



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2015-002

January 9, 2015

Tiffany M. Lindley
Fayetteville Police Department
100 West Rock Street
Fayetteville, Arkansas 72701

Dear Officer Lindley:

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). 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.

The correspondence you have provided indicates that you are employed as a patrol officer with the City of Fayetteville, someone has made a request under the FOIA for your personnel file, and the custodian of records for the City intends to release the file after making certain redactions. You have submitted the records to my office and you seek my opinion on whether the custodian's decision to release the records as redacted 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 records, it is my opinion that the custodian's decision is for the most part consistent with the act. As explained below, however, a few more redactions are necessary and a few redactions are inconsistent with the FOIA.

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 appear met in this case. As for the first element, the documents are 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

All the documents you have submitted plainly meet this definition. Therefore, in my opinion, they 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.² For purposes of the FOIA, these items can usually

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

² 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).

be divided into two mutually exclusive groups: “personnel records”³ or “employee evaluation or job performance records.”⁴ 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 exception.

The first of the two most relevant potential exceptions is the one for “personnel records,” which the FOIA does not define. But this office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.⁵ 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.”⁶

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁷ 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

³ 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.”

⁴ 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.”

⁵ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

⁶ A.C.A. § 25-19-105(b)(12) (Supp. 2013).

⁷ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

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.⁸ 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.⁹ 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.¹⁰ 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.¹¹

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹² Additionally, 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 under the above balancing test.

b. Employee-evaluation exception.

The second potentially relevant exception is for "employee evaluation or job performance records," which the FOIA likewise does not define. But the Arkansas Supreme Court has recently adopted this office's view that the term refers to any records (1) created by or at the behest of the employer (2) to evaluate the employee (3) that detail the employee's performance or lack of performance on

⁸ *Id.* at 598, 826 S.W.2d at 255.

⁹ *Id.*, 826 S.W.2d at 255.

¹⁰ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹¹ *E.g.* Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹² Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

the job.¹³ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁴

If a document meets the above definition, the document *cannot* be released unless all the following elements have been met:

1. The employee was suspended or terminated (i.e., level of discipline);
2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., basis); and
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).¹⁵

The primary purpose of this exception is to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship.¹⁶

III. Application.

We can now apply the foregoing to the documents at issue. The custodian reports that you have never been suspended or terminated, and that the City consequently does not intend to release any records in your file that constitute evaluation or job performance. I cannot comment on any specific record in this regard because I have not seen any of the records that the custodian has identified as falling into this category. However, I can state that the custodian's decision in this respect is generally consistent with the FOIA because the level-of-discipline element for the release of employee-evaluation records is not met. As you can see

¹³ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Op. Att'y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-038; 2005-030; 2003-073; 98-006; 97-222; 95-351; 94-306; and 93-055.

¹⁴ *Id.*

¹⁵ A.C.A. § 25-19-105(c)(1) (Supp. 2013); Op. Att'y Gen. 2008-065.

¹⁶ *Cf.* Op. Att'y Gen. 96-168; *Watkins & Peltz, supra*, at 204.

from the test set out above, suspension or termination is a threshold required for the release of such records.

The custodian intends to release the records you submitted to my office, after making the redactions noted thereon. With a few exceptions, this decision is consistent with the FOIA. The records are properly classified as personnel records, in my opinion, and most of the redactions are required under the balancing test explained above. However, it is my opinion that some of the redactions are inconsistent with the FOIA, and several additional redactions are necessary.

With regard to the incorrect redactions, this office has previously opined that the race of public employees is generally disclosable under the FOIA.¹⁷ Accordingly, I believe the redaction under “Ethnic Group” on one of the records is inconsistent with the FOIA. Additionally, in my opinion, as to those personal references who are not public employees,¹⁸ there is no clear basis for redacting the city of residence or phone number from the record entitled “Background Investigation References.” These pieces of information are not exempt under A.C.A. § 25-19-105(b)(12) – the “personnel records” exemption, *supra* note 3 – because any privacy interest the employee might have in the information is *de minimus*. Nor is this information exempt under any other provision of law, in my opinion. There is no other applicable statutory exemption. And this office has previously opined that the addresses and telephone numbers of a job applicant’s references when contained in a non-exempt public record are not exempt from disclosure.¹⁹

A question also arises regarding the redaction of height and weight information from another record. This office has previously opined that the question whether a police officer’s height and weight are properly disclosed under the FOIA turns on

¹⁷ Op. Att’y Gen. Nos. 2005-100; 91-351.

¹⁸ The redaction of city of residence and phone number of those personal references who are public employees is specifically required by A.C.A. § 25-19-105(b)(13) (exempting from public disclosure personal contact information, including home phone numbers and home addresses, of public employees when contained in employer records).

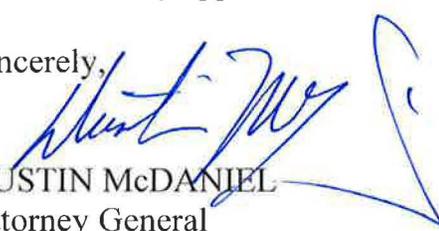
¹⁹ Op. Att’y Gen. 2010-070 (noting that addresses, resumes, telephone numbers, and the names of an applicant’s employer and references would probably not trigger constitutional protection). *Cf. Hopkins v. City of Brinkley*, 2014 Ark. 139, 432 S.W.3d 609 (declining to consider the argument that home addresses of municipal-utility ratepayers are protected from public disclosure under the Arkansas Constitution, where no specific proof was offered that any ratepayer’s home address qualifies as a “personal matter” under *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989)).

whether a specific height/weight (or range of heights/weights) is a condition of initial or continuing employment.²⁰ If height/weight is a condition, then the public's interest in the information will be substantial and will outweigh the privacy interest under the applicable balancing test.²¹ In contrast, if the height/weight is not a condition of employment, then the public's interest does not outweigh the privacy interest in this data because the record(s) would reflect very little about the department's performance of its duties.²²

With regard to required redactions that have not been made, one of the records is a school transcript. It is the long-held view of this office that school transcripts, as they exist in employer's files, are considered personnel records and are exempt from disclosure under § 25-19-105(b)(12).²³ Accordingly, this record is exempt from disclosure, in my opinion, and should be redacted entirely before the remaining non-exempt records are released. In addition, several records contain information about marital status and family life that should also be redacted under the § 25-19-105(b)(12)'s "clearly unwarranted invasion of personal privacy" standard.²⁴ And finally, as previously noted, the personal contact information of other public employees must be redacted from these employer records pursuant to § 25-19-105(b)(13).²⁵ It appears that several redactions must be made in this regard from the records entitled "Personal Reference Questions."

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN McDANIEL
Attorney General

DM/EAW:cyh

²⁰ Op. Att'y Gen. 2012-097.

²¹ *Id.*

²² *Id.*

²³ Op. Att'y Gen. 2014-109.

²⁴ See Op. Att'y Gen. Nos. 2001-368; 2000-168.

²⁵ Note 18, *supra*.