



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2021-087

October 18, 2021

Mr. Richard Hamrick  
c/o Rick Lolley, Director  
Fort Smith Human Resources  
P. O. Box 1908  
Fort Smith, AR 72902

Dear Mr. Hamrick:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the subject of the records, is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Supp. 2021). This subdivision authorizes the custodian, requester, or the subject of certain employee-related 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 the City of Fort Smith has received a request under the FOIA for "records that show all current employees' salaries, with their names and job position and any salary increases since 2015." The records custodian has determined that the requested records are releasable, and has stated that "[n]o sensitive personal information such as address, date of birth, telephone number or social security information will be released." You object to the release of the requested information because you believe its release may subject you and your family to possible harm. You ask whether the custodian may release the requested information, and if so, whether such information may "be provided in such a way as to not identify a particular employee's job position and/or salary."

**RESPONSE**

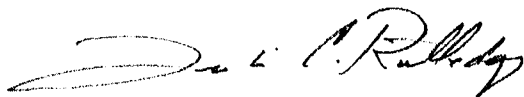
My statutory duty is to state whether the decision of the custodian of records is consistent with the FOIA. I am not authorized to address specific questions posed

by the custodian, subject, or requester.<sup>1</sup> Accordingly, I can only respond to your first question, in which you request my opinion as to the custodian's decision.

This request, along with your objections to the release of your employment-related records, is virtually identical to the request I responded to in Op. Att'y Gen. 2021-084, published on October 11, 2021. As set out in that opinion, this office has long and consistently opined that the release of public employees' names, job positions, and salary must be evaluated under the provision of the FOIA applicable to "personnel records,"<sup>2</sup> and that the release of such information generally does not rise to the level of a clearly unwarranted invasion of personal privacy.<sup>3</sup> At issue here is whether disclosing documents that reflect your name, job position, and salary would amount to a "clearly unwarranted invasion of personal privacy" under this balancing test. In my opinion, it does not. It has long been the opinion of this office that the public interest in this type of basic employment information is substantial, and any potential privacy interest does not outweigh it.<sup>4</sup>

The legal analysis provided in Opinion 2021-084 and its application to your request are the same. Therefore, I will not repeat the opinion herein, but instead refer you to the enclosed Opinion 2021-084 for the substantive analysis.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

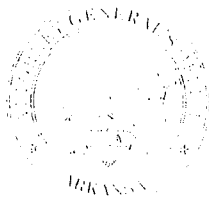
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<sup>1</sup> See, e.g., Op. Att'y Gen. 2020-033; *see also* Ops. Att'y Gen. 2013-088, 2010-140, 2009-161, 2006-071, 1996-386.

<sup>2</sup> E.g., Ops. Att'y Gen. 2012-014, 2011-132, 2011-045, 2011-114, 2002-107, 96-205.

<sup>3</sup> E.g., Ops. Att'y Gen. 2012-014 and 2011-045.

<sup>4</sup> E.g., Op. Att'y Gen. 2008-050 (citing Ops. Att'y Gen. 2007-001, 2005-194, 2005-057, 2004-225, and 2002-087). *See also* Ops. Att'y Gen. 2005-074 (and opinions cited therein); 2003-298 ("[T]he public interest in obtaining salary information relating to public employees, including the identity of particular employees, outweighs the employees' privacy interests."); 98-126 ([S]alary information is clearly subject to disclosure, as such information does not constitute a "clearly unwarranted invasion of personal privacy[.]" citing Ops. Att'y Gen. 96-205, 95-242, 95-070, and 94-198); 95-220 ("[C]ourts have found relatively little privacy interest in records revealing names of public employees."); and 90-335 ("The 'public' is the employer of these individuals, and pays their salaries. It is not unreasonable to expect that an employer would have an interest in knowing whom it employs.").



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2021-084

October 11, 2021

Mr. Bill Striplin  
c/o Rick Lolley, Director  
Fort Smith Human Resources  
P. O. Box 1908  
Fort Smith, AR 72902

Dear Mr. Striplin:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the subject of the records, is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Supp. 2021). This subdivision authorizes the custodian, requester, or the subject of certain employee-related 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 the City of Fort Smith has received a request under the FOIA for "records that show all current employees' salaries, with their names and job position and any salary increases since 2015." The records custodian has determined that the requested records are releasable, and has stated that "[n]o sensitive personal information such as address, date of birth, telephone number or social security information will be released." You object to the release of your name in conjunction with the other requested records because you believe this release may subject you "to harm and embarrassment unnecessarily." You ask whether the decision to release the requested records, specifically your name, is consistent with the FOIA.

**RESPONSE**

Although I have not seen the records that the custodian intends to release, I believe, based on your representation, that the custodian's decision to release your name, job

position, and salary, including salary increases, is consistent with the FOIA and with the long-held opinion of this office.

## **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 to be met. The request was made to the City of Fort Smith, which is a public entity and is subject to the FOIA. Moreover, the request appears to pertain to public records.<sup>1</sup> Because the records are held by a public entity, they are presumed to be public records,<sup>2</sup> although that presumption is rebuttable.<sup>3</sup> Accordingly, given that I have no information to suggest that the presumption can be rebutted, the analysis proceeds to the third element, that is, whether any exceptions preclude disclosure.

### **II. Exceptions to disclosure.**

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.<sup>4</sup> For purposes of the FOIA, these items can usually be

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<sup>1</sup> The FOIA defines public records 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 that constitute a record of the performance or lack of performance of official functions ... carried out by a public official or employee ...." Ark. Code Ann. § 25-19-103(7)(A) (Supp. 2021).

<sup>2</sup> *Id.*

<sup>3</sup> See *Pulaski Cty. v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435, 440-41, 260 S.W.3d 718, 722 (2007) ("the presumption of public record status established by the FOIA can be rebutted if the records do not otherwise fall within the definition found in the first sentence, i.e., if they do not 'constitute a record of the performance or lack of performance of official functions,'" citing Op. Att'y Gen. 2005-095).

<sup>4</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;

divided into two mutually exclusive groups: “personnel records”<sup>5</sup> or “employee evaluation or job performance records.”<sup>6</sup> 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. In this instance, I believe it is clear that the relevant exception is the one for personnel records. I will therefore limit my discussion to the test for disclosure relating to those types of records.<sup>7</sup>

The FOIA does not define the term “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>8</sup> 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. If a document meets this definition, then it is open to public inspection and copying except “to the

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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-Steele & Robert Steinbuch, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 205-06 (Arkansas Law Press, 6th ed., 2017).

<sup>5</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>6</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>7</sup> Regarding “employee evaluation or job performance records,” the Arkansas Supreme Court has adopted this office’s view that the term refers to any 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. The record in question plainly does not constitute an employee-evaluation record. Consequently, I will not undertake any further discussion of that exception.

<sup>8</sup> *See, e.g.*, Ops. Att’y Gen. 2015-072, 99-147; Watkins, et al., at 202.

extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”<sup>9</sup>

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,<sup>10</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 the scale tipped in favor of disclosure.<sup>11</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>12</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>13</sup> 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.<sup>14</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 objective.<sup>15</sup> And whether any particular personnel record’s release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.<sup>16</sup>

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<sup>9</sup> Ark. Code Ann. § 25-19-105(b)(12).

<sup>10</sup> 308 Ark. 593, 826 S.W.2d 252 (1992).

<sup>11</sup> Watkins, et al., at 208.

<sup>12</sup> *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

<sup>13</sup> *Id.*, 826 S.W.2d at 255.

<sup>14</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

<sup>15</sup> *E.g.*, Ops. Att’y Gen. 2016-055, 2001-112, 2001-022, 94-198; Watkins, et al., at 207.

<sup>16</sup> Ops. Att’y Gen. 2006-176, 2004-260, 2003-336, 98-001.

Additionally, a requester's identity or motive for making a request under the FOIA is generally irrelevant as to whether a non-exempt public record must be released.<sup>17</sup> Again, the test under the FOIA for the release of personnel records asks whether, *as an objective matter*, the records in question shed light on the workings of government for the general public.<sup>18</sup> This ordinarily precludes the custodian from considering any subjective motives or the identity of a requester when making the determinations whether a record must be disclosed or withheld.<sup>19</sup>

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));
- Employee personnel number (Ops. Att'y Gen. 2014-094, 2007-070);
- 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 number and photocopy of driver's license (Ops. Att'y Gen. 2017-125, 2013-090);

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<sup>17</sup> Ops. Att'y Gen. 2019-036, 2018-125, 2014-094, 2012-014, 2011-107.

<sup>18</sup> See Ops. Att'y Gen. 2019-047, 2018-061.

<sup>19</sup> See Ops. Att'y Gen. 2018-087, 2018-061; *see also* Op. Att'y Gen. 2014-094 (noting that "neither the Arkansas Legislature nor our appellate courts have allowed custodians to consider the subjective motive of the requester."). While the requester's *subjective* motive cannot be the basis for the decision, it can be considered by the custodian to determine whether it supplies an *objective* public interest previously unseen. Op. Att'y Gen. 2014-094 at n.8.

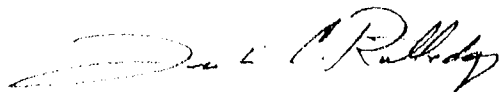
It should also be noted that the Legislature has not seen fit to include a generalized "harassment" exemption to the release of otherwise disclosable employee-related records. Op. Att'y Gen. 2019-047 (and opinions cited therein).

- 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).

### **III. Application.**

This office has long and consistently opined that the release of public employees’ names, job positions, and salary must be evaluated under the provision of the FOIA applicable to “personnel records,”<sup>20</sup> and that the release of such information generally does not rise to the level of a clearly unwarranted invasion of personal privacy.<sup>21</sup> At issue here is whether disclosing documents that reflect your name, job position, and salary would amount to a “clearly unwarranted invasion of personal privacy” under this balancing test. In my opinion, it does not. It has long been the opinion of this office that the public interest in this type of basic employment information is substantial and any potential privacy interest does not outweigh it.<sup>22</sup>

Sincerely,



LESLIE RUTLEDGE  
Attorney General

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<sup>20</sup> *E.g.*, Ops. Att’y Gen. 2012-014, 2011-132, 2011-045, 2011-114, 2002-107, 96-205.

<sup>21</sup> *E.g.*, Ops. Att’y Gen. 2012-014 and 2011-045.

<sup>22</sup> *E.g.*, Op. Att’y Gen. 2008-050 (citing Ops. Att’y Gen. 2007-001, 2005-194, 2005-057, 2004-225, and 2002-087). *See also* Ops. Att’y Gen. 2005-074 (and opinions cited therein); 2003-298 (“[T]he public interest in obtaining salary information relating to public employees, including the identity of particular employees, outweighs the employees’ privacy interests.”); 98-126 ([S]alary information is clearly subject to disclosure, as such information does not constitute a “clearly unwarranted invasion of personal privacy[.]” citing Ops. Att’y Gen. 96-205, 95-242, 95-070, and 94-198); 95-220 (“[c]ourts have found relatively little privacy interest in records revealing names of public employees.”); and 90-335 (“[t]he ‘public’ is the employer of these individuals, and pays their salaries [and] [i]t is not unreasonable to expect that an employer would have an interest in knowing whom it employs.”).