

Opinion No. 2012-008

January 24, 2012

Stacey Witherell
Labor and Employee Relations Manager
City of Little Rock
500 West Markham, Suite 130W
Little Rock, Arkansas 72201-1428

Dear Ms. Witherell:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). Your request, which is made as the custodian of public records, which you believe are also personnel or employee evaluation records, is based on A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011). This statute authorizes the custodian, requester, or the subject of personnel or employee evaluation records to seek an opinion from this office stating whether the custodian’s decision regarding the release of such records is consistent with the FOIA.

You have received an FOIA request that seeks “any and all records maintained by your agency as they relate to” a former, and now deceased, employee. You characterize this request as one “for personnel records.” You have attached to your opinion request the set of records that you believe are responsive to the FOIA request. Further, you explain that it is your “opinion that the personnel records would be releasable with the standard exemptions noted, i.e. social security number, address, date of birth, telephone number, [and] evaluations that did not form the basis of a suspension or termination.”

You, apparently, ask me to do two things. First, you seem to want me to look through all the attached records to see whether they are all personnel records. Second, you ask about the FOIA’s notification requirement, under which the custodian of personnel or employee evaluation records must notify the subject of the records that someone is seeking his or her records. You ask whether that

notification requirement applies in the case of a former employee who is now deceased.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. But it is clear to me that you have not made a complete decision for me to review. Instead, you have attached a set of unredacted records, all of which you refer to as "personnel records." The most I can say about these records is that many of them are clearly not personnel records. Rather, many are employee evaluation documents, which are subject to an entirely different test for their release. The definitions of personnel records and employee evaluation documents are explained below. Further, most of the documents contain some information that must be redacted. Your second request—that I opine on how the FOIA's notice requirements apply to deceased, former employees—is beyond the scope of my authority under A.C.A. § 25-19-105(c)(3)(B)(i). That statute only permits me to opine on whether the custodian's decision to exempt (or not to exempt) certain records is consistent with the FOIA. Since the notification provisions are not related to whether a record is exempt, I cannot opine on the notification question in an opinion released pursuant to subsection 25-19-105(c)(3)(B)(i).

DISCUSSION

I. General standards governing disclosure.

A document must be disclosed in response to a FOIA request if all three of the following elements are met. First, the FOIA request must be directed to an entity subject to the act. Second, the requested document must constitute a public record. Third, no exceptions allow the document to be withheld.

The first two elements appear met in this case. As for the first element, the documents are held by the city, which is a public entity. As for the second element, the FOIA defines "public 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 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.¹

I will assume, for purposes of the remainder of this Opinion, that the records you have attached to your request are public records. Whether a document qualifies as a public record is always a question of fact that the custodian must initially make. Given this assumption, these documents are public records and must be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two items normally found in employees' personnel files.² For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"³ or "employee evaluation or job performance records."⁴ The test for whether these two types of documents may be released differs significantly.

When custodians assess whether either of these exceptions applies to a particular record, they must make two determinations. First, they must determine whether the record meets the definition of either exception. Second, assuming the record

¹ A.C.A. § 25-19-103(5)(A) (Supp. 2011).

² This office and the leading commentators on the FOIA have observed that personnel files usually include: employment applications; school transcripts; payroll-related documents such as information about reclassifications, promotions, or demotions; transfer records; health and life insurance forms; performance evaluations; recommendation letters; disciplinary-action records; requests for leave-without-pay; certificates of advanced training or education; and legal documents such as subpoenas. *E.g.*, Op. Att'y Gen. 97-368; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 187-89* (Arkansas Law Press, 5th ed., 2009).

³ A.C.A. § 25-19-105(b)(12): This subsection states: "It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter.... [p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy."

⁴ A.C.A. § 25-19-105(c)(1): "Notwithstanding subdivision (b)(12) of this section, all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure."

does meet one of the definitions, the custodian must apply that exception's test for disclosure to determine whether the FOIA requires that record be disclosed.

a. Personnel-records exception.

The first of the two most relevant potential exceptions is the one for “personnel records,” which the FOIA does not define. But this office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.⁵ Whether a particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. If a document meets this definition, then it is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁶

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁷ has provided some guidance. To determine whether the release of a personnel record would constitute a “clearly unwarranted invasion of personal privacy,” the court applies a balancing test that weighs the public's interest in accessing the records against the individual's interest in keeping the records private. The balancing takes place with a thumb on the scale favoring disclosure.

To aid in conducting the balancing test, *Young v. Rice* developed a two-step approach. First, the custodian must assess whether the information contained in the requested document is of a personal or intimate nature such that it gives rise to greater than *de minimus* privacy interest.⁸ If the privacy interest is merely *de minimus*, then the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimus* privacy interest, then the custodian must determine whether that interest is outweighed by the public's interest in disclosure.⁹ Because the exceptions must be

⁵ See, e.g., Op. Att'y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

⁶ A.C.A. § 25-19-105(b)(12) (Supp. 2011).

⁷ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁸ *Id.* at 598, 826 S.W.2d at 255.

⁹ *Id.*, 826 S.W.2d at 255.

narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public's interests.¹⁰ The fact that the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.¹¹

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹² Further, this balancing test may be slightly altered when the subject of the records is a deceased, former employee. Specifically, this office has opined that in that case, the former employee's privacy interest remains but is somewhat lessened.¹³

Even if a public record, when considered as a whole, meets the test for disclosure, it may contain discrete pieces of information that have to be redacted. Some items that must be redacted include:

- dates of birth of public employees (Op. 2007-064);
- social security numbers (Ops. 2006-035, 2003-153);
- medical information (Op. 2003-153);
- any information identifying certain law enforcement officers currently working undercover (A.C.A. § 25-19-105(b)(10));
- driver's license numbers (Op. 2007-025);
- insurance coverage (Op. 2004-167);
- tax information or withholding (Ops. 2005-194, 2003-385);
- payroll deductions (Op. 98-126);

¹⁰ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹¹ *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹² Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

¹³ Op. Att'y Gen. 96-368.

- banking information (Op. 2005-195);
- unlisted telephone numbers (Op. 2005-114);
- home addresses of most public employees (A.C.A. § 25-19-105(b)(13)); personal e-mail addresses (Op. 2004-225); and
- marital status of employees and information about dependents (Op. 2001-080).

b. Employee-evaluation exception.

The second potentially relevant exception is for “employee evaluation or job performance records,” which the FOIA likewise does not define. But this office has consistently opined that the phrase refers to records that were created by (or at the behest of) the employer that detail the employee’s performance or lack of performance on the job.¹⁴ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁵

If a document meets the above definition, the document *cannot* be released unless all the following elements have been met:

1. The employee was suspended or terminated (i.e., level of discipline);
2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., relevance); and

¹⁴ Op. Att’y Gen. 2004-012 (and opinions cited therein).

¹⁵ *Id.*

4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).¹⁶

As for the final prong, the FOIA never defines the key phrase “compelling public interest.” But two leading commentators on the FOIA, referring to this office’s opinions, have offered the following guidelines:

[I]t seems that the following factors should be considered in determining whether a compelling public interest is present: (1) the nature of the infraction that led to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved; (2) the existence of a public controversy related to the agency and its employees; and (3) the employee’s position within the agency. In short, a general interest in the performance of public employees should not be considered compelling, for that concern is, at least theoretically, always present. However, a link between a given public controversy, an agency associated with the controversy in a specific way, and an employee within the agency who commits a serious breach of public trust should be sufficient to satisfy the “compelling public interest” requirement.¹⁷

These commentators also note that “the status of the employee” or “his rank within the bureaucratic hierarchy” may be relevant in determining whether a “compelling public interest” exists,¹⁸ which is always a question of fact that must be determined, in the first instance, by the custodian after he considers all the relevant information.

The primary purpose of this exception is to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship.¹⁹

¹⁶ A.C.A. § 25-19-105(c)(1) (Supp. 2011); Op. Att’y Gen. 2008-065.

¹⁷ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹⁸ *Id.* at 216 (noting that “[a]s a practical matter, such an interest is more likely to be present when a high-level employee is involved than when the [records] of ‘rank-and-file’ workers are at issue.”).

¹⁹ *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

III. Application.

We can now apply the foregoing to the attached documents. Your first conclusion is that all the documents you have attached are, in addition to being public records, “personnel records.” But this is mistaken because many, perhaps most, of the documents you have attached seem to meet the definition of an employee evaluation record. Accordingly, you will need to clearly sort the attached documents into personnel records and employee evaluation documents. Then, you will need to apply the tests described above to determine whether these documents must be released. I cannot assess whether your decision to release these documents is consistent with the FOIA unless I first know what your factual determination is regarding how these records are categorized.

In addition, most of the documents contain at least one piece of information that must be redacted. Given that you have not made a decision about what should be redacted, I cannot assess whether you have fully and properly complied with the FOIA in this respect.

Finally, as indicated above, opining on how the FOIA’s notice provisions apply to deceased, former employees is beyond the scope of an opinion issued pursuant to A.C.A. § 25-19-105(c)(3)(B)(i). I will simply note that the FOIA does not speak to this precise issue.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh