

Opinion No. 2008-096

May 28, 2008

Mr. James M. Llewellyn, Jr.
Thompson and Llewellyn, P.A.
412 South 18th Street
Post Office Box 818
Fort Smith, Arkansas 71902-0818

Dear Mr. Llewellyn:

I am writing in response to your request, made pursuant to A.C.A. § 25-19-105(c)(3)(B), for an opinion on whether the custodian of records at the Booneville School District has correctly determined to release certain documents with redactions in response to a request under the Arkansas Freedom of Information Act (“FOIA”), codified at A.C.A. §§ 25-19-101—109 (Repl. 2002) and (Supp. 2007). The persons making the FOIA request seek access to all information that led to the termination of a particular District employee, including any investigation documents, as well as a copy of the employee’s contract. One of the requesters also wants to review cell phone and text message records; and this requester asks to know the reasons why the contract was not paid in full, and specifically how it was breached. You have submitted copies of the records with and without redactions, and you state as follows regarding the custodian’s decision with respect to the FOIA requests:

The initial determination by the custodian of the records is that some of the enclosed records are releasable provided the names of all individuals other than the [employee] terminated by the Board are redacted. This redaction would be made pursuant to A.C.A. § 25-19-105(b)(12). The custodian has determined that the cell phone is not releasable because the cell phone was not available and not part of the documentation before the Board when it made its [termination] decision. The cell phone was later delivered to the District by the [terminated individual] with the SIM card removed

and not produced. It has been reported that the cell phone without the SIM card would contain no information.

The custodian has also determined that the letter from the District's Counsel to the President of the School Board, the topics attachment and the summary of the interviews conducted by Mr. Cromwell^[1] are not releasable for the reason that the information contained therein is contained in the original interview records and does not appear to be described in Ms. Sherrill's request.

The information redacted consisted of name; date of birth; Social Security Number; position at Booneville School District; years at Booneville School District; if son or daughter is mentioned; telephone number; cell phone number; and, make of interviewee's car.

You state further that there is no document listing or otherwise identifying the reasons the individual's contract was not paid in full or how the contract allegedly was breached, other than the interview records.

RESPONSE

I must initially note that I am unable to opine regarding your identification of records in response to the FOIA requests, as that is a matter uniquely within your purview. *See* Op. Att'y Gen. Nos. 2008-044 and 2006-158 (noting that the Attorney General's duty under A.C.A. § 25-19-105(c)(3)(B) arises after the records have been located and is limited to reviewing the custodian's decision as to "whether the records are exempt from disclosure.") *Id.* I nevertheless feel constrained to note with regard, specifically, to the letter from the District's counsel, the "topics" document, and the interview summaries that access to these records may not properly be denied based solely on the fact that the information therein is contained in other records. The FOIA specifically authorizes requests for public records "in *any medium* in which the record[s] [are] readily available." *Id.* at (d)(2)(B) (Supp. 2007) (emphasis added). "Medium" is defined as "the

¹ One of the records at issue explains that the District's legal counsel obtained the services of William M. Cromwell to interview persons alleged to have knowledge of the events surrounding possible improper conduct by the District employee who was ultimately terminated and another District employee.

physical form or material on which records and information may be stored or represented....” A.C.A. § 25-19-103(3) (Supp. 2007). Accordingly, the listed records must be provided if they are nonexempt public records that are responsive to the request, regardless of whether their substance is reflected in other records.²

As a further preliminary matter, regarding the letter dated September 24, 2007, and directed “To Whom it Concerns,” I must question whether this is a “personnel or evaluation record” for purposes of my statutory duty to issue an opinion under A.C.A. § 25-19-105(c)(3)(B). As I recently had occasion to note, “not all records authored by public employees are properly classified as “personnel records” for purposes of ... A.C.A. § 25-19-105(c)(3)(B).” See Op. Att’y Gen. 2008-095 (noting that my duty under subsection 25-19-105(c)(3)(B) “appears restricted to opining as to whether the custodian’s decision as to the *exemption* of records is consistent with the FOIA[,]” emphasis added, and that this subsection “presumes that the records are “personnel or evaluation records”....”) It is not clear from the face of the September 24 correspondence that it is a “personnel or evaluation record.” In the absence of facts indicating that it is such a record for purposes of my statutory mandate, I must decline to address the custodian’s decision in this respect. It is also possible that the primary issue concerning this record is whether it comes within the threshold requirement of being a “public record” under the FOIA. That issue similarly is not within my statutory power of review under A.C.A. § 25-19-105(c)(3)(B). See *again* Op. 2008-095.

² It must also be recognized that an agency or an official can be a “custodian” of public records under the FOIA even when the agency or official is not in actual physical possession of the records. See *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995) (requiring the Arkansas Development Finance Authority (“ADFA”), to obtain copies of audit worksheets from a private accountant under contract with ADFA in order to satisfy a citizen FOIA request, even though ADFA was not in actual possession of the public records.) See also *Fox v. Perroni*, 358 Ark. 251, 263, 188 S.W.3d 881 (2004) (holding that a circuit judge had administrative control over, and thus was the “custodian” of a check written by his law clerk, with the consequent responsibility to provide either a copy of the check or reasonable access to it.) I am uncertain to what extent this principle might bear on the particular FOIA requests at hand, but I feel constrained to at least mention it in light of the custodian’s apparent determination that the requested cell phone records are not releasable in part because the SIM card was removed before the phone was returned to the District. One of the requesters has specifically sought access to the cell phone records, and the custodian’s response to that request is likely inadequate if he or she has administrative control over those records. This is a factual question falling outside the scope of this opinion.

Bearing in mind these preliminary matters, I have concluded that your decision to release the records of the interviews conducted by Mr. Cromwell, as redacted, is generally consistent with the FOIA, with one exception involving the record of the interview of the employee under investigation as to whom there has been no suspension or termination decision. In my opinion, information in this record pertaining uniquely to the employee who has not been disciplined should be further redacted. This also assumes, as explained further below, that the un-redacted information in the interview records in fact formed a basis for the termination decision, and that the termination is final. If any of the information in these records did not form a basis for the termination, such information should be redacted from the records before they are released. These observations pertain equally to the letter from the District's counsel, the "topics" document, and the interview summaries, if it is determined, as noted above, that these records are responsive to the FOIA request. In my opinion, the requested employment contract clearly must be released. With regard to the text messages record, the voice mail messages, and the e-mail records, the custodian in my opinion has also properly determined that the voice mails and e-mails are releasable, as redacted. But in my opinion the text messages transcript is likely exempt from disclosure.

DISCUSSION:

The FOIA provides for the disclosure upon request of certain "public records," which the Arkansas Code defines 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.

A.C.A. § 25-19-103(5)(A) (Supp. 2007).

Given that the interview records, the letter from the District's counsel, the "topics" document, and the interview summaries (referred to hereinafter as "investigation records") were all prepared for the District at its request and pertain to District employees, I believe they clearly qualify as "public records" under this definition. *Cf.* Op. Att'y Gen. 2005-164 (applying the FOIA to an investigative report prepared by a private law firm concerning allegations made against a city's chief of police, citing *Edmark v. City of Fayetteville*, 304 Ark. 179, 801 S.W.2d 275 (1990)). The employment contract similarly clearly falls within this "public records" definition. With regard to the remaining records, consisting of text messages, voice mail messages, and e-mails, I have no reason to question the custodian's apparent determination that they qualify as public records. Accordingly, as with the investigation records and the contract, my review under subsection 25-19-105(c)(3)(B) turns to whether the custodian's decision to release these records, as redacted, is consistent with the FOIA.

As one of my predecessors noted regarding the above definition of "public records":

If records fit within the definition of "public records" . . . , they are open to public inspection and copying under the FOIA except to the extent they are covered by a specific exemption in that Act or some other pertinent law.

Op. Att'y Gen. No. 99-305.

