



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2015-130

October 30, 2015

Frank Hammond  
c/o Pine Bluff School District  
512 South Pine Street  
P. O. Box 7678  
Pine Bluff, AR 71601

Dear Mr. Hammond:

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. 2015). 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 correspondence indicates that you have requested the job application and educational background of the successful applicant for the position of Executive Director of Operations at the Pine Bluff School District ("PBSD"), and other records detailing the employee's service and training in certain areas. The custodian of records for the PBSD has made three determinations with respect to the requested records: (1) the requested documents are personnel records and disclosure would constitute a clearly unwarranted invasion of personal privacy; (2) personal contact information that may be contained in a PBSD employee's personnel file is exempt from public disclosure under the FOIA; and (3) a public employee's evaluation or job performance records, including preliminary notes and other materials, are exempt from disclosure until there has been a final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate, and there is a compelling public interest in their disclosure. You ask whether the aforementioned decisions are consistent with the FOIA.

## RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Not having seen any of the records at issue, I cannot opine about any particular records. I can, however, set out the legal standards the custodian must apply to determine whether two categories of documents that were requested—job application and resume of a current employee—must be disclosed. And I can opine generally, for the reasons explained below, that the custodian's decision to withhold such records appears inconsistent with the FOIA. But it may be necessary to redact some discrete pieces of the applicant's personal information prior to the release of a job application or resume.

## DISCUSSION

### **I. General standards governing disclosure.**

Responsive documents 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 documents must constitute public records. Third, no exceptions allow the documents to be withheld.

The first two elements appear met in this case. As for the first element, the documents are held by the Pine Bluff School District, 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.<sup>1</sup>

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<sup>1</sup> A.C.A. § 25-19-103(5)(A) (Supp. 2015).

I believe it is clear that job applications and resumes accompanying those applications are public records under this definition.<sup>2</sup>

## II. Exceptions to disclosure

As public records, an application and resume must be released unless some exemption prohibits their release. In my opinion, the potentially relevant exemption is the one for “personnel records.”<sup>3</sup> 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.<sup>4</sup> And this office and the two leading commentators on the FOIA have repeatedly noted that job applications and accompanying resumes generally meet this definition.<sup>5</sup>

Accordingly, those records must be released unless doing so constitutes a clearly unwarranted invasion of personal privacy.<sup>6</sup> While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,<sup>7</sup> 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.<sup>8</sup>

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*

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<sup>2</sup> See Op. Att’y Gen. 87-070 (finding that applications are “a record of the performance of public officials charged with the responsibility of reviewing those applications and deciding on the most qualified candidate.”).

<sup>3</sup> 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.”

<sup>4</sup> E.g., Op. Att’y Gen. 2007-008 (and opinions cited therein). See also John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT*, 187 (m & m Press, 5th ed., 2009).

<sup>5</sup> E.g., Op. Att’y Gen. Nos. 2010-044; 2005-004, 2001-368; Watkins & Peltz, *supra* note 4, at 185–87.

<sup>6</sup> See, *supra*, note 3.

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

<sup>8</sup> Watkins & Peltz, *supra* note 4, at 191.

privacy interest.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

### III. Application

Whether the release of any particular personnel record would constitute a clearly unwarranted invasion of personal privacy is a question of fact.<sup>13</sup> With regard, however, to applications and resumes, this office has repeatedly indicated that the release of such records rarely rises to such a level.<sup>14</sup> And this office has previously specifically opined that the names of personal references listed on a resume or job application are subject to disclosure.<sup>15</sup>

I can opine generally, therefore, that the custodian's decision to withhold the current employee's job application and resume is likely contrary to the FOIA. Such records ordinarily should be released because their release typically does not rise to the level of a clearly unwarranted invasion of personal privacy. I should also note, however, that 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. Some items that must be redacted include:

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<sup>9</sup> *Id.* at 598, 826 S.W.2d at 255.

<sup>10</sup> *Id.*, 826 S.W.2d at 255.

<sup>11</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

<sup>12</sup> *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

<sup>13</sup> Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

<sup>14</sup> Op. Att'y Gen. 2010-070.

<sup>15</sup> *E.g.*, Op. Att'y Gen. 2014-123 (and opinions cited therein).

- dates of birth of public employees (Op. 2007-064);
- social security numbers (Ops. 2006-035, 2003-153);
- medical information (Op. 2003-153);
- any information identifying certain law enforcement officers currently working undercover (A.C.A. § 25-19-105(b)(10));
- driver's license numbers (Op. 2007-025);
- insurance coverage (Op. 2004-167);
- tax information or withholding (Ops. 2005-194, 2003-385);
- payroll deductions (Op. 98-126);
- banking information (Op. 2005-194);
- unlisted telephone numbers (Op. 2005-114);
- home addresses of most public employees (A.C.A. § 25-19-105(b)(13)); personal e-mail addresses (Op. 2004-225); and
- marital status of employees and information about dependents (Op. 2001-080).

In sum, the custodian should apply the foregoing definitions and standards for disclosure to each individual record believed to be responsive to the FOIA request. While I have not seen the records at issue, I believe the relevant question as to a job application and resume is whether their release would constitute a "clearly unwarranted invasion of personal privacy" under the test described above. Unless the records contain some detailed information of a personal nature, it is unlikely they are exempt from disclosure under this test.

Sincerely,



LESLIE RUTLEDGE  
Attorney General