

Opinion No. 2012-063

May 1, 2012

Christy Peterson
Saline County Personnel Manager
200 N. Main, Room 112
Benton, Arkansas 72015

Dear Ms. Peterson:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). Your request, which is made as the record’s custodian, 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 two sets of documents. The first request is for the “entire personnel file of” a certain, current county employee. You have decided “to release the entire file,” except for the insurance information of that employee’s spouse and the employee’s direct-deposit information. You have attached these records for my review, calling them “Attachment 1.” The second request seeks copies of “selection/non-selection letters” and documents signed by certain employees acknowledging the office’s personnel policies and various amendments thereto. You have decided to release these records “with personal information redacted.” You have also attached these records for my review, calling them “Attachment 2.”

You ask whether your decisions are consistent with the FOIA.

RESPONSE

In my opinion, your decisions are only partly consistent with the FOIA. As explained more fully below, you should withhold from disclosure the copy of the

employee's driver's license, all documents that indicate the employee's tax withholdings, and the insurance applications/records.

DISCUSSION

While your decisions regarding "Attachment 2" are, in my opinion, consistent with the FOIA, some of your decisions regarding "Attachment 1" are inconsistent with the Act. I will start this analysis by explaining the general rules pertaining to the release of public records and, more specifically, personnel records. With this background in mind, I can then turn to the specific records you have attached.

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 county, 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

The documents you have attached clearly meet this definition. Therefore, in my opinion, these documents are public records and must be disclosed unless some specific exception provides otherwise.

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

II. Exceptions to disclosure.

Because the most obvious exemption at issue here is the one for “personnel records,” I will only focus on it.

While the FOIA does not define the term “personnel records,” this office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.² 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.”³

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁴ 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 them private. The balancing takes place with a thumb on the scale favoring disclosure.

The balancing test elaborated by *Young v. Rice* has two steps. 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 a greater than *de minimus* privacy interest.⁵ 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.⁶ Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the

² See, e.g., Op. Att’y Gen. No. 1999-147; J. Watkins & R. Peltz, *The Arkansas Freedom of Information Act*, 5th ed. (Arkansas Law Press, 2009), p. 187.

³ A.C.A. § 25-19-105(b)(12) (Supp. 2011).

⁴ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁵ *Id.* at 598, 826 S.W.2d at 255.

⁶ *Id.*, 826 S.W.2d at 255.

circumstances, his privacy interests outweigh the public's interests.⁷ 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.⁸

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.⁹

Even if a document, 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);
- **driver's licenses** (Op. 2007-025, 2005-194);
- **insurance applications and coverage** (Op. 2005-194, 2004-167);
- **tax information or withholding** (Ops. 2005-194, 2003-385);
- payroll deductions (Op. 98-126);
- 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).

⁷ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

⁸ *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

⁹ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

III. Application.

We can now apply the foregoing to the attached documents. As noted above, both sets of attachments constitute public records. Further, they all meet the definition of a “personnel record.” Accordingly, these records must be released unless doing so constitutes a clearly unwarranted invasion of personal privacy. In my opinion, you have properly applied this test to all the records in Attachment 2. Accordingly, I concur with your decision to release those records. In contrast, many of the records in Attachment 1 are insurance applications/records and tax withholding information. Both of these kinds of records are, in my opinion, entirely exempt from disclosure because the nominal public interest in them is easily outweighed by the employee’s privacy interest. In addition, as noted above, this office has opined that a photocopy of a public employee’s driver’s license is exempt from disclosure pursuant to the personnel-records balancing test. Accordingly, in my opinion, you should not release this record. Other than these three areas, I cannot say that, with regard to Attachment 2, your decisions are inconsistent with the FOIA.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh