



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-062

June 11, 2015

Mr. Bud Roberts, Director
Alcoholic Beverage Control Division
1515 West 7th Street, Suite 503
Little Rock, Arkansas 72201

Dear Mr. Roberts:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the custodian, is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Repl. 2014). 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.

Your letter indicates that someone has sent an FOIA request to the Arkansas Alcohol Beverage Control ("ABC") Division for "all documents that provide details and information regarding undercover operatives used by the [ABC] Division for the past three calendar years." According to your letter and the attached correspondence, the ABC Division has determined that information concerning undercover operatives ranging in age from 16 to 20 years is exempt from disclosure under Ark. Code Ann. § 25-19-105(b)(12) (Repl. 2014) – the FOIA's personnel records exception. In its letter to the requester, the Division stated that "[c]ooperating minors are utilized by the [ABC] Enforcement Division in compliance check operations" and "[t]he disclosure of the identities of the cooperating minors is a clearly unwarranted invasion of personal privacy that is not outweighed by any public interest regarding their specific information."

You have asked for my opinion "whether the personal information regarding these cooperating individuals should be disclosed" to the requester, and if so, "what information must be disclosed."

RESPONSE

My statutory duty under Ark. Code Ann. § 25-19-105(c)(3)(B)(i) is to state whether a custodian's decision regarding the disclosure of personnel or employee-evaluation records is consistent with the FOIA. In the present case, the custodian has determined that the identities of "cooperating minors" who are utilized by ABC in undercover operations are exempt from disclosure under the FOIA's personnel records exception. I take this to mean that the custodian has classified the records identifying the minors as personnel records. I have not seen the actual records in question and I lack sufficient information to opine as to their proper classification. For purposes of this opinion, however, I will proceed under the assumption that the records at issue in fact constitute personnel records.¹ And I will limit my analysis to the question posed, that is, whether the cooperating minors' personal information contained in personnel records is exempt from disclosure.

With this background in mind, it is my opinion that the custodian's decision to decline to disclose information identifying the cooperating minors 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 qualify as a public record. Third, no exceptions require that the document be withheld.

The first two elements are clearly met in this case. As for the first element, the documents are held by the ABC Division, which is a public entity. As for the second element, the FOIA defines "public records" 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

¹ The scope of my review under subsection 25-19-105(c)(3)(B)(i) is of course limited to personnel and employee-evaluation records.

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

It seems clear based on your statements that the records at issue reflect the performance of the official functions of the ABC Division. Accordingly, they plainly meet the above definition.

The records must therefore be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure

Under certain conditions, the FOIA exempts two groups of items normally pertaining to personnel. For purposes of the FOIA, these items can usually 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 the custodian has determined that the records at issue are personnel records, I will narrow my analysis to that exception.

² Ark. Code Ann. § 25-19-103(5)(A) (Repl. 2014).

³ Ark. Code Ann. § 25-19-103(5)(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 Ark. Code Ann. § 25-19-105(c)(1) (Repl. 2014).

a. Personnel-records exception

The FOIA does not define “personnel records,” 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 a question of fact. 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 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*, 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, the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.⁹ The public’s interest is measured by the extent to which disclosure of the information sought would “shed light on an agency’s performance of its statutory duties or otherwise let citizens know ‘what their government is up to.’”¹⁰ Because the exceptions must be narrowly construed, the person resisting

⁵ See, e.g., Op. Att’y Gen. No. 1999-147; John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT 187 (Arkansas Law Press, 5th ed., 2009).

⁶ Ark. Code Ann. § 25-19-105(b)(12).

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

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) (quoting *Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994)).

disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public's interests.¹¹

The question whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.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

b. Applying the test for disclosure

In this instance, it seems clear that the cooperating minors have a greater-than-*de minimus* privacy interest in information that would reveal their identities as ABC Division undercover operatives. Revealing their identities carries a clear potential for the information to be used to embarrass, harass, or otherwise impinge upon their privacy. Consequently, we must move to the second step to assess the public's interest in the information. We measure this interest by, as noted above, assessing the extent to which disclosure of the information sought would "shed light on [the] agency's performance ... or otherwise let citizens know 'what their government is up to.'"

In this regard, there may well be a legitimate public interest in some information regarding undercover operatives utilized by the ABC Division. It is my opinion, however, that the public's interest in knowing the identities of minors who cooperate as undercover operatives is minimal, at best. Under the *Young v. Rice* balancing test described above, I conclude that any measurable public interest is insufficient to override the minors' clear privacy interest in personal identifying information contained in their personnel records.

In sum, it is my opinion that the custodian's decision to decline to disclose information contained in personnel records that would identify the cooperating minors is consistent with the FOIA.

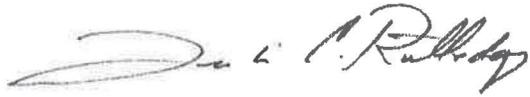
¹¹ *Id.*

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge". The signature is written in a cursive style with a large initial "L" and "R".

LESLIE RUTLEDGE
Attorney General

LR/EAW:cyh