STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2021-083

October 8, 2021

Officer Jamar R. Bennett
c/o Benton Police Department
100 South East Street
Benton, AR 72015

Dear Officer Bennett:

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 Benton has received a request under the FOIA for records in your personnel file. You have attached several documents that have been identified by the custodian of records as responsive to the instant FOIA request. The custodian has redacted certain personal information from these records, which you do not question. However, these redactions do not include "disclosures made on [your] employment application and personal history statement and during the background check pertaining to charges that were nolle prossed and expunged/sealed…." You object to the release of this particular information and ask whether the custodian's decision to release the records without these additional redactions is consistent with the FOIA.

RESPONSE

Having reviewed the records, it is my opinion, based on the definitions and standards discussed below, that the custodian's decision to release (as redacted) the records qualifying as personnel records may not be entirely consistent with the FOIA. Additional redactions may need to be made regarding information relating

to charges that were not prosecuted and subsequently sealed or expunged, given your heightened privacy interest in that information.

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 Benton ("City"), which is a public entity and is subject to the FOIA. Moreover, the request appears to pertain to public records.[1] Because the records are held by a public entity, they are presumed to be public records,[2] although that presumption is rebuttable.[3] 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.[4] For purposes of the FOIA, these items can usually be

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[1] 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).

[2] *Id.*

[3] *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).

[4] 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"[5] or "employee evaluation or job performance records."[6] 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. Although I have no information regarding how the custodian has classified these records, it appears that the records at issue are personnel records. I will, therefore, limit my discussion to records of that type.

The FOIA does not define "personnel records," but this office has consistently opined that the term refers to all records other than "employee evaluation or job-performance records" that pertain to individual employees.[7] Whether a particular record meets this definition is 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."[8]

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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).

[5] 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."

[6] 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."

[7] *See, e.g.*, Ops. Att'y Gen. 2015-072, 99-147; Watkins, *et al.*, at 202.

[8] Ark. Code Ann. § 25-19-105(b)(12).

While the FOIA does not define the phrase "clearly unwarranted invasion of personal privacy," the Arkansas Supreme Court, in *Young v. Rice*,[9] 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.[10]

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.[11] 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.[12] 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.[13] The fact that the subject of records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.[14]

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.[15] 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.[16] 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

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[9] 308 Ark. 593, 826 S.W.2d 252 (1992).

[10] Watkins, *et al.*, at 208.

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

[12] *Id.*, 826 S.W.2d at 255.

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

[14] *E.g.*, Ops. Att'y Gen. 2016-055, 2001-112, 2001-022, 94-198; Watkins, *et al.*, at 207.

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

[16] Ops. Att'y Gen. 2019-036, 2018-125, 2014-094, 2012-014, 2011-107.

government for the general public.[17] 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.[18]

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);
- 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).

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[17] *See* Ops. Att'y Gen. 2019-047, 2018-061.

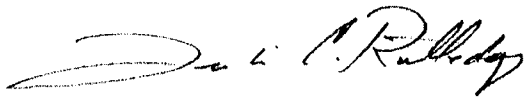
[18] *See* Ops. Att'y Gen. 2018-087, 2018-061; *see also* Op. Att'y Gen. 2014-094 (noting that "neither the Arkansas Legislature nor our appellate courts have allowed custodians to consider the subjective motive of the requester."). While the requester's *subjective* motive cannot be the basis for the 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).

III. Application.

This office has consistently opined that under the balancing test set forth in *Young*, records reflecting a public servant's criminal history are generally subject to disclosure under the FOIA unless the individual's criminal records have been sealed or expunged.[19] According to your correspondence and the information contained in the records themselves, both of the charges in question ended with an order of *nolle prosequi*[20] being entered, after which the records and documents relating to those charges were expunged or sealed pursuant to Ark. Code Ann. § 25-19-906.[21] The custodian of those records is prohibited from disclosing the records' existence or releasing them except in a limited number of circumstances.[22] It is my opinion, therefore, that you have a heightened privacy interest in the information in your personnel file that relates to those sealed or expunged records, and the custodian's decision not to redact that information prior to releasing the records is likely inconsistent with the FOIA.

Sincerely,



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Attorney General

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[19] *See, e.g.*, Ops. Att'y Gen. 2014-123, 98-202, 97-177, 95-113.

[20] "*Nolle prosequi*" is Latin for "does not wish to prosecute." BLACK'S LAW DICTIONARY 1259 (11th ed. 2019). "Nolle pros" or to have a charge "nolle prossed" are common colloquial derivatives. *See* Garner, Brian A., GARNER'S DICTIONARY OF LEGAL USAGE 606 (3d ed. 2011).

[21] Ark. Code Ann. § 16-90-906 was part of the Uniform Expungement Act. That act was repealed and replaced by the Comprehensive Criminal Record Sealing Act (Sealing Act) in 2013. *See* 2013 Ark. Acts No. 1460, § 7. The current statute—Ark. Code Ann. § 16-90-1410—similarly allows the records relating to a criminal case to be sealed when the charges are nolle prossed.

[22] *See* Ark. Code Ann. § 16-90-1416(a) (Supp. 2021) (Ark. Code Ann. § 16-90-903(a) governed the release of sealed records under the Uniform Expungement Act).