

Opinion No. 2012-146

December 19, 2012

Joel DiPippa
Revenue Legal Counsel
Dept. of Finance and Administration
Post Office Box 1272, Room 2380
Little Rock, Arkansas 72203-1272

Dear Mr. DiPippa:

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 the Department of Finance and Administration has received an FOIA request for “copies of the Applicant Selection Record...for a job position recently filled by the Department.” This document is a large chart that reflects each applicant’s name, date interviewed, race, sex, military history, veteran’s points, whether the person was hired, and interview scores, which are broken into “essential,” “beneficial,” and “desirable.” You intend to release this document with each applicant’s scores redacted. You have also prepared another document to show the relative scores between the applicant who was hired and the other applicants. This document shows (a) the successful applicant’s name and scores and (b) redacts the unsuccessful applicants’ names and identifying information but leaves their scores so that the unsuccessful applicants’ scores are not personally identifiable. You ask whether all these decisions are consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the records, it is my opinion (1) that your decisions regarding the successful applicant are consistent with the FOIA; and (2) that I lack sufficient information to assess your decisions regarding the unsuccessful applicants. Nevertheless, regarding the latter, I will set out the standards the custodian should apply.

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.

Because the first two elements were explained in Opinion No. 2012-115, which was issued to you a few months ago in relation to similar records, I will simply enclose it for your reference and avoid repeating what it explained. Accordingly, the remainder of this opinion will focus on the third element—whether any exception shields the documents from disclosure.

The primary issue giving rise to this opinion request appears to be whether some exception shields from disclosure each applicant's name, identifying characteristics (race, sex, etc.), and interview scores assigned by the interviewer(s). The answer to this question depends on which of three categories each applicant falls into: (1) the successful applicant; (2) an unsuccessful applicant who was already (at the time of the application/interview) a public employee, or (3) an unsuccessful applicant who was not already a public employee.

The successful applicant

This office has consistently opined that the successful applicant's name, identifying characteristics, and interview scores qualify as "personnel records"

under the FOIA.¹ As noted in Opinion No. 2012-115, personnel records must be disclosed unless doing so “constitutes a clearly unwarranted invasion of personal privacy.” Whether the release of some document rises to that level depends on the outcome of a two-part balancing test, which takes place with a thumb on the scale favoring disclosure.

The balancing test first requires one to assess whether the information contained in the personnel record is of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest.² 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. 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.’”³

Applying this two-part test to the successful applicant’s information, this office has held that the balance weighs in favor of release.⁴ As for the first part of the test, this office has held that the successful applicant’s interest in “keeping his or her prevailing score” and name undisclosed is “minimal, if there at all.”⁵ And even if, depending on the circumstances, the interest is at least *de minimus*, the second step of the analysis would generally outweigh it. Specifically, this office has held that the second part of the test generally outweighs such a privacy interest when

¹ *E.g.*, Op. Att’y Gen. Nos. 2009-156, 2009-096, 2005-086, 98-101; *see also* A.C.A. § 25-19-105(b)(12) (setting out the exception for “personnel records”).

² *See, e.g.*, *Young v. Rice*, 308 Ark. 593, 598, 826 S.W.2d 252, 255 (1992); *see also* Op. Att’y Gen. 2012-136.

³ *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).

⁴ *E.g.* Op. Att’y Gen. Nos. 2012-115, 2008-039, 2006-044, 2005-086.

⁵ Op. Att’y Gen. 2005-086, p.3; *see* Op. Att’y Gen. Nos. 2012-115, 2008-039, 2006-044.

“the identifiable public interest is...to establish that the most qualified applicant was actually hired.”⁶

Given the foregoing, your decision to release the name and interview scores for the successful applicant is, in my opinion, consistent with the FOIA.

Unsuccessful applicants who are already public employees

Other applicants might fall into the category of those who are unsuccessful and who are already public employees. Because these applicants are already public employees, their names, identifying characteristics, and scores are eligible for the personnel-records exception, which was explained above.

But the two-part balancing test applies differently to these applicants than it does to the successful applicant. First, because the applicant was unsuccessful the privacy interest in the specific interview scores is, arguably, greater. Second, the public’s interest is not nearly as strong as in the case of the successful applicant because the unsuccessful applicant will not be assuming the new role with all its responsibilities. Because this balancing test generates slightly different results than the one for the successful applicant, this office has opined that the public’s interest is generally satisfied by redacting the unsuccessful applicants’ names before releasing their scores.⁷ But if, under the circumstances, it is reasonable to think that the unsuccessful applicant could be identified by his or her score alone, then it should also be redacted.⁸

Unsuccessful applicants who are not already public employees

The final category of applicants is for those who are unsuccessful and who are not already public employees. This office has consistently opined that the personnel-records exception does *not* apply to these applicants:

[T]he names and scores of applicants *who are not employees* should not be redacted. The reason for this differentiation is that the “clearly

⁶ Op. Att’y Gen. 2005-086, p.3; *see* Op. Att’y Gen. Nos. 2006-044, 2008-039.

⁷ *E.g.* Op. Att’y Gen. 2008-039.

⁸ *Id.*

unwarranted” standard applies only to “personnel records.” The Applicant Selection Record is not the “personnel record” of any applicant who is not already an employee or who is not hired as a result of the application process. For those individuals, there is no exemption under the FOIA or any other law that would permit withholding this information from the public. I note that the Arkansas Supreme Court has steadfastly interpreted the FOIA liberally in favor of openness and has construed exemptions narrowly, so as to serve the FOIA’s purpose of assuring that the public is “fully apprised of the conduct of public business.” *Waterworks v. Kristen Invest. Prop.*, 72 Ark. App. 37, 32 S.W.3d 60 (2000); *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000). I also note that the FOIA contains no general privacy exemption protecting personal information outside the personnel records context.⁹

Two commentators on the FOIA disagree with this analysis,¹⁰ and two lower courts are divided on the issue.¹¹ But this office has frequently noted this difference in the way the FOIA applies to job applicants, and the legislature has not amended the FOIA to address it. This is an issue for the legislature to resolve.

I am not able to apply these last two categories to the redactions you plan to make because you have not indicated whether any of the unsuccessful applicants are already public employees. On one of the documents, you have redacted the names

⁹ *Id.* My predecessor noted at this juncture that: “Act 608 of 1981 added a clause to the FOIA to provide a general privacy exemption for information “of a personal nature.” See Acts 1981, No. 608, § 1. However, that clause was deleted by Act 468 of 1985. See Acts 1985, No. 468, § 1. In addition, my predecessor concluded that the information at issue therein did not warrant protection afforded by the constitutional right of privacy discussed in *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

¹⁰ John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 185–87* (Arkansas Law Press, 5th ed., 2009).

¹¹ Compare *Little Rock School District v. Little Rock Newspapers, Inc.*, Pulaski County Circuit Court Case No. 87-7638 (1987), and *Little Rock Newspapers, Inc. v. Board of Trustees of the University of Central Arkansas*, Pulaski County Circuit Court Case No. 87-6930 (1987).

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and identifying information of *all* the unsuccessful candidates. In my opinion, in light of the foregoing, I can say this is consistent with the FOIA only if each of the unsuccessful candidates was already a public employee. If any of the unsuccessful candidates was *not* already a public employee at the time of the application/interview, then their information should, in my opinion, be disclosed.¹²

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh

¹² The fact that you have redacted *all* the information (except scores) of each unsuccessful applicant may stem from how you characterize Opinion No. 2012-115, which you say opined that custodians should disclose interview scores “so long as *only* the successful applicant score is identified.” (Emphasis added.) But that opinion did not say that “only” the successful applicant’s scores are releasable. In that opinion, the custodian redacted the scores of the successful applicant. While the opinion held that the successful applicant’s scores should be disclosed, it did not hold that nothing else should be released.