



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-031

March 28, 2016

The Honorable Caleb Norris
City Attorney
550 Edgewood, Suite 590
Maumelle, AR 72113

Dear Mr. Norris:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the custodian's attorney, 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 a Maumelle City Alderman has requested release of employee timesheets from March 10, 2016 through March 13, 2016 for all Maumelle Fire Department and Maumelle Police Department employees. The custodian of records has determined that the requested timesheets constitute personnel records and their release would not constitute a clearly unwarranted invasion of personal privacy. You ask whether the custodian's decision is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the timesheets in question, it is my opinion that with the possible exception of one item of information, the custodian has properly determined that these attendance/leave records are subject to release under the test applicable to personnel records.

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 City of Maumelle, 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 attendance/leave records of public employees clearly qualify as “public records” under this definition.² The timesheets at issue record the employees’ hours of attendance and leave taken. They thus constitute public records that 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.³ For purposes of the FOIA, these items can usually

¹ A.C.A. § 25-19-103(5)(A) (Supp. 2015).

² See, e.g., Op. Att’y Gen. 2007-258.

³ 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;

be divided into two mutually exclusive groups: “personnel records”⁴ or “employee evaluation or job performance records.”⁵ This office has consistently opined that attendance/leave records are personnel records.⁶ I will therefore limit my discussion to that particular category of record.

Personnel records are open to public inspection and copying except “to the extent that disclosure would constitute 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

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*

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).

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 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.”

⁶ See Op. Att’y Gen. 2013-022 (and opinions cited therein).

⁷ A.C.A. § 25-19-105(b)(12) (Supp. 2013).

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

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

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

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁴ 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.

II. Application.

This office has consistently opined that attendance/leave records are generally disclosable under the foregoing two-part balancing test, based on the following analysis:

While there is arguably a greater than *de minimus* privacy interest in the fact that an employee used sick or annual leave, that interest is, in my opinion, outweighed by the balancing test's second step. Specifically, disclosing whether an employee used annual or sick leave sheds light on an agency's performance of its duties because, among other things, it shows whether the agency is properly

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).

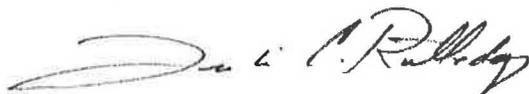
¹³ *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

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

adhering to the policies limiting the amount of leave (whether annual or sick) that employees may take.¹⁵

It is therefore my opinion that the timesheets in question are subject to disclosure, with the possible exception of one item of information.¹⁶ Each timesheet contains an entry for “Employee No.” I have no information regarding this entry. But I will note that this office has previously opined that the custodian correctly decided to redact an “employee personnel number” from particular records where the number provided access to an employee’s social security number.¹⁷ It should also be noted that pursuant to Ark. Code Ann. § 25-19-105(b)(11) (Supp. 2015), records containing “personal identification numbers” used for computer security functions are specifically exempt from disclosure under the FOIA. I have no information upon which to gauge whether this exemption applies to the “Employee No.” listed on these timesheets. But if these numbers provide access to computerized data, I believe it is clear that this information must be redacted, pursuant to subsection 25-19-105(b)(11), prior to the records’ release.¹⁸

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹⁵ Op. Att’y Gen. 2012-136.

¹⁶ I will note that further analysis may be required in cases where the *reason* for using the leave is also stated on attendance/leave records. *See id.* (explaining if the reason for using the sick or annual leave is stated on the leave request, the custodian would need to consult Op. Att’y Gen. 2007-258 (and opinions cited therein), which explains the standards custodian should apply to decide when and what to redact from leave requests.

¹⁷ Op. Att’y Gen. 2007-070 (regarding a request for a copy of the Arkansas Administrative Statewide Information System (“AASIS”) employee database.)

¹⁸ *Accord* Op. Att’y Gen. 2014-094.