



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2016-103

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Janice Harris-Crawford  
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Dear Ms. Harris-Crawford and Messrs. Keller and Bopp:

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.

It is my understanding that someone has made a request for your salaries from 2013 to present, as well as your years of service with the University of Arkansas for Medical Sciences ("UAMS"). The custodian of records has determined that a record of this information is subject to release under the FOIA.

**RESPONSE**

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. In my opinion, the custodian's decision to release this information is consistent with the FOIA. A record of this information constitutes a personnel

record. And this office has consistently opined that public employees' names, salaries, and dates of hire are personnel records that are subject to disclosure.<sup>1</sup>

## 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.

Based on my understanding of what has been requested, the first two elements appear met in this instance. As for the first element, the documents are held by UAMS, which is a public entity. As for the second element, the FOIA defines "public record" as:

[W]ritings, 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.<sup>2</sup>

A record of UAMS employees' salaries and years of service plainly meets this definition of a public record and therefore would have to be disclosed unless some specific exemption under the Act provides otherwise.

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<sup>1</sup> See, e.g., Op Att'y Gen. 2015-016 at n. 6. The opinions cited therein (Ops. Att'y Gen. 2012-017, 2011-125, 2007-070, 2004-225) explain why the FOIA requires disclosure of such records.

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

## II. Exemptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.<sup>3</sup> For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"<sup>4</sup> and "employee evaluation or job performance records."<sup>5</sup> The tests for whether these two types of documents may be released differ 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 exemption. 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.

In my opinion, the personnel-records provision is the relevant exemption in this instance. I will therefore limit my discussion to personnel records.

The FOIA does not define "personnel records." But this office has consistently opined that "personnel records" are all records other than employee evaluation and job performance records that pertain to individual employees.<sup>6</sup> Whether a

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<sup>3</sup> 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).

<sup>4</sup> 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."

<sup>5</sup> 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."

<sup>6</sup> *See, e.g.*, Op. Att'y Gen. 1999-147; Watkins & Peltz, *supra* note 3, at 187.

particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. If a document meets this definition, then it is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”<sup>7</sup>

While the FOIA likewise does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> If the privacy interest is merely *de minimis*, then the thumb on 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.<sup>11</sup> Because the exemptions 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.<sup>12</sup> 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

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<sup>7</sup> Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2015).

<sup>8</sup> 308 Ark. 593, 826 S.W.2d 252 (1992).

<sup>9</sup> *Watkins & Peltz*, *supra* note 3, at 191.

<sup>10</sup> *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

<sup>11</sup> *Id.*, 826 S.W.2d at 255.

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

objective.<sup>13</sup> Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.<sup>14</sup>

### III. Application.

This office has long maintained that public employees' names, salaries, and dates of hire are personnel records that are subject to disclosure. As the record at issue here is limited to your names, salaries since 2013, and dates of hire (and a corresponding calculation of your years of service), it is my opinion that the custodian's decision to release such record is consistent with the FOIA.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

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<sup>13</sup> *E.g.*, Ops. Att'y Gen. 2001-112, 2001-022, 94-198.

<sup>14</sup> Ops. Att'y Gen. 2006-176, 2004-260, 2003-336, 98-001.