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State Government—The Arkansas Freedom of Information Act—Houston We Have a Problem: A Coach and a Comptroller Illustrate the Repercussions of Releasing Electronic Information Through the Arkansas Freedom of Information Act

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I. INTRODUCTION

"Justice cannot survive behind walls of silence."[1] This is particularly true in a democratic government, which must necessarily render itself transparent to its citizens so that they may appropriately oversee it to safeguard against corruption and injustice. Without this transparency, a true and free democratic state cannot exist. And this transparency cannot exist without the granting of access to the government's activities. Otherwise, "[a] popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. And a people who mean to be their own [g]overnors must arm themselves with the power which knowledge gives."[2] For Americans, these arms may be acquired through freedom of information statutes.

Freedom of information statutes provide citizens of the nation and the various states with the means to access much of their governments' records.[3] Arkansas created its own version with the Arkansas Freedom of Information Act (the FOIA) in 1967.[4] Since that time, however, much has changed in the ways the government conducts its business. Chief among these is the advent of the "electronic era, which has given rise to a myriad of concerns over access" to governmental records.[5] In the past year, the state of Arkansas has seen two highly publicized scandals that arose out of this tension, as the FOIA has been adapted and interpreted to meet these various concerns.

To understand the breadth of these issues and concerns, several areas must be discussed. First, the FOIA itself will be examined, as its provisions and interpretative models are explored.[6] The difficulty in

4. WATKINS & PELTZ, supra note 3, at 3.
6. See infra Part II.A.
analyzing electronic communications through these models will also be explicated. Next, the scandal involving former University of Arkansas football coach Houston Nutt and his ordeals with the FOIA will be examined. Lastly, the scandal spanning four court cases regarding former Pulaski County Comptroller Ron Quillin will be analyzed to determine the impact of his activities on the FOIA. These events uniquely display both the strengths and the weaknesses of the FOIA, as well as show what may be seen in the future.

II. THE FOIA

"The FOIA is the people's law." Arkansas has adopted "one of the strongest and most comprehensive Freedom of Information Acts in the nation," thereby ensuring that its citizens have access to information at every level of government. This provides a necessary oversight by which Arkansans can monitor the actions of those within the government. First, the actual text and traditional analyses and interpretations associated with the FOIA will be discussed. Next, the various issues and problems that have been caused by adapting the FOIA to electronic communications will be detailed.

A. Provisions, Interpretation, and Analysis

As with all statutory construction, the "cardinal rule is to give full effect to the will of the legislature." With regards to the FOIA statutory scheme, that will is expressed through the FOIA’s purpose:

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7. See infra Part II.B.
8. See infra Part III.
10. See infra Part IV.
12. Id.
13. Id.
14. See infra Part II.A.
15. See infra Part II.B.
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, [the FOIA] is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their officials.¹⁷

This laudable purpose is effectuated through key provisions in the FOIA which grant Arkansas citizens considerable access to the state government, through its records¹⁸ and meetings.¹⁹ The government's records are presumed to be public and open to the state's citizens if they are “maintained in public offices or by public employees within the scope of their employment.”²⁰ This presumption is rebuttable, the burden of which must be carried by the agency resisting disclosure.²¹

The FOIA also ensures that its purpose may not be thwarted by prohibiting the transfer, withdrawal, or destruction of documents in an attempt to prevent their release to the public.²² It further guarantees that Arkansans will have some degree of oversight of their government by requiring that governmental meetings be held in public and that notice of the meetings be given to anyone who requests it.²³

Numerous legal entities provide binding and persuasive authority as to how the FOIA should be interpreted so that its purpose may be realized. Of course, the various judicial courts of the state interpret the statute as any case before them may require. Yet several FOIA issues have yet to be addressed by these courts, leaving a vacuum where guidance is still necessary.²⁴ In these instances, the Arkansas Attorney General often provides instruction. While Arkansas judicial opinions are typically lockstep with the Arkansas Attorney General's

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19. Id. § 25-19-106. While the provisions related to meetings are undoubtedly important when understanding the FOIA, they are beyond the scope of this Comment as they do not relate to the factual circumstances discussed in Parts III and IV infra.
22. WATKINS & PELTZ, supra note 3, at 20–22.
23. ARK. CODE ANN. § 25-19-106. While this ensures oversight, it does not provide for participation; whether a citizen has a right to be heard at public meetings is beyond the FOIA's ambit. WATKINS & PELTZ, supra note 3, at 26. Also, some administrative agencies are governed by specifically-tailored statutes which exempt them from this openness requirement. WATKINS & PELTZ, supra note 3, at 26.
24. WATKINS & PELTZ, supra note 3, at 28.
interpretations of the FOIA, the latter "are not binding and lack the legal force of appellate court decisions." Nonetheless, the Arkansas Attorney General's reading of the statute can be highly persuasive, particularly when a court is resolving a previously unlitigated aspect of the FOIA.

Professors John J. Watkins and Richard J. Peltz have authored a treatise (the "Treatise") on the FOIA that has been highly influential upon both the judiciary and the Arkansas Attorney General's Office for decades. Several of their legal proposals have been adopted by the courts, and the Treatise is frequently cited as persuasive authority on the subject. This extensive and exhaustive treatise is in its fourth edition and is a key asset in understanding the FOIA.

Governmental entities generally adhere to certain guidelines when interpreting the FOIA provisions. Because of the broad purpose behind the FOIA that was geared towards an open government, it should "be liberally interpreted to the end that its praiseworthy purposes may be achieved." Thus, any exceptions to the FOIA's purview are necessarily interpreted narrowly. Courts may deviate somewhat from these general interpretative schemes, however, where common sense dictates an alternative result. Nevertheless, such interpretations will still be consistent with the overall purpose behind FOIA.

Irrelevant to such an analysis, however, is the purpose for which an individual seeks access to a governmental record. "This is because all FOIA requestors have an equal, and equally qualified, right to information." As such, Arkansas law recognizes the norms of requester neutrality and motive immaterially in its analyses and acknowledges that a requestor's personal information is immaterial.

With these general interpretive guidelines in mind, it is necessary to examine whatever the particular circumstances at hand may be. First, it must be determined whether an entity that has been requested

25. WATKINS & PELTZ, supra note 3, at 28.
28. Id. at 406, 432 S.W.2d at 756.
30. WATKINS & PELTZ, supra note 3, at 11.
32. Id.
33. Peltz, Leonard & Andrews, supra note 5, at 706. See also Ark. Op. Att'y Gen. No. 2007-215 (stating that "the FOIA does not afford access to public records by virtue of one's position or status.")
to comply with a provision of the FOIA is in fact subject to the act.\textsuperscript{34}
Next, if that entity is indeed within its ambit, the custodian of records
must determine whether the requested records are subject to release.\textsuperscript{35}
Lastly, if the FOIA does require that the records be released to the
public, the custodian of records must determine whether any legal
limitations apply which prevent the records from being released under
some other form of law.\textsuperscript{36} If a custodian is still unclear as to whether to
comply with the FOIA, he may consult the Attorney General’s office
for assistance.\textsuperscript{37}

1. \textit{Entities Who Must Comply with FOIA Requests}

Initially, an agency must determine whether it is within the pur-
view of the FOIA.\textsuperscript{38} In a very broad sense, “[t]he FOIA applies to all
governmental entities.”\textsuperscript{39} It enumerates several applicable governmen-
tal entities and also contains a catchall provision that extends its applic-
cability to any governmental entity that receives or spends public
funds.\textsuperscript{40} Consequently, even the legislative, executive, and judicial
branches of the government are subject to the FOIA.\textsuperscript{41}

Further, this public funding provision has been extended so that
certain private entities have been found to be subject to the FOIA.\textsuperscript{42}
With that said, determining whether a private entity must comply with
a FOIA request has proven much more complicated in comparison to
public entities. Essentially, the FOIA extends to publicly funded pri-
ivate organizations that share a “symbiotic relationship” with the gov-
ernment.\textsuperscript{43} The statute states that “private organizations . . . supported
wholly or in part by public funds or expending public funds” must
comply with its provisions.\textsuperscript{44} Still, various judicial interpretations of the
FOIA have expanded the requirement into a three-part test, which

\begin{itemize}
  \item \textsuperscript{34} See infra Part II.A.1.
  \item \textsuperscript{35} See infra Part II.A.2.
  \item \textsuperscript{36} See infra Part II.A.3.
  \item \textsuperscript{37} See infra Part II.A.4.
  \item \textsuperscript{38} WATKINS \& PELTZ,\textit{ supra} note 3, at 30.
  \item \textsuperscript{40} Ark. Code Ann. \textit{\$} 25-19-103(5) (LEXIS Supp. 2007); see also WATKINS \&
  PELTZ,\textit{ supra} note 3, at 30.
  \item \textsuperscript{41} WATKINS \& PELTZ,\textit{ supra} note 3 at 33, 35. Administrative agencies with quasijudicial functions are also within FOIA’s ambit. WATKINS \& PELTZ,\textit{ supra} note 3, at
  45.
  \item \textsuperscript{42} WATKINS \& PELTZ,\textit{ supra} note 3, at 30.
  \item \textsuperscript{43} WATKINS \& PELTZ,\textit{ supra} note 3, at 51.
  \item \textsuperscript{44} Ark. Code Ann. \textit{\$} 25-19-103(4); see also WATKINS \& PELTZ,\textit{ supra} note 3 at
  47-8.
\end{itemize}
was first delineated by Professors Watkins and Peltz: “the FOIA applies only to private organizations that (1) receive public funds,\textsuperscript{45} (2) engage in activities that are of public concern, and (3) carry on work that is intertwined with that of government bodies.”\textsuperscript{46} Various courts have justified this extension to private parties because of the additional guarantee that the government will be open and public, and should not escape oversight when it “seeks to conduct its affairs through private entities.”\textsuperscript{47} Otherwise, the government could easily circumvent the FOIA by enlisting private entities to perform its obligations in secret, though those entities would essentially be the government itself.\textsuperscript{48}

2. Records Subject to Release Under FOIA

Once it has been established that an entity, whether public or private, is subject to the FOIA, a citizen may request access to certain records held by that entity. First and foremost, the FOIA is concerned with granting access to records and not necessarily to information.\textsuperscript{49} Initially, the FOIA establishes a presumption that a record is open to public access if it is “maintained in public offices or by public employees within the scope of their employment.”\textsuperscript{50} The government can rebut the presumption only by demonstrating that the record does not indicate either performance or lack of performance of official functions.\textsuperscript{51}

Such public records include:

“writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record

\begin{itemize}
\item \textsuperscript{45} “Public funds means moneys belonging to government, or any department of it, in the hands of a public official.” \textit{Sebastian County Chapter of American Red Cross}, 311 Ark. at 659, 846 S.W.2d at 643.
\item \textsuperscript{46} \textsc{WATKINS \& PELTZ, supra} note 3, at 50. It is unclear how much interrelatedness between the private and public entities is necessary for the former to become subject to FOIA. \textit{Ark. Op. Att’y Gen. No. 92-205} (1992). It is clear, however, that it is subject to FOIA when it “receives public funds for the general support of activities that are closely aligned with those of government.” \textsc{WATKINS \& PELTZ, supra} note 3, at 52.
\item \textsuperscript{47} \textsc{WATKINS \& PELTZ, supra} note 3, at 51.
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
of the performance or lack of performance of official functions.

The FOIA will grant access to such records that have been originated within the agency itself or received from third parties. These records are presumed to be open to the public so long as they are made or received in relation to the agency’s duties. This can be problematic in certain instances, however, because “the personal activities of a public official or employee [may be] inextricably linked to his or her governmental role.”

3. FOIA Limitations

If an entity is within the FOIA’s ambit and the requested records are likewise subject to release under the act, a records custodian must then determine whether the requested information is excepted from release because of some exemption or limitation on release that is external to the FOIA. The limitations may arise from statutory exemptions within the act, constitutional limitations, or limitations arising under federal law.

a. Statutory exemption

The FOIA statutorily exempts certain public records that would otherwise be accessible to Arkansans. As these exemptions are mandatory, a custodian may not release affected records, even in the interest of furthering the overall purpose of the FOIA. Many of these exemptions recognize the privacy interests that are attendant to each record. For example, records containing information relating to state income taxes, medical records, the identities of certain undercover law enforcement officials, and the home addresses of private citizens are exempt from disclosure. Additionally, many exemptions from other statutes are incorporated by reference, such as grand jury minutes,

55. Watkins & Peltz, supra note 3, at 93.
56. See infra Part A.3.a.
57. See infra Part A.3.b.
58. See infra Part A.3.c.
60. See id. § 25-19-105(b).
61. Id. § 25-19-105.
unpublished working materials of members of the executive and judicial branches, and military discharge records.\textsuperscript{62} Lastly, in recognition of its impact on public contracts, the FOIA also exempts commercial records that "would give advantage to competitors or bidders."\textsuperscript{63}

Furthermore, even if a record does contain exempt information in addition to public information, a redacted version of the record that deletes exempted information may be released.\textsuperscript{64}

b. Constitutional limitations

The Arkansas Constitution provides numerous safeguards to protect the privacy rights of individuals.\textsuperscript{65} This constitutional right against the otherwise lawful intrusion of the government can supersede the dictates of the FOIA to protect individual privacy.\textsuperscript{66} However, this right does not encompass every scrap of information that an individual would prefer to keep out of the public domain; rather, the requested record should be released "unless it can be factually established that [to do so] would constitute a clearly unwarranted invasion of . . . personal privacy."\textsuperscript{67} This right to privacy, as endowed by the Arkansas Constitution, applies to information that "(1) an individual wants to and has kept confidential; (2) can be kept confidential but for the challenged governmental action in disclosing information; and (3) would be harmful or embarrassing to a reasonable person if disclosed."\textsuperscript{68} Further, a series of factual inquiries must be conducted: initially, the custodian of the records must examine, on the basis of the facts before him, whether the information is protected; if he so determines, he must weigh the public's legitimate interest in disclosure against the protectable interest.\textsuperscript{69} Naturally, the party protesting the disclosure will have the burden of demonstrating that the privacy interest is guarded by the Constitution.\textsuperscript{70} This analysis aids courts in protecting Arkansans from "clearly unwarranted invasion[s] of personal privacy" that are likewise prohibited under the FOIA.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} § 25-19-105(f)(2).
\item \textsuperscript{70} \textit{Id.}
\end{itemize}
There is no definitive rule for determining whether an invasion of privacy is warranted. Whether disclosure must be made depends upon the nature of the requested record and its relationship to the purpose of the FOIA, which is to ensure an open government.\textsuperscript{72} It is the burden of the party protesting disclosure to establish that his privacy interest outweighs the public's.\textsuperscript{73} As to the privacy interest that weighs in the balance, there is only a "substantial privacy interest in records revealing the intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends."\textsuperscript{74} Further, there is a presumption that the individual's privacy interest is somewhat substantial where there is little public interest to begin with.\textsuperscript{75}

As to whether the public has a compelling public interest in the information's release is factually dependent.\textsuperscript{76} For example, the bureaucratic rank of the employee in the government is relevant.\textsuperscript{77} Additionally, employee activities that undermine the public's trust in the government or compromises the safety of the public are compelling public interests.\textsuperscript{78} Also, Arkansas courts have noted that additional weight should be given to the public's interest where there are allegations of sexual misconduct on the part of the employee.\textsuperscript{79} Lastly, even if records do contain information that is protected by the constitution, such information may be redacted from the record so that only constitutionally disclosable information is released.\textsuperscript{80}

c. Federal law

Federal law exists which may supersede the FOIA and prohibit disclosure of certain information. For example, a public educational institution may lose its federal funding for complying with a FOIA request if it violates the Federal Educational Rights and Privacy Act of 1974 (FERPA). FERPA prohibits disclosure of certain educational records, particularly if it contains personally identifiable information. Additionally, the Federal Freedom of Information Act may prohibit an otherwise permissible release for certain records that are transmitted between state and federal agencies.

4. Assistance from the Arkansas Attorney General's Office

Public officials are permitted to consult with the Arkansas Attorney General's Office when they remain unclear as to whether FOIA compliance is necessary. In certain circumstances, it may be highly advisable for such officials to request and rely upon such opinions because of the likelihood that they will be not be held liable for criminal or civil actions relating to the FOIA response taken. Further, private citizens may seek assistance for issues pertaining to personnel and job evaluation records.

B. The Issues that Arise with Electronic Communication under FOIA

Unfortunately, the FOIA was created for a time still governed by tangible communication when the common law was still wary of electronic media, long before electronic communication would dominate the way people interact with one another. At least part of this tension stemmed from determining whether the manner in which a record is stored may qualitatively alter it, regardless of whether the content

82. Id. FERPA defines "education records" as "records, files, documents and other materials which . . . contain information directly related to a student." 20 U.S.C. 1232(g)(a)(4)(A) (2006).
83. WATKINS & PELTZ, supra note 3 at 14.
84. ARK. CODE ANN. § 25-16-706 (LEXIS Repl. 2002).
85. See WATKINS & PELTZ, supra note 3, at 28.
contained therein has actually changed. This has created considerable confusion as the FOIA has been interpreted to resolve modern problems, causing courts to "look at the present through a rear-view mirror." The General Assembly first addressed this problem when it amended the FOIA in 2001 to reflect the impact of new and evolving communicative technologies. The amendments conformed the FOIA to address a new age in which the government and its affiliates relied heavily upon electronic communication in the "creation, use, and storage of public records." To illustrate the various issues that have arisen during this electronic age, the manner in which access to electronic information may be granted will first be discussed. Next, the particular privacy concerns that have become heightened through the release of electronic information will be detailed.

