

Opinion No. 2012-080

June 8, 2012

Greg Harton, Editor
Northwest Arkansas Times
212 N. East Avenue
Fayetteville, Arkansas 72701

Dear Mr. Harton:

I am writing in response to your request for my opinion regarding the application of the Arkansas Freedom of Information Act (the “FOIA”).¹ 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 such records.²

You have sought my opinion in the wake of a reported denial by the Fayetteville School District (the “District”), in response to various FOIA requests made by your newspaper, to produce a copy of an e-mail reportedly sent by a Fayetteville high teacher to a fellow teacher on May 5, 2012. The teacher who allegedly sent the e-mail has since filed suit contesting the district’s actions against him, attaching to his complaint a memorandum in which the superintendent allegedly characterized the e-mail as “inappropriate and defamatory.” I have not been provided a copy of the e-mail at issue.

In your request for my opinion, you protest what you characterize as the custodian’s “denial of access to job performance and evaluation records” and seek my review of the custodian’s provisional decision regarding disclosure. In its most recent denial of your newspaper’s request, the District has declared that “the requested document is exempt from disclosure pursuant to A.C.A. 25-19-105(b)[12] regarding personnel records.”

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

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

RESPONSE

I should note as an initial matter that my statutory role under the FOIA pursuant to A.C.A. § 25-19-105(c)(3)(B)(i) is limited to reviewing the provisional decision of the custodian regarding the release of personnel or evaluation records.³ In the present case, there appears to be a difference of opinion between you and the custodian of records regarding whether the requested e-mail constitutes an employee evaluation/job performance record or a personnel record. As discussed below, based upon the information available to me, I believe the e-mail is a personnel record. I will set forth below, however, the distinct standard applicable to each variety of record.

In *Nabholz Construction Corp. v. Contractors for Public Protection Assoc.*,⁴ the Arkansas Supreme Court declared that “for a record to be subject to the FOIA and available to the public, it must be (1) possessed by an entity covered by the Act, (2) fall within the Act's definition of a public record, and (3) not be exempted by the Act or other statutes.”⁵ The FOIA defines the term “public records” 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.⁶

³ A.C.A. § 25-19-105(c)(3)(B)(i).

⁴ 371 Ark. 411, 266 S.W.3d 689 (2007).

⁵ *Id.* at 416, citing *Legislative Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987).

⁶ A.C.A. § 25-19-103(5)(A) (Supp. 2011).

It is undisputed in this instance that the District is a public entity subject to the FOIA. There further appears to be agreement that the requested e-mail constitutes a “public record,” although the custodian characterizes it as one variety of public record and you characterize it as another. The employee through counsel has characterized the e-mail as an inter-employee “use of public electronic mail,” and the e-mail is apparently in the possession of – and hence “kept” by – the District. Moreover, the District has apparently not contested that the record “constitute[s] a record of the performance or lack of performance of official functions.” Inasmuch as the parties involved apparently agree on this issue, I will assume for purposes of the ensuing discussion that the record is “public.”

Under certain conditions, the FOIA exempts two mutually exclusive categories of documents normally found in employees’ personnel files⁷ – “personnel records”⁸ and “employee evaluation or job performance records.”⁹ The tests for whether these two types of documents may be released differ significantly.

The personnel records exception

This office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.¹⁰ Whether a particular record meets this definition is, of course, a

⁷ Personnel files usually include the following: employment applications; school transcripts; payroll-related documents such as information about reclassifications, promotions, or demotions; transfer records; health and life insurance forms; performance evaluations; recommendation letters; disciplinary-action records; requests for leave-without-pay; certificates of advanced training or education; and legal documents such as subpoenas. *See, e.g.*, Op. Att’y Gen. 97-368; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 187–89 (Arkansas Law Press, 5th ed., 2009).

⁸ A.C.A. § 25-19-105(b)(12): “It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter: ...[p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”

⁹ A.C.A. § 25-19-105(c)(1): “Notwithstanding subdivision (b)(12) of this section, all 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.”

¹⁰ *See, e.g.*, Op. Att’y Gen. 1999-147; Watkins & Peltz, *supra*, at 187.

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.”¹¹

Although the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,¹² 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 that weighs the public’s interest in accessing the records against the individual’s interest in keeping them private. The balancing takes place with a thumb on the scale favoring disclosure.

The balancing test elaborated by *Young v. Rice* has two steps. First, the custodian must assess whether the information contained in the requested document is of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest.¹³ If the privacy interest is merely *de minimus*, the interest in disclosure outweighs the privacy interest. As the court noted in *Stilley v. McBride*,¹⁴ 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.” Secondly, if the information involves a greater than *de minimus* privacy interest, the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.¹⁵ With respect to the strength of the public interest, it is generally acknowledged that “the personnel records of high-ranking officials are less likely to be exempt than the records of other employees, given the greater public interest in their performance.”¹⁶

¹¹ A.C.A. § 25-19-105(b)(12) (Supp. 2011).

¹² *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

¹³ *Id.* at 598.

¹⁴ 332 Ark. 306, 312, 965 S.W.2d 125 (1998).

¹⁵ *Young, supra*, 308 Ark. at 598.

¹⁶ *Watkins & Peltz, supra*, at 187, citing Op. Att’y Gen. 97-331 (opining that disclosing a former mayor’s pension information would not constitute “a clearly unwarranted invasion personal privacy,” given his position as the city’s chief executive officer).

If the custodian determines that a particular employee's privacy interest outweighs the public's interest in disclosure, the custodian should nevertheless, if possible, redact the document only to the extent needed to spare the employee from any "clearly unwarranted invasion of personal privacy." In this regard, the court in *Young* stressed the fact that the phrase "clearly unwarranted" constitutes a significant qualifier to the phrase "invasion of personal privacy":

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.*¹⁷

Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public's interests.¹⁸ The fact that the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.¹⁹

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.²⁰

The employee evaluation/job performance records exception

The FOIA likewise does not define the term "employee evaluation or job performance records." The Arkansas Supreme Court, however, has recently adopted this office's view that the term refers to any record (1) created by or at the

¹⁷ *Id.* (emphasis added); *accord* Op. Att'y Gen. No. 2009-047.

¹⁸ *Stilley, supra*, 332 Ark. at 313.

¹⁹ *See, e.g.*, Ops. Att'y Gen. 2001-112, 2001-022, 94-198.

²⁰ Ops. Att'y Gen. 2006-176, 2004-260, 2003-336, 98-001.

behest of the employer (2) to evaluate the employee (3) that details the employee's performance or lack of performance on the job.²¹

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;
2. There has been a final administrative resolution of the suspension or termination proceeding;
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee; and
4. The public has a compelling interest in the disclosure of the records in question.²²

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.²³

Discussion

In the present case, I believe the e-mail at issue does not qualify as an employee evaluation/job performance record because it was reportedly not created at the behest of the employer. The information I have been provided suggests that the e-mail was an unsolicited communication from one teacher to another that apparently contained a complaint about a supervisor's conduct of District activities. Any such communication cannot be classified as an evaluation record

²¹ *Thomas v. Hall*, 2012 Ark. 66, ___ S.W.3d ___ (Feb. 16, 2012); *see, e.g.*, Op. Att'y Gen. 2009-067; 2005-030; 2003-073; 98-006; 97-222; and 93-055.

²² A.C.A. § 25-19-105(c)(1) (Supp. 2011); Op. Att'y Gen. 2008-065.

²³ *Cf.* Op. Att'y Gen. 96-168; *Watkins & Peltz, supra*, at 204.

created by or at the behest of the employer.²⁴ In light of this fact, it would appear to be irrelevant that the parties to this dispute disagree regarding whether the District's disciplinary actions against the teacher who sent the e-mail rise to the level of a suspension or termination, since these classifications matter only in determining the disclosability of an employee evaluation/job performance record, not a personnel record. It likewise appears to be irrelevant whether the teacher's filing suit marks the equivalent of a final administrative resolution of a suspension or termination proceeding. The appropriate analysis the custodian must conduct in determining whether to release the e-mail, then, should be under the objective standard applicable to a personnel record – namely, whether release of the e-mail would constitute a “clearly unwarranted invasion of personal privacy.”

In applying the above described balancing test applicable to personnel records, the custodian will be obligated to balance the public's interest in disclosure of the record against the respective privacy interests of *any* individual whose personnel record the document might constitute. To the extent that the e-mail in this instance pertains to multiple employees, including the sender and the recipient, under the standard set forth above, it will constitute the personnel record of each such employee.

Not being in possession of the e-mail in question and being unacquainted with all of the attendant circumstances, I am obviously not in a position to determine whose privacy interests might be implicated and what public interest in disclosure might exist. I consequently can do no more than offer guidelines that the custodian will be obliged to apply in making his or her final determination regarding disclosure.

In conducting the balancing test described above, the custodian will initially need to address with respect to each affected employee what a leading commentary on the FOIA terms the “threshold question” of “whether the information is of a personal or intimate nature sufficient to give rise to a substantial privacy interest.”²⁵ If it is not, then the document should normally be disclosed. If the record contains such personal or intimate information, the custodian will next need to determine whether a public interest in disclosure outweighs this privacy interest. In this regard, the Arkansas Supreme Court has indicated that the strength of the

²⁴ See, e.g., Op. Att'y Gen. 2008-064 (quoting Op. Att'y Gen. 2001-123 to the effect that “documents that are complaints about employees and that are unsolicited by the employer constitute personnel records, rather than employee evaluation/job performance records.”).

²⁵ Watkins & Peltz, *supra*, at 191-92 (footnote omitted).

public interest is gauged 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.’”²⁶

Based upon the limited information I have been provided, it appears that the public interest in disclosure of the e-mail may in fact be substantial. I am struck by a number of reported circumstances that appear to suggest that the situation giving rise to your request is of considerable public significance. You indicate in your request that the author of the e-mail at issue is “a longtime teacher at Fayetteville High School”; that he has sued the school district – a fact reflected in the complaint you have attached to your request; that he was disciplined in various significant ways; that he has “many supporters among students, former students, parents and some teachers; that “[t]his disciplinary action apparently stems from the school district’s reaction to his criticism of the administration in some form”; that the requested record “would appear or purport to show performance or lack of performance” of either the e-mail’s author, his supervisor(s) “or other administrators within the school district on matters of public policy”; and that various itemized events demonstrate “high public interest” in the teacher’s situation “and the way the high school is administered in this case.” Moreover, in correspondence sent to the District and attached to the complaint, counsel for the teacher who sent the e-mail has further reported that “several employees” of the school are considering filing EEOC complaints based upon “strong evidence for violation of federal employment law” and that a supervisory school official “is trying to isolate them and does not want them to communicate with each other.” Counsel’s correspondence further suggests that the e-mail at issue was sent by one teacher to another teacher concerning the official conduct of a supervisory officer.

Although I am not situated to test the accuracy of these various representations, the custodian of the record presumably is. In my opinion, if accurately reported, the circumstances just summarized create a strong public interest in disclosure of the requested record. As noted above, however, I have not reviewed the e-mail and consequently cannot determine either the extent of its focus on matters of public concern or the strength of any countervailing privacy interests. I can do no more, therefore, than repeat that the balance in any doubtful case should tip in favor of disclosure.

²⁶ *Stilley*, 332 Ark. at 312, quoting *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

The documents you have supplied me provide little information regarding the school district's reasoning in denying you access to the requested document. You have provided me several e-mail exchanges relating to contacts between your newspaper and representatives of the school district. One e-mail reports that the district declined to produce the e-mail because it is "part of the discipline file and not subject to public disclosure." In my opinion, this rationale for declining to produce the document could not withstand challenge. A document that was not an employee evaluation/job performance record when created cannot be transformed into such by being made a part of a disciplinary investigation. As I recently noted in response to a suggestion that two e-mails might constitute evaluation records because they sparked an investigation into the charges set forth in the e-mails:

[T]his misplaces the analysis. The threshold question is whether the e-mails were created by or at the behest of the employer (or supervisor). Clearly, they were not. Accordingly, these e-mails were not employee evaluations when they were created, which means these e-mails are personnel records. And a personnel record cannot later be transformed into an employee-evaluation record simply because the personnel record prompted or was made a part of an investigation.²⁷

In another e-mail responding to your request, the District's counsel remarked that "there is no email of a similar nature which resulted in a ' . . . [.] disciplinary action on Friday, May 25, 2012' as referenced in Ms. Pearce's request and your email of today." Counsel further observed: "30 students do not a 'compelling interest' make." However, as reflected in the foregoing, the "compelling interest" test is irrelevant in this case, applying only to employee evaluation/job performance records, not to personnel records of the sort that the e-mail apparently represents. Under the pertinent test, the recited student support, if considered in conjunction with the other alleged factual circumstances detailed above, should be weighed only as one reflection of substantial public concern relating to the e-mail and its consequences – a fact clearly pertinent to the custodian's deliberations regarding disclosure.

As noted above, in response to your third and final request, the District has acknowledged that the requested e-mail exists but contends that it is not subject to

²⁷ Op. Att'y Gen. 2012-073, citing Ops. Att'y Gen. 2007-206, 1996-168, 1996-033.

inspection because it falls under the exemption for personnel records. The District has not elaborated on how it applied the relevant balancing test in reaching this tentative conclusion. Again, not being acquainted with all of the facts, including the contents of the e-mail itself, I am unable to agree or to disagree with the custodian's provisional determination. I will note, however, that the teacher's counsel has strongly intimated that the e-mail addresses the official conduct of a highly situated school officer. I will further note that if the factual representations set forth above are accurate – a determination only the custodian can make – then a strong public interest in disclosure of this document would appear to exist. As regards any countervailing privacy interest(s), with respect to each affected employee, the custodian will need to balance the employee's privacy interest against the public interest in disclosure, bearing in mind that the rebuttable presumption in each case will be that the document is subject to disclosure.

Finally, I must stress that the custodian's decision regarding whether to release the record should not be influenced by his or her opinion regarding the veracity or propriety of the representations contained therein. The custodian's function is not to assess the merit of the document's contents. It is rather to determine whether a substantial public interest exists in disclosure and, if so, whether a privacy interest of sufficient strength exists to warrant withholding some or all of the record. In making this determination, the presumption will always be in favor of disclosure.

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh