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State Government—The Arkansas Freedom of Information Act—Public or Private Record: A Simple Distinction Threatens the Future of Open Government in Arkansas, *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 371 Ark. 214, 264 S.W.3d 465 (Ark. Oct. 4, 2007).

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STATE GOVERNMENT—THE ARKANSAS FREEDOM OF INFORMATION ACT—PUBLIC OR PRIVATE RECORD: A SIMPLE DISTINCTION THREATENS THE FUTURE OF OPEN GOVERNMENT IN ARKANSAS. *PULASKI COUNTY V. ARKANSAS DEMOCRAT-GAZETTE, INC.*, 371 Ark. 217, 264 S.W.3d 465 (Ark. Oct. 4, 2007).

I. INTRODUCTION

“Regnat Populus—The People Rule—is the motto of Arkansas. It should ever remain inviolate.”¹

For advocates of open government, former Arkansas Supreme Court Justice Jim Johnson’s words are music to their ears and bring to mind Abraham Lincoln’s famous trilogy: “government of the people, by the people, for the people.”² The statutory right of individuals to inspect the records or attend the meetings of their federal, state, and local governments is arguably the most effective check that citizens have on their elected officials and government agencies.³ For example, the Arkansas Freedom of Information Act (FOIA) allows access to government records and meetings;⁴ this provides Arkansans with the ability to monitor the management of their state and local governments, to scrutinize their elected officials in the prudent execution of their duties, and to ensure efficient spending of their tax dollars.⁵

Long before public records laws, Thomas Jefferson recognized that “[e]very government degenerates when trusted to the rulers of the people alone. The people themselves, therefore, are its only safe depositories.”⁶ Today, as in the early years of our republic, it is understood that an educated and informed electorate is essential to our form of government and neces-

1. *Republican Party of Ark. v. State, ex. rel. Hall*, 240 Ark. 545, 549, 400 S.W.2d 660, 662 (1966).

2. Abraham Lincoln, United States President, Gettysburg Address (Nov. 19, 1863).

3. Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation*, 54 ADMIN. L. REV. 983, 984 (2002).

4. ARK. CODE ANN. §§ 25-19-101 to -109 (LEXIS Repl. 2002 & Supp. 2007).

5. *See id.* § 25-19-102.

6. Eyler Robert Coates, Sr., Thomas Jefferson on Politics and Government (Dec. 21, 1995), <http://etext.lib.virginia.edu/jefferson/quotations/jeff1350.htm> (webpage is a collection of over 2,700 of Thomas Jefferson’s quotations compiled using Thomas Jefferson, Notes on Virginia Q.XIV (1782), in 2 THE WRITINGS OF THOMAS JEFFERSON 207 (Lipscomb and Berg eds., Memorial Edition, 1903–04)).

sary for the continued public oversight of government functions.⁷ The United States Supreme Court has stated that “[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁸

In June of 2007, the *Arkansas Democrat-Gazette* made a routine request under the Arkansas FOIA for the disclosure of a former Pulaski County official’s e-mails.⁹ In an attempt to satisfy that request, the county released some of the requested e-mails.¹⁰ The county’s failure to release all of the e-mails led the newspaper to file suit, alleging that the remaining e-mails were public records subject to disclosure.¹¹ These events led to the Arkansas Supreme Court’s most recent interpretation of what constitutes a “public record” under the Arkansas FOIA in *Pulaski County v. Arkansas Democrat-Gazette, Inc.*¹²

Although the court’s ultimate decision to disclose the e-mails was correct, its failure to establish clear standards regarding both the presumption created by section 25-19-103(5)(A) of the Arkansas Code¹³ and the burden required to rebut that presumption, results in a lack of guidance for the state’s trial courts and leads to the possibility of increased government abuse in denying FOIA requests.¹⁴ The long-term effect of *Pulaski County* is unclear, but its potential impact is unsettling. If Arkansas courts interpret the *Pulaski County* decision as creating a “personal” exemption to the FOIA, the right of Arkansans to monitor the workings of their state and local governments will be hindered forever because the cost of FOIA litigation will increase, the disclosure of public records will be significantly delayed, and the total number of successful FOIA requests will dramatically decrease.¹⁵

7. *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974) (stating that the purpose of the FOIA is to provide an informed public so that it may make intelligent decisions regarding government functions); ARK. CODE ANN. § 25-19-102 (LEXIS Repl. 2002).

8. *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

9. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435, 437, 260 S.W.3d 718, 719 (2007) (“*Pulaski County I*”).

10. *Id.*, 260 S.W.3d at 719.

11. *Id.*, 260 S.W.3d at 719–20.

12. The supreme court actually delivered five decisions in this case, but the court’s significant opinions are contained in only two of those decisions: *Pulaski County I* and *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 371 Ark. 217, --- S.W.3d --- (2007) (“*Pulaski County II*”). *Pulaski County I* was delivered on July 20, 2007, and *Pulaski County II* on October 4, 2007.

13. ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007) (“All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.”).

14. See *infra* Part IV.

15. See *infra* Part IV.A–B.

This note begins by exploring the historical development of the Arkansas FOIA.¹⁶ It then considers the present state of the FOIA,¹⁷ and how Arkansas courts have interpreted it over the last forty years.¹⁸ Next, the note focuses on the issues that public use of e-mail has created for the Arkansas FOIA as well as the public records laws in several other states.¹⁹ After an analysis of the *Pulaski County* decision,²⁰ the note concludes by discussing the ongoing impact of the court's decision and considers the threat *Pulaski County* poses to Arkansans' right to access and scrutinize their state and local governments.²¹

II. BACKGROUND

The First Amendment to the United States Constitution does not encompass a general right of access to government records and affairs.²² The United States Supreme Court has, however, acknowledged "the paramount public interest in a free flow of information to the people concerning public officials."²³ Although no constitutional right of access to government records or meetings exists,²⁴ Congress and state legislatures have established such a right through public access laws.²⁵

This section briefly traces the historical development of the public access law in Arkansas.²⁶ It also discusses the current public access law in Arkansas under the Arkansas FOIA, focusing primarily on access to public records.²⁷ Next, this section describes how Arkansas courts have interpreted the Arkansas FOIA over the last forty years.²⁸ Finally, this section considers the complicated relationship between e-mails created on government-owned e-mail systems and states' open records laws.²⁹

16. See *infra* Part II.A.

17. See *infra* Part II.B.

18. See *infra* Part II.C.

19. See *infra* Part II.D.

20. See *infra* Part III.

21. See *infra* Part IV.

22. *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978).

23. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

24. *Potter Stewart, Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975).

25. See, e.g., 5 U.S.C.S. § 552 (LexisNexis 2008); ARK. CODE ANN. §§ 25-19-101 to -109 (LEXIS Repl. 2002 & Supp. 2007).

26. See *infra* Part II.A.

27. See *infra* Part II.B.

28. See *infra* Part II.C.

29. See *infra* Part II.D.

A. Historical Development of the Arkansas Freedom of Information Act in Arkansas

The common law recognized a very limited right of public access to government records in favor of "those seeking to vindicate the public interest."³⁰ Access was often denied, however, because the inspector's purpose was based improperly on curiosity or commercial gain, or if the government determined that disclosure would be detrimental to the public interest.³¹ In addition, the definition of a "public record" was limited to only those records government agencies were legally required to hold.³² Unfortunately, the common law did not create any right of access to governmental meetings, allowing most government bodies to convene in complete secrecy without any interference from the public.³³

In the 1940s and 1950s, the Arkansas General Assembly tried to enact laws that would require open meetings at the state and local levels of government, but their attempts proved relatively ineffective.³⁴ In 1966, the Arkansas Supreme Court expanded the scope of the public's right to access government records, and stated, "[I]f there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions."³⁵ Following the court's decision in *Republican Party of Arkansas v. State, ex rel. Hall*,³⁶ the Arkansas General Assembly enacted the Arkansas Freedom of Information Act in 1967.³⁷ In addition to the supreme court's expansion of the common law right to access government records, several other factors contributed to the enactment of the FOIA, including: (1) a campaign by Arkansas journalists; (2) a Legislative Council study that examined public access laws in other states; (3) Attorney General interpretations that undermined the open meeting statutes that applied to cities, counties, and school districts; (4) several controversial governmental meetings that were closed to the public; and (5) the election of Governor Winthrop Rockefeller.³⁸ At his last press confe-

30. JOHN J. WATKINS & RICHARD J. PELTZ, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 1-2 (4th ed. 2004).

31. *Id.* at 2.

32. *Id.*

33. *Id.*

34. *Id.* at 4.

35. *Republican Party of Ark. v. State, ex rel. Hall*, 240 Ark. 545, 549, 400 S.W.2d 660, 662 (1966).

36. 240 Ark. 545, 400 S.W.2d 660 (1966).

37. *Laman v. McCord*, 245 Ark. 401, 402, 432 S.W.2d 753, 754 (1968). The Act has been amended on various occasions and is currently codified at ARK. CODE ANN. §§ 25-19-101 to -109 (LEXIS Repl. 2002 & Supp. 2007).

38. WATKINS & PELTZ, *supra* note 30, at 4.

rence in office, Governor Rockefeller told reporters that he considered the FOIA to be one of his greatest achievements as governor.³⁹

B. The Arkansas Freedom of Information Act

The Arkansas FOIA requires that “all public records . . . be open to inspection and copying by any citizen of the State of Arkansas,”⁴⁰ and mandates that “all meetings . . . of the governing bodies . . . of the State of Arkansas . . . supported wholly or in part by public funds or expending public funds, shall be public meetings.”⁴¹ The General Assembly clearly states the purpose of the FOIA in section 25-19-102 of the Arkansas Code, which provides the following:

It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials.⁴²

The legislature furthered its desire for liberal, public access to state and local government by defining “public records” as:

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 that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. *All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.*⁴³

The final sentence of section 25-19-103(5)(A) makes the General Assembly’s desire apparent by presuming that any records maintained in a public office or by a public employee in the course of his employment are public records.⁴⁴ The presumption is broad, but is only a presumption and

39. John J. Watkins, *Access to Public Records under the Arkansas Freedom of Information Act*, 37 ARK. L. REV. 741, 757–58 (1984).

40. ARK. CODE ANN. § 25-19-105(a)(1)(A) (LEXIS Supp. 2007).

41. *Id.* § 25-19-106(a) (LEXIS Supp. 2007).

42. *Id.* § 25-19-102 (LEXIS Repl. 2002).

43. *Id.* § 25-19-103(5)(A) (LEXIS Supp. 2007) (emphasis added).

44. WATKINS & PELTZ, *supra* note 30, at 86.

may be rebutted by showing that "the records do not otherwise fall within the definition found in the first sentence" of section 25-19-103(5)(A).⁴⁵

The FOIA mandates that all records "required by law to be kept" by government officials or employees are subject to disclosure, but also includes those records "otherwise kept and that constitute a record of the performance or lack of performance of official functions."⁴⁶ The "performance" language narrows the scope of what constitutes a "public record" because it requires that a document have some connection to the performance of "official functions."⁴⁷ The term "official functions" makes no distinction between governmental and proprietary functions.⁴⁸ Therefore, both the "performance" language and the term "official functions" further the General Assembly's intent that the "public business be performed in an open and public manner" because, taken in combination, they require that a document specifically relate to the administration of governmental affairs before being subject to disclosure.⁴⁹

Although the last sentence appears to create such a presumption, possession alone is not determinative of what constitutes a public record under section 25-19-103(5)(A) of the Arkansas Code.⁵⁰ If it were, personal records would be subject to the FOIA.⁵¹ Section 25-19-103(5)(A), however, negates the FOIA's applicability to personal items because it reaches only documents that are "required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions" and those maintained by public employees within their scope of employment.⁵² Thus, personal records necessarily fall outside the definition of

45. Op. Ark. Att'y Gen. No. 2005-095 (2005). For example, a document may be presumed to be a public record if it is found in a public office, but would not be subject to disclosure if the government agency could show that it was not "required by law to be kept or [if] otherwise kept [that it does not] constitute a record of the performance or lack of performance of official functions." See *id.* (quoting ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007)).

46. ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007). The FOIA originally applied only to "records which are required by some statute . . . to be made and kept." *McMahan v. Bd. Trs. of the Univ. of Ark.*, 255 Ark. 108, 111, 499 S.W.2d 56, 58 (1973).

47. WATKINS & PELTZ, *supra* note 30, at 91, 93.

48. WATKINS & PELTZ, *supra* note 30, at 91. This is the view of the Arkansas Supreme Court as expressed in *City of Fayetteville v. Edmark*, where the court stated that "whether the activity is 'proprietary' or 'governmental' in nature . . . the government is involved in the 'public[s] business.'" 304 Ark. 179, 187, 801 S.W.2d 275, 279 (1990) (quoting *Watkins*, *supra* note 39, at 768).

