IN THE CIRCUIT COURT CRITTENDEN COUNTY

PAM HICKS and JOHN MARK BYERS — **APPELLANTS**

v. **CV-2012-290-6**

THE WEST MEMPHIS, ARKANSAS, POLICE DEPARTMENT; et al. — **APPELLEES**

APPELLANT'S, JOHN MARK BYERS, RESPONSE AND BRIEF TO APPELLEE'S, CITY OF WEST MEMPHIS, MOTION TO DISMISS, AND APPELLANT'S, JOHN MARK BYERS, MOTION AND BRIEF TO DECLARE ARKANSAS CODE ANNOTATED SECTION 25-19-105(a)(1)(A) UNCONSTITUTIONAL

Come now the Appellant[1], John Mark Byers (hereinafter "Appellant"), and for his Response and Brief to Appellee's, City of West Memphis (hereinafter, "Appellee"), Motion to Dismiss, and for his Motion and Brief to Declare Arkansas Code Annotated Section 25-19-105(a)(1)(A) Unconstitutional states:

I. RESPONSE AND MOTION

1. The Appellee states in its Brief that it "restates and realleges the grounds set forth in the previously filed motions to dismiss on behalf of the Defendants."

2. As the Appellee is now re-asserting its grounds for dismissal against separate Appellant, Appellant also adopts by reference all arguments set forth in Response to the original Motion to Dismiss in this matter. Ark. R. Civ. P. 10(c).

3. Appellee makes the additional claim against Appellant that Appellant lacks

[1] Pursuant to Arkansas Code Annotated, Section 25-19-107(b), Ms. Hicks and Mr. Byers believe that the more appropriate designation for their status is that of "Appellants", not "Plaintiffs", as they continue to respectfully state that this Court has jurisdiction as any appellate court upon the filing of the appeal, and that formal service of process was not required in this matter.

standing to pursue a claim under the Freedom of Information Act because Appellant is a resident of Tennessee.

4. Appellee cites Arkansas Code Annotated Section 25-19-105(a)(1)(A) for justification of this position.

5. The above-referenced Section limits public records to "any citizen of the State of Arkansas".

6. However, as is shown in the Brief below, the Section cited is violative of the United States Constitution and is unenforceable.

7. Therefore, Appellant moves to deny the Appellee's Motion and for an order of this Court declaring the above-cited statute unconstitutional. Therefore, the Appellant hereby gives notices of service to the Office of the Attorney General of Arkansas. Ark. Code Ann. §16-111-106.

II. BRIEF

a. Constitutional Overview

Obviously, the Court knows that the United States "Constitution, and the Laws of the United States which shall be made in [p]ursuance thereof . . . *shall be the supreme law of the land*; and the judges in every state shall be bound thereby, [anything] in the constitution or laws of any state to the contrary notwithstanding." U. S. Const., Art. VI, §2 (emphasis supplied).

Here, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, §2, Cl. 1. This Clause is applied to the States. Specifically, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Am. XIV, §1. As is shown herein, the denial of the Appellant's access to the public records of this State due to his Tennessee residency is a violation of his Privileges and Immunities under both Article IV and Amendment Fourteen of the United States Constitution and violation of his liberty without due process of law, and violation of equal protection of the laws.

b. The Constitutional Test for Application of the Privileges and Immunities Clause

The Third Circuit Court of Appeals has addressed this same issue, where the State of Delaware also restricted requests under their freedom of information act to citizens of that State. *Lee v. Minner*, 458 F.3d 194, 196 (3d Cir. 2006). To determine whether state action violates the Privileges and Immunities Clause, the court must: (1) Determine whether the policy at issue burdens a right protected by the Privileges and Immunities Clause; (2) Consider whether the state has substantial reason for its action; and, (3) Evaluate whether the practice bears a substantial relationship to the state's objective. *Toomer v. Witsell*, 334 U.S. 385, 395, 396 (1948). The Appellant will review below each prong of this test.

