

Opinion No. 2008-053

March 26, 2008

The Honorable Phil Mask
Saline County Sheriff
321 N. Main
Benton, Arkansas 72015

Dear Sheriff Mask:

I am writing in response to your request, made pursuant to A.C.A. § 25-19-105(c)(3)(B)(i), for an opinion on whether your provisional decision to release certain documents pursuant to the Arkansas Freedom of Information Act (“FOIA”), A.C.A. §§ 25-19-101—109 (Repl. 2002 and Supp. 2007), is consistent with that act. Specifically, you have asked me to review your “decision as custodian of records to release certain records contained in a deputy sheriff’s personnel file.” You have enclosed copies of the records, and you state that you “have preliminarily determined that the following records ..., subject to certain redactions, would be subject to disclosure:”

1. Application Letters
2. Resume with address and phone numbers redacted
3. Curriculum Vitae with phone number redacted
4. Letters of Reference with deputy’s home address redacted
5. Authorization for Release of Information Agreement with home address, telephone number and social security number redacted
6. Commission on Law Enforcement Standards and Training Initial Employment Report with social security number, date of birth, and driver’s license number redacted
7. Hire Letter
8. Payroll Enrollment Form
9. Policy and Procedures Manual Employee Acknowledgement Form
10. Law Enforcement code of Ethics Form
11. Oaths of Office
12. Certificate of Training and Attendance

You have determined that the following records are not subject to disclosure:

13. Copy of Birth Certificate
14. Commendation Letters from Sheriff
15. Fingerprint Card
16. Arkansas Automated Fingerprint Identification System (AFIS) Comparison Letter
17. FBI Civil Applicant Response to Fingerprint Submission
18. Arkansas Traffic Report
19. Background Investigation
20. Commission on Law Enforcement Standards and Training Personal History Statement
21. Copy of High School Diploma
22. Copy of Arkansas Driver's License
23. Certificate of Release or Discharge from Active Duty
24. Copy of College Transcript
25. Workers' Compensation Work Status Reports

I am directed by subsection 25-19-105(c)(3)(B) (Supp. 2007) to issue my opinion as to whether your determination concerning the release of these records is consistent with the FOIA. In this regard, I should initially emphasize that my duty under A.C.A. § 25-19-105(c)(3)(B) is limited to determining whether the records that you have identified in response to the FOIA request are subject to disclosure. I am neither authorized nor equipped to determine whether you have selected the appropriate responsive documents. *See* Op. Att'y Gen. 2006-158 (observing that the Attorney General's duty under A.C.A. § 25-19-105(c)(3)(B) arises after the records have been located and is limited to reviewing the custodian's decision as to "whether the records are exempt from disclosure." *Id.*)

RESPONSE:

In my opinion, your decision to release the first group of records as redacted is consistent with the FOIA, with one exception. The subject's home e-mail address must also be redacted from the "Curriculum Vitae" prior to the release of that document. Regarding the second group of documents, in my opinion you have correctly decided not to release items 14, 18, and 22-25. In my opinion, however, items 13, 15-17, and 20 may not be withheld entirely. Instead, these documents are subject to disclosure with certain redactions, as noted below. Contrary to your

preliminary determination, items 19 and 21 are subject to disclosure in their entirety, in my opinion.

As explained further below, these redactions and withholdings must be made either to comply with A.C.A. § 25-19-105(b)(12) (requiring redaction of information in “personnel records” giving rise to a “clearly unwarranted invasion of personal privacy”) or other specific exemptions in the FOIA, or to comply with other state or federal law under the FOIA’s so-called “catch-all” exemption that incorporates all exemptions contained in “laws specifically enacted to provide otherwise.” *Id.* at (a)(1)(A).

The FOIA provides for the disclosure upon request of certain “public records,” which the Arkansas Code defines as follows:

“Public records” means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which 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.

A.C.A. § 25-19-103(5)(A) (Supp. 2005).

Given that the subject of the instant request is a deputy sheriff, I believe the requested documents clearly qualify as “public records” under this definition.

As my predecessor noted in Op. Att’y Gen. 99-305: “If records fit within the definition of ‘public records’..., they are open to public inspection and copying under the FOIA except to the extent they are covered by a specific exemption in that Act or some other pertinent law.” Regarding the records in question, it appears that there are several pertinent exemptions, but the majority of the records constitute “personnel records,” in my opinion. A.C.A. § 25-19-105(b)(12) (Supp. 2007). Although the FOIA does not define the term “personnel records,” this office has consistently taken the position that “personnel records” are any records other than employee evaluation/job performance records that relate to the

individual employee. *See* Op. Att'y Gen. 2006-071. "Employee evaluation or job performance records," as the name implies, are records that relate to an employee's performance or lack of performance on the job. *See* Op. Att'y Gen. 2000-122. Different tests apply to the release of "personnel records" as distinguished from "employee evaluation or job performance records."

Generally, "personnel records" are open to public inspection and copying except "to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy." A.C.A. § 25-19-105(b)(12) (Supp. 2007). The FOIA does not define the phrase "clearly unwarranted invasion of personal privacy." The Arkansas Supreme Court has construed the phrase, however, and has adopted a balancing test to determine if it applies, weighing the interest of the public in accessing the records against the individual's interest in keeping the records private. *See Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992). If the public's interest outweighs the individual's interest, the custodian must disclose the personnel records. As the court noted in *Young*:

The fact that section 25-19-105(b)(10) [now subsection 105(b)(12)] exempts disclosure of personnel records only when a clearly unwarranted personal privacy invasion would result, indicates that certain "warranted" privacy invasions will be tolerated. Thus, section 25-19-105(b)(10) requires that the public's right to knowledge of the records be weighed against an individual's right to privacy. . . . Because section 25-19-105(b)(10) allows warranted invasions of privacy, it follows that when the public's interest is substantial, it will usually outweigh any individual privacy interests and disclosure will be favored.

308 Ark. at 598.

However, as the court noted in *Stilley v. McBride*, 332 Ark. 306, 312, 965 S.W.2d 125 (1998), when "there is little relevant public interest" in disclosure, "it is sufficient under the circumstances to observe that the employees' privacy interest in nondisclosure is not insubstantial." Additionally, given that exemptions from disclosure must be narrowly construed, *see, e.g., Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000), it is the burden of an individual resisting disclosure to establish that his "privacy interests outweighed that of the public's under the circumstances presented." *Stilley, supra*, 332 Ark. at 313.

The FOIA establishes a different, three-part test for the release of “employee evaluation or job performance records.” A.C.A. § 25-19-105(c)(1). *See also generally* Op. Att’y. Gen. 2001-125. A threshold requirement for release of such records is a suspension or termination of the employee in question. *Id.* Absent a final administrative resolution of a suspension or termination proceeding, therefore, employee evaluation/job performance records are not subject to disclosure.

Turning then to the records in question, it is my conclusion based on the applicable test and previous opinions of this office that with one exception, your decision to release the first group of records (items 1 through 12), as redacted, is consistent with the FOIA. These records are all “personnel records,” in my opinion, the release of which, with the noted redactions and one additional redaction, would not amount to a “clearly unwarranted invasion of personal privacy.” This is the proper procedure when faced with documents containing both exempt and non-exempt information - any reasonably segregable portion of the records must be provided after deleting the exempt portion. This is in keeping with the exemption language of subsection 25-19-105(b)(12), which applies only “to the extent” that disclosure would constitute a clearly unwarranted invasion of privacy, and with A.C.A. § 25-19-105(f) (Supp. 2007), which provides as follows:

- (1) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.
- (2) Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.
- (3) The amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, at the place in the record where the deletion was made.
- (4) If it is necessary to separate exempt from nonexempt information in order to permit a citizen to inspect, copy, or obtain copies of public records, the custodian shall bear the cost of the separation.

Consistent with the foregoing, the home e-mail address must in my opinion also be redacted from the “Curriculum Vitae” prior to the release of that document. *See* Op. Att’y Gen. 2005-114 (“The [personnel records] test as applied to a personal e-

mail ... generally calls for nondisclosure ... given the conceivable attendant privacy interest and the likely absence of any significant public interest.”). The deputy sheriff’s home address is specifically exempt pursuant to A.C.A. § 25-19-105(b)(13). The home telephone number of this law enforcement officer, whether listed or unlisted, is in my opinion also properly redacted in keeping with *Stilley, supra*. See Op. Att’y Gen. Nos. 2001-080, 2000-306 and 99-016. This office has also previously opined in opinions too numerous to recount that social security numbers of public employees are exempt from public disclosure. See, e.g., Op. Att’y Gen. 2006-165 (and opinions cited therein). Additionally, I have previously concluded that the dates of birth of public employees are not subject to inspection and copying under the FOIA. See Op. Att’y Gen. 2007-070. Finally, the driver’s license number must be redacted pursuant to the federal “Driver’s License Privacy Protection Act,” 18 U.S.C. § 2721 *et seq.* See Op. Att’y Gen. 2001-080.