49. ARK. CODE ANN. § 25-19-102 (LEXIS Repl. 2002).

50. WATKINS & PELTZ, *supra* note 30, at 86.

51. WATKINS & PELTZ, *supra* note 30, at 86.

52. See ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007). Professor Watkins and Professor Peltz recommend that Arkansas courts adopt the reasoning of the United States Court of Appeals for the District of Columbia in *Wolfe v. Department of Health & Humans Services*, 711 F.2d 1077 (D.C. Cir. 1983), in order to protect the statutory protection of per-

“public records” because the law does not require their retention; they are unrelated to the performance of official functions, and they are not maintained by public employees within their scope of employment.⁵³

Conversely, lack of actual possession will not preclude a document from disclosure.⁵⁴ Section 25-19-103(1)(A) of the Arkansas Code defines “custodian” as “the person having administrative control of” a public record.⁵⁵ The idea of “administrative control” means that records will be subject to the FOIA regardless of their physical location, as long as the records are within an agency’s control or constructive possession.⁵⁶ The Arkansas Supreme Court has designated possession or administrative control of a document as the initial factor to consider when determining whether a document is a public record subject to disclosure.⁵⁷

C. Judicial Interpretation of the FOIA

Through dozens of decisions, the Arkansas Supreme Court has developed specific rules of statutory interpretation for the Arkansas FOIA. This section looks at these general rules of FOIA interpretation as the court has developed them over the last forty years.⁵⁸ It also discusses a rule of judicial balancing adopted by the Arkansas Supreme Court to assist in FOIA interpretation.⁵⁹

1. General Rules of FOIA Construction

In 1968, the Arkansas Supreme Court had its first opportunity to interpret the FOIA in *Laman v. McCord*.⁶⁰ In that case, the question arose as to whether the North Little Rock City Council could conduct closed meetings

sonal records. WATKINS & PELTZ, *supra* note 30, at 86. In that case, the court held that documents were not subject to the federal FOIA simply because they were located in the office of a high-ranking agency official, instead the requirement is that a federal agency actually have custody of records before subjecting them to disclosure under the federal FOIA. *Wolfe*, 711 F.2d at 1080 (citing *Forsham v. Harris*, 445 U.S. 169, 178 (1980)).

53. See *id.* § 25-19-103(5)(A).

54. *City of Fayetteville v. Edmark*, 304 Ark. 179, 186–87, 801 S.W.2d 275, 279 (1990); see also *Scott v. Smith*, 292 Ark. 174, 175, 728 S.W.2d 515, 515 (1987) (rejecting physical possession by agency counsel as determinative of a document’s status as a public record).

55. ARK. CODE ANN. § 25-19-103(1)(A) (LEXIS Supp. 2007).

56. WATKINS & PELTZ, *supra* note 30, at 86.

57. *Swaney v. Tilford*, 320 Ark. 652, 655, 898 S.W.2d 462, 464–65 (1995).

58. See *infra* Part II.C.1.

59. See *infra* Part II.C.2.

60. 245 Ark. 401, 432 S.W.2d 753 (1968).

with the city attorney.⁶¹ The supreme court affirmed the trial court's decision that such a meeting violated the FOIA.⁶²

Two major developments in FOIA jurisprudence resulted from *Laman*. First, the court rejected the city's argument that the provisions of the FOIA must be strictly construed, and in doing so developed the method by which the FOIA was to be interpreted.⁶³ The court stated the following:

Whether a statute should be construed narrowly or broadly depends upon the interest with which the statute deals. As a rule, statutes enacted for the public benefit are to be interpreted most favorably to the public We have no hesitation in asserting our conviction that the Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved.

The language of the act is so clear, so positive, that there is hardly any need for interpretation.⁶⁴

Second, the court addressed the city's argument that the attorney-client privilege was an exception to the FOIA.⁶⁵ The court rejected this argument and articulated its rule that the FOIA's disclosure provisions are to be liberally interpreted by implicitly requiring narrow construction of the FOIA exceptions.⁶⁶ Later, in *McCambridge v. City of Little Rock*,⁶⁷ the court explained that the FOIA exceptions must be narrowly construed to "counterbalance the self-protective instincts of the governmental bureaucracy."⁶⁸

In *Ragland v. Yeargan*,⁶⁹ the court explained that in order for a statute to create a FOIA exception or exemption, the language of the statute must be explicit and specific.⁷⁰ The court held that "the objectives of the FOIA are such that whenever the legislature fails to specify that any records in the public domain are to be excluded from inspection . . . then privacy must yield to openness and secrecy to the public's right to know the status of its own affairs."⁷¹ *Ragland* requires that the General Assembly balance public

61. *Id.* at 402, 432 S.W.2d at 754.

62. *Id.* at 406, 432 S.W.2d at 756.

63. *Id.* at 404, 432 S.W.2d at 755.

64. *Id.* 404-05, 432 S.W.2d at 755 (citations omitted).

65. *Id.* at 405, 432 S.W.2d at 755.

66. *Laman*, 245 Ark. at 405-06, 432 S.W.2d at 755-56. The court focused on the General Assembly's use of the term "specifically" when referring to FOIA exceptions and refused to create an exception to the FOIA not explicitly created by the Act. *Id.*, 432 S.W.2d at 755.

67. 298 Ark. 219, 766 S.W.2d 909 (1989).

68. *Id.* at 226, 766 S.W.2d at 912.

69. 288 Ark. 81, 702 S.W.2d 23 (1986).

70. *Id.* at 85-86, 702 S.W.2d at 25.

71. *Id.*, 702 S.W.2d at 25.

access and interests of confidentiality when amending the FOIA, allows courts to interpret ambiguity in favor of openness, and prevents court-made exceptions that would allow for secrecy in government operations.⁷²

2. *Common Sense Approach*

At times, the Arkansas Supreme Court has failed to liberally interpret the FOIA to achieve its laudable purposes.⁷³ In *Sebastian County Chapter of the American Red Cross v. Weatherford*,⁷⁴ the court noted that it was “aware of the need for a balancing of interests to give effect to the intent of the General Assembly, and [it did] so with a common sense approach.”⁷⁵ That case involved a ground lease between the City of Fort Smith and the Sebastian County chapter of the American Red Cross, under which the chapter paid the city one dollar per year to lease the property.⁷⁶ The single issue was whether the lease subjected the chapter to the FOIA because it was “supported wholly or in part by public funds.”⁷⁷

Using its “common sense” approach, the court focused on the term “public funds” and held that the term meant money that belonged to the government,⁷⁸ not “indirect benefit conveyed by [the] government upon a private organization.”⁷⁹ This definition meant that the nominal rent payments were merely an indirect benefit conferred upon the chapter and did not involve the expenditure of public funds.⁸⁰ The court did not believe that the General Assembly intended for every private organization that received any form of government assistance to be subject to the FOIA.⁸¹ In conclusion, the court stated that its interpretation was consistent with the intent of the General Assembly and “not at odds with a liberal construction of the

72. WATKINS & PELTZ, *supra* note 30, at 10.

73. See, e.g., *Pulaski County I*, 370 Ark. 435, 260 S.W.3d 718 (2007); *Sebastian County Chapter of the Am. Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993); *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992); *Simmons First Nat’l Bank v. Liberty Mut. Ins. Co.*, 282 Ark. 194, 667 S.W.2d 648 (1984).

74. 311 Ark. 656, 846 S.W.2d 641 (1993).

75. *Id.* at 658–59, 846 S.W.2d at 643 (citing *Bryant*, 309 Ark. at 485, 830 S.W.2d at 872; *Simmons First Nat’l Bank*, 282 Ark. at 198, 667 S.W.2d at 650).

76. *Id.* at 656–57, 846 S.W.2d at 642.

77. *Id.*, 846 S.W.2d at 642; ARK. CODE ANN. § 25-19-106(a) (LEXIS Supp. 2007).

78. *Sebastian County*, 311 Ark. at 659, 846 S.W.2d at 643.

79. *Id.* at 660, 846 S.W.2d at 644.

80. *Id.* at 661, 846 S.W.2d at 645.

81. *Id.*, 846 S.W.2d at 644. The court stated that “[h]ad the General Assembly intended to extend the FOIA to private organizations that receive any form of government assistance or subsidy, no matter how indirect, it would not have used the words ‘supported . . . by public funds.’” *Id.* at 660, 846 S.W.2d at 644.

FOIA.”⁸² In spite of the court’s assertion that its decision was consistent with the general rules of FOIA interpretation, it is arguable that the City of Fort Smith was subsidizing the chapter by leasing the property for what was less than fair market value,⁸³ which is the same result that would have been achieved had the city directly supplied funds to the chapter to minimize its lease obligation with a third party. Using its controversial “common sense” approach, however, the court concluded that indirect financial support was not a government expenditure of “public funds,”⁸⁴ even though a disbursement of “public funds” could have yielded the same outcome and, thus, triggered application of the FOIA.⁸⁵

The general rule that FOIA exemptions and exceptions are to be narrowly construed has also fallen victim to the “common sense” approach.⁸⁶ In *Bryant v. Mars*,⁸⁷ the court held that the term “Attorney General” as used in section 25-19-105(b)(7) of the Arkansas Code refers to the office of the Attorney General as a collective, not just the constitutional officer.⁸⁸ Section 25-19-105(b)(7) exempts “[u]npublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Judges, and the Attorney General.”⁸⁹ Even the Attorney General admitted in his brief that the statute did not specify the sense in which “Attorney General” was used,⁹⁰ but the court stated that it was “fully aware of [its] prior decisions [that] clearly state[d] that exemptions [were] to be narrowly construed in favor of openness However, [the court was] nevertheless persuaded that the state policy [did] not preclude an open-minded consideration of the meaning of the exemption.”⁹¹ An application of the narrow construction rule would have limited the exemption to the Attorney General as an individual, but the court held

82. *Id.* at 661, 846 S.W.2d at 644. Although the court said its decision was consistent with a liberal construction, the authors of the *The Arkansas Freedom of Information Act* believe that the common sense approach is a departure from the general rules of FOIA construction. WATKINS & PELTZ, *supra* note 30, at 10. Before *Sebastian County*, the Arkansas Attorney General had opined that indirect financial support was sufficient to trigger the FOIA based on the liberal interpretation rule. Op. Ark. Att’y Gen. No. 88-004 (1988).

83. *Id.* at 657–58, 846 S.W.2d at 643. “[T]he parties stipulated that . . . \$1.00 per year would be less than a reasonable rental value for the leased property,” and the trial court concluded that “the fair market value of the leased property was ‘substantially more than \$1 per year’ and that the lease constituted a partial support by public funds, or an expenditure of public funds.” *Id.*, 846 S.W.2d at 643.

84. *Sebastian County*, 311 Ark. at 660, 846 S.W.2d at 644.

85. *Id.*, 846 S.W.2d at 644.

86. *See, e.g.,* *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992).

87. 309 Ark. 480, 830 S.W.2d 869 (1992).

88. *Id.* at 485, 830 S.W.2d at 872.

89. ARK. CODE ANN. § 25-19-105(b)(7) (LEXIS Supp. 2007).

90. WATKINS & PELTZ, *supra* note 30, at 11.

91. *Bryant*, 309 Ark. at 484, 830 S.W.2d at 871 (citations omitted).

that the ordinary use of “Attorney General” included the elected official, his deputies, and his representatives.⁹²

The authors of *The Arkansas Freedom of Information Act* point out that the Arkansas Supreme Court “has not stated when or how to employ the [“common sense”] balancing approach.”⁹³ Although it is unpredictable when a court will choose to use the “common sense” approach, Professor Watkins and Professor Peltz predict that the decision in *Bryant* will encourage FOIA abuse by agencies seeking to “stretch” ambiguous FOIA exemptions.⁹⁴ They also state that because of *Bryant*, Arkansans cannot be sure that Arkansas courts will interpret FOIA ambiguities in favor of public access as the legislature would have intended.⁹⁵ This is because when the legislature failed to specify that the term “Attorney General” included the officer, his deputies, and his representatives—creating a patent ambiguity—the Arkansas Supreme Court did not liberally interpret the ambiguity that allows “privacy [to] yield to openness and secrecy to the public’s right to know the status of its own affairs.”⁹⁶

D. E-mails and the FOIA

E-mail has become a regular forum for public officials to communicate within their respective agency and to their constituents.⁹⁷ One survey shows that nearly eighty-two percent of public officials use e-mails in their public activities.⁹⁸ Public access to electronic records has always been an issue under FOIA, “[b]ut it was the advent of electronic mail as a pervasive channel of communication that catapulted electronic access to the top of the public agenda.”⁹⁹

The Arkansas Attorney General opined that e-mail exchanges are public records subject to disclosure under the FOIA and are no different than any other document falling within the definition set out in section 25-19-

92. *Id.*, 830 S.W.2d at 871. The court deemed this understanding of the term consistent with the intent of the General Assembly. *Id.* at 485, 830 S.W.2d at 872.

93. WATKINS & PELTZ, *supra* note 30, at 12.

94. WATKINS & PELTZ, *supra* note 30, at 13.

95. *Id.*

96. *Ragland*, 288 Ark. at 86, 702 S.W.2d at 25.

97. Peter S. Kozinets, *Access to the E-mail Records of Public Officials Safeguarding the Public’s Right to Know*, 25 A.B.A. COMM. LAW. 17, 18 (2007).

98. ELENA LARSEN & LEE RAINIE, DIGITAL TOWN HALL: HOW LOCAL OFFICIALS USE THE INTERNET AND THE CIVIC BENEFITS THEY CITE FROM DEALING WITH CONSTITUENTS ONLINE, PEW INTERNET & AM. LIFE PROJECT 8 (2002), http://www.pewinternet.org/pdfs/PIP_Digital_Town_Hall.pdf. Approximately one-third of those surveyed said they have a public account and use it exclusively for public affairs, another third said they use both personal and private e-mail accounts for public matters, and the final third said they exclusively use personal e-mail accounts for public business. *Id.*

99. WATKINS & PELTZ, *supra* note 30, at 431.

103(5)(A) of the Arkansas Code.¹⁰⁰ The Attorney General has even suggested that e-mail exchanges may constitute public meetings, thereby requiring public notice and access.¹⁰¹ Through these opinions, the Attorney General has made it clear that e-mail may not be used to undermine the FOIA's requirements.¹⁰² Unfortunately, e-mails continue to create problems for the FOIA.

One issue with e-mail involves the relationship between the FOIA and records retention.¹⁰³ Professor Peltz wrote that "a freedom of information system can only be as strong as its companion records retention program."¹⁰⁴ Because electronic records are easily created, modified, and destroyed, states, including Arkansas, have struggled to develop effective retention programs for electronic records because of their "ephemeral" nature.¹⁰⁵ E-mails pose an even greater threat because as public officials and employees increase the use of e-mail as a convenient means of communication, they are also deleting e-mails at an exponential rate.¹⁰⁶

Another issue with e-mail involves public employees' right to privacy.¹⁰⁷ As the use of e-mail to conduct public affairs has increased in recent years, so has the use of public e-mail accounts for private purposes.¹⁰⁸ The highest courts of several states have confronted this issue in FOIA litigation, and this section focuses on how the highest courts of Ohio,¹⁰⁹ Arizona,¹¹⁰ Colorado,¹¹¹ Florida,¹¹² and Idaho¹¹³ have dealt with this question of great public concern and importance.¹¹⁴

100. Op. Ark. Att'y Gen. No. 99-018 (1999). When requested by certain public officials, the Arkansas Attorney General may give his opinion on any constitutional or other legal question that involves the discharge of the officials' duties, but the opinion is not binding and lacks legal force. ARK. CODE ANN. § 25-16-706 (LEXIS Repl. 2002).

101. See Op. Ark. Att'y Gen. No. 2000-096 (2000) (stating that a determination will depend on the facts of a particular case).

102. WATKINS & PELTZ, *supra* note 30, at 432.

103. Richard J. Peltz, *Arkansas's Public Records Retention Program: Finding the FOIA's Absent Partner*, 28 U. ARK. LITTLE ROCK L. REV. 175, 175 (2006) (stating that lack of a sound records retention program will render public records laws useless).

104. *Id.* at 177.

105. *Id.* at 198, 204; WATKINS & PELTZ, *supra* note 30, at 431.

106. WATKINS & PELTZ, *supra* note 30, at 431.

107. Kozinets, *supra* note 97, at 17.

108. WATKINS & PELTZ, *supra* note 30, at 436.

109. See *infra* Part II.D.1.

110. See *infra* Part II.D.2.

111. See *infra* Part II.D.3.

112. See *infra* Part II.D.4.

113. See *infra* Part II.D.5.

114. The Washington Court of Appeals has also dealt with the issue of e-mails and public employees' privacy. *Tiberino v. Spokane County*, 13 P.3d 1104, 1106 (Wash. Ct. App. 2000). In *Tiberino*, the Washington Court of Appeals held that the e-mails at issue were related to a governmental or proprietary function, but were exempt under a statutory exemption

1. Ohio

In 1998, the Ohio Supreme Court became one of the first jurisdictions to face the issue of e-mails as public records.¹¹⁵ In Ohio, a public record must be a document “which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.”¹¹⁶ *State ex. rel. Wilson-Simmons v. Lake County Sheriff's Department* involved e-mails exchanged between public employees that allegedly contained racial slurs.¹¹⁷ The court held that a public record was not “any piece of paper on which a public officer writes something [,] . . . [and] [t]o the extent that any item . . . [did] not serve to document the organization, . . . it [was] not a public record and need not be disclosed.”¹¹⁸ The court did not regard the fact that the e-mails were created, exchanged, and maintained on a government e-mail system as dispositive.¹¹⁹ The court concluded that the racist e-mails were not public records subject to disclosure because they were never used to conduct the public's business.¹²⁰

2. Arizona

In 2007, the Arizona Supreme Court held that personal e-mails were not public records.¹²¹ Furthermore, the court held that when a government entity withholds e-mails and claims that they are personal, the requester may ask a court to review the e-mails *in camera* to determine if they are public records subject to disclosure.¹²²

In 2005, the Pinal County Sheriff's Office began investigating alleged improper conduct by a high-ranking county official.¹²³ The official, Stanley Griffis, later entered into a plea agreement with prosecutors on six felony charges for embezzlement, fraud, and tax evasion.¹²⁴ Phoenix Newspapers, Inc. (PNI) filed a public records request with the county seeking Mr. Grif-

for personal information. *Id.* at 1108-09. Washington statutorily exempts from disclosure “[p]ersonal information . . . to the extent that disclosure would violate [an employee's] right to privacy.” WASH. REV. CODE ANN. § 42.56.230(2) (LexisNexis 2008). Because the state of Washington's highest court did not decide *Tiberino*, it is not further discussed in this note.

115. *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 693 N.E.2d 789 (Ohio 1998).

116. OHIO REV. CODE ANN. § 149.011(G) (West 2008).

117. *State ex rel. Wilson-Simmons*, 693 N.E.2d at 792-93.

118. *Id.* at 792.

119. *Id.* at 793.

120. *Id.*

121. *Griffis v. Pinal County*, 156 P.3d 418, 419 (Ariz. 2007).

122. *Id.* at 419-20.

123. *Id.* at 420.

124. *Id.*; Kozinets, *supra* note 97, at 19.

Griffis's e-mails.¹²⁵ The county released 706 e-mails, but withheld several, citing Mr. Griffis's privacy as grounds for denial.¹²⁶ After PNI threatened suit, the county decided to release the remaining e-mails, and Mr. Griffis obtained a preliminary injunction that blocked their release.¹²⁷ The trial court dissolved the injunction, presumed that the e-mails were public records, and ordered their disclosure.¹²⁸ The court of appeals reversed, holding that personal e-mails were not public records subject to disclosure under Arizona's public records law.¹²⁹

The Arizona Supreme Court commenced its discussion by stating that "Arizona law defines 'public records' broadly and creates a *presumption requiring the disclosure* of public documents."¹³⁰ Although the term "public records" is not statutorily defined in Arizona, the state's courts have developed three alternative definitions of the term "public records."¹³¹ The court made clear that the definitions, however broad, are not unlimited.¹³²

The court held that "public records" were "only those documents having a 'substantial nexus' with a government agency's activities."¹³³ Furthermore, to determine whether a document is a public record, the court held that a content-driven inquiry was required to determine whether the requisite

125. *Griffis*, 156 P.3d at 420.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 421 (emphasis added). Arizona's "presumption of disclosure of public records" is distinguishable from Arkansas's statutory presumption of public record status found in section 25-19-103(5)(A) of the Arkansas Code. In Arkansas, every non-exempt public record is subject to disclosure, meaning that disclosure is absolute and not presumed as is the case under Arizona law. ARK. CODE ANN. § 25-19-105 (LEXIS Supp. 2007). To further its desire of liberal public access to government records, the Arkansas General Assembly created a presumption that certain documents are by definition "public records," thereby placing the burden on the government to rebut that presumption. *See id.* § 25-19-103(5)(A) (LEXIS Supp. 2007). Once presumed to be public records, these documents are subject to disclosure unless the government can rebut this presumption or prove that the documents are subject to a statutory FOIA exception. *See id.* § 25-19-105.

131. *Griffis*, 156 P.3d at 421. The three definitions of public records are:

[(1) a record] made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference; [(2)] a record that is required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done; or [(3)] any written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties and is kept by him as such, whether required by . . . law or not.

Id. (internal quotation marks omitted).

132. *Id.*

133. *Id.*

connection to government activity existed.¹³⁴ The content-driven analysis ruled out possession as a determining factor of what constituted a public record, effectively exempting personal effects from disclosure.¹³⁵ The court stated “the purpose of the law [was] to open *government* activity to public scrutiny, not to disclose information about private citizens.”¹³⁶

Though it did not specify what constituted a substantial nexus with government activities, the court reiterated the importance of this connection in determining whether a document qualified as a public record.¹³⁷ Before ever applying any presumption of disclosure, the court stated that a reviewing court must initially determine if the document is even a “public record.”¹³⁸ In making this determination, *in camera* review of a contested document is necessary because its nature and purpose provide the necessary link to government activities.¹³⁹

Outlining the process by which a court is to determine if the document is a “public record,” the court stated that the document requester bears the burden to ask for an *in camera* review after the government denies the disclosure request on a personal privacy basis.¹⁴⁰ Once a requester shows that an *in camera* review is required, the burden then shifts to the government agency or other party opposing disclosure to prove that the documents are not public records.¹⁴¹ Even if the government agency cannot carry this burden, the Arizona courts are required to “consider whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure.”¹⁴²

The Arizona Supreme Court remanded the case because the e-mails had not been reviewed by any court.¹⁴³ The court ordered the trial court to

134. *Id.*

135. *Id.*

136. *Id.*

137. *Griffis*, 156 P.3d at 422.

138. *Id.* Again, in Arkansas, there is not a presumption of disclosure; there is a presumption of public record status. ARK. CODE ANN. § 25-19-103(5)(a) (LEXIS Supp. 2007). This presumption immediately attaches to “[a]ll records maintained in public offices or by employees within the scope their employment.” *Id.* Upon attachment of the presumption, the record is subject to disclosure unless the presumption is overcome or a FOIA exception is applicable. *Id.* § 25-19-105.

139. *Id.*

140. *Griffis*, 156 P.3d at 423.

141. *Id.*

142. *Id.* Although the Arizona Supreme Court initiated this decision by outlining Arizona’s broad disclosure requirements, the state’s courts have broad discretion in determining whether documents “that have already been categorized as public records” should not be disclosed if “privacy interests, confidentiality or the best interests of the state outweigh the public’s right of access.” *Id.* at 423 n.8.

143. *Id.* at 423.

conduct the necessary *in camera* review to determine whether Mr. Griffis' e-mails were public records subject to disclosure.¹⁴⁴

3. *Colorado*

In 2005, the Colorado Supreme Court determined that the term "public records" included only those records that a public agency makes, maintains, or keeps and that "have a demonstrable connection to the exercise of" public functions.¹⁴⁵ The court's decision reversed in part, affirmed in part, and remanded the decision of the court of appeals,¹⁴⁶ which ruled that the e-mails at issue were public records subject to a constitutional privacy exception.¹⁴⁷ The Colorado Supreme Court believed that the court of appeals unnecessarily considered the constitutional question, and held that the Colorado Open Records Act (CORA) required an examination of the content of the requested e-mails to determine whether the e-mail records were actually public records.¹⁴⁸

The case involved e-mails exchanged between an elected official and a public employee, who allegedly were engaged in an affair.¹⁴⁹ In 2002, the Board of County Commissioners of Arapahoe County initiated an investigation of the county clerk and recorder's office based on allegations of sexual harassment, violation of open meeting laws, and misuse of public property and funds.¹⁵⁰ The county hired a private investigator, who created a report setting forth his findings.¹⁵¹ The report included 622 e-mail messages between the two parties, 570 of which contained sexually explicit or romantic content.¹⁵² The county released the report but redacted the sexually explicit messages.¹⁵³ Following the release, the Denver Publishing Company requested disclosure of a non-redacted copy.¹⁵⁴ The county did not release such a version and filed a petition with the trial court seeking a determination as to whether it should release a non-redacted copy.¹⁵⁵ The elected official and public employee contested the necessity of any disclosure.¹⁵⁶

144. *Id.*

145. *Denver Publ'g Co. v. Bd. of County Comm'rs of the County of Arapahoe*, 121 P.3d 190, 198 (Colo. 2005) (internal quotation marks omitted).

146. *Id.* at 205.

147. *Id.* at 191.

148. *Id.* at 192.

149. *Id.*

150. *Id.*

151. *Denver Publ'g Co.*, 121 P.3d at 192.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 192-93.

156. *Id.* at 193.

The Colorado Supreme Court began its “analysis where all CORA analysis begins—determining if the records at issue are public records within the scope of CORA’s mandatory disclosure provisions.”¹⁵⁷ The court determined that the Colorado General Assembly intended for a limited definition of “public records” that excluded private information and documents.¹⁵⁸

Focusing on the CORA’s definition of “public records,” the court held that e-mail records were no different from other public record writings that were subject to disclosure; that is, e-mails must also be made, maintained, or kept for use in government activity if they are to be disclosed.¹⁵⁹ “[P]ossession, creation, or receipt of an e-mail record by a public official or employee” was also ruled out as determinative of an e-mail’s status as a public record.¹⁶⁰ In determining whether an e-mail record constituted a public record, the court concluded that the inquiry must be content-driven to ensure that the necessary connection to government functions existed.¹⁶¹

Based on a review of the e-mails’ content, the court concluded that none of the e-mail messages at issue displayed the necessary connection to the performance of public functions.¹⁶² The court remanded the case to the trial court with the direction to redact any sexually explicit content from the e-mails.¹⁶³ Stating that the CORA did not require the disclosure of entire documents or mandate that public officials or employees distinguish between private and public e-mails, the court held that its protection of the parties’ privacy rights was consistent with the intent of the Colorado General Assembly.¹⁶⁴

4. *Florida*

In 2003, the Florida Supreme Court addressed the issue of “[w]hether all e-mails transmitted or received by public employees of a government agency are public records . . . by virtue of their placement on a government-owned computer system.”¹⁶⁵ The court concluded that personal e-mails did not fall within the definition of “public records” because they “[were] not made or received pursuant to law or ordinance or in connection with the

157. *Denver Publ’g Co.*, 121 P.3d at 195.

158. *Id.*

159. *Id.* at 198.

160. *Id.* at 199.

161. *Id.* at 199, 200.

162. *Id.* at 203.

163. *Denver Publ’g Co.*, 121 P.3d at 205.

164. *Id.*

165. *State v. City of Clearwater*, 863 So. 2d 149, 150 (Fla. 2003).

transaction of official business" as defined in section 119.011(11) of the Florida Statutes.¹⁶⁶

In 2000, a Times Publishing Company ("Times") reporter submitted a public records request to the City of Clearwater seeking disclosure of all e-mails exchanged between two city employees between October 1, 1999, and October 6, 2000.¹⁶⁷ After the request, the employees reviewed their e-mails and designated which were personal and which were public.¹⁶⁸ Subsequently, the city disclosed the public e-mails but retained those deemed personal.¹⁶⁹ The Times filed suit, asserting that it was entitled to all of the e-mails.¹⁷⁰

The Florida Supreme Court began, as most courts have, by looking at what constitutes a public record under Florida law.¹⁷¹ It quickly concluded that "public records" referred only to those records that were related to official government business.¹⁷² Therefore, the personal e-mails at issue fell outside of the definition of public records because of the simple fact that they were in no way connected to official business.¹⁷³

The court rejected the Times's argument that placement of the e-mails on a city-owned computer automatically made the e-mails public records.¹⁷⁴ It stated that a possession rule would yield absurd results, such as requiring disclosure of a public employee's personal utility bills by virtue of placement in a state-owned desk.¹⁷⁵ Therefore, e-mails, just as any other public record, "must have been prepared 'in connection with official agency business' and be 'intended to perpetuate, communicate, or formalize knowledge of such type'" to be subject to disclosure.¹⁷⁶ Consistent with the emerging trend in cases involving public employees' right to privacy in e-mail,¹⁷⁷ the Florida Supreme Court concluded that the nature of an e-mail record deter-

166. *Id.* at 155. Section 119.011(11) of the Florida Statutes defines "public records" as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." FLA. STAT. ANN. § 119.011(11) (LEXIS 2007).

167. *Clearwater*, 863 So. 2d at 150.

168. *Id.*

169. *Id.* at 151.

170. *Id.*

171. *Id.* at 151-52.

172. *Id.* at 152. The court looked to Florida case law as far back as 1889 and determined "that the connection between public records and official business was established well before the [l]egislature" defined the term "public records" in 1967. *Clearwater*, 863 So. 2d at 152.

173. *Id.* at 153.

174. *Id.* at 154.

175. *Id.*

176. *Id.*

177. *See supra* Part II(D)(1-3).

mined whether the record was or was not a public record subject to disclosure.¹⁷⁸

5. *Idaho*

In 2007, the Idaho Supreme Court addressed the issue of e-mails as public records.¹⁷⁹ The case was a result of public scrutiny surrounding the downfall of the Kootenai County Juvenile Education and Training (JET) Court, which was overseen by the county prosecutor and funded by a grant from the United States Department of Justice.¹⁸⁰ When the JET Court failed to provide a quarterly finance report, the Department of Justice suspended its funding, and the JET Court was terminated.¹⁸¹

Local officials accused Marina Kalani, the program's manager, of inappropriate and unprofessional conduct that led to the demise of the JET Court.¹⁸² Allegations also arose of an improper relationship between Kalani and the county prosecutor, William Douglas.¹⁸³ Douglas denied the existence of such a relationship and publicly defended Kalani's management of the JET Court.¹⁸⁴

A county investigation into the allegations of misconduct uncovered over one thousand e-mails exchanged between Kalani and Douglas.¹⁸⁵ A local newspaper reporter requested disclosure of the e-mails for the purpose of public inspection.¹⁸⁶ The county disclosed 172 complete e-mails, 287 redacted e-mails, and withheld 597 others.¹⁸⁷ Cowles Publishing, the owner of the local newspaper, filed suit and demanded the release of the remaining e-mails.¹⁸⁸ The trial court found that the e-mails were public records and ordered their disclosure; Kalani subsequently appealed.¹⁸⁹

In Idaho, a "public record" is defined as "a writing that (1) contains information relating to the conduct or administration of the public's business, and (2) was prepared, owned, used or retained by a governmental agency."¹⁹⁰ Furthermore, the Idaho legislature has defined "public records" so

178. *Clearwater*, 863 So. 2d at 154.

179. *Cowles Publ'g Co. v. Kootenai County Bd. of County Comm'rs*, 159 P.3d 896 (Idaho 2007).

180. *Id.* at 898.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Cowles Publ'g Co.*, 159 P.3d at 898.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 900.

190. *Id.* at 900 (citing IDAHO CODE ANN. § 9-337(13) (2007)).

broadly that a document may be subject to disclosure even if it does not satisfy the statutory definition.¹⁹¹ The Idaho Supreme Court held that a document's "relation to legitimate public interest . . . makes [it] a public record."¹⁹²

Focusing on its definition of "public records," the court, unlike most courts faced with the issue, held that the e-mails at issue were public records subject to disclosure.¹⁹³ First, the court believed the e-mails were sufficiently connected to the public's business because the public had an interest in the communications between an elected official and his subordinate, especially when the official publicly defended his subordinate's management of the public's business.¹⁹⁴ Second, the court determined that the e-mails were created by county employees, used in a county investigation, and owned by the county.¹⁹⁵ Following these findings, the court concluded that the e-mails were public records because both prongs of its definition of "public records" were satisfied.¹⁹⁶ The court emphasized, however, that "[i]t [was] not simply the fact that the e-mails were sent and received while the employees were at work or the fact that they were 'in' the employee's office that makes them a public record."¹⁹⁷

Concerned with the e-mails' relation to the public's legitimate interest in making its determination, the court focused on the underlying facts of the case, including: (1) the relationship between the elected official and his subordinate, (2) the fact that the e-mail exchange utilized county-owned computers, and (3) the official's public defense of his subordinate and her management of the JET Court.¹⁹⁸ The court believed these factors brought the e-mail within the realm of legitimate public interest.¹⁹⁹

Although the court held that possession alone was insufficient to make a document a public record, the court did not adopt a content-based approach to determine if an e-mail is a public record subject to disclosure.²⁰⁰ Rather, the court classified the e-mails as public records by focusing on the

191. *Cowles Publ'g Co.*, 159 P.3d at 900. Section 9-337(13) defines "public record" to include "any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency . . . regardless of physical form or characteristics." IDAHO CODE ANN. § 9-337(13) (2007).

192. *Cowles Publ'g Co.*, 159 P.3d at 901.

193. *Id.*

194. *Id.* at 900.

195. *Id.* The court stated that because the second prong of the definition contains the conjunction "or," a writing did not have to satisfy all three tests contained therein. *Id.*

196. *Id.* at 901.

197. *Cowles Publ'g Co.*, 159 P.3d at 901.

198. *Id.*

199. *Id.*

200. *See id.*

context in which they were created and exchanged in relation to the public interests involved.²⁰¹

Approximately two months after the Idaho Supreme Court decided *Cowles Publishing Co. v. Kootenai County Board of County Commissioners*, the Arkansas Supreme Court had to decide whether so-called “personal” e-mails created, exchanged, and saved on a government e-mail system were “public records” subject to disclosure under the Arkansas FOIA.

III. THE CASE

The dispute over a former Pulaski County official’s e-mails began in early June of 2007 when the Arkansas Democrat-Gazette made a routine request under the Arkansas FOIA.²⁰² The request followed the arrest of the official on charges of embezzlement.²⁰³ The county released some of the requested e-mails and asserted that the remaining e-mails were “personal” and, therefore, not “public records” subject to disclosure.²⁰⁴ The county’s refusal to release all of the e-mails lead to a swift two months of litigation that concluded with the Arkansas Supreme Court’s most recent interpretation of what constitutes a “public record.”²⁰⁵

This section first describes what events motivated the Arkansas Democrat-Gazette to request the e-mails and provides the procedural history of the case.²⁰⁶ This section also discusses the *Pulaski County*²⁰⁷ decision and its various opinions.²⁰⁸

A. Facts

On June 5, 2007, Arkansas Democrat-Gazette reporter Van Jensen submitted a written FOIA request to Pulaski County Attorney Karla Burnett.²⁰⁹ The newspaper requested that the county “disclose ‘all e-mail and other recorded communication between former Pulaski County Comptroller and Director of Administrative Services Ron Quillin and employees of Government e-Management Solutions [(GEMS)], a software contractor for Pulaski County, from Jan[uary] 2005 to the termination of Mr. Quillin’s em-

201. *Id.* at 901.

202. ARK. CODE ANN. §§ 25-19-101 to -109 (LEXIS Repl. 2002 & Supp. 2007).

203. *See infra* Part III.A.

204. *See infra* Part III.A.

205. *Pulaski County I.*, 370 Ark. 435, 260 S.W.3d 718 (2007).

206. *See infra* Part III.A.

207. For purposes of this note, *Pulaski County I* and *Pulaski County II* are analyzed as two halves of a single decision. Where the note refers to the case as *Pulaski County*, it is referring to the decision as a whole rather than its various decisions and opinions.

208. *See infra* Part III.B.

209. *Pulaski County I*, 370 Ark. at 437, 260 S.W.3d at 719.

ployment with the county.”²¹⁰ The request came one day after Mr. Quillin was arrested on embezzlement charges for allegedly stealing approximately \$42,000 of public funds.²¹¹

Pulaski County had an ongoing contractual relationship with GEMS.²¹² Mr. Quillin represented the county in this matter and “was responsible for the flow of public funds from the [c]ounty to GEMS.”²¹³ GEMS was a county contractor that had sold the county more than \$1 million of software and services.²¹⁴ While maintaining the county’s relationship with GEMS, Mr. Quillin was engaged in an extramarital affair with the GEMS vendor who managed the Pulaski County account.²¹⁵ Mr. Quillin later admitted to authorities that he began embezzling the money to maintain his affair and the “extravagant lifestyle he had been leading since the affair began.”²¹⁶

Before being terminated, Mr. Quillin deleted all of the e-mails on his computer, including those between him and his lover.²¹⁷ Pulaski County, however, had the deleted e-mails restored before the *Arkansas Democrat-Gazette* made its FOIA request.²¹⁸ On June 12, 2007, in an attempt to satisfy the FOIA request, the county released some of the restored e-mails between Mr. Quillin and GEMS.²¹⁹ The county refused to release all of the e-mails, claiming that some did not constitute “public records” subject to disclosure under the FOIA.²²⁰

On June 14, 2007, the *Arkansas Democrat-Gazette* filed a complaint in Pulaski County Circuit Court seeking to challenge Pulaski County’s refusal to disclose all of the requested e-mails.²²¹ The suit named both Pulaski County and Pulaski County Attorney Karla Burnett as defendants.²²² At a hearing on June 19, 2007, Pulaski County Attorney Karla Burnett was dismissed, and “Jane Doe” was allowed to intervene in the case.²²³ Also at the hearing, Pulaski County Circuit Judge Mary Spencer McGowan heard tes-

210. *Id.*, 260 S.W.3d at 719.

211. *Id.*, 260 S.W.3d at 719.

212. *Pulaski County II*, 371 Ark. 217, 218, 264 S.W.3d 465, 466 (2007).

213. *Id.*, 465 S.W.3d at 466.

214. 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, at Front Section.

215. *Pulaski County II*, 371 Ark. at 219, 264 S.W.3d at 466.

216. Netterstrom & Upshaw, *supra* note 210.

217. *Pulaski County I*, 370 Ark. at 437, 260 S.W.3d at 719.

218. *Id.*, 260 S.W.3d at 719.

219. *Id.*, 260 S.W.3d at 719.

220. *Id.*, 260 S.W.3d at 719.

221. *Id.*, 260 S.W.3d at 719.

222. *Id.*, 260 S.W.3d at 719.

223. *Pulaski County I*, 370 Ark. at 437, 260 S.W.3d at 719–20. Mr. Quillen’s lover, Cheryl Zeier, was allowed to intervene in this case and is referred to as “Jane Doe” in the court’s opinions. Netterstrom & Upshaw, *supra* note 210.

timony from Van Jensen, Arkansas Democrat-Gazette managing editor David Bailey, and a Pulaski County Information Systems hardware analyst who maintained the county's file servers.²²⁴

On June 25, 2007, Judge McGowan issued a final judgment in favor of the *Arkansas Democrat-Gazette* and ordered the county to release all e-mails within twenty-four hours.²²⁵ Pulaski County filed a notice of appeal and a motion for stay pending appeal, but Judge McGowan denied the motion.²²⁶ The county "then filed motions to expedite and for stay pending appeal" with the Arkansas Supreme Court,²²⁷ both of which were granted.²²⁸ The supreme court also demanded that the parties submit briefs addressing the following issues:

1. Do Pulaski County and the intervenor, Jane Doe, have standing to raise an [sic] FOIA issue?
2. Are personal e-mails in a county computer exempt from the FOIA? If so, under what circumstances?
3. Did the intervenor waive all privacy rights by sending e-mails to a county computer?
4. Is it necessary for this court to do an *in camera* review of the e-mails to distinguish personal from business e-mails?²²⁹

On July 20, 2007, the Arkansas Supreme Court delivered its opinion and remanded the case to the circuit court for an *in camera* review.²³⁰ The supreme court held that there was insufficient evidence in the record to support the circuit court's factual findings that the e-mails at issue were public records subject to disclosure under the FOIA.²³¹ The supreme court held that the only way to make such a determination is to examine the e-mails.²³²

224. *Pulaski County I*, 370 Ark. at 437–38, 260 S.W.3d at 720. The county called Professor Richard Peltz to obtain his opinion concerning hypothetical situations, but the court excluded his testimony. Brief of Appellant at 33–38, *Pulaski County I*, 370 Ark. 435, 260 S.W.3d 718 (2007) (No. 07-669). Professor Peltz is a professor at the University of Arkansas at Little Rock William H. Bowen School of Law, has authored several publications regarding the Arkansas FOIA, and is regularly requested to give his opinion on FOIA matters. *Id.* at 33.

225. *Id.*, 260 S.W.3d at 720.

226. *Id.*, 260 S.W.3d at 720.

227. *Id.*, 260 S.W.3d at 720.

228. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 433, 434, 260 S.W.3d 298, 298 (2007) ("*Pulaski County III*"). The motion was granted by the court on June 28, 2007. *Id.*, 260 S.W.3d at 298. This is the first of three minor decisions delivered in this case. See *infra* note 232.

229. *Pulaski County III*, 370 Ark. at 434–35, 260 S.W.3d at 298.

230. *Pulaski County I*, 370 Ark. at 446, 260 S.W.3d at 726.

231. *Id.* at 445–46, 260 S.W.3d at 725.

232. *Id.* at 446, 260 S.W.3d at 725.

Consequently, the court remanded the case to the circuit court to review the e-mails to determine if they were actually public records.²³³

On remand, the circuit court reviewed the content of each e-mail.²³⁴ Following this review, the circuit court ordered disclosure of all the e-mails "with the exception of six graphic, sexually explicit photos and seven e-mails sent on a chain of forwards."²³⁵ Pulaski County once again appealed the circuit court's decision.²³⁶

On its second appeal to the Arkansas Supreme Court, Pulaski County argued that the circuit court failed to properly follow the supreme court's order for an *in camera* review.²³⁷ Jane Doe argued that release of the e-mails would violate her right to privacy.²³⁸ The supreme court held, as the circuit court had found, that Jane Doe waived her right to privacy and had no expectation that the e-mails she sent to Mr. Quillin on the county computer would remain private.²³⁹ The supreme court also stated that the record did not support Pulaski County's assertion that the circuit court failed to follow its mandate for *in camera* review.²⁴⁰ After rejecting the appellants' arguments, the supreme court affirmed the circuit court's order to disclose the e-mails.²⁴¹

B. Reasoning

This section lays out how the Arkansas Supreme Court reached its decision in *Pulaski County*.²⁴² First, this section discusses the court's decision

233. *Id.*, 260 S.W.3d at 726.

234. *Pulaski County II*, 371 Ark. at 221, 264 S.W.3d at 468 (2007).

235. *Id.* at 219, 264 S.W.3d at 467.

236. *Id.*, 264 S.W.3d at 467. The other minor decisions in this case were delivered before *Pulaski County II*. On August 22, 2007, the supreme court granted motions for clarification and to expedite and denied a motion to lift stay, all of which were filed by the Arkansas Democrat-Gazette. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 456, 456, 260 S.W.3d 299, 299 (2007). On August 31, 2007, the supreme court granted the Arkansas Democrat-Gazette's motion to unseal appellate briefs after remand, but the court did not unseal a CD-ROM that contained the e-mails at issue. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 459, 459, 260 S.W.3d 732, 732 (2007).

237. *Pulaski County II*, 371 Ark. at 221, 264 S.W.3d at 467.

238. *Id.* at 220, 264 S.W.3d at 467.

239. *Id.* at 221, 264 S.W.3d at 468.

240. *Id.*, 264 S.W.3d at 468.

241. *Id.* at 222, 264 S.W.3d at 468.

242. The court dealt with multiple issues in this case; however, for purposes of this note, only two issues will be addressed in detail. The other issues included whether Jane Doe had standing to raise a FOIA issue and whether disclosure of the e-mails violated her constitutional right to privacy, both of which were issues the court addressed in *Pulaski County II*. *Pulaski County II*, 371 Ark. at 219-21, 264 S.W.3d at 466-68. Therefore, this section focuses primarily on the court's reasoning in *Pulaski County I*, specifically the issues of whether the

as to whether e-mails on government computers are “public records” as defined by the FOIA.²⁴³ Second, this section looks at the court’s decision regarding the necessity of an *in camera* review of the e-mails at issue.²⁴⁴ Finally, this section discusses each additional opinion issued in this case: (1) Justice Glaze’s dissent in *Pulaski County I*, in which Justice Imber and Justice Danielson joined;²⁴⁵ (2) Justice Glaze’s dissent in *Pulaski County II*,²⁴⁶ (3) Justice Imber’s dissent in *Pulaski County I*, in which Justice Glaze and Justice Danielson joined;²⁴⁷ and (4) Justice Danielson’s opinion in *Pulaski County II*, joined by Justice Imber, in which he concurred in part and dissented in part.²⁴⁸

1. *E-mails as “Public Records”*

This section focuses on the majority’s reasoning in *Pulaski County I*. It discusses the majority’s interpretation of the definition of “public records” as that term is used in the Arkansas FOIA.²⁴⁹ This section also discusses the court’s adoption of a content-driven analysis for determining whether an e-mail constitutes a public record subject to disclosure.²⁵⁰

a. The limit of public records

When the supreme court granted Pulaski County’s motion for stay pending appeal, the court directed the parties to file briefs analyzing, among other things, whether personal e-mails in a county computer were exempt from the FOIA.²⁵¹ The court concluded, however, that the issue was not one of exemption, but was an issue of whether such e-mails were even public records as defined by the FOIA.²⁵² At that point, the case became a matter of statutory interpretation to determine what constituted a public record under section 25-19-103(5)(A) of the Arkansas Code.²⁵³

e-mails were “public records” and whether *in camera* review was necessary. *Pulaski County I*, 370 Ark. at 438–44, 260 S.W.3d at 720–24.

243. See *infra* Part III.B.1.

244. See *infra* Part III.B.2.

245. See *infra* Part III.B.3.

246. See *infra* Part III.B.4.

247. See *infra* Part III.B.5.

248. See *infra* Part III.B.6.

249. See *infra* Part III.B.1.a.

250. See *infra* Part III.B.1.b.

251. *Pulaski County III*, 370 Ark. 433, 434, 260 S.W.3d 298, 298 (2007).

252. *Pulaski County I*, 370 Ark. 435, 438, 260 S.W.3d 718, 720 (2007).

253. *Id.* at 439, 260 S.W.3d at 721. In analyzing this issue, the court used a *de novo* standard of review. *Id.*, 260 S.W.3d at 720 (citing *Harris v. City of Fort Smith*, 366 Ark. 277, 280, 234 S.W.3d 875, 878 (2006)). Though not bound by the trial court’s interpretation, the supreme court would accept it as long as it were not shown that the lower court erred in its

The court began by stating that it “liberally interpret[ed] the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner . . . [and] broadly construe[d] the [FOIA] in favor of disclosure.”²⁵⁴ The court, however, confessed that:

While recognizing [its] commitment to the general proposition that the FOIA should be broadly construed in favor of disclosure and exceptions construed narrowly in order to counter balance the self-protective interests of the governmental bureaucracy, [it was] also aware of the need for a balancing of interests to give effect to what [it] perceive[d] to be the intent of the General Assembly. In doing so a common sense approach must be taken.²⁵⁵

In determining what the Arkansas General Assembly intended public records to include, the court quoted extensively from *The Arkansas Freedom of Information Act*.²⁵⁶ The court relied on the book to discuss how “the legislature apparently did not intend that every record maintained by an agency be subject to public inspection, because the ‘performance’ language in [s]ection 25-19-103(5)(A) limits the term ‘otherwise kept’” and narrows the meaning of public records.²⁵⁷ The court also cited an Arkansas Attorney General opinion, which stated that the presumption found in section 25-19-103(5)(A) may be rebutted by showing that the records do not satisfy the first sentence of the section.²⁵⁸ Relying on these interpretations, the court concluded that the general assembly intended for some limitation as to what items constitute public records, specifically that “[p]ublic records are limited by definition to ‘records of the performance or lack of performance of official functions.’”²⁵⁹

b. Content-driven analysis

Next, the court focused on whether the e-mails satisfied the definition of public records set out in section 25-19-103(5)(A).²⁶⁰ Pulaski County argued that a court must look to the content of a document, rather than its lo-

interpretation. *Id.*, 260 S.W.3d at 720–21 (citing *Fox v. Perroni*, 358 Ark. 251, 256, 188 S.W.3d 881, 885 (2004)).

254. *Id.*, 260 S.W.3d at 721 (citing *Fox*, 358 Ark. at 256, 188 S.W.3d at 885).

255. *Id.* at 439–40, 260 S.W.3d at 721 (citing *Bryant v. Mars*, 309 Ark. 480, 485, 830 S.W.2d 869, 871 (1992)).

256. *Pulaski County I*, 370 Ark. at 440–41, 444, 260 S.W.3d at 721–22, 724 (citing *WATKINS & PELTZ*, *supra* note 30).

257. *Id.* at 440, 260 S.W.3d at 721–22 (quoting *WATKINS & PELTZ*, *supra* note 30, at 91, 93).

258. *Id.* at 440–41, 260 S.W.3d at 722 (citing *Op. Ark. Att’y Gen. No. 2005-095* (2005)).

259. *Id.* at 441, 260 S.W.3d at 722 (quoting *WATKINS & PELTZ*, *supra* note 30, at 437).

260. *Id.*, 260 S.W.3d at 722.

cation, when determining whether the document is a public record subject to disclosure.²⁶¹ The court discussed decisions from other jurisdictions that adopted a content-driven analysis in determining whether a document was subject to disclosure.²⁶²

Consistent with those decisions, the court took the stance that the nature of a record, not its physical location, was dispositive as to public record status.²⁶³ Furthermore, the court held that a context-based analysis was insufficient to determine what constituted a public record.²⁶⁴ Therefore, the court concluded that a fact-specific, content-based inquiry was necessary to determine whether a document was so closely related to the performance of government functions as to deem the document a public record subject to disclosure.²⁶⁵

2. *In Camera* Review

Pulaski County argued that an *in camera* review was necessary for a court to properly classify an e-mail as a public record based upon the e-mail's content.²⁶⁶ The court agreed that the only way to conduct this content-based "inquiry, while maintaining the privacy of personal, non-public documents" was to allow such a review.²⁶⁷ The court compared the instant case to other cases where the government claimed a FOIA exemption.²⁶⁸ In exemption cases, circuit courts are required to conduct an *in camera* review to determine whether the claimed exemption applies or whether the information should be disclosed, thereby preventing government abuse of the FOIA.²⁶⁹

The court again relied on *The Arkansas Freedom of Information Act* to support its belief that *in camera* review was the appropriate method for discerning whether e-mails constituted public records.²⁷⁰ It reasoned that *in*

261. *Id.*

262. *Pulaski County I*, 370 Ark. at 441–43, 260 S.W.3d at 722–24. The court relied on the cases from the highest courts of Florida, Colorado, and Arizona discussed in Part II of this note. *Id.*, 260 S.W.3d at 722–24; *see supra* Part II.D.2–4.

263. *Pulaski County I*, 370 Ark. at 442, 260 S.W.3d at 722 (citing *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003)).

264. *Id.*, 260 S.W.3d at 723 (quoting *Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190, 202 (Colo. 2005)).

265. *Id.* at 446, 260 S.W.3d at 724–25.

266. *Id.* at 443, 260 S.W.3d at 723.

267. *Id.* at 444, 260 S.W.3d at 724.

268. *Id.* at 443–44, 260 S.W.3d at 724.

269. *Pulaski County I*, 370 Ark. at 443–44, 260 S.W.3d at 724.