1. Access to Electronic Communications through FOIA

The FOIA explicitly states that electronic communications are within its purview. This eradicates any lingering doubt, if there was any, that the FOIA applies to records that only exist as electronic data. If the data is duplicable, the FOIA further permits Arkansans to copy these records in any readily available medium. Indeed, the FOIA implicitly encourages the custodian of such records to "compile, tailor, or summarize requested electronic data in an electronic format." It should be noted, however, that the FOIA does not place an affirmative duty on the State or its employees to maintain electronic copies of all of its records.

90. MARSHALL MCLuhan & QUENTIN FIORE, THE MEDIUM IS THE MESSAGE 75 (1967).
91. Peltz, Leonard & Andrews, supra note 5, at 611. The impetus for this amending came primarily from recommendations of the Arkansas Electronic Records Study Commission. Id.
92. ANNAMARY DOUGHERTY, JEFF HARPER, TERRY D. JONES, DREW MASHBURN, AND N.M. NORTON, WHAT YOU NEED TO KNOW ABOUT PUBLIC RECORDS AND MEETINGS IN ARKANSAS 133 (2006).
93. See infra Part II.B.1.
94. See infra Part II.B.2.
95. DOUGHERTY ET AL., supra note 92, at 137.
96. See WATKINS & PELTZ, supra note 3, at 422.
97. See id. at 423.
99. See WATKINS & PELTZ, supra note 3, at 425.
Emails pose especially difficult questions with regards to the release of records through the FOIA due to their ephemeral nature. The Arkansas Attorney General’s Office has nevertheless provided some guidance on the issue. For example, several opinions stated that a series of electronic communications may constitute a “meeting” to which the public must have access. The possibility that a series of emails may constitute a meeting occurs along a spectrum that is highly fact dependent. On one end of the spectrum, emails generally do not constitute a meeting for purposes of FOIA. This is primarily due to the similarity between electronic communication and traditional tangible communication. But many Attorney General opinions have cautioned that, at the other end of the spectrum, a series of interrelated email exchanges can constitute a meeting. For example, such electronic communication may constitute a meeting where a series of emails concerning a single topic between a group of people suggests that the essential deliberations of a meeting are taking place. Unfortunately, the plasticity of this spectrum does not offer much comfort to an agency that is confronted with circumstances or facts that fall in the middle of this spectrum. Nevertheless, various judicial and Attorney General opinions indicate certain factors will tend to demonstrate whether a series of electronic communications do constitute a meeting: where there are signs that public discussion is intentionally being avoided; whether actions that were taken after the communications have been sent would normally be precipitated by a meeting; whether the public was privy to any of the deliberations that gave rise to the e-mails, or the e-mails themselves; and whether the e-mails constitute something more than simply traditional communication or the passive receipt of electronic communications. If such communications do constitute a meeting, the proper public official is required to

100. See Watkins & Peltz, supra note 3, at 433. This is particularly true because such records are routinely deleted by employees. See id. at 432.
106. Id. This ambiguity is likely to persist until the Arkansas Supreme Court has the occasion to offer guidance on this issue. See id.
107. Id.
108. Id.
109. Id.
110. E.g. id.
“provide the requisite public notice and some means for the public to monitor the discussion.”

There is no question, however, that emails are subject to disclosure as records under the FOIA. As with any tangible record that a citizen desires to access, whether a specific e-mail will be subject to disclosure will “depend upon the content of the document and whether it reflects the performance or lack of performance of official functions that are or should be carried out by a public official or employee.” As such, the fact that the recipient of an email is a public employee does not in of itself subject it to the risk of disclosure.

2. *Privacy Concerns*

The established boundaries of an employee’s constitutional right to privacy become much more complicated when dealing with their electronic communiques outside those traditional bounds. This problem is particularly compounded because employee’s typically have an expectation of privacy when communicating through e-mail. This expectation arises because the private and public lives of government employees converge in their various electronic communications, much as with private employees. Initially, the FOIA appears to resolve any privacy issue in this regard because public records are limited to “records of performance or lack of performance of official functions,” which may prevent the disclosure of personal communications. As Professors Watkins and Peltz note, however, “an argument can be made that if an employee is using state computer resources for personal correspondence, that use reflects the ‘lack of performance of official functions,’ either because state computing resources are being misappropriated or because the employee is handling personal matters while on the state clock.” While these experts conclude that such an argument is tenuous at best, its soundness will be examined at length in Part IV. A similarly murky issue arises when a governmental em-

114. Id.
115. Id.
118. See Watkins & Peltz, supra note 3, at 437.
119. See Watkins & Peltz, supra note 3, at 438.
120. See infra Part IV.
ployee conducts public business through his personal computer or e-mail—as the content of a record determines whether it is subject to release under FOIA; such communications are at risk because the form of communication itself is irrelevant.\textsuperscript{121}

It should not be implied, however, that all electronic information is immediately encompassed by the FOIA the moment a public employee comes into contact with it. Rather, an employee's privacy interest still prevails in numerous aspects. For example, public employees' personal email addresses are not subject to release under the FOIA because there is little or no public interest in such information that could override the employees' interest.\textsuperscript{122} Conversely, there is no "privacy interest in work email addresses [that] is substantial enough to override the public's interest" because they do not reflect any intimate details of the employee's life.\textsuperscript{123} These issues and potential problems were fully realized in a series of scandals that demonstrated the many strengths and weaknesses of the FOIA.

III. THE STRENGTH OF THE FOIA: THE HOUSTON NUTT SCANDAL

Razorback sports are an obsession for many Arkansans.\textsuperscript{124} It is the closest thing to a professional sports franchise in the state, and many citizens are proud alums of the University of Arkansas.\textsuperscript{125} Perhaps that is why so many in the state responded so harshly when some strange and scandalous rumors slowly disseminated from Old Main. In a very narrow sense, the scandal is about former University of Arkansas football Coach Houston Nutt, the public's perception of his professional ability (or lack thereof) and his relationship with the fans, competitor universities, and a woman to whom he was not married.\textsuperscript{126} In a much broader context, however, the story is more about Arkansas citizens "using all of the tools at their disposal to demand accountabili-

\textsuperscript{121} See Watkins & Peltz, supra note 3, at 439.
\textsuperscript{123} Id. See also Ark. Op. Att'y Gen. No. 2004-225 (2004) (stating that "it is difficult to conceive of any privacy interest that public employees could assert in their work e-mail addresses.").
\textsuperscript{125} See id. The author is among them.
\textsuperscript{126} Tony Barnhart, Fit to be Hogtied, Atlanta Journal and Constitution, May 31, 2007. "And if you don't know about all of this by now, you've been living either in a cave or in France." Jan Cottingham, Who's Zoomin' Who, Ark. Business, May 21, 2007.
ty from public officials,” for which the FOIA was more than adequate.

A. The Emails

On December 7, 2006, Teresa Prewett exercised what may be kindly referred to as poor judgment and sent an email to then-Arkansas Quarterback Mitch Mustain to express her views about his athletic ability and behavior off of the field. As a booster and close friend of the Nutt family, Prewett felt compelled to convey her dissatisfaction with Mustain, as well as her desire that he quit the team. The email was largely incited by a book that had recently been published about Mustain in which he allegedly made disparaging comments towards Nutt. This e-mail was rife with invective and personal insults against the eighteen year-old freshman. Given the somewhat tense relationship between Mustain and Nutt, some theorized that the coach encouraged or at least condoned the e-mail.

Indeed, given prior related incidents, it would seem disingenuous for Nutt to suggest that he had no knowledge whatsoever of Prewett’s hostility towards Mustain and his immediate family. In May 2006, a

127. Barnhart, supra note 126.
128. Cottingham, supra note 126. Prewett sent a copy of this email to both Coach Nutt’s wife, Diana, as well as his brother, Danny Nutt, who was the running backs coach for the Razorbacks. Id.; see also Mark Minton, Truth-Seeking or Fan Interference? A New Breed of Razorback Fan has Gone From Mere Spectator to Actively Investigating Coaches, ARK. DEMOCRAT-GAZETTE, April 17, 2007. Mustain was the USA TODAY’s National High School Offensive Player of the Year. Kelly Whiteside, At Arkansas, Turmoil Becomes Norm—Athletics Endures Six-Month Saga, USA TODAY, May 29, 2007.
129. Cottingham, supra note 126. This e-mail was sent one day after a similar one had been sent to sports editorialist Wally Hall, which had condemned his coverage of Razorback football. Id.
130. Whiteside, supra note 128.
131. Whiteside, supra note 128. An excerpt from the e-mail:

  Competition scares the shit out of you, doesn’t it little boy? Please transfer. All you’ve been since you walked onto campus is a cancer . . . Why is it that you came to Arkansas again? Was it so your mommie could be close by to change your diaper, or was it because you thought having [Offensive Coordinator Gus Malzahn] on the sideline would make playing the SEC easier?

