

Opinion No. 2012-141

February 11, 2013

The Honorable Jon Woods  
State Senator  
Post Office Box 8082  
Springdale, Arkansas 72766-8082

Dear Senator Woods:

You have asked for my opinion on several questions regarding the Arkansas Freedom of Information Act (FOIA), which is codified at A.C.A. §§ 25-19-101 to -110 (Repl. 2002 & Supp. 2011). You give the following background facts for your request:

A city has received a FOIA request for all emails to and from [official] city email addresses for a period of approximately two years. There are many thousands of emails responsive to this request. The city has the ability, with the help of its IT consultant, to produce the emails electronically in a matter of minutes. With a request this large, however, there is concern that some emails may contain information that would normally be exempt under the FOIA, such as home addresses and phone numbers, garnishment information, etc. The city is a small town with limited personnel.... To inspect and redact each email would consume all the city's personnel for many days and prevent the employees from carrying out the other business of the city during that time.

With this background in mind, you ask seven questions:

1. What obligation if any, does the city have to redact exempt information from emails before producing them?

2. May the city simply produce the emails in their entirety without examining the contents?
- 3(A). Does the city have to go through each email and redact exempt information before producing the responsive emails?
- 3(B). If so, will the city be entitled to any relief from the statutory time requirements imposed by the FOIA?
4. May the city charge the cost of redacting to the person making the request?
5. Would it be sufficient for the city to redact any emails that it has prior knowledge contain exempt information and produce all other emails without first examining them for necessary redactions?
6. May the city refuse to honor a FOIA request on the grounds that it will require the production of a large amount of documents and take a great deal of time and resources to respond?

## **RESPONSE**

In response to your first question, the city (like all entities subject to the FOIA) must redact exempt information from any records it discloses in response to an FOIA request. The answer to questions 2, 4, 5, and 6 is, in my opinion, “no.” The answer to question 3(A) is “yes.” And, for reasons explained in the opinion, I am unable to answer question 3(B).

## **DISCUSSION**

***Question 1: What obligation if any, does the city have to redact exempt information from emails before producing them?***

Under the FOIA, a document must be disclosed if it meets the definition of a “public record” and if no exemptions shield it from disclosure.<sup>1</sup> All exemptions to

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<sup>1</sup> *E.g. Nabholz Const. Corp. v. Contractors For Public Protection Assn.*, 371 Ark. 411, 416, 266 S.W.3d 689, 692 (2007).

the FOIA are mandatory.<sup>2</sup> So, if a public record is entirely or partly exempt from disclosure, the custodian—whether a county, city, agency, or some other entity—is obliged either to withhold the entirety or to release the non-exempt portion after redacting the exempt information.

***Question 2: May the city simply produce the emails in their entirety without examining the contents?***

No. If the City fails to “examine the contents” of the e-mails, then the City has no way to know whether the e-mail even qualifies as a public record.<sup>3</sup> Nor can the City determine whether the e-mail qualifies (in whole or part) for an exception to disclosure. Because all exemptions are mandatory (as explained above), the City will have to examine the e-mails to decide whether the e-mail qualifies, in whole or part, for an exception.

***Question 3(A): Does the city have to go through each email and redact exempt information before producing the responsive emails?***

Yes. Please see the response to Question 2.

***Question 3(B): If so, will the city be entitled to any relief from the statutory time requirements imposed by the FOIA?***

Custodians must disclose non-exempt public records “immediately.”<sup>4</sup> But if the record is in “active use or storage,” custodians have three “working days” to disclose the records.<sup>5</sup>

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<sup>2</sup> Three sections of the FOIA’s text—whether considered individually or jointly—establish this mandate: **first**, section 25-19-105(a)(1) (“Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas....”); **second**, section 25-19-105(b) (“It is the specific intent of this section that the following shall not be deemed to be made open to the public....”); and **third**, section 25-19-105(f)(2) (“Any reasonably segregable portion of a record *shall* be provided *after deletion* of the exempt information.). *See also* Op. Att’y Gen. 2010-140.

<sup>3</sup> The mere fact that a public employee author’s an e-mail on a public computer or on a publicly funded e-mail system does not, by itself, make the e-mail a “public record.” *See* Op. Att’y Gen. Nos. 2013-002, n.8; 2005-139.

<sup>4</sup> A.C.A. § 25-19-105(e). In 2000, the Electronic Records Study Commission proposed some alternative timeframes for circumstances that rendered immediate or three-day compliance impossible. *See Report of the Electronic Records Study Commission & Recommendations for*

Nevertheless, this office, and two commentators on the FOIA, have long noted that sometimes it is impossible for custodians to respond under those time constraints.<sup>6</sup> This office has noted that such a scenario can occur if, for example, “a voluminous amount of records have been requested” and it will take some time to either search for the records or consult with legal counsel “to determine if there is any exempt information contained” in those documents that must be redacted before disclosure.<sup>7</sup> Therefore, this office has concluded that “under these and other similar circumstances, [custodians should] be afforded a reasonable time in order to comply with an FOIA request.<sup>8</sup> This ‘reasonable’ amount of time, however, may or may not equal a three day interval, depending on the circumstances of a particular request.”<sup>9</sup>

Many courts have followed a similar approach. In 2001, a federal district court lifted the FOIA’s standard deadlines for a school district that was struggling to respond to a voluminous request.<sup>10</sup> And, under similar conditions, courts in other jurisdictions have also lifted those states’ standard deadlines.<sup>11</sup> Two commentators, summarizing these cases, note that “[w]hile not letting government agencies off the hook merely because open records compliance is difficult, courts have tolerated delayed or restricted access when open records compliance would otherwise render custodians or agencies unable to do their jobs.”<sup>12</sup>

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*Amendments to the Arkansas Freedom of Information Act*, December 15, 2000, at pp. 30–31. But the General Assembly did not adopt this part of the Commission’s recommendations.

<sup>5</sup> *Id.*

<sup>6</sup> *E.g.* Op. Att’y Gen. Nos. 2000-059, 98-223, 96-354, 94-225; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* (Arkansas Law Press, 5th ed., 2009), pp. 274–76.

<sup>7</sup> *E.g.* Op. Att’y Gen. Nos. 2000-059, 98-223, 96-354, 94-225.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *See* Watkins & Peltz, *supra* note 5, at 275 n.780.

<sup>11</sup> *Id.* at 275 n.781 (collecting cases).

<sup>12</sup> *Id.* at 275–76 (collecting cases) (internal citations omitted).

Whether any particular custodian is, as you say, “entitled to relief from the statutory time requirements imposed by the FOIA” is a question of fact that this office cannot resolve.

***Question 4: May the city charge the cost of redacting to the person making the request?***

No. Section 25-19-105(f) requires custodians to absorb the cost of making redactions: “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.”

Another subsection in the FOIA further clarifies the kinds of “costs” that the “custodian shall bear” when redacting. Section 25-19-105(d)(3)(A), which outlines the things for which custodians can charge requestors, says that custodians cannot charge for “existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.” The Electronic Records Study Commission, which proposed this language, explained that the language was intended to “specif[y] that the custodian may not charge for personnel time associated with copying the records **or reviewing them to determine whether they contain exempt information.**”<sup>13</sup>

The custodian should be aware, however, that it has the authority to require advanced payment of valid copying fees when the estimated copying costs exceed \$25.<sup>14</sup> So if the FOIA requester is seeking thousands of pages, the cost of copying these documents will probably be more than \$25. The custodian could require the requestor to pay these costs before making all the copies.

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<sup>13</sup> *Report of the Electronic Records Study Commission & Recommendations for Amendments to the Arkansas Freedom of Information Act*, December 15, 2000, at p. 29. Please see Opinion No. 2009-186 for further discussion of the phrase “existing agency personnel” in Section 25-19-105(d)(3)(A).

<sup>14</sup> A.C.A. § 25-19-105(d)(3)(A)(ii).

***Question 5: Would it be sufficient for the city to redact any emails that it has prior knowledge contain exempt information and produce all other emails without first examining them for necessary redactions?***

No. Please see my response to Question 2.

***Question 6: May the city refuse to honor a FOIA request on the grounds that it will require the production of a large amount of documents and take a great deal of time and resources to respond?***

No. As noted above, if a valid FOIA request has been made for non-exempt public records, then the custodian must disclose the records. The legislature has not created an exception to disclosure for voluminous requests that take extensive time and resources to respond to. Nevertheless, while a custodian cannot simply “refuse to honor an FOIA request” on those grounds, there are occasions when it is impossible to comply with the request within the statutory deadline of three “working days.” For a discussion of that scenario, please see my response to Question 3(B).

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

Sincerely,

DUSTIN MCDANIEL  
Attorney General

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