Opinion No. 2014-011

February 5, 2014

Ms. Stacey Witherell
Labor and Employee Relations Manager
City of Little Rock
500 West Markham, Suite 130W
Little Rock, Arkansas 72201-1428

Dear Ms. Witherell:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the records custodian, is based on A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2013). 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 someone has requested the personnel files, including photographs, for a list of certain police officers. You have determined that the responsive documents are best characterized as personnel records and should be disclosed. You ask whether these decisions are consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Not having seen the records at issue, I cannot opine about the release of any particular document. I can, however, discuss the general rules regarding personnel records.

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. Because the only question here is about the applicability of the exception for personnel records, I will confine my discussion to that exception.

When custodians assess whether the personnel-records exception applies to a particular record, they must make two determinations. First, they must determine whether the record meets the definition of a personnel record. Second, assuming it does, the custodian must apply the appropriate test to determine whether the FOIA requires that record be disclosed.

While the FOIA does not define the term "personnel records," this office has consistently opined that "personnel records" are all records other than employee evaluation and job performance records that pertain to individual employees.[1] 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."[2]

While the FOIA does not define the phrase "clearly unwarranted invasion of personal privacy," the Arkansas Supreme Court, in *Young v. Rice*,[3] has provided some guidance. To determine whether the release of a personnel record would constitute a "clearly unwarranted invasion of personal privacy," 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.

The balancing test elaborated by *Young v. Rice* has two steps. 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.[4] 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

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[1] *See, e.g.*, Op. Att'y Gen. No. 1999-147; John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT 187 (Arkansas Law Press, 5th ed., 2009).

[2] A.C.A. § 25-19-105(b)(12) (Supp. 2013).

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

[4] *Id.* at 598, 826 S.W.2d at 255.

custodian must determine whether that interest is outweighed by the public's interest in disclosure.[5] 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.[6] 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.[7]

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.[8]

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 that must be redacted include:

- dates of birth of public employees (Op. 2007-064);
- social security numbers (Ops. 2006-035, 2003-153);
- medical information (Op. 2003-153);
- driver's license numbers (Op. 2007-025);
- insurance coverage (Op. 2004-167);
- tax information or withholding (Ops. 2005-194, 2003-385);
- payroll deductions (Op. 98-126);
- banking information (Op. 2005-195);
- unlisted telephone numbers (Op. 2005-114);

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[5] *Id*., 826 S.W.2d at 255.

[6] *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

[7] *E.g*., Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

[8] Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

- home addresses of most public employees (A.C.A. § 25-19-105(b)(13)); personal e-mail addresses (Op. 2004-225);

- marital status of employees and information about dependents (Op. 2001-080); and

- any information that would identify an undercover law enforcement officer falling within A.C.A. § 25-19-105(b)(10).

With regard to the last item, while my review under subsection 25-19-105(c)(3)(B)(i) is limited to discussing -105(b)(12) and -105(c)(1), I will note that this office has long opined that the photographs of police officers are personnel records and that photographs of undercover police officers are exempt from disclosure (e.g. Opinion No. 96-005). Further, if a department currently employs undercover officers, certain kinds of FOIA requests may render it practically impossible to refrain from effectively identifying the department's undercover officers. For example, if a FOIA request seeks the photographs of officers on a specific list, and the custodian releases only the non-undercover officers' photos, then the requester can determine that the officer whose photograph was not released is undercover. That procedure would violate -105(b)(10) because it effectively discloses the "identity" of the undercover officer. In my opinion, the more reasonable approach is as follows: When a law enforcement agency employs officers who fall within -105(b)(10), the agency should not disclose the photographs of any of its officers.

You, as the custodian, should apply the foregoing definitions and standards for disclosure to each individual record that you believe to be responsive to the FOIA request.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

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