Whiteside, supra note 128.
similarly-derogatory e-mail was sent from Nutt's personal email account to Prewett's roommate, Sherri Darby. The e-mail described an incident in which Mustain's mother, Beck Campbell, had been severely battered and was written in a gloating and mocking tone. The e-mail concluded with the author expressing a desire to have assisted with the assault. The authorship of this e-mail remains in question because of the absence of any formal investigation into the physical computers owned by the Nutts and Darby. Indeed, Darby even gloated that no one could prove one way or another who had actually sent the e-mail "[u]nless the police [came] into our house and [Houston’s brother, Danny Nutt’s] house and [took] the computers." On January 5 of the following year, Campbell took action in the interest of Mustain's well-being and forwarded Prewett's e-mail to the University of Arkansas Chancellor John White. White immediately promised decisive action and directed Razorbacks Athletic Director Frank Broyles to look into the incident. Interestingly, White also directed Nutt to assist with the investigation, despite his known association and familiarity with Prewett, because Nutt denied having any prior knowledge of the email. Shortly thereafter, Prewett wrote an

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133. Mike Masterson, *Questions Remain*, ARK. DEMOCRAT-GAZETTE, Nov. 13, 2007. Coach Nutt has denied sending the e-mail, "which leaves dangling the question of who did." *Id.* While Coach Nutt has denied responsibility for authoring the e-mail, he has admitted that it was also sent to an e-mail address used by his wife, Diana.


135. Masterson, *supra* note 133. An excerpt from the email:

Did you know she [Mustain's mother] once lived in Fayetteville? You probably already know that she has rental property and that's how she makes her living. Anyway, some renters beat the shit out of her several years back so she moved to Springdale and claims she HATES Fayetteville because of that. Of course the renters went to jail, but I wish I were one of them, do you blame them?

Masterson, *supra* note 133.


137. *Id.* This activity has not gone unnoticed. Attorney Eddie Christian, Jr. has alleged in a related lawsuit that this e-mail "points to a cover-up by key witnesses in the case stemming from an e-mail sent in December to Mitch Mustain." *Id.*


139. *Id.*

apology letter expressing regret for the e-mail. White also charged Nutt with reprimanding Prewett over the incident—Nutt responded with relatively minor sanctions. Satisfied with the matter, White contacted Campbell to officially condemn the e-mail and to assure her that Nutt had taken appropriate action.

Campbell, however, was far from satisfied. She again contacted White to demand that the university conduct a full investigation into the incident. In the midst of this turmoil and scandal, several concerned outsiders began to use everything at their disposal to uncover the truth. Foremost amongst this arsenal was the FOIA.

B. The FOIA Requests

The first, and expected, FOIA requests related to this matter came through Mustain's attorney, Tim Hutchinson. Presumably, these requests were simply to garner more information into the incidents directly affecting the freshman's scholastic and athletic activities. The next, and unforeseen, FOIA requests came from Thomas McAfee, "a fresh-faced, clean-cut 28-year-old" who would likely consider himself among the "obsessed" Razorback fans. McAfee wrote a simple, yet broad, FOIA request to the university for copies of all communications between Nutt, his brother, and Prewett over several months preceding the publicized e-mail to Mustain. Among the communications that were subject to release under FOIA were Nutt's telephone records from University of Arkansas cell phones. Rather than filtering through Nutt's doubtlessly immense records for those specifically requested, the university simply sent all of them to McA-

141. Cook, supra note 138.
142. Cook, supra note 138. These sanctions included a letter of reprimand, as well as being barred from the sidelines during football games. Cook, supra note 138; Ron Higgins, Hogs Coach Standing Strong—Nutt Determined to Weather Recent Strife, MEMPHIS COMMERCIAL APPEAL, Apr. 27, 2007.
143. Givens, supra note 140.
144. E.g. Bradford, supra note 133.
145. Bradford, supra note 133.
146. Wally Hall, UA Doing Nothing to Delete Emailgate Debate, ARK. DEMOCRAT-GAZETTE, Nov. 8, 2007. Tim Hutchinson is a member of the Williams and Hutchinson law firm. Givens, supra note 140.
147. E.g. Givens, supra note 140.
148. Cottingham, supra note 126.
149. Minton, supra note 128. McAfee expressly stated that "[t]his correspondence between the Nutts and Prewett would include emails, letters, records of phone calls, text messages, and what dates they were made." Minton, supra note 128.
150. Harris, supra note 132.
fee. In retrospect, this time-saving decision proved to have grave consequences for Nutt and his family.

Almost immediately, McAfee noticed a phone number amongst the records that Nutt frequently contacted. Eventually, the number was revealed to belong to Donna Bragg, a news reporter from Fort Smith. Nutt had exchanged more than 1,000 calls or text messages with Bragg in just a two month period. While the frequency of the communications seemed curious, the contents of the messages themselves remain a mystery as Nutt claimed the messages could no longer be retrieved. Nutt, however, claimed that the frequent communications were devoted to a non-profit organization with which the two were involved, and that Bragg was merely a friend. Intrigued by the wealth of information he had acquired through FOIA, McAfee began to distribute these records amongst his friends, and a forty-eight page “mystery report” surfaced shortly thereafter.

C. The Mystery Report

The mystery report compiled information from the requested records, as well as media reports of the ongoing debacle. It culled the various records and organized them into three principle areas: the communications between Nutt and Prewett; the voluminous exchanges between Nutt and Bragg; and certain isolated phone calls that Nutt made to athletic officials at two separate universities, each of which had recently opened up coaching positions. The mystery report quickly disseminated on message boards for sports discussion on the internet, and McAfee emailed his own findings to White, the Uni-

152. Upshaw, supra note 151.
153. See Harris, supra note 132.
154. See Higgins, supra note 142.
155. Harris, supra note 132. One of these text messages was sent twenty-seven minutes before the kickoff of the Capitol One Bowl on January 1. Id. While the exact language of the message remains undisclosed, Bragg claims to have told Nutt to “[w]atch our warriors play with all their heart and spirit and win.” Minton, supra note 128. The Razorbacks lost 17-14 to Wisconsin. Harris, supra note 132.
156. Harris, supra note 132.
157. Id.
158. Cottingham, supra note 126. McAfee denies creating the report and has declined to name who its author or authors may be. Cottingham, supra note 126.
159. Minton, supra note 128.
160. Minton, supra note 128.
versity of Arkansas Trustees, and the University of Arkansas System President B. Alan Sugg. Almost immediately, Nutt retained Byron Freeland as counsel to allege that McAfee had defamed the coach and illegally interfered with his contract with the university and demanded a meeting with the enthusiastic fan to discuss what had happened. McAfee then readied himself for an emotional showdown with the coach.

On May 3, the two, along with Houston's wife, Diana, gathered for a terse and brief meeting. Each had made several demands of the other, though neither conceded: McAfee wanted Nutt to produce a transcript of his text messages with Bragg or to provide access to the memory chip in his phone; Nutt demanded to know if someone had urged McAfee to pursue the matter and specifically whether McAfee had had any discussions with Mustain. While Nutt was willing to let McAfee physically inspect the phone within the meeting, he would not surrender its internal memory card that contained the phone's stored information; McAfee denied having had any external influences, from Mustain or otherwise. The meeting thus ended at a stalemate, with Diana accusing McAfee of trying to humiliate her family.

D. Impact of the FOIA Requests

On April 24, attorney John A. Terry filed a public exaction suit against the university and its officials, charging that tax dollars had been "wasted, misused, misapplied and wrongfully or illegally spent" because of the way the email investigation had been handled. Terry

161. Harris, supra note 132.
163. Minton, supra note 132. McAfee retained Nate Coulter of Little Rock. Harris, supra note 132.
164. See Upshaw, supra note 151. While Coulter tactfully described the meeting as "candid," he dryly noted that McAfee did not ask for Nutt's autograph. Id.
165. Minton, supra note 132.
166. Id. The SIM card was particularly desirable because Nutt claimed that he did not have access to the messages and his phone company was unable to provide them; yet a computer forensics expert may have been able to retrieve messages that had been deleted. See Editorial, Nutt Defends Text Message Mania with Female Anchor, CAPITAL TIMES, Apr. 18, 2007. One such expert, Christopher Taylor, noted that it was "definitely possible." Minton, supra note 132.
167. Minton, supra note 132.
168. E.g. Bradford, supra note 133; Associated Press, Hogs Try to Quash Fan's Plan, MEMPHIS COMMERCIAL APPEAL, May 6, 2007. Essentially, the suit alleged that
filed subpoenas to acquire physical access to the cell phones and hard drives which had already yielded much information through standard FOIA requests. In response to the ongoing scandal, mounting lawsuits, and unresolved issues that had been exacerbated by Nutt's unwillingness to cooperate, Razorback fans revolted. They flew banners over football games that mocked the coach, much to the cheers of the fans below. Nutt, however, proclaimed that he was not giving any serious thought to resigning. Nutt complained about the public's access to his records, deriding the entire process as "ridiculous." Nutt also became antagonistic with media outlets that frequently questioned him about the possibility of resigning, and he even became so emboldened as to confidently point out that his coaching contract did not end until 2012. But the damage had been done: Nutt resigned on November 26 after ten seasons with the Razorbacks, and only a matter of months since the FOIA requests had begun to pour in. He blamed his departure on family concerns and disloyal fans, and accepted a coaching position at the University of Mississippi the very next day. Nutt's long and prestigious career had ended abruptly and sourly, giving that much more credence to the power behind the FOIA, as well as ample reason to examine its lasting effects from this scandal.
E. The Strength of the FOIA

If nothing else, this debacle illustrates the powerful effects that can result through the use of the FOIA. But it has also been instructive in other ways. Many have found much encouragement in the saga, as they believed that the state’s citizens properly exercised their rights through the FOIA to uncover the truth behind their government’s activities. Further, the episode served as an interesting educational tool for both the parties involved and the public at large, who were largely uninformed about the mechanics and even the existence of the FOIA.

