

Opinion No. 2013-016

February 19, 2013

Mr. Andy Davis  
Arkansas Democrat-Gazette  
Post Office Box 2221  
Little Rock, Arkansas 72203-2221

Dear Mr. Davis:

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). 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 you submitted a request under the FOIA to the Arkansas Department of Correction (“Department”) for the resignation letters of two employees who resigned from the Department. The custodian of the records denied your request, apparently on the basis of A.C.A. § 25-19-105(c)(1), which governs the release of “employee evaluation or job performance records.” You have asked whether this decision is consistent with the FOIA.

**RESPONSE**

In my opinion, the custodian’s decision is likely inconsistent with the FOIA. Not having reviewed the letters in question, I cannot offer a more definitive assessment of the custodian’s determination that they are exempt from disclosure. As explained further below, however, letters of resignation are generally “personnel records” for purposes of the FOIA. Unless the release of a personnel record would constitute a “clearly unwarranted invasion of personal privacy,” such records are not exempt from public inspection and copying.

## **DISCUSSION**

I will begin the analysis by explaining the law that governs “personnel records” and “employee evaluation or job performance records.” I will then apply these standards to the custodian’s decision in this instance.

### **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 are clearly met in this case. As for the first element, the documents are held by the Department, 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.<sup>1</sup>

It seems clear that a public employee’s resignation letter generally meets this definition. Therefore, in my opinion, the requested resignation letters are public records that must be disclosed unless some specific exception provides otherwise.

### **II. Exceptions to disclosure**

Under certain conditions, the FOIA exempts records relating to individual employees. Employee-related records can usually be divided into two mutually

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<sup>1</sup> A.C.A. § 25-19-103(5)(A) (Supp. 2011).

exclusive groups: “personnel records”<sup>2</sup> or “employee evaluation or job performance records.”<sup>3</sup> The test for whether these two types of documents may be released differs significantly.

When custodians assess whether either of these exceptions applies to a particular record, they must make two determinations. First, they must determine whether the record meets the definition of either exception. Second, assuming the record does meet one of the definitions, the custodian must apply the appropriate test to determine whether the FOIA requires that the record be disclosed.

***a. Personnel-records exception***

The FOIA does not define the term “personnel records.” But this office has consistently opined that personnel records are all records other than employee evaluation and job performance records that pertain to individual employees.<sup>4</sup> 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.”<sup>5</sup>

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,<sup>6</sup> has provided some guidance. 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.

This balancing test has two steps. First, the custodian must assess whether the information contained in the requested document is of a personal or intimate

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<sup>2</sup> A.C.A. § 25-19-105(b)(12) (Supp. 2011).

<sup>3</sup> A.C.A. § 25-19-105(c)(1) (Supp. 2011).

<sup>4</sup> See, e.g., Op. Att’y Gen. 99-147; John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT 187 (Arkansas Law Press, 5th ed., 2009).

<sup>5</sup> A.C.A. § 25-19-105(b)(12).

<sup>6</sup> 308 Ark. 593, 826 S.W.2d 252 (1992).

nature such that it gives rise to a greater than *de minimus* privacy interest.<sup>7</sup> 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.<sup>8</sup> Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public's interests.<sup>9</sup> 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.<sup>10</sup>

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.<sup>11</sup>

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 include dates of birth of public employees (Op. 2007-064), social security numbers (Ops. 2006-035, 2003-153), and medical information (Op. 2003-153). (Please see Opinion No. 2012-063 for a more complete list.)

***b. Employee-evaluation exception***

The FOIA likewise does not define "employee evaluation or job performance records" (referred to hereinafter as "evaluation records"). But the Arkansas Supreme Court has recently adopted this office's view that the term refers to any records (1) created by or at the behest of the employer (2) to evaluate the employee (3) that detail the employee's performance or lack of performance on the job.<sup>12</sup> This exception includes records generated while investigating allegations

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<sup>7</sup> *Id.* at 598, 826 S.W.2d at 255.

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

<sup>9</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

<sup>10</sup> *E.g.* Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

<sup>11</sup> Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

<sup>12</sup> *Thomas v. Hall*, 2012 Ark. 66, \_\_\_ S.W.3d \_\_\_ (Feb. 16, 2012); *see, e.g.*, Op. Att'y Gen. Nos. 2009-067, 2008-004, 2007-225, 2006-111, 2003-073, 98-006, 97-222, 95-351, 93-055.

of employee misconduct that detail incidents that gave rise to an allegation of misconduct.<sup>13</sup>

Evaluation records cannot be released unless the following three elements are met:

- (1) There has been a final administrative resolution of any suspension or termination proceeding;
- (2) The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee; and
- (3) There is a compelling public interest in the disclosure of the records in question.<sup>14</sup>

### III. Application.

We can now apply the foregoing to the resignation letters at issue. I note that the Department's response to your FOIA request includes the statement that "[r]esignations are not subject to the law based on 25-19-105(c)(1)."<sup>15</sup> This statement may reflect a misunderstanding of the exemption under A.C.A. § 25-19-105(c)(1) for evaluation records. As you can see from the above definition, suspension or termination is a threshold requirement for the release of "employee evaluation or job performance records." This means that resignation is not a triggering event for the release of evaluation records. That is, an employee's evaluation records will be exempt from disclosure if the employee resigns, as opposed to being suspended or terminated.

This does not mean, however, that all records associated with an employee's resignation are exempt from disclosure under A.C.A. § 25-19-105(c)(1). It is also clear from the above definition of evaluation records that a record cannot fall within this classification unless it was **created by or at the behest of the**

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<sup>13</sup> *Id.*

<sup>14</sup> A.C.A. § 25-19-105(c)(1); Op. Att'y Gen. Nos. 2011-100, 2008-065.

<sup>15</sup> Faxed correspondence from Shea Wilson to Andy Davis, February 12, 2013.

**employer to evaluate the employee.** Regarding the letters of resignation that are at issue in the request at hand, I believe it may reasonably be assumed that such letters were not created by the employees at the instigation of their employer. Instead, as noted in previous opinions of this office, a resignation letter generally will be a **personnel record**:

The disclosure of public employee resignation letters has been discussed many times in opinions of the Attorney General. The status of the law regarding the release of such letters was detailed by my predecessor in Op. Att’y Gen. 2002-320. In that opinion it was stated that: “[t]his office has consistently opined that letters of resignation generally constitute ‘personnel records,’ within the meaning of the FOIA. *See, e.g.,* Ops. Att’y Gen. Nos. 2002-006; 2001-276; 99-147; 99-119; 98-122; 95-162; 88-147.” The FOIA, as you indicate, exempts from disclosure “personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.” A.C.A. § 25-19-105(b)(12) (Supp. 2005).<sup>16</sup>

In my opinion, therefore, the resignation letters at issue likely constitute personnel records. As such, they are subject to release absent some detailed information of a personal nature that would cause their release to be “a clearly unwarranted invasion of personal privacy” under the test described above for the release of personnel records.

I should note that some confusion on this score might be generated by several opinions of this office that could be read to suggest that a resignation letter can constitute an evaluation record if the resignation was in fact a “constructive termination.”<sup>17</sup> For instance, Op. Att’y Gen. 2009-156 states that “if a resignation

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<sup>16</sup> Op. Att’y Gen. 2006-082. *Accord* Op. Att’y Gen. 2012-019.

<sup>17</sup> My predecessors and I have stated that “a voluntary resignation in the face of a disciplinary challenge does not equate to a suspension or termination.” *See, e.g.,* Op. Att’y Gen. Nos. 2007-322, 2007-061, 2006-038, 2006-035, 2005-094, 2005-032, 2005-030, 2004-219, 2002-235, 2001-246, 98-188, 97-063. On the other hand, other previous opinions of this office leave open the possibility that a coerced resignation might amount to a constructive termination. One of my predecessors has acknowledged that under certain facts, “a resignation tendered in the face of a more certain, impending termination could be deemed to be a forced, coerced or constructive termination for purposes of A.C.A § 25-19-105(c)(1).” Op. Att’y Gen. 97-063. The issue is a question of fact in each instance. Op. Att’y Gen. Nos. 2011-078, 2007-061.

was coerced, the letter of resignation may constitute an employee evaluation record and may amount to a ‘constructive termination.’”

There is no suggestion in your request for my opinion in the matter at hand that the former employees’ resignations were coerced. Nevertheless, I will take this opportunity to say that to the extent Op. 2009-156, or any other opinions of this office, suggest that a record can be classified as an evaluation record based upon the fact that the employee was either suspended or terminated, such opinions are hereby overruled. To reiterate, a record will not constitute an “evaluation or job performance record” unless it was created by or at the behest of the employer to evaluate the employee. I believe it may reasonably be assumed that this will not be the case with regard to an employee’s letter of resignation.

In conclusion, while I have not seen the resignation letters at issue, I believe the relevant question is whether their release would constitute a “clearly unwarranted invasion of personal privacy” under the test described above. Unless the letters contain some detailed information of a personal nature, they it is unlikely they are exempt from disclosure, in my opinion.<sup>18</sup>

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/EAW:cyh

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<sup>18</sup> See Op. Att’y Gen. Nos. 97-063, 95-169, 95-162, 89-077.