

Opinion No. 2013-123

September 27, 2013

Mr. Alton Davis
c/o JoAnn Maxey, Associate General Counsel
University of Arkansas System
2404 N. University
Little Rock, Arkansas 72207

Dear Mr. Davis:

I am writing in response to your request for my opinion regarding the application of the Arkansas Freedom of Information Act (the “FOIA”).¹ The FOIA authorizes the custodian, requester, or the subject of personnel or employee evaluation records to seek an opinion from this office determining the legal propriety of the custodian’s provisional decision regarding the release of requested records.²

The FOIA request here at issue was directed to the custodian of records of the University of Arkansas at Pine Bluff. The custodian has determined that certain documents, which she characterizes as your “personnel records,” fall within the scope of a request for “[a]ll Verbal and Writing Complaints . . . concerning every officers [sic] and personnel within the police department^[3] which lead [sic] to the officer or personnel being placed on Administration Leave within the last three years.” The custodian has provisionally determined to release these records, subject to your entitlement, which you have elected to exercise, to seek my review of this tentative decision. Not having been provided copies of the records at issue, I can do no more than set forth the test the custodian should apply in reviewing her provisional determination to release the requested records.

¹ A.C.A. §§ 25-19-101 – 110 (Repl. 2002 and Supp. 2011).

² A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011).

³ The referenced “police department” is reportedly the Public Safety and Police Department of the University of Arkansas at Pine Bluff.

I have no information to suggest that the “complaints” were created by or at the behest of your supervisor.⁴ Accordingly, I assume they were unsolicited, which means that they are indeed your “personnel records.”⁵ They also qualify as your personnel records inasmuch as they presumably contain 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. Under the test, the public’s interest in accessing the records is weighed 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 has prescribed 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

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 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.*, Ops. Att’y Gen. 2009-067, 2005-030, and 93-055.

⁵ *See, e.g.*, Ops. Att’y Gen. 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. 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).

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

⁹ *Id.* at 598.

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 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

Assuming the custodian has properly applied the balancing test set forth above and has determined that the public interest in disclosure outweighs your privacy interest, I agree that disclosure would not rise to the level of a "clearly unwarranted invasion of personal privacy." Under these circumstances, releasing the records would not offend the provisions of the FOIA.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

¹⁰ *Id.*

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. 8.

¹³ *Id.*

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