This lesson did not come without a price, however. McAfee and his family received death threats in response to his utilization of his rights as an Arkansas citizen. Mustain and other gifted players from the Razorback football team transferred to other schools, after having played only one season with the team. And University officials offered resoundingly negative responses to the entire ordeal. Without mincing words, White stated that he was “embarrassed for our state.” Broyles went so far as to allege that many fans had engaged in “evil, sinful, un-Christianlike things.” Nutt, who resigned in the face of the mounting scandal without any unequivocal evidence that he had acted improperly, strongly resented Arkansas fans use of the FOIA, calling it “overboard,” “crazy, and stupid.”

In fact, several comments from the university’s officials have indicated that they are now more concerned with dodging the FOIA than with rectifying the incidences that led to this scandal. For example,
Nutt stated that the biggest lesson he learned was that he should not have used a cell phone purchased by tax dollars. Further, White claimed that he would put "nothing in writing" nor use his university-issued cellphone when conducting a search for a new athletics director. Others have simply noted that the lesson these officials will take away is to avoid University phones and avoid FOIA requests.

It is interesting to note the role of the Razorback Foundation may play in this scenario if some officials attempt to dodge the FOIA. The Razorback Foundation is a private organization that raises money for the University, and exclusively acquires and sells tickets to all of the university's athletic activities. It essentially operates, however, under the influence of the university. In the aftermath of the scandal, a rumor began to circulate that many of the university's records had been reallocated to the Razorback Foundation to remove them from the reach of the FOIA.

But university officials would be foolish to attempt such a maneuver: under these or similar circumstances, the Razorback Foundation would unequivocally be subject to the FOIA under these circumstances. The FOIA expressly anticipates such a situation, and it guarantees that a governmental agency may not thwart its purpose by transferring its records outside of the agency in order to prevent its release to the public. Unfortunately, this hypothetical is not bound within the imaginary. As will be seen, the various governmental bodies of Arkansas have been all too willing to circumvent to the FOIA and prevent Arkansans from realizing a truly transparent government.

IV. THE WEAKNESS OF THE FOIA: THE RON QUILLIN SCANDAL

In January of 2007, a reporter for the Arkansas Democrat-Gazette presciently wondered whether "there [was] something We the People of Pulaski County [were not] being told about our county government?" Within months, that question was answered in a resounding affirmative, as a story involving corruption, embezzlement, and sex

185. Haisten, supra note 171.
186. Whiteside, supra note 128.
188. http://www.razorbackfoundation.net/foundation.htm
189. Essentially, "the [Razorback Foundation's] role is to support whatever the [university] wants to do." Blomely, supra note 175.
190. Harris, supra note 132. University officials have denied this rumor. Harris, supra note 132.
began to unfold. Yet a much graver problem surfaced when the story was almost hidden from the public due to the government's interference with Arkansans' right to oversee their government's activities. After an array of FOIA requests was issued, two appeals were made to the Arkansas Supreme Court, and countless dollars in litigation costs were expended, the truth had been uncovered. The truth behind former Pulaski County Comptroller Ron Quillin, who betrayed the trust of his family, friends, co-workers, and the taxpayers to pursue an adulterous affair that cost the county tens of thousands of dollars. But perhaps the greatest damage was done to the FOIA, which the Arkansas Supreme Court sharply limited as it unsuccessfully tried to determine how electronic communications should be analyzed through the FOIA.

A. The Affair

Quillin began his duties as acting comptroller in August 2000. Despite misgivings about his qualifications, he was entrusted with administering Pulaski County's $60 million dollar budget after earning the trust of his superiors through his thirteen years of service with the county government. To assist with managing the finances of the county, Quillin engaged the services of Government e-Management Solutions (GEMS). He proceeded to orchestrate a contract on behalf of Pulaski County with GEMS worth over one million dollars. It was through this contractual relationship that Quillin would begin one of a more personal nature, with GEMS Director of Client Services Cheryl Zeier.

194. At least one person opined that Quillin “didn’t know what he was doing.” Id. Regardless of his level of competence, Quillin had a varied criminal history: he once battered his wife (with whom he had entered into a bigamous marriage), he was convicted of drunken driving, and portentously, had committed forgery by illegally writing checks from his family's bank account. Upshaw & Murphy, supra note 192.
195. Upshaw & Murphy, supra note 192.
196. Upshaw & Murphy, supra note 192.
197. Amy Upshaw, E-Mails Show Try to Bypass Rules, ARK. DEMOCRAT-GAZETTE, Oct. 14, 2007. It does not appear that the formation of this contract was made through Quillin's improper influence, despite its eventual outcome. Id.
198. Upshaw & Murphy, supra note 192.
The two initially constrained their relationship to work purposes, but it was not long before each expressed a desire to pair business with pleasure. Zeier eventually made a business trip to Little Rock to see Quillin, and an affair quickly commenced. But Quillin did not have the financial resources to support both himself and his new long distance affair, so, he began to steal.

First, Quillin siphoned funds from a county bank account for which he was serving as an officer. Next, Quillin scheduled out-of-town conferences to meet up with Zeier, all on the county’s tab. It was also during this time that he used a “county cell phone to text sexually graphic conversations, which he later forwarded to his government email account.” The two frequently discussed—while on the taxpayer’s dime—in graphic detail the sexual acts in which they wanted to participate. The messages also contained numerous photographs of women’s clothing and jewelry that Quillin offered to buy Zeier, even though it would “drastically diminish the sugar daddy reserve.”

199. Upshaw & Murphy, supra note 192.
200. Upshaw & Murphy, supra note 192.
201. Upshaw & Murphy, supra note 192. The two met, along with coworkers, at a local bar in Little Rock, Arkansas. Upshaw & Murphy, supra note 192. It was at this early stage that one of Quillin’s associates already noticed that there was an inappropriate relationship between the two, when she “felt Zeier’s legs moving up until her feet landed in Quillin’s lap under the table.” Upshaw & Murphy, supra note 192.
202. Upshaw & Murphy, supra note 192.
203. Upshaw & Murphy, supra note 192.
204. Upshaw & Murphy, supra note 192.
205. Kristin Netterstrom & Amy Upshaw, Quillin E-Mails Released, Show Steamy Affair—Messages Reveal Pair Making Plans to Meet, Trading Photos, ARK. DEMOCRAT-GAZETTE, Oct. 9, 2007. Quillin and Zeier met on one such trip in Reno, Nevada. Upshaw & Murphy, supra note 192. This vacation, arranged at the county’s expense, succeeded in wooing Zeier, who later recalled “enjoy[ing] reliving those memories and making more new ones.” Upshaw & Murphy, supra note 192. Quillin even slimmed down enough to lose his “double chin.” Upshaw & Murphy, supra note 192.
207. Upshaw & Murphy, supra note 192. For example: “I just can’t get enough of making love to you and feeling your sensual body against mine!” and “the sex with you is always mind blowing,” (Kristin Netterstrom & Van Jensen, Account Left Open Pointed to Quillin—Colleague Noticed ‘Unfamiliar Activity’, ARK. DEMOCRAT-GAZETTE, June 17, 2007); and “I want to make love to you!” (Netterstrom & Upshaw, supra note 205.)
208. Netterstrom & Upshaw, supra note 205.
Unfortunately, the affair blinded Quillin to the impending financial crisis that faced the Pulaski County "sugar daddy reserve." Quillin's revenue projections for Pulaski County were inexcusably incorrect, and the county entered into dire financial straits. This time would come to be known as "the crisis." But Quillin's dismal performance with the government was clearly not enough to hinder him, as he shortly became the chief financial officer of Medicaid at the Department of Health and Human Services.

