

Opinion No. 2012-149

December 31, 2012

Richard “Chris” Madison, Esq.
Bryant City Attorney
210 S.W.3d Street
Bryant, Arkansas 72002

Dear Mr. Madison:

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 requested records.²

In your capacity as Bryant City Attorney, you have sought my review of your tentative decisions regarding the requested release of various documents pursuant to the FOIA. These records relate to a disciplinary action taken against an officer of the Bryant Police Department (the “Department”). You report that this investigation was initiated following receipt of an unsolicited, unrecorded complaint from a citizen who had objected to various Facebook and private cell-phone communications she received from the disciplined officer. The investigation resulted in a five-day suspension without pay. You report that “the investigative file is close[d] and no further administrative review is available.” The requester has sought to review the following:

Please include all investigatory documents, notes from any meeting(s) held to determine the outcome of the complaint and the

¹ A.C.A. §§ 25-19-101 – 110 (Repl. 2002 and Supp. 2011).

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

person(s) involved in the meetings and determination of the course of action taken.

You have attached to your request two exhibits. Exhibit A comprises all or various of the referenced communications between the complainant and the disciplined officer. Each of the Facebook communications sent by the complainant contains not only text, but also a picture of the complainant with her children. Exhibit B comprises the following:

1. A police Captain's chronology of certain events;
2. An Internal Investigative Summary prepared for the Chief of Police by a Detective Sergeant;
3. An Internal Investigative Warning and Assurance signed by the subject of the investigation and the interviewer;
4. The investigator's notes;
5. An undated statement by the subject of the investigation;
6. An Administrative Leave Note; and
7. A Disciplinary Notice.

These documents as redacted apparently constitute the entire investigative file, with the exception only of the documents contained in Exhibit A, which were reportedly copied with the complainant's permission and incorporated into the investigative file. The redactions referenced in the preceding sentence are apparently only of the names of the complainant³ and of her ex-husband.⁴ You have expressed your intention to disclose the material contained in Exhibit B and to withhold the material contained in Exhibit A.

³ Inadvertently, I assume, one document in Exhibit B discloses her name.

⁴ By what I again assume to have been inadvertency, this individual's name is both deleted and disclosed on one page of the material contained in Exhibit B.

RESPONSE

I disagree with your tentative determination that the documents contained in Exhibit A are not subject to disclosure. For reasons discussed below, these documents appear to be personnel records whose disclosure would not constitute an unwarranted invasion of the disciplined officer's privacy. Hence I believe these documents should be released, possibly subject to redaction of the complainant's name and the photographs of herself and her children. I concur in your provisional opinion that the documents contained in Exhibit B are subject to disclosure as employee evaluation/job performance records under the FOIA. Although the question is ultimately one of fact for you to resolve, I further have no basis to question your provisional decision to redact from these records the names of the complainant and her ex-husband.

I. General standards governing disclosure

A document must be disclosed in response to a FOIA request if three conditions are met: first, the FOIA request is directed to an entity subject to the act; second, the requested document constitutes a "public record"; and third, the document does not fall within an express exception to disclosure requirements.

The first element is clearly met in this case, inasmuch as the Bryant Police Department is clearly a public entity.

With respect to the second element, 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 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.⁵

In my opinion, the documents contained in Exhibit A qualify as “public records.” Based upon my review of the documents you have submitted, Exhibit A contains only documents supplied by the complainant in conjunction with her verbal complaint regarding the conduct of the disciplined officers. Under these circumstances, I believe the Exhibit A documents constitute part of a citizen complaint against a public official, and as such they qualify as that individual’s personnel records, which are necessarily public records.

This office has long held that unsolicited complaints concerning public officials or employees are personnel records:

[C]omplaints about employees and that are unsolicited by the employer constitute personnel records *See, e.g.*, Ops. Att’y Gen. Nos. 2001-028, 2000-058, 2000-231. This classification is in contrast to the classification of documents that are generated by an employer as a part of an investigation into the conduct of an employee, which I have held to constitute employee evaluation/job performance records. I have consistently opined that an unsolicited complaint about an employee does not constitute an “employee evaluation/job performance record” and therefore is not entitled to the exemption that is sometimes available for such records. *See* A.C.A. § 25-19-105(c)(1); Op. Att’y Gen. Nos. 2000-175, 2000-166, 99-026. . . . Rather, an unsolicited complaint document . . . must be evaluated under the standard for the release of personnel records.⁶

As I further stated in the foregoing opinion, the rationale for the employee evaluation exemption does not encompass unsolicited complaints:

Unsolicited citizen complaints are not created by the employer to evaluate job performance. They thus do not come within the rationale behind the A.C.A. § 25-19-105(c)(1) exemption for “employee evaluation or job performance records,” which is to allow

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

⁶ Op. Att’y Gen. 2008-064; *accord* Op. Att’y Gen. 2011-152.

supervisors to be candid in assessing employee performance and to identify weaknesses with an eye toward fostering improvement. *See, e.g.*, Op. Att’y Gen. 2006-007, citing Op. Att’y Gen. 2005-074 and Watkins, *THE ARKANSAS FREEDOM OF INFORMATION ACT* (m & m Press).⁷

Thus, for example, one of my predecessors concluded that an unsolicited memorandum or “grievance” written by a police officer against the police chief and delivered to the mayor was properly characterized as a “personnel record” for purposes of the FOIA.⁸ In my opinion, then, the Exhibit A documents are “public records” subject to analysis as “personnel records” under the standard discussed below.

The documents contained in Exhibit B likewise clearly fall within the scope of the definition of “public records.” Consequently, these documents must be disclosed unless some specific exception provides otherwise.

A. Exceptions to disclosure

Under certain conditions, the FOIA exempts from disclosure documents falling within either of two categories of documents normally found in employees’ personnel files.⁹ These two categories, which are mutually exclusive for purposes of FOIA analysis, are “personnel records”¹⁰ and “employee evaluation or job

⁷ Op. Att’y Gen. 2008-064.

⁸ Op. Att’y Gen. 2002-210.

⁹ This office and the leading commentators on the FOIA have observed that personnel files usually include: 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. *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).

¹⁰ A.C.A. § 25-19-105(b)(12) (Supp. 2011): “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.”

performance records.”¹¹ The tests for determining whether documents falling within either group may be released differ significantly.

1. Employee-evaluation exception

The first potentially relevant exception is for “employee evaluation or job performance records.” The Arkansas Supreme Court has recently adopted this office’s view that this 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.¹² This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹³ If a document meets the above definition, the document *cannot* be released unless the employee was suspended or fired; the suspension or termination has been finally resolved administratively; the records formed a basis for the decision to suspend or terminate the employee; and a compelling public interest exists in the records’ disclosure.¹⁴

With regard to the final prong, the FOIA does not define the term “compelling public interest.” The two leading commentators on the FOIA, however, based upon this office’s opinions, 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

¹¹ A.C.A. § 25-19-105(c)(1) (Supp. 2011): “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.”

¹² *Thomas v. Hall*, 2012 Ark. 66, **8-9, ___ 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.

¹³ *Id.*

¹⁴ A.C.A. § 25-19-105(c)(1); Op. Att’y Gen. Nos. 2011-100, 2008-065.

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.¹⁵

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,¹⁶ 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.

2. Personnel-records exception

The second of the two exceptions referenced above is for “personnel records,” which the FOIA likewise does not define. This office, however, has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.¹⁷ Whether a 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, it is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”¹⁸

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,¹⁹ has provided

¹⁵ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹⁶ *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.”).

¹⁷ *See, e.g.*, Op. Att’y Gen. 1999-147; Watkins & Peltz, *supra*, at 187.

¹⁸ A.C.A. § 25-19-105(b)(12).

¹⁹ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

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 occurs with a thumb on the scale favoring disclosure.

This balancing test 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.²⁰ If the privacy interest is merely *de minimus*, the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimus* privacy interest, the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.²¹ 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.²² 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.²³ Whether any particular personnel record’s release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.²⁴

3. Constitutional privacy interests

Apart from the legal tests for personnel records and employee-evaluation records, you should be aware of some general constitutional implications of disclosure.

²⁰ *Id.* at 598, 826 S.W.2d at 255.

²¹ *Id.*, 826 S.W.2d at 255.

²² *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

²³ *E.g.* Op. Att’y Gen. Nos. 2001-112, 2001-022, 94-198. Although it does not appear to bear directly on your request, I will note that even if a document, when considered as a whole, meets the test for disclosure, it may contain discrete pieces of information are considered objectively private to an extent that warrants their automatic redaction. This category includes dates of birth of public employees (Op. Att’y Gen. 2007-064), social security numbers (Op. Att’y Gen. Nos. 2006-035, 2003-153), and medical information (Op. Att’y Gen. 2003-153). See Op. Att’y Gen. 2012-063 for a more complete list.

²⁴ Op. Att’y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

Any party who may be identified from any of the requested records potentially has a constitutionally-protected privacy interest in those records. In *McCambridge v. City of Little Rock*, the Arkansas Supreme Court recognized that the constitutional right of privacy can supersede the specific disclosure requirements of the FOIA with regard to documents containing constitutionally protectable information.²⁵

McCambridge established a two-part test for custodians to use when assessing whether this exception applies in any given case. Custodians must first determine whether the record contains any extremely personal information that is protected by the constitution. The *McCambridge* court provided a three-step test to help custodians determine whether any piece of information qualifies as protected under this standard. First, the subject of the information must want to keep, and must have kept, the information confidential. Second, it must be the case that the information might be kept confidential but for the challenged government action that may disclose it. Third, the disclosure of the record must be of a sort that would be harmful or embarrassing to a reasonable person. If the material does not meet these criteria, it necessarily fails to qualify as constitutionally protectable. If the material does meet these criteria, however, then the custodian moves to the second and final part of the analysis.²⁶

In the second part of the analysis, the custodian must conduct a balancing test to determine whether the document must be disclosed. To conduct this test, the custodian determines whether the person’s privacy interest outweighs the government’s interest in disclosure. If the privacy interest is weightier, then the material cannot be disclosed.²⁷

B. Application of the Exceptions

Exhibit A documents. As noted above, the documents contained in Exhibit A are part of an unsolicited citizen’s complaint and hence are personnel records.²⁸

²⁵ *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

²⁶ *Id.*

²⁷ *Id.*

²⁸ I will note that they do not qualify as employee evaluation/job performance records because they were not created by the employer or at the employer’s behest. Further, they do not become employee evaluation

Given the status of these documents as the disciplined officer’s personnel records, the question becomes whether they might be withheld because their disclosure would constitute a “clearly unwarranted invasion of [the officer’s] personal privacy” under the balancing test articulated above.

The information contained in the requested document is indeed of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest. The remaining question, then, is whether the public’s interest in disclosure outweighs any implicated privacy interest. As noted above, any party challenging disclosure bears the burden of establishing that the balance against disclosure tips in his favor under an objective standard of when an invasion of personal privacy might be “unwarranted.”

Based upon my review of the documents contained in Exhibit A, I believe the balance in this instance tips in favor of disclosure, notwithstanding your contrary conclusion. Significant portions of the particular communications at issue involve an offer by a law enforcement officer to abuse his professional position for personal reasons. Those personal reasons, moreover, involve allegations of sexual harrassment found to be meritorious by investigators. As one of my predecessors has noted:

This office has consistently opined that the public does have a compelling interest in the release of job performance records relating to sexual misconduct. See, e.g., Ops. Att’y Gen. Nos. 1999-361; 94-119; 93-356 (records containing allegations of sexual misconduct of

or job performance records simply because they have been incorporated into the Department’s investigative file. As I have recently noted:

[P]re-existing, otherwise public records that have been included in an internal affairs file, but which were not generated as a result of the investigation, ordinarily do not constitute employee evaluation or job performance records. As stated by one of my predecessors, “[t]he fact that a previously created record is later used in an internal investigation of an employee does not transform the record into an employee evaluation/job performance record.”

Op. Att’y Gen. 2012-001, *citing and quoting* Op. Att’y Gen. Nos. 2008-172 and 2005-032.

²⁸ Op. Att’y Gen. 2005-032.

school superintendent give rise to compelling public interest); 89-073 (job performance records relating to sexual misconduct of police officers gives rise to a compelling public interest).²⁹

Although it is not entirely clear from the record, it further appears that this conduct may well have occurred while the officer was on duty.

I appreciate that the documents contained in Exhibit A were created as distinctly personal communications. In facing a similar issue, I recently offered the following conclusions:

The FOIA does not define the term “personnel records,” nor are there any helpful Arkansas cases construing the term or stating whether “personal” records such as Exhibit B (the “personal photos”) or Exhibit C (“personal emails”) are properly classified as “personnel records” for purposes of A.C.A. § 25-19-105(b)(12). When addressing this exemption, my predecessors and I have given the term “personnel records” a broad interpretation, stating that it encompasses any records (other than evaluation or job performance records) that pertain to or relate to the individual employee.³⁰

Although in my previous opinion I characterized as a factual question whether the materials there at issue were sufficiently related to an individual employee to qualify as “personnel records,” I do not believe the nature of the documents in this case, which are clearly a part of a citizen complaint, is in question; the documents are clearly personnel records.

Under the circumstances in this case, the public interest in disclosure appears sufficiently strong to warrant their disclosure under the above standard applicable

²⁹ Op. Att’y Gen. 2002-237. *See also* Op. Att’y Gen. 2004-012 (generally discussing this principle).

³⁰ Op. Att’y Gen. 2012-001 (citations omitted); *see* Op. Att’y Gen. 2010-006 (and opinions cited therein). Two recognized commentators on the FOIA have further observed that “documents that only tangentially relate to an employee” are not covered by the exemption. Watkins & Peltz, *supra* at 188–89 (citing Op. Att’