents proposing that such power be delegated to the city administrator; personally delivered the memorandum to 5 of 7 board members in advance of a study session to be held to discuss, but not vote on, the issue; the administrator did

not request an opinion or potential vote regarding the matter; two members of the board expressed preliminary support and two members expressed preliminary disfavor; no board member expressed an opinion of how they would vote; at the study session, where any two members could place the item on the agenda of a regular meeting for consideration, no motion was made to do so; and, at time of trial, no legislative item regarding the topic was pending before the governing body. Add. 106-07 (Findings 22-27).

Two news articles appeared discussing the hire/fire legislative proposal. Ab. 12. On May 14, 2009, Appellant McCutchen initiated this action asserting City Administrator Kelly had “knowingly violated” the public meetings provision of the FOIA. Add. 3. At trial, McCutchen contended the FOIA prohibits the administrator from discussing proposed legislation with an individual member of the board except at a public meeting and prohibits the administrator from providing pre-meeting information to influence legislation by contact with one or more members via personal meetings, telephone calls or written materials. Ab. 10-11, 14-15 and 19-20. McCutchen based this contention on this Court’s decision in Harris v. City of Fort Smith, 359 Ark. 355, 197 S.W.3d 461 (2004). Add. 73 (McCutchen’s Pre-Trial Brief, p. 6).

Fort Smith denied violating the FOIA. Add. 13-17. Fort Smith asserted a

SoC 2

counterclaim for declaratory relief. Relying on the legislative origin of the FOIA and the Arkansas constitutional principle of separation of powers, Fort Smith sought judicial declarations that only the General Assembly may legislate on the topics of (a) whether a meeting subject to the FOIA can occur if less than two members of the subject governing body are present, (b) the number of board members required to constitute a meeting, (c) whether citizen contact and/or administrative contact for informational purposes only with one or more board members is a meeting, and (d) whether a meeting for FOIA purposes can occur by electronic mail, telephone or simply delivery of written information. Add. 46-50. Fort Smith's counterclaim also asserted the unconstitutionality of the public meetings provision (A.C.A. § 25-19-106 (Supp. 2011)) and the criminal provision (A.C.A. § 25-19-104 (Supp. 2011)) of the FOIA. Id.

Subsequently, McCutchen filed an Amended Complaint deleting administrator Kelly as a party defendant and made his own request for declaratory relief. Add. 36-40. Permitted by the trial court (Add. 44-45), Fort Smith board members Gary Campbell and André Good, Ken Pyle, a citizen who routinely is involved in Fort Smith legislative matters as executive director of the Fort Smith Housing Authority, and administrator Kelly intervened. Add. 51-55. Intervenors, like Fort Smith, asserted the unconstitutionality of the public meetings and

*see Arg!*

criminal provisions of the FOIA and requested declaratory relief to that effect.

Add. 54. McCutchen added David Harris as a co-plaintiff. Add. 58-62. Harris participated at trial, but has not appealed. Add. 161-63. Notice was given to the Arkansas Attorney General. Supp. Add. 50-56.

Supported by the agreement of all parties (Add. 61; Add. 46-47; Add. 54), the trial court found the extant controversy to be genuine, justiciable, ripe for determination and substantial as involving public issues fully developed and presented pursuant to the Arkansas Declaratory Judgment Act. Add. 114 (Finding 56).

On August 8-9, 2011, the case was heard in a bench trial by the Hon. James O. Cox of the Sebastian County Circuit Court. On October 4, 2011, the trial court entered judgment making findings of fact and stating conclusions of law. Add. 100-48. Inter alia, the trial court determined:

a. No violation of the FOIA occurred with reference to administrator Kelly's personal delivery of the May 7, 2009, memorandum and packet of written information to individual board members. Add. 106-08 (Findings 21-29) and Add. 130 (Conclusion of Law 10).

b. As a matter of ordinary meaning, the word "meetings" as used in the FOIA's phrase "meetings . . . of the governing bodies of municipalities . . ."

SoC 4



contemplates a gathering of at least two members of the governing body. Add. 101 (Finding 1); Add. 130 (Conclusion of Law 9).

c. Fort Smith administrative officials, board members and citizens are uncertain as to application of the FOIA to mere informational exchanges because the FOIA does not mention third party contact with board members; does not draw a distinction between meetings for decision as compared to meetings merely to receive information; and does not mention contact by telephone, electronic mail or written packets of information. See, e.g., Finding 55 at Add. 114. The trial court issued declarations that each topic is a matter for consideration by the General Assembly. Add. 144 (Conclusion of Law 59). The trial court ruled that, absent clarification of Arkansas law by the declarations of Conclusion of Law 59, the public meetings provision of the FOIA would indeed be unconstitutional. Add. 144-45 (Conclusions of Law 60-62).

d. The criminal provision of the Arkansas FOIA is unconstitutional. Add. 142 (Conclusion of Law 52) and Add. 145 (Conclusion of Law 63).

McCutchen's post judgment motions were denied by the trial court. Add. 160. McCutchen timely filed a Notice of Appeal to this Court. Add. 161-63. Fort Smith and the Intervenors timely filed a Notice of Cross Appeal. Add. 164-66.

## ARGUMENT

The Arkansas Freedom of Information Act (“FOIA”) mandates that “[e]xcept as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all municipalities . . . shall be public meetings.” A.C.A. § 25-19-106(a) (Supp. 2011). Additional to regular meetings for legislative action, a “public meeting” may occur when less than a quorum of a governing body meets for the purpose of receiving information which may lead to subsequent legislative action. Mayor of El Dorado v. El Dorado Broadcasting Co., 260 Ark. 821, 824, 544 S.W.2d 206 (1976):

We can think of no reason for the . . . [FOIA] specifying its applicability to informal meetings of governmental bodies unless it was intended to cover informal but unofficial group meetings for the discussion of governmental business as distinguished from those contacts by the individual members that occur in the daily lives of every public official.

An informal meeting requires a gathering of more than two members:

Furthermore, we do not interpret the trial court’s judgment as applying the Freedom of Information Act to a chance meeting or even a planned meeting of any two members of the city council.

Id. Based, in part, on testimony of administrator Gosack (Ab. 58-60), the trial court found that Fort Smith acknowledges the laudable goals of the FOIA and has a history of complying with the Act’s public records and public meetings

requirements. Add. 104 (Finding 16). Plaintiff David Harris, a longtime observer of Fort Smith governmental functions, stated that meetings of Fort Smith's governing body and boards and commissions (with more than 130 volunteer members – Ab. 49) are held in an open, public fashion. Ab. 20-21.

### **STATEMENT OF THE CONTROVERSY**

What, then, is the controversy? Based on the testimonies of all witnesses, the trial court found that Fort Smith administrative officials, board members and citizens are unclear as to application of the FOIA public meetings provision to mere exchanges of information. Add. 114 (Finding 55). That uncertainty adversely affects the performance of administrative officials and chills the speech of Intervenors. Add. 138 and 145 (Conclusions of Law 38 & 64). The uncertainty arises from a cumulative effect:

1. The FOIA is legislative and not the result of development of common law. Arkansas' Constitution reposes legislative powers in the General Assembly and those powers may not be exercised by the judicial or executive branches. The State's public policy is found in its Constitution and enactments by the General Assembly. This Court has rejected prior requests that it establish public policy. See authorities cited in the trial court's Conclusions of Law 3-6 at Add. 125-28.

2. In stark contrast to sunshine laws of the District of Columbia and 41

states, Arkansas' FOIA does not define "meetings."<sup>1</sup> Add. 115-16 (Finding 59). This Court repeatedly has stated that the principal rule in considering a statute's meaning is to construe it as it reads, giving words their ordinary meaning. See authorities cited in Conclusion of Law 7 at Add. 128-29. Here, all witnesses concur the common meaning of "meeting" is two or more people in close proximity talking to each other. Plaintiff Harris (Ab. 23); Plaintiff McCutchen (Supp. Ab. 1); administrator Gosack (Ab. 49-50); citizen Pyle (Ab. 119). As noted by citizen Pyle, the FOIA concerns itself with meetings of members of public bodies with no reference to third parties, so that the common meaning of "meeting" under the FOIA requires a gathering of at least two members of the governing body. Ab. 119. The trial court found (Add. 101, Finding 1) and concluded (Add. 130, Conclusion of Law 9) that the ordinary meaning of "meetings" as used in the FOIA's phrase "meetings . . . of the governing bodies of municipalities . . ." contemplates a gathering of at least two members of the

---

<sup>1</sup>Appellant quotes (Arg 10) the Attorney General citing El Dorado as providing a definition. The Attorney General's non-literal statement of El Dorado's construction of "informal" meetings is not a definition from the FOIA. The FOIA's circular "meeting" is a "meeting" of identified bodies is noted by the Attorney General to not be "particularly helpful." Opinion No. 2005-166, p. 2.