With regard to the second group of records listed above (items 13 through 25), in my opinion you have correctly decided not to release the following:

- Item 14 – Commendation Letters from Sheriff (job performance or evaluation records exempt under A.C.A. § 25-19-105(c)(1), given that the records did not form the basis for a suspension or termination);
- Item 18 – Arkansas Traffic Violation Report (exempt in keeping with the federal “Drivers’ Privacy Protection Act,” *supra*, see Op. Att’y. Gen. 2005-194);
- Item 22 – Copy of Arkansas Driver’s License (exempt in keeping with the federal “Drivers’ Privacy Protection Act,” *supra*, see Op. Att’y. Gen. 2005-194, unless this information was obtained from the Arkansas Crime Information Center, in which case this record is exempt under A.C.A. § 12-12-211, see Op. Att’y Gen. 2000-122);
- Item 23 – Certificate of Release or Discharge from Active Duty (exempt under A.C.A. § 25-19-105(b)(15), pertaining to “military service discharge records or DD Form 214;”
- Item 24 – Copy of College Transcript (exempt “education records” under A.C.A. § 25-19-105(b)(2). See Op. Att’y Gen. 2003- 381;
- Item 25 – Workers’ Compensation Work Status Reports (exempt “medical records” under A.C.A. § 25-19-105(b)(2). See Op. Att’y Gen. 2007-026.

The remaining records in my opinion constitute “personnel records,” the release of which is governed by A.C.A. § 25-19-105(b)(12), discussed above. It is my

conclusion based on this test that items 13, 15-17, and 20 are subject to inspect and copying after making the following redactions:

- Item 13 – Copy of Birth Certificate (redact date of birth and names of parents, *see* Op. Att’y Gen. Nos. 2007-070, 98-152, and 97-177);
- Item 15 – Fingerprint Card (redact date of birth, address and social security number, *see* Op. Att’y Gen. 2000-122);
- Item 16 – Arkansas Automated Fingerprint Identification System (AFIS) Comparison Letter (redact social security number, *see* Op. Att’y Gen. 2000-122);
- Item 17 – FBI Civil Applicant Response to Fingerprint Submission (redact date of birth and social security number, *see* Op. Att’y Gen. 2000-122);
- Item 20 – Commission on Law Enforcement Standards and Training Personal History Statement (redact social security number, home addresses (including former), telephone number, marital status and information about family life (including names and addresses of family members), personal financial information, driver’s license number, addresses and phone numbers of nonelected public employee personal references, *see* Op. Att’y Gen. Nos. 2007-278, 2006-165, 2005-268, and 2001-080, 97-197, 95-113,

The remaining items 19 (Background Investigation) and 21 (Copy of High School Diploma) are subject to disclosure, in my opinion. With regard to the background check, I have previously agreed with my predecessor’s statement that:

... a blanket denial of access to all background investigation records may be inconsistent with the FOIA. *See* Ops. Att’y Gen. Nos. 1998-101, 97-286, 96-368, 95-242, 94-113, and 92-319. The FOIA does not provide a blanket exemption for background investigations. For this reason, records reflecting a background investigation must be examined individually and separately to determine whether each such record is disclosable, whether it falls under a specific exemption from disclosure, or whether particular information should be redacted from the records prior to disclosure.

Op. Att’y Gen. 2007-278, quoting Op. Att’y Gen. 2005-245.

In my opinion, the “Background Investigation” (item 19) at issue is properly classified as a “personnel record,” and its disclosure would not constitute a clearly

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unwarranted invasion of personal privacy as it contains no protectable information.

Regarding the “High School Diploma” (item 21), I note that although the FOIA expressly exempts “education records as defined in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g,” *see* A.C.A. § 25-19-105(b)(2), this definition of “education records” does not include records that generally reflect an individual’s educational background, such as diplomas or records indicating that the individual holds a particular degree. *See* Op. Att’y Gen. Nos. 2003-231 and 2003-060. Nor, in my opinion, is item 21 otherwise shielded from public inspection under the FOIA. It is therefore subject to disclosure.

Assistant Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:EAW/cyh