STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-075

July 6, 2016

Delois Hare
c/o Gregory Ferguson, Legal Counsel
Department of Workforce Services
P. O. Box 8040
Little Rock, AR 72203

Dear Ms. Hare:

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, the 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 someone has made a FOIA request for the documents constituting your application for employment with the Arkansas Department of Workforce Services (ADWS). The custodian of records for ADWS has decided that the requested records are not exempt from disclosure and that "to be in compliance with the Arkansas FOIA, these documents will be provided to the person requesting this information." You have asked for an opinion regarding ADWS's decision to release the requested documents.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. I have not been provided with copies of the documents at issue and I therefore cannot opine specifically about the propriety of their release. I can state generally, however, that documents constituting an application for public employment are subject to public disclosure, provided that redaction of certain information may be necessary before release. Among the categories of exempt

323 CENTER STREET, SUITE 200 · LITTLE ROCK, ARKANSAS 72201
TELEPHONE (501) 682-2007 · FAX (501) 682-8084
ARKANSASAG.GOV

information to be redacted are personal contact information (including home address and personal phone number and email address), social security numbers, medical information, and school transcripts.

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, there must be no exceptions that require the document to be withheld.

The first two elements appear to be met in this case. As for the first element, the documents are held by ADWS, 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]

I believe a job application kept by ADWS clearly qualifies as a "public record" under this definition.[2] Accordingly, a job application must be released unless some exemption applies to prohibit its release.

II. Exceptions to disclosure.

In my opinion, the exemption that is potentially relevant here is the one for "personnel records."[3] While the FOIA does not define the term "personnel

---

[1] Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2015).

[2] *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.").

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.[4] And this office and the two leading commentators on the FOIA have repeatedly observed that job applications of public employees, and accompanying resumes, generally meet this definition.[5]

Accordingly, such a job application generally must be released unless doing so constitutes 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 record against the individual's interest in keeping it private. The balancing takes place with a thumb on the scale favoring disclosure.[8]

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.[9] 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.[10] Because FOIA exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the

---

[3] 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."

[4] *See, 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).

[5] *E.g.*, Ops. Att'y Gen. 2010-044; 2005-004, 2001-368; Watkins & Peltz, *supra* note 4, at 185–87.

[6] *See supra* note 3.

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

[8] Watkins & Peltz, *supra* note 4, at 191.

[9] *Young v. Rice*, 308 Ark. at 598, 826 S.W.2d at 255.

[10] *Id.*

circumstances, his privacy interests outweigh the public's interests.[11] 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.[12]

I. Application

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.[13] But because job applications of public employees[14] rarely contain information the disclosure of which constitutes a clearly unwarranted invasion of personal privacy,[15] I can state generally that ADWS 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]

In conclusion, although I have not seen the documents constituting your application for employment with ADWS and therefore cannot opine specifically about their release, I can state generally that the custodian's decision to release

---

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

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

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

[14] It appears that you are an ADWS employee, and I take it that the job application at issue was successful in the sense that it led to your hiring by ADWS. I do not, however, have sufficient information to rule out the possibility that the job application at issue pertains to an unsuccessful attempt to gain a promotion or transfer to a different job within ADWS. If that possibility is fact, the analysis is slightly different with respect to certain personnel records. *See, e.g.,* Op. Att'y Gen. 2014-127 (public interest may be somewhat less, and privacy interest somewhat greater, with respect to interview score sheets pertaining to a public employee's unsuccessful attempt to gain a promotion or transfer). It seems unlikely, however, that a job *application* would contain information of a type that would require different treatment depending on the public employee's success in gaining the promotion or transfer.

[15] *See* Ops. Att'y Gen. 2010-070; 2009-032.

[16] Op. Att'y Gen. 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).

records of this sort—after redacting social security numbers, school transcripts, and personal contact information—is consistent with the FOIA.[18]

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).