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OPINION NO. 85-186

August 20, 1985

Ray Scott, Director
Arkansas Department of
Human Services
Donaghey Building, Suite 1300
7th & Main Streets
Little Rock, AR 72201

Dear Mr. Scott:

This is in response to your letter wherein you requested clarification and interpretation of Act 468 of 1985, with specific answers to the following questions:

- 1) What records pertaining to employees and clients are now determined to be open to public inspection?
- 2) Where Federal law exists regarding the release of employee/client information, will such law supercede Act 468?
- 3) If it is determined that Act 468 is the controlling legislation, and all employees and/or clients records are open to public inspection, would the release of such records be a violation of constitutional rights to privacy?

Section 3 of Act 93 of 1967, Ark. Stat. Ann. §12-2803 was amended by Act 468 of 1985. The amended section had certain language deleted as follows:

Section 12-2803. DEFINITIONS. 'Public records' are writings, recorded sounds, films, tapes, or data compilations in any form

- (a) required by law to be kept, or
- (b) 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.

"Public meetings" are the meetings of any bureau, commission or agency of the State, or any political

subdivision of the State, including municipalities and counties, board of education and all other boards, except grand juries, supported wholly or in part by public funds, or expending public funds.

Ark. Stat. Ann. §12-2803 creates a presumption that certain records are open to public inspection and copying while specific records are explicitly exempted from inspection. Ark. Stat. Ann. §12-2804. Before Act 468 of 1985 became effective, a further exemption from disclosure existed for information of a personal nature public disclosure of which would be a clearly unwarranted invasion of personal privacy.

Act 468 repealed the exemption for personal information but did not affect the other exemptions. Records exempted from disclosure include medical and scholastic records and other records which are by law required to be closed to the public. Ark. Stat. Ann. §12-2804.

Of the specific examples of information contained in personnel files, medical information is clearly exempt from disclosure. Wage garnishments are public records available in the respective court clerks' files and are not exempt from disclosure under the FOIA. Performance evaluations appear to constitute a record of the performance of official functions and do not appear to fall within any of the present exceptions to the FOIA. Therefore, with the deletion of the exception for information of a personal nature, performance evaluations of employees appear to be subject to disclosure. Such an interpretation is required in order to fulfill the purpose of the FOIA to conduct public business in an open manner and because no exemption exists for performance evaluations. See Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968).

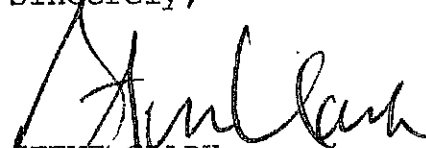
Because of the deletion of the exemption for personal information by Act 468, the legislative intent appears to be to open to the public documents which are closely related to the purpose of executive session, e.g., performance evaluations, but to preserve the executive session for the discussion and evaluation of the documents and other relevant data. It would appear that following this line of reasoning, a document presented to the agency in executive session and retained in its files would be open to public inspection unless otherwise exempt under §4. This reasoning is contrary to and therefore supercedes Opinion No. 73-230 that states documents intimately connected with the purposes of executive sessions are exempt from public disclosure under the FOIA.

You cite other examples as grievance/appeal information, client information and other documents relating to investigations and abuse/neglect of clients. Certain information is to be confidential pursuant to federal law. For example 29 CFR 1601.7, 1601.22 and 1601.26 require certain information regarding unlawful employment allegations be kept confidential. This and other information required by law to be closed to the public would not be open under the FOIA because of the explicit exemption for such records. Ark. Stat. Ann. §12-2804. Even if that statutory exemption were not applicable, information required by federal law to be kept confidential but otherwise subject to public view under the FOIA would appear to be exempt from disclosure on the premise that federal law will control in the event of conflict with state law.

While we cannot answer your first question specifically as to each record without further information, we have provided some general guidelines. Having answered question No. 2 affirmatively, it is not necessary to address the final inquiry.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Thomas S. Gay.

Sincerely,



STEVE CLARK
Attorney General

JSC:TSG:jk