

Opinion No. 2012-144

December 13, 2012

Doris Anderson
Post Office Box 6660
Sherwood, Arkansas 72124

Dear Ms. Anderson:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). Your request is based on A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011), which 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 you have requested a copy of a former public employee’s “resignation letter.” The custodian responded by saying that the former employee sent two e-mails “announcing his resignation.” One was “for department heads” and the other was for “his employees.” The custodian then transcribed portions of those two e-mails and sent you those transcriptions. The custodian claims that the redacted portions of the e-mails were “personal information” that he was “required to redact.”

You object, yet your reason for doing so is not clear. On the one hand, you seem to object to the *way* the custodian has redacted information. That is, you object to the fact that the custodian has apparently transcribed these e-mails instead of redacting the allegedly exempt information on the document itself. On the other hand, you seem to object to the fact that the custodian has redacted *any information at all*, for you say that since these e-mails were “sent on a city computer using a city email address,” the e-mails are “electronic records subject to release under FOIA.”

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. In this case, the custodian has made two decisions: (1) that the resignation letters (via e-mail) are subject to release under the FOIA; and (2) that certain discrete parts of the e-mails must be redacted. Regarding the former, I can say that resignation letters are generally subject to release under the FOIA as "personnel records." So the custodian has correctly decided to release the records. Regarding the latter, I cannot definitively say whether the custodian has correctly omitted certain information because I have not seen the original documents. But, as explained more fully below, the way the custodian has made the redactions is 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 first two elements appear met in this case. As for the first element, the documents are held by a public entity. As for the second element, the FOIA defines "public record" as (1) any "writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations" that are (2) "kept" and that (3) "constitute a record of the performance or lack of performance of official functions."¹ These e-mails appear to be a public employee's resignation letters. As such, they meet the definition of a "public record" because they are electronic information that have clearly been kept and constitute the performance of the official functions of the former employee.

Therefore, in my opinion, these documents are public records and must be disclosed unless some specific exception provides otherwise.

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

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

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.

The resignation letter as a whole

Because this office has consistently opined that a resignation letter is generally the resigning employee’s “personnel record,”⁵ we will focus on that exception. While the FOIA does not define the term “personnel record,” this office has consistently opined that the term refers to all records other than employee evaluation and job performance records that pertain to individual employees.⁶ 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.”⁷ We determine this by applying a balancing test that weighs the public’s interest in accessing the record against the individual’s privacy interest.

This balancing test, which takes place with a thumb on the scale favoring disclosure, has two steps.⁸ First, the custodian must assess whether the information

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): “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.”

⁵ *E.g.*, Op. Att’y Gen. 2012-019 (and opinions cited therein).

⁶ *See, e.g.*, Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

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

⁸ *See, e.g.*, *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

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.⁹ If the privacy interest is merely de minimus, then the thumb on the scale favoring disclosure outweighs the privacy interest. The next step in the balancing test is assessing whether the public's interest outweighs the privacy interest. According to the Arkansas Supreme Court, the public's interest is measured by "the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'"¹⁰

This office has consistently held that most resignation letters should be disclosed under the personnel-records balancing test described above.¹¹ So, in my opinion, the custodian has correctly decided that the FOIA requires the e-mails be disclosed.

Redacting information from the letter

Nevertheless, even if a document—when considered as a whole—must be disclosed, it may contain discrete pieces of information that must be redacted before disclosure. Custodians are obligated to redact pieces of information from an otherwise discloseable personnel record when, among other things, the release of the information would be a clearly unwarranted invasion of personal privacy. Because I have not seen the original e-mails at issue here, I cannot say whether the custodian correctly redacted the information.

But I can say that the *way* he redacted the information was inconsistent with the FOIA. The FOIA establishes a specific procedure for redacting public records: "The amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, **at the place in the record where the deletion was made.**"¹² Here, the custodian responded to your FOIA request in such a way that no one else can tell where deletions were made and how much of the record was deleted. The proper way to redact the allegedly exempt information would have been to use some tool to blackout the deleted material. The custodian's

⁹ *Id.* at 598, 826 S.W.2d at 255.

¹⁰ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998), quoting *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

¹¹ See the Opinions referenced in note 5, above.

¹² A.C.A. § 25-19-105(f)(3) (emphasis added).

failure to make redactions in this way renders his decision (at least) partially inconsistent with the FOIA.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh