



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-008

January 20, 2015

Patrick Hanby
Fayetteville Police Department
100 West Rock Street
Fayetteville, Arkansas 72701

Dear Officer Hanby:

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 state that the issues you have with the custodian's decision are few. You have submitted the records to my office, and you have questioned whether the following additional pieces of information must be redacted prior to the records' release: middle initial, diploma, partial social security number, marital status, views on alcohol and drug use, personal reference information.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Per your request, this opinion is limited to the custodian's decision with respect to the particular information you have identified. As explained below, that decision is partially consistent with the FOIA, in my opinion.

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 of Fayetteville, 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.

The first of these two exceptions – the one for “personnel records” – appears to be the relevant exception in this case. The FOIA does not define the term “personnel records,” but this office has consistently opined that it means 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 individual’s interest in keeping them private. The balancing takes place with a thumb on the scale favoring disclosure.

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).

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.

III. Application.

We can now apply the foregoing to the discreet pieces of information you have identified. With regard to a middle initial, I have been provided no information in support of this redaction, and I see no clear basis for concluding that the above balancing test requires that a middle initial be redacted from a personnel record. Absent some evidence to the contrary, I see only a minimal privacy interest in this information and thus conclude that there is no basis for its redaction from the records at hand. Similarly, in my opinion, a diploma is not exempt from disclosure. But I believe you are correct to object to the failure to redact the partial social security number, as well as the marital status information that has not

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.

been redacted from two of the records. This information is plainly exempt from disclosure. Additionally, there are two health insurance records that must be redacted entirely. This office has consistently opined that information about specific public employees' health insurance coverage is intimate financial information that cannot be disclosed.¹³

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 whether a specific height/weight (or range of heights/weights) is a condition of initial or continuing employment.¹⁴ 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.¹⁵ 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.¹⁶

Regarding references to alcohol and drug use, this office has previously opined that specific information about alcohol and drug use generally gives rise to a substantial privacy interest.¹⁷ But in my opinion, the public has a substantial interest in a law enforcement officer's views or attitudes in this regard. Accordingly, it is my opinion that a few additional redactions to these records are required to remove the references to personal use of these substances; but in my opinion, that is the extent of the required redactions in this respect.

With regard, finally, to personal references' cell phone numbers and addresses, it is my opinion that redaction is proper only as to public employee references.¹⁸ Otherwise, there is no clear basis, in my opinion, for redacting this contact

¹³ Op. Att'y Gen. Nos. 2008-163; 99-016.

¹⁴ Op. Att'y Gen. 2012-097.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *E.g.*, Op. Att'y Gen. Nos. 2009-096; 2008-004; 95-256.

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).

information. 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

In sum, it is my opinion that the custodian’s decision with regard to the particular information you have identified is partially consistent with the FOIA. The records are properly classified as personnel records, in my opinion, and the custodian has properly declined to redact some of this information. However, it is my opinion that some of the redactions are inconsistent with the FOIA, and several additional redactions are necessary.

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

Sincerely,



LESLIE RUTLEDGE
Attorney General

LR/EAW:cyh

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)).