



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-066

June 7, 2016

Dr. George P. Tebbetts
c/o Karen L. Roberson, Program Coordinator
Academic Affairs and Office of the Provost
University of Arkansas at Little Rock
2801 South University Avenue
Little Rock, AR 72204

Dear Dr. Tebbetts:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request is based on Ark. Code Ann. § 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.

You have been notified by the custodian of records that a reporter for the Arkansas Democrat-Gazette has requested copies of the resolutions approved by the Board of Trustees of the University of Arkansas that contain the substance of early retirement agreements entered between the University of Arkansas at Little Rock ("UALR") and several UALR employees. It is my understanding that you entered into such an agreement, and the custodian has notified you that the requested resolution is a personnel record that must be disclosed after redacting the identity of any named third-party beneficiaries. You have asked for my opinion on whether the custodian has properly decided to release the information in the resolution that discloses the exact disposition of the amount paid to you under the agreement.¹ You have indicated that you believe this information is private.

¹ As explained further below, the statute authorizing these early retirement agreements provides that the amount agreed upon "may be paid to [the retiring member] or into retirement plans for their benefit." Ark. Code Ann. § 24-7-101(b) (Repl. 2014).

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. In my opinion, the custodian has properly classified the resolution as a personnel record. I cannot definitively opine, however, on whether the custodian's decision to release the information regarding disposition of the payment is consistent with the FOIA. This is because I am not familiar with all the details surrounding the payment in return for your early retirement. As a consequence, I am unable to definitively determine whether the public's interest rises to a level sufficient to overcome your privacy interest in the information concerning the disposition of the amount paid.

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 document is held by UALR, 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

Given that the resolution at issue is kept by UALR and the subject matter involves your termination of covered employment for retirement purposes, I believe the

² Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2015).

resolution clearly qualifies as a “public record” under this definition.³ Accordingly, it must be disclosed unless some specific exemption provides otherwise.

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees’ personnel files.⁴ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: “personnel records”⁵ or “employee evaluation or job performance records.”⁶ 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.

III. Personnel-Records Exemption

The most relevant exemption in this instance is the one for “personnel records.” Although the FOIA does not define the term “personnel records,” this office has

³ See Ops. Att’y Gen. 2010-152, 97-331.

⁴ 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; 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).

⁵ Ark. Code Ann. § 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.”

⁶ Ark. Code Ann. § 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.”

interpreted the term to encompass all records other than employee evaluation and job performance records that pertain to individual employees.⁷ Additionally, this office has consistently opined that records reflecting retirement information pertaining to an individual officer or employee are personnel records.⁸

If a document constitutes a personnel record, then it is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁹ While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,¹⁰ 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.¹¹

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.¹² 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.¹³ According to the Arkansas Supreme Court, 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.’”¹⁴

⁷ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra* note 3, at 187.

⁸ See Op. Att’y Gen. 2013-057 (and opinions cited therein).

⁹ Ark. Code Ann. § 25-19-105(b)(12).

¹⁰ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

¹¹ Watkins & Peltz, *supra* note 3, at 191.

¹² *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

¹³ *Id.*

¹⁴ *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)).

In addition to the substantive rules explained above, there are a few procedural rules governing the foregoing. 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.¹⁵ 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.¹⁶ Additionally, whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁷

IV. Application.

I can now apply the foregoing to the requested record. The first step of the test is to determine whether the information at issue is of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest. I think there is no question that there is a greater than *de minimus* privacy interest in the information in the resolution concerning the amount paid to you or for your benefit, and its disposition. This office has consistently opined that individual employees have a greater than *de minimus* privacy interest in specific financial information concerning their retirement.¹⁸ Thus, we must move to the next step in the analysis which assesses whether the privacy interest is outweighed by the public's interest in disclosure.

In my opinion, the public undoubtedly has a substantial interest in the payment amount reflected in the resolution. First, the public generally has a substantial interest in the expenditure of public funds.¹⁹ Second, the resolution plainly sheds light on the higher education institution's exercise of its statutory authority to approve "special allowances" for faculty and staff to encourage early retirement

¹⁵ *Stilley*, 332 Ark. at 313, 965 S.W.2d at 128.

¹⁶ *E.g.*, Ops. Att'y Gen. 2001-112, 2001-022, 94-198.

¹⁷ Ops. Att'y Gen. 2006-176, 2004-260, 2003-336, 98-001.

¹⁸ *See, e.g.*, Ops. Att'y Gen. 2013-057, 2005-041, 2002-043, 97-331.

¹⁹ Op. Att'y Gen. 2013-057 (citing Op. Att'y Gen. 97-331).

and thereby effect savings in personnel costs.²⁰ These allowances are negotiated with tenured faculty and “may be paid to them or into retirement plans for their benefit.”²¹ Such allowances for non-tenured faculty and staff are provided through “early retirement window incentives.”²² As to both categories of personnel, the amount of the allowances cannot exceed, in the aggregate in any fiscal year, 1% of aggregate personnel costs during the preceding fiscal year.²³ I believe it necessarily follows that the public has a substantial interest in the amount of the special allowances. In my opinion, this interest outweighs any privacy interest in the amount of the payment.²⁴

I am less certain, however, regarding the relative weight of the public interest in the exact disposition of the special allowance amount—that is, whether the agreed-upon amount is paid as a so-called “stipend” or paid into a retirement plan. There is no case law in Arkansas directly on point or addressing a closely-related situation. The information sought essentially reflects whether the employee receives the allowance immediately in cash or whether it is placed in a retirement fund as an investment. Ordinarily, absent factors indicating a heightened public interest in this type of intimate personal financial information, such information is exempt from disclosure under the personnel records balancing test.²⁵

The precise basis for the custodian’s decision to provide public access to this disposition information is not entirely clear. The only grounds I am aware of are the custodian’s reference to a previous Attorney General opinion regarding a former mayor’s pension.²⁶ In my view, however, that opinion does not provide a sufficient basis to conclude that the public interest outweighs the individual’s privacy interest in the disposition information at hand. The previous opinion concluded that the public had a heightened interest with regard to the details of the mayor’s pension because he was the city’s chief executive officer and because

²⁰ Ark. Code Ann. §§ 24-7-101 and -102 (Repl. 2014).

²¹ Ark. Code Ann. § 24-7-101(a).

²² Ark. Code Ann. § 24-7-102(a).

²³ Sections 24-7-101(c) and 24-7-102(d).

²⁴ See *Young*, *supra* note 10, 308 Ark. at 598, 826 S.W.2d at 255 (noting that a substantial public interest will usually outweigh any individual privacy interest).

²⁵ See Op. Att’y Gen. 2013-057.

²⁶ Op. Att’y Gen. 97-331.

without those details, the public would be unable to determine whether the pension provided by the city itself was properly calculated. The relevancy of these considerations to the disposition of the payment in question is not immediately apparent. However, there may be other facts of which I am unaware that establish a heightened public interest in knowing whether the special allowance paid with respect to a faculty member in return for his early retirement is paid as a stipend or into a retirement plan. As noted above, the question whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.

In sum, I am not familiar with all the details surrounding the special allowance paid in return for your early retirement. Because I cannot act as a factfinder when rendering opinions pursuant to Ark. Code Ann. § 25-19-105(c)(3)(B)(i),²⁷ I am unable to definitively determine whether the public's interest rises to a level sufficient to overcome your privacy interest in the information concerning the disposition of the amount paid. However, I do believe the custodian needs to reassess the public and private interests in light of this opinion, and specifically keeping in mind the fundamental distinction (discussed above) between the situation at hand and the situation in Attorney General Opinion 97-331.

Sincerely,



LESLIE RUTLEDGE
Attorney General

²⁷ See Op. Att'y Gen. 2015-072.