In my opinion, the pertinent exemptions are the ones for "employee evaluation or job performance records" and "personnel records." A.C.A. § 25-19-105(c)(1) and (b)(12) (Supp. 2007). Although the FOIA does not define the term "personnel records," as used therein, this office has consistently taken the position that "personnel records" are any records other than employee evaluation/job performance records that relate to the individual employee. In addition, the FOIA does not define the term "employee evaluation or job performance record," as used therein. Nor has the phrase been construed judicially. This office has consistently taken the position that any records that were created at the behest of the employer and that detail the performance or lack of performance of the employee in question with regard to a specific incident or incidents are properly classified as employee evaluation or job performance records. *See, e.g.*, Op. Att'y Gen. 2008-044 (and opinions cited therein.) This includes records that were

generated as part of an investigation of allegations of the misconduct of an employee, including sexual misconduct, and that detail incidents that gave rise to an allegation of misconduct. *See again* Op. 2008-044. Ancillary documentation may also be included. For example, the term “job performance record” has been interpreted by this office to include incident reports, supervisors’ memos, and transcripts of investigations, including witness statements. *See, e.g.*, Op. Att’y Gen. 2002-095 (and opinions cited therein).

It is important to identify the correct classification of each record, because the FOIA sets forth different tests to govern the releasability of the two types of records. “Personnel records” are generally open to inspection and copying by the public, except to the extent that their release would constitute a “clearly unwarranted invasion of personal privacy,” A.C.A. § 25-19-105(b)(12), whereas “employee evaluation or job performance records” are releasable only if the following three conditions are met: (1) there has been a final administrative resolution of any suspension or termination proceeding; (2) the records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee; and (3) there is a compelling public interest in the disclosure of the records. *Id.* at (c)(1).

Employment Contract

In my opinion, the contract of the terminated employee plainly is a non-exempt “public record” that is available for public inspection and copying under the FOIA. *See* Op. Att’y Gen. Nos. 2005-120 and 92-145.

Investigation Records

It seems clear based upon the circumstances surrounding their creation that the investigation records constitute “employee evaluation or job performance records.” They document an investigation that was initiated at the behest of the District, through the District’s counsel, for the purpose of evaluating alleged employee misconduct with regard to a particular incident or incidents. With regard, specifically, to the investigation records as they pertain to the employee who was terminated, it appears that the first two conditions are met, assuming that the termination is final and that the records in fact formed a basis for the termination decision. *See generally* Op. Att’y Gen. Nos. 2003-091; 98-210; 97-415 (noting that information contained in investigation records that did not form a

basis for a suspension or termination should be deleted from the records prior to their release.) In my opinion, the third condition is likely met as well. Although the FOIA at no point defines the phrase “compelling public interest,” two leading commentators on the FOIA, referring to this office’s opinions on the issue, have offered the following guidelines:

[I]t seems that the following factors should be considered in determining whether a compelling public interest is present: (1) the nature of the infraction that led to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved; (2) the existence of a public controversy related to the agency and its employees; and (3) the employee’s position within the agency. In short, a general interest in the performance of public employees should not be considered compelling, for that concern is, at least theoretically, always present. However, a link between a given public controversy, an agency associated with the controversy in a specific way, and an employee within the agency who commits a serious breach of public trust should be sufficient to satisfy the “compelling public interest” requirement.

Watkins & Peltz, *The Arkansas Freedom of Information Act*, (4th ed. m&m Press, 2004) at 207(footnotes omitted).

This office has consistently opined that the public does have a compelling interest in the release of job performance records relating to sexual misconduct. *See, e.g.*, Op. Att’y Gen. Nos. 2002-005 (sexual misconduct by sheriff’s deputies involving female prisoners); 94-119 (allegations of sexual misconduct of university president which resulted in termination give rise to a compelling public interest); 93-356 (allegations of sexual misconduct of school principal which resulted in termination give rise to a compelling public interest); 89-073 (allegations of sexual misconduct of police officers which resulted in suspension give rise to a compelling public interest). Additionally, it has been previously concluded in an analogous context that the balance tips in favor of disclosure where the allegations involve sexual misconduct by a manager directed toward a worker. Op. Att’y Gen. 91-003. In this regard, I note that the employee who was terminated held a high-ranking supervisory position and that the misconduct involved an employee who was subject to this individual’s supervisory authority. I believe it is further

relevant to note the records' reflection of a decrease in staff morale and quality of working conditions as a consequence of the allegations. In my opinion, the public's interest in knowing the details of this reported conduct by a highly placed public official is quite compelling. The public in my opinion has a strong interest in knowing both the substance of such allegations and the nature of the District's response.

In my opinion, therefore, the test for releasing the investigation records, which constitute job performance records of the superior officer, is met.

The matter is somewhat complicated, however, by the fact that the records appear to also be the "job performance" records of another employee who was the subject of the investigation and who is named in the records. It must be recognized, however, that the test has not been met with respect to the job performance records as they pertain to that other employee because it appears that there was no suspension or termination as to this employee. As explained above, suspension or termination is a threshold requirement for the release of records under subsection 25-19-105(c)(1). Because the investigation records likely constitute job performance records of the other employee involved in the incident(s), the release of the records as this person who was not disciplined would appear to be contrary to A.C.A. § 25-19-105(c)(1).

When faced with a similar question concerning records that could be viewed as the job performance records of both an employee whose suspension was not final and another employee as to whom all conditions for release of the records were met, one of my predecessors opined as follows:

It is my opinion under these circumstances that the records must, nevertheless, be released *after deleting information pertaining uniquely to the employee as to whom there has been no final suspension decision*. With this deletion, the records may be fairly characterized as the job performance records of only that employee whose suspension is final. While the records could conceivably be linked to the other employee, depending upon the availability of information necessary to make that connection, I do not believe this justifies withholding the records. . . . I believe the policy considerations require release of the job performance records following deletion of the name of the employee whose suspension is

not final and any other information relating solely to that employee. Surely, the legislature did not intend under § 25-19-105(c)(1) to protect records that are relevant to job performance deficient enough to warrant suspension simply because the records also contain information pertaining to another employee whose suspension is not final. . . .

Op. Att’y Gen. 97-400 at 3 (emphasis added).

I agree that this is the proper means of reconciling the nondisclosure and disclosure requirements with respect to the job performance records at issue. The custodian must therefore further redact from the investigation records that information that relates solely to the other subject of the investigation who was neither suspended nor terminated.

Another matter to be addressed involves the fact that the investigation records mention employees or citizens who apparently were not targets of the investigation. As to such other employees, I believe the records naming the employees constitute their “personnel records,” or in some cases possibly their job performance records because of the job actions that are recounted. *Cf.* Op. Att’y Gen. 2008-049 (observing that records mentioning employees other than those under investigation may be such other employees’ “personnel records,” and further noting that although an employee mentioned in connection with the particular incident apparently was not the subject of any inquiry or investigation, some of the records described and detailed the actions of this employee on the job such that they might constitute his evaluation or job performance records.) *See also* Op. Att’y Gen. 94-391 (observing that information concerning an employee’s job performance might be related in detail such that the record must be deemed an “employee evaluation or job performance record,” for otherwise the entire purpose of the exemption would be thwarted.)

In my opinion, consistent with Op. 2008-049, the names of those employees whose job actions are detailed are properly redacted from the investigation records pursuant to A.C.A. § 25-19-105(c)(1), given the absence of any suspension or termination decision with respect to such employees. Regarding other named employees whose job actions are not detailed, it is necessary to determine whether release of the records would constitute a “clearly unwarranted invasion of personal privacy,” *id.* at (b)(12), such that their names must be redacted. *See, e.g.,* Op.

Att’y Gen. 2002-055. Although the FOIA does not define this phrase, the Arkansas Supreme Court has construed it and has adopted a balancing test to determine if it applies, weighing the interest of the public in accessing the records against the individual’s interest in keeping the records private. *See Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992). If the public’s interest outweighs the individual’s interest, the custodian must disclose the personnel records. As the court noted in *Young*:

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. Thus, section 25-19-105(b)[12] requires that the public’s right to knowledge of the records be weighed against an individual’s right to privacy. . . . 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.

308 Ark. at 598.

As the court noted in *Stilley v. McBride*, 332 Ark. 306, 312, 965 S.W.2d 125 (1998), however, when there is “little relevant public interest” in disclosure, “it is sufficient under the circumstances to observe that the employees’ privacy interest in nondisclosure is not insubstantial.” Given that exemptions from disclosure must be narrowly construed, it is the burden of an individual resisting disclosure to establish that his “privacy interests outweighed that of the public’s under the circumstances presented.” *Id.* at 313.

Applying this balancing test, and recognizing that the investigation records meet the test for the release of job performance records under A.C.A. § 25-19-105(c)(1) as to the terminated employee, I believe the custodian has properly decided that the names and other identifying information of both the interviewed employees and the other employees who were the subjects of remarks in the interviews should be redacted to avoid a clearly unwarranted invasion of privacy as to those individuals. At least one of my predecessors and I have reached a similar conclusion under comparable scenarios. *See* Op. Att’y Gen. 2007-206, citing Op. Att’y Gen. Nos. 2002-237 (investigative report, which was the employee

evaluation or job performance record of employee being investigated and personnel record of other employees mentioned therein, should be redacted to remove private personal information of other employees that would give rise to a clearly unwarranted invasion of personal privacy), and 2002-055 (investigative records pertaining to one employee and referencing other employees, constituted the personnel records of other employees and the other employees' names should be redacted where release would constitute a clearly unwarranted invasion of personal privacy).

As a final matter regarding the investigation records, it appears that the records also mention citizens who are not, and were not at the relevant time, employees of the District. The custodian proposes to delete these names, presumably on constitutional grounds. I recently noted in Op. Att'y Gen. 2008-049 with regard to the names of non-employee citizens appearing in employee evaluation or job performance records that such citizens could possibly have a constitutional privacy interest in such reference. I cited *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989), wherein the Arkansas Supreme Court has recognized that the constitutional right of privacy can supersede the specific disclosure requirements of the FOIA, at least with regard to the release of documents containing constitutionally protectable information. This evaluation is similar to the balancing test that is applied to personnel records. See Op. Att'y Gen. 2005-032. See also *The Arkansas Freedom of Information Act*, *supra* at 243-244.

The question of whether information is protectable under the constitutional right of privacy is one of fact that must be determined in the first instance by the custodian of the records, on the basis of the facts of the case. Although I am not well-situated to definitively opine on this factual determination, I believe the privacy interest in nondisclosure of the non-employee names likely outweighs any governmental interest in disclosure under the particular circumstances surrounding these investigative records. See generally *McCambridge*, 298 Ark. at 230, 231 and Op. Att'y Gen. 93-356 (concluding, in an analogous context, that an individual's name should be excised prior to the release of a job performance record that contained information constituting a "personal matter" under the *McCambridge* test).

Text Messages, Voice Mail Messages, and E-mail Records

In my opinion, the custodian's decision to release the voice mail and e-mail records with the noted redactions is consistent with the FOIA. With regard to the e-mail records, I am somewhat uncertain whether these records were created at the behest of the investigator in the course of the investigation, such that they constitute job performance records. *See, e.g.,* Op. Att'y Gen. 2008-078 (and opinions cited therein). If they were not so created, then they must be evaluated under the test for "personnel records." In either case, however, I believe the custodian has properly determined that the records are releasable, with the redactions, for the reasons discussed above with respect to the investigation records.

Regarding the voice mail messages, these records in my opinion are releasable as redacted under the test for the release of "personnel records," discussed above.

Finally, as to the transcript of text messages, I believe it is a little unclear whether this record constitutes a "personnel record" under the FOIA, although I note that the contents do reflect some semblance of a work-related context. Assuming that it is a "personnel record," then in my opinion the custodian's decision to release the record is probably inconsistent with the FOIA. The information clearly is of a personal or intimate nature so as to implicate a substantial individual privacy interest. This is the first step in the balancing process applicable to personnel records. *See Young v. Rice, supra.* The public's interest in the release of this record must therefore be gauged. The Arkansas Supreme Court has indicated that the public interest is measured by "the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Stilley v. McBride, supra*, 332 Ark. at 312, citing *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994)). If the public interest in this regard is substantial, it will usually outweigh any privacy interest. *Young v. Rice, supra.* If there is "little relevant public interest," a "not insubstantial" privacy interest is necessary to shield the records. *Stilley, supra.*

While I cannot say that there is little relevant public interest in this record, nor can I conclude, based on the test identified in *Stilley*, that there is a substantial public interest in the contents of this record. I recognize that the individual bears the burden to establish that the privacy interest outweighs that of the public's under

the particular circumstances presented. On balance, however, weighing these interests, and assuming that the record is a “personnel record,” it is my conclusion that the privacy interest in this instance probably rises to a level sufficient to overcome the public’s interest in the release of this particular record. I will also note that regardless of its status as a “personnel record,” this record may well be exempt from disclosure in any event under the constitutional right to privacy. *See McCambridge, supra.*

Assistant Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:EAW/cyh