270. *Id.* at 444, 260 S.W.3d at 724 (quoting WATKINS & PELTZ, *supra* note 30, at 437–38). The authors of the book suggest that an e-mail requester who raises a sufficient "doubt as to the reliability of a record segregation process . . . could obtain an *in camera* review by a

camera review would allow a court to determine whether an e-mail deemed “personal” is in fact a public record subject to disclosure.²⁷¹ The court concluded that *in camera* review was proper because it would allow a neutral court, rather than a document requester or the government, to determine whether the requested e-mails constituted public records, while simultaneously protecting the privacy of personal, non-public documents.²⁷²

3. Justice Glaze’s First Dissent

In *Pulaski County I*, Justice Glaze dissented, stating that remanding the case would “seriously weaken the FOIA and its legislative intent.”²⁷³ He traced the history of the court’s interpretations of the FOIA back to *Laman v. McCord*.²⁷⁴ Applying the principles of *Laman*, Justice Glaze looked to the plain language definition of public records.²⁷⁵ He believed that the facts of the case brought the e-mails at issue within the definition of “public records.”²⁷⁶ More specifically, he stated that “the personal and professional relationship between Quillin and Doe may have affected or influenced Quillin’s performance and his expenditures of county funds,” making the exchanged e-mails records of his performance or lack of performance of his official functions.²⁷⁷

Alternatively, Justice Glaze argued that Quillin’s e-mails were statutorily presumed to be public records because Quillin maintained and used the e-mails to conduct county business.²⁷⁸ Justice Glaze also thought that the e-mails were public records “because information is not exempt from the FOIA *unless* specifically exempted under the Act or some other statute.”²⁷⁹

Justice Glaze stated that the circuit court properly favored public interests as required by the FOIA.²⁸⁰ He argued that remanding the case for an *in camera* review was “unwarranted and a complete waste of time . . . [that] unnecessarily prolong[ed] the process and increase[d] the expense of a

court, which would not infringe on the employee’s right to privacy.” WATKINS & PELTZ, *supra* note 30, at 437–38.

271. *Pulaski County I*, 370 Ark. at 446, 260 S.W.3d at 724.

272. *Id.* at 446, 260 S.W.3d at 725–26.

273. *Id.* at 447, 260 S.W.3d at 726 (Glaze, J., dissenting).

274. *Id.*, 260 S.W.3d at 726 (citing *Laman v. McCord*, 245 Ark. 401, 404–05, 432 S.W.2d 753, 755 (1968) (requiring that the FOIA be liberally interpreted in favor of the public, yet stating that the FOIA requires little interpretation because its language and purpose are clear)).

275. *Id.* at 448, 260 S.W.3d at 727.

276. *Id.* at 449, 260 S.W.3d at 727.

277. *Pulaski County I*, 370 Ark. at 449, 260 S.W.3d at 727 (Glaze, J., dissenting).

278. *Id.* at 448, 260 S.W.3d at 727.

279. *Id.* at 449, 260 S.W.3d at 727 (citing *Furman v. Holloway*, 312 Ark. 378, 381, 849 S.W.2d 520, 522 (1993)).

280. *Id.* at 449, 260 S.W.3d at 728.

FOIA request, and in so doing needlessly infringe[d] upon a citizen's right to obtain public records."²⁸¹ In sum, Justice Glaze believed an *in camera* review was improper because it unnecessarily impeded Arkansans' rightful access to public records.²⁸²

4. *Justice Glaze's Second Dissent*

Justice Glaze again parted with the majority's handling of the case in *Pulaski County II*.²⁸³ He stated that the purpose of the FOIA was to provide the public with almost immediate access to public records and argued that the court had done little to further that purpose.²⁸⁴ Furthermore, he accused the majority of attempting to protect a public employee's inappropriate conduct by unjustifiably delaying access to Quillin's e-mails and preventing public exposure of what was placed on a county computer during working hours at the taxpayers' expense.²⁸⁵ Justice Glaze concluded that the court's prolonged treatment of this case undermined the intent of the FOIA and exclaimed: "Oh, the irony of it all!"²⁸⁶

5. *Justice Imber's Dissent*

Justice Imber stated that the majority failed to apply traditional statutory construction rules in *Pulaski County I*.²⁸⁷ She also accused the majority of failing to liberally interpret the FOIA.²⁸⁸ Justice Imber argued that all of the e-mails at issue were presumed to be public records, and Pulaski County had failed to rebut that presumption.²⁸⁹

First, Justice Imber turned to rules of statutory construction and stated "that the first rule in considering the meaning and effect of a statute [was] to construe it just as it reads, giving the words their ordinary and usually ac-

281. *Id.* at 449–50, 260 S.W.3d at 728.

282. *Id.* at 450, 260 S.W.3d 728.

283. *Pulaski County II*, 371 Ark. at 227, 264 S.W.3d at 472 (Glaze, J., dissenting). Justice Glaze actually wrote three dissenting opinions throughout the course of this case, but for purposes of this note only his dissents in *Pulaski County I* and *Pulaski County II* are discussed. His second dissent came on August 22, 2007, when the court denied the Arkansas Democrat-Gazette's motion to lift the stay. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 456, 457, 260 S.W.3d 299, 299 (2007) (Glaze, J., dissenting). He argued that the stay should be lifted and that the county's desire to appeal a second time bordered on frivolous. *Id.* at 457–58, 260 S.W.3d at 300.

284. *Pulaski County II*, 371 Ark. at 227, 264 S.W.3d at 472 (Glaze, J., dissenting).

285. *Id.* at 228, 264 S.W.3d at 473.

286. *Id.*, 264 S.W.3d at 473.

287. *Pulaski County I*, 370 Ark. at 450, 260 S.W.3d at 728 (Imber, J., dissenting).

288. *Id.*, 260 S.W.3d at 728.

289. *Id.*, 260 S.W.3d at 728.

cepted meaning in common language.”²⁹⁰ Applying a plain language interpretation to the definition of “public records,” Justice Imber argued that the emails retrieved by the Pulaski County computer hardware analyst were records maintained by a public employee within the scope of his employment and should be presumed to be public records.²⁹¹ Accordingly, she believed Pulaski County either had to overcome that presumption or disclose all of the retrieved e-mails.²⁹²

Next, Justice Imber criticized Pulaski County’s argument that the e-mails were not public records because of their personal nature.²⁹³ She agreed that the county’s argument would be valid under a narrow definition of public records.²⁹⁴ Nevertheless, she stated that the court has always liberally interpreted the FOIA in favor of disclosure, and concluded that any e-mails between a government employee and government contractor fell within a liberal definition of public records.²⁹⁵ She asserted that “the very context of the e-mails, Quillin and Jane Doe’s relationship as business associates engaged in a romantic relationship, [made] the content of the e-mails relevant to . . . the performance or lack of performance of a government official[,]” and thereby satisfied the definition of public records.²⁹⁶

Finally, Justice Imber criticized the majority for analogizing this case with cases involving FOIA exemptions where the trial courts ruled in favor of the government.²⁹⁷ Those cases required *in camera* reviews to prevent government abuse of FOIA exemptions.²⁹⁸ Justice Imber did not believe remand for *in camera* review was needed in this case because the trial court ruled in favor of the *Arkansas Democrat-Gazette*, meaning in favor of the public and in furtherance of the FOIA’s policy of liberal disclosure.²⁹⁹

6. Justice Danielson’s Concurrence in Part, Dissent in Part

Justice Danielson wrote an opinion in *Pulaski County II* in which he concurred in part and dissented in part.³⁰⁰ He concurred with the majority’s decision that the county and Jane Doe failed to demonstrate that the circuit court’s findings on remand were erroneous, but his concurrence stopped

290. *Id.*, 260 S.W.3d at 728.

291. *Id.* at 451, 260 S.W.3d at 728.

292. *Id.*, 260 S.W.3d at 728.

293. *Pulaski County I*, 370 Ark. at 451–52, 260 S.W.3d at 729 (Imber, J., dissenting).

294. *Id.* at 452, 260 S.W. 3d at 729.

295. *Id.*, 260 S.W. 3d at 729.

296. *Id.* at 454, 260 S.W.3d at 731.

297. *Id.*, 260 S.W.3d at 731.

298. *Id.*, 260 S.W.3d at 731.

299. *Pulaski County I*, 370 Ark. at 454, 260 S.W.3d at 731 (Imber, J., dissenting).

300. *Pulaski County II*, 371 Ark. at 222, 264 S.W.3d at 468–69 (Danielson, J., dissenting).

there.³⁰¹ Justice Danielson asserted that the court mishandled this case from the beginning and claimed that “the majority completely lost sight of and ignored the [FOIA] statutory scheme and our case law.”³⁰²

Justice Danielson accused the majority of completely disregarding the rebuttable, statutory presumption and of erroneously remanding the case for *in camera* review.³⁰³ He believed the e-mails were presumed to be public records, a presumption that the county and Jane Doe could have rebutted by proving that the e-mails did “not constitute a record of an employee’s performance or lack of performance of official functions.”³⁰⁴ He was convinced that the trial court’s original decision was correct, the county and Jane Doe failed to rebut the presumption, and the majority gave the two parties an unwarranted “second bite at the apple.”³⁰⁵

Although Justice Danielson dissented in *Pulaski County II*, he agreed that the circuit court must review any document that the county argued was not a record that constitutes a record of performance or lack of performance of official functions.³⁰⁶ He expected, however, that the county would have proffered the e-mails to the circuit court to create a record sufficient to show error on appeal.³⁰⁷ He stated that the majority mishandled the case because the county and Jane Doe not only failed to rebut the public records presumption but also failed to sufficiently develop a record by which a reviewing court could determine whether the circuit court erred.³⁰⁸ Because of these failures, Justice Danielson would have had the court affirm the circuit court’s original ruling reviewed in *Pulaski County I*.³⁰⁹

Justice Danielson stated that “[t]he sole consideration in determining whether [a] record [was] a public record . . . subject to disclosure [was] whether [it] constitute[d] a record of the performance or lack of performance of a public official,” regardless of its nature as “personal, private, or sexually explicit.”³¹⁰ He argued that a court must liberally interpret the FOIA when determining what constituted a “public record” to further the FOIA’s “purpose that public business be performed in an open and public manner.”³¹¹ In conclusion, Justice Danielson asserted that the majority’s decision to re-

301. *Id.* 264 S.W.3d at 468–69.

302. *Id.*, 264 S.W.3d at 469.

303. *Id.*, 264 S.W.3d at 469.

304. *Id.* at 223, 264 S.W.3d 469.

305. *Id.*, 264 S.W.3d 469.

306. *Pulaski County II*, 371 Ark. at 224–25, 264 S.W.3d at 470. (Danielson, J., dissenting).

307. *Id.* at 225 n.5, 264 S.W.3d at 470 n.5.

308. *Id.* at 227, 264 S.W.3d at 472.

309. *Id.* at 223, 264 S.W.3d at 469.

310. *Id.* at 225, 264 S.W.3d at 471.

311. *Id.* at 226, 264 S.W.3d at 471 (citing *Ark. Dep’t of Fin. & Admin. v. Pharmacy Assocs., Inc.*, 333 Ark. 451, 456, 970 S.W.2d 217, 219 (1998)).

mand the case resulted in an unnecessary delay contrary to the purposes and objectives of the FOIA.³¹²

IV. ANALYSIS

The Arkansas Supreme Court's decision in *Pulaski County* threatens to "seriously weaken the FOIA and its legislative intent."³¹³ The majority utilized its controversial "common sense" balancing approach to give effect to the legislative intent concerning the disclosure of allegedly "personal" e-mails,³¹⁴ but it simultaneously disregarded the presumption that the Arkansas General Assembly created in section 25-19-103(5)(A).³¹⁵ By using its "common sense" approach, the court made the argument that the rules of statutory interpretation are unnecessary when legislative intent is clear on a statute's face.³¹⁶ This argument, however, is flawed considering that the court interpreted the FOIA in favor of private interests rather than public access, which is in contrast with the express legislative intent that Arkansans have liberal access to public records.³¹⁷ As Professor Watkins recognized, "the attitude of agency officials toward the rights of the citizenry overwhelmingly determines whether the FOIA is to be a pathway or a roadblock."³¹⁸ Unfortunately, it seems that the attitude of the Arkansas Supreme Court will be the source of a FOIA roadblock in the future.

This section addresses the potential impact that *Pulaski County* will have on Arkansans' statutory right to access public records. First, it focuses on the increased costs of FOIA litigation caused by the requirement of *in camera* review and the deterring effect it will have on e-mail requesters.³¹⁹ Next, it discusses the idea that *Pulaski County* embodies a judicially-created "personal" exception to the FOIA.³²⁰ Finally, it considers the increased discretion that the court's content-based analysis gives to state trial judges and how this threatens the future of open government in Arkansas.³²¹

312. *Pulaski County II*, 371 Ark. at 227, 264 S.W.3d at 472 (Danielson, J., dissenting).

313. *Pulaski County I*, 370 Ark. 435, 447, 260 S.W.3d 718, 726 (2007) (Glaze, J., dissenting).

314. *Id.*, 370 Ark. at 440, 260 S.W.3d at 721.

315. ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Repl. 2002 & Supp. 2007).

316. WATKINS & PELTZ, *supra* note 30, at 12.

317. *See Pulaski County I*, 370 Ark. at 444, 260 S.W.3d at 724 (stating that *in camera* review was necessary to protect personal records).

318. Watkins, *supra* note 39, at 842.

319. *See infra* Part IV.A

320. *See infra* Part IV.B.

321. *See infra* Part IV.C.

A. Increased Costs of FOIA Litigation

The court's decision in *Pulaski County* effectively hampers Arkansans' ability to access public records by immediately increasing the cost of FOIA litigation. By burdening state trial courts with the review of a potentially voluminous number of e-mail records, e-mail requesters will be discouraged from pursuing FOIA litigation because of the great expense associated with such a task. Also, by giving trial judges more discretion to determine what constitutes a public record, the potential for appeal is greatly increased. Further, *in camera* review necessarily requires the e-mail requester to file suit. After *Pulaski County*, an e-mail requester knows that the costs of its requests will be substantially increased because of the burden the trial court will face in reviewing a potentially voluminous amount of e-mails and the increased possibility of appellate proceedings.³²² These reasons alone are enough to deter e-mail requesters from filing suit, which is a detriment to the system that the Arkansas General Assembly did not intend when it enacted the FOIA.

The ability of citizens to access public records and to scrutinize the management of their state and local governments is arguably the "most effective check that citizens have on their elected officials."³²³ This right promotes accountability of government officials and agencies, fosters public trust and confidence by opening government operations to the public eye, and encourages participation in the democratic process.³²⁴ To further these noble goals, however, citizens must be willing and able to request public records, combat any reluctance to disclosure, and publicly report their findings. If, however, the costs of making a FOIA request become too much for less-than-deep-pocketed requesters to bear, many requesters will be deterred from making FOIA requests in the first place.

Knowing that the costs of FOIA requests have increased, government bodies fueled by their "self-protective instincts of the governmental bureaucracy"³²⁵ will be encouraged to deny more FOIA requests on the basis that a requested document is an allegedly "personal" record. In doing so, the governmental bodies recognize that the uphill battle for a FOIA requester has become more difficult, thereby increasing the government's chance of successfully withholding the requested records. Furthermore, regardless of whether the judge decides that the e-mails are public records, an appeal is most likely in order. Again, the requester faces the high costs of an appeal

322. See *Pulaski County I*, 370 Ark. at 449–50, 260 S.W.3d at 728 (2007) (Glaze, J., dissenting) (arguing that *in camera* review increases the costs of FOIA requests).

323. Halstuk & Davis, *supra* note 3, at 984.

324. Kozinets, *supra* note 97, at 17.

325. *McCambridge v. City of Little Rock*, 298 Ark. 219, 226, 766 S.W.2d 909, 912 (1989).

and will likely abandon his or her request, resulting in another win for the withholding government body.

The decrease in FOIA litigation and the prolonged process associated with *in camera* review will be detrimental to the FOIA's purpose. A decrease in the number of successful requests will undoubtedly lead to less transparency in government, and much more government business will go unchecked by the public. Also, the amount of time associated with *in camera* review and the increased likelihood of appeal will delay a timely disclosure of critical public records. From any point of view, it appears the requirement of *in camera* review seriously threatens the success of FOIA requests for e-mail records, which is a disturbing result considering the increased use of e-mail correspondence in the daily conduct of governmental affairs. To put it in perspective, an electronic evidence expert estimated that a business with 100 employees could generate 7,500,000 e-mail messages per year.³²⁶ The state of Arkansas, not including county and local governments, employs over 50,000 people.³²⁷ Following the expert's same calculation method, this means that the employees of the state of Arkansas could produce well over 3.75 billion e-mail records per year.

In camera review is probably unavoidable in many situations because the "performance" language in the first sentence of section 25-19-103(5)(A) of the Arkansas Code is determinative of what documents constitute "public records."³²⁸ Nevertheless, an alternative to *in camera* review is necessary to decrease the costs of e-mail requests because, if high-cost deterrence is not minimized, then the purpose of the FOIA will be seriously and permanently undermined.

Arkansas courts and the Arkansas General Assembly should establish a standard focused on a strong presumption in favor of e-mail disclosure.³²⁹

326. Kenneth J. Withers, *Discovery of Electronic Evidence: What You Need to Know*, May 29, 2003, <http://www.kenwithers.com/articles/abcny/slide09.html>. This number was calculated by predicting that an employee of the business will generate twenty-five e-mails per day for 250 working days per year, for a total of 625,000 e-mails. *Id.* It also assumed a business will conduct twelve monthly backups, which brings the total to 7,500,000. *Id.*

327. Aaron Sadler, *State Employee Numbers Increase*, Ark. News Bureau, Jan. 19, 2006, <http://www.arkansasnews.com/archive/2006/01/19/News/333086.html>.

328. See Op. Ark. Att'y Gen. No. 2005-095 (2005) (opining that documents must satisfy the first sentence of the section).

329. Kozinets, *supra* note 97, at 23. Arguably, the Arkansas General Assembly did just that by enacting the last sentence of section 25-19-103(5)(A) of the Arkansas Code, but as made apparent in *Pulaski County*, the Arkansas Supreme Court did not think the general assembly's efforts were enough to require anything less than *in camera* review. See *Pulaski County I*, 370 Ark. 435, 446, 260 S.W.3d 718, 725-26 (2007). In *Pulaski County*, the county did little more than say that the documents were not public records, which was sufficient in the supreme court's eyes to warrant remand for *in camera* review. *Id.* at 438-39, 446, 260 S.W.3d at 726. Had the supreme court applied a more strenuous presumption of public records status as Judge McGowan had done, the county would have had to argue that the e-

Furthermore, when *in camera* review is required, the courts should look at both the content and context of the e-mails.³³⁰ It would defeat the purpose of the FOIA if “personal” language alone could be used to hide improper or illegal conduct that clearly falls within the purview of the public’s interest. By implementing a strong presumption in favor of public record status and requiring both context- and content-based analysis, the deterrent factor made effective by *Pulaski County* will be reduced because it will: (1) limit the number of e-mails that would have to be reviewed *in camera* by requiring litigants opposing disclosure to specifically focus their objections on the e-mails they believe are purely personal, thereby lowering costs to requesters;³³¹ (2) increase the potential for a successful FOIA request by restoring the traditional standard in favor of disclosure;³³² and (3) prevent government abuse in denying FOIA request on personal grounds without a well-grounded argument for doing so.³³³

B. Personal Exception

Although the majority in *Pulaski County* based its holding on the interpretation of the “performance” language found in section 25-19-103(5)(A),³³⁴ one gets the feeling that the majority’s decision was driven by a desire to protect employee privacy in e-mails generated on county-owned computers.³³⁵ This ulterior motive, if true, is inconsistent with precedent and the court’s long history of construing the FOIA liberally.³³⁶ As previously stated, one of the primary goals of the FOIA is to allow the citizenry to monitor the conduct of their elected officials, to check their elected officials’ decisions, and to prevent abuses of power.³³⁷ Essentially, the FOIA opens the activities of the government to public scrutiny, but the public can only exercise its power over state and local government officials if the public can inspect the records generated by these persons.³³⁸

mails were more than merely “personal.” At a minimum, the records should have been presumed to be public records first and personal records second, a result that is clearly consistent with the Arkansas General Assembly’s intent when it created the statutory presumption of public record status. See ARK. CODE. ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007).

330. Kozinets, *supra* note 97, at 23.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Pulaski County I*, 370 Ark. at 440–41, 260 S.W.3d at 721–22.

335. Kozinets, *supra* note 97, at 23.

336. See *Laman v. McCord*, 245 Ark. 401, 432 Ark. S.W.2d 753 (1968).

337. Kozinets, *supra* note 97, at 17–18.

338. Penelope Thurmon Bryan & Thomas E. Reynolds, *Agency E-mails and the Public Records Laws—Is the Fox Now Guarding the Hen-House?*, 33 STETSON L. REV. 649, 664 (2004).

Many scholars and courts have recognized that the increased use of e-mails by government officials and employees will lead to FOIA abuse, whether intentional or not.³³⁹ Therefore, it seems reasonable that by anticipating this problem, courts hearing FOIA litigation would have addressed this issue before it became a problem of great public concern. Nevertheless, this has not been the case, and courts have seemingly erased decades of case law that required liberal interpretation of public records laws in favor of public access.³⁴⁰ These courts, including the Arkansas Supreme Court, have essentially created a “personal” exception to the FOIA and related public records laws.³⁴¹

Courts have historically refused to allow state agencies to withhold records by raising content-based objections not grounded in statutorily-created exceptions because doing so “would effectively divest the [l]egislature of its status as the only government branch authorized to declare a record exempt from public inspection.”³⁴² In Arkansas, the supreme court has stated that the policy decisions required in developing exceptions to the FOIA “are peculiarly within the province of the legislative branch of the government.”³⁴³ Although the Arkansas Supreme Court has traditionally construed the FOIA liberally in favor of disclosure and in furtherance of legislative intent,³⁴⁴ it seems to reverse course in *Pulaski County*, creating an exception to the FOIA that restricts Arkansans’ ability to access public records by disregarding the statutory presumption of public record status created by the Arkansas General Assembly when it enacted section 25-19-103(5)(A) of the Arkansas Code.³⁴⁵

As conceded above,³⁴⁶ the “performance” language in the first sentence of section 25-19-103(5)(A) of the Arkansas Code drives the definition of “public records.”³⁴⁷ Nevertheless, the last sentence of that section, which creates the presumption of public record status,³⁴⁸ cannot be deemed superfluous; it was enacted for a reason. The reason may have been to prevent the government from raising content-based, non-statutory objections to the disclosure of public records. In *Pulaski County*, the county rejected disclosure

339. Jean Maneke & Dan Curry, *Public Scrutiny of Missouri E-mail Under the Sunshine Law*, 60 J. Mo. B. 14, 14–15 (2004).

340. See *supra* Part II.D.

341. Kozinets, *supra* note 97, at 17.

342. Bryan & Reynolds, *supra* note 338, at 659.

343. Laman v. McCord, 245 Ark. 401, 406, 432 S.W.2d 753, 756 (1968).

344. *Id.* at 404–05, 432 S.W.2d at 755.

345. ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007).

346. See *supra* Part IV.A.

347. See ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007).

348. *Id.* (“All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.”).

on the basis that the e-mails were allegedly “personal,”³⁴⁹ an objection not based on one of the many FOIA exceptions enacted by the Arkansas General Assembly.³⁵⁰ By disregarding the public record presumption found in section 25-19-103(5)(A) of the Arkansas Code and allowing Pulaski County’s non-statutory objection to prevail,³⁵¹ the Arkansas Supreme Court essentially established a “personal” exception to the FOIA that is unsupported by the FOIA’s statutory scheme.

In fact, the FOIA’s statutory scheme and decades of judicial interpretation of the FOIA suggest an approach that furthers the public’s interest in access to governmental affairs rather than restricting this public right in favor of privacy interests, as was the case in *Pulaski County*. The “performance” language of the FOIA extends to records that are in fact public but are held in a private setting, such as an e-mail that conducts public business through a personal e-mail account.³⁵² Furthermore, the last sentence of section 25-19-103(5)(A) presumes that a record maintained in a public office by an employee in the course of his employment is a public record subject to disclosure.³⁵³ The presumption is rebuttable, but the document is initially deemed a public record, and the burden is on the party opposing disclosure to rebut that presumption.³⁵⁴ Both the Arkansas Supreme Court’s reasoning in *Scott v. Smith*³⁵⁵ and the Arkansas General Assembly’s public record presumption balance the public and private interests involved and resolve any discrepancy in favor of the public benefit. In clear conflict with the principle that the FOIA was “passed wholly in the public interest,”³⁵⁶ the “personal” exception created in *Pulaski County* relieves the party opposing disclosure of their burden to overcome the statutory presumption, ignores legislative intent, and undermines the idea of liberal public access to governmental records.

The argument that *Pulaski County* creates a “personal” exception to the FOIA is strengthened because the Arkansas Supreme Court now requires a trial court to review the requested e-mails to determine whether they are

349. *Pulaski County I*, 370 Ark. at 438–39, 260 S.W.3d at 720.

350. ARK. CODE ANN. § 25-19-105(b) (LEXIS Supp. 2007).

351. *Pulaski County I*, 370 Ark. at 446, 260 S.W.3d at 725 (“[E]ven with the statutory presumption, it is still necessary to examine . . . [these] e-mails . . . to discern whether [they] relate solely to personal matters”).

352. See, e.g., *Scott v. Smith*, 292 Ark. 174, 175, 728 S.W.2d 515, 515 (1987) (rejecting physical possession by agency counsel as determinative of document’s status as a public record).

353. ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007).

354. Op. Ark. Att’y Gen. No. 2005-095 (2005) (stating the agency will bear the burden of overcoming the presumption).

355. *Scott*, 292 Ark. at 175, 728 S.W.2d at 515.

356. *Laman*, 245 Ark. at 405, 432 S.W.2d at 755.

even “public records” under the FOIA.³⁵⁷ In Arizona, this is a reasonable result because in that state there is only a *presumption* that all public records are subject to disclosure,³⁵⁸ but such review is unnecessary in Arkansas. In Arizona, statutes do not explicitly define the term “public records,” and the Arizona courts have developed the definition of the term through case law.³⁵⁹ This requires that Arizona state courts determine whether a document is even a public record before ruling on disclosure; therefore, the burden is on the courts to determine this status.³⁶⁰

In contrast, the Arkansas General Assembly explicitly defined “public records,”³⁶¹ created a presumption of public record status to facilitate disclosure,³⁶² and subjected all non-exempted “public records” to disclosure.³⁶³ By creating the “personal” exception, the Arkansas Supreme Court disregards the statutory presumption, effectively equating a public record in Arkansas with that which is a public record in Arizona. The supreme court placed the burden on Arkansas trial judges to decide whether a document is a public record,³⁶⁴ even though the legislature clearly placed the burden on the parties opposing disclosure to prove that a requested record presumed to be public is *not* actually a public record subject to disclosure.³⁶⁵

As the majority points out in *Pulaski County*, courts must review documents *in camera* when a government agency or other opposing party claims a *legislatively-created, statutory exception* as grounds for withholding documents.³⁶⁶ The purpose for requiring *in camera* review in cases involving FOIA exceptions is rooted in the idea that the general assembly enacted the FOIA in the public interest, reflecting a public policy of open government—the same policy furthered by the requirement that exceptions be interpreted narrowly in favor of disclosure.³⁶⁷ In FOIA exception cases, *in camera* review prevents governmental abuse of the FOIA by protecting the strong public interest in the transparency of government operations.³⁶⁸ The

357. *Pulaski County I*, 370 Ark. at 446, 260 S.W.3d at 726.

358. *Griffis v. Pinal County*, 156 P.3d 418, 421 (Ariz. 2007).

359. *Id.*

360. *Id.* at 422.

361. ARK. CODE ANN. § 25-19-103(5)(A) (LEXIS Supp. 2007).

362. *Id.*

363. *Id.* § 25-19-105(a)(1) (LEXIS Supp. 2007).

364. *See Pulaski County I*, 370 Ark. at 444, 260 S.W.3d at 724 (stating that a neutral court should decide whether a document is or is not a public record).

365. Op. Ark. Att’y Gen. No. 2005-095 (2005) (stating the agency will bear the burden of overcoming the presumption).

366. *Pulaski County I*, 370 Ark. at 443–44, 260 S.W.3d at 724 (citing *Johninson v. Stodola*, 316 Ark. 423, 427, 872 S.W.2d 374, 376 (1994); *Gannett River States Publ’g Co. v. Arkansas Indus. Dev. Comm’n*, 303 Ark. 684, 689–90, 799 S.W.2d 543, 547 (1990)).

367. *McCambridge v. City of Little Rock*, 298 Ark. 219, 226, 766 S.W.2d 909, 912 (1989).

368. *See* ARK. CODE ANN. § 25-19-102 (LEXIS Repl. 2002).

procedure is designed “to ensure that the government agency has fulfilled its affirmative duty of proving that the records are truly exempt from disclosure.”³⁶⁹ Unfortunately, by using the same tool designed to protect the public interest in disclosure of public records, the supreme court in *Pulaski County* created a “personal” exception to the FOIA that is adverse to the FOIA’s laudable purposes.

The “personal” exception may also have the effect of encouraging further misconduct by public officials or employees, especially if such persons believe that they can freely communicate using government-owned e-mail systems with the immunity of a judicially-created FOIA exception.³⁷⁰ It is clear that the public’s ability to monitor official functions and inspect public records is an effective deterrent of official misconduct, such as the misappropriation of government funds.³⁷¹ If, however, a government agency can withhold what appears on its face to be a personal e-mail sent or received on a government computer, unscrupulous officials and government employees will be protected from public scrutiny. In fact, such officials and employees could conduct their illegal or inappropriate behavior in the guise of personal communication and be protected by the same law designed to bring just that kind of behavior to the forefront of public concern. Again, such a results flies in the face of legislative intent and threatens the future of open government in the state of Arkansas.

C. Increased Discretion for State Trial Judges

An issue closely related to the “personal” exception is the amount of discretion that *Pulaski County* provides Arkansas state trial judges. The discretion is rooted in the weak and ambiguous “connection to the performance of official functions” standard that judges must use to determine if an allegedly personal record is actually a public record subject to disclosure.³⁷² By failing to clearly articulate the intricacies and limits of this standard, the supreme court has allowed subjectivity to replace objectivity in the determination of what constitutes a “public record” subject to disclosure.

At first blush, the “connection to the performance of official functions” standard seems reasonable and easily applicable. But upon closer inspection, the standard provides a significant amount of discretion to judges reviewing allegedly “personal” e-mails. The supreme court’s failure to elaborate on

369. *Pulaski County I*, 370 Ark. at 454, 260 S.W.3d at 731 (Imber, J., dissenting).

370. Bryan & Reynolds, *supra* note 338, at 666.

371. *Id.* at 664.

372. *Pulaski County I*, 370 Ark. at 446, 260 S.W.3d at 725. The standard’s name is a creation of this note’s author, but it derives from the court’s ambiguous standard, namely that public records must “reflect a substantial nexus with [the government’s] activities.” *Id.*, 260 S.W.3d at 725.

what constitutes a sufficient "connection to the performance of official functions" will result in an inconsistent application of the standard throughout the state because it is unclear what distinguishes a "personal" record from one that "reflect[s] a substantial nexus with [government] activities."³⁷³ By providing this discretion, the likelihood of successfully litigating a FOIA case will be less predictable, resulting in the same chilling effect as the increased litigation costs discussed above.³⁷⁴ A potential requester faced with the high costs of litigation will be further discouraged from making a FOIA request knowing that a judge will decide the fate of his or her request behind closed doors and away from the public eye.

The Arkansas Supreme Court's "connection to the performance of official functions" standard "threatens to shield from disclosure e-mails that do not necessarily memorialize the performance of required government function but that could nevertheless reveal official malfeasance, misfeasance, or nonfeasance."³⁷⁵ This is because of the difficulty in distinguishing that which is purely "personal" from that which is purely "official," and such difficulty is compounded at the margins of these categories.

On its face, an e-mail may seem to relate to a personal relationship between government employees. Nevertheless, such an e-mail could show favoritism, corruption, fraternization in violation of government policy, sexual discrimination or harassment, or any other kind of conduct that could result in discipline or termination.³⁷⁶ Although such e-mails may not reflect the performance of official duties or functions, they are important to the public who places special trust in the government officials who are exchanging such e-mails or supervising those who are.

Similarly, an e-mail exchanged between a government official and a private party may not reflect the performance of government functions.³⁷⁷ Such an e-mail, however, may provide evidence into the illegal trading of favors between a government official and the private party.³⁷⁸ For example, an e-mail about a public official's weekend fishing trip seems harmless until someone discovers that the trip was paid for by parties conducting business before that official's agency.

But who makes the decision as to whether an e-mail has a substantial connection to government business? According to *Pulaski County*, a single trial judge is to decide, by reviewing an e-mail *in camera*, whether the e-mail sufficiently reflects the performance of official functions.³⁷⁹ The re-

373. *Id.*, 260 S.W.3d at 725.

374. *See supra* Part IV.A.

375. Kozinets, *supra* note 97, at 17.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Pulaski County I*, 370 Ark. at 446, 260 S.W.3d at 726.

quirement for *in camera* review threatens the public's right of access by placing too much discretion in the hands of state trial judges.

The increased discretion given to state trial judges provides an opportunity for both judicial abuse and judicial mistake in interpreting and applying the FOIA. The abuse will result from anti-FOIA judges' narrow interpretation of the "connection to the performance of official functions" standard. These anti-FOIA judges will limit the scope of what documents they believe demonstrate the performance of official functions. By limiting what constitutes a public record, these judges will decrease the number of successful FOIA requests, effectively undermining the principal of liberal disclosure historically required by the FOIA and the Arkansas Supreme Court.³⁸⁰

Some judges may be accused of possessing anti-FOIA views because they will inadvertently interpret the "connection to the performance of official functions" standard narrowly and improperly deny the disclosure of requested e-mails. These judges will simply misapply the standard due to the supreme court's failure to articulate clear, manageable standards. Although the supreme court suggested that it intends to continue interpreting the FOIA in favor of disclosure,³⁸¹ its failure to create a standard that favors disclosure, or at least facilitates it, seems to undermine the court's assertion.

Because of the failure to articulate clear standards, a trial judge could easily confuse the court's analysis (or lack thereof) with the United States Supreme Court's controversial "central purpose" test.³⁸² If Arkansas trial judges confuse the two, the result will critically impair the ability of Arkansans to receive information about their state and local governments and will forever distort the FOIA and its purpose.

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,³⁸³ a CBS reporter sought to obtain an FBI rap sheet on Charles Medico for the reporter's investigation into the relationship between a corrupt Pennsylvania congressman and a known crime-family member whose business received federal defense contracts.³⁸⁴ When the FBI refused the request, the reporter filed suit.³⁸⁵ After an eleven-year court battle, the Court held that the public interest must be balanced against the privacy in-

380. *Laman*, 245 Ark. at 402, 432 Ark. S.W.2d at 754.

381. *Pulaski County I*, 370 Ark. at 439, 260 S.W.3d at 721.

382. The "central purpose" test was developed in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and limited public records subject to disclosure under the federal FOIA to only those documents that directly reveal the operations or activities of the federal government. *Reporters Comm.*, 489 U.S. at 772-73.

383. 489 U.S. 749 (1989).

384. *Id.* at 757.

385. *Id.*

terests involved when determining what documents are subject to disclosure.³⁸⁶ It concluded that only official information directly revealing the operations or activities of the federal government should be disclosed because the federal FOIA focused on United States citizens' right "to know what their government is up to."³⁸⁷ Believing that "the FOIA's central purpose [was] to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happen[ed] to be in the warehouse of the Government be so disclosed,"³⁸⁸ the Court denied disclosure of the rap sheet.³⁸⁹ As a result of this decision, the definition of a record subject to disclosure under the federal FOIA was interpreted to include only official information that reflected an agency's performance and conduct of its statutory duties.³⁹⁰

The *Reporters Committee* "central purpose" test is considered "an alarming instance of judicial activism . . . that constrict[s] the ambit of the FOIA's statutory purpose."³⁹¹ The result of the "central purpose" test greatly restricted the number and kinds of records subject to disclosure under the federal FOIA because it only allowed access to those records that directly reflected an agency's performance of government operations.³⁹² It raised legitimate concerns about public access to an enormous amount of information that did not necessarily reveal the performance of government business, but which nevertheless had substantial value to the public.³⁹³ The concerns became a reality as lower federal courts began to reformulate their FOIA precedent in favor of privacy interests and against public disclosure.³⁹⁴

The Supreme Court's "central purpose" test and the Arkansas Supreme Court's "connection to the performance of official functions" standard are strikingly similar, posing a realistic threat to the future of the Arkansas FOIA. If Arkansas courts adopt the "central purpose" test, the courts will closely scrutinize public interest assertions, and Arkansans will see their successful FOIA requests diminished in favor of privacy interests. As the

386. *Id.* at 772-73.

387. *Id.*

388. *Id.* at 774.

389. *Reporters Comm.*, 489 U.S. at 774.

390. *Id.* at 773.

391. Halstuk & Davis, *supra* note 3, at 995.

392. Halstuk & Davis, *supra* note 3, at 992. This standard is analogous to the "connection to the performance of official functions" standard developed by the Arkansas Supreme Court in *Pulaski County*. See *Pulaski County I*, 370 Ark. 435, 446, 260 S.W.3d 718, 725 (2007) (requiring that e-mails reflect a close connection to the performance of government activities before being subject to disclosure).

393. Halstuk & Davis, *supra* note 3, at 990.

394. Halstuk & Davis, *supra* note 3, at 996 (providing an extensive list of federal courts that reconsidered the privacy concerns implicated in FOIA cases) (citations omitted).

above examples show,³⁹⁵ many e-mails do not directly reveal agency performance, but have the potential to shed light on official decision making, management, and misconduct. The “central purpose” test will prevent access to these e-mail records—a result that undermines the mandate of the Arkansas FOIA that “public business be performed in an open and public manner.”³⁹⁶

V. CONCLUSION

Pulaski County is a direct threat to Arkansans’ statutory right to inspect the e-mail records produced by the officials and employees of their state and local governments. The Arkansas Supreme Court’s failure to elaborate on its newly created “connection to the performance of official functions” standard results in a lack of guidance for the state’s trial courts and increases the possibility of government abuse in denying FOIA requests. Though the long-term effect of *Pulaski County* is unclear, its potential impact threatens to forever undermine the purpose of the FOIA. To prevent such stark results, the Arkansas General Assembly and Arkansas state courts should revive the statutory presumption in favor of public record status, demand clarification of the “connection to the performance of official functions” standard, and adopt policies that will minimize the privacy interests involved in e-mails created on government computers. In sum, the guarantee of public access to government records must be preserved to ensure Arkansans’ ability to monitor the operations of their state and local governments, to scrutinize their elected officials, and to stay actively involved in the democratic process of this great state.

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395. See *supra* Part IV.B.

396. ARK. CODE ANN. § 25-19-102 (LEXIS Repl. 2002).

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