Opinion No. 2012-068

May 4, 2012

D. Scott Hickham, Esq.
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211 Hobson Avenue, Suite C
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Dear Mr. Hickham:

I am writing in response to your request for my opinion regarding the application of the Arkansas Freedom of Information Act (the "FOIA").[1] The FOIA authorizes the custodian, requester, or the subject of personnel or employee evaluation records to seek an opinion from this office determining the legal propriety of the custodian's provisional decision regarding the release of requested records.[2]

You report that you are the attorney and the custodian of records for the Hot Springs Advertising and Promotion Commission (the "A&P Commission"). You have asked me to review, in accordance with my obligations under the FOIA, your provisional decision to release only certain records whose disclosure has been requested by a citizen pursuant to the FOIA.

You have recited some factual background regarding both the citizen's request and a related request made by the Mayor of Hot Springs. However, you have asked me to address only the propriety of releasing to the citizen-requester certain documents falling within the following three categories:

A. Copies of lists showing all immediate family members and relatives of City of Hot Springs Directors, A&P Board Members, Chamber of Commerce, and City related or

[1] A.C.A. §§ 25-19-101 – 109 (Repl. 2002 and Supp. 2011).

[2] A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011).

sponsored boards and committees who have worked for the A&P Commission or its related and affiliate organizations (e.g., Turf Catering, Hot Springs Tower, Visit Hot Springs, etc.).

B. Copies of all expenses for A&P Commission or its affiliate organizations paid to or incurred by City Board Members and A&P Commission or its affiliate organizations. These should include all parties, celebrations, awards, phone, and travel related expenses.

C. Copies of all expenses including gasoline statements for City owned vehicles used by or for A&P Commission Board Members, employees including members and employees of affiliate organizations.[3]

I will respond to your provisional decisions regarding these documents below.

RESPONSE

I should note as an initial matter that my statutory role under the FOIA pursuant to A.C.A. § 25-19-105(c)(3)(B)(i) is limited to reviewing the provisional decision of the custodian regarding the release of personnel or evaluation records.[4] As discussed below, I question whether some of the documents requested would fall under either designation, rendering your decision regarding their potential release outside the scope of my review in this opinion. As further discussed, however, certain of the requested documents clearly appear to constitute personnel records. To the extent such records are not exempt, they will be subject to disclosure so long as they can be identified and retrieved with reasonable effort. With respect to the documents you have tentatively resolved to disclose, I consider these personnel records and agree with your conclusion that they are subject to disclosure.

[3] The copy you supplied me of the FOIA request submitted to the Hot Springs City Attorney contains a handwritten deletion of the term "City owned" in this passage and an apparent substitution therefor of an illegible, two-letter interpolation. Without attempting to divine the significance of this change, I will merely note that the records requested appear to be those reflecting gasoline expenditures incurred by A&P board members using publicly owned vehicles.

[4] A.C.A. § 25-19-105(c)(3)(B)(i).

The FOIA provides for the disclosure upon request of "public records" – a term 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 that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is 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.[5]

Because an A&P Commission is indisputably a public entity,[6] I believe the requested documents are clearly "public records" under this definition.

The FOIA provides for certain exemptions from disclosure, the most pertinent of which is the exemption under specified circumstances of personnel records. The FOIA exempts from disclosure "personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy."[7] The FOIA does not define the term "personnel records," nor are there any helpful Arkansas cases construing the term. When addressing this exemption, my predecessors and I have given the term "personnel records" a broad interpretation, stating that it encompasses any records (other than evaluation or job performance records) that pertain to or relate to the individual employee.[8]

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

[6] *See generally* the Advertising and Promotion Commission Act, A.C.A. §§ 26-75-601 through -618 (Repl. 2008 & Supp. 2011). Section 26-75-605 expressly addresses the public formation and composition of an A&P Commission.

[7] A.C.A. § 25-19-105(b)(12) (Supp. 2011).

[8] *E.g.*, Op. Att'y Gen. 2010-099; *see* Op. Att'y Gen. 2010-006 (and opinions cited therein). Two recognized commentators on the FOIA have further observed that "documents that only tangentially relate to an employee" are not covered by the exemption. John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT, 188–89 (Arkansas Law Press, 5th ed., 2009) (citing Op. Att'y Gen. Nos. 2007-255 and 94-391). I have also suggested that the exemption probably does not cover records that do not relate to any matter involving an individual employee's status as an employee. Op. Att'y Gen. 2008-095.

The FOIA further does not define the phrase "clearly unwarranted invasion of personal privacy." However, the Arkansas Supreme Court has construed the phrase and has applied a balancing test that requires weighing the interest of the public in accessing the records against the individual's interest in keeping the records private.[9] If the public's interest outweighs the individual's interest, the release of the records will not constitute a "clearly unwarranted invasion of personal privacy." Any uncertainty regarding the results of such a balancing test should be resolved in favor of disclosure. The court in *Young* noted the following regarding the test:

> 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.[10]

If there is little public interest in information, however, the privacy interest will prevail if it is not insubstantial.[11] Additionally, given that exemptions from disclosure must be narrowly construed,[12] 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."[13]

In my opinion, at least some of the requested documents specified in category A above qualify as personnel records.[14] You reportedly intend to decline providing

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

[10] 308 Ark. at 598.

[11] *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998).

[12] *E.g., Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000).

[13] *Stilley, supra*, 332 Ark. at 313.

[14] It is questionable whether the employees of "related and affiliate organizations," as opposed to employees of the A&P Commission itself, would qualify as "personnel" of a public agency. To the extent

any "lists" of the sort requested in this subsection based not upon a conclusion that their disclosure would involve an "unwarranted invasion of privacy," but rather because no such "lists" exist. In support of your decision not to compile a list containing the requested information, you have informed the requester that "FOI does not require a custodian to compile information or create a record in response" to a request. I concur in this conclusion, which tracks almost verbatim the language of the FOIA.[15]

You further support your tentative decision to withhold the information requested in category A because you consider "problematic" the requester's references to "City related or sponsored boards and committees" and to A&P "related and affiliated organizations." You have advised the requester as follows: "The terms 'city related,' 'A&P related,' and 'affiliate organizations,' are not sufficiently specific to enable the custodian to locate the records with reasonable effort." Although I need not address this objection in light of the conclusion set forth in my previous paragraph, I will note as a general proposition that a request must be sufficiently specific to enable the custodian to locate the pertinent records "with reasonable effort."[16] Given that the requested "lists" reportedly do not exist, this issue would appear to be moot as regards documents of the sort identified in category A.

At least some of the documents included within category B likewise comprise personnel records.[17] You report an intention "to substantially decline section B)," basing your provisional decision on two factors: first, you consider "not sufficiently specific" the request for expense records relating to "affiliate organizations" of the A&P Commission; and, secondly, you object to the fact that the request "has no time frame" and "could be interpreted to go back as far as 1989." With regard to this second objection, you note the following:

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you as custodian might possess documents relating to such employees, these might qualify as "public records" subject to disclosure. This question, however, is beyond the scope of this opinion.

[15] *See* A.C.A. § 25-19-105(d)(2)(C) ("A custodian is not required to compile information or create a record in response to a request made under this section.").

[16] *Id.* at subsection (a)(2)(C).

[17] Although expenses "paid to or incurred by" members and employees of the A&P Commission would clearly constitute personnel records whose disclosability is subject to my review, the status of such records with respect to "affiliate organizations" is unclear. *See* discussion in note 14, *supra*. I will not address whether any documents relating to such organizations available to you as custodian might be subject to disclosure as "public records."

> "Copies of all expenses paid to or incurred by . . . (the) A&P Commission . . . ," for any one year would be voluminous and going back to 1989, it would involve thousands upon thousands of documents and hundreds of dollars in reproduction costs.

With respect to your objection to the request for records relating to "affiliate organizations," I can only repeat my previous observation, which appears to accord with your own perception, that the applicable test is whether the request is precise enough to enable you as custodian to respond to the request "with reasonable effort." This determination is one that only you, as the custodian familiar with all the pertinent circumstances, are in a position to make.

You further object to the scope and the time frame of records requested relating to A&P Commission expenses. I do not agree with your conclusion that the request is insufficiently specific merely because it is not limited to documents produced within a described time frame. Although the FOIA contains no requirement that public records be retained for any given period of time, it obligates a custodian to produce for inspection requested public records that have been retained unless they fall within an exemption.[18] This is not to suggest that a custodian would be obliged to respond to a blanket general request for, say, every public record in his actual or constructive possession. The requirement that a request be "sufficiently specific to enable the custodian to locate the records with reasonable effort"[19] continues to apply. As this office has previously opined, a custodian's perception that a request is so vague and/or broad that it will not permit him to locate the records in timely fashion may warrant as "an appropriate first response to the FOIA request" objecting to the request as unreasonable.[20] Determining the propriety of such a response in any given instance will require undertaking a factual review of the sort I am neither equipped nor authorized to conduct. I can do no more than set forth the standard you should apply in making your determination regarding disclosure.

In your initial response to the requester, you objected that complying with the request would be onerous in that it would entail incurring "hundreds of dollars in

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[18] *See* A.C.A. § 25-19-105(a)(1) (setting forth the general requirement that qualifying public records be open for inspection); Op. Att'y Gen. No. 2001-120 (rejecting as "unwarranted" a claim that a request covering a period of nine years was objectionable because "extremely broad and unreasonable").

[19] A.C.A. § 25-19-105(a)(2)(C).

[20] Op. Att'y Gen. No. 2006-093.

reproduction costs." I do not consider this anticipated expense as in itself supporting an objection to the request. The Code contains no provision reciting the cost of reproduction as a factor bearing on the question of whether a custodian must comply with an FOIA request. Rather, the Code simply provides that "[u]pon request and payment of a fee . . . , the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment."[21] Copying expense consequently cannot be considered a factor in determining whether the FOIA mandates disclosure.

You have advised the requester of your intention to respond to his request for production of Category-B documents to the extent of producing records of "payments readily known to the staff" to "any A&P Commissioners, including City Board Member Commissioners." The only payments reportedly meeting this description comprise fees paid to an individual, who is presumably an A&P commissioner, for the rental of tents and the purchase of fireworks. I concur in your decision to release documents relating to these specific transactions. I am obviously not in a position to determine whether further disclosure is warranted. I will note, however, that the non-exempt documents subject to disclosure are not those relating to payments "readily known to the staff," but rather responsive documents that you as custodian can locate with "reasonable effort."[22] It is for you to determine what documents fall within this range.

Certain of the documents referenced in category C of the request also constitute personnel records whose disclosability is subject to my review. With respect to these documents, you have renewed your objection that the term "affiliate organizations" is too vague to interpret. Again, the issue you must face in determining how or if to respond to this request is whether you are able with "reasonable effort" to determine which documents, if any, would be responsive and to make these documents available. Only you are in a position to make this determination. As regards your related objection to the requester's failure to specify a time frame for his request, the guidelines discussed above will apply.

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[21] A.C.A. § 25-19-105(d)(2)(A). Under subsection (d)(3) of this statute, the fee is limited to "the actual costs of reproduction . . . not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records." If the estimated copying costs exceed $25, the custodian may require advance payment of the fee. Subsection (d)(3)(A)(iii). The custodian may reduce or waive the fee if the records have been "requested for noncommercial purposes" and if the reduction or waiver would serve "the public interest." Subsection (d)(3)(A)(iv).

[22] *See* A.C.A. § 25-19-105(a)(2)(C).

With regard to "expenses including gasoline statements for . . . vehicles used by or for A&P Commission Board Members" and A&P Commission "employees," you have advised the requester that no such expenses have been "paid to A&P Commissioners." You have named two individuals, whose positions you have not identified, as having been "provided vehicles." You have further reported that "[m]any employees submit mileage reimbursement claims for work related matters." You report that "[t]hese records" will be made available "for the years 2011 and 2012 (the dates specified in the Mayor's request)."

I assume from your correspondence to the requester that your provisional pledge to provide "these records" will result in the disclosure of all documents relating, first, to the "two individuals" who have been "provided vehicles" and, secondly, to the "many employees" who have submitted "mileage reimbursement claims for work related matters." I am obviously not situated to determine whether the requester is indeed willing to restrict his request to the 2-year time period acceded to by the mayor as a result of your negotiations. I agree, however, with your tentative conclusion that the documents you have decided to release are subject to disclosure.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh