Opinion No. 2012-077

May 29, 2012

Mr. Luther O'Neal Sutter
Sutter & Gillham, P.L.L.C.
310 West Conway Street
Benton, Arkansas 72015

Dear Mr. Sutter:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). As the attorney for the custodian of records at the Pine Bluff School District, you make your request based on A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011). This statute 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 employee-related records is consistent with the FOIA.

You state that you have received several requests from the media for a letter that was delivered to the Superintendent in February terminating his employment without cause. You report that the letter resulted from a vote taken in executive session in February, and that apparently there was no subsequent vote in public session. You further report that the School District voted in public session in May and approved the letter. You state that the Board believes its actions have resulted in the Superintendent being terminated without cause, but you note that the Superintendent's lawyer has taken the position that the February letter is not effective because of the failure to take a public vote.[1] You seek my opinion on whether the February letter must be disclosed under these circumstances. The

[1] You also note that the District voted in May to approve a letter setting out its beliefs that there is reason to terminate the superintendent for cause, and that the Board has scheduled a hearing on the cause issue in order to assure the superintendent due process. It is not clear from your correspondence whether this letter was reduced to writing. If it was, and if the current FOIA request extends to this letter, then the custodian must employ the test for the release of "employee evaluation or job performance records," noted below, to determine whether that letter is subject to release.

precise question you pose is "whether, given the Board's action in May taking a public vote on the letter terminating the Superintendent's employment without cause delivered to him in February, but without public vote, renders the letter subject to the FOIA."

RESPONSE

My statutory duty under subsection 25-19-105(c)(3)(B)(i) is to state whether the custodian's decision regarding the release of "personnel or evaluation records" is consistent with the FOIA. You have not indicated or described the decision of the custodian with respect to the requested letter. Instead, you have presented a question that appears to focus on the effectiveness of the termination decision. Not having seen the letter or been apprised of the custodian's decision—and because my duty is limited to reviewing that decision—I cannot address your specific question or definitively opine regarding the record's release.[2]

However, I can and will set forth what appears, from the limited information before me, to be the applicable analysis the custodian should apply in determining whether the letter is subject to disclosure. While no definitive answer is possible in this opinion, you will see from the discussion below that the analysis may well lead to the conclusion that the February letter is subject to release as a "personnel record" under A.C.A. § 25-19-105(b)(12).

DISCUSSION

I. General standards governing disclosure.

A document must be disclosed in response to a FOIA request if all three of the following elements are met. First, the FOIA request must be directed to an entity subject to the act. Second, the requested document must constitute a public record. Third, no exceptions allow the document to be withheld. The first two elements appear met in this case. As for the first element, the documents are held by the school district, which is a public entity. As for the second element, the FOIA defines "public record" as:

[2] My duty under A.C.A. § 25-19-105(c)(3)(B)(i) is not to address particular questions posed by custodians, subjects and requesters, but is merely to "stat[e] whether the decision is consistent with [the FOIA]." *See* Op. Att'y Gen. 2006-071 (and opinions cited therein).

> 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.[3]

A letter from the District informing the Superintendent of his termination plainly falls within this definition. Accordingly, it must be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure.

The FOIA provides two exceptions for employee-related records, such as the letter in question. Such records can usually be divided into two mutually exclusive groups: "personnel records"[4] or "employee evaluation or job performance records."[5] The test for whether these two types of documents may be released differs significantly. When custodians assess whether either of these exceptions applies to a particular record, they must make two determinations. First, they must determine whether the record meets the definition of either exception. Second, assuming the record does meet one of the definitions, the custodian must apply that exception's test for disclosure to determine whether the FOIA requires that record be disclosed.

Personnel-records exception.

The FOIA does not define the term "personnel records." But this office has consistently taken the position that "personnel records" under the FOIA are all records other than employee evaluation and job performance records that pertain to individual employees, former employees, or job applicants.[6] Whether a

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[3] A.C.A. § 25-19-103(5)(A) (Supp. 2011).

[4] A.C.A. § 25-19-105(b)(12) (Supp. 2011).

[5] *Id*. at (c)(1).

[6] *See* Op. Att'y Gen. 2011-081.

particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. If a document meets this definition, then it is open to public inspection and copying except "to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy."[7]

Employee-evaluation exception.

The second potentially relevant exception is for "employee evaluation or job performance records," which the FOIA likewise does not define. But the Arkansas Supreme Court has recently adopted this office's view that term refers to any records (1) created by or at the behest of the employer (2) to evaluate the employee (3) that detail the employee's performance or lack of performance on the job.[8] This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.[9]

If a document meets the above definition, the document cannot be released unless all the following elements have been 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

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[7] A.C.A. § 25-19-105(b)(12). The FOIA does not define the phrase "clearly unwarranted invasion of personal privacy." However, the Arkansas Supreme Court, in *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992), has provided some guidance. To determine whether the release of a personnel record would constitute a "clearly unwarranted invasion of personal privacy," the court applies a balancing test, which weighs the public's interest in accessing the records against the individual's interest in keeping the records private. The balancing takes place with a thumb on the scale favoring disclosure. For further discussion of this test, see Op. Att'y Gen. 2011-100.

[8] *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.

[9] *Id*.

4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).[10]

The primary purpose of this exception is to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship.[11]

III. Application

As reflected by the above test, disciplinary records that were created by (or at the behest of) the employer and that detail the employee's performance or lack of performance on the job are exempt from release in the absence of a suspension or termination decision. With regard, specifically, to letters of termination, this office has consistently opined that such letters constitute evaluation or job performance records if they contain the reasons for the suspension or termination.[12] If, however, such a letter does no more than reflect the fact of termination, without elaboration, then this office has opined that it is properly classified as a "personnel record" under A.C.A. § 25-19-105(b)(12), and is subject to release under the separate test noted above for release of that category of records.[13]

With regard to the particular letter at issue, I find it particularly significant that you describe the letter as one that was delivered to the Superintendent "terminating his employment without cause." This suggests that the letter does not contain reasons for the termination, but instead only reflects the fact of termination. If that is the case, then in my view it is likely subject to release as a "personnel record."

In the event the letter in fact gives reasons for the termination and is properly classified as an evaluation or job performance record, then it appears there may be a threshold question in this instance whether the "suspension or termination"[14] requirement for the release of evaluation or job performance records has been

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

[11] *Cf.* Op. Att'y Gen. 96-168.

[12] *E.g.* Op. Att'y Gen. 2001-276 (and opinions cited therein).

[13] *E.g.* Op. Att'y Gen. 2006-147.

[14] A.C.A. § 25-19-105(c)(1).

met.[15] This threshold question must of course be resolved before moving on to the remaining test for the release of an evaluation record. If the termination is not effective, then it would be necessary to withhold the letter/evaluation record. As one of my predecessors had occasion to note: "The withholding of employee evaluation or job performance records until the 'termination' has actually occurred and is effective is consistent with the provisions of the FOIA."

It should be emphasized, however, that the effectiveness of the termination is only relevant in addressing the release of "employee evaluation or job performance records" and not any "personnel records" at issue. Id. As stated above, if the letter is a personnel record, I believe it is likely subject to release.

To the extent a dispute exists in this instance regarding the effectiveness of the termination decision, I must note that the resolution of that dispute is outside the scope of this opinion. The specific question you have posed seems to focus on the validity and/or effectiveness of the Board's action in several meetings involving the termination decision. This raises issues of fact and law that do not fall within the scope of my review under A.C.A. § 25-19-105(c)(3)(B)(i). Again, subsection 25-19-105(c)(3)(B) requires me to state whether the custodian's decision is consistent with the FOIA, not to answer specific questions posed by custodians or to advise the custodian in making his or her decision.[16]

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

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[15] Assuming the effectiveness of the termination, it will of course also be necessary to determine whether the remaining prongs of the test for the release of employee evaluation or job performance records have been met.

[16] *E.g.*, Op. Att'y Gen. 2005-268.