



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-011

January 22, 2015

Mark Speight
c/o Lori McDonald
Arkansas Department of Humans Services
Office of Policy and Legal Services
Post Office Box 1437, S260
Little Rock, Arkansas 72203

Dear Mr. Speight:

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), 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 someone has requested your "personnel file." The custodian has gathered the responsive documents, determined which of those must be disclosed, and redacted certain information on the documents she intends to disclose. You object to disclosure because of the identity of the person making the FOIA request and because you believe the FOIA request is solely an attempt to "intimidate [you] and invade [your] private life as a form of harassment."

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the records at issue, it is my opinion that the custodian's decision to disclose these documents is consistent 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 are met in this case. As for the first element, the documents are held by a state agency, 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

The attached documents clearly qualify as public records. Therefore, in my opinion, these documents 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.

Because none of the records at issue are employee-evaluation records, I will only address the personnel-records exception.

While the FOIA does not define the term “personnel records,” 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

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).

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.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

III. Application

We can now apply the foregoing to the attached documents. The attached documents are all standard personnel records, and their disclosure does not constitute a clearly unwarranted invasion of personal privacy.

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.

Your objection to disclosure is based (1) on the requester's identity and (2) on your view that the requester intends to harass you. This office has long noted that custodians are generally not permitted to take the requester's identity into account.¹³ The General Assembly has not seen fit to establish a generalized "harassment exception" to the release of otherwise discloseable personnel records. Therefore, neither basis for your objection is sufficient to overcome the foregoing conclusion that the custodian's decision is consistent with the FOIA.

Two additional issues bear mention. First, the custodian has redacted your signature throughout. I see no clear basis for concluding that the balancing test for personnel records requires this redaction. Second, the custodian should ensure that all personnel ID numbers are redacted from the attached documents, including those of other public employees.¹⁴ One such number is visible on the last page of the attached documents.

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

Sincerely,



LESLIE RUTLEDGE
Attorney General

LR/RO:cyh

¹³ See Att'y Gen. Op. Nos. 2013-027, n.4 (regarding immateriality of requester's identity); 2013-080 (regarding the lack of a generalized harassment exemption).

¹⁴ A.C.A. § 25-19-105(b)(11) (exempting from disclosure "[r]ecords containing measures, procedures, instructions, or related data used to cause a computer or a computer system or network, including telecommunication networks or applications thereon, to perform security functions, including, but not limited to, passwords, *personal identification numbers*....") (emphasis added).