



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-081

July 22, 2016

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

Dear Ms. Williams:

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 someone has made a FOIA request for your job application for employment with the Arkansas Department of Workforce Services (ADWS). The custodian of records for ADWS has decided that the requested information is not exempt from disclosure and that "to be in compliance with the Arkansas FOIA, a redacted copy of your job application will be provided to the person requesting this information." A copy of your application has been made available for my review, and you have asked whether the custodian's decision to release the application with certain personal information redacted 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 records at issue, it is my opinion that the custodian's decision to release your job application as redacted is consistent with the FOIA.

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 Arkansas Department of Workforce Services, 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 it is clear that a job application is a public record under this definition.² Accordingly, your application must be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure

It appears that the most relevant exception in this case is the one for “personnel records.”³ While the FOIA does not define the term “personnel records,” this

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

² 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.”).

³ 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.”

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 noted that job applications and accompanying resumes generally meet this definition.⁵

Accordingly, those records 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 records against the individual’s interest in keeping them 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 minimis* privacy interest.⁹ If the privacy interest is merely *de minimis*, then the thumb on

The other specific exception covering employee-related records is the one for “employee evaluation or job performance records.” Ark. Code Ann. § 25-19-105(c)(1). I cannot definitively determine whether this exception applies to a record dated August 18, 2015. This may or may not be your employee-evaluation record, depending upon the circumstances surrounding its creation. Specifically, I cannot determine whether this record was created for the purpose of evaluating you. The employee-evaluation exception only applies to records 1) created by or at the behest of the employer 2) to evaluate the employee (3) that detail the employee’s performance or lack of performance on the job. *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387. Please see the attached Op. Att’y Gen. 2014-109 for a more detailed discussion of this exception. If this exception applies, suspension or termination is a threshold requirement for its release. Because you were neither suspended nor terminated, there may be some question whether the record dated August 18, 2015, is subject to release. The answer likely turns on the record’s proper classification, which is not apparent from the face of the record. The record’s classification is a question of fact that must be decided by the record’s custodian.

⁴ 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., Op. Att’y Gen. Nos. 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.

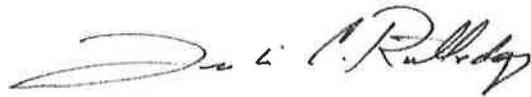
⁹ *Id.* at 598, 826 S.W.2d at 255.

the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimis* privacy interest, then the custodian must determine whether that interest is outweighed by the public's interest in disclosure.¹⁰ 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.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

III. Application

Whether the release of any particular personnel record would constitute a clearly unwarranted invasion of personal privacy is a question of fact.¹³ With regard, however, to job applications, this office has repeatedly indicated that the release of such records rarely rises to such a level.¹⁴ Having reviewed your job application, it is my opinion that the custodian's decision to release it as redacted is consistent with the FOIA.

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹⁰ *Id.*, 826 S.W.2d at 255.

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

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

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

¹⁴ *See* Op. Att'y Gen. Nos. 2016-075, 2016-047, and 2016-044.