Quillin would not have long to enjoy his new position, however. Immediately upon his departure as comptroller, his former coworkers began discovering irregularities in various county checking accounts. The county began to investigate Quillin's past activities, and it quickly became obvious that he had stolen taxpayers' money. The office contacted the prosecuting attorney's office to apprise them of the embezzlement, and a warrant was quickly issued. On June 4, 2007, Quillin was arrested without incident. He was formally charged with several felonies relating to his embezzlement of over $42,000.00 in county funds, as well as the misdemeanor offense of abuse of office. While this scandal ended with Quillin entering a guilty plea in exchange for a twenty-year prison sentence and court-ordered restitution, his steamy messages had caused a new scandal to boil.

209. Upshaw & Murphy, supra note 192.
210. Upshaw & Murphy, supra note 192.
211. Upshaw & Murphy, supra note 192.
212. Upshaw & Murphy, supra note 192.
214. Upshaw & Murphy, supra note 192.
215. Upshaw & Murphy, supra note 192.
216. Upshaw & Murphy, supra note 192. Though without incident, the arrest was certainly tense: Quillin was "bobbing his head in resignation," and the arresting deputies stated they "were about to totally obliterate his entire world" and feared that Quillin was a danger to himself. Upshaw & Murphy, supra note 192.
218. John Lynch, Quillin Admits Stealing $42,954—Ex-Official Gets 20-Year Term, ARK. DEMOCRAT-GAZETTE, Sep. 29, 2007. Quillin and his wife sold their home in attempts to repay the county. Id.
B. The FOIA Requests

In an effort to determine the impetus behind Quillin’s embezzlement, the Arkansas Democrat-Gazette, which publishes the state’s most widely circulated newspaper, issued a broad FOIA request to the county for any messages exchanged between the former comptroller and all GEMS personnel. While the county acquiesced in releasing a portion of the messages, some 660 others were withheld because they were deemed to be “personal.” County Judge Buddy Villines claimed that “county employees have a right to privacy and that the messages had nothing to do with county business.” In the interest of uncovering the truth and providing the information to the public, the newspaper brought suit against Pulaski County to compel the government to comply with FOIA.

C. Quillin I

The matter was brought before Circuit Judge Mary McGowan. Judge McGowan made several findings of fact and law regarding the matter, and she placed particular focus on the emails within the context of the business and personal relationship between Quillin and Zeier. Initially, Judge McGowan noted that while Zeier may have had a protectable privacy interest in another context, “any such hope or expectation was lost when the [e-mails] were exchanged on [Quillin’s] government email account.” Judge McGowan then noted the

219. Meredith Oakley, Faith in Court Remains Shaken, ARK. DEMOCRAT-GAZETTE, Oct. 7, 2007. The county was able to restore the messages despite his attempts to delete all of them upon his departure. Lynch & Netterstrom, supra note 213. As a matter of internal policy, the county makes backups of the messages of all department heads in the event that their successors will need the information. Kristin Netterstrom, Quillin’s Emails Ordered Released—Two of 600-Plus Deemed Too Racy, ARK. DEMOCRAT-GAZETTE, Aug. 3, 2007.

220. Oakley, supra note 219.

221. Lynch & Netterstrom, supra note 213. As a reporter with the Arkansas Democrat-Gazette stated, the county might as well have claimed that the emails were “none of the public’s business.” Meredith Oakley, ‘Personal’ Doesn’t Mean ‘Private’, ARK. DEMOCRAT-GAZETTE, June 17, 2007.

222. See Oakley, supra note 219.


225. Id. Further, any privacy interest would have greatly outweighed the public’s right to access the records, as their interests were “paramount” in this case. Id.
presumption that the e-mails were public records because they were maintained in a public office by a public employee within the scope of governmental employment.\(^{226}\) Furthermore, the county failed to rebut this presumption because the records were not proffered to the court. Without being able to examine the e-mails themselves, Judge McGowan next declared that the taxpayers had a right to know whether Quillin’s adulterous affair had impaired his duties as an officer for the government.\(^{227}\) She justified this decision by noting that it was "impossible" to separate the personal emails from the business emails because both were so intertwined with one another, particularly because of the possibility that "[t]he personal relationship may have influenced [Quillin] in expenditures of funds of Pulaski County."\(^{228}\) Therefore, Judge McGowan ruled that emails exchanged between Quillin and Zeier were public records because the county could not prove otherwise.\(^{229}\) Judge McGowan ordered the release of the emails, with the exception of certain messages containing sexually graphic photos.\(^{230}\) Pulaski County immediately appealed to the Supreme Court of Arkansas.\(^{231}\)

D. Quillin II

On appeal, the Arkansas Supreme Court stated that the primary contested issue was whether the e-mails were public records under the FOIA.\(^{232}\) The court noted that it generally construes the FOIA broadly to provide greater public access to governmental records, but that this general proposition must be constrained by a "common sense approach."\(^{233}\) The court, in relying upon reasoning offered in the Treatise, determined that the FOIA should only apply to "those records made or received 'in connection with' or 'relating to' the agency’s duties." In the context of personal emails sent and received through governmental accounts, the court further took notice of Professors Watkins’s and Peltz’s suggestion that the "to", "from," and "subject" fields of the messages can be examined to determine whether the

\(^{226}\) Id. at *4.

\(^{227}\) Id.

\(^{228}\) Id. at *3.


\(^{230}\) Id.

\(^{231}\) Oakley, supra note 219.


\(^{233}\) Id. at 440, 260 S.W.3d at 721.
records constitute a lack of performance that would subject the records to release.\textsuperscript{234} The court then looked to other jurisdictions’ handling of similar matters for guidance.\textsuperscript{235} The court noted that other state supreme courts have utilized "a content-driven analysis in determining whether a document is a public record" because mere possession of a document by an agency should not in of itself be determinative of its status as a public record.\textsuperscript{236} Pulaski County argued in favor of such an analysis, and it reasoned that it could not be properly conducted without an in-camera review by a trial court.\textsuperscript{237} Lastly, the court also noted that this approach had been approved by Professors Watkins and Peltz in the Treatise.\textsuperscript{238}

The court agreed and held that an in camera review was necessary.\textsuperscript{239} The court stated that the status of the e-mails as a public record could only be determined by examining their content rather than the context in which they were sent. Essentially, the electronic communications would only be declared public records if they had a "substantial nexus" with the employee’s governmental responsibilities.\textsuperscript{240} As such, the court opined that such a factual review of the content of the e-mails was necessary to determine whether there was an appropriate nexus between the personal and business relationship between Quillin and Zeier to necessitate their release through the FOIA.\textsuperscript{241} With that determination, the divided court ordered the trial judge to review all 660 messages that the county had withheld to determine which were public records and should therefore be released.\textsuperscript{242} Villines claimed this ruling as a victory, claiming that his goal had always been "a review by an independent party."\textsuperscript{243}

The dissenting justices heavily criticized the majority’s reliance on secondary authority in rendering its decision.\textsuperscript{244} These justices stated

\begin{itemize}
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id. at 441, 260 S.W.3d at 722.
  \item \textsuperscript{236} Id. at 441-43, 260 S.W.3d at 722-23.
  \item \textsuperscript{237} Id. at 443-44, 260 S.W.3d at 723-24.
  \item \textsuperscript{238} Quillin II, 370 Ark. 435, 444, 260 S.W.3d 718, 724 (2007).
  \item \textsuperscript{239} Id. at 446, 260 S.W.3d at 725.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id.
  \item \textsuperscript{242} Oakley, supra note 219.
  \item \textsuperscript{243} Kristin Netterstrom, Justices Partition Quillin's E-Mails—Review by Judge to Pick Public Ones, ARK. DEMOCRAT-GAZETTE, July 21, 2007. It is interesting to note that the county never sought review of the matter by the Arkansas Attorney General's Office, the independent party that typically reviews such matters.
  \item \textsuperscript{244} See Quillin II, 370 Ark. 435, 450 & n.1, 260 S.W.3d 718, 728 & n.1 (2007).
\end{itemize}
that the extra-jurisdictional cases relied upon by the majority were based upon interpretations of "public records" that greatly vary from the FOIA, making reliance upon them inappropriate.\(^{245}\) Furthermore, the dissenting justices claimed that the FOIA and the case law pertaining to its analysis is "so clear, so positive, that there is hardly any need for interpretation."\(^{246}\) As such, they stated that the FOIA's express statement that records held by public employees are presumed to be accessible by the public, and that Pulaski County made no attempt whatsoever to rebut that presumption.\(^{247}\) Because of the failure to do so, the dissenting justices argued that "remanding the matter for an in camera examination was unwarranted and a complete waste of time."\(^ {248}\)

E. **Quillin III**

To complete the task set by the Arkansas Supreme Court, Judge McGowan combed through printouts of all of the emails from Quillin's county computer.\(^ {249}\) Judge McGowan stated that the e-mails evidenced a highly enmeshed business and sexual relationship between Quillin and Zeier.\(^ {250}\) This level of intertwining made it "impossible to discern which emails or parts of emails were strictly personal or business because they were often mixed together."\(^ {251}\) Judge McGowan then cited several emails to support this claim, all of which "indicate[d] that Quillin favor[ed] Zeier regarding business besides pleasure."\(^ {252}\) There were also several suspect emails indicating that Quillin

\(^ {245}\) Id. at 447, 450, 260 S.W.3d at 726, 728 (Imber, J., dissenting).

\(^ {246}\) Id. at 448, 260 S.W.3d at 727 (quoting City of Fayetteville v. Edmark, 304 Ark. 179, 185, 801 S.W.2d 275, 278 (1990)) (Glaze, J., dissenting).

\(^ {247}\) Id. at 448-49, 260 S.W.3d at 727-28 (Glaze, J. dissenting).

\(^ {248}\) Id. at 449, 260 S.W.3d at 728 (Glaze, J. dissenting).

\(^ {249}\) Netterstrom, *supra* note 219. Judge McGowan acerbically noted that it would have been interesting for her to rule that the emails were personal, because many had already been divulged to the Arkansas Democrat-Gazette. Kristin Netterstrom, *Will Be Tough to Decide What's Public, Judge Says of 600 E-Mails—Ex-Comptroller's Records Under Examination*, ARK. DEMOCRAT-GAZETTE, July 25, 2007.


\(^ {251}\) Kristin Netterstrom, *Quillin's E-Mails Public Records, Justices Declare—County's Second Appeal Fails*, ARK. DEMOCRAT-GAZETTE, Oct. 5, 2007. Judge McGowan nevertheless found some e-mails more easier to discern than others:  

 Zeier: "I'm purring as I write type."

 Quillin: "Oooh baby! You know what ur purring makes me do and what I think about. Hard firm tongue pressed against u, just waiting for ur body to shutter [sic]!"

 Oakley, *supra* note 206.

\(^ {252}\) *Quillin III*, 2007 WL 4739693, at 5. For example, Quillin wrote the following
had purchased jewelry for Zeier, which may or may not have been purchased with public funds.\textsuperscript{253} Further, "the overwhelming majority of the emails were written during business hours on business days." Judge McGowan therefore concluded that these emails were a record of Quillin’s performance or lack of performance and should be made available to the public. She excluded without explanation, however, certain emails containing sexually graphic photos of Quillin and Zeier.\textsuperscript{255}

Villines’s ultimate goal of attaining independent review was apparently not achieved by this in camera review that had been conducted by an impartial party: he directed the county to immediately appeal the decision and to request a stay on the ordered release until the Arkansas Supreme Court could hear the matter again.\textsuperscript{256}

F. Quillin IV

1. Majority Opinion

The majority opinion, authored by Justice Gunter, agreed with Judge McGowan that Zeier had waived her privacy interests, and affirmed the circuit court’s order to release the records.\textsuperscript{257} The court first dealt with Zeier’s privacy arguments.\textsuperscript{258} She argued that her reputation would have been irreparably damaged if the e-mails had been released because of their personal content, which in and of itself would consti-

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\textsuperscript{253} Id. at 5–6.
\textsuperscript{254} Id. at 11.
\textsuperscript{255} Id. at 12.; Netterstrom, supra note 250.
\textsuperscript{256} Netterstrom, supra note 219. Villines now stated that he did not want to violate any governmental employees’ right to privacy and that the government did not have “a clear definition of what a public record is.” Netterstrom, supra note 219.
\textsuperscript{258} Id. at 219–20, 264 S.W.3d at 467.
tute an unconstitutional invasion of privacy.\textsuperscript{259} The court quickly dismissed this claim, stating that Zeier was aware of the risk that the e-mails could become public, and she willfully disregarded that risk.\textsuperscript{260} Zeier continued to transmit and receive sexual messages to and from Quillin on private business and county email accounts and thus forsook any expectation of privacy she might have otherwise claimed.\textsuperscript{261} Indeed, Zeier was patently aware of the risk associated with sending such communications to Quillin’s government account because she playfully admonished him for sending sexually explicit material through work e-mail.\textsuperscript{262}

Next, the court addressed Pulaski County’s argument that the \textit{Quillin II} mandate—to examine the content and not the context of the e-mails—had been violated by Judge McGowan in \textit{Quillin III}.\textsuperscript{263} The majority disagreed, noting that Judge McGowan had apparently “reviewed each e-mail for content as instructed.”\textsuperscript{264} Furthermore, the county’s argument to the contrary was baseless because there was nothing in the record to indicate that Judge McGowan had not followed the court’s prior mandate.\textsuperscript{265} Thus, nearly four months after the Arkansas Democrat-Gazette initially filed its FOIA request with the county,\textsuperscript{266} the court dismissed the county’s contentions that the e-mails had been improperly reviewed at the circuit court level.\textsuperscript{267} The court took great care to caution that the mere presence of an e-mail on a county computer did not automatically render it a public record and that the context of the e-mail still governed its status.\textsuperscript{268}

2. \textit{The Dissenting Opinion}

The dissenting justices, however, were far from finished with the matter. Several justices issued vociferous opinions to discuss their frustration and disagreement with the court’s general handling of the matter since its inception.

\textsuperscript{259} Id.
\textsuperscript{260} Id. at 221, 264 S.W.3d at 468.
\textsuperscript{261} Id. Zeier promptly hung up on a reporter who asked for her comment on the judge’s ruling. Netterstrom, \textit{supra} note 250.
\textsuperscript{262} \textit{Quillin IV}, 371 Ark. 217, 221, 264 S.W.3d 465, 468 (2007).
\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
\textsuperscript{266} Netterstrom, \textit{supra} note 250.
\textsuperscript{267} \textit{Quillin IV}, 371 Ark. At 221–22, 264 S.W.3d at 468.
\textsuperscript{268} Netterstrom, \textit{supra} note 250.
Justice Danielson wrote a dissenting opinion to present his position that the Supreme Court had completely disregarded the will of the people, as espoused by the General Assembly.\textsuperscript{269} Justice Danielson stated that the legislature explicitly mandated that an e-mail is presumed to be a "public record if it does not constitute a record of an employee's performance or lack of performance of official functions."\textsuperscript{270} As Pulaski County did not rebut that presumption, the matter should never have been remanded to the circuit court for further review.\textsuperscript{271}

Justice Danielson also offered what he believed to have been a proper analysis of the issue at hand.\textsuperscript{272} While he would have reached a substantively similar result as Judge McGowan at the circuit level, Justice Danielson stated that the consideration of whether the e-mails were private or sexually graphic was completely inappropriate.\textsuperscript{273} Justice Danielson opined that because the statutory language of FOIA does not account for such considerations, they should be abandoned before conducting a FOIA analysis.\textsuperscript{274} Rather, "the sole consideration is whether the record itself constitutes a record of the performance or lack of performance of a public official."\textsuperscript{275} For these reasons, Justice Danielson would have ordered the release of all of the e-mails under FOIA, including the sexually graphic messages.\textsuperscript{276}

Justice Glaze also "took issue with the manner in which Justices Jim Hannah, Jim Gunter, Donald Corbin, and Robert Brown handled the case" when it had come before the court three months prior.\textsuperscript{277}

\textsuperscript{269} Quillin IV, 371 Ark. at 222, 264 S.W.3d at 469 (Danielson, J., concurring in part, dissenting in part).
\textsuperscript{270} Id. at 223, 264 S.W.3d at 469 (Danielson, J., concurring in part, dissenting in part). Justice Danielson did caution that he was "in no way stating that every email sent from or delivered to a government computer or government email account constitutes a public record under the FOIA.... [Rather], those decisions must be made on a case by case basis." Id. at 224, 264 S.W.3d at 470 (Danielson, J., concurring in part, dissenting in part).
\textsuperscript{271} Id. at 223, 264 S.W.3d at 469 (Danielson, J., concurring in part, dissenting in part).
\textsuperscript{272} Id. at 224–25, 264 S.W.3d at 470 (Danielson, J., concurring in part, dissenting in part).
\textsuperscript{273} Id. at 225, 264 S.W.3d at 471 (Danielson, J., concurring in part, dissenting in part) (noting that whether such emails are sexually graphic "is of absolutely no moment as such designations are simply irrelevant in the context of a FOIA case").
\textsuperscript{274} Id. (Danielson, J., concurring in part, dissenting in part) (stating that "[a]ny other consideration is erroneous").
\textsuperscript{276} Id. at 225–26 & n.7, 264 S.W.3d at 471 & n.7 (Danielson, J., concurring in part, dissenting in part).
\textsuperscript{277} Oakley, supra note 219.
tice Glaze emphasized that the FOIA is designed for expeditious action, whether through release of records or a prompt explanation of why they are exempt.\textsuperscript{278} Instead, Justice Glaze felt that "Pulaski County ha[ dred] done nothing but delay access to the records, contrary to the intent of the [FOIA]."\textsuperscript{279} Justice Glaze also accused the majority of assisting the county in this endeavor by trying to "place a square peg in a round hole."\textsuperscript{280} Thus, the majority's remand and accommodation of the county's delaying tactics was wholly inconsistent with the purpose of the FOIA.\textsuperscript{281}

