

Published by:  
Springdale  
City Attorney's  
Office

# The M.A.P.

*The Municipal Attorney Periodical*

Issue 11-01

March 1, 2011

*Cold days  
of winter*



Mailbox at City Administration Building

**Termination of Texarkana Fire  
Department Employee is  
Upheld by Arkansas  
Supreme Court  
Page 4**

**A Variety of Issues Involving City  
Council Matters  
Pages 1—4**

**Arkansas Attorney General  
Opinion—Records Related to  
Retirement of City's Recorder-  
Treasurer are Public Record  
Page 10**



Corner of Spring St. and Price St.

**Injunction Against  
City of Fayetteville Ordinance  
Regulating Rock Quarries is  
Upheld by Eighth Circuit  
Court of Appeals  
Page 7**



Tyson Plant on Huntsville Avenue—

All photos on this page are from the February 9, 2011 snowstorm and were taken by Jacque Roth, employee of the City Attorney's Office.

*Turn to warm  
days of spring*



## A Variety of Issues Involving City Council Matters

**Note:** This article was first published in the March 1, 2007 edition of *The M.A.P.*, but is included again in this edition of *The M.A.P.* for the purpose of review and because we have a new Council member.

The following issues involve matters on voting and other procedural issues of the City Council. I have put the issues in question and answer form so they will be easier to read. The questions and answers were selected because they have frequently come up in the past.

\*\*\*\*\*

**Question No. 1:** How many different times does an ordinance have to be read in order to pass?

**Answer:** All ordinances must be distinctly read on three different days unless two-thirds of the members composing the municipal council shall dispense with the rule (A.C.A. §14-55-202). It takes six votes on the Springdale City Council in order to dispense with this rule.

\*\*\*\*\*

**Question No. 2:** How many votes does it take to pass an ordinance or resolution?

**Answer:** It takes a concurrence of a majority of a whole number of members elected to the Council (A.C.A. §14-55-203). In Springdale, this means it takes five votes to pass an ordinance or resolution.

\*\*\*\*\*

**Question No. 3:** Can the Mayor be one of the six votes to dispense with the rules under *Question No. 1*, and can the Mayor be one of

the five votes it takes to pass an ordinance as described in *Question No. 2*?

**Answer:** The Mayor shall have a vote when his vote is needed to pass any ordinance, by-law, resolution, order or motion (A.C.A. §14-43-501(b)(1)(B)). In *Question No. 1*, a motion to suspend the rules is involved, and in *Question No. 2*, a passage of an ordinance is involved, so the Mayor can vote in both cases. In *Question No. 1*, his vote can make the sixth vote necessary to suspend the rules, and in *Question No. 2*, his vote can be the fifth vote necessary to pass the ordinance. The Mayor's vote cannot be counted, however, in the passage of an emergency clause, because Amendment 7 to the Arkansas Constitution requires "two-thirds vote of all the members elected to the City Council" in order for an emergency clause to pass. An emergency clause means the ordinance goes into effect immediately.

\*\*\*\*\*

**Question No. 4:** Can the Mayor cast the deciding vote on issues involving appropriations of money?

**Answer:** Yes. The Arkansas Supreme Court has held that the Mayor can vote to pass an ordinance, even if the ordinance involves an appropriation of money for the City's fiscal year. *Gibson v. City of Trumann*, 311 Ark. 561 (1993).

**Note from City Attorney:** About the only time the Mayor cannot vote to pass a motion, ordinance or resolution is in the passage of an emergency clause or when the vote is one to repeal an initiated ordinance (an ordinance initiated by the people through petition under Amendment 7 of the Arkansas Constitution). Any other time, the Mayor can cast the deciding vote to pass a motion, ordinance or resolution.

**Question No. 5:** Who can call a special meeting of the City Council?

**Answer:** The Mayor, OR any three City Council members. Reference: A.C.A. §14-43-502(b)(2)(B).

\*\*\*\*\*

**Question No. 6:** If three members or the Mayor want to call a special meeting, how much notice do they have to give the press?

**Answer:** Two hours before such meeting takes place.

\*\*\*\*\*

**Question No. 7:** A resolution or an ordinance is proposed at a City Council meeting, but one member of the City Council is absent. Four members vote in favor of the resolution or ordinance, and three Council members vote against the ordinance or resolution. The Mayor decides not to vote. Since the vote is 4 - 3, and there was a quorum, does it pass?

**Answer:** No. Under Arkansas law, for an ordinance or resolution to pass, it is required that a majority of the whole number of members elected vote to pass the resolution or ordinance. Since Springdale has eight Council members elected, this means there has to be five votes to pass a resolution or ordinance, regardless of how many Council members show up for the meeting. As noted above, the Mayor's vote can be the fifth vote.

\*\*\*\*\*

**Question No. 8:** Can the Mayor be counted in making up a quorum? For instance, four members of the City Council show up at a meeting, along with the Mayor. Does this constitute a quorum?

**Answer:** Yes. Under Act 354 of 2001, which amended A.C.A. §14-43-501(b), the Mayor of a first class city can have a vote to establish a quorum at any regular meeting of the City Council.

Note from City Attorney: Note that this is at a regular meeting of the City Council, and would not apply to a special meeting. Therefore, it would take 5 City Council members to have a quorum at a special called meeting, but only 4 plus the Mayor to have a quorum at a regular City Council meeting.

\*\*\*\*\*

**Question No. 9:** If the Council, a commission or board of the City knows that they are calling a meeting solely to discuss a personnel matter, which is allowed to be conducted in executive session, does the press have to be notified of the meeting?

**Answer:** Yes. The press has to be notified of the meeting, even though the sole purpose of calling the meeting is so the board can go into executive session to discuss an authorized personnel matter. Before voting to go into executive session, you have to call the open public meeting to order, establish that a quorum is present, and then take up the motion to go into executive session.

\*\*\*\*\*

**Question No. 10:** When are executive sessions allowed?

**Answer:** Only to discuss the employment, appointment, promotion, demotion, disciplining or resignation of a specific public employee.

\*\*\*\*\*

**Question No. 11:** If the Council or a board goes into executive session to discuss the employment, appointment, promotion, demotion, disciplining or resignation of a specific employee, do we have to give the name of the employee involved before we go into executive session?

**Answer:** No. However, Arkansas did pass a new law in the 1999 Legislative Session (Act 1589 of 1999) and this law adds another requirement to governing bodies that go into executive session. Under Act 1589 of 1999, “the specific purpose of the executive session shall be announced in public before going into executive session.” By using the words “specific purpose,” the Legislature made plain that the announcement must reflect why the governing body is going into executive session. For instance, a member of the governing body can make a motion as follows, “I make a motion we go into executive session to consider the resignation (or whatever authorized reason) of an employee.” This announcement must be made before the governing body goes into executive session.

**Note from City Attorney:** An earlier version of Act 1589 would have required the governing body to disclose the name of the particular employee, but this provision did not pass. It seems the purpose of an executive session would be defeated if you had to give the name of the employee involved.

One thing also to remember is that you must be talking about a specific employee or employees, not a general class. For instance, the Council could not call an executive session for the purpose of discussing whether all public safety employees should receive a bigger raise than normal. This is a policy issue rather than a

personnel issue, and such policy issues shall be discussed in public.

\*\*\*\*\*

**Question No. 12:** Who can go into executive session with the governing body?

**Answer:** Only the person holding the top administrative position in the public agency, department, or office involved, the immediate supervisor of the employee involved, as well as the employee, when so requested by the governing body, board, commission or other public body holding the executive session (A.C.A. §25-19-106(c)(2)(A)). All these people mentioned are allowed to be in the executive session, but only if the governing body, board or commission wants them in the executive session.

\*\*\*\*\*

**Question No. 13:** When we come out of executive session, do we have to tell what we did?

**Answer:** Only if a resolution, ordinance, rule, regulation or motion is to be considered. If no action is taken, then it is not necessary for such a resolution, ordinance, rule, regulation or motion to be brought up after the executive session. However, under the law, no resolution, ordinance, rule, contract, regulation or motion is valid unless there is a public vote. (A.C.A. §25-19-106(c)(4)(A))

\*\*\*\*\*

**Question No. 14:** Does the Arkansas Freedom of Information Act apply to committees and sub-committees of governing bodies?

**Answer:** Yes, the press has to be notified of committee meetings, just like they are notified of meetings by the whole Council, board or commission.

Jeff Harper  
City Attorney

\*\*\*\*\*

**Arkansas Supreme Court Upholds Decision to Terminate the Employment of Texarkana Fire Department Employee**

**Facts Taken From the Opinion:** Charles Lawrence (Appellant) was a twelve-year veteran of the Texarkana, Arkansas Fire Department and had achieved the rank of Engineer. On November 1, 2003, Appellant was approached by Jerry Reeves, a Nevada County Reserve Sheriff’s Deputy, after he received a report that Appellant and his family had been involved in a family dispute at a local store. Reeves first spoke with Mrs. Lawrence, who was upset and attempting to calm her children. He then approached Appellant, who was sitting in his truck, across the street from where his wife and children were. According to Reeves, he informed Appellant that he wanted to talk to him about the family-disturbance report that he had received. Then, while Reeves was in the process of checking Appellant’s license, Appellant hurriedly left the scene. Deputy Reeves turned on his blue lights and pursued Appellant down a nearby county road, at times, reaching speeds of over 100 miles per hour. Appellant then pulled off the road and fled down a pipeline right of way, and Reeves was unable to continue his pursuit. Later, an officer with the Arkansas Game and Fish Commission located Appellant’s vehicle, but he was not in it. Reeves again came into contact with Appellant after he

was subsequently arrested by the Game and Fish officer.

Two days after his arrest, Appellant was scheduled to work a shift at the fire department. He contacted another firefighter and arranged to switch shifts. Appellant later met with Bobby Honea, Fire Chief for Texarkana, Arkansas. Chief Honea, who had been informed of the fleeing incident, inquired of Appellant as to what had transpired. Appellant declined to explain the situation, stating that it was a personal matter. On November 7, 2003, Chief Honea sent Appellant a letter, terminating his employment with the fire department. In that letter, Chief Honea pointed to the fact that Appellant had failed to show for his scheduled shift on November 3 and that he had been arrested for fleeing in Nevada County.

Appellant appealed his termination to the Texarkana Civil Service Commission, and a hearing was held on December 15, 2003. Following the presentation of testimony, the Commission unanimously voted to affirm Appellant’s termination. The Commission’s decision was announced orally by the Commission’s chairman.

Appellant then appealed the Commission’s decision to the Miller County Circuit Court. After conducting a *de novo* review, the circuit court issued a letter opinion affirming the decision of the Commission. Therein, the court rejected Appellant’s contention that he had been terminated under regulations not validly adopted by the governing body of the City of Texarkana. Additionally, while the trial court found that there was no basis to terminate Appellant because he switched shifts with another firefighter, the court found that Appellant’s conduct of fleeing and his subsequent arrest was a violation of fire department rules and regulations and, thus, warranted termination.

Appellant then appealed to the Arkansas Supreme Court, who reversed and remanded for the circuit court to dismiss without prejudice due to the lack of factual findings from the Commission. Following the Court's opinion, the Texarkana Civil Service Commission issued an "ORDER UPON TRIAL" on February 13, 2006, in which it made findings of fact and conclusions of law, concluding that Chief Honea was justified in terminating Appellant.

Appellant again appealed the Commission's decision to the Miller County Circuit Court. The circuit court held a hearing on January 3, 2008, although no new arguments of counsel or evidence were presented. The circuit court ultimately issued a letter ruling on December 2, 2009, and entered an order on December 31, 2009, affirming Appellant's termination. Appellant timely appealed for the second time to this court.

**Argument and Decision by Arkansas Supreme Court:** In Appellant's first argument for reversal, he contended he was terminated under rules not validly adopted. It is not disputed that Appellant was terminated pursuant to rules and regulations of the Department that had been approved by the Commission. The issue Appellant raises is whether those rules were required by statute to be approved by the City Board of Directors.

Appellant contended that since the Department's rules had not been adopted by the City Board of Directors, they were not validly adopted in compliance with Ark. Code Ann. § 14-51-302 (Repl. 1998). That statute provides in its entirety as follows:

*§ 14-51-302. Departmental rules and regulations.*

All employees in any fire or police department affected by this chapter shall be governed by rules and regulations set out by the chief of their respective police or fire departments after rules and regulations have been adopted by *the governing bodies of their respective municipalities.*

(Emphasis added.)

Arkansas Code Annotated § 14-51-301 (Supp. 2009) establishes the general rulemaking power of civil service commissions, and provides in pertinent part as follows:

*§ 14-51-301. Rules and regulations generally.*

(a)(1) The board provided for in this chapter shall prescribe, amend, and enforce rules and regulations governing the fire and police departments of their respective cities.

(2) The rules and regulations shall have the same force and effect of law. . . .

(b) These rules shall provide for: . . . .

(11)(A) Discharge . . . only after the person to be discharged . . . has been presented with the reasons for the discharge . . . in writing. . . .

(d) The commission shall adopt such rules not inconsistent with this chapter for necessary enforcement of this chapter, but *shall not adopt any rule or rules which would authorize any interference with the day-to-day management or operation of a police or fire department.*

(Emphasis added.)

Appellant's argument is that the rules and regulations under which he was terminated clearly dealt with the day-to-day operations of the Department and that, according to §14-51-301(d), the only body authorized by statute to adopt such rules would be the governing body of the City, which is the City Board of Directors. According to Appellant, the Department has therefore terminated his employment under rules that were not validly adopted in conformity with state law, namely §14-51-301(d).

In reviewing the two statutes, the Court noted that they have long followed the common law maxim that statutes on the same subject will be construed together and reconciled to effect the legislative intent. *Cummings v. Washington County Election Comm'n*, 291 Ark. 354, 724 (1987). "We are required to give effect to both enactments unless it is impossible to do so." *Id.*

The Court then read §14-51-301 harmoniously with §14-51-302 so as to reconcile the legislature's intent and to give effect to every part of the statutes, and agreed with the circuit court's interpretation that, as long as the rules approved by the Commission do not interfere with the Department's day-to-day operations, they are validly approved in compliance with state law. Such an interpretation reconciles the statutes and gives them harmonious, sensible effect.

The Court noted that following the passage of Act 439 of 1989, the Court stated that a civil service commission's authority to modify disciplinary penalties is intended by the General Assembly, and that, "the modification of punishment, after a statutory hearing, cannot be construed as 'interference with the day-to-day management or operation of a police or fire department.' Instead, it is the statutorily authorized enforcement of a regulation." *Tovey v. City*

*of Jacksonville*, 305 Ark. 401, (1991). Thus, according to *Tovey*, matters relating to a department's discharge and discipline polices are not to be construed as interfering with the department's day-to-day operations. Accordingly, the Court concluded that the Commission's enforcement of the Department's disciplinary policy in the present case was not an interference with the day-to-day management of the Department, and therefore the rules at issue were not required to be adopted by the City Board of Directors pursuant to §14-51-302. The Court held that Appellant's first point for reversal is therefore without merit, and the Court found no error in the circuit court's conclusion that the rules at issue were validly adopted.

On his second point for reversal, Appellant contended that he was not terminated in accordance with state law. He argued that, because the letter of termination he received from Chief Honea did not charge Appellant with a specific rule violation relating to the conduct that led to his arrest, his termination was in violation of §14-51-301(b)(11)(A). That statute requires that discharges can occur "only after the person to be discharged . . . has been presented with the reasons for the discharge . . . in writing." The City responded that Chief Honea's letter stated the reasons for Appellant's termination, and that is all that is required under §14-51-301(b)(11)(A).

Chief Honea's letter, which was dated November 7, 2003, recited three instances where Appellant had either failed to report for duty or violated the sick-leave policy. The letter then went on to state as follows:

It has also been brought to my attention that you were arrested for fleeing law enforcement officials. This incident occurred on November 1, 2003 in Nevada County.

The Court held that a plain reading of §14-51-301(b)(11)(A) reveals that the reasons given for the termination are not required to include citations or references to specific rules. Rather, the statute requires only that the writing present "the reasons for the discharge."

In summary, the Arkansas Supreme Court held the circuit court did not err in its interpretation of the two seemingly conflicting statutes and, in addition, the circuit court did not err in concluding that Chief Honea's letter gave Appellant sufficient notice that his conduct of fleeing from law enforcement officers was the reason for his termination. Therefore, the Court affirmed the order of the circuit court upholding Appellant's termination.

**Case:** This case was decided by the Arkansas Supreme Court on February 9, 2011. The case cite is *Lawrence v. City of Texarkana*, 2011 Ark. 42.

Jeff Harper  
City Attorney

\*\*\*\*\*

**Eighth Circuit Court of Appeals Upholds Injunction Issued by District Court Preventing the City of Fayetteville From Enforcing Their Ordinance Regulating Rock Quarries**

**Facts Taken From the Opinion:** In early 2009, the City, responding to noise and vibration complaints from citizens living near rock quarries, began considering an ordinance to regulate and license rock quarries operating in or near the City's corporate limits. Although Rogers Group maintains that it never agreed to be regulated by the City and consistently

denied that the City had jurisdiction over the Quarry, it participated in the City's ordinance drafting discussions and meetings. In fact, the City incorporated a number of Rogers Group's recommendations into the proposed ordinance. On October 20, 2009, the Fayetteville City Council passed Ordinance No. 5280, entitled "AN ORDINANCE TO PREVENT INJURY OR ANNOYANCE WITHIN THE CORPORATE LIMITS OF FAYETTEVILLE BY REGULATING ROCK QUARRYING FACILITIES SO THAT THESE FACILITIES WILL NOT BE NUISANCES" ("the Ordinance").

The Ordinance provided for the licensing and regulation of rock quarries. It purported to find that "the operation of a rock quarry would be a nuisance to the citizens and City of Fayetteville, Arkansas[,] if operated or used other than as prescribed in [the Ordinance]." Thus, in order to operate a rock quarry within the City or one mile beyond the City's corporate limits, a quarry operator must obtain a license from the City after demonstrating its full compliance with all requirements of the Ordinance.

The Ordinance limited quarry operations to a total of 60 hours per week and allowed "major noise producing activities" only between 8:30 a.m. and 4:30 p.m., Monday through Friday. Further, the Ordinance restricted rock blasting to a five-hour period on the first and third Wednesday of each month. In addition, a quarry must comply with several "safeguards and measures" to protect the City's roads from all vehicles, regardless of ownership, exiting the quarry. An "operator, manager, or employee" of a quarry subject to the Ordinance may face criminal punishment for violating the Ordinance, and the quarry may have its license suspended or revoked for multiple violations. In addition, the City may fine the

quarry for each violation of the operational hour and rock blasting restrictions.

At the preliminary injunction hearing, Darin Matson, Rogers Group's Vice President of Aggregate Operations, testified that Rogers Group would lose approximately \$13,000 per week under the Ordinance's restrictions. Matson conceded that the Ordinance's blasting restrictions reflect the frequency of Rogers Group's current blasting operations. Nevertheless, Matson believed the blasting restrictions would limit Rogers Group's ability to bid on and meet larger customer orders. This restricted bid ability, in turn, would hinder its competitiveness in the Northwest Arkansas market. Matson also testified that the Ordinance would restrict Rogers Group's ability to expand the Quarry. He considered future expansion necessary for the Quarry's long-term viability. Matson further stated that Rogers Group would have difficulty restoring its customer base upon reopening if the City closed the Quarry for violating the ordinance.

Rogers Group filed a lawsuit against the City of Fayetteville. The complaint alleged the City lacked authority to license and regulate Rogers Group's quarry. Rogers Group also moved for a preliminary injunction to enjoin the ordinance prior to its enforcement date, and the district court granted the preliminary injunction. The City of Fayetteville then appealed the case to the United States Court of Appeals for the Eighth Circuit, arguing the district court erred in granting the preliminary injunction.

**Decision by Eighth Circuit Court of Appeals:** On appeal, the City argued the district court erred in granting the preliminary injunction for two reasons: (1) the City had jurisdiction to regulate the Quarry within one mile of its corporate limits, making it unlikely that Rogers Group would succeed on the merits; and (2) Rogers

Group did not show that it would suffer irreparable harm if the Ordinance were allowed to go into effect.

For their first argument, the City contended that Rogers Group is unlikely to succeed on the merits of its suit to enjoin the enforcement of the Ordinance. The City argued that it possessed statutory authority to regulate the Quarry because it enacted the Ordinance pursuant to Arkansas Code Annotated §14-54-103(1). Under this statute, the City contended that it had broad regulatory authority both within and one mile beyond its corporate limits. Under the statute, the City's police power to abate a nuisance extends one mile beyond its corporate limits. However, the Eighth Circuit noted that rock quarries are not nuisances per se and normally, like other activities, must be declared so after a judicial determination. The City maintained that Arkansas law authorizes a city to exercise its broad regulatory power under §14-54-103(1) to abate activity that a city by ordinance declares to be a nuisance. The City contended that the statute provided this authority—within or beyond corporate limits—without a previous judicial determination that a quarry is a nuisance.

Section 14-54-103(1) grants cities two distinct powers. Within its corporate limits, a city may act to "prevent injury or annoyance . . . from anything dangerous, offensive, or unhealthy." This general police power allows a city to regulate or, in some cases, prohibit altogether the operation of an otherwise lawful business. *Phillips v. Town of Oak Grove*, 968 S.W.2d 600, 606 (holding that a city could prohibit commercial swine and fowl businesses within city limits). In contrast, in the area one mile beyond its corporate limits, a city may only act to "cause any nuisance to be abated." Ark. Code. Ann. §14-54-103(1).

Thus, while a city possesses limited authority to regulate businesses located within one mile of its corporate limits, those regulations must be directed "to cause any nuisance to be abated." The question remains, however, whether the City can, in essence, simply declare otherwise lawful conduct outside its corporate limits to be a nuisance. The court held that the City can only regulate an activity beyond its corporate limits if the activity is, in fact, a nuisance. *See Ward v. City of Little Rock*, 41 Ark. 526, 529–30 (1883) (holding that a statute giving the city authority to abate a nuisance does not give the city authority to condemn an act that "does not come within the legal notion of a nuisance").

Under Arkansas law, a rock quarry is only a nuisance if a court of competent authority determines that it is a nuisance. The Arkansas Supreme Court has recognized that while a rock quarry may, under some circumstances, constitute a nuisance, it is not a nuisance per se—that is, it cannot be said to constitute a nuisance under all circumstances. In turn, the Arkansas Supreme Court has long held that if an activity is not a nuisance per se, a city has no authority to legislatively declare that activity a nuisance absent express legislative authority to do so.

The court held in the present case, §14-54-103(1) only grants authority to "cause any nuisance to be abated." There is no express authority to determine by ordinance whether something is a nuisance per se beyond the city's boundaries. Thus, the Ordinance's "Finding of Nuisance and Need for Abatement" did not confer on the City the authority to regulate the Quarry under §14-54-103(1). Absent a judicial determination that the Quarry's activities constitute a nuisance, the City has no statutory authority to regulate the Quarry in the guise of abating a nuisance. Accordingly, the Eighth U.S.

Circuit Court of Appeals held the district court did not err in finding that Rogers Group was likely to succeed on the merits of its suit.

The City next argued that the district court erred in granting the preliminary injunction because Rogers Group failed to demonstrate that it would be irreparably harmed if the Ordinance were allowed to go into effect. The City argued that the dump truck regulations are the only provisions of the Ordinance that alter the Quarry's status quo. Because of the severability provision in the Ordinance, the City contended that a preliminary injunction, if any, should be limited to those regulations. The City asserted that any other harm that Rogers Group alleged was "wholly speculative" and cannot justify a preliminary injunction. On this point, the City noted that Matson, Roger's Group's Vice President of Aggregate Operations, acknowledged that the Quarry could continue operating at the same levels under the Ordinance. Matson stated that the Quarry's current operations were "sufficiently profitable," but that the restrictions might hinder future growth.

Here, the district court determined that Rogers Group established a threat of irreparable harm, finding that Rogers Group would suffer a loss of goodwill if forced to operate under the Ordinance's restrictions. While Matson did admit that the Quarry currently operated at a level the Ordinance permitted, he also testified that the Ordinance would prevent the Quarry from expanding. Without the ability to expand its operations, Rogers Group cannot bid on larger projects or accept projects on short notice. The ability to grow and accommodate its customers' demands, Matson testified, is critical to the Quarry's commercial viability. In addition, Matson testified that the dump truck restrictions would drive away customers. He further

stated that even if Rogers Group ultimately prevails in the present action, any customers the Quarry loses—if and when the Ordinance goes into effect—would be unlikely to return once the Ordinance's restrictions are lifted. Based on this evidence, the Court held that the district court did not clearly err in finding that Rogers Group established a threat of irreparable harm.

For those reasons, the Eighth U.S. Circuit Court of Appeals affirmed the preliminary injunction issued by the district court.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on December 27, 2010. The appeal was from the United States District Court for the Western District of Arkansas, the Honorable Jimm Larry Hendren, Chief Judge. The case cite is *Rogers Group v. City of Fayetteville*, No. 09-3915 (8<sup>th</sup> Cir. 12-27-10).

Jeff Harper  
City Attorney

\*\*\*\*\*

**Arkansas Attorney General  
Opinion – Records Related to  
Retirement of City's Recorder-  
Treasurer are Public Record**

On December 6, 2010, the Arkansas Attorney General issued an opinion to Mr. Andy Davis, Arkansas Democrat-Gazette, concerning a request for records under the Arkansas Freedom of Information Act (FOIA). Davis submitted an FOIA request to the City of Quitman for correspondence related to the retirement of the City's Recorder-Treasurer, as well as records relating to her "'retiring'/going off the city payroll and going back on the city payroll."

The City previously denied his request on the basis that "[r]etirement records and records related to retirement are not records subject to disclosure under A.C.A. §25-19-103(5)(A)." Counsel for the City further stated that "[e]ven after having attempted to strip out the protected records, what appears to be remaining in your request are records that directly relate to and are integral to [the Recorder-Treasurer's] retirement. Therefore, you entire request is respectfully denied at this time."

In the opinion, the Attorney General noted that the FOIA provides for the disclosure upon request of certain "public records," which are defined as follows:

'Public records' means 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 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.

The Attorney General opined that, "given that the records at issue are kept by the City of Quitman and the subject matter involves a City official's termination of covered employment for retirement purposes, I believe the records clearly qualify as "public records" under this definition. Accordingly, they can only be withheld if an exception prohibits their disclosure."

In the Attorney General's opinion, the City was incorrect in stating that retirement-related records "are not records subject to

disclosure under A.C.A. §25-19-103(5)(A).” “I find no support for this broad-based denial of access to records that are kept by a municipality and that relate to the retirement of a public officer or employee.” “To the contrary, a blanket denial of access to personnel records is usually contrary to the FOIA. Instead, any exempt information (information the disclosure of which would constitute a “clearly unwarranted invasion of personal privacy”) should be deleted and the remainder of the personnel records made available for inspection and copying.”

In the opinion, the Attorney General noted that to determine whether the release of a personnel record would constitute a “clearly unwarranted invasion of personal privacy,” the court applies a balancing test. The test weighs the public’s interest in accessing the records against the individual’s interest in keeping the records private. The balancing takes place with a thumb on the scale favoring disclosure.

The Attorney General further noted that to aid in conducting the balancing test, the court in *Young v. Rice*, 308 Ark. 593 (1992), elucidated a two-step approach. 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 greater than de minimus privacy interest. If the privacy interest is merely de minimus, then the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than de minimus privacy interest, then the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.

Because all FOIA 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. E.g., *Stilley v. McBride*, 332 Ark. 306, (1998); Op. Att’y Gen. 2009-077. 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. E.g., Op. Att’y Gen. Nos. 2001-112, 2001-022, 94-198.

“The fact that section 25-19-105(b)(10) [now subsection 105(b)(12)] exempts disclosure of personnel records only when a clearly unwarranted personal privacy invasion would result, indicates that certain “warranted” privacy invasions will be tolerated. Because section 25-19-105(b)[12] allows warranted invasions of privacy, it follows that when the public’s interest is substantial, it will usually outweigh any individual privacy interests and disclosure will be favored.

Additionally the Attorney General opined that it is beyond question that city payroll records reflecting basic employment information, including the date(s) of separation from or return to employment, are subject to disclosure under the relevant balancing test. The Attorney General recognized, however, that the balance most often tips in favor of the individual’s privacy interest in the case of records containing intimate financial details, such as payroll deductions. “I do not know whether the requested retirement or payroll-related records contain this type of personal financial information. But the City should be aware of the possible need to redact data of this nature from otherwise releasable personnel records.”

In sum, the Attorney General opined that the FOIA provides an exemption for personnel records, but only to the extent that their disclosure would constitute a “clearly unwarranted invasion of personal privacy.”

Accordingly, it was the Attorney General's opinion that a blanket denial of access to such records – in this instance, personnel records kept by a city relating to the retirement of a public official – is generally inconsistent with the FOIA. Instead, the necessary balancing test must be applied to determine whether certain information must be deleted prior to the records' release.

**Opinion:** This opinion number was 2010-152 and Deputy Attorney General Elisabeth A. Walker prepared the opinion, which was approved by Dustin McDaniel, Attorney General, and released on December 6, 2010.

Jeff Harper  
City Attorney



*The M.A.P.  
is a publication of the  
Springdale City Attorney's Office  
201 Spring Street  
Springdale, AR 72764  
479-750-8173*

