



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-056

June 24, 2015

The Honorable David Whitaker
State Representative
717 North Lewis Avenue
Fayetteville, AR 72701-1611

Dear Representative Whitaker:

You have requested my opinion on the following question concerning two recent legislative enactments that add certain exceptions to the disclosure requirements of the Arkansas Freedom of Information Act ("FOIA")¹:

Along with creating Freedom of Information Act exemptions, do [Acts 2015, Nos. 186 and 1102] deny the ability to voluntarily disclose certain information?

RESPONSE

Exemptions under the FOIA are mandatory.² That is, if a record is exempt under the FOIA, the agency holding the record may not disclose it even if it wishes to.

¹ The FOIA is codified at Ark. Code Ann. § 25-19-101 *et seq.* (Repl. 2014).

² Three sections of the FOIA's text—whether considered individually or jointly—establish this mandate: First, Ark. Code Ann. § 25-19-105(a)(1) ("Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas"); Second, Ark. Code Ann. § 25-19-105(b) ("It is the specific intent of this section that the following shall not be deemed to be made open to the public"); and third, Ark. Code Ann. § 25-19-105(f)(2) ("Any reasonably segregable portion of a record *shall* be provided *after deletion* of the exempt information.") (Emphasis added). *See also* Op. Att'y Gen. 2010- 140.

Accordingly, the custodian does not have discretion to make available to the public those records that fall within an exemption.³

In response to your question, therefore, the FOIA prohibits the custodian of records from voluntarily disclosing to the public those records that are exempted by Acts 186 and 1102 of 2015.⁴

Some additional discussion of this prohibition is warranted, however, in light of the background information in your letter requesting my opinion. You report that “a particular city has for years publicly disclosed [tax information of] specific hotels and restaurant as well as collection efforts for past due ... taxes.” You also refer to “collection cases against non-paying entities ... conducted publicly in court.” You further note that while your constituents “applaud the exemption of water customers’ records to protect citizens’ privacy,” it has been brought to your attention that there are “legitimate law enforcement and other governmental needs for this information.”

These statements seem to reflect a concern that the exemptions under Act 1102 of 2015 will affect efforts to collect past-due hotel and restaurant taxes. Governmental access to utility systems’ records also appears to be a matter of concern.

These statements prompt me to note that law enforcement and other government officials may not always be subject to the same limitations as the public in accessing records. The FOIA is concerned with the disclosure of records to the “public”:

Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, *all public records shall be open to inspection and copying by any citizen* of the State of

³ See John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT 112 (Arkansas Law Press, 5th ed., 2009); Op. Att’y Gen. Nos. 2009-161; 96-386; 91-374.

⁴ Act 1102 exempts certain hotel and restaurant tax information from public disclosure under the FOIA, and Act 186 creates an exemption for certain information contained in records of “public water systems” and “municipally owned utility systems,” including customers’ “personal information.” For the definitions of “public water systems” and “municipally owned utility systems,” see section 2 of Act 186, amending Ark. Code Ann. § 25-19-103(4) and (7).

Arkansas during the regular business hours of the custodian of the records.

* * *

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.....”⁵

The FOIA therefore forecloses the public from accessing exempt records. The act is silent, however, on the question of who may access records by virtue of an official position.⁶ One recognized commentary on the FOIA has observed in this regard that “some officials may be able to obtain access to exempt records by virtue of statutory authority, or subpoena power, or otherwise in the course of their official duties.”⁷

I cannot speculate as to all the circumstances in which a public official might be entitled to receive information that is otherwise exempt from public inspection under Acts 186 and 1102 of 2015. With regard, however, to “collection efforts” as referenced in your letter, I can state that it seems likely that some officials will require access to exempt information in order to pursue collections. It may also be necessary and appropriate in certain circumstances for some exempt information to be released to those undertaking collection efforts on behalf of government officials.⁸

⁵ Ark. Code Ann. § 25-19-105(a)(1)(A) and (b) (emphasis added).

⁶ *Accord* Op. Att’y Gen. 2006-190 (and opinions cited therein).

⁷ *Watkins & Peltz, supra* n. 3, at 94-95 (citing several Attorney General opinions, including Op. Att’y Gen. 96-386 (opining that a city attorney, in the exercise of his power and duty to represent the city, could access municipal employee personnel records that are exempt from release to the public), and 91-323 (noting that a prosecuting attorney, through the use of a subpoena, could compel records that are otherwise exempt under the FOIA)).

⁸ Those who are engaged in collections as agents of a city or county would in effect stand in the shoes of city or county officials, and would likely have access to records and information that are unavailable to the general public. In other similar instances, the Arkansas Supreme Court has found that entities contracting with a public entity to provide services are in effect the “functional equivalent” of that public entity. *See Waterworks V. Kristen Invest. Prop.*, 72 Ark. App. 37, 32 S.W.3d 60 (2000); *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995); *City of Fayetteville v. Edmark*, 304 Ark. 480, 830 S.W.2d 275 (1990).

As for concerns about publicly disclosing efforts to collect past-due hotel and restaurant taxes, it bears noting that those who access exempt information when pursuing collections as agents of a county or a city will be bound by the FOIA's nondisclosure requirements.⁹ Regarding cases conducted in court, however, it is not immediately apparent to me that pursuing collections in court is tantamount to opening records to the public. While I am therefore uncertain whether the concerns mentioned in this regard are legitimate concerns under the FOIA, the county or city should consult local counsel for specific advice in connection with collection efforts.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'LR', is written over the printed name 'LESLIE RUTLEDGE'.

LESLIE RUTLEDGE
Attorney General

LR/EAW:cyh

⁹ *Accord Op. Att'y Gen. 2008-071* (opining that a private audit firm had access to exempt information when engaged in an undertaking that would otherwise fall upon a city's administrator, but emphasizing that the private entity was bound by FOIA exemptions).