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To Meet or Not to Meet, That is the Question: An Analysis of the Meeting Requirement of the Arkansas Freedom of Information Act

Jerry L. Canfield
City Attorney for Fort Smith, Arkansas

TO MEET OR NOT TO MEET, THAT IS THE QUESTION: AN ANALYSIS OF THE MEETING REQUIREMENT OF THE ARKANSAS FREEDOM OF INFORMATION ACT

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INTRODUCTION

The 1960s were times of change. Implementation of the historic 1964 Civil Rights Act brought both change and conflict across the nation. The war in Southeast Asia changed the lives of many—especially young men of fighting age. The decade saw the assassination of an American president and a cold war Cuban missile crisis. Change was also occurring in Arkansas. Winthrop Rockefeller, after losing in a first attempt to unseat long-term Governor Orval Faubus, was elected in 1966, the first Republican Governor of Arkansas since Reconstruction, and began an administration determined to change Arkansas politics and government.[1] Not all of Governor Rockefeller's proposed changes progressed smoothly (e.g., reform of Arkansas's prison system). But a key piece of Rockefeller's legislative program was put in place by the adoption of the state's first sunshine law, the Arkansas Freedom of Information Act ("FOIA") of 1967.[2] FOIA provided access to public records and open public meetings of

* Jerry Canfield is an alumnus of the University of Arkansas School of Law (J.D., 1970) and partner at Daily & Woods, P.L.L.C. in Fort Smith, Arkansas. He currently serves as the Fort Smith City Attorney, a position he has held since 1974. Canfield is the recipient of the 2014-2015 C.E. Ransick Award of Excellence issued by the Arkansas Bar Association and the Arkansas Bar Foundation and is the inaugural recipient of the Outstanding Government Attorney Award presented by the Municipal Law Section of the Arkansas Bar Association. He expresses his appreciation to his law partner, Rick Wade, for his valuable and constructive suggestions during the planning and development of this article.

1. Tom W. Dillard, *Winthrop Rockefeller (1912-1973)*, ENCYC. OF ARK., [https://perma.cc/6Y3X-VK9F] (Feb. 28, 2023).

2. Freedom of Information Act of 1967, No. 93, 1967 Ark. Acts 208 (codified as amended at ARK. CODE ANN. §§ 25-19-101 to -112 (West, Westlaw through 2023 Legis. Sess.)).

governing bodies of municipalities, school districts, and State of Arkansas boards and commissions.[3]

FOIA's public meetings provision is the topic of this article. FOIA's open meetings requirement provides, in part:

> Except as otherwise specifically provided by law, all *meetings*, formal and 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.[4]

Through the years, FOIA's open meetings provision has been amended as to executive sessions, to provide for recording of meetings, and to provide for meetings via electronic means in the event of a declared disaster emergency.[5] However, the basic requirement that meetings of governing bodies be open to the public has remained unchanged since adoption in 1967.[6]

Although expressly including informal as well as formal meetings and special as well as regular meetings, FOIA's "public meeting" requirement does not provide any definition of a "meeting."[7] As the Arkansas Attorney General's Office noted, FOIA's "circular definition" that a "meeting" is a "meeting" of identified bodies is not "particularly helpful."[8] In contrast, a large majority of American states expressly provide a definition of "meeting" in their respective sunshine laws—often applying their open public meeting requirement to meetings of governing bodies where a quorum of the body is present.[9]

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3. ARK. CODE ANN. § 25-19-105 to -106 (West 2021).

4. ARK. CODE ANN. § 25-19-106(a) (emphasis added).

5. ARK. CODE ANN. § 25-19-106(c) to -(e).

6. *Compare* Freedom of Information Act § 5, 1967 Ark. Acts at 210 ("[A]ll meetings . . . of the governing bodies of all municipalities . . . shall be public meetings."), *with* ARK. CODE ANN. § 25-19-106(a) (same).

7. *See* ARK. CODE ANN. § 25-19-103 (West 2015).

8. Ark. Att'y Gen., Op. No. 2005-166, at 2 (Nov. 8, 2005).

9. *See* D.C. CODE ANN. § 1-207.42 (West 1973) ("All meetings . . . at which official action of any kind is taken shall be open to the public."); ALA. CODE § 36-25A-2(6) (2016); ALASKA STAT. ANN. § 44.62.310(h)(2) (West 2009); ARIZ. REV. STAT. ANN. § 38-431(4) (2018) (requiring a "quorum of the members of a public body"); CAL. GOV'T CODE § 54952.2 (West 2021) (requiring a "majority of the members of a legislative body" and specifically excluding question answering or information gathering); COLO. REV. STAT. ANN. § 24-6-402(2)(b) (West 2022); DEL. CODE ANN. tit. 29, § 10002(j) (West 2021) (requiring a "quorum of the members of any public body for the purpose of discussing or

In the absence of a clear definition of "meeting" by the Arkansas General Assembly, reasonable people would expect that the word would be given its common, ordinary meaning. Fundamental statutory construction teaches that in considering the meaning and effect of a statute, it is to be construed just as it reads, giving the words their ordinary and usually accepted meaning in common language.[10]

It has been asserted that the common understanding of the word "meeting" is two or more people in close proximity talking to each other.[11] In *McCutchen v. City of Fort Smith*,[12] testimonies

taking action on public business"); FLA. STAT. ANN. § 286.011(1) (West 2012) ("[A]ll meetings . . . at which official acts are to be taken are declared to be public meetings open to the public at all times . . . ."); GA. CODE ANN. § 50-14-1(a)(3)(A)(i) (West 2021) (requiring a quorum); HAW. REV. STAT. ANN. § 92-2 (West 2022) (requiring a quorum; two members may consult so long as no commitment to vote is made); IDAHO CODE ANN. § 74-202(6) (West 2018); 5 ILL. COMP. STAT. ANN. 120/1.02 (West 2015) (requiring a "majority of a quorum"); IND. CODE ANN. § 5-14-1.5-2(c) (West 2022) (requiring a majority to take official action, including deliberation, but excluding chance or social meetings); IOWA CODE ANN. § 21.2(2) (West 2009) (requiring a "majority of the members of a governmental body"); KAN. STAT. ANN. § 75-4317a (West 2015) (requiring a majority to discuss business); KY. REV. STAT. ANN. § 61.810(1) (West 2022) (requiring a quorum); MD. CODE ANN., GEN. PROVIS. § 3-101(g) (West 2022) (requiring a quorum); MICH. COMP. LAWS ANN. § 15.262(b) (West 2001) (requiring a quorum); MISS. CODE ANN. § 25-41-3(b) (West 2021) (requiring "an assemblage of members of a public body at which official acts may be taken"); MO. ANN. STAT. § 610.010(5) (West 2004); MONT. CODE ANN. § 2-3-202 (West 1987) (requiring a quorum); N.H. REV. STAT. ANN. § 91-A:2(I) (2019) (requiring a quorum); N.J. STAT. ANN. § 10:4-8(b) (1981); N.M. STAT. ANN. § 10-15-1(B) (West 2013) (requiring a quorum); N.Y. PUB. OFF. LAW § 102(1)-(2) (McKinney 2021); N.C. GEN. STAT. ANN. § 143-318.10(d) (West 2020); OHIO REV. CODE ANN. § 121.22(B)(2) (West 2021) (requiring a majority); OKLA. STAT. ANN. tit. 25, § 304(2) (West 2022) (requiring a majority); OR. REV. STAT. ANN. § 192.630(2) (West 2021) (requiring a quorum); S.D. CODIFIED LAWS § 1-25-1 (2019) (requiring a quorum); TENN. CODE ANN. § 8-44-102(b)(1)(A), (2) (West 2018) (requiring a quorum); TEX. GOV'T CODE ANN. § 551.001(4)(A) (West 2021) (defining "meeting" as a deliberation between a quorum or a quorum and another person, during which public business is discussed or considered or during which formal action is taken); UTAH CODE ANN. § 52-4-103(6)(a) (West 2022) (requiring a quorum); VT. STAT. ANN. tit. 1, § 310(3)(A) (West 2018) (requiring a quorum); VA. CODE ANN. § 2.2-3711 (West 2021) (specifying instances that are *not* meetings for purposes of sunshine law); WASH. REV. CODE ANN. § 42.30.020(3)-(4) (West 2022); W. VA. CODE ANN. § 6-9A-2(4)-(5) (West 2013) (requiring a quorum and defining circumstances that are *not* meetings); WIS. STAT. ANN. § 19.82(2) (West 2011); WYO. STAT. ANN. § 16-4-402(a)(iii) (West 2018).

10. Hanners v. Giant Oil Co. of Ark., 373 Ark. 418, 425-26, 284 S.W.3d 468, 474-75 (2008); City of Jacksonville v. City of Sherwood, 375 Ark. 107, 113, 289 S.W.3d 90, 94-95 (2008); Kyle v. State, 312 Ark. 274, 277, 849 S.W.2d 935, 937 (1993).

11. *See, e.g.*, *Meeting*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A single official gathering of people to discuss or act on matters in which they have a common interest; esp., the convening of a deliberative assembly to transact business.").

12. 2012 Ark. 452, 425 S.W.3d 671.

of all trial witnesses, including Plaintiffs David Harris and Joey McCutchen, supported the trial court's finding of fact and conclusion of law 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 governing body."[13] In *City of Fort Smith v. Wade*,[14] the trial witnesses' testimonies, including that of Plaintiff Wade, acknowledged that "meeting" refers to at least two persons getting together for discussion.[15] However, that common sense legal standard of statutory construction—apply the ordinary, usually accepted meaning—has not prevailed in applying FOIA in Arkansas. The approach was not followed in the mid-1970s cases.[16] Later, when the Arkansas Supreme Court was presented with witness testimony that "meeting" refers to at least two persons sitting together for discussion, the court declined to reconsider its prior approach to the undefined word "meeting," noting that "any interpretation of a statute by [the] court subsequently becomes a part of the statute itself."[17] Similarly, the Arkansas Freedom of Information Task Force has refused to recommend legislation providing a definition to FOIA's undefined "meeting."[18]

13. Findings of Facts and Conclusions of Law, Harris v. City of Fort Smith, No. CV-2009-935, slip op. at 2 (Ark. Cir. Ct. Sebastian Cnty. Oct. 4, 2011), *aff'd in part, rev'd in part sub nom.* McCutchen v. City of Fort Smith, 2012 Ark. 452, 425 S.W.3d 671 (quoting ARK. CODE ANN. § 25-19-106(a) (West 2021)).

14. 2019 Ark. 222, 578 S.W.3d 276.

15. Brief & Addendum of Appellants add. at 443, City of Fort Smith v. Wade, 2019 Ark. 222, 578 S.W.3d 276 (No. CV-18-351).

16. *See* Ark. Gazette Co. v. Pickens, 258 Ark. 69, 73, 522 S.W.2d 350, 352 (1975); Mayor of El Dorado v. El Dorado Broad. Co., 260 Ark. 821, 824, 544 S.W.2d 206, 208 (1976).

17. *McCutchen*, 2012 Ark. 452, at 19, 425 S.W.3d at 683 (citing Cochran v. Bentley, 369 Ark. 159, 251 S.W.3d 253 (2007)).

18. *See* John Lovett, *FOIA Task Force Report Seeks Preservation of 'Sunshine Law'*, Sw. TIMES REC. (Oct. 23, 2018, 1:33 PM), [https://perma.cc/S439-6MH8]. Act 923 of the 2017 General Assembly created the Arkansas Freedom of Information Task Force and charged it to make FOIA amendment recommendations to the General Assembly in advance of every legislative session. Act of Apr. 5, 2017, No. 923, 2017 Ark. Acts 4967 (codified at ARK. CODE ANN. § 25-19-111 (West 2017)). Task Force consideration of a definition for "meeting" is discussed *infra* Section III.A.

I. WHAT IS A "MEETING"?

In 1975, in *Arkansas Gazette Co. v. Pickens*,[19] the Arkansas Supreme Court applied the public meetings provision of FOIA to committees of the Board of Trustees of the University of Arkansas.[20] The court noted the legislative intent behind the requirement of open public meetings was to allow the electorate to be advised of the performance of public officials and to learn and fully report on the activities of public officials.[21] The court further noted that both the Trustees and the committees of the Trustees dealt with public business.[22] The following year, in *Mayor of El Dorado v. El Dorado Broadcasting Co.*, the Arkansas Supreme Court found that a gathering of four of eight municipal aldermen (less than a quorum) with legal counsel and a third party was subject to the open meeting requirement when the meeting was for the purpose of discussing the use of federal funds, a topic on which it was foreseeable that the city council would take action in the future.[23] Again, the Arkansas Supreme Court relied on FOIA's legislative intent provision requiring public meetings so that the electorate may be fully informed of the actions, and the reasons for taking those actions, of public officials.[24] However, in *Mayor of El Dorado*, the court stated that FOIA is not applicable to "a chance meeting or even a planned meeting of any two members of [a] city council," but rather, to "any group meeting called by the mayor or any member of the city council."[25] During the next two decades, the reference in *Mayor of El Dorado* to the number of participating governing body members became the standard focus of legal speculation as to what was to be considered a "meeting" under FOIA.[26] In the

19. 258 Ark. 69, 522 S.W.2d 350 (1975).

20. *Id.* at 77-78, 522 S.W.2d at 354.

21. *Id.* at 71-72, 522 S.W.2d at 351-52.

22. *Id.* at 74, 522 S.W.2d at 353.

23. 260 Ark. 821, 822-24, 544 S.W.2d 206, 206-07 (1976).

24. *Id.* at 823, 544 S.W.2d at 207 (citing *Ark. Gazette Co.*, 258 Ark. at 75, 522 S.W.2d at 353).

25. *Id.* at 824, 544 S.W.2d at 208.

26. For example, in 2004, in oral argument before the Arkansas Supreme Court in *Harris v. City of Fort Smith*, a case involving serial one-on-one discussions with Fort Smith governing body members, Justice Annabelle Clinton Imber inquired of counsel for the City of Fort Smith whether the case being argued turned on *Mayor of El Dorado*'s comment that

midst of this uncertainty, the cities of Fort Smith and Little Rock recommended to their respective governing bodies what was considered to be a FOIA-safe policy: that not even two board members should meet to discuss municipal business. However, on infrequent occasions (mostly for the handling of litigation), administrators and attorneys would meet with individual board members in a serial fashion to obtain consensus regarding a specific litigation or business topic.[27]

Foreshadowing future controversy about the meaning of "meeting," Supreme Court Justice John Fogleman, an eminent appellate jurist, concurred in *Arkansas Gazette Co.*[28] and dissented in *Mayor of El Dorado*.[29] Justice Fogleman noted that groups of governing body members less than a quorum in number have no authority to act for a governing body,[30] and that both majority opinions' attempts to attach a numbers-meaning to FOIA's undefined "meeting" were not sound judicial constructions of FOIA's language but were simply arrived at by judicial rhetoric.[31] Justice Fogleman referred to this rhetoric as "judicial legislation,"[32] which is prohibited by the Arkansas Constitution's fundamental principle of separation of powers.[33] In making his point, Justice Fogleman relied on a *Harvard Law Review* article discussing the fight of the press for the "right to know."[34] Justice Fogleman noted that:

> [I]t may be said there are advantages to the public in permitting preliminary discussions in which there can be greater freedom of expression without fear of benefitting special interests, harming reputations, inviting pressure from special interests, creating a public image of ignorance by

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FOIA is not applicable to a planned meeting of two members of a city council. *See* 359 Ark. 355, 365, 197 S.W.3d 461, 467 (2004).

27. Harris v. City of Fort Smith (*Harris II*), 366 Ark. 277, 282-83, 234 S.W.3d 875, 879-80 (2006) (discussing the testimony of Little Rock City Attorney Tom Carpenter).

28. 258 Ark. at 78, 522 S.W.2d at 355 (Fogleman, J., concurring).

29. 260 Ark. at 825, 544 S.W.2d at 208 (Fogleman, J., dissenting).

30. *Id.* at 828, 544 S.W.2d at 209.

31. *Ark. Gazette Co.*, 258 Ark. at 79, 522 S.W.2d at 356 (Fogleman, J., concurring).

32. *Mayor of El Dorado*, 260 Ark. at 830, 544 S.W.2d at 211 (Fogleman, J., dissenting).

33. *See* ARK. CONST. art. IV, § 2.

34. *Mayor of El Dorado*, 260 Ark. at 832, 544 S.W.2d at 212 (Fogleman, J., dissenting). *See generally* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know"*, 75 HARV. L. REV. 1199 (1962).

> searching questions, producing demagogic oratory, exposing disagreements of subordinates with policy determinations they must administer, or 'freezing' members into publicly expressed opinions they might well prefer to abandon.[35]

Although the cases did not present the issue of freedom of speech, perhaps Justice Fogleman was motivated by the basic constitutional right of all persons, including members of governing bodies, to speak and privately explore ideas in groups of two or in other numbers insufficient to make a decision of a governing body.[36]

The ongoing litigation calling into question the meaning of "meeting," which followed *Arkansas Gazette Co.* and *Mayor of El Dorado*, could have been avoided if the Arkansas Supreme Court had, in these mid-1970s cases, noted the absence of a meaningful statutory definition of "meeting" in FOIA, applied the common meaning to the term, and directed the parties to the General Assembly to address controlling public policy in other situations. The cardinal principle of statutory construction is to give words in statutes their common, ordinary meaning.[37] This principle comes before all rules of construction.[38] The word "meeting" clearly implies the gathering of at least two persons together in one forum.[39] Apparently, however, the Arkansas Supreme Court felt FOIA, being rooted in a public policy of open government, is too important to be limited to its actual words.[40] Continuing its pattern of interpretation in *Arkansas Gazette Co.*

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35. *Mayor of El Dorado*, 260 Ark. at 832, 544 S.W.2d at 211-12 (Fogleman, J., dissenting).

36. *See generally* U.S. CONST. amend. I; Bond v. Floyd, 385 U.S. 116, 135-36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979) (holding that "freedom of speech" is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public").

37. *See* cases cited *supra* note 10 and accompanying text.

38. Hanners v. Giant Oil Co. of Ark., 373 Ark. 418, 425, 284 S.W.3d 468, 474-75 (2008) ("When reviewing issues of statutory interpretation, we keep in mind that *the first rule* in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language." (emphasis added)).

39. *See, e.g.*, *Meeting*, *supra* note 11.

40. *See, e.g.*, Ark. Gazette Co. v. Pickens, 258 Ark. 69, 73, 522 S.W.2d 350, 352 (1975) ("[FOIA] does not specifically set out the word 'committees' when it defines public meetings, and the question thus becomes whether the legislative intent was to encompass the subgroups of a board.").

and *Mayor of El Dorado*, the Arkansas Supreme Court, in *Harris v. City of Fort Smith* (*Harris I*), found a "meeting" occurred when no two members of a governing body ever met.[41] Once the court itself began the process of deciding when a "meeting" occurs, standard rules of statutory construction make those decisions a part of the statute's meaning.[42] In this manner, the court has now sidestepped the legislature and bootstrapped a FOIA "meeting" into being whatever the court declares it to be.

A. Birth of a City Administrator Form of Government: Fort Smith

The climate of change in the 1960s was also occurring in Fort Smith, then Arkansas's second largest city.[43] In 1967, Fort Smith discarded more than fifty years of elected commission local government in favor of professional administration under a city administrator form of government.[44] The city administrator form of government had been authorized by Act 36 of the 1967 General Assembly, the same legislative session at which FOIA was adopted.[45] Thus, in 1967, both Act 36, which created the city administrator form of local government and was adopted by Fort Smith voters on March 28, 1967,[46] and Act 93, which provided for access to public records and open meetings of governing bodies, were adopted.[47]

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41. 359 Ark. 355, 365, 197 S.W.3d 461, 467 (2004) (holding that "one-on-one meetings" between the Deputy City Administrator and individual members of the City Board of Directors constituted "an informal meeting subject to the FOIA"). See discussion *infra* Part II, for an analysis on *Harris I*. In a second opinion, the Arkansas Supreme Court denied an attorney's fee to citizen Harris. *See Harris II*, 366 Ark. 277, 284, 234 S.W.3d 875, 880 (2006).

42. *See* McCutchen v. City of Fort Smith, 2012 Ark. 452, at 19, 425 S.W.3d 671, 683.

43. *See* U.S. BUREAU OF THE CENSUS, *Arkansas*, *in* U.S. CENSUS OF POPULATION: 1970, at 5-47 (1973), [https://perma.cc/TFA8-Y75S].

44. Dave Hughes, *Governing Shift Urged in Petition*, ARK. DEMOCRAT-GAZETTE (Feb. 9, 2015, 2:30 AM), [https://perma.cc/2354-MTZJ].

45. Act of Feb. 7, 1967, No. 36, § 1, 1967 Ark. Acts 36, 36 (codified at ARK. CODE ANN. §§ 14-48-101, -103 (West 1967)); *see also* Freedom of Information Act of 1967, No. 93, 1967 Ark. Acts 208 (codified as amended at ARK. CODE ANN. §§ 25-19-101 to -112 (West, Westlaw through 2023 Legis. Sess.)).

46. *Fort Smith History: March 28–April 3*, SW. TIMES REC. (Mar. 28, 2021, 6:00 AM), [https://perma.cc/X4Q9-C9HM].

47. *See* sources cited *supra* note 45.

In a sense, professional administration of local government and FOIA application were born and "grew up" together in Fort Smith. From its inception, local government in Fort Smith accepted FOIA's requirements of access to public records and open public meetings as indicative of good government.[48] Decades later, in Fort Smith litigation involving FOIA, Sebastian County Circuit Court Judge James Cox stated: "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."[49]

Despite the common background of FOIA and local government in Fort Smith, this article will suggest there has been a long history of antagonism by the Fourth Estate vis-à-vis the City of Fort Smith relating to FOIA. During the approximate half-century of history covered herein, those who disagreed with or challenged the media's common perceptions (or misperceptions) of proper application of the meeting provisions of FOIA often found themselves opposed by those who "buy ink by the barrel."[50]

II. CAN THERE BE A MEETING OF A GOVERNING BODY WHEN ITS MEMBERS DO NOT MEET WITH EACH OTHER?

The open public meetings provision of FOIA was the focus of a Fort Smith dispute and lawsuit that concluded in an Arkansas Supreme Court decision in the early 2000s. Several separate factors influenced the development of the litigation resulting in *Harris I*.[51] At the turn of the 21st century, a large volume of truck traffic in downtown Fort Smith came off Wheeler Avenue—a state-maintained, four-lane truck route—onto 6th Street, which ran between the Sebastian County Courthouse and the United

48. *See* Findings of Facts and Conclusions of Law, Harris v. City of Fort Smith, No. CV-2009-935, slip op. at 5 (Ark. Cir. Ct. Sebastian Cnty. Oct. 4, 2011), *aff'd in part, rev'd in part sub nom.* McCutchen v. City of Fort Smith, 2012 Ark. 452, 425 S.W.3d 671.

49. *Id.* See also *McCutchen*, 2012 Ark. 452, at 18-19, 425 S.W.3d at 683, where the Arkansas Supreme Court affirmed this particular finding of fact.

50. *See infra* notes 82-94, 104-08 and accompanying text.

51. *Harris I*, 359 Ark. 355, 358-61, 197 S.W.3d 461, 463-65 (2004).

States Courthouse on opposite sides.[52] For decades, circuit and chancery judges (especially, Judge Warren O. Kimbrough, whose courtroom bordered the wall of the Sebastian County Courthouse closest to 6th Street) had complained of truck noise disturbing court proceedings and lobbied for some realignment of the truck traffic. The difficulty was that the area to the west and north was occupied by the Fort Biscuit Bakery.[53] However, by 2003, the bakery was closed and the bakery property was being sold at public auction, thus presenting an opportunity to relocate the truck traffic to the west of 6th Street, if the City could acquire the property.[54] A second factor to the underlying story was the unique public service of David Harris, then a retired Fort Smith resident who faithfully attended the meetings of the Board of Directors and other boards and commissions of local government.[55] Not only did Harris attend, he was a frequent commentator at the public meetings—often espousing interesting perspectives on items of public business.[56]

While the public auction presented an opportunity to the City, it also presented the challenge of how the City Administrator could be authorized to bid at the auction without publicly revealing the City's bidding position. Following the procedure noted *supra*, as developed by Fort Smith and Little Rock,[57] City Administrator Bill Harding contacted each member of the Board to obtain approval to bid and the amount of a potential bid. Administrator Harding was successful in the April 18, 2003, bidding (saving some $400,000 as compared to the appraised value of the Bakery property).[58] A special meeting of the Board was scheduled five days later to obtain formal approval before Administrator Harding had to complete bonding of the purchase price. Mr. Harris was at the special meeting. The

52. *See, e.g.*, *id.* at 358-59, 197 S.W.3d at 463.

53. *See id.* at 358-59, 197 S.W.3d at 463.

54. *See id.* at 358-59, 197 S.W.3d at 463.

55. *See id.* at 359, 197 S.W.3d at 463. David Harris passed from this life on May 5, 2022. For more on his life and legacy, see Obituary of David Harris, LEGACY (May 5, 2022), [https://perma.cc/T7BU-X46P].

56. *See, e.g.*, *Fort Smith Board Approves 'Tax Back' Resolution*, TALK BUS. & POL. (Nov 7, 2012, 4:53 AM), [https://perma.cc/3N9L-GBLE].

57. *See supra* note 27 and accompanying text.

58. *See Harris I*, 359 Ark. at 359, 197 S.W.3d at 463; *Harris II*, 366 Ark. 277, 283, 234 S.W.3d 875, 879 (2006).

discussion at that meeting suggested that serial discussion with individual board members had preceded the auction. Represented by Attorney Michael Hodson of Fayetteville, Mr. Harris then sued Fort Smith in his individual capacity, contending that the pre-meeting, serial communications with Board members by Administrator Harding constituted a "meeting" under FOIA, even though no two board members had actually met.[59] In the trial that ensued, Sebastian County Circuit Court Judge Michael Fitzhugh found that the purchase was not considered to be final until it was discussed and approved in a public meeting.[60] In *Harris I*, the Arkansas Supreme Court held:

> Under the particular facts of the matter before us, we conclude that an informal meeting subject to the FOIA was held by way of the one-on-one meetings. 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.[61]

In 2006, the Arkansas Supreme Court recognized Fort Smith's action was "laudable," because it had acquired the Fort Biscuit property for street development while saving the City approximately $400,000.[62] In *Harris II*, the court also noted that Fort Smith Deputy City Administrator Ray Gosack and Little Rock City Attorney Tom Carpenter testified that the Fort Smith action, before the *Harris I* decision, was believed to be a proper procedure under FOIA.[63] Although Mr. Harris had prevailed in the initial FOIA litigation, the court denied his request for attorneys' fees because Fort Smith's actions were found to be "substantially justified."[64]

The decision in *Harris I* perhaps represented a departure from the "before *Harris*" framing of the "meetings" issue based on the number of members who physically gathered at any one time in favor of an "after *Harris*" focus on whether the pre-formal

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59. *See Harris I*, 359 Ark. at 359-61, 364-65, 197 S.W.3d at 463-65, 467.

60. *Id.* at 358, 197 S.W.3d at 463.

61. *Id*. at 365, 197 S.W.3d at 467.

62. *Harris II*, 366 Ark. at 283, 234 S.W.3d at 880 ("[A]ppellees had 'a laudable purpose in acquiring the Fort Biscuit property by confidential bid.' Appellees would acquire the property at a price 'favorable to taxpayers,' and the downtown area would benefit from the improved traffic conditions." (quoting *Harris I*, 359 Ark. at 365, 197 S.W.3d at 468 (citations omitted))).

63. *Id*. at 282-83, 234 S.W.3d at 879-80.

64. *Id*. at 282-84, 234 S.W.3d at 879-80.

meeting action reached a decision that should have been reached in a public meeting.[65] The court declared its decision was made under the case's "particular facts."[66] Arguably, the court intended to say nothing more than that it considered the one-on-one serial meetings in *Harris I* to be an "informal meeting" of the Board subject to FOIA because the purpose of the one-on-one meetings "was to obtain a decision."[67]

A. *AOG v. MacSteel* (2007)

In 2007, the Arkansas Supreme Court made clear in a Fort Smith-based case that *Harris I* did not stand for the proposition that all pre-meeting information sharing between members of a governing body was improper and a violation of FOIA.[68] In the early 2000s, MacSteel Corporation was a high-volume user of natural gas and, as a cost savings measure, contracted for the construction of a private gas line to deliver natural gas from a common carrier pipeline to its plant in south Fort Smith.[69] Arkansas Oklahoma Gas Corporation ("AOG"), the franchised supplier of natural gas in the area, resisted MacSteel's efforts.[70] To construct the pipeline, MacSteel needed an easement across property owned by Sebastian County.[71] AOG successfully blocked the first grant of easement by Sebastian County when the Arkansas Supreme Court upheld the voiding of the easement for failure of the County to comply with a mandatory, statutory procedure for the grant of property interests.[72] After the General Assembly amended the involved statute to exempt industrial development interests, Sebastian County again conveyed the needed easement to MacSteel.[73] The second time, AOG challenged the easement contending in part that the private process by which the County granted the easement violated FOIA

65. *See Harris I*, 359 Ark. at 364-65, 197 S.W.3d at 466-67.

66. *Id*. at 365, 197 S.W.3d at 467.

67. *Id*. at 365, 197 S.W.3d at 467.

68. *See* Ark. Okla. Gas Corp. v. MacSteel Div. of Quanex (*MacSteel II*), 370 Ark. 481, 488, 262 S.W.3d 147, 152-53 (2007).

69. *Id*. at 483-84, 262 S.W.3d at 149.

70. *See id*. at 484, 486-87, 262 S.W.3d at 149, 151-53.

71. *Id*. at 484, 262 S.W.3d at 149.

72. MacSteel Div. of Quanex v. Ark. Okla. Gas Corp. (*MacSteel I*), 363 Ark. 22, 33, 210 S.W.3d 878, 884-85 (2005).

73. *MacSteel II*, 370 Ark. at 483, 485-86, 262 S.W.3d at 149, 151.

as interpreted in *Harris I*.[74] The proof at trial was that MacSteel lobbied ten of thirteen quorum court[75] members and, in some instances, obtained verbal commitments on how members would vote.[76] Additionally, the proof showed that, prior to the formal meeting of consideration, the County Judge called the members seriatim and asked if they had questions regarding the agenda items.[77] The Arkansas Supreme Court refused to apply *Harris I*, noting that the County Judge did not contact the members to obtain approval of the easement grant but, rather, to ask if the members understood the agenda.[78] Essentially, the court held that non-decisional contact by the county's administrator was not a violation of FOIA. Regarding MacSteel's contacts, the court merely said there was no evidence that, "in contacting quorum court members, MacSteel acted in any capacity other than its own."[79] The court failed to explain what it meant by the words that MacSteel acted in its own capacity. Even so, there was serial one-on-one contact with a substantial majority of the quorum court members, as in *Harris I*. The most reasonable explanation is that the court believed the private entity, MacSteel, had the constitutional right to contact members and, correspondingly, the members had the constitutional right to discuss the business item with a constituent so long as no decision was made during the contacts.[80]

B. Meaning of "Meetings" in the Wake of *Harris I*

Intended or not, the court's decision in *Harris I* did alter the landscape of the FOIA discussion in Arkansas. Whether *Harris I* was misunderstood or intentionally misrepresented, the decision

74. *Id*. at 488, 262 S.W.3d at 152.

75. In Arkansas, a quorum court is a governing body of a county. *See* ARK. CONST. amend. LV, § 1.

76. *MacSteel II*, 370 Ark. at 488, 262 S.W.3d at 152.

77. *Id.* at 488, 262 S.W.3d at 152.

78. *Id.* at 488, 262 S.W.3d at 153.

79. *Id.* at 488, 262 S.W.3d at 153.

80. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 392 (2010) (Scalia, J., concurring) ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons*.").

soon became the basis for the Fourth Estate's promotion of the premise that no two members of a governing body could discuss business, nor could any information about public business be shared among board members outside an open public meeting.[81] That discussion seemingly ignored the court's decision in *MacSteel*.

