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2010 ISSUE 1

IS DISCLOSURE BY A PUBLIC BODY OF AN EMPLOYEE'S BIRTH DATE A "CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY" UNDER THE OKLAHOMA OPEN RECORDS ACT?

by Staci L. Roberds and Samanthia S. Marshall

On December 8, 2009, the Oklahoma Attorney General issued Revised Opinion No. 09-33, addressing the following questions: (i) whether a record containing the date of birth of an employee of a public body is protected against disclosure as an "unwarranted invasion of personal privacy" under § 24A.7 of the Oklahoma Open Records Act; and (ii) whether a record indicating the date of birth of an employee is protected from disclosure under the federal Driver's Privacy Protection Act or Oklahoma law regarding the disclosure of vital statistics records. The revised opinion replaced the earlier Attorney General Opinion 09-33 issued on November 30, 2009, which is no longer valid. This article examines whether school districts are required by law to release the birth dates of their employees and considers the possible implications of disclosing such information.

Summary of Opinion

The Attorney General Opinion acknowledges that under § 24A.7 of the Oklahoma Open Records Act, a public body *may* keep information in employee records confidential if "disclosure would constitute a clearly unwarranted invasion of personal privacy." The examples given include information in employee evaluations, payroll deductions, employment applications of persons not hired, and transcripts maintained in employee personnel files. The statute specifically provides that if information in personnel records does not fall within these exceptions, it should be made available for public inspection and copying. The only information a public body is *required* to keep confidential is an employee's home address, telephone numbers, and social security numbers of current and former employees.

The Attorney General Opinion notes that an employee's date of birth is not explicitly included or excluded by any of the statute's provisions. It suggests that a public body will need to determine if disclosing such information "would constitute a clearly unwarranted invasion of personal privacy," which requires the public body to balance all the interests involved, *i.e.*, the public's right to access records against the employee's interest in protecting his or her privacy. Although the opinion makes the observation that the birth date is not explicitly made confidential and there is a presumption that records containing such information are open to the public, it leaves the disclosure determination in the discretion of the public body. Thus, the determination of whether to disclose a birth date based on personal privacy concerns must be done on an individual basis,

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as the development of any general policy prohibiting such disclosure would go beyond the authority of the public body and constitute legislative action.

Implications for a school district

The Attorney General Opinion has several implications for school districts and their decisions on whether to disclose records containing an

employee's date of birth. A school district, as a public body, now has a responsibility to release birth dates of its employees unless it makes a specific finding that the re-

lease of the record would constitute a "clearly unwarranted invasion of personal privacy." School districts must also be aware that in the event a court finds that it improperly withheld a birth date of an employee or employees, the school district will be forced to pay the attorney's fees of the challenging party. Furthermore, the Attorney General Opinion implies that the development of a blanket policy regarding the release of a birth date is prohibited and that the decision as to whether to disclose such information

under the presumption in the Oklahoma Open Records Act or to withhold such information pursuant to the "clearly unwarranted invasion of personal privacy" exception must be made on an individualized case-by-case basis. However, the Attorney General Opinion does not provide guidance on what factors to consider in the individualized analysis, and Oklahoma case law, similarly, fails to provide examples of what constitutes a "clearly unwarranted invasion of personal privacy."

Considerations when determining whether to disclose an employee's birth date

In making its case-by-case determination of whether to disclose an employee's birth date, a school district should take into account not only the public's right to access records, but also the potential risks to its employees if the information is disclosed. After balancing all the interests involved, a school district may: (i) disclose the information under the presumption favoring disclosure; (ii) find the information "constitutes a clearly unwarranted invasion of personal privacy" and is confidential and not subject to disclosure; or, (iii) choose to disclose the information but redact any information that could put an employee at risk.

Initially, with respect to an employee's date of birth, there does not seem to be any

reason to disclose it other than the presumption discussed in the Attorney General Opinion. Arguably, the release of one's birth date does not serve the purpose of the Oklahoma Open Records Act because in most, if not all, situations, such information fails to provide any insight into the inner workings of an agency and that agency's fiscal management. See *Trentadue v. Integrity Committee*, 501 F.3d 1215, 1233 (10th Cir. 2007) (In discussing the "unwarranted invasion of personal privacy" exemption of the federal Freedom of Information Act, the Tenth Circuit discussed the balancing test, stating "We must assess the extent to which disclosure would contribute to the 'public understanding of the operations or activities of the government,' not the interests of the requesting party. 'Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose'; however, that purpose 'is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.'" (citations omitted)). Even the Attorney General Opinion seems to suggest that an employee's

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"... unless it makes a specific finding that the release of the record would constitute a 'clearly unwarranted invasion of personal privacy.'"

EMPLOYEE BIRTH DATE DISCLOSURES (CONTINUED FROM PAGE 2)

privacy interests outweigh the public’s right to access records. The Attorney General discusses several attorney general opinions and court cases from other states which have found that an employee’s privacy interest in his or her date of birth outweighs the public’s interest in disclosure. He also discusses federal law pertaining to the Freedom of Information Act and the federal court decisions, noting that disclosure of an employee’s date of birth would

be “a clearly unwarranted invasion of personal privacy.”

Nevertheless, Revised Oklahoma Attorney General Opinion 09-33 requires that a school district release an employee’s birth date unless such disclosure would constitute a “clearly unwarranted invasion of privacy.” The determination must be made on an individualized basis, and the school district should not apply a blanket policy. If you have any questions regarding these issues, please

contact your local school district attorney for further clarification and guidance.



“ . . . unless such disclosure would constitute a ‘clearly unwarranted invasion of privacy.’ ”

RFR HIRES NEW LAWYERS



Samanthia S. Marshall

Marshall was recently selected to be a member of Leadership Tulsa Class 43.

Rosenstein, Fist & Ringold is pleased to announce that **Samanthia Sierakowski Marshall** has joined the firm as an associate attorney. Ms. Marshall was admitted to the Oklahoma bar in 2009. Her undergraduate degree is from the University of Southern California (B.A., *cum laude*, Annenberg Departmental Honors, 2001), and her law degree is from the University of Tulsa (J.D., with highest honor, 2009). While in law school, Ms. Marshall was Editor-in-Chief of the *Tulsa Law Review*, selected for Order of the Curule Chair and received the Martin Fellow Smith Award for the Most Outstanding Student and the ALI-ABA Scholarship & Leadership Award. Ms.



Staci L. Roberds

In addition, **Rosenstein, Fist & Ringold** is pleased to announce that **Staci L. Roberds** has joined the firm as an of counsel attorney. Ms. Roberds was admitted to the Oklahoma bar in 2001. Her undergraduate degree is from the University of Tulsa (B.S., with honors, 1997), and her law

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degree is from the University of Tulsa College of Law (J.D./M.A., with honors, 2000). While in law school, Ms. Roberds served on the Energy Law Journal as a Notes & Comments Editor and the student Editor-in-Chief of the ABA Year in Review. Her article, "Nontraditional Takings and the Coal Act," was published in the Spring 1999 issue of the Energy Law Journal. Prior to joining the firm, Ms. Roberds served as a pro se law clerk (2001-2003) and as a career law clerk (2003-2009) to United States Magistrate Judge Steven P. Shreder in the Eastern District of Oklahoma.

RFR SPEAKER SHOWCASE

John Moyer, Bryan Drummond, Eric Wade and Matt Ballard will present a school law workshop on January 27 at the Northeast Technology Center campus in Claremore. Topics covered will include: Mid-year and Year End Reductions in Force; Documentation and Adverse Employment Action for Cause; Sexual Harassment and Student Issues. Registration is \$25.00 for the first registrant from a school district. All additional registrants from that school district will be admitted at no charge. Contact Rosenstein, Fist & Ringold for registration information.

Andrea Kunkel will speak at the Oklahoma Federation of the Council for Exceptional Children on February 3 at the Reed Center in Midwest City. She will discuss proposed state legislation affecting special education and proposed changes to the State Department of Education's policies and procedures for special education, including proposals addressing the use of restraint and seclusion for students with disabilities.

Andrea Kunkel will also make a presentation about students with disabilities under the Individuals with Disabilities Act at the OSSBA School Law and Leadership Institute on February 13 at the Renaissance Hotel in Tulsa.

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Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.