



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-089

August 12, 2014

Jason B. Kelley, Staff Attorney
City of Bella Vista
Post Office Box 5655
Bella Vista, Arkansas 72714

Dear Mr. Kelley:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the custodian's attorney, 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 correspondence indicates that someone has requested the personnel files of eight police officers who are currently employed by the city. You have gathered the documents you believe to be responsive to the request and have asked me to review your decision regarding a particular subset of those documents. Specifically, each officer's file contains a 23-page document entitled "The Integrity Interview," which appears to have been administered to each officer during their application process. The document asks 349 questions (304 separately enumerated and grouped questions, plus 45 subparts) ranging from the mundane and innocuous ("What is your full name?") to the extremely sensitive and personal ("Have you ever been the victim of sexual child abuse?"). You have determined that this document is a personnel record and that its disclosure would constitute a clearly unwarranted invasion of the officers' personal privacy. Therefore, you have decided to withhold the document in its entirety. You ask whether this decision is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the "Integrity Interview," it is my opinion (1) that the custodian has properly classified the document as a personnel record of each officer who completed the questionnaire; and (2) that the custodian has correctly decided to withhold the entire document from disclosure.

DISCUSSION

I. General standards governing disclosure

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 documents are created, administered, and held by the City, which is a public entity. As for the second element, the FOIA defines "public record" 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 "Integrity Interview" at issue here was created by the city and administered to applicants for positions as law enforcement officers. Thus, the blank document itself (before any answers are provided by applicants) constitutes a record of the performance of the Police Department's official functions. Likewise, as a component part of the job-application process, a completed questionnaire (i.e. with candidates' answers) constitutes a public record.²

¹ A.C.A. § 25-19-103(5)(A) (Supp. 2013).

² *E.g.*, Op. Att'y Gen. 2009-156 (and opinions cited therein).

Therefore, in my opinion, these documents are public records and must be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.³ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"⁴ or "employee evaluation or job performance records."⁵ The test for whether these two types of documents may be released differs significantly.

When custodians assess whether either of these exceptions applies to a particular record, they must make two determinations. First, they must determine whether the record meets the definition of either exception. Second, assuming the record does meet one of the definitions, the custodian must apply the appropriate test to determine whether the FOIA requires that record be disclosed.

A. *Personnel records*

I will focus here on the exception for personnel records. This office has repeatedly opined that the job-application documents of a successful applicant constitute that

³ This office and the leading commentators on the FOIA have observed that personnel files usually include: employment applications; school transcripts; payroll-related documents such as information about reclassifications, promotions, or demotions; transfer records; health and life insurance forms; performance evaluations; recommendation letters; disciplinary-action records; requests for leave-without-pay; certificates of advanced training or education; and legal documents such as subpoenas. *E.g.* Op. Att'y Gen. 97-368; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 187-89* (Arkansas Law Press, 5th ed., 2009).

⁴ 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."

⁵ A.C.A. § 25-19-105(c)(1): "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."

person's personnel records.⁶ Such records must be disclosed unless doing so constitutes "a clearly unwarranted invasion of personal privacy."⁷

While the FOIA does not define the phrase "clearly unwarranted invasion of personal privacy," the Arkansas Supreme Court, in *Young v. Rice*,⁸ 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.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 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.¹¹ 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.¹²

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹³

⁶ *E.g.*, Op. Att'y Gen. 2010-078 (and opinions cited therein).

⁷ A.C.A. § 25-19-105(b)(12) (Supp. 2013).

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

⁹ *Id.* at 598, 826 S.W.2d at 255.

¹⁰ *Id.*, 826 S.W.2d at 255.

¹¹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹² *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹³ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

B. Redactions

The foregoing test can shield from disclosure either an entire document or only discrete pieces of information on an otherwise discloseable document. When the latter occurs, custodians must take special care to ensure they comply with the FOIA's redaction provisions, which are codified at subsection 25-19-105(f). For purposes of this opinion, the FOIA's redaction rules can be divided into the prescribed manner of making redactions and the nature of the redaction requirement itself.

First, custodians must make redactions in the proper manner. The FOIA requires that the redactions be made in such a way that one can see both the "amount" and "place" of the redaction.¹⁴ The surest way to comply with these requirements when redacting from paper documents is to use a black marker to redact the material.

Second, custodians have a conditional obligation to make redactions. As a general rule, custodians cannot refuse a request to "to inspect, copy, or obtain copies of public records" simply because those records comingle exempt and nonexempt information.¹⁵ Rather, the custodian must make the redactions if the non-exempt information is "reasonably segregable."¹⁶

While the FOIA does not define what is meant by the term "reasonably segregable," nor has it been interpreted by any Arkansas appellate court, this office has examined the FOIA's statutory history in an attempt to shed some light. As I explained in Opinion No. 2012-083, the term "reasonably segregable" was clearly borrowed from the redaction provision in the federal FOIA. Thus, federal case law on the meaning and application of the term would be highly relevant and persuasive to an Arkansas court faced with examining Arkansas's use of the term. As further explained in that earlier opinion, the federal courts appear to have reached a consensus that the term "reasonably segregable" means non-exempt portions of a record must be disclosed unless they are "inextricably intertwined" with exempt portions. To determine whether non-exempt information is

¹⁴ A.C.A. § 25-19-105(f)(3).

¹⁵ A.C.A. § 25-19-105(f)(1).

¹⁶ A.C.A. § 25-19-105(f)(2).

“inextricably intertwined” with exempted information, courts employ the following test:

[T]he reasonableness of [redaction is] dependent upon the **proportion** and **distribution** of non-exempt information in a given document: For example, if only ten percent of the material is non-exempt and it is interspersed line-by-line throughout the document, an agency claim that it is not reasonably segregable because the cost of line-by-line analysis would be high and the result would be an essentially meaningless set of words and phrases might be accepted. On the other extreme, if a large proportion of the information in a document is non-exempt, and it is distributed in logically related groupings, the courts should require a high standard of proof for an agency claim that the burden of separation justifies nondisclosure or that disclosure of the non-exempt material would indirectly reveal the exempt information.¹⁷

III. Application

We can now apply the foregoing to the “Integrity Interview” administered to the eight officers. The primary issue here is not whether the blank questionnaire is discloseable; rather, the question is whether a completed questionnaire is discloseable. Further, the primary issue here is not whether just *any* completed questionnaire is discloseable; rather, the question is whether a *successful* candidate’s completed questionnaire is discloseable. As noted above, the completed questionnaire constitutes the personnel record of each officer. Therefore, it must be disclosed unless doing so constitutes a clearly unwarranted invasion of the officer’s personal privacy.

In my opinion, the foregoing standard requires that some information be disclosed and that some information be withheld. For example, it is clearly not an unwarranted invasion of an officer’s personal privacy to disclose the mundane and innocuous question (and its answer), “What is your full name?” Thus, the FOIA requires that this information be disclosed. Yet it clearly would be an unwarranted invasion of an officer’s personal privacy to disclose responses to many other questions such as the following: “How many financial obligations are you not current on at this time?” “If currently separated from your spouse, what are the reasons for the separation?” “Have you ever been the victim of sexual child

¹⁷ *Missouri Coalition for Env. Found. v. U.S. Army Corps of Engineers*, 542 F.3d 1204, 1211–12 (8th Cir. 2008) (emphasis added, internal quotation omitted and reformatted).

abuse?” These three questions are representative of a slew of questions that ask highly personal questions for which there is an exceedingly low or non-existent public interest.¹⁸

Accordingly, the record at issue comingles exempt and non-exempt information. As explained above, the custodian must redact the exempt information from the non-exempt if the latter is “reasonably segregable” from the former. This is ascertained by assessing the proportion and distribution of the exempted information in relation to the non-exempted information. In my opinion, the exempted information clearly predominates, representing around 70% of the questionnaire. Further, this 70% is found in a line-by-line format. As noted above, the federal courts, when assessing the term “reasonably segregable,” have marked out two ends of a spectrum. When 90% of the information was exempted and dispersed line-by-line, the court took that as an obvious example of a situation in which it would be unreasonable to require the custodian to redact the exempted information and disclose the rest. Here, the exempted information is also line-by-line but represents about 70%. So while the hypothetical scenario contained in the federal cases is more clear than the current scenario, I believe a court faced with your question would, in all likelihood, hold that the exempted information is inextricably intertwined with the non-exempted information. Therefore, in my opinion, the custodian is not obligated to make the redactions and must withhold the entire document from disclosure.

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

Sincerely,


DUSTIN MCDANIEL
Attorney General

DM/RO:cyh

¹⁸ I make no comment on the propriety of these questions from an employment perspective as that would be outside the scope of my review under subsection 25-19-105(c)(3)(B)(i).