The new "interpretation" of FOIA was playing out in Fort Smith as well as around Arkansas. Less than two years after *Harris*, a local newspaper, *Southwest Times Record*, sent a January 17, 2006, email exchange between Fort Smith Directors Bill Maddox and Velvet Graham (discussing a tax proposal and copied to the newspaper) to the Sebastian County Prosecutor, who, in turn, wrote a letter to Fort Smith's mayor and city attorney asserting the informational exchange among the directors was a technical violation of FOIA, as applied in *Harris I*.[82] The prosecutor made no mention of the *Harris I* decision's imperative that the decision was based on the "particular facts" of *Harris I*, in which one-on-one contact occurred for the purpose of making an actual decision on the subject legislative topic.[83]

On May 14, 2009, the *Southwest Times Record* published a front-page article describing Fort Smith City Administrator Dennis Kelly's decision to provide draft legislation and supporting documents in a serial fashion to five of the seven members of the Fort Smith Board of Directors.[84] Citing a purported FOI expert, a lobbyist for the Arkansas Press Association, the article asserted, based on *Harris I*, that "[e]ven if only two government officials are involved, a meeting is subject to FOI Law if the discussion pertains to any matter of public business on which foreseeable government action will be taken."[85] This bold statement, apparently, ignored *MacSteel*, and

81. *See* Brief & Addendum of Appellants, *supra* note 15, at add. 153.

82. Letter from Stephen Tabor, Prosecuting Att'y, Twelfth Jud. Dist., to author and Ray Baker, Mayor, City of Fort Smith (Jan. 31, 2006) (on file with the *Arkansas Law Review*).

83. *See id.*

84. Wanda Freeman, *FOI Expert Sees Possible City Violation*, SW. TIMES REC., May 14, 2009 (on file with the *Arkansas Law Review*); *see also* McCutchen v. City of Fort Smith, 2012 Ark. 452, at 11, 425 S.W.3d 671, 679.

85. Freeman, *supra* note 84.

once the Arkansas Supreme Court had an opportunity to address Kelly's action, this statement was shown to be wrong.[86]

On May 16, 2009, the *Southwest Times Record* published a second article with a photograph of City Administrator Kelly immediately below the article heading: "Prosecutor: No One Has Filed FOI Complaint on City Boss."[87]

The article noted a civil lawsuit had been filed contending Kelly's action violated FOIA and discussed the need for a criminal complaint to be filed in order for the prosecutor to file a criminal charge against Kelly.[88] The article concluded with a quote of the opinion of Fort Smith lawyer Joey McCutchen that the meetings held by Kelly were a "classic violation of the *Harris* case."[89] At the end of the litigation, in 2012, a unanimous Arkansas Supreme Court would declare Kelly's non-decisional information sharing with board members not to be a violation of FOIA at all.[90] However, in the initial aftermath of *Harris I*, many, including the Arkansas Press Association, took a myopic view of the clear language of *Harris I* and marched purposefully down the road of "a broad reading of the FOIA," which would preclude the sharing of any information between governing body members prior to the body's public meeting.[91]

In 2011, just before the issue of Kelly's actions was decided in *McCutchen v. City of Fort Smith*,[92] the *Fort Smith City Wire* complained to the Fort Smith City Administrator that two board members had attended a meeting of the Fraternal Order of Police, writing, "the law is clear that meetings between two or more members of a governing board on issues that have or may come before said board require public/media notification."[93]

On August 14, 2011, following the trial court proceedings in *McCutchen*, the *Southwest Times Record* published an editorial

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86. *McCutchen*, 2012 Ark. 452, at 11-12, 425 S.W.3d at 679.

87. Wanda Freeman, *Prosecutor: No One Has Filed FOI Complaint on City Boss*, SW. TIMES REC., May 16, 2009 (on file with the *Arkansas Law Review*).

88. *Id.*

89. *Id.* (cleaned up).

90. *McCutchen*, 2012 Ark. 452, at 11-12, 425 S.W.3d at 679.

91. Editorial, *People Must Ensure FOIA Stays Strong*, SW. TIMES REC., Mar. 12, 2012, at 1, 2012 WLNR 5292031.

92. *McCutchen*, 2012 Ark. 452, at 20, 425 S.W.3d at 683 (decision rendered on December 6, 2012).

93. Email from Michael Tilley, Ed., The City Wire, to Ray Gosack, City Adm'r., City of Fort Smith (Apr. 13, 2011, 7:10 PM) (on file with the *Arkansas Law Review*).

discussing the trial proceedings, contending the city administrator had "sidestepped" FOIA, and stated, "Elected officials who want to talk about public business should do it in public and should avoid it amongst themselves."[94]

Not only was the media's prevailing understanding of *Harris I* wrong, but this understanding was promoted without foundation in the actual language of *Harris I* while ignoring *MacSteel*. Thus, the misunderstanding was clearly wrong.

C. *McCutchen v. City of Fort Smith* (2012)

By 2012, the lawsuit Attorney McCutchen had filed in Sebastian County Circuit Court—contending Administrator Kelly could not discuss proposed city legislation in a serial fashion with five of the seven members of the Board of Directors—had reached the Arkansas Supreme Court. In Kelly's discussions with board members, two members expressed support for Kelly's proposed legislation, and two expressed disfavor with the proposal.[95] At a public agenda session to discuss the legislation, the item was not placed on an agenda of a regular meeting and thus not adopted.[96] Attorney McCutchen contended the serial discussions violated *Harris I.*[97] Further, Attorney McCutchen contended the court should prohibit the Administrator from providing any information regarding city business to board members in advance of the meeting (presumably, McCutchen believed that board members should be able to receive, read, and digest hundreds of pages of agenda information *only* at the public meeting).[98] The Arkansas Supreme

94. Opinion, *Courts Should Uphold FOIA For Citizens*, SW. TIMES REC., Aug. 14, 2011, at 8A.

95. *McCutchen*, 2012 Ark. 425, at 3, 425 S.W.3d at 674.

96. *Id.* at 3, 425 S.W.3d at 674.

97. *Id.* at 4, 425 S.W.3d at 674.

98. See Abstract & Opening Brief of Appellant at arg. 4, McCutchen v. City of Fort Smith, 2012 Ark. 452, 425 S.W.3d 671 (No. 11-1086) (on file with author) [hereinafter Appellant's Materials, *McCutchen*], for McCutchen's argument that City Administrator Kelly violated FOIA by one-on-one meetings with Board members "and by delivering the packets of information that strongly recommended changing the ordinance." In its *McCutchen* opinion, the court noted that a typical information packet covered "three to seven regular items of business and ten to twenty-five consent-agenda items of business." *McCutchen*, 2012 Ark. 425, at 2, 425 S.W.3d at 673. The sample board packet of information admitted into evidence at the trial of the *McCutchen* case contained 87 pages. *See* Supp. Abstract, Brief & Supp. Add. of Appellees & Cross Appellants at supp. add. 57-144,

Court unanimously distinguished *Harris I* and ruled that the providing of background information on a matter to be discussed at a subsequent public meeting does not subject the discussions to the open meeting requirement of FOIA.[99] The court said:

> In *Harris*, . . . the Board members ran afoul of the FOIA because the purpose of the meetings was to obtain approval of action to be taken by the Board as a whole. . . . In this case, the purpose of Kelly's memorandum was to provide background information on an issue that would be discussed at an upcoming study session.[100]

Because of decades of uncertainty regarding when a meeting is a meeting under FOIA, Fort Smith and individual board members who intervened in the lawsuit contended that parts of FOIA, especially the criminal provision, were unconstitutional due to vagueness and as an improper limitation on protected speech.[101] The City of Fort Smith presented at trial the testimony of Sebastian County Prosecutor Daniel Shue that the absence of a clear definition of meetings, changing judicial decisions, and conflicting opinions of the Arkansas Attorney General make it "darn difficult" to know what constitutes a "meeting."[102] On appeal from a circuit court decision in favor of the City of Fort Smith, the Arkansas Supreme Court sidestepped the constitutional challenges, declaring the City of Fort Smith has an argument with the legislature, "but not one that amounts yet to a case or controversy that should be decided by a court."[103]

McCutchen v. City of Fort Smith, 2012 Ark. 452, 425 S.W.3d 671 (No. 11-1086) (on file with author) [hereinafter Appellees' Supplemental Materials, *McCutchen*].

99. *McCutchen*, 2012 Ark. 452, at 11-12, 425 S.W.3d at 679.

100. *Id.* at 11-12, 425 S.W.3d at 679.

101. *Id.* at 13-14, 425 S.W.3d at 679-80. The FOIA criminal provision provides criminal sanction for any person "who negligently violates" FOIA. ARK. CODE ANN. § 25-19-104 (West 2005).

102. *See* Appellant's Materials, *McCutchen*, *supra* note 98, at ab. 94.

103. *McCutchen*, 2012 Ark. 452, at 17, 425 S.W.3d at 682. The Arkansas Supreme Court also criticized Fort Smith's efforts to obtain a legislative amendment to address the uncertainty arising from the lack of a statutory definition of "meeting." *Id.* at 17-18, 425 S.W.3d at 682-83 (noting that the City "abandoned its attempt to amend the FOIA" after representatives of the press gave the impression that they "had no interest in going to the General Assembly to address concerns with the FOIA").

III. AFTERMATH OF *MCCUTCHEN*—THE BEAT GOES ON

An observer might conclude that the court's unanimous decision in *McCutchen*—distinguishing *Harris I* and declaring pre-meeting, non-decisional, information sharing between members of a governing body to be beyond the scope of FOIA's open meetings provision[104]—would conclude further discussion. Alas, that is not what happened. In an editorial published three days after the *McCutchen* decision, the *Southwest Times Record* noted, "[t]he sad truth about the law is that it is not always what you want it to be," and self-servingly declared that "[p]roponents of open and transparent government like the Arkansas Press Association are disappointed that the Supreme Court ruled that Kelly's actions were not an FOI violation."[105] The article contained no hint of apology to City Administrator Kelly for displaying Kelly's photo with the observation that the prosecutor needed a complaint in order to initiate a criminal prosecution; the article also contained no retraction of its published opinion of Attorney McCutchen that Administrator Kelly's actions were classic violations of *Harris*—an opinion shown to be wrong by the court's unanimous opinion in *McCutchen*.[106] Moreover, assuming the role of a clairvoyant, the article erroneously asserted, "[t]here are leaders in Fort Smith who simply refuse to accept . . . *Harris v. Fort Smith*," and "if they see a need to circumvent the FOIA and they think they can get away with it, they will."[107] Contrary to that view, and as found by the courts, the City of Fort Smith has a long history of compliance with FOIA.[108] Those who interpret FOIA as prohibiting pre-meeting information sharing among governing body members simply misread *Harris I* and ignore the Arkansas Supreme Court's *McCutchen* decision.

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104. *Id.* at 20, 425 S.W.3d at 683.

105. Editorial, *Arkansas Supreme Court Refuses to Invalidate FOIA*, SW. TIMES REC., Dec. 9, 2012, at 1, 2012 WLNR 26184104.

106. *See id.*

107. *Id.* This author has represented the City of Fort Smith for decades and has never heard such sentiment expressed by any City of Fort Smith representative. Since the decision, this author has counseled Fort Smith officials on the binding effect of the *Harris I* decision.

108. *See supra* notes 48-49 and accompanying text.

The beat goes on. It was not long before Attorney McCutchen again filed suit against Fort Smith. In July 2014, in an action filed on behalf of Fort Smith resident Jack Swink, McCutchen contended the open meeting requirement of FOIA applied to Fort Smith's agenda formulation procedures.[109] Even though FOIA has no provision about agenda formulation and, in fact, does not require an agenda for meetings,[110] the lawsuit contended the Fort Smith Board and City Clerk violated FOIA when an agenda item scheduled for a meeting of the Board was removed from the agenda pursuant to a long-standing agenda formulating ordinance.[111] The Fort Smith ordinance allows a board member to request removal of an agenda item by contacting the City Clerk;[112] following that contact, the Clerk is directed to make contact with all other board members seeking concurrence or non-concurrence in the removal request;[113] if approved by a majority of the board, the item is removed from the agenda.[114] In October 2014, Sebastian County Circuit Judge James O. Cox held the agenda procedure involved no "substantive legislative action" and is not subject to the open meeting requirement of FOIA.[115] No appeal was taken.[116]

A. The City Looks to the General Assembly

Heeding the criticism of the Arkansas Supreme Court in *McCutchen* that the City of Fort Smith had not adequately

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109. *See* Swink v. Gard, No. CV-2014-605 (Ark. Cir. Ct. Sebastian Cnty. Oct. 13, 2014); *see also* Letter from Ray Gosack, City Adm'r, City of Fort Smith, to Dustin McDaniel, Ark. Att'y Gen. (Aug. 26, 2014) (on file with the *Arkansas Law Review*).

110. *See generally* ARK. CODE ANN. § 25-19-106 (West 2021).

111. Gosack, *supra* note 109. Arkansas statutorily authorizes the adoption of agenda and procedural rules by municipalities. *See* ARK. CODE ANN. § 14-43-501(a)(2)(C)(iii) (West 2015); *see also* ARK. CODE ANN. § 14-48-120(f), (j) (West 2017).

112. FORT SMITH, ARK., CODE § 2-31(4) (1992).

113. *See id.*

114. *See id.*

115. *See* Opinion and Order, Kitchens v. City of Fort Smith, No. CV-2021-927, slip op. at 5 (Ark. Cir. Ct. Sebastian Cnty. Dec. 16, 2021) (quoting Swink v. Gard, No. CV-2014-605 (Ark. Cir. Ct. Sebastian Cnty. Oct. 13, 2014)).

116. In 2021, Kristin Kitchens, represented by Attorney McCutchen, sued the City of Fort Smith and City Clerk Sherri Gard contending the City's agenda formulation process violates FOIA. *See id.* Ms. Kitchens lost her claim and has appealed to the Arkansas Court of Appeals. *See* Opening Brief of Appellant at 17-18, Kitchens v. City of Fort Smith, *filed*, No. CV-22-210 (Ark. Ct. App. May 23, 2022). The *Kitchens* case is pending at the time of preparation of this article. *See infra* note 156 and accompanying text.

pursued legislative amendment of FOIA,[117] the City, in August 2014, proposed to the Arkansas Attorney General, the Arkansas Press Association, and others that there be a discussion of adding to FOIA a definition of "meeting."[118] Unfortunately, the proposed discussion did not take place. In 2017, the Arkansas General Assembly created a FOIA Task Force to make FOIA amendment recommendations to the General Assembly.[119] The City of Fort Smith was granted an opportunity to address the Task Force at its April 2018 meeting and proposed that FOIA be amended to include an express definition of "meeting" consistent with *Arkansas Gazette Co.*, *Mayor of El Dorado*, *Harris I*, *MacSteel II*, and *McCutchen*.[120] The Task Force neither approved Fort Smith's proposed definition of "meeting" nor any other definition—apparently, content with the courts' continued development of FOIA's meeting concept without any public policy guidance from the General Assembly.[121] Even before Fort Smith could address the Task Force, Attorney McCutchen again sued Fort Smith.

B. *City of Fort Smith v. Wade* (2017–2019)

If evidence were needed that the Arkansas Supreme Court's unanimous decision in *McCutchen*—indicating pre-meeting, non-decisional information sharing did not constitute a FOIA meeting—was either not understood or not accepted as controlling law, that evidence was presented in 2017 in yet another FOIA challenge to the City of Fort Smith, this time involving the Sebastian County Prosecutor and local media.[122] In

117. McCutchen v. City of Fort Smith, 2012 Ark. 452, at 17-18, 425 S.W.3d 671, 682-83.

118. Fort Smith City Administrator Ray Gosack sent to the Attorney General, State Representative Lea of the State Agencies and Government Affairs Committee, the Arkansas Press Association, and the Arkansas Municipal League a letter lauding FOIA, noting the litigation spawned by the lack of definition of "meeting" and requesting a meeting to discuss the topic. Gosack, *supra* note 109, at 2-4.

119. *See* sources cited *supra* note 18.

120. *See* Proposed Amend. from the City of Fort Smith to the Arkansas Freedom of Info. Task Force (Apr. 2018); *see also infra* Appendix.

121. *See, e.g.*, Lovett, *supra* note 18; Aric Mitchell, *Fort Smith City Attorney Petitions FOIA Task Force to Define 'Public Meeting'*, TALK BUS. & POL. (Jul. 17, 2018, 3:02 PM), [https://perma.cc/57WX-AT6K].

122. *See* City of Fort Smith v. Wade, 2019 Ark. 222, 578 S.W.3d 276.

