

Opinion No. 2012-024

February 24, 2012

George Butler, Jr.
Washington County Attorney
280 North College, Suite 501
Fayetteville, AR 72701

Dear Mr. Butler:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). Your request, which is made as the custodian’s attorney, is based on A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011), which authorizes the custodian, requester, or the subject of personnel or employee evaluation records to seek an opinion from this office stating whether the custodian’s decision regarding the release of such records is consistent with the FOIA.

I addressed this same request a few days ago in Opinion No. 2012-019, which I have enclosed for ease of reference. In that opinion, I explained that I could not perform my statutory duty to evaluate the custodian’s decision because neither the custodian nor you, as the custodian’s attorney, made a decision for me to review. So I simply explained the relevant law that the custodian must apply and presented a step-by-step series of questions that the custodian must answer when thinking about whether the FOIA requires the release of the seven documents you asked about. I explained that six of the seven documents are clearly employee evaluation documents and one is clearly a personnel record. I then encouraged the custodian to apply the relevant test for the disclosure of each kind of record.

Having made the factual determinations you think the earlier opinion called for, you again ask whether the custodian’s decision is consistent with the FOIA. You also ask whether, over the former employee’s objection, the custodian is correct to release the resignation letter, which you now correctly characterize as a personnel record, without any redactions.

RESPONSE

Again I am not able to fully perform my statutory duty because neither you nor the custodian has made a factual determination about, what the earlier opinion called, the “first question the custodian should be asking.” With respect to the resignation letter, the custodian’s decision to release the record in full is consistent with the FOIA, in my opinion.

DISCUSSION

In your first opinion request, you attached seven documents that you characterized as employee evaluation records. I concurred with that except as it applied to one record: the handwritten (apparent) resignation letter, which is a personnel record. I then noted that the custodian must apply the correct test for the release of such records. Under that test, the records must be disclosed unless doing so “constitutes a clearly unwarranted invasion of personal privacy.” You report that, having applied that test, the custodian now believes the record should be released with no redactions. But the former employee who wrote that document thinks that the foregoing test requires that certain, unspecified parts of the letter should be redacted before release. You ask whether the custodian’s decision is consistent with the FOIA.

In my opinion, the custodian’s decision to release the personnel record without any redactions is consistent with the FOIA. As explained in the earlier opinion, and the opinions it cites, to determine whether the release of a personnel record would count as a “clearly unwarranted invasion of personal privacy,” one must weigh the employee’s privacy interest in the matter against the public’s interest. I refer you to Opinion No. 2011-045, which was cited in the earlier opinion, for more detail on this balancing test. Suffice it to say, in my opinion, that the balancing test, when applied in this specific case, indicates that the public’s interest in the unredacted resignation letter outweighs the former employee’s privacy interest in the reasons he gave for his resignation. Accordingly, the custodian has correctly decided to release this document without any redactions.

Turning to the remaining six documents, the custodian has correctly categorized them as employee evaluation records. Accordingly, as I explained in the earlier opinion, the records cannot be released unless each of the following four prongs are met:

1. The employee was suspended or terminated (i.e., level of discipline);
2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., relevance);
and
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).¹

In the earlier opinion, I went on to explain that you seemed concerned only about whether the first element was met; that is, you seemed to wonder whether there was in fact a suspension or termination for which the remaining six documents could have formed a basis. But, noting that the records clearly reflect that the employee was suspended on December 9, I expressed my surprise about your concern.

In response, you say “please note that the suspension of the employee was a suspension pending an investigation.” This acknowledges that there was, in fact, a suspension, which means that the first prong is met. The fact that the suspension was “pending an investigation” is only relevant to whether the suspension was final, which goes to the second prong. And the suspension clearly is final because, four days later, the employee resigned. You have not indicated (and I doubt) that there are any proceedings still ongoing that might overturn this now three-month old suspension. Therefore, in this case, in the absence of such proceedings, the fact that the suspension was “pending an investigation” is irrelevant to any of the four prongs.

Given that the suspension occurred and that, in this case, it seems to be final, the custodian should have gone on to answer, what the earlier opinion referred to as, the “first question the custodian should be asking.” That question is **whether, under prong three above, the six remaining documents formed a basis for the suspension.** You failed to address this threshold question in your first request, and you have still failed to do so in this request. This failure makes it difficult for me

¹ A.C.A. § 25-19-105(c)(1) (Supp. 2011); Op. Att’y Gen. 2008-065.

to perform my statutory duty with respect to these documents. But, I will note, these documents (all except the December 20 statement), at least on their face, do seem to have formed a basis for the suspension.² The custodian must ultimately make this determination.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh

Enclosures

² If the records did not form a basis for the suspension, only then does the nature of the former employee's termination become relevant. If the person was, in fact, terminated, and if the records did form the basis for that termination, then the records would need to be released. Again, the custodian has to make those determinations.