



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**DUSTIN McDANIEL**

Opinion 2014-094

August 22, 2014

Lori McDonald  
Post Office Box 1437, Suite 260  
Little Rock, AR 72201

Dear Ms. McDonald:

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. 2013), which 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 copies of “any documents involving” your employment. The custodian has decided to disclose redacted copies of various personnel records totaling 151 pages. You object to this disclosure because you believe that—given the requester’s identity and behavior—the disclosure of these records to this specific requester would be a clearly unwarranted invasion of your personal privacy. You say that the requester’s sole motive is to use these documents to harass, annoy, and potentially harm you or those you know. You ask whether, in light of your concerns, the custodian is required to shield your personnel records from disclosure to this specific requester.

**RESPONSE**

My statutory duty is to state whether the custodian’s decision is consistent with the FOIA. Having reviewed the records, it is my opinion (1) that the custodian has properly decided to disclose these personnel records; (2) that some additional information must be redacted before disclosure; and (3) that, while your harassment claim is extremely strong and may well persuade a judge to issue a “No Contact” order or an order that forbids the

requester from seeking information from or about you, the custodian cannot consider this claim in the context of 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 only dispute here is whether the exception for personnel records requires the custodian to shield these 151 pages of records from disclosure to this specific requester. A personnel record is any record that pertains to an individual employee that is not an employee-evaluation document.<sup>1</sup> The FOIA requires that personnel records be disclosed unless doing so constitutes a clearly unwarranted invasion of personal privacy.<sup>2</sup>

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> Because the exceptions must be

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<sup>1</sup> See generally Op. Att’y Gen. 2014-084.

<sup>2</sup> A.C.A. § 25-19-105(b)(12).

<sup>3</sup> *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

<sup>4</sup> *Id.* at 598, 826 S.W.2d at 255.

<sup>5</sup> *Id.*, 826 S.W.2d at 255.

narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public's interests.<sup>6</sup> 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.<sup>7</sup>

As noted above, you object to disclosure of these records because, you say, the requester is seeking these records solely to harass, annoy, or harm you or those whose relationships with are revealed in these records. You give very strong evidence to support your concerns.

But, as noted above, when custodians conduct the balancing test for personnel records, the test is entirely objective. That means that, as this office has consistently noted, the custodian does not consider the subjective motives or identity of the requester.<sup>8</sup> Justice Ginsburg, who was assessing a similar rule in the federal FOIA, noted that "the identity and *particular purpose* of the requester is irrelevant under the [federal] FOIA." This rule, she continued, "serves as a check against selection among requesters, by agencies and reviewing courts, according to idiosyncratic estimations of the request's or requester's worthiness."<sup>9</sup>

Therefore, though you have strong evidence that the requester is merely seeking to harass

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<sup>6</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

<sup>7</sup> *E.g.* Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

<sup>8</sup> *See generally* Op. Att'y Gen. Nos. 2011-095 ("This office has repeatedly noted that the intent of the FOIA requester is generally irrelevant to the question whether the document must be released."); 2006-218 ("[T]he identity of the FOIA requester is not ordinarily pertinent to the analysis in applying the provisions of the FOIA."). In other words, the test for release of personnel records asks whether, as an objective matter, the records in question shed light on the workings of government for the general public. It may be that the requester has an ulterior motive, even a nefarious one. But the requester's motive is not the basis for the custodian's analysis. In some cases, it may not be readily apparent whether the records shed such light and, in that circumstance, the Arkansas Supreme Court considered whether the requester's subjective motive established such an objective, general public interest. *See Stilley v. McBride*, 332 Ark. 306 (1998). That is why this office's opinions have stated that the requester's motive is "generally" irrelevant: while the requester's *subjective* motive cannot be the basis for the decision, it can be considered by the custodian to determine whether it supplies an *objective* public interest previously unseen.

<sup>9</sup> *Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 508 (1989) (Ginsburg, J., concurring in judgment) (emphasis added).

you, neither the Arkansas legislature nor our appellate courts have allowed custodians to consider the subjective motive of the requester. Therefore, in my opinion, the custodian cannot consider this objection and has properly applied the FOIA. I must note, however, that the custodian should also redact every occurrence of your personnel number.<sup>10</sup> This number appears several times throughout these documents. Further, the record on page 82 of the PDF of the documents that the custodian intends to release contains a list of current or former public employees. Some of these employees' personal contact information appears to be contained on pp. 11, 37, 52, 70, 98, and 122. The FOIA requires that personal contact information of current or former public employees be redacted.<sup>11</sup>

I hasten to add that I recognize harassment occurs when the offender uses a method that is itself legal in to further the illegal purpose of harassing, annoying, or intimidating the victim. For example, the offender might repeatedly call the victim's home or photograph the victim in a public place. Here, there appears to be strong evidence that the requester is using the FOIA to harass. But only a court has the authority to declare that to be the case and to fashion an appropriate remedy. I believe some judicial remedy may be available to you in this instance. But the FOIA simply does not authorize custodians to deny access to public records due to the custodian's assessment of the requester's intent to harass.

Sincerely,



DUSTIN MCDANIEL  
Attorney General

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<sup>10</sup> See A.C.A. § 25-19-105(b)(11) ("It is the specific intent of this section that the following shall not be deemed to be made open to the public....[r]ecords containing measures, procedures, instructions, or related data used to cause a computer or a computer system or network, including telecommunication networks or applications thereon, to perform security functions, including, but not limited to, passwords, *personal identification numbers*....") (emphasis added).

<sup>11</sup> A.C.A. § 25-19-105(b)(13).