2017, Fort Smith local government was involved in a dispute between the Police Department and the Civil Service Commission ("CSC"), as the City's new police chief sought greater hiring authority in hopes of addressing community/police relations.[123] A CSC meeting was held to consider the chief's hiring authority proposals.[124] Two Fort Smith governing body members and the city administrator exchanged email communications discussing CSC action and an upcoming meeting of the board of directors.[125] A public meeting of the board of directors followed—with an hour-long discussion and a 4-3 vote in favor of a non-binding resolution supporting the changes sought by the new police chief.[126] McCutchen filed suit on behalf of Fort Smith resident Bruce Wade contending the email communications constituted a meeting under FOIA.[127] McCutchen then sent a settlement proposal offering to dismiss the lawsuit if the City of Fort Smith would concede the email communications violated FOIA.[128] The settlement proposal was provided to members of the board and, over two days, three board members expressed opposition to settling the litigation via email communications shared with the board.[129] The settlement proposal was discussed by the board in an open public study session—no member moved to add the topic to a regular meeting agenda, and the settlement was not accepted.[130]

McCutchen then involved Sebastian County Prosecutor Daniel Shue by providing copies of the latter email series and suggesting the prosecutor file criminal charges.[131] The prosecutor asked the Sebastian County Sheriff's Office to conduct an investigation. Fort Smith's City Administrator Carl Geffken and

123. *Id.* at 2, 578 S.W.3d at 277-78.

124. *Id.* at 2, 578 S.W.3d at 278.

125. *Id.* at 2-3, 578 S.W.3d at 278.

126. Agenda Summary, Bd. of Dirs. of the City of Fort Smith (June 6, 2017), [https://perma.cc/SEA9-H3UM]; *see also Wade*, 2019 Ark. 222, at 3, 578 S.W.3d at 278.

127. *Wade*, 2019 Ark. 222, at 3, 578 S.W.3d at 278.

128. *Id.* at 4, 578 S.W.3d at 278.

129. *Id.* at 4, 578 S.W.3d at 278.

130. *Id.* at 4, 578 S.W.3d at 278.

131. Letter from Daniel Shue, Prosecuting Att'y, Twelfth Jud. Dist., to the Bd. of Dirs. of the City of Fort Smith 1-2 (Aug. 28, 2017) (on file with the *Arkansas Law Review*) (stating that the emails "were provided to my office by attorney Joey McCutchen, who obtained the emails by means of a [FOIA] request," and that Mr. McCutchen "expressed concern that the series of email communications were conducted in violation of the [FOIA]").

at least two members of the Fort Smith Board of Directors were taken separately into an interrogation room at the sheriff's department and interrogated in filmed interviews.[132] On August 28, 2017, Prosecutor Shue issued a letter finding the email communications violated FOIA, threatening, "[I]f there is another occurrence of 'conducting public business in this fashion' the Sheriff's Office and my office will be compelled by the law to take further action."[133] The next day, the City responded stating: (1) there is no authority determining that a FOIA meeting could occur by email; (2) that the prosecutor did not mention that the decision in *McCutchen* found that non-decisional, pre-meeting information sharing is not violative of FOIA; and (3) reminding the prosecutor of his *McCutchen* trial testimony that it is "darn difficult" to know what constitutes a FOIA meeting.[134] The local television media were alerted on August 28, 2017, when Prosecutor Shue released to the media his letter and the sheriff's interview tapes. That evening, local television aired portions of Geffken's interrogation and reported on McCutchen's civil lawsuit that contended Fort Smith had violated FOIA.[135]

As before, the prosecutor, the media, and McCutchen were wrong. Once the *Wade* case made it to the Arkansas Supreme Court, a 5-2 majority decision noted that no decision was sought by the email or made, and that the email constituted permissible, pre-meeting information sharing, as approved in *McCutchen*.[136]

The court rejected the City of Fort Smith's argument that emails could not constitute a meeting. While the General Assembly had amended FOIA to state that electronic messages were documents subject to FOIA, the City argued that the General Assembly had not amended the meeting provision to indicate a meeting could be held by email.[137] Justices Womack and Wood dissented from the holding noting that the issue of whether emails

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132. *See id.* at 2.

133. *Id.* at 4 (quoting Order, Bradshaw v. Fort Smith Sch. Dist., No. CV-2016-1053, slip op. at 4 (Ark. Cir. Ct. Sebastian Cnty. June 13, 2016)).

134. Letter from Jerry Canfield, Att'y, Dailey & Woods, P.L.L.C., to Daniel Shue, Prosecuting Att'y, Twelfth Jud. Dist. (Aug. 29, 2017) (on file with the *Arkansas Law Review*) [hereinafter Canfield Letter].

135. *See Prosecuting Attorney: Fort Smith City Directors in Violation of FOIA Law*, 5NEWS (Aug. 29, 2017, 10:12 AM), [https://perma.cc/E8SP-TYCR].

136. City of Fort Smith v. Wade, 2019 Ark. 222, at 8-9, 578 S.W.3d 276, 280-81.

137. *Id*. at 6-7, 578 S.W.3d at 280.

could constitute a FOIA "meeting" was a matter of public policy for the General Assembly to decide, not the court, and that the General Assembly had the opportunity to amend the definition of meeting to include meeting by email but had not done so.[138]

Although not discussed in the *Wade* opinion, the City of Fort Smith had supported its positions with the free speech, criminal law vagueness, and separation of powers constitutional arguments presented in *McCutchen*, wherein the court said the issues were not ripe yet for determination.[139] While the meeting and voting procedures involved in making a decision by a public, governing body arguably may be statutorily regulated in a constitutional manner, this author contends that any attempt to tell individual members of local governing bodies that they cannot speak regarding public matters except in a public meeting is a violation of constitutional protections—"[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech.[140] The efforts to apply FOIA's open meeting requirement to pre-meeting, non-decisional information sharing run squarely into the rights of members of governing bodies to speak and discuss ideas in the same manner as all other persons in the United States of America.[141]

Following the Arkansas Supreme Court decision in *Wade*, Fort Smith demanded that Sebastian County formally withdraw Prosecutor Shue's August 28, 2017, threat of prosecution if the City conducted business as complained of in *Wade*.[142] By letter dated October 2, 2019, Sebastian County Judge David Hudson noted the *Wade* decision had been filed of record and would be followed by the county—"accordingly, there is no ongoing threat concerning this matter."[143]

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138. *Id*. at 15, 578 S.W.3d at 284 (Womack, J., concurring in part and dissenting in part).

139. Brief & Addendum of Appellants, *supra* note 15, at arg. 11-12, 14-15, 27-28; *see also* McCutchen v. City of Fort Smith, 2012 Ark. 452, at 17-18, 425 S.W.3d 671, 682-83.

140. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 349 (2010).

141. *See generally id*. at 349-50.

142. Canfield Letter, *supra* note 134, at 2.

143. Letter from the Hon. David Hudson, Sebastian Cnty. Judge, to author (Oct. 2, 2019) (on file with the *Arkansas Law Review*).

C. Will *Wade* End Misconstruction of *Harris I*?

The 2012 decision in *McCutchen* did not cause proponents of the "public's right to know" nor some government officials to accept that FOIA as applied in *Harris I* does not subject pre-meeting, non-decisional information sharing among members of a governing body to the public meeting requirement of FOIA. There is no clear evidence that the court's 2019 decision in *Wade* will dissuade continuing misconstruction of FOIA's "meeting" requirement.

The *Wade* decision itself demonstrates a majority of the Arkansas Supreme Court is comfortable with continuing to define "meetings" on a case-by-case application. The majority said, "We . . . have no difficulty in concluding that FOIA's open-meeting provisions apply to email and other forms of electronic communication . . . ."[144] The court so held although Justice Womack, dissenting, noted the majority was "judicially expanding the legislatively adopted definitions in the FOIA," even though the General Assembly did not do so as to "meetings" when, in 2005, electronic communications were expressly added to FOIA's definition of "records."[145]

In part, the majority in *Wade* relied on an analogy relating electronic communications to telephone conversations,[146] citing *Harris I* and *Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency, Inc.*,[147] despite the fact that email was an unknown method of communication when FOIA was adopted. Typically, the court would not define a legislatively used word or term to include that which was unknown when the General Assembly first wrote the word or term.[148] Yet, the court seems

144. City of Fort Smith v. Wade, 2019 Ark. 222, at 7, 578 S.W.3d 276, 280.

145. *Id*. at 14-15, 578 S.W.3d at 284 (Womack, J., concurring in part and dissenting in part).

146. *Id*. at 6-7, 578 S.W.3d at 280 (majority opinion).

147. 285 Ark. 397, 687 S.W.2d 840 (1985). *Rehab Hosp. Servs. Corp.* was decided in 1985 and involved a telephone polling of members of the governing body of a non-profit entity. In affidavit testimony in *Wade*, Little Rock City Attorney Tom Carpenter noted the *Rehab Hosp. Servs. Corp.* decision created no difficulty for municipal corporations because counsel for municipalities realized the bylaws of the involved institution allowed board decisions to be made by telephone polling (a practice then not authorized for the governing bodies of municipal corporations). Brief & Addendum of Appellants, *supra* note 15, at add. 131.

148. *See, e.g.*, Finley v. Astrue, 372 Ark. 103, 110, 270 S.W.3d 849, 853 (2008).

content to cite its previous decisions by which it supplied definition to the legislatively undefined word "meeting" as justification to further define the word.[149]

Similarly, the Fourth Estate has not relented from its pursuit of application of *Harris I* based on the stated fact a "decision" was made to pre-meeting, non-decisional information sharing. Consistent with the Fourth Estate's refusal to understand *Harris I*, *MacSteel II*, and *McCutchen*, columnists in the *Arkansas Democrat-Gazette* bemoaned the *Wade* decision and continued to assail the City of Fort Smith, castigating the Arkansas Supreme Court's decision in *Wade* as a "dagger to the public's right to know"[150] and "a single misguided decision."[151] There was no mention that, for more than a decade, the Arkansas Supreme Court had refused to expand *Harris I* beyond its particular facts in which a "decision" was made on public business—expressly rejecting invitations to do so in both *MacSteel* and *McCutchen*. The newspaper's article went further, mentioning that "governing boards around the state have attempted from time to time to circumvent public-meeting requirements of the FOI Act," and it labeled the City of Fort Smith as a "multiple offender."[152] There is no judicial authority for such a critical accusation. *Harris I* is the only case where Fort Smith was found to have violated the public meeting provision of FOIA.[153] There is no other. Although often challenged by a myriad of persons and entities, the City of Fort Smith has successfully defended all other lawsuits asserting "meeting" violations of FOIA.

Further, *Wade* did not end the FOIA litigation filed against the City of Fort Smith. As noted above,[154] Attorney McCutchen is currently representing Fort Smith resident Kristin Kitchens in litigation filed against the City of Fort Smith and City Clerk Sherri Gard, contending the City's agenda formulation for a

149. *See Wade*, 2019 Ark. 222, at 6-7, 578 S.W.3d at 280.

150. Brenda Blagg, *A Permission Slip for Secrecy: Supreme Court's Ruling Defies Precedent on Public's Right to Know*, ARK. DEMOCRAT-GAZETTE (June 26, 2019, 1:00 AM), [https://perma.cc/U3Y5-DQ38].

151. Mike Masterson, *A Costly Outcome*, ARK. DEMOCRAT-GAZETTE (Sept. 24, 2019, 2:01 AM), [https://perma.cc/XRH4-ZCSD].

152. Blagg, *supra* note 150.

153. *See Harris I*, 359 Ark. 355, 365, 197 S.W.3d 461, 467 (2004).

154. *See supra* notes 115-16.

public meeting was itself a public meeting.[155] The Sebastian County Circuit Court dismissed the claim, but that decision was appealed to the Arkansas Court of Appeals where it is pending as of the writing of this article.[156]

Also, the Freedom of Information Handbook ("Handbook"),[157] in answering the question, "What is a meeting?," continues to provide in part: "If two members meet informally to discuss past or pending business, that meeting may be subject to the FOIA. This question will turn on the facts of each case."[158]

An observer might expect the Handbook to answer the question differently by noting the permissibility of pre-meeting, non-decisional, informational communications—as approved in *McCutchen* and *Wade*. But that expectation is disappointed. Furthermore, the Handbook's answer given to the oft-asked question, "What is a meeting?," ignores early FOIA precedent and is constitutionally inadequate.[159] As early as 1976, in *Mayor of El Dorado*, the Arkansas Supreme Court said FOIA is not applicable to "a chance meeting or even a planned meeting of any two members of [a] city council," but rather, to "any group meeting called by the mayor or any member of the city council."[160] The Handbook gives no explanation of its suggestion that a meeting of two members might invoke FOIA. Unless the governing body is composed of three or fewer members, making two members a quorum for decision-making purposes, no "two members" of a governing body can legally approve an action to be taken by the governing body as a whole.[161] Because serial one-on-one or other small group meetings that are intended to "obtain approval of action[s] to be taken by the [governing body] as a

155. *See* Opening Brief of Appellant, *supra* note 116, at 8.

156. *See* sources cited *supra* note 116.

157. The Arkansas Freedom of Information Handbook is a publication jointly sponsored by the Office of the Governor of Arkansas, the Office of the Arkansas Attorney General, the Arkansas Press Association, the Arkansas Municipal League, the Arkansas Broadcasters Association, the Society of Professional Journalists, and the Public Relations Society of America. OFF. OF THE GOVERNOR OF ARK. ET AL., THE ARKANSAS FREEDOM OF INFORMATION HANDBOOK 1 (20th ed. 2022) [hereinafter FOIA HANDBOOK].

158. FOIA HANDBOOK, *supra* note 157, at 33.

159. *See, e.g.*, Mayor of El Dorado v. El Dorado Broad. Co., 260 Ark. 821, 824, 544 S.W.2d 206, 207-08 (1976).

160. *Id.* at 824, 544 S.W.2d at 208.

161. *See id.* at 824, 544 S.W.2d at 208.

whole" may constitute informal meetings under FOIA,[162] the Handbook's answer surely should acknowledge the right of members in numbers less than a quorum to meet and exchange pre-meeting, non-decisional information. Also, it is an affront to our Constitution's guarantee of freedom of speech to assert an informational communication between two members of a governing body could subject them to FOIA's criminal punishment or civil liability.[163]

CONCLUSION

Despite the reluctance of some to accept it, the Arkansas Supreme Court, by its decisions in *MacSteel*, *McCutchen*, and *Wade*, has dispelled all reasoned supposition that *Harris* barred two governing body members from communicating about public business in violation of FOIA's public meetings requirements. In *McCutchen*, the court stated definitively:

> In *Harris*, . . . the Board members ran afoul of the FOIA because the purpose of the meetings was to obtain approval of the action to be taken by the Board as a whole. . . . In this case, the purpose of Kelly's memorandum was to provide background information on an issue that would be discussed at an upcoming study session.[164]

In *Wade*, the court followed the same rationale, noting that "[n]o decision was made" by pre-meeting email communications among board members and the administrator.[165] Pre meeting, non-decisional information sharing among members of a governing body is not subject to FOIA's public meeting requirements. Until, and unless, the General Assembly legislatively defines "meeting" under FOIA, the Arkansas Supreme Court has clearly held the proposition that two members may not meet or communicate about public business except in public session to be a misconstruction of FOIA.[166]

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162. McCutchen v. City of Fort Smith, 2012 Ark. 452, at 8-9, 425 S.W.3d 671, 677 (quoting *Harris I*, 359 Ark. 355, 358, 197 S.W.3d 461, 463 (2004)).

163. *See generally* ARK. CODE ANN. § 25-19-104 (West 2005) ("Any person who negligently violates any of the provisions of [the Freedom of Information Act] shall be guilty of a Class C misdemeanor.").

164. *McCutchen*, 2012 Ark. 542, at 11-12, 425 S.W.3d at 679.

165. City of Fort Smith v. Wade, 2019 Ark. 222, at 8, 578 S.W.3d 276, 281.

166. *See supra* notes 164-65 and accompanying text.

The City of Fort Smith's proposed legislative definition of "meeting"[167] is recommended as an appropriate codification of the Arkansas Supreme Court's precedent regarding FOIA "meetings." Adopting a clear definition will affirm First Amendment rights and dispel vagueness in criminal enforcement, and failure to do so will likely result in a successful constitutional challenge to FOIA with adverse effects on its important protection of the public's right to be informed about government affairs.

167. *See* Proposed Amend. from the City of Fort Smith to the Arkansas Freedom of Info. Task Force, *supra* note 120; *see also infra* Appendix.

APPENDIX: PROPOSED AMENDMENT TO ARK. CODE ANN. § 25-19-106(a) TO PROVIDE DEFINITION OF "MEETINGS"[168]

Additions are indicated by underline.

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

168. Proposed Amend. from the City of Fort Smith to the Arkansas Freedom of Info. Task Force, *supra* note 120. Fort Smith's proposed definition is consistent with current Arkansas Supreme Court decisions, and the "quorum" provision—like most other states' sunshine laws—provides stability and certainty.

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.