

Opinion No. 2012-119

September 19, 2012

George E. Butler, Jr.
Washington County Attorney
Washington County Courthouse
280 North College, Suite 501
Fayetteville, Arkansas 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). 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 the records custodian for the Boston Mountain Solid Waste District (“District”) has received a FOIA request for a copy of a report of an investigation into “alleged improprieties” by the District’s former Director. You state that the District Board terminated the Director’s employment after review of the investigation. You further state that the custodian has determined that “this investigation constitutes job performance/evaluation records and that there is a compelling public interest in its disclosure.” The former Director has objected, stating that “the contents are allegations only” and that “this report is not in his personnel file.”

RESPONSE

My statutory duty under A.C.A. § 25-19-105(c)(3)(B)(i) is to state whether a custodian’s decision regarding the disclosure of certain employee-related records is consistent with the FOIA. In the present case, the custodian has determined that the requested records are job performance or evaluation records and should be

released. In my opinion, the custodian's decision to classify the records as job performance or evaluation records is consistent with the FOIA to the extent the records were created by or at the behest of the employer in the course of investigating the alleged improprieties. It should be noted, however, that records relating to allegations of misconduct could include unsolicited complaints containing such allegations. As discussed further below, such complaints generally constitute "personnel records" which are subject to a different standard of disclosure. Not having seen the records that reflect the investigation in this case, or been advised of the factual basis for the custodian's decision to release them, I cannot definitely assess that decision. Rather, I am limited to setting forth the general standards for determining whether certain employee-related records are releasable under the FOIA. I can state, however, that the veracity or propriety of the allegations contained in the records cannot properly enter into the custodian's decision. The custodian's function is not to assess the merit of the document's contents. Additionally, the location of the investigative report is irrelevant to its proper classification for purposes of applying the applicable standard of disclosure under 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.¹

The first two elements appear met in this case. As for the first element, the documents are held by the Boston Mountain Solid Waste District, which is a public entity. As for the second element, the FOIA defines "public record" as:

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

¹ *Nabholz Construction Corp. v. Contractors for Public Protection Assoc.*, 371 Ark. 411, 416, 266 S.W.3d 689, 692 (2007) (citing *Legislative Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987)).

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.²

The second element also appears met because the documents at issue were reportedly generated as part of an official internal investigation into an employee's official actions. Therefore, in my opinion, these documents are public records and must be disclosed unless some specific exception provides otherwise.

I. Exceptions to disclosure

Under certain conditions, the FOIA exempts from disclosure two distinct types of employee-related records: "personnel records" and "employee evaluation or job performance records." 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 the appropriate test to determine whether the FOIA requires that the record be disclosed.

A. Personnel records

This office has consistently opined that "personnel records" are all records other than employee evaluation and job performance records that pertain to individual employees.³ Personnel records are open to public inspection and copying except "to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy."⁴ The Arkansas Supreme Court has provided some guidance in determining whether the release of a personnel record would constitute a "clearly

² A.C.A. § 25-19-103(5)(A) (Supp. 2011).

³ *E.g.*, Op. Att'y Gen. 99-147; *see also* John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT 187 (Arkansas Law Press, 5th ed., 2009).

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

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.⁵ The balancing takes place with a thumb on the scale favoring disclosure.

Whether a particular record constitutes a personnel record is, of course, a question of fact that can only be definitively determined by reviewing the record itself. With regard to investigative report at issue, you have not identified any of the records comprising the report as “personnel records.” According to your letter, however, the report contains allegations of improprieties. This prompts me to note this office’s long-held view that unsolicited complaints and/or allegations of misconduct concerning public officials or employees constitute personnel records under the FOIA.⁶ I am referring here to complaint records that were created voluntarily by third parties and that were not solicited by the employer. If such complaints or allegations are part of the report, then the balancing test applicable to personnel records must be applied. Whether release of any information within an unsolicited complaint would constitute a “clearly unwarranted invasion of privacy” is ultimately a question of fact, dependent upon the actual contents of the record in question. With respect, however, 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:

... the public’s interest in records relevant to the misconduct of a high ranking public official and of other public employees will generally outweigh those individuals’ privacy interest in those records. It has been noted by a commentator on the Freedom of Information Act that “the ‘public interest’ will ordinarily be great when there is a need for oversight to prevent wrongdoing or when the requested records would inform the public about agency misbehavior or other violations of the public trust.” Watkins, The

⁵ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992). This office has issued numerous opinions further discussing this balancing test. For more information in this regard, please refer to the Office of Attorney General website: <http://www.arkansasag.gov/opinions/>.

⁶ *E.g.*, Ops. Att’y Gen. 2011-152; 2001-028; 2000-058; 2000-231.

Freedom of Information Act, 3rd ed., at 139. *Accord*, Op. Att’y Gen. No. 1998-001.

B. Employee evaluation or job performance records

The FOIA does not define “employee evaluation or job performance records.” However, the Arkansas Supreme Court has defined the term to refer 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.⁷ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.⁸

If a document meets the above definition, the document *cannot* be released unless of 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).⁹

As for the final prong, the FOIA never defines the key phrase “compelling public interest.” But two leading commentators on the FOIA, referring to this office’s opinions, have offered the following guidelines:

⁷ *Thomas v. Hall*, 2012 Ark. 66, ___ S.W.3d ___ (Feb. 16, 2012); *see also* Op. Att’y Gen. Nos. 2009-067, 2005-030, and 93-055.

⁸ *Id.*; Op. Att’y Gen. 2008-010.

⁹ A.C.A. § 25-19-105(c)(1) (Supp. 2011); Op. Att’y Gen. 2008-065.

[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.¹⁰

These commentators 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, which is always a question of fact that must be determined, in the first instance, by the custodian after he considers all the relevant information.

II. Application

In the present case, the custodian has determined that the requested records are job performance or evaluation records and should be released. In my opinion, the custodian's decision to classify the records as job performance or evaluation records is consistent with the FOIA as to those records that were created by or at the behest of the employer in the course of investigating the alleged improprieties. However, because I have not seen the records and do not know the precise factual basis for the custodian's decision to release them, I cannot definitely opine on whether the above test for release has been met. Given the former Director's reported termination, the first element is obviously met. But as explained above, each of the four (4) stated elements must be met before an evaluation or job performance record may be released. As set out in the previous discussion regarding compelling public interest, the rank of the former Director weighs

¹⁰ Watkins & Peltz, *supra* n. 3, at 217–18 (footnotes omitted).

heavily in favor of disclosure. But other factors may come into play. The custodian must make the requisite factual determinations and then apply the above test to all the pertinent facts within his or her knowledge.

Several final matters must be noted in closing. The former Director has objected to release of the investigative report on the basis that “the contents are allegations only.” But as I have previously stated, the custodian’s decision regarding whether to release the records should not be influenced by his or her opinion as to the veracity or propriety of the representations contained therein.¹¹ Reference has also been made to the fact that the investigative report is not in the former Director’s personnel file. The location of the report is irrelevant, however, to its proper classification under the FOIA:

It should be noted that the fact that a record is not maintained in an employee’s personnel file does not preclude a conclusion that it constitutes a personnel record or an employee evaluation/job performance record. This office has consistently opined that the location of documents is not determinative of how a document should be classified, and the location of documents should be irrelevant when considering the application of particular exemptions under the FOIA. *See, e.g.*, Ops. Att’y Gen. Nos. 2000-225; 1998-127; 1992-237 at n. 2; 91-123; 91-100.¹²

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:EAW/cyh

¹¹ Op. Att’y Gen. 2012-080 (“The custodian’s function is not to assess the merit of the document’s contents.”).

¹² Op. Att’y Gen. 2003-316 at 3.