



TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-101

August 26, 2024

The Honorable Clarke Tucker
State Senator
Post Office Box 7268
Little Rock, Arkansas 72217

Dear Senator Tucker:

I am writing in response to your request for my opinion about (1) whether private schools¹ are subject to the Arkansas Freedom of Information Act (FOIA) if they choose to accept Education Freedom Account (EFA) funds under Act 237 of 2023—the LEARNS Act—and (2) if so, the extent the FOIA applies to those schools.²

¹ For purposes of this opinion, I use the term “private schools” to collectively refer to your request’s questions about “private and independent schools.”

² Specifically, your opinion request asks the following: (1) “Whether the school’s participation in EFA subjects it to the FOIA?”; (2) “Whether the percentage of the school’s students using EFA funds affects whether the school is subject to the FOIA?”; (3) “Whether the percentage of each individual student’s tuition at the school that is covered by EFA funds affects whether the school is subject to the FOIA?”; (4) “If the school’s participation in EFA subjects it to the FOIA, to what extent is the school subject to the FOIA (i.e., is the school partially subject to the FOIA)?”; (5) “If it is your opinion that the school’s participation in EFA subjects it to the FOIA, whether and to what extent: (a) school employee personnel records are subject to disclosure under the FOIA; (b) school employee job evaluation records are subject to disclosure under the FOIA; (c) school financial records are subject to disclosure under the FOIA and, if so, what specific financial records are subject to disclosure under the FOIA; (d) communications that concern EFA funds or student who use EFA funds to pay tuition are subject to disclosure under the FOIA; (e) communications unrelated to EFA funds or students who use EFA funds to pay tuition are subject to disclosure under the FOIA; (f) other records that are unrelated to EFA funds are subject to disclosure under the FOIA; and (g) meetings or portions of meetings of the governing body of the school must be public meetings”; (6) “If it is your opinion that the school’s participation in EFA subjects it to the FOIA, whether records that would constitute or qualify as ‘public records’ under the FOIA, but were created prior to the private school’s acceptance or receipt of EFA funds, are subject to disclosure under the FOIA. For purposes of this question, please assume that the record or a copy of the record is maintained by the school *after* the school begins receiving EFA funds”; and (7) “If it is your opinion that the school’s participation in EFA subjects it to the FOIA, whether the ‘Custodian,’ as defined by A.C.A. 25-19-103(1), is a designee of the school or the [Arkansas Department of Education (‘ADE’)] (or division of the ADE)?”

RESPONSE

To be subject to the FOIA, a private school must (1) receive public funds and (2) have its activities intertwined with those of the government. As discussed below, in my opinion, private schools receiving EFA funds meet the first element but not the second. Therefore, they are not subject to the FOIA.

DISCUSSION

The FOIA applies if (1) the entity is subject to the FOIA; (2) the requested document is a “public record”³ or the meeting is a “public meeting”;⁴ and (3) the public record or public meeting is not “exempted by the [FOIA] or other statutes.”⁵ Arkansas courts “liberally interpret[] the FOIA” and “broadly construe [it] in favor of disclosure.”⁶

1. Entity subject to the FOIA. The threshold question is whether a private school is subject to the FOIA. Generally, the FOIA applies only to public entities, like public schools,⁷ but sometimes it applies to private entities.⁸ This means that records held by a private entity can be “public records”⁹ and that discussions had by a private entity can be “public meetings.” But private entities are subject to the FOIA only if (1) they are

³ A.C.A. § 25-19-103(7)(A) (defining “[p]ublic record” 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”).

⁴ *Id.* § 25-19-103(6) (defining “[p]ublic meetings” as “the meetings of any bureau, commission, or agency of the state or any political subdivision of the state, including municipalities and counties, boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds”).

⁵ *Legis. Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 91, 722 S.W.2d 581, 582 (1987).

⁶ *Harrill & Sutter, PLLC v. Farrar*, 2012 Ark. 180, at 8, 402 S.W.3d 511, 515–16.

⁷ A.C.A. § 25-19-106(a) (including “school districts” as public entities subject to the FOIA open-meeting requirements); Ark. Att’y Gen. Op. 2008-167 (presuming records maintained by a public school were public records because where were maintained by a public entity).

⁸ *E.g., N. Cent. Ass’n of Colls. & Sch. v. Troutt Bros.*, 261 Ark. 378, 380–81, 548 S.W.2d 825, 826–27 (1977); Ark. Att’y Gen. Ops. 2016-013, 2006-185; John J. Watkins et al., *The Arkansas Freedom of Information Act* 61–62 (6th ed. 2017).

⁹ Although not relevant here, the FOIA cannot be circumvented “by the simple ‘hand-off’ of documents to entities not covered by the Act.” *Nabholz Const. Corp. v. Contractors for Pub. Prot. Ass’n*, 371 Ark. 411, 419, 266 S.W.3d 689, 694 (2007). Public records that have been handed off to circumvent the FOIA are still subject to the FOIA, even if the entity holding them were not otherwise subject to the FOIA. *See id.*

“supported wholly or partially by public funds or expending public funds” and (2) their activities are “intertwined” with those of the government.¹⁰

1.1. Public Funding. Although a private entity must be supported by or expend “public funds,” that phrase is undefined in the FOIA. But the Arkansas Supreme Court has defined it as “[m]oneys belonging to the government, or any department of it, in hands of public officials.”¹¹ The financial support to the private entity must be a “direct” flow of funds.¹² Indirect “government benefits or subsidies” do not make a private entity subject to the FOIA.¹³

Here, there is direct public funding: EFA funds are state funds going directly to private schools.¹⁴ But simply receiving public funds will not subject a private entity to the FOIA.¹⁵

1.2. Intertwined with government. To be subject to the FOIA, a private school must also engage in activities that are “intertwined” with those of the government. This is a fact-intensive, totality-of-the-circumstances analysis.¹⁶ When analyzing this step, authorities have used various language and factors. For example, this office has

¹⁰ See *Blakely v. Ark. Children’s Hosp.*, 2022 Ark. App. 116, at 4; Ark. Att’y Gen. Ops. 2011-077, 2010-059, 2009-063, 2008-154, 2007-227, 2006-086, 96-287, 93-092. Some of my predecessors have included an additional requirement—that the private entity’s activities must be of “public concern.” *E.g.*, Ark. Att’y Gen. Ops. 2023-108, 2016-013. But this step is necessarily incorporated into the “intertwined with government” step. See *Watkins et al.*, *supra* note 9, at 65 (noting that “[w]hile the Supreme Court’s decisions shed little light of the meaning of the term ‘public concern,’ this requirement would presumably be satisfied in most cases when the requisite intertwining is present”). Therefore, this opinion will use the two-part test as articulated above.

¹¹ *Sebastian Cnty. Chapter of Am. Red Cross v. Weatherford*, 311 Ark. 656, 659, 846 S.W.2d 641, 643 (1993); see also Ark. Att’y Gen. Ops. 2010-136, 95-128.

¹² *Weatherford*, 311 Ark. at 660–61, 846 S.W.2d at 644; Ark. Att’y Gen. Ops. 2016-013, 2012-108, 2007-210, 2004-223, 2001-069, 96-267, 95-077.

¹³ *Weatherford*, 311 Ark. at 660–61, 846 S.W.2d at 644. Examples of indirect funding include government-property leases and tax breaks. See *Watkins et al.*, *supra* note 9, at 63–64; Ark. Att’y Gen. Op. 95-077.

¹⁴ Once a family elects to use EFA funds for eligible expenses, the ADE reviews, approves, and directly transfers those funds from the state to participating schools. See A.C.A. §§ 6-16-1705 (authorizing funding by the ADE), 6-18-2504 (authorizing a division of the ADE to administer the EFA program), 6-18-2505 (charging a division of the ADE with the task of allocating “appropriated” EFA funds); see also Ark. Att’y Gen. Op. 1993-119 (opining that “State and local funding satisfies the ‘receipt of public funds’ requirement”).

¹⁵ See, e.g., *Nabholz*, 371 Ark. at 418–19, 266 S.W.3d at 693–94 (analyzing whether the receipt of public funding itself subjects a private entity to the FOIA, without addressing the “intertwined with government” element).

¹⁶ See, e.g., *McCutchen v. City of Fort Smith*, 2012 Ark. 452, at 16, 425 S.W.3d 671, 682 (“The FOIA does not attempt to give an exact description of every conceivable fact situation that might give rise to the application of the FOIA.”); Ark. Att’y Gen. Ops. 2006-185, 2002-274, 2001-069, 96-287, 93-121.

interchangeably used “functional equivalent” of government;¹⁷ in “close alignment” with the government;¹⁸ in a “symbiotic relationship” with the government;¹⁹ and engaging in “traditional[]” government activities.²⁰ Notably, the Arkansas Supreme Court does not even use the word “intertwined” in its opinions concerning private entities and the FOIA. Instead, it has used the “functional equivalent” language.²¹

Because the analysis varies from situation to situation, the Arkansas Supreme Court and this office review multiple factors to determine if a private entity is subject to the FOIA. Generally, each of those factors is aimed at determining the degree of control the government exercises over the private entity itself or the activity the private entity is engaged in. In other words, the North Star of applying the FOIA to private entities is determining if the government is “conduct[ing] its affairs through private entities” such that “those entities are for all practical purposes the government itself.”²²

This opinion synthesizes the caselaw and Attorney General opinions into the two tests: (1) the delegated “functional equivalent” and (2) the significantly controlled “functional equivalent.”

1.2.1. Delegated “functional equivalent.” The Arkansas Supreme Court has held that a public entity cannot avoid the FOIA by delegating its “regular duties” to a private entity “specially retained to perform the same task.”²³ This type of delegation automatically makes the private entity “the functional equivalent of the regular [public employee].”²⁴ Thus, this test applies when the government merely replaces itself with a private entity.²⁵ This will most often occur when a private entity performs an activity for the government

¹⁷ See, e.g., Ark. Att’y Gen. Op. 2008-154.

¹⁸ See, e.g., Ark. Att’y Gen. Ops. 2006-086, 2005-067, 2001-352, 2001-069.

¹⁹ See, e.g., Ark. Att’y Gen. Ops. 90-243, 83-163.

²⁰ See, e.g., Ark. Att’y Gen. Op. 2005-067.

²¹ See, e.g., *City of Fayetteville v. Edmark*, 304 Ark. 179, 186, 801 S.W.2d 275, 279 (1990); *Swaney v. Tilford*, 320 Ark. 652, 654, 898 S.W.2d 462, 464 (1995).

²² *Edmark*, 304 Ark. at 187, 801 S.W.2d at 279 (quoting John J. Watkins, *Access to Public Records Under the Arkansas FOIA*, 37 Ark. L. Rev. 741, 768 (1984)).

²³ *Id.* at 187, 801 S.W.2d at 279.

²⁴ *Id.* at 186, 801 S.W.2d at 279.

²⁵ See Ark. Att’y Gen. Op. 96-185 (opining that “because the state prisons would presumably otherwise be operated by state officers and employees, private companies providing those services will likely be subject to the FOIA under the rationale outlined in *Edmark*”).

(1) that the government had a statutory duty to perform²⁶ or (2) that the government did perform or would have performed itself but for contracting with the private entity.²⁷

Private schools preexisted the EFA program and will presumably continue to operate as they have, charging for educational services with almost no State oversight—except for a few provisions that apply to private schools that choose to participate in the EFA program.²⁸ Public schools will likewise continue as they have—remaining free of cost to students and under State control. Thus, the legislature has not delegated its public-education duties, so private schools, in my opinion, are not the delegated functional equivalent of the government.

1.2.2. Significantly controlled “functional equivalent.” Even if a private entity is not a delegated functional equivalent for the government, it may be a functional equivalent if the government significantly controls the private entity.²⁹ To make this determination, courts weigh multiple factors to determine whether the government significantly controls the private entity: (1) whether the activity is a traditional government function; (2) the extent of government control over the private entity’s management, operations, and budget; (3) the degree of public funding compared to the private entity’s other sources of revenue; (4) whether the private entity’s leadership and employees are or are appointed by government actors; and (5) whether the private entity was formed independently of the government. If the factors on balance indicate that the entity in question is the “functional equivalent” of the government—or “for all practical purposes the government itself”³⁰—then the private entity will be subject to the FOIA.

- **Traditional government functions.** If a private entity performs a traditional government function, it is more likely to be found to be significantly controlled by the government. Activities that that have been found to satisfy this factor

²⁶ *E.g.*, *Swaney*, 320 Ark. at 654, 898 S.W.2d at 464 (statutorily mandated audit); Ark. Att’y Gen. Op. 2008-154 (public-school transportation).

²⁷ *E.g.*, *Edmark*, 304 Ark. at 186, 801 S.W.2d at 278–79 (city attorney); Ark. Att’y Gen. Op. 2005-067 (fire-protection services).

²⁸ *See* A.C.A. § 6-18-2507(a) (providing for certain requirements that private schools must meet to receive EFA funds); *see also id.* § 6-18-2503(8) (defining “participating school” to include a “private elementary school or private secondary school” that “[o]ffers enrolled students a full academic curriculum and full academic year experience” and “[r]eceives payments from Arkansas Children’s Educational Freedom Account Program accounts to provide goods and services that are covered as qualifying expenses”).

²⁹ *See* Ark. Att’y Gen. Op. 2012-108 (explaining that when a private entity is “subject to significant control by [public entities]” the public entity is more likely subject to the FOIA).

³⁰ *Edmark*, 304 Ark. at 187, 801 S.W.2d at 279 (quoting John J. Watkins, *Access to Public Records Under the Arkansas FOIA*, 37 Ark. L. Rev. 741, 768 (1984)).

include providing services for fire protection,³¹ routine and emergency law enforcement,³² utilities,³³ and economic development.³⁴

- **Government control over management, operations, and budget.** If the private entity’s budget, “management, operation and activities” are subject to review and approval by the government, the private entity is more likely to be significantly controlled by the government for FOIA purposes.³⁵
- **Public funding compared to other sources of revenue.** The more public funding the private entity receives compared to its other sources of revenue, the more this factor weighs in favor of finding significant control.³⁶
- **Leadership or employees are appointed by public officials.** Significant control more likely exists when a private entity’s executive leadership or staff are government employees,³⁷ when they are appointed and removed by government employees,³⁸ and when they are headquartered in publicly owned buildings.³⁹
- **Formation independent of the government.** When a private entity is created by a public body to perform public functions, the private entity is more likely to be significantly controlled by the government.⁴⁰

³¹ See *Kristen Inv. Props., LLC v. Faulkner Cnty. Waterworks & Sewer Pub. Facilities Bd.*, 72 Ark. App. 37, 41, 32 S.W.3d 60, 62 (2000); Ark. Att’y Gen. Ops. 2005-067, 96-372.

³² Ark. Att’y Gen. Op. 89-082.

³³ See Ark. Att’y Gen. Ops. 93-154, 92-205.

³⁴ See, e.g., Ark. Att’y Gen. Ops. 2000-260, 94-023, 90-243.

³⁵ See Ark. Att’y Gen. Ops. 2012-108, 95-353; see also *Watkins et al.*, *supra* note 9, at 68.

³⁶ Compare *Troutt Bros.*, 261 Ark. at 381, 548 S.W.2d at 826–27 (weighing in favor of significant control when “[o]ver 90% of the money contributed by Arkansas Schools [to the private entity] is public money”), and Ark. Att’y Gen. Op. 90-243 (same when 33% of the private entity’s total budget), with Ark. Att’y Gen. Op. 2012-108 (weighing against control when “only 5% of the [private entity’s] current operating budget constitutes public funds”), and Ark. Att’y Gen. Op. 2006-086 (same when less than 3% of the private entity’s total budget).

³⁷ *Troutt Bros.*, 261 Ark. at 381, 548 S.W.2d at 826–27 (noting that the entity “is composed of public servants with its official situs and operation in a public owned institution”).

³⁸ See Ark. Att’y Gen. Ops. 2012-108, 95-353; see also *Watkins et al.*, *supra* note 9, at 68.

³⁹ *Troutt Bros.*, 261 Ark. at 381, 548 S.W.2d at 826.

⁴⁰ *Rehab. Hosp. Servs. Corp. v. Delta-Hills Health Sys. Agency, Inc.*, 285 Ark. 397, 400, 687 S.W.2d 840, 842 (1985) (private entity’s creation “mandate[d]” by federal law, which also “indicat[ed]...the public

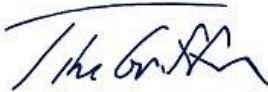
Considering these factors, courts will likely find that the State does not exert significant control over private schools. First, government has traditionally operated free public schools—not paid private schools. The EFA program does not change that. Moreover, private schools often educate in ways that public schools do not and cannot, such as providing religious education. Second, the State does not control private schools. In fact, I have found no authority that the State exercises over private schools, except for limited oversight of schools participating in the EFA program; the State does not review private schools’ management, budget, or operations, nor it does appoint private-school leadership or employees. Third, the degree of public funding compared to other sources of revenue will vary from private school to private school based on multiple considerations, including tuition cost, percent of students participating in the EFA program, and private donations. Because of the wide variability, I am unable to consider this factor in my analysis. Fourth, private schools are often private nonprofit corporations, formed by private individuals, and their creation is not mandated by statute.

* * *

In sum, because private schools are not intertwined with government activities merely because they choose to participate in the EFA program, their meetings and records are not subject to the FOIA.

Assistant Attorney General William R. Olson prepared this opinion, which I hereby approve.

Sincerely,



TIM GRIFFIN
Attorney General

purpose served by [the private entity]”); Ark. Att’y Gen. Op. 2012-108 (private entity created by two public bodies under the Interlocal Cooperation Agreement Act, A.C.A. §§ 25-20-101 to -542, to be the public bodies’ “agent”).