

Opinion No. 2012-105

August 14, 2012

Floyd A. Healy
Attorney at Law
8 Shackelford Plaza, Suite 103
Little Rock, Arkansas 72211

Dear Mr. Healy:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). Your request is based on A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011). This subsection 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.

Your letter indicates that your client filed a complaint against a superior officer. The complaint led to an internal investigation during which four employees wrote “narratives” about their knowledge of the incident that your client complained about. You say that these four employees wrote the “narratives” at the request of the person(s) conducting the investigation. Your client then made an FOIA request for the four narratives. But the custodian has determined that all four “narratives” are employee evaluations of the superior officer and are exempt from disclosure.

You ask whether the custodian’s decisions—categorizing the records and then applying the appropriate legal test—are consistent with 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. Based on what you have relayed, the custodian’s

decision classifying the documents as employee-evaluations is, in my opinion, consistent with the FOIA. But, for the reasons explained below, I cannot say whether the custodian's refusal to disclose them is consistent with the FOIA.

DISCUSSION

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.

In this case, because the first two elements are clearly met, I will focus on the third. When a document qualifies as a "public record" under the FOIA, the document must be released unless a specific exception shields it from disclosure. The custodian has relied on the employee-evaluation exception as the reason for refusing to disclose the documents. When assessing whether a particular record qualifies for the employee-evaluation exception, custodians must make two determinations: whether the public record at issue meets the definition of an employee-evaluation record; and if so, whether the applicable test shields that record from disclosure.

While the FOIA itself does not define the phrase "employee evaluation" record, the Arkansas Supreme Court has recently indicated that the 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.¹ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.²

In light of the facts you relay, these four "narratives" meet the definition of employee evaluation documents. Specifically, you indicate that the superior officer was being investigated about a specific incident—meeting (2) and (3)—and

¹ *Thomas v. Hall*, 2012 Ark. 66, ___ S.W.3d ___ (Feb. 16, 2012); *see, e.g.*, Op. Att'y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-111; 2003-073; 98-006; 97-222; 95-351 and 93-055.

² *Id.*

the employees who wrote the “narratives” did so at the request of the person(s) conducting the investigation—meeting (1).

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
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).³

Because you do not say whether any of these elements are met, and because I have no documents showing whether they are met, I cannot say whether the custodian’s decision to refuse to disclose the documents is consistent with the FOIA.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh

³ A.C.A. § 25-19-105(c)(1) (Supp. 2011); Op. Att’y Gen. 2008-065.