



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-025

March 14, 2016

Ms. Carol Blann
c/o Valerie Hudson, Executive Assistant
Office of the Deputy Superintendent
Little Rock School District
810 West Markham Street
Little Rock, AR 72201

Dear Ms. Blann:

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 the Little Rock School District ("LRSD") has received a FOIA request for a copy of your application for employment. The records custodian has determined that your application should be made available, after redacting personal contact information and education records such as college transcripts. You state that "[you] have retired from [LRSD] and [are] no longer employed," and that the requester "has no valid reason for accessing [your] records." You have asked for my opinion on what the LRSD is required to release.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. You have not provided me with your job application and I therefore cannot opine specifically about the propriety of its release. I can state generally, however, that the job application of a public employee is subject to public disclosure, provided that certain information may need to be deleted from the application

before it is released. Among the categories of exempt information to be deleted are personal contact information (including home address and personal phone number and email), social security numbers, medical information, and school transcripts. The fact that you are no longer a LRSD employee is not in and of itself a basis for LRSD to refuse a request for application for employment. The job application of a successful applicant remains subject to the FOIA after an employee leaves a public agency.¹

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 LRSD, 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.²

¹ See, e.g., Op. Att’y Gen. 2006-182 (summarizing previous Attorney General opinions that conclude the FOIA’s “personnel records” provisions apply to former employees and stating that “the fact that the officer is no longer an employee of the City does not dictate non-disclosure of the records”).

² A.C.A. § 25-19-103(5)(A) (Supp. 2015).

I believe a job application that is kept by the LRSD clearly qualifies as a “public record” under this definition.³ Accordingly, a job application must be released unless some exemption applies to prohibit its release.

II. Exceptions to disclosure.

In my opinion, the potentially relevant exemption is the one for “personnel records.”⁴ 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 And this office and the two leading commentators on the FOIA have repeatedly observed that job applications, and accompanying resumes, generally meet this definition.⁶

Accordingly, a job application generally must be released unless doing so constitutes a clearly unwarranted invasion of personal privacy.⁷ While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁸ 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.⁹

³ See Op. Att’y Gen. 2015-130 at n.2 (citing Op. Att’y Gen. 87-070, which found 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.”).

⁴ 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.”

⁵ 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).

⁶ E.g., Op. Att’y Gen. Nos. 2010-044; 2005-004, 2001-368; Watkins & Peltz, *supra* note 4, at 185–87.

⁷ See, *supra*, note 3.

⁸ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁹ Watkins & Peltz, *supra* note 4, at 191.

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.¹⁰ 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.¹¹ 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.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

III. Application

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁴ But because job-applications rarely contain information the disclosure of which constitutes a clearly unwarranted invasion of personal privacy,¹⁵ I can state generally that the LRSD is likely not permitted to withhold your job application under the exemption for personnel records.¹⁶ Nonetheless, certain information may need to be redacted from the application. Among the categories of exempt information to be deleted are social security numbers, medical information, school transcripts, and personal contact information.¹⁷

¹⁰ *Id.* at 598, 826 S.W.2d at 255.

¹¹ *Id.*, 826 S.W.2d at 255.

¹² *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

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

¹⁴ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

¹⁵ *See* Op. Att'y Gen. Nos. 2010-070; 2009-032.

¹⁶ Op. 2009-032 (“[T]he information contained in job applications such as ‘educational background and work history’ ‘reflect job qualifications and a public interest therefore attaches to this information,’” quoting Op. Att’y Gen. 2006-165, at 9-10).

¹⁷ *Id.* (and opinions and Arkansas Code sections cited therein).

In conclusion, although I have not seen your application with the LRSD and therefore cannot opine specifically about its release, I can state generally that the custodian's decision to release this kind of record—after redacting personal contact information and college transcripts—is consistent with the FOIA.¹⁸ The provisions of the FOIA that govern the release of public employees' job applications apply to the records of former employees. Therefore, in my opinion, the custodian cannot consider the fact that you are no longer employed with the LRSD as a basis, on its own, for declining to release your application.

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹⁸ Other discrete pieces of information to be redacted if contained in a current or former employee's job application include date of birth (Op. Att'y Gen. 2007-064), medical information (Op. Att'y Gen. 2003-153), and marital status and information about dependents (Op. Att'y Gen. 2001-080).