

Opinion No. 2012-041

March 27, 2012

Mr. George R. Spence  
Benton County Attorney  
121 South Main Street  
Bentonville, Arkansas 72712

Dear Mr. Spence:

I am writing in response to your request for my opinion regarding the application of the Arkansas Freedom of Information Act (the “FOIA”).<sup>1</sup> The FOIA authorizes the custodian, requester, or the subject of personnel or employee evaluation records to seek an opinion from this office determining the legal propriety of the custodian’s provisional decision regarding the release of requested records.<sup>2</sup>

You report that an employee of the Benton County Road Department was recently terminated. You indicate that the employee was a supervisor and that the reason for his dismissal “was the misuse of county property.” The employee has reportedly failed to appeal his termination, and no avenue of administrative remedy remains open for him to pursue. A newspaper has requested a copy of the letter informing the former employee of his termination. The former employee has opposed such disclosure. You have reviewed the letter and report having provisionally determined that it is a job performance or evaluation record subject to release. You have attached to your request a copy of the letter for my review.

---

<sup>1</sup> A.C.A. §§ 25-19-101 – 109 (Repl. 2002 and Supp. 2011).

<sup>2</sup> A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011).

## **RESPONSE**

Based upon the above recited background facts and my review of the letter, I agree in all respects with your provisional conclusions and consider the letter subject to disclosure.

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 or improvement district that is 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.<sup>3</sup>

Because the subject of your request is a former county employee, 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 of which is the exemption from disclosure under specified circumstances of employee evaluations and job performance records.<sup>4</sup> “Employee evaluation or job performance records” are releasable only if certain conditions have been met. Specifically, 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.<sup>5</sup>

---

<sup>3</sup> A.C.A. § 25-19-103(5)(A) (Supp. 2011).

<sup>4</sup> A.C.A. § 25-19-105(c)(1) (Supp. 2011).

<sup>5</sup> *Id.*

The FOIA does not define the term “employee evaluation or job performance records.” But the Arkansas Supreme Court has recently adopted this office’s view that the term refers to any records created by or at the behest of the employer 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.<sup>6</sup> The record must also have been created for the purpose of evaluating an employee.<sup>7</sup> The exemption promotes candor in a supervisor’s evaluation of an employee’s performance with a view toward correcting any deficiencies.<sup>8</sup>

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.<sup>9</sup>

---

<sup>6</sup> *Thomas v. Hall*, 2012 Ark. 66, \_\_\_ S.W.3d \_\_\_ (Feb. 16, 2012); *see, e.g.*, 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; and 93-055.

<sup>7</sup> *See, e.g.*, Op. Att’y Gen. No. 2008-004; 2006-038; and 2004-012.

<sup>8</sup> *See* J. Watkins & R. Peltz, *The Arkansas Freedom of Information Act* (5th ed., Arkansas Law Press 2009), at 204.

<sup>9</sup> *Id.* at 217-18 (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.<sup>10</sup>

Applying the above standards, my review of the letter at issue reflects that it is, indeed, an employee evaluation/job performance record. This office has consistently opined that a letter of suspension or termination that details the reasons that served as a basis for the disciplinary action is an employee evaluation or job performance record for purposes of the FOIA.<sup>11</sup> The letter you have provided for my review clearly meets this condition. You have further informed me that there has been a final administrative resolution of the employee's termination, leaving open only the question of whether a compelling public interest exists in disclosing the document.

Although the letter at issue does not indicate the position formerly held by the terminated employee, you indicate in your correspondence that he was a supervisor – i.e., a relatively highly placed employee. The letter further confirms your report that the basis for the termination was the employee's misuse, apparently on more than one occasion, of county equipment, thus strongly implicating the public interest. Under these circumstances, I believe you are correct in concluding that the letter is subject to disclosure under the FOIA.

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

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM/JHD:cyh

---

<sup>10</sup> *Id.* at 216 (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.)

<sup>11</sup> *See, e.g.*, Ops. Att’y Gen. Nos. 2011-068, 2009-210; 2006-026 and 95-171.