



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-104

October 12, 2016

Sergeant Derrick Threadgill
Little Rock Police Department
700 West Markham Street
Little Rock, AR 72201-1329

Dear Sgt. Threadgill:

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.

Your correspondence indicates that someone has requested your employment application and any information on complaints and internal investigation files involving your employment with the Little Rock Police Department ("LRPD"). The director of Human Resources with the City of Little Rock has notified you of her decision that your *employment application*, with certain redactions, is not exempt from disclosure. You have requested my review of the custodian's decision to ensure complete compliance with the FOIA.

Before reviewing that decision, I must reiterate that **the notice you received from the Human Resources director only involved the release of your *employment application***. It did not include any decision regarding any complaints and internal investigation files. I have no record of any notice to you regarding any decision that may have been made involving any records relating to complaints and internal investigation files.¹ Because my duty under the FOIA is to opine on whether a

¹ In fact, I have been informed by the Human Resources director that LRPD states that, with respect to records regarding complaints and internal investigations, LRPD has no responsive

records custodian's decision is consistent with the FOIA,² this opinion must of necessity be limited to a review of the only custodian decision this office has received, namely **the Human Resources director's decision to release your employment application as redacted.**

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the record, it is my opinion that (1) the record is properly classified as a personnel record; (2) there is confidential information on the record that is shielded from disclosure under the FOIA; and (3) the custodian of the record has redacted the confidential information in a manner that is consistent with the FOIA. I will set out all the definitions and standards and then apply them to the record at issue.

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 exemptions allow the document to be withheld.

The first two elements appear met in this case. As for the first element, the record at issue is held by the City of Little Rock, which is a public entity. As for the second element, the FOIA defines a "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

documents. This opinion does not address LRPD's determination that it has no responsive documents. Such a determination is outside the scope of an Attorney General's opinion under Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Supp. 2015).

² Ark. Code Ann. § 25-19-105(c)(3)(B)(i).

maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.³

I believe it is clear that an employment application is a public record under this definition.⁴ Therefore, in my opinion, this document is a public record and must be disclosed unless some specific exemption provides otherwise.

II. Exemptions from disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.⁵ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"⁶ or "employee evaluation or job performance records."⁷ The test for whether these two types of documents may be released differs significantly.

When custodians assess whether either of these exemptions 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

³ Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2015).

⁴ See Op. Att'y Gen. 2016-081 (citing 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.")).

⁵ 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).

⁶ 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."

⁷ 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."

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 only relevant exemption in this instance. I will therefore limit my discussion to personnel records.

While the FOIA does not define the term “personnel 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.⁸ Whether a particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. This office and the two leading commentators on the FOIA have repeatedly noted that job applications generally meet this definition.⁹ Accordingly, those records must be released unless doing so constitutes a “clearly unwarranted invasion of personal privacy.”¹⁰

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,¹¹ 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.¹²

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.¹³ If the privacy interest is merely *de minimis*, then the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the

⁸ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz at 187.

⁹ See e.g., Ops. Att’y Gen. 2010-044, 2005-004, 2001-368; Watkins & Peltz at 185–87.

¹⁰ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2015).

¹¹ 308 Ark. 593, 826 S.W.2d 252 (1992).

¹² Watkins & Peltz, *supra* note 5, at 191.

¹³ *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

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.¹⁴ 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.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

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. Some items that must be redacted include:

- Personal contact information of public employees, including personal telephone numbers, personal e-mail addresses, and home addresses (Ark. Code Ann. § 25-19-105(b)(13));
- Marital status of employees and information about dependents (Op. Att'y Gen. 2001-080);
- Dates of birth of public employees (Op. Att'y Gen. 2007-064);
- Social Security numbers (Ops. Att'y Gen. 2006-035, 2003-153);
- Medical information (Op. Att'y Gen. 2003-153);
- Any information identifying certain law enforcement officers currently working undercover (Ark. Code Ann. § 25-19-105(b)(10));
- Driver's license numbers (Op. Att'y Gen. 2007-025);
- Insurance coverage (Op. Att'y Gen. 2004-167);
- Tax information or withholding (Ops. Att'y Gen. 2005-194, 2003-385);
- Payroll deductions (Op. Att'y Gen. 98-126); and
- Banking information (Op. Att'y Gen. 2005-194).

¹⁴ *Id.*, 826 S.W.2d at 255.

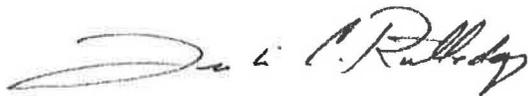
¹⁵ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

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

III. Application.

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁷ With regard to job applications, however, this office has repeatedly indicated that the release of such records rarely rises to such a level. Having reviewed your employment 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

cc: Stacey Witherell
City of Little Rock

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