



STATE OF ARKANSAS  
THE ATTORNEY GENERAL  
DUSTIN MCDANIEL

Opinion No. 2014-127

November 17, 2014

Kathleen Thomas  
c/o City of Little Rock  
Solid Waste Collection  
10805 Ironton Cutoff Road  
Little Rock, Arkansas 72206

Dear Ms. Thomas:

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), 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 you and another person were candidates for the position of "Collection Systems Specialist," and that the other candidate has made an FOIA request for the interview-score sheets for the two of you. It seems that you were a public employee at the time you applied for the position, but it is not clear whether the other candidate was. Nor is it clear whether you or the other person (or neither) were hired for the position. The custodian has sent you a form letter stating that someone "has requested information related to your personnel file" which the custodian has determined "is releasable."

You object to the disclosure of your test scores because you "do not wish to have" them "revealed."

## RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Because I have not seen the records, I cannot opine about the disclosure of any specific document. Further, I have not been informed of certain key facts, which were identified above; and the custodian has only made a "disclosure" decision without explaining any of the preliminary decisions regarding how he has classified the records at issue or why he believes the test for disclosure has been met. While these discrepancies prevent me from definitively addressing the custodian's decision, I will explain how this office has treated score sheets of candidates for public employment.

## 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 satisfied. Accordingly, the remainder of this opinion will focus on the third element—whether any exception shields the documents from disclosure.

The primary issue giving rise to this opinion request appears to be whether some exception shields from disclosure your interview scores assigned by each of the three interviewers (respectively). The answer to this question depends on which of three categories you fall into: (1) the successful applicant; (2) an unsuccessful applicant who was already (at the time of the application/interview) a public employee, or (3) an unsuccessful applicant who was not already a public employee.

### *The successful applicant*

This office has consistently opined that the successful applicant's name, identifying characteristics, and interview scores qualify as "personnel records" under the FOIA.<sup>1</sup> As noted in Opinion No. 2012-115, personnel records must be disclosed unless doing so "constitutes a clearly unwarranted invasion of personal privacy." Whether the release of some document rises to that level depends on the outcome of a two-part balancing test, which takes place with a thumb on the scale favoring disclosure.

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<sup>1</sup> *E.g.*, Op. Att'y Gen. Nos. 2009-156, 2009-096, 2005-086, 98-101; *see also* A.C.A. § 25-19-105(b)(12) (setting out the exception for "personnel records").

The balancing test first requires one to assess whether the information contained in the personnel record is of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest.<sup>2</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. 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.'"<sup>3</sup>

Applying this two-part test to the successful applicant's information, this office has held that the balance weighs in favor of release.<sup>4</sup> As for the first part of the test, this office has held that the successful applicant's interest in "keeping his or her prevailing score" and name undisclosed is "minimal, if there at all."<sup>5</sup> And even if, depending on the circumstances, the interest is at least *de minimus*, the second step of the analysis would generally outweigh it. Specifically, this office has held that the second part of the test generally outweighs such a privacy interest when "the identifiable public interest is...to establish that the most qualified applicant was actually hired."<sup>6</sup>

Given the foregoing, if you were the successful applicant, then the custodian's decision to release your name and interview scores is, in my opinion, consistent with the FOIA.

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<sup>2</sup> See, e.g., *Young v. Rice*, 308 Ark. 593, 598, 826 S.W.2d 252, 255 (1992); see also Op. Att'y Gen. 2012-136.

<sup>3</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998), quoting *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

<sup>4</sup> E.g., Op. Att'y Gen. Nos. 2012-115, 2008-039, 2006-044, 2005-086.

<sup>5</sup> Op. Att'y Gen. 2005-086, p.3; see Op. Att'y Gen. Nos. 2012-115, 2008-039, 2006-044.

<sup>6</sup> Op. Att'y Gen. 2005-086, p.3; see Op. Att'y Gen. Nos. 2006-044, 2008-039.

***Unsuccessful applicants who are already public employees***

But it is not clear whether you were the successful applicant. So we must continue the analysis with the second category: persons who are unsuccessful and who are already public employees. Because these applicants are already public employees, their names, identifying characteristics, and scores are eligible for the personnel-records exception, which was explained above.

But the two-part balancing test applies differently to these applicants than it does to the successful applicant. First, because the applicant was unsuccessful, the privacy interest in the specific interview scores is, arguably, greater. Second, the public's interest is not nearly as strong as in the case of the successful applicant because the unsuccessful applicant will not be assuming the new role with all its responsibilities. Because this balancing test generates slightly different results than the one for the successful applicant, this office has opined that the public's interest is generally satisfied by redacting the unsuccessful applicants' names before releasing their scores.<sup>7</sup> But if, under the circumstances, it is reasonable to think that the unsuccessful applicant could be identified by his or her score alone, then it should also be redacted.<sup>8</sup>

***Unsuccessful applicants who are not already public employees***

The final category of applicants is for those who are unsuccessful and who are not already public employees. This office has consistently opined that the personnel-records exception does *not* apply to these applicants:

[T]he names and scores of applicants *who are not employees* should not be redacted. The reason for this differentiation is that the “clearly unwarranted” standard applies only to “personnel records.” The Applicant Selection Record is not the “personnel record” of any applicant who is not already an employee or who is not hired as a result of the application process. For those individuals, there is no exemption under the FOIA or any other law that would permit withholding this information from the public. I note that the Arkansas Supreme Court has steadfastly interpreted the FOIA liberally in favor of openness and has construed exemptions narrowly, so as to serve the FOIA's purpose of assuring that the public is “fully apprised of the conduct of public business.” *Waterworks v. Kristen Invest. Prop.*, 72 Ark. App. 37, 32 S.W.3d 60

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<sup>7</sup> E.g., Op. Att'y Gen. 2008-039.

<sup>8</sup> *Id.*

(2000); *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000). I also note that the FOIA contains no general privacy exemption protecting personal information outside the personnel records context.<sup>9</sup>

Two commentators on the FOIA disagree with this analysis,<sup>10</sup> and two lower courts are divided on the issue.<sup>11</sup> But this office has frequently noted this difference in the way the FOIA applies to job applicants, and the legislature has not amended the FOIA to address it. This is an issue for the legislature to resolve.

Because you (and the custodian) know which of the three foregoing categories you fall into, you should be able to apply the rules for the relevant category to determine whether the disclosure decision in this instance is consistent with the FOIA.

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

Sincerely,



DUSTIN MCDANIEL  
Attorney General

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<sup>9</sup> *Id.* My predecessor noted at this juncture that: “Act 608 of 1981 added a clause to the FOIA to provide a general privacy exemption for information “of a personal nature.” See Acts 1981, No. 608, § 1. However, that clause was deleted by Act 468 of 1985. See Acts 1985, No. 468, § 1. In addition, my predecessor concluded that the information at issue therein did not warrant protection afforded by the constitutional right of privacy discussed in *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

<sup>10</sup> John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 185–87* (Arkansas Law Press, 5th ed., 2009).

<sup>11</sup> Compare *Little Rock School District v. Little Rock Newspapers, Inc.*, Pulaski County Circuit Court Case No. 87-7638 (1987), and *Little Rock Newspapers, Inc. v. Board of Trustees of the University of Central Arkansas*, Pulaski County Circuit Court Case No. 87-6930 (1987).