Arg 3

governing body. This Court itself required a gathering of more than two members to constitute an “informal” meeting.<sup>2</sup> El Dorado, 260 Ark. at 824.

3. In 2004, this Court decided Harris v. City of Fort Smith, 359 Ark. 355, 365, 197 S.W.3d 461 (2004), determining serial, third party contact with individual board members was a meeting under the FOIA where the “purpose of the one-on-one meetings was to obtain a decision of the board as a whole on the purchase of the Fort Biscuit property.”<sup>3</sup> Seemingly ignoring El Dorado, local

---

<sup>2</sup>See J. Watkins & R. Peltz, The Arkansas Freedom of Information Act, § 4.02[b][2], pp. 299-301 (2009), for a discussion of the Attorney General’s vacillations, sometimes disagreeing with El Dorado, and of his attempts to balance “open meetings” with the “realities of the day-to-day operations of government.”

<sup>3</sup>This Court relied on Rehab Hosp. Serv. Corp. v. Delta-Hills Health Systems Agency Inc., 285 Ark. 397, 400-01, 687 S.W.2d 840 (1985) where, in a single sentence, the Court found a violation of the FOIA’s meetings provision based on “a telephone poll of those members of the executive committee who could be reached over a three day period.” However, the entity’s bylaws permitted meetings to be held by telephone poll. Testimony of Thomas Carpenter, Supp. Add. 151 (R. 1820). Regardless, whether originating in Rehab Hospital (10 years after El Dorado) or Harris (30 years after El Dorado), application of the FOIA

Arg 4

news media, after Harris, boldly asserted an FOIA violation when two board members attended a citizens' meeting. Supp. Add. 148-49.

4. The third party contact with board members in Harris was by Fort Smith's chief administrative employee, the city administrator. The FOIA is silent about third party contact. What is the effect of serial contact by other employees or by citizens? At trial, detailed information was provided as to citizen contact with individual board members; testimony that, with regard to a specific zoning/rezoning issue, citizens on both sides serially used telephone, written materials, e-mail and personal meetings to strongly advocate for their positions in private, not wanting opponents to participate; and proof that public meeting time constraints could not accommodate the citizens' desired presentations. See Gosack at Ab. 79-91; Pyle at Ab. 110-16. Many items of legislative business involve basic citizen interest and become heated contests in the face of citizen presentation of information, lobbying and requests for vote commitments made serially to individual board members. Add. 111-13 (Findings 46-49). In Arkansas Okla. Gas Corp. v. MacSteel, 370 Ark. 481, 262 S.W.3d 147 (2007), an industrial entity serially contacted 10 of 13 members of Sebastian County's Quorum Court meetings requirement to situations where no two members meet provides a source for the current controversy. Add. 118 (Finding 63).

Arg 5

during which it lobbied for and, in instances, obtained voting commitments on a legislative matter. Add. 120-21 (Findings 66-67). This Court, however, dismissed AOG's FOIA public meetings challenge stating that "AOG offers no evidence that in contacting quorum court members, MacSteel acted in any capacity other than its own." Id., 370 Ark. at 488. No reasoned analysis was offered as to how, under the language of the FOIA, serial contact by a citizen differs from the same action by a city administrator. As in Harris, proposed legislation was the subject of the discussions. Is there a constitutional right for citizens to make such contact? Here, the trial court said yes. Add. 113 (Finding 52). MacSteel did not so explain. The FOIA's silence and the ad hoc, case-by-case decisions of this Court (in Harris finding a "meeting" based on third party contact resulting in a legislative decision and, three years later, in MacSteel, finding no "meeting" through similar citizen contact) cause citizens and officials alike to be confused and adversely affect officials in performing their duties. Add. 121 (Finding 69).

5. In contrast to the laws of at least 28 other states, Arkansas' FOIA does not address modern forms of communications including electronic mail and telephone. Add. 116 (Finding 59); Add. 122-23 (Finding 73). Pre-Harris and based on El Dorado, the Attorney General opined in Ark. Op. Att'y Gen. 99-018, p. 2 that electronic mail from a municipal official serially to council members,

though a public document, would not constitute a public meeting; yet, post-Harris, the Attorney General said the issue is “uncertain under the . . . FOIA.” Ark. Op. Att’y Gen. 2005-166, p. 2. Citing Harris, Sebastian County’s Prosecuting Attorney asserted Fort Smith violated the FOIA when some board members discussed a preliminary legislative topic by e-mail even though a copy had been provided to the local newspaper. Supp. Add. 145-47 (R. 1517-19). It is patent that the determination in Harris of a “meeting” by serial one-by-one contact has created doubt and speculation as to topics about which the FOIA is silent.

6. It seems axiomatic that the decision in Harris would have been the same had the city administrator serially circulated a writing to individual board members asking for approval of his public auction bid rather than personally inquiring. Does Harris mean a “meeting” occurs any time the city’s administrators (or citizens) provide written material to board members about a legislative topic? Again, the FOIA is silent. This Court never has said so. Yet, the confusion following Harris has reached the point that McCutchen so contends. At trial, he asserted that any written memo delivered serially to the board, which attempts to influence a legislative matter, violates the FOIA’s meetings provision. Ab. 14-15; Ab. 19-20; Add. 73 (Trial Brief, p. 6). Ergo, governmental employees, hired to provide administrative information to governing bodies (Gosack, Ab. 34-35, 43 &

Arg 7



65; Pyle, Ab. 109-12), may not provide written information unless in a public meeting. McCutchen boldly asserts this based on Harris. Appellant's Brief, Arg 4. In Fort Smith, a few days before the board's next regular or study meeting, a written agenda and packet of documents providing information as to items on that agenda are routinely delivered serially to the mayor and each board member. The information is meant to influence the board's legislative decision. Ab. 34 & 43. An illustrative packet was provided at trial. Supp. Add. 57-144. As to each agenda item, administrative employees provide a briefing report and draft of a resolution/ordinance to be used legislatively to adopt the recommended action. Id. Adhering to McCutchen's understanding, the FOIA's public meetings provision would preclude those employees from providing pre-meeting written information, depriving governing bodies of pre-meeting consideration and opportunity to investigate. See Gosack, Ab. 56-58, 66; Pyle, Ab. 111; Campbell, Ab. 193. Appellees respectfully suggest that such confusion regarding the FOIA was never intended by the General Assembly or this Court – but it has developed.

The genesis of the controversy is the FOIA's silence as to third party contact determined in Harris to be a "meeting" and, in its wake, efforts by news media, prosecutors, the Attorney General, scholars, and, now, McCutchen to expand application of Harris to other topics as to which the FOIA is mute. As

Plaintiff Harris testified: “I think the legislative intent was to leave it [meaning of “meeting”] broad and then let the courts decide.” Ab. 23 (R. 693). That approach is fundamentally flawed. The legislative function may not be abdicated to others. Ark. Const., Art. 4, §§ 1, 2. A statute must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. Arkansas Tobacco Control Bd. v. Sitton, 357 Ark. 357, 362, 166 S.W.3d 550 (2004).

Officials and citizens of this State are faced with a public meetings requirement which they overwhelmingly support yet do not know how to apply. The situation is comparable to motorists faced with a legislative mandate “not to exceed the speed limit,” followed not by a stated speed limit but silence and then case-by-case determinations by police officers and judges.

All parties agree the controversy is genuine, real and ripe for determination. Add. 46-47, 54 & 61. Plaintiff Harris and administrator Gosack concur this action presents a real, legitimate controversy about the FOIA. Ab. 21 & 78. The trial court correctly found the extant controversy is justiciable, ripe for determination and substantial as involving public issues fully developed and presented pursuant to the Arkansas Declaratory Judgment Act. Add. 114 (Finding 56).

The trial court issued judicial declarations affirming the General Assembly’s

legislative power to address unsettled topics as to which the FOIA currently is silent. Add. 144 (Conclusion of Law 59). The declarations of Conclusions of Law 59 would, if affirmed by this Court, avoid the separation of powers constitutional infirmity that otherwise results from case-by-case judicial determinations of legislative topics. In Section I below, Appellees respectfully ask this Court affirm those declarations and clarify its decision in Harris as not being in conflict. In Section II below, these parties present their cross appeal and their discussion of free speech and vagueness infirmities of the FOIA's public meetings and criminal sanction provisions.

I.

**THE TRIAL COURT PROPERLY APPLIED THE FOIA IN THIS CASE AND ISSUED APPROPRIATE JUDICIAL DECLARATIONS TO AVOID A SEPARATION OF POWERS CONSTITUTIONAL INFIRMITY.**

The standard of review from a bench trial is whether the trial court's findings of fact are clearly erroneous. Parker v. BankcorpSouth Bank, 369 Ark. 300, 305, 253 S.W.3d 918 (2007). Issues of law are reviewed de novo. See Wade v. Ferguson, 2009 Ark. 618, at 2, \_\_\_ S.W.3d \_\_\_.

A. Administrator Kelly's Discussions with and Memo to Board Members Were Not in Violation of the FOIA. Here, the determined facts are: a newly hired city administrator undertook an evaluation of hire/fire authority regarding some



August 26, 2014

The Honorable Dustin McDaniel  
Arkansas Attorney General  
323 Center Street, Suite 200  
Little Rock, AR 72201

Representative Andrea Lea  
State Agencies & Governmental Affairs Committee  
Arkansas General Assembly  
P.O. Box 1342  
Russellville, AR 72811

Mr. Tom Larimer, Executive Director  
Arkansas Press Association  
411 South Victory  
Little Rock, AR 72201

Mr. Don A. Zimmerman, Executive Director  
Mr. Mark Hayes, General Counsel  
Arkansas Municipal League  
P.O. Box 38  
North Little Rock, AR 72115

Re: Arkansas Freedom of Information Act -- Public Meeting Provisions

Gentlemen and Representative Lea:

Representatives of the City of Fort Smith have been interested in legislative clarification of the Arkansas Freedom of Information Act (FOIA) since the determination ten years ago that a public meeting occurred when a non board member contacted the seven members of the Fort Smith Board of Directors one-on-one serially where the "purpose of the one-on-one meetings was to obtain the decision of the board as a whole" on a substantive issue. Harris v. City of Fort Smith. While the Court in Harris indicated that its decision was made solely "under the particular facts of the matter" then before the

623 Garrison Avenue  
P.O. Box 1908  
Fort Smith, Arkansas 72902  
(479) 785-2801  
Administrative Offices FAX (479) 784-2430

Court, the determination in Harris of a “meeting” by serial contact has created doubt and speculation as to topics about which the FOIA is silent. Previous discussion among some of us has not resulted in clarification.

Three years after Harris, the Arkansas Supreme Court, in Arkansas Oklahoma Gas Corp. v. MacSteel, held that, though the Sebastian County Judge had contacted individual quorum court members to ask if they had any questions about certain agenda items and, though MacSteel personnel had met serially with quorum members to lobby for its interest, no “meeting” had occurred.

In 2010, Fort Smith citizen Joey McCutchen brought suit against the City of Fort Smith and City Administrator as well as several members of the Board of Directors, asserting that the City Administrator, by delivering to each board member a draft of proposed legislation and a memo recommending same, had violated Arkansas’ open-meeting requirements under the FOIA. In that case, the Arkansas Supreme Court held that the open-meetings provision of the FOIA was not violated.

Presently, a lawsuit is pending in Sebastian County Circuit Court brought by a citizen, Jack Swink, in which it is alleged that an agenda procedure, adopted decades earlier and which permits board members to withdraw an item from the agenda of an upcoming meeting, constituted, in effect, a “meeting” in violation of the FOIA.

The genesis of these several lawsuits is the absence in the Arkansas Freedom of Information Act of any definition of “meeting.” More than 30 other states, plus the District of Columbia, include in their Sunshine Laws a clear and distinct definition for the word “meeting.” To date, the Arkansas General Assembly has failed to provide that definition and, as a consequence, the Arkansas Supreme Court, on a case-by-case basis, has determined whether a specific set of facts presented to it constitutes a “meeting” under the FOIA.

The existing state of the law only leads to frustration as each new set of circumstances seems to invite further litigation. The existing ambiguity and uncertainty strikes at the heart of fundamental due process. By analogy, basic due process suggests that when a motorist is stopped by a law enforcement officer for speeding that the motorist has been given notice, e.g., a posted speed limit sign, as to what constitutes a violation. That same fundamental requirement of due process urges that the meaning of “meeting” not be left to ever changing sets of facts and ensuing court decisions. Rather, the definition should be stated by statutory definition legislated by the Arkansas General Assembly. This point was brought home, when, in testimony before the trial court in McCutchen v. City of Fort Smith, Sebastian County Prosecuting Attorney Daniel Shue,

when asked how a member of the public is supposed to know what a “meeting” is, replied [it would] “be darn difficult to do.”

Fort Smith administrative officials, members of the Fort Smith Board of Directors, and citizens want to comply with the requirements of the FOIA, but are uncertain regarding the application of the FOIA to such matters as informational exchanges in telephone conversations, e-mail communications and citizens participation. The surrounding uncertainty as to when a “meeting” occurs encourages the public to criticize the activities of the City’s administrative staff and its Board of Directors. The trial court in McCutchen found:

The uncertainty regarding the interpretation of the FOIA and the genuine controversy created by the current litigation adversely affects the administrative staff and the members of the Board of Directors of the City of Fort Smith in the conduct of their public employment and public capacity duties. The uncertainty in the law causes others publicly to criticize the activities of the administrative staff and Board of Directors. This litigation has been filed and must be defended. Multiple news articles, including the May 14, 2010 editorial in the Times Record, promotes public criticism arising from the uncertainty of the application of the FOIA. Moreover, criminal prosecution has been publicly discussed and is a possibility under the FOIA.

Finding of Fact 69, Appeal Addendum p. 21.

Because the Arkansas Freedom of Information Act carries with it a potential criminal penalty, it is extremely important that elected and appointed governmental officials have a clear understanding, based on statute, as to when they might violate the law. It is fundamentally unfair that an elected or appointed official would be required to sift through wide ranging judicial decisions in order to determine whether he or she is in compliance or violation of the law.

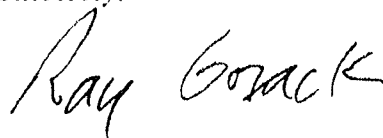
The lawsuits referenced above have caused the City of Fort Smith and Sebastian County to expend significant sums of taxpayer money defending the governmental entity and its representatives all to the financial detriment of the governmental entity and its taxpayers.

The Arkansas Freedom of Information Act has provided great public service and benefit to the people of Arkansas. However, the uncertainty created by the lack of definition of “meeting” poses a significant constitutional risk to the public benefit of the FOIA’s requirement of open public meetings. The Arkansas Supreme Court in

McCutchen avoided deciding constitutional challenges noting that the difficulties with the definition of “meeting” are for the legislature and are not yet a case or controversy that should be decided by a Court. McCutchen, supra at 2012 Ark. 452, page 17. The Court’s “not yet” comment looms ominous. It seems obvious that, if interested constituents do not request and obtain action by the General Assembly on this topic, the Court soon will be compelled to address the constitutional infirmities created by the absence of a definition. In fact, some of the constitutional issues are already surfacing again in the pending Swink litigation.

I respectfully urge that our respective offices and organizations accept the responsibility to provide leadership in addressing this issue with the Arkansas General Assembly. The City of Fort Smith does not have a predetermined position as to the full extent of the definition of public meetings; rather, the interest of the City of Fort Smith is that a definition which properly serves the public be adopted so that Fort Smith public officials and its citizenry can proceed with the conducting of public business in an understood and open manner. We will be pleased to participate in or even host a discussion meeting. Please advise of your interest.

Sincerely,

A handwritten signature in black ink that reads "Ray Gosack". The signature is written in a cursive, slightly slanted style.

Ray Gosack  
City Administrator

E-mail: [rgosack@fortsmithar.gov](mailto:rgosack@fortsmithar.gov)