G. The Weakness of the FOIA

The greatest weakness in the FOIA comes from without: the Arkansas Supreme Court. Inexplicably, the majority court justices in \textit{Quillin II} misinterpreted the FOIA's plain and express language, thereby weakening one of the citizens' strongest statutes. But their motivations, much as their deliberations, are black boxes to the outside world. Whatever their underlying justifications, "Pulaski County Judge Buddy Villines and . . . four accommodating state Supreme Court justices . . . ignored decades of case law and the plain language of the [FOIA]."\textsuperscript{282} Foremost, the majority unnecessarily fretted over the sexual nature of many of the e-mails. Such consideration was wholly irrelevant. A public employee cannot remove governmental records from the FOIA's ambit because of the foolish decision to include pornography therein. Rather, as pointedly noted by Justice Danielson, "the \textit{sole} consideration in determining whether the record is a public record and one subject to disclosure is whether the record itself constitutes a record of the performance or lack of performance of a public official."\textsuperscript{283} As such, the \textit{Quillin IV} majority did not wholly rectify its earlier error, as even these sexually explicit e-mails should have been released. These records, just as much as those that the majority ordered to be released, indicated Quillin's lack of performance of his official duties. Undoubtedly, the private lives of certain individuals in this case, already given great exposure, would have come under even

\textsuperscript{278} \textit{Quillin IV}, 371 Ark. at 227, 264 S.W.3d at 472 (Glaze, J., concurring in part, dissenting in part).

\textsuperscript{279} Id. (Glaze, J., concurring in part, dissenting in part).

\textsuperscript{280} Id. at 228, 264 S.W.3d at 472 (Glaze, J., concurring in part, dissenting in part).

\textsuperscript{281} Id. at 228, 264 S.W.3d at 473 (Glaze, J., concurring in part, dissenting in part).

\textsuperscript{282} Oakley, \textit{supra} note 206.

\textsuperscript{283} \textit{Quillin IV}, 371 Ark. at 225, 264 S.W.3d at 471 (Danielson, J., concurring in part, dissenting in part) (emphasis in original).
greater embarrassing scrutiny had these additional e-mails been released. But that is the consequence for conducting such personal and intimate matters on government funded equipment while ostensibly on the taxpayers’ payroll.\textsuperscript{284} To do otherwise grossly distorts the spirit of the FOIA, which was designed to promote a transparent government, and not to protect its inefficient employees by concealing evidence of their incompetence.

The \textit{Quillin II} majority’s decision presents other concerns as well. The \textit{Quillin II} dissenting justices offered several criticisms for the majority’s reliance upon secondary and persuasive authority in making its holding. The dissenting justices rightfully stated that the majority unnecessarily relied upon other states’ freedom of information laws when interpreting Arkansas’s distinct statute. Other jurisdictions can provide excellent examples of alternative treatments of interpretative matters where there is no guidance on that point within the state.\textsuperscript{285} That, however, was not so in these circumstances at all: the Arkansas FOIA is “one of the strongest [freedom of information] laws in the nation . . . and to resort to other jurisdictions for interpretations weakens it to its core.”\textsuperscript{286} The FOIA was also unambiguous on the matter, making it wholly unnecessary to look beyond Arkansas’s borders to resolve this issue. The dissenting justices, however, misplace their vehemence in criticizing the majority’s examination of the Treatise. While it is by no means binding authority, the text has been used numerous times by both the Arkansas Supreme Court and the Arkansas Attorney General’s Office for decades in resolving FOIA issues. To silently and suddenly ignore the text in this case would prove perplexing and would raise serious questions as to the justices’ examination of the matter at hand.

\textsuperscript{284} This sentiment was echoed by Katherine Shurlds, a media law instructor at the University of Arkansas, who stated that

\begin{quote}
Even though there isn’t a county policy on e-mail usage, government employees shouldn’t have an expectation of privacy . . . The taxpayers have the right to know what you’re doing with their money, and if their money is being used to pay for your cell phone, your computer, then I don’t know why that isn’t a public record.
\end{quote}

Netterstrom & Upshaw, \textit{supra} note 205.

\textsuperscript{285} For example, the Arkansas Supreme Court wisely examined other jurisdictions treatments when deciding to break with federal precedent in its treatment of the constitutional right to privacy and intimate association, for which there was a dearth of interpretative Arkansas case law. \textit{See generally} Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002).

\textsuperscript{286} Netterstrom & Lynch, \textit{supra} note 242.
While the Treatise was rightfully consulted in *Quillin II* as an excellent resource, the majority nonetheless unwisely applied some of its suggestions to these circumstances. Unlike the vast majority of their work and the court's prior adoptions, the suggestions taken in this case do not bode well for the FOIA. First, the suggestion to simply examine the subject headings of the e-mails is insufficient. As Quillin demonstrated, this can be too easily flouted in a series of e-mails with the subject line "Job Security!", Quillin and Zeier carried on the following communication:

Zeier: "... I wanted to say [I love you]."

Quillin: "What did you want to say? That you love me, miss me, can't live without me, want to make love to me? God I hope it's all that and more because I know that's how I feel."\(^{287}\)

Clearly, access to a record should not depend on the label placed upon it, particularly when the maker of the record may desire to conceal the contents within.

But the faultiest suggestion offered in the Treatise that was adopted by the *Quillin II* majority regards the new in camera review, which Professors Watkins and Peltz only casually comment "would require bringing suit."\(^{288}\) Few taxpayers—for whom the FOIA was designed—have the resources necessary to pursue such an avenue of recourse to the Supreme Court (and back, in this instance) if the government refuses to rebut the presumption that is mandated by the FOIA. More importantly, Arkansans should not have to bear this financial hardship: the burden is upon the government to demonstrate why any presumptively open records should not be released, and it subverts the FOIA to require persistent record-seekers to shoulder the economic burden of litigating its cause. In these circumstances, the Arkansas Democrat-Gazette shouldered that economic burden.\(^{289}\) But certainly the average citizen, for whom the FOIA was designed, cannot rightfully be expected to have the same level of resources as the most powerful media outlet in the state.\(^{290}\)

Furthermore, the General


289. Netterstrom, *supra* note 250. The newspaper was reportedly "proud" to do so. *Id.*

290. Indeed, few "taxpayers [would] have enough money to afford the legal costs attendant to making them do so in case after case ad infinitum." Meredith Oakley, *Limiting Public's Right to Know Won't Be Forgotten*, *Ark. Democrat-Gazette*, July 25, 2007.
Assembly apparently did not intend that the citizens be required to do so, having made no mention whatsoever of this process or its requirement within the FOIA.

The only outcome from these errors that will quarantine the effects of the Arkansas Supreme Court’s mistake will be if they limit the application of the in camera review to the much particularized facts of the Quillin cases alone. To do otherwise will have disastrous effects upon the FOIA and those who use it. First, it would place a wholly unnecessary and overwhelming burden upon the already overworked legal system. Further, it would require trial judges to differentiate the public from the private. This judicial determination is not required by the FOIA, and it delays the public’s access to records far beyond the three day period permitted by the General Assembly.

Additionally, the government should always resort first to the traditional method of guidance when it is unsure about the release of records: the Arkansas Attorney General’s Office. To do so protects the records custodian from criminal liability and offers a safe harbor for the government, without the needless hassle of going through the court system.

V. CONCLUSION

These scandals illustrate the polar ends of what can be achieved by utilizing the FOIA. Again, the purpose of the FOIA is simple:

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, [the FOIA] is adopted, making it possible for them, or their representatives to learn and to report fully the activities of their officials.

The end result of the Houston Nutt scandal illustrates the full realization of this goal: the citizens were provided timely access to governmental records that highlighted the activities of the government. The end result of the Ron Quillin scandal illustrates the perverse subversion of this goal: the citizens were not provided timely access to governmental records, and the government attempted to preclude

291. While it is tempting to implore the General Assembly to craft some legislative exit out of this quagmire, such efforts would be a waste of time and effort. Simply put, the plain, express, and unambiguous language of the FOIA cannot be made more plain, express, and unambiguous.

them from learning of a public official’s lack of performance. And worse still, the *Quillin II* majority has made an ex cathedra pronouncement that adds a cumbersome new requirement into the FOIA when the government fails to abide by its plain requirements.

These various circumstances also demonstrate that the tension that began with construing the FOIA at the advent of the electronic era has not eased. It is evident that few people in Arkansas understand the wide scope of information that is now attainable through the FOIA, at least until they become unpleasantly surprised upon receiving a FOIA request. Until such time as the government and its actors gain greater comprehension of the FOIA, they would do well to heed the lessons learned by Houston Nutt and Ron Quillin and to heed the privacy sacrifices that are made in maintaining a transparent government.

*Alexander Justiss*