

Opinion No. 2009-210

December 28, 2009

Ms. Janie Ginocchio, Editor
Paragould Daily Press
1401 W. Hunt St.
Paragould, Arkansas 72450

Dear Ms. Ginocchio:

I am writing in response to your request, made pursuant to A.C.A. § 25-19-105(c)(3)(B)(i), which is contained within the Arkansas Freedom of Information Act (the “FOIA”), A.C.A. §§ 25-19-101 – 109 (Repl. 2002 and Supp. 2009), for my opinion regarding the Greene County Tech School District's provisional decision to withhold from disclosure to the Paragould Daily Press the employee evaluation/job performance records that reportedly formed a basis for the suspension of several assistant football coaches employed by the district.

RESPONSE

Although I have not been provided the records at issue, I can and will discuss below the legal standards the custodian should apply in determining precisely what records are subject to disclosure and what information contained in those records might be subject to redaction.

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 that constitute a record of the performance or lack of performance of official functions that 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. 2009).

Because the subjects of your request are employees of a public school district, I believe the requested documents are clearly “public records” under the definition set forth above. However, the FOIA provides for certain exemptions from disclosure, the most pertinent being that set forth at A.C.A. § 25-19-105(c)(1) (Supp. 2009), which exempts from disclosure under specified circumstances employee evaluations and job performance records. “Employee evaluation or job performance records” are releasable only if certain conditions have been met. Subsection 25-19-105(c)(1) of the Code provides in pertinent part:

[A]ll employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.

The FOIA does not define the term “employee evaluation or job performance records” as used in A.C.A. § 25-19-105(c), nor has the phrase been construed judicially. This office has consistently taken the position that any records that were created by or 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.,* Ark. Ops. Att’y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-111; 2006-038; 2006-035; 2005-030; 2004-211; 2003-073; 98-006; 97-222; 95-351; 94-306; 93-055. The record must also have been created for the purpose of evaluating an employee. *See, e.g.,* Ark. Op. Att’y Gen. No. 2008-004; 2006-038; 2004-012. The exemption promotes candor in a supervisor’s evaluation of an employee’s performance with a view toward correcting any deficiencies. *See J. Watkins & R. Peltz, The Arkansas Freedom of Information Act* (m&m Press, 4th ed. 2004), at 196.

The FOIA at no point defines the phrase “compelling public interest” as used in the final prong of the test for disclosure set forth in A.C.A. § 25-19-105(c)(1). However, two leading commentators on the FOIA, referring to this office's opinions on this 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, *supra* at 207 (footnotes omitted). Professors Watkins and Peltz also note that “the status of the employee” or “his rank within the bureaucratic hierarchy” may be relevant in determining whether a “compelling public interest” exists. *Id.* at 206 (noting that “[a]s a practical matter, such an interest is more likely to be present when a high-level employee is involved than when the [records] of ‘rank-and-file’ workers are at issue.”) The existence of a “compelling public interest” in disclosure will necessarily depend upon all of the surrounding facts and circumstances.

Applying the above standards, I must note initially that you have not informed me whether there has been a final administrative resolution of the reported suspensions. If there has not, the school district was warranted under the above standard in withholding the records from disclosure. If an administrative resolution of the suspensions is no longer available, the records should be disclosed if they were created by or at the behest of the school district and if a compelling public interest exists in their production. The custodian of records will be charged with making this determination.

With respect to the question of whether a compelling public interest exists in the disclosure of a coach's employee evaluation/job performance records, this office has repeatedly opined that the public has a particularly heightened interest in records reflecting the conduct of public school teachers during school hours, during school events, and especially when students are affected by that conduct. *See, e.g.*, Ops. Att'y Gen. Nos. 2009-095; 2002-320; 2002-158; 2001-142; 2001-144; 2001-148; 2001-153; 2001-151; 2001-150. In Opinion No. 2001-148, this office specifically articulated this principle with respect to records relating to the conduct of a high school coach.

Not being in possession of the records, I cannot determine whether the documents at issue have been generated by or at the behest of the employer specifically in the course of investigating a complaint. Some such records, such as those that merely contain administrative information about an employee, might properly be characterized as personnel records, as distinct from employee evaluation/job performance records.

Under the FOIA, "personnel records" are open to public inspection and copying except "to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy." A.C.A. § 25-19-105(b)(12) (Supp. 2007). The FOIA does not define the term "personnel records." Whether a particular record constitutes a "personnel record" within the meaning of the FOIA is, of course, a question of fact that can only be determined upon a review of the record itself. However, the Attorney General has consistently taken the position that "personnel records" are all records other than employee evaluation and job performance records that pertain to individual employees, former employees, or job applicants. *See, e.g.*, Op. Att'y Gen. No. 1999-147, *citing* Watkins, THE ARKANSAS FREEDOM OF INFORMATION ACT (m & m Press, 3rd ed., 1998), at 134.

The FOIA likewise does not define the phrase "clearly unwarranted invasion of personal privacy." However, the Arkansas Supreme Court has construed the phrase. In determining which disclosures constitute a "clearly unwarranted invasion of personal privacy," the court applies a balancing test, 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 release of the records will not constitute a "clearly unwarranted invasion of personal privacy." If there is little public interest in the information, the privacy interest

will prevail if it is not insubstantial. *Stilley v. McBride*, 332 Ark. 306, 965 S.W.2d 125 (1998). 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)(10) 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)(10) 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. However, as the court noted in *Stilley v. McBride*, 332 Ark. 306, 312, 965 S.W.2d 125 (1998), when “there is little relevant public interest” in disclosure, “it is sufficient under the circumstances to observe that the employee’s 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. The fact that the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is not relevant to the analysis. *See* Ark. Ops. Att’y Gen. Nos. 2001-112; 2001-022; 94-198; 94-178; and 93-055; *Watkins & Peltz, supra* at 126. The test is an objective one. *See, e.g.,* Ark. Op. Att’y Gen. 96-133. The question of whether the release of any particular personnel record would constitute a clearly unwarranted invasion of personal privacy is always a question of fact to be made by the custodian of records. Ops. Att’y Gen. 2008-025; 2004-260; 2003-336; 2003-201; 2001-101; 98-001.

With respect to the issue of how various records should be classified, unsolicited third-party complaints against an employee, which might be contained in a file to reflect a pattern of possible misconduct, are not considered employee evaluation/job performance records, although they do qualify as “personnel records” subject to review under the standard stated above. *See* Ark. Op. Att’y Gen. No. 2007-206. With regard to any other records relating to the suspensions at issue, I should note that a letter of suspension or dismissal may or may not qualify as an “employee evaluation/job performance record” subject to the standard of review set forth above. This office has consistently opined that a letter

of suspension or termination that details the reasons for the disciplinary action is an employee evaluation or job performance record for purposes of the FOIA. *See, e.g.,* Ark. Ops. Att’y Gen. Nos. 2006-026 and 95-171 (relying on Ark. Ops. Att’y Gen. Nos. 92-191 and 88-97). However, if correspondence merely announces the fact of the suspension or termination, the custodian should determine its disclosability under the FOIA using the standard for the disclosure of personnel records.

The custodian should further be aware that any party who is identifiable from any of the requested records may have a constitutionally protected privacy interest in those records. 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. *See McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). The *McCambridge* court held that a constitutional privacy interest applies to matters that: (1) an individual wants to and has kept confidential; (2) can be kept confidential but for the challenged governmental action in disclosing the information; and (3) would be harmful or embarrassing to a reasonable person if disclosed.

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. If the custodian of the records determines factually that the records contain constitutionally protectable information (i.e., information that meets the three prongs of the test laid out by the *McCambridge* court), the custodian must then consider whether the governmental interest in disclosure under the Act (i.e., the public's legitimate interest in the matter) outweighs the privacy interest in their nondisclosure. As always, the person claiming the right will have the burden of establishing it. *Accord*, Ark. Ops. Att’y Gen. Nos. 2007-001; 2006-141 and 2001-122.

In addition to the exemptions discussed above, various types of information are subject to possible redaction prior to disclosure of a record. Among these are medical records, A.C.A. § 25-19-105(b)(2); portions of records listing the home addresses of nonelected municipal employees, A.C.A. § 25-19-105(b)(12); portions of records revealing social security numbers, 5 U.S.C. § 552a (the Federal Privacy Act); and portions of records disclosing driver's license numbers, 18 U.S.C. § 2721 (the Driver's License Privacy Protection Act). *See* Ark. Ops. Att’y

Ms. Janie Ginocchio, Editor
Paragould Daily Press
Opinion No. 2009-210
Page 7

Gen. Nos. 2008-046; 2006-035; 2003-153; 93-300; and 91-003. The custodian will need to determine which, if any, of these exemptions apply.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh