

Opinion No. 2013-057

June 7, 2013

Ms. Helen Williams
c/o Jennifer Johansen, Assistant Director
Human Resources/Administration
City Services Building, 3d Floor
120 Main Street
North Little Rock, Arkansas 72114-2228

Dear Ms. Williams:

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 correspondence indicates that the City of North Little Rock has received a request for information on individuals who draw a pension and a paycheck from the City. Specifically, the requester seeks the salary, position title, and yearly pension for individuals who hold a full or part-time job with the City and who also draw retirement benefits from the City. The custodian has notified you of its intent to release a record containing this information. You object to the release of the amount of your pension. You do not object to the release of the other information.

RESPONSE

In my opinion, the custodian's decision to release the amount of your individual pension benefit is probably inconsistent with the FOIA. It is my opinion that the record containing this information is properly classified as a personnel record

under the FOIA, and that in all likelihood the test for release of the record is not met.

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 are clearly met in this case. The City of North Little Rock is a public entity; and the record at issue plainly falls within the FOIA's definition of "public records."¹ With regard to the third element, the FOIA provides two exemptions for employee-related records: the "personnel records" exemption under A.C.A. § 25-19-105(b)(12) (Supp. 2011),² and the exemption under A.C.A. § 25-19-105(c)(1) (Supp. 2011) for "employee evaluation or job performance records."³ In my opinion, the record at issue is properly categorized as a personnel record. Although the FOIA does not define the term "personnel records," this office has consistently interpreted the term to encompass records concerning an individual's contributions to his or her pension system, as well as the amount of benefits an individual receives.⁴

With regard to the applicable test for disclosure, "personnel records" are open to public inspection and copying under the FOIA, except "to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy."⁵

¹ A.C.A. § 25-19-103(5)(A) (Supp. 2011) (defining "public records" 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.")

² This subsection states: "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."

³ Subsection 25-19-105(c)(1) states: "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."

⁴ *E.g.*, Op. Att'y Gen. Nos. 2010-152; 2009-215; 2005-041; 98-097; 97-331.

⁵ *See n. 2, supra.*

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁶ 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 the records private. The balancing takes place with a thumb on the scale favoring disclosure. To aid in conducting the balancing test, *Young v. Rice* developed a two-step approach. First, the custodian must assess whether the information 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.⁷ 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.⁸ 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.’”⁹ Because FOIA exemptions 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.¹⁰

When applying this balancing test to personal financial information concerning items such as insurance coverage and retirement benefits, my predecessors and I have consistently opined that the balance most often tips in favor of the individual’s privacy interest in this information.¹¹ The individual clearly has a greater than de minimus privacy interest in the specific data concerning his or her pension benefit income. As for the public interest, the public undoubtedly has a substantial interest in the expenditure of public funds.¹² But unless that interest is somehow heightened under the particular circumstances, I believe the public

⁶ 308 Ark. 593, 826 S.W.2d 252 (1992).

⁷ *Id.*, 308 Ark. at 598.

⁸ *Id.*

⁹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125 (1998), quoting *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

¹⁰ *Id.*

¹¹ *E.g.*, Op. Att’y Gen. Nos. 2009-161; 2005-041; 2002-042 (and opinions cited therein).

¹² *Accord* Op. Att’y Gen. 97-331.

interest can ordinarily be satisfied through the release of general benefit information applicable to all employees,¹³ and/or through the disclosure of aggregate data on benefits paid to retired public employees.¹⁴

In only one Attorney General opinion has the balance been found to tip in favor of the public's interest in an individual's pension benefit information. In Op. Att'y Gen. 97-331, it was concluded that the lump sum amount a former mayor received in retirement benefits and the amount she paid into the pension system should be released to the public.¹⁵ As another of my predecessors later observed, however, "[t]his result is unusual, and absent factors indicating a heightened public interest in such personal financial information, these records should in my opinion be withheld from disclosure."¹⁶

In conclusion, therefore, it is my opinion that the public's interest in all likelihood does not rise to a level sufficient to overcome the individual's privacy interest in the amount of pension benefit he or she draws.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

¹³ Op. 2005-041.

¹⁴ Op. 97-331.

¹⁵ As my predecessor nevertheless noted in this opinion, one of our colleagues has opined that the disclosure of specific data concerning a retired public employee's pension benefit income or payout option selected would constitute a clearly unwarranted invasion of personal privacy. *Id.*, citing Op. Att'y Gen. Hawaii 90-1 (issued May 8, 1997). The Attorney General for the State of Hawaii recognized, however, that under certain circumstances, such as where specific allegations of fraud are present, the public interest in disclosure may outweigh an individual's privacy interest.

¹⁶ Op. 2005-041.