1. Burden to a Protected Activity

The Court in *Lee* first set out to determine whether the denial of information to a non-resident of a state burdens a Privilege and Immunity of that person. The Court in *Lee* noted that the Plaintiff was a journalist and that "the Supreme Court has held that pursuit of a common calling, the ownership or disposition of privately held property, and access to the courts are protected under the Privileges and Immunities Clause." *Lee* at 198, citing *Baldwin v. Fish &*

Game Comm'n of Montana, 436 U.S. 371, 383 (1978). The Court in Lee concluded that a journalist seeking information under the state's freedom of information act was in fact a significant activity and thus protected by the Privileges and Immunities Clause. *Lee* at 198-200.

Here, John Mark Byers is the father of Christopher Byers, deceased. Mr. Byers seeks information from the State regarding the murder of his son. It is unclear how the State can even seriously argue that a father seeking information regarding the murder of his son is somehow less significant than a journalist seeking information for a story. Advancing such an argument by the State not only is incredulous, but offensive, and the Appellant will not waste any of the Court's time explaining his position on this topic.

2. Substantial Reason of the State

In *Lee*, the only substantial reason provided by the State of Delaware justifying its position in denying public information to non-citizens of the State was that limiting access to citizens of that state defined the political community and strengthened the bond between citizens and the government of that State. *Id.* at 200. The court acknowledged that defining political communities is a substantial interest of a state. However, the Court also concluded that such definition cannot come at a cost of excluding others from participation in such a state. For example, a State cannot prohibit the employment of foreign nationals. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

Here, the State can show no substantial interest that outweighs the interest of the Appellant to the information that he seeks. Therefore, again, the statute is violative of the Privileges and Immunities Clause.

3. Substantial Relationship

Even if the Statute in question did further a substantial interest of the State (which it does not), the Statute bears no substantial relationship to furtherance of any such substantial interest. As the Court noted in *Lee*, information is not a finite resource. Therefore, prohibiting dissemination of information to non-citizens of Delaware did not advance the stated interest of defining the political community and strengthening the bond between citizens and the government of that State, as those citizens could still request the same information. Moreover, with regarding to defining the political community by the exclusion of non-citizens of the State, the Court insightfully instructed that "[s]uch a justification is contrary to the principles of comity inherent in Article IV, section 2." *Id.* at n. 5.

Further, the Court noted that the purpose of the Delaware freedom of information act was to promote transparency and accountability. As the Court pointed out, those goals are advanced, not impeded, by records being available to all members of the public, not just restricted to one state. *Id.* Therefore, there was no substantial relationship between the purpose of the statute and the exclusion of non-citizens.

The stated purpose of the Delaware statute is similar to that of the Arkansas statute. Specifically, the General Assembly found that "the proper functioning of a democratic society is dependent upon the public being informed at all times with respect to the operations of government, and public officials shall at all times be held accountable for their public actions and conduct". Emergency Clause of the Freedom of Information Act of 1967. Further, the General Assembly found that: "the immediate passage of [the Freedom of Information Act of 1967] is necessary . . . to secure to the public their proper right of access to public records". *Id.* There is

no relationship (substantial or otherwise) between these findings and purpose and the exclusion of non-citizens to public records of this State. In fact, as much as Mr. Byers is the surviving next-of-kin to Christopher Byers, deceased, any information that the State has regarding the murder of his son is his "proper right of access to public records", and with regard to any government agency investigating his son's death, it is his prerogative to hold them "accountable for their public actions and conduct." The position of the State in denying Mr. Byers access to information regarding the murder of his son frustrates the purpose of the Act and is offensive of common decency.

c. Agreement of the Office of the Arkansas Attorney General

As noted above, in conformity with Arkansas statutory law, the Office of the Arkansas Attorney General is being provided notice of this pleading so that the Office will have the right to intervene to argue for the statute's validity. Certainly, the Office of the Attorney General always has this right whenever the constitutionality of any statute is questioned. However, it should be noted for the Court that the Office of the Attorney General has already provided its opinion in this matter and has already repeatedly adopted the position of the Court in *Lee*.

On May 6, 2011, a state employee objected to release of information "because the requester is not an Arkansas citizen." Noting the *Lee* decision, the Attorney General concluded: "given that the FOIA does not prohibit the release of public records to non-citizens of Arkansas, a custodian *might* reasonably decide to grant the FOIA request in light of the Third Circuit decision." *See*, Plaintiff's Exhibit 1, Ark. A.G. Opinion No. 2011-058, attached (emphasis supplied).

On August 1, 2011, the Office of the Attorney General went further in its support of the

Lee case. The Office was questioned by State Senator Sue Madison whether the County of Washington could charge additional fees to persons not residents of the County of Washington. The Office of the Attorney General responded in the negative. However, more important than this conclusion was the justification of the Attorney General for the conclusion. Specifically, the Office of the Attorney General adopted, without criticism,the holding in *Lee*. *See*, Plaintiff's Exhibit 2, Ark. A.G. Opinion No. 2011-060, n. 4, attached.[2] Specifically, the Office of the Attorney General opined:

> The Lee court struck down a provision in Delaware's FOIA that discriminated among requesters based on their residency. *The court held that*, in the context of open-records laws, *discriminating based on residency violates the federal constitution's Equal Protection and Privileges and Immunities clauses*. Given the Lee court's extensive analysis of a government action that treats FOIA requestors differently based solely on residence, *a court would likely invalidate the Washington County Assessor's plan as violating the extrinsic limitations contained in the U.S. Constitution.*

Id. (emphasis supplied).

The Office of the Attorney General confirmed this opinion yet again this year. In Opinion No. 2012-017, a state employee objected to release of information "because, he says, 'the requester has to be a United States Citizen.' And, he says, he is 'not certain of the citizenship of' the requester. He would like his information be 'withheld until verification of the citizenship of the requestor can be ascertained through proper documentation.'" However, again relying on the *Lee* case, the Attorney General concluded that because

> the FOIA does not prohibit the release of public records to non-citizens of Arkansas, a custodian might reasonably decide to grant the FOIA request in light of the Third Circuit decision. Therefore, this employee has not provided a legally

---

[2] The opinion references "Lee v. Minor". This is merely a typographical error. Reference to the citation at note four clearly shows that the case cited is actually *Lee v. Minner*, 458 F.3d 194, 196 (3d Cir. 2006).

sufficient reason to block the release of his name and salary.

In summary, in my opinion, the custodian's decision to release this information is consistent with the FOIA.

See Plaintiff's Exhibit 3, Arkansas Attorney General Opinion No. 2012-017, attached.

WHEREFORE, the Appellant prays that the Appellee's Motion to Dismiss be denied, that this Court hold Arkansas Code Annotated Section 25-19-105(a)(1)(A) unconstitutional as applied to non-citizens of this State in general, and as applied to the Appellant in particular, and for all other proper relief.

Respectfully Submitted,

Ken Swindle
Ark. Bar #97234
619 West Walnut Street
Rogers AR 72756
Telephone (479) 621-0120
Fax (479) 621-0838

CERTIFICATE OF SERVICE

I, Ken Swindle, hereby state that the above-referenced document was transmitted to David Peeples, via facsimile, (870) 732-7514, to Scott Ellington, via facsimile, (870) 336-4011, and to the Office of the Arkansas Attorney General, via facsimile, (501) 682-8084, this 16th day of September, 2012.

Ken Swindle

Opinion No. 2011-058

May 6, 2011

Ms. Kay Barnhill Terry State Personnel Administrator Office of Personnel Management Department of Finance and Administration 1509 West Seventh Street, Suite 201 Little Rock, Arkansas 72203-3278

Dear Ms. Terry:
I am writing in response to several requests, made pursuant to A.C.A. § 25-19-105(c)(3)(B), for my opinion on whether the release of certain records in the Arkansas Administration Statewide Information System (AASIS) would be consistent with the Arkansas Freedom of Information Act (FOIA), which is codified at A.C.A. §§ 25-19-101 to –110 (Repl. 2002 & Supp. 2009). The requests reference an e-mail to Don Lukas, of the Arkansas Department of Finance and Administration, from Dakin Sloss of California Common Sense. Mr. Sloss seeks an electronic copy of the name, agency, job title, and salary of every state employee.
Seven state employees object to and request this office's review of the custodian's decision to release this information. These employees object for the following reasons:

two simply state that they "do not wish" their information to be released;

two object because they want to know the requester's intention;

two object because they believe the release of this information would make it easier for abusive ex-spouses to locate them; one has a restraining order, the other does not indicate whether a restraining order is in place; and

one objects because the requester is not an Arkansas citizen.

RESPONSE
My duty under A.C.A. § 25-19-105(c)(3)(B) is to determine whether a custodian's decision regarding the disclosure of certain employee-related documents is consistent with the FOIA. In the present case, the custodian has determined that the requested records are personnel records and should be released. In my opinion the custodian's decision is consistent with the FOIA.
DISCUSSION

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.

As this office has consistently opined, given the nature of this request, the first two elements are clearly met. The analysis for those two elements is contained in Opinion No. 2011-045, which is enclosed. So I will not repeat it here.

Turing to the third element, the question is whether some exception shields these records from disclosure. As noted in Opinion No. 2011-045, these records meet the definition of a "personnel record."[1] Accordingly, the FOIA requires that these records be released unless doing so constitutes a "clearly unwarranted invasion of personal privacy."[2] As Opinion No. 2011-045 explains, the release of these kinds of records—i.e. those reflecting the name, salary, job title, etc.—will rarely rise to the level of such an invasion. Therefore, these kinds of records generally must be released.

The only remaining question is whether any of the objections present facts showing that, given specific considerations, the release of the objectors' records would constitute a clearly unwarranted invasion of personal privacy. I will address each objection in turn.

None of the objections listed in the first two bullet-points above requires the records be withheld, in my opinion. The first two objectors merely state their desire that the information not be released. But, under the FOIA, the question whether the subject of the records desires to have their records released is not relevant to the analysis. The third and fourth objectors question whether the requester really needs the names of employees. This office has consistently explained that state employees' names are generally releasable under the FOIA and the requester's motive in seeking the records is generally not relevant.[3] Further, as this office has consistently noted, the public is the employer of these individuals and pays their salaries. It is reasonable to expect that an employer would have an interest in knowing whom it employs.[4] Thus, the decision to release these objectors' records is consistent with the FOIA, in my opinion.

Two employees object to releasing their personnel records because doing so might enable abusive ex-spouses to find them. Their argument is, presumably, that releasing their names, salaries, and the name of their agencies would be a clearly unwarranted invasion of personal privacy because, in their case, it may raise the probability that the ex-spouse will find them and harm them. In 2006, my predecessor was presented with a similar scenario and opined that the release of personnel records would not constitute a clearly unwarranted invasion of personal privacy. Opinion 2006-142 reviewed a custodian's decision to release personnel records to a requester who had been the subject of a "No Contact Order" that forbade the requester from contacting the employee in any way. In that case, my predecessor opined that, absent a review of the actual court order, the release of the personnel records to the subject of the "No Contact Order" was not a clearly unwarranted invasion of personal privacy. I concur with my predecessor's analysis, which, when applied to the current case, requires the records be released, in my opinion. Thus, the custodian's decision to release these two employees' names, salaries, etc. is consistent with the FOIA.

The final objector argues that the requester is not entitled to use the FOIA because the requester is not an Arkansas citizen. As this office has previously noted, the FOIA only requires that access to records be provided to Arkansas citizens: "[A]ll public records shall be open to inspection and copying by any citizen of the State of Arkansas...."[5] Accordingly, as I explained in Opinion 2008-191, if the requester is not an Arkansas citizen, then that would be a basis for denying the request. I will note, however, that the Third Circuit Court of Appeals has issued a decision that—while not binding in Arkansas—used the Privileges and Immunities Clause of the U.S. Constitution to hold that the citizen restriction in Delaware's FOIA was unconstitutional.[6] Additionally, given that the FOIA does not prohibit the release of public records to non-citizens of Arkansas, a custodian might reasonably decide to grant the FOIA request in light of the Third Circuit decision.

In summary, in my opinion, the custodian's decision to classify the requested documents as personnel records is consistent with the FOIA; the decision to release the records under the personnel-records test is consistent with the FOIA; and none of the objections overcomes either of those decisions. As a final matter, please note this opinion does not preclude anyone from pursuing judicial remedies afforded by

the FOIA. The custodian's decision is subject to court review under A.C.A. § 25-19-107, which provides for a citizen's appeal to enforce the rights granted by the FOIA. Such an appeal may be made to the Pulaski County Circuit Court or to the circuit court of the residence of the aggrieved party.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

Dustin McDaniel
Attorney General

DM/RO:cyh

Enclosure

*[1]*Please see Opinion No. 2011-045 for the definition of "personnel record."
[2]□ A.C.A. § 25-19-105(b)(12) (Supp. 2009).
*[3]*Op. Att'y Gen. No 2011-045 (citing multiple opinions).
*[4]*E.g. Op. Att'y Gen. Nos. 2011-048, 90-335.
*[5]*E.g., Op. Att'y Gen. 2001-314, at note 1 (citing A.C.A. § 25-19-105(a)(1)); see also J. Watkins & R. Peltz, The Arkansas Freedom of Information Act (5th ed., Arkansas Law Press 2009), at 87.
*[6]*Lee v. Minner, 458 F.3d 194 (3rd Cir. 2006); see also Watkins & Peltz, supra note 5, at 92–94 (analyzing Lee v. Minner).

Opinion No. 2011-060

August 1, 2011

The Honorable Sue Madison
State Senator
573 Rock Cliff Road
Fayetteville, Arkansas 72701-3809

Dear Senator Madison:

You have requested a follow-up opinion on Opinion No. 2010-169, which addressed a question about the Arkansas Freedom of Information Act (FOIA). You ask the following six questions, some of which I have paraphrased:

1. Pursuant to the FOIA, **must** the custodian of records charge a fee for the actual cost of reproduction of the record?

2. May the custodian charge a fee that is less than the actual cost of reproduction?

3. For purposes of the fee, may the custodian treat FOIA requestors differently based solely on whether the requestor lives in Washington County?

4. May the custodian waive or reduce fees only if he or she determines that the request is for non-commercial purposes and it is in the public interest to do so?

5. May the custodian simply provide the records to the public as a public service and not necessarily under the FOIA?

6. If the answer to Question 5 is "yes," may the custodian charge people who request the documents differently based solely on whether the requestor lives in Washington County?

RESPONSE

For purposes of your first four questions, and unless otherwise stated, I will assume (*a*) that a request for non-exempt, public records has been properly made under the FOIA and (*b*) that the request is not being fulfilled pursuant to A.C.A. § 25-19-109.

In light of these assumptions, the short answers to your questions are as follows: [Q1] no; [Q2] yes, with certain caveats; [Q3] probably not; [Q4] no; [QQ5 & 6] the answers depend on the way your questions are interpreted.

DISCUSSION

Question 1: Pursuant to the FOIA, must the custodian of records charge a fee for the actual cost of reproduction of the record?

No. In my opinion, the FOIA does not require custodians to always charge. While this might not be immediately apparent from the face of the FOIA, it reasonably follows from the Act's legislative history. The FOIA probably does, however, contemplate that custodians will ordinarily charge. But this is probably the consequence of the common practice at the time when the fee provisions were adopted.

As recently as 2001, the FOIA contained no guidance on how much custodians could charge for copies, or even whether they had authority to charge at all. In that year, however, the General Assembly amended the FOIA when it adopted recommendations by the Electronic Records Study Commission. These amendments, which are contained in subsection 25-19-105(d), state:

> (d)(2)(A) Upon request and payment of a fee as provided in subdivision (d)(3) of this section, the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment.
>
> * * *
>
> (3)(A)(i) [A]ny fee for copies shall not exceed the actual costs of reproduction, including the costs of the medium of reproduction,

> supplies, equipment, and maintenance, but not including existing agency personnel time associated with searching for, retrieving, reviewing, or copying the records.
>
> (ii) The custodian may also charge the actual costs of mailing or transmitting the record by facsimile or other electronic means.
>
> (iii) If the estimated fee exceeds twenty-five dollars ($25.00), the custodian may require the requester to pay that fee in advance.
>
> (iv) Copies may be furnished without charge or at a reduced charge if the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest.

This entire subsection was originally drafted by the Commission in 2000.[1] The Commission, which was convened to bring the FOIA into the electronic age, proposed a complete set of amendments for the General Assembly to consider incorporating into the FOIA. The foregoing subsection, which was accompanied by commentary explaining the Commission's intent and rationale, was adopted, *in toto*, by the General Assembly. Therefore, the Commission's commentary illumines the provision's meaning.

Even a cursory look at that commentary makes clear that the Commission did not believe its proposal would *require* custodians to charge for copies. In portions of its commentary, the Commission explains its guiding principle behind the fee provisions by noting that custodians "may elect to provide access at reduced or no charge, and should do so whenever appropriate."[2] Further, when commenting on the foregoing provision, the Commission indicates that, far from imposing a new rule that custodians must always charge, the Commission simply intended to codify the then-current practice: "[Subsection –105(d)(2)(A)] simply expresses in

---

[1] *Report of the Electronic Records Study Commission & Recommendations for Amendments to the Arkansas Freedom of Information Act*, December 15, 2000.

[2] *Id.*, p. 12.

the [FOIA] the frequent practice of responding to FOIA requests by providing copies of records with a fee for duplicating cost."[3]

Notwithstanding the apparent absence of intent to mandate fees, the answer to your question may be somewhat complicated by subsection 25-19-105(d)(3)(A)(iv), which states: "Copies may be furnished without charge or at a reduced charge if the custodian determines that the records have been requested primarily for noncommercial purposes and that waiver or reduction of the fee is in the public interest." At first glance, one might read this as requiring custodians to charge. But such a reading is negated by the legislative history explained above.

Instead, this subsection may be read, in my opinion, simply as an example of a clear instance in which custodians can waive or reduce fees. Accordingly, I do not read it to suggest that there are no other circumstances in which a fee may be waived or reduced. Such a reading would, as explained above, implicitly require custodians to charge, which is contrary to the clear legislative intent.

I recognize that custodians may encounter some difficulty in identifying potential limits on deciding whether or how much to charge. The fact that the FOIA is not entirely clear on that score may suggest the need for legislative clarification. Custodians would be wise to consult local counsel when making these decisions with an eye toward establishing a usual practice. Finally, as I explain in response to your third question, constitutional considerations may come into play when deciding whether or how much to charge.

Question 2: May the custodian charge a fee that is less than the actual cost of reproduction?

As noted in the foregoing discussion, the answer is generally "yes." But particular circumstances may require further analysis. For example, the particular facts behind Opinion 2010-169 involved a plan by the Washington County Assessor to establish an online database for access to certain public records. When charging for access to the site, the Assessor proposed to distinguish between county residents and non-county residents. I suggested several problems with such a proposal and concluded that the plan was probably inconsistent with the FOIA. I will note, additionally, that all official actions of Washington County officials are

[3] *Id.*, p. 28.

governed by the principles of fairness and equality contained in the U.S. Constitution, which are embodied in, *inter alia*, the Equal Protection clause of the Fourteenth Amendment.

Your question asks whether a county official can treat FOIA requestors differently based solely on where the requestors live. In *Lee v. Minor*,[4] the United States Court of Appeals for the Third Circuit was asked a similar question. The *Lee* court struck down a provision in Delaware's FOIA that discriminated among requesters based on their residency. The court held that, in the context of open-records laws, discriminating based on residency violates the federal constitution's Equal Protection and Privileges and Immunities clauses. Given the *Lee* court's extensive analysis of a government action that treats FOIA requestors differently based solely on residence, a court would likely invalidate the Washington County Assessor's plan as violating the extrinsic limitations contained in the U.S. Constitution.

Question 3: For purposes of the fee, may the custodian treat FOIA requestors differently based solely on whether the requestor lives in Washington County?

See my response to your second question.

Question 4: Are custodians permitted to waive or reduce fees only if they determine (a) that the request is for non-commercial purposes and (b) that it is in the public interest to waive or reduce the fee?

See my response to your first question. As stated there, I do not read A.C.A. § 25-19-105(d)(3)(A)(iv) as prescribing the only circumstances in which fees may be waived or reduced. Accordingly, the answer to this question, as worded, is "no."

Question 5: May the custodian simply provide the records to the public as a public service and not necessarily under the FOIA?

If you are asking whether custodians can release non-exempt, public records on their own and not in response to any specific requester, then the answer is clearly "yes." The FOIA does not limit the kinds or amounts of non-exempt, public records that custodians may freely disclose.

---

[4] 458 F.3d 194 (3rd Cir. 2006).

But if you are asking whether the custodian can treat a request for public records as if it were not governed by the FOIA, the answer is "no." There is no requirement that an FOIA requester specifically refer to the FOIA in order to employ it, though it is obviously advisable to do so. In my opinion, if a request is made for public records, the custodian must operate under the FOIA.

Question 6: If the answer to Question 5 is "yes," may the custodian charge people who request the documents differently based solely on whether the requestor lives in Washington County?

This question is a little confusing because the phrase "as a public service," as used in Question 5, typically means "for free." Under that fairly common usage, there would be no occasion to charge differently based on one's residence. Nevertheless, if the custodian charges a fee, then treating requestors differently based on residence would likely violate the U.S. Constitution, as explained in response to Question 3.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

Opinion No. 2012-017

February 10, 2012

Billy D. Vanlandingham & Michael E. Suttle
c/o Kay Barnhill Terry, State Personnel Administrator
Office of Personnel Management
Department of Finance and Administration
1509 West Seventh Street, Suite 201
Little Rock, Arkansas 72203-3278

Dear Messrs. Vanlandingham & Suttle:

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. 2011), which 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.

You report that someone has requested the names and salaries of all state employees. The custodian intends to release this information, which includes both or your names and salaries, as a personnel record. One employee objects to the release, but does do not indicate why. The other employee objects to the release because, he says, "the requester has to be a United States Citizen." And, he says, he is "not certain of the citizenship of" the requester. He would like his information be "withheld until verification of the citizenship of the requestor can be ascertained through proper documentation."

RESPONSE

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. Neither of you dispute whether any of these elements are met.

This office has repeatedly held that the release of a public employee's name and salary must be evaluated under the provision of the FOIA applicable to "personnel records."*[1]* The FOIA requires that personnel records be released unless doing so would constitute a "clearly unwarranted invasion of personal privacy."*[2]* This office has consistently opined that the release of a public employee's name and salary does not rise to such a level, which means the name and salary information must be released in response to an FOIA request.*[3]*

The only remaining question is whether either of the employees raise legally sufficient reasons that, in their cases, require that their names and salary information be withheld. The first employee does not give any reasons for his objection. He seems to think that, if he just objects, then the custodian is barred

from releasing his information. There is no provision in the FOIA that requires the subject of personnel records to give his or her consent before the records can be released. Therefore, this employee has failed to provide a legally sufficient reason for the custodian to withhold his information.

The other employee objects to release of your information until the requestor is proven to be a "United States Citizen." As this office has previously noted, the FOIA only requires that access to records be provided to Arkansas citizens: "[A]ll public records shall be open to inspection and copying by any citizen of the State of Arkansas...."*[4]* Accordingly, as I explained in Opinion Nos. 2008-191 and 2011-058, if the requester is not an Arkansas citizen, then that would be a basis for denying the request. I will note, however, that the federal Court of Appeals for the Third Circuit has issued a decision that—while not binding in Arkansas—used the Privileges and Immunities Clause of the U.S. Constitution to hold that the citizen restriction in Delaware's FOIA was unconstitutional.*[5]* Additionally, given that the FOIA does not prohibit the release of public records to non-citizens of Arkansas, a custodian might reasonably decide to grant the FOIA request in light of the Third Circuit decision. Therefore, this employee has not provided a legally sufficient reason to block the release of his name and salary.

In summary, in my opinion, the custodian's decision to release this information is consistent with the FOIA.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

Dustin McDaniel
Attorney General

DM/RO:cyh

*[1]*E.g., Op. Att'y Gen. 2011-045.
*[2]*A.C.A. § 25-19-105(b)(12) (Supp. 2011).
*[3]*E.g., Op. Att'y Gen. 2011-045.
*[4]*E.g., Op. Att'y Gen. 2001-314, at note 1 (citing A.C.A. § 25-19-105(a)(1)); see also J. Watkins & R. Peltz, The Arkansas Freedom of Information Act (5th ed., Arkansas Law Press 2009), at 87.
*[5]*Lee v. Minner, 458 F.3d 194 (3rd Cir. 2006); see also Watkins & Peltz, supra note 4, at 92–94 (analyzing Lee v. Minner).