



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2015-003

January 12, 2015

Carla Daniels
c/o Mary Ann Zakrzewski, Director
Pulaski County Human Resources Department
201 South Broadway, Suite 100
Little Rock, Arkansas 72201

Dear Ms. Daniels:

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.

It is my understanding that you are a former employee of Pulaski County, Arkansas, and that someone has submitted a FOIA request to Pulaski County for your personnel file. It is my further understanding that the custodian of records for the County 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 may be 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 FOIA requestor's identity or motive for making the request is generally irrelevant to whether a non-exempt public record should be released.¹

The first two elements appear met in this case. As for the first element, the documents are held by the County, 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.²

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.³ For purposes of the FOIA, these items can usually

¹ *E.g.*, Op. Att'y Gen. Nos. 2012-014; 2011-107.

² A.C.A. § 25-19-103(5)(A) (Supp. 2013).

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.

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 exception.

It appears that the relevant exception in this case is the one for “personnel records.”⁶ The FOIA does not define this term. 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.⁷ If a document meets this definition, then it is open to public inspection and copying except “to

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.”

⁶ According to my review, none of the records at issue qualify as employee evaluation or job performance records, which this office has historically opined 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 the job. *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. The Arkansas Supreme Court recently adopted this view of the term “employee evaluation or job performance records.” *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387. Because this category of records does not appear to be at issue, I will not further discuss this exception, the primary purpose of which is to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship. *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

⁷ *See, e.g.*, Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁸

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁹ 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.¹⁰ 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.¹¹ 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.¹² 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.¹³

Whether any particular personnel record’s release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁴ Additionally, even if a document, when considered as a whole, meets the test for

⁸ A.C.A. § 25-19-105(b)(12) (Supp. 2013).

⁹ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

¹⁰ *Id.* at 598, 826 S.W.2d at 255.

¹¹ *Id.*, 826 S.W.2d at 255.

¹² *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹³ *E.g.* Op. Att’y Gen. Nos. 2001-112, 2001-022, 94-198.

¹⁴ Op. Att’y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

disclosure, it may contain discrete pieces of information that have to be redacted under the above balancing test.¹⁵

III. Application.

It is my opinion that the records in question are properly classified as personnel records. The custodian's decision to release them with certain redactions is, in my opinion, consistent with the FOIA for the most part because most of the redactions are required under the balancing test set out above. However, I believe a few 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 and gender of public employees is generally disclosable under the FOIA.¹⁶ It is therefore my opinion that this information should not be redacted from the several documents entitled "Personnel Appointment or Status Change." Additionally, as a general matter, there is no clear basis, in my opinion, for redacting from a personnel record the addresses and telephone numbers of personal references who have never been public employees.¹⁷ 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.¹⁸

¹⁵ See Op. Att'y Gen. 2014-027 (listing items that typically must be redacted).

¹⁶ Op. Att'y Gen. Nos. 2005-100; 91-351.

¹⁷ 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). Like the exemption under subsection (b)(12) for personnel records (see Op. Att'y Gen. 2003-095 at n. 1), the exemption under subsection (b)(13) extends, in my opinion, to both current and former public employees.

¹⁸ 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)).

Consequently, depending upon whether the references listed on your job application have ever been public employees, the redaction of the addresses and telephone numbers may be inconsistent with the FOIA.

Finally, information about marital status and family life must be redacted under A.C.A. § 25-19-105(b)(12)'s "clearly unwarranted invasion of personal privacy" standard.¹⁹ Although this information is redacted from one of the records, I note that the necessary redactions in this regard have not been made from several other records. The custodian must ensure that these redactions are made prior to the records' release.

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

Sincerely,



DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

¹⁹ See Op. Att'y Gen. Nos. 2001-368; 2000-168.