

Opinion No. 2012-039

March 23, 2012

George E. Butler, Jr.  
Washington County Attorney  
280 North College, Suite 501  
Fayetteville, Arkansas 72701

Dear Mr. Butler:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). Your request, which is made as the custodian’s attorney, is based on A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011). This subsection 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.

Your letter indicates that someone has requested the “personnel file” of a current deputy sheriff. The custodian has gathered all the responsive documents and has decided that the release of “any information about the deputy would constitute a clearly unwarranted invasion” of the deputy’s personal privacy. The custodian has reached this conclusion because, according to the custodian, there have been credible threats and actual attacks on the officer’s life. You, as the custodian’s attorney, ask whether the custodian’s decision is consistent with the FOIA.

**RESPONSE**

In my opinion, the custodian’s decision may only be partly consistent with the FOIA. Not having seen any documents, I cannot opine about any specific record. I can, however, explain the general rules pertaining to redacting an employee’s identifying information. As explained more fully below, there are situations in which particular employees have a heightened privacy interest in information that could identify them. While it is possible that such an interest may exist here, only a proper fact finder can make that determination. Accordingly, any person

aggrieved by your decision to withhold certain documents would have to ask a court to review the matter. Nevertheless, there are categories of information about public employees that are likely subject to release after identifying information has been redacted. Therefore, in my opinion, if there are records that can be released after redacting any identifying information, then the custodian's decision to withhold those records is likely inconsistent with the FOIA.

## **DISCUSSION**

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 sole issue in your opinion request appears to be whether an exception shields these public records from disclosure. You have categorized the responsive documents as "personnel records." The FOIA makes clear that such records must be released unless doing so constitutes a "clearly unwarranted invasion of personal privacy."<sup>1</sup> In light of this test, the issue is whether your decision to not release *any personnel records at all* is consistent with the FOIA.

To assess this question, we need to examine the balancing test that applies to the release of personnel records. In *Young v. Rice*,<sup>2</sup> the Arkansas Supreme Court has expounded on the factors that a custodian must consider:

The fact that section § 25-19-105(b)(1[2]) 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, § 25-19-105(b)(1[2]) requires that the public's right to knowledge of the records be weighed against an individual's right to privacy.... Because § 25-19-105(b)(1[2]) allows warranted invasions of privacy, it follows that when the public's

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<sup>1</sup> A.C.A. § 25-19-105(b)(12).

<sup>2</sup> 308 Ark. 593, 826 S.W.2d 252 (1992).

interest is substantial, it will usually outweigh any individual privacy interest and disclosure will be favored.<sup>3</sup>

In *Young*, the court applied the foregoing balancing test to uphold the denial of access to the *names* of police officers participating in the lieutenant promotion examination proceedings, but allowed release of the records of the examination with the names deleted. The court relied upon federal case law that finds a substantial privacy interest in records relating the intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends. The court held that some of the actions of the police officers when taking the role-playing portion of the examination were "embarrassing behaviors" touching on intimate details of the candidates' lives, and the release of the information could subject them to embarrassment and perhaps threaten future employment. The court therefore found a substantial privacy interest in the records. The court also found a substantial public interest in the records, but concluded that the public's interest was satisfied by the release of the examination records with the candidates' names deleted.

Thus, under the test for the release of personnel records, the public right to access the records is weighed against the individual employee's right to privacy. This office has previously applied this test in two relevant contexts with regard to questions involving the **identity** of certain employees. In each instance, this office concluded that although as a general matter this information is open to the public, there are certain public employees whose privacy interest is heightened because of the increased possibility of harm or harassment following release of their personnel records.<sup>4</sup> In the first context, this office concluded that the names and addresses of prison guards or certain other employees of the Department of Correction might be shielded under the personnel-records exception.<sup>5</sup> In the second context, this office concluded that the indentifying information of an

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<sup>3</sup> *Id.* at 598.

<sup>4</sup> Op. Att'y Gen. Nos. 95-220 and 90-335.

<sup>5</sup> Op. Att'y Gen. 95-220.

undercover officer who had recently resigned was also shielded from disclosure.<sup>6</sup> That opinion reasoned that, given the nature of that officer's job duties, the release of information that could identify him—especially photographs of him—would subject him to a significant risk of harm.

Similarly, you report that there are good reasons to believe that, if identifying information of this deputy were released, the deputy could be subjected to a significant risk of physical harm. I have no way of knowing whether this is true. But if that is in fact true, then the foregoing opinions offer some basis to redact identifying information. Only a proper fact finder—which in this case is a court—can determine (1) whether there is significant risk of physical harm, and (2) whether that risk warrants redacting the deputy's identifying information.

I am concerned, however, about your decision to not release any records at all. In the opinions discussed above, some information was released. There does not seem to be any basis to withhold every piece of information because not every piece of information is identifying information. For example, the dates of employment, the salary, and rank are all pieces of information that probably should be released.

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

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/RO:cyh

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<sup>6</sup> Op. Att'y Gen. 96-005.