



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2014-137

March 17, 2015

The Honorable Leon Johnson
Circuit Judge
Sixth Judicial District, First Division
401 West Markham Street, Room 420
Little Rock, Arkansas 72201

Dear Judge Johnson,

You have asked for an opinion on how the Arkansas Freedom of Information Act (FOIA) applies to data stored on the disaster recovery system (DRS) for you and your staff. You provide substantial background for your request. Because much of this background is important to the opinion, I will quote from it at length:

My office has received an FOIA request from a citizen that asks for “a copy of all emails, including backup copies” for myself and my staff. To my understanding, there are no “backup copies” or archives of emails for my office. However, the Pulaski County Circuit/County Clerk maintains a disaster recovery system which contains emails of both the Pulaski County Circuit Courts’ and the Clerks’ Office employees. This is not an archive of emails, but a copy of the email server maintained for disaster recovery purposes only. In the event of a catastrophic event, the sole purpose of the disaster recovery system is to reproduce the previous day’s business so that there is no disruption of public service. Furthermore, the disaster recovery system is continuously overwritten. It is not designed, nor is the Clerk’s Office equipped, to pull individual emails that may have been deleted or lost. In essence, the Clerk can provide what is currently being “kept” by each employee in their email account with little or no effort. Basically, the only information that could be obtained by access to the disaster recovery system

would be those emails that were deleted. Further, the disaster recovery system is not in place to store public records.

You then explain what would be required to retrieve information from the disaster recovery tapes:

In order to make the data contained on the system available pursuant to the FOIA, the Clerk would be required to build a “virtual server” for each “snapshot” of data contained on the disaster recovery system. At that point, each virtual server would have to be queried in order to retrieve the emails that have been requested pursuant to the FOIA. Once queried, the extracted information must be transferred to the same environment as the live server (or a server would have to be purchased and the environment mimicked) in order for the information to be accessible. While it is theoretically possible for the courts and the Clerk to see no interruption of service while the extraction is taking place, it would be impossible to say with absolute certainty that the live servers and the disaster recovery system would not sustain damage if there was interaction between the two. The costs to Pulaski County in order to carry out this retrieval would be substantial (license fees, hardware/software, etc.).

With this background in mind, you ask three questions:

1. Are deleted emails of public officials or employees considered “kept” pursuant to A.C.A. § 25-19-103(5)(A), merely because they may exist on a disaster recovery server? Or are deleted emails, by their nature, to be considered “not otherwise kept” by an employee who makes a conscious decision to delete it?
2. Are emails that are stored for only disaster recovery purposes subject to release pursuant to the FOIA?
3. Based on the fact scenario above, would a decision to provide the requested information be considered summarizing, compiling, or tailoring electronic data in a particular manner or medium to which it is not readily convertible as set out in A.C.A. § 25-19-109? Would this information be considered as information that the custodian would not be required to copy because necessary duplicating equipment does not exist as set out in A.C.A. § 25-

19-105(d)(1)(A)? Or would the information be considered not readily convertible because the Clerk's Office does not have the means, without purchase of additional equipment, thereby making it not subject to the FOIA?

RESPONSE

The FOIA requires custodians to disclose nonexempt "public records" in response to requests for them. A public record is, among other things, (1) a writing or electronic information, (2) that is "required by law to be kept or otherwise kept," (3) that "constitute[s] the performance or lack of performance of official functions." Given this definition, it is my opinion that emails stored on a disaster recovery system (DRS) are not considered "public records" because they are likely not "kept," as the FOIA uses the term. But even if we assume that DRS data is "kept" (and that it otherwise qualifies as a public record), it is my opinion that the FOIA does not require its disclosure because, as explained below, DRS data is not "readily convertible." Accordingly, the answer to your second question is "no," in my opinion, either because DRS data is not considered a public record, or (alternatively), because it is not readily convertible. If a court were to employ the former analysis (i.e. that DRS data is not a public record) then, in response to your third question, the court would hold that A.C.A. § 25-19-109 does not apply because the statute only address occasions when a *public record* is not "readily available" or "readily convertible." But if the court employed the latter analysis (i.e. that DRS data is a public record that is not readily convertible), then section 25-19-109's *would* apply.

DISCUSSION

I will address all three of your questions together.

The FOIA does not clearly address these questions, nor have they been addressed by any Arkansas appellate court. There are also no previous Attorney General Opinions addressing these questions. Nevertheless, there are several reasons to think that an email being stored only on a disaster recovery system is probably not required to be disclosed under the FOIA, either because (1) such data is not being "kept" as the FOIA employs that term, which means that the data is not a public record in the first instance; or (2) alternatively, though such data might be considered "kept," the manner in which such data is stored renders it not readily available/convertible, which means that section 25-19-105 does not require its

disclosure. In either case, it is my opinion that the FOIA does not require the disclosure of data that is stored only on a disaster recovery system (DRS).¹

Under the FOIA, the term “public record” is a term of art. It refers to (1) “writings, recorded sounds, films, tapes, **electronic or computer-based information, or data compilations in any medium**” that are (2) “required by law to be kept **or otherwise kept**” and (3) “that constitute a record of the performance or lack of performance of official functions that are or should be carried out by” an entity that is subject to the FOIA.² The emails stored on a DRS clearly meet the first element, and this opinion will assume that the emails meet the third element.³ Thus, the threshold question for our purposes is whether the emails on a DRS are considered “kept” for purposes of the FOIA.

The FOIA does not define what is meant by the term “otherwise kept,” nor have Arkansas appellate courts construed the term. But analogizing to paper records can shed light on when electronic records are no longer kept. Thus, we can start analyzing the term “otherwise kept” by establishing a spectrum on which to map whether paper records are clearly kept. On one end of the spectrum, a paper document is clearly kept when it is being actively used by someone or is sitting on someone’s desk and will be used soon. On the other end of the spectrum, it seems clear that a paper document is not “otherwise kept” when it has been shredded. Before analogizing to electronic records, it is important to note that when a paper record has been shredded, it is *possible*—though not practicable—to reconstruct the paper record. One could hire an expert with specialized equipment to reconstruct the document. Yet such a process would likely be expensive and very time consuming. Thus, even though it would be *possible* to reconstruct the

¹ At least one Arkansas circuit court has also reached this conclusion. *Partne A. Kiesling-Daugherty v. Judge Floyd “Buddy” Villines, et al.*, 60CV-14-4180, (Pulaski County Circuit Court, Nov. 14, 2014) (“With regard to Plaintiff’s [] request for a copy of all emails contained on Defendant’s disaster recovery database, Plaintiff is not entitled to access to said database because it does not fall within the parameters of the FOIA.”).

² A.C.A. § 25-19-103(5)(A) (emphases added).

³ Regarding the first element, the emails on the disaster recovery system are clearly “electronic or computer-based information, or data compilations.” If an email in the disaster recovery system did not meet the third element, then there would be no need to assess whether it was “kept” as that term is used in the FOIA. Not every email authored by a public employee on public computers “constitutes the performance or lack of performance of official functions.” See *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007) (remanding to trial court with instructions that the trial judge conduct an in camera review of all emails to determine which were public records).

shredded paper document, it seems clear that a shredded document is not “otherwise kept” for purposes of the FOIA.

Electronic records can be mapped on the same spectrum. On one end of the spectrum, an electronic document is clearly kept when it is being actively used (e.g. the employee is typing an email), or it is sitting on someone’s electronic desktop and will (or might) be used soon (e.g. a dispatched email being stored in an employee’s “sent” folder). When electronic data exists only on a DRS, that data is analogous to the shredded paper document. This analogy holds for at least two reasons. First, the data (like the shredded paper) still exists in some sense, though only in a disaggregated, disorganized manner that is not designed for retrieving individual documents. One federal court of appeals relied on just this point when it refused to require a federal agency to search backup tapes to comply with an FOIA request because such a search was “impossible, impractical, or futile” since the files were “not organized for retrieval of individual documents or files, but rather for purposes of disaster recovery.”⁴ Second, and also like the shredded paper, it is technically possible to retrieve the data and attempt to reassemble it. But, as your background facts indicate, that process would probably be expensive, time consuming, and would likely require outside expertise. Given the similarities between shredded paper records and data on a DRS, it seems reasonable to conclude that data on a DRS is not “kept” as that term is used in the FOIA.

In my opinion, however, there is an even stronger line of reasoning to support the conclusion that the FOIA does not require DRS data to be disclosed. As explained below but summarized here: (1) custodians must disclose public records in the format requested if the requested data is readily convertible; (2) any request for DRS data necessarily includes an implied request for the DRS data to be converted; (3) given current technology, such data is seldom “readily” convertible; (4) therefore, it follows (*a*) that the FOIA does not require the disclosure of DRS data and (*b*) that requests for DRS data are best handled as special requests for electronic information, which are governed by section 25-19-109.

The FOIA authorizes requesters to seek a copy of a public record “in any format to which it is readily convertible with the custodian’s existing software.”⁵ The FOIA defines “format” as “the organization, arrangement, and form of electronic

⁴ *Stewart v. U.S. Dept. of Transp.*, 554 F.3d 1236, 1243–44 (10th Cir. 2009).

⁵ A.C.A. § 25-19-105(d)(2)(B).

information for use, viewing, or storage.”⁶ Thus, custodians are sometimes required to convert an electronic record into the format the requester seeks. But when such a conversion cannot be “readily” accomplished, the custodian is not obligated to disclose the record. Instead, the FOIA request becomes governed by section 25-19-109, which (among other things) allows custodians the discretion whether to disclose such documents after agreeing with the requester on a fee.⁷

In my opinion, and as your background facts show, any request for DRS data necessarily includes an implied request to convert the DRS data from its existing format into a format that renders individual files readable, searchable, and disclosable. This would also apply when a requester sought an entire DRS backup tape—as opposed to specific files on the tape. This is because, as noted above, DRS data is not maintained or organized for the ready retrieval of individual documents. Rather, DRS data—by its nature—is designed to be a complete system restore in the event of a catastrophe. Accordingly, any request for DRS data necessarily includes an implied request that the data be converted, thereby enabling the custodian to read and retrieve individual files.

As your background facts show, it is technologically possible to convert DRS data into a readable, searchable, and discloseable form. However, making such a conversion requires specialized software and knowledge, and (potentially) significant amounts of time and money. In my opinion, DRS data is seldom “readily” convertible with a public custodian’s existing software and equipment. No Arkansas appellate court has construed the term “readily convertible,” nor has any previous Attorney General opinion. Nevertheless, the Electronic Records Study Commission provided some helpful commentary explaining what they meant when they suggested the “readily convertible” standard:

In many cases, it is relatively easy and cost-free to transfer an electronic record from one medium to another or to convert it from

⁶ The definition and rule were added to the FOIA on the recommendation of the Electronic Records Study Commission whose commentary further explains this definition: “The term ‘format’...is intended to include both the technical and informal usage of the term. For example, the term is often used informally to mean conversion of data from one word processing program to another [e.g. from Word Perfect to Word], or to mean the rearrangement of the display of data on a spreadsheet. A more technical use of the term format would refer to the definition of data structure used by various programs.”

⁷ See generally Att’y Gen. Op. Nos. 2009-186, 2006-093 (explaining when and how to apply section 25-19-109).

one common format to another....This versatility can facilitate access to public records and increase public convenience in their use. However, agencies have limited resources and responding to FOIA requests is typically not the responding authority's primary mission....In other words, the user convenience opportunities of electronic records can only be taken so far without unduly imposing upon agencies' time and manpower.⁸

After noting these competing interests—i.e. that electronic records are, in some senses, easier to disclose than paper records, while (in other senses) more difficult—the Commission proposed a general principle to help balance the interests:

Seeking to balance these competing considerations, the Commission first developed Principle Eight, which states in pertinent part: “Custodians should release electronic information in the form requested when they are capable of doing so, *with presently available resources, without undue effort or expense*, provided the request reasonably describes the records.”⁹

While the Commission's principle is not positive law, I believe it (together with the Commission's commentary) would be highly persuasive to an Arkansas court that was directly addressing whether DRS data is subject to disclosure. In fact, at least one Arkansas trial court has specifically held that DRS data is *not* subject to disclosure, though the basis for that holding is not entirely clear.¹⁰ Your background facts describe a process that clearly seems to entail “undue effort” and “expense.” Thus, certainly in your case, and probably in most cases—a court would hold that DRS data is not “readily convertible.”

Therefore, if a court were to follow this alternative line of reasoning, it would conclude (*a*) that the FOIA does not *require* the disclosure of DRS data and (*b*) that requests for DRS data are best handled as special requests for electronic information, governed by section 25-19-109.

⁸ Report of the Electronic Records Study Commission & Recommendations for Amendments to the Arkansas Freedom of Information Act (December 15, 2000), p. 28.

⁹ *Id.* (emphasis added).

¹⁰ *See, supra*, note 1.

We can summarize all the foregoing reasoning into two categories, each leading to the conclusion that DRS emails are not required to be disclosed: the FOIA does not require the DRS data to be disclosed either (1) because such data is not kept, or (2) alternatively, because such data is kept but not readily convertible.

With this reasoning in place, we can now turn directly to your questions. The first question asks whether DRS data (specifically emails) are considered “kept” for purposes of the FOIA. As explained above, the answer to this question is not entirely clear, though it is my opinion that a court would probably consider the information not “otherwise kept.”

The second, and broader, question asks whether DRS emails are “subject to release under the FOIA.” If a court followed either of the two foregoing lines of reasoning, then the answer to this question would be “no.” Under the first line of reasoning, the basis for that answer would be that the DRS emails are not considered public records in the first place. Under the second line of reasoning, the basis for that answer would be as follows: (1) custodians must disclose public records in the format requested if the requested data is readily convertible; (2) any request for DRS data necessarily includes an implied request for the DRS data to be converted; (3) given current technology, such data is seldom “readily” convertible. Therefore, it follows that the FOIA does not *require* the disclosure of DRS data.

The third question is whether, given the nature of DRS data, its disclosure would be governed by section 25-19-109. If a court took the first line of reasoning, then the answer to this question would be “no.” This is because section 25-19-109 only applies to public records, and the first line of reasoning concludes that DRS data is not a public record because it is not “kept.” But if a court took the second line of reasoning, then the answer to this question would be “yes.”

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

Sincerely,



LESLIE RUTLEDGE
Attorney General

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