

Opinion No. 2013-066

July 8, 2013

Patricia Vick
c/o Jean Block, Chief Legal Counsel
Arkansas Scholarship Lottery
Post Office Box 3238
Little Rock, Arkansas 72203-3238

Dear Ms. Vick:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”).¹ Your request, which is based on A.C.A. § 25-19-105(c)(3)(B)(i), seeks an opinion from this office stating whether the custodian’s decision regarding the release of personnel or employee-evaluation records is consistent with the FOIA.

Your letter indicates that someone has requested “each of the lottery employees’ merit raises, the percentage raise, and the raise in dollar terms as well as their COLA raise in dollar terms and their new total annual salary.” The custodian has decided that the FOIA requires each of these pieces of information be released. While you recognize that, as a public employee, your salary is subject to release in response to a FOIA request, you question the release of the “merit pay *percentages*.” You point out that “under the Merit Pay System, merit pay increases are directly tied to the performance evaluation process.” Specifically, employees who receive a certain overall rating receive a defined percentage increase: those who are overall “satisfactory” receive 1.5%; those who are overall “above average” receive 3%; those who overall “exceed standards” receive 4.5%.

¹ The FOIA is codified at A.C.A. §§ 25-19-101 to 25-19-110.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Not having seen any of the specific documents that the custodian intends to disclose, I cannot opine about the release of any specific record. Nevertheless, I can opine more generally about the release of the percentages for merit raises. As explained more fully below, the custodian's decision to release the percentages is, in my opinion, consistent 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.

Given the nature of the underlying FOIA request, the first two elements are clearly met. The analysis for those two elements is contained in Opinion No. 2011-045, which is enclosed. So I will not repeat it here.

Turning to the third element, the question is whether some exception shields the specific percentage of the merit raise from disclosure. You point out a somewhat unusual scenario in which the release of a personnel record indirectly reveals exempt information on an employee-evaluation record. The Arkansas Supreme Court has defined an evaluation record as a public record that is created by or at the behest of the employer to evaluate the employee.²

As noted in Opinion No. 2011-045, salary information—which includes raises and COLA amounts—meets the definition of a “personnel record.”³ Accordingly, the FOIA requires that these records be released unless doing so constitutes a “clearly unwarranted invasion of personal privacy.”⁴ As Opinion No. 2011-045 further explains, the release of salary information will rarely rise to the level of such an invasion. Therefore, these kinds of records generally must be released.

² *Thomas v. Hall*, 2012 Ark. 66, ___ S.W.3d ___ (Feb. 16, 2012); *see generally*, Op. Att’y Gen. Nos. 2009-067, 2006-035, 93-055.

³ Please see Opinion No. 2011-045 for the definition of “personnel record.” *See also* Op. Att’y Gen. 2011-098 (opining, as a more general matter, that the amount of a raise is considered a personnel record and is discloseable).

⁴ A.C.A. § 25-19-105(b)(12) (Supp. 2011).

While there is very good reason to think that the percentage-increase is itself a personnel record, there are no good reasons to think it is itself an employee evaluation. Given the scenario you convey, the award of and amount of the percentage-increase are *effects* of receiving a certain rating on an employee evaluation. But the percentage increase itself was not created by the employer to evaluate the employee. Instead, just like any other raise or promotion, the percentage-increase rewards the employee for a certain level of performance.

Therefore, in my opinion, the percentage-increase is best characterized as a personnel record, not an employee-evaluation record.

Your core concern seems to be not so much that the percentage-increase is itself an evaluation record, but that, as you say, “the request for the ‘percentage raise’ [seems to be] a ‘back door’ way of discovering an employee’s overall job performance review[.]” In other words, you seem to grant that the release of the percentage-increase itself would not *directly* disclose an employee evaluation record, but the release seems to *indirectly* reveal the overall evaluation result because the percentage-increase can be cross-referenced with the state statute that sets the percentages.

I addressed this concern about cross-referencing in Opinion No. 2011-118. In that opinion, I explained that, because the FOIA’s exceptions must be narrowly construed, when there is a reasonable doubt about what an exception means, we are required to opt for the interpretation that exempts the fewest records.⁵ Likewise, when there is a reasonable doubt about how an exception applies to a given set of facts, we are required to opt for the application that exempts the fewest records.⁶ In my opinion, these principles of interpreting the FOIA indicate that the legislature has not established a general prohibition on the release of an otherwise discloseable record simply because it could be cross-referenced with other information to reveal exempted information.

In summary, the percentage increase is, in my opinion, best classified as a personnel record. There is no clear basis in the FOIA for the custodian to withhold the percentage-increase on the grounds that it could be cross-referenced with the

⁵ See *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998) (holding that all exceptions to disclosure under the FOIA must be narrowly construed).

⁶ See *id.*

state statute to reveal non-discloseable information. Therefore, the custodian has, in my opinion, properly decided to disclose it.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

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