

Opinion No. 2013-108

September 4, 2013

Ms. Annie M. Dowling
c/o Mark Rushing, Director
Strategic Communications, University Relations
University of Arkansas
100 Davis Hall
Fayetteville, Arkansas 72701

Dear Ms. Dowling:

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.

In this case, you have objected to the custodian’s decision to release a document relating to your resignation from the University of Arkansas. In stating your objections, you say the document “contains what I consider to be personnel information regarding an employment decision and I am concerned about protecting my privacy in regards to this matter.”

RESPONSE

It is my opinion, based upon the information at hand, that the custodian’s decision to release the document is 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.

The first two elements are clearly met in this case. As for the first element, the document is held by the University of Arkansas, which is a public entity. As for the second element, the FOIA defines “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.¹

The document in question is kept by the University and plainly constitutes a record of the performance or lack of performance of official functions. As such, it constitutes a “public record” under this definition.

With the first two elements met, the document must be released in response to a FOIA request unless some exemption shields it from disclosure. It appears that the applicable exemption in this instance is the one for “personnel records.”² The first part of the document appears to be in the nature of a resignation letter, which according to numerous opinions of this office generally constitutes the resigning employee’s personnel record.³ The second part is a complaint. I have no information to suggest that this complaint was created by or at the behest of your supervisor.⁴ Accordingly, I assume it was unsolicited, which means that it is the

¹ A.C.A. § 25-19-103(5)(A) (Supp. 2011).

² 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.”

³ *See Op. Att’y Gen. 2012-019* (and opinions cited therein).

⁴ A complaint solicited by a supervisor ordinarily falls into the other category of records that are subject to this office’s review under the FOIA -- “employee evaluation or job performance records.” A.C.A. § 25-19-105(c)(1). The FOIA does not define this category of records, which is subject to another test for disclosure. However, the Arkansas Supreme Court has stated, consistent with previous opinions of this office, that it refers to any records (1) created by or at the behest of the employer (2) to evaluate the

personnel record of the employee complained about.⁵ It is also your personnel record, to the extent it contains information pertaining to your individual employment.⁶

A personnel record is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁷ While the FOIA does not define this phrase, the Arkansas Supreme Court, in *Young v. Rice*,⁸ stated that in order to determine whether the release of a personnel record would constitute a “clearly unwarranted invasion of personal privacy,” a balancing test must be applied. The test 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, the Court elucidated 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 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. 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.¹⁰ 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

employee (3) that detail the employee’s performance or lack of performance on the job. *Thomas v. Hall*, 2012 Ark. 66, ___ S.W.3d ___ (Feb. 16, 2012); *see, e.g.*, Op. Att’y Gen. Nos. 2009-067, 2005-030, and 93-055.

⁵ *E.g.*, Op. Att’y Gen. Nos. 2011-152, pp. 3-4; 2008-064, pp. 5-6; 2002-210. *See also generally* Op. Att’y Gen. 2008-064 (explaining why unsolicited complaints constitute personnel records rather than employee evaluation or job performance records.)

⁶ This office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees. *See, e.g.*, Op. Att’y Gen. No. 99-147. *See also* John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 187* (Arkansas Law Press, 5th ed., 2009).

⁷ A.C.A. § 25-19-105(b)(12), *supra* n. 2.

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

⁹ 308 Ark. at 598.

¹⁰ *Id.*

let citizens know ‘what their government is up to.’”¹¹ If the public interest in this regard is substantial, it will usually outweigh any privacy interest.¹²

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.¹³ Additionally, 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.¹⁴

Applying this objective test to the document at issue in this case, I do not see any reason, from the face of the record, to think that its release would rise to the level of a “clearly unwarranted invasion of personal privacy” -- either as to you or as to the subject of the complaint. In my opinion, there is a substantial public interest in the content of the document, and I see no privacy interest that rises to a level sufficient to overcome that interest.

Accordingly, it is my opinion, based upon the information at hand, that the custodian’s decision to release the document is consistent with the FOIA.

The foregoing opinion, which I hereby approve, was prepared by Deputy Attorney General Elisabeth A. Walker.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

¹¹ *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).

¹² *Young*, *supra*, n. 9.

¹³ *Id.*

¹⁴ *See* Op. Att’y Gen. 2013-012 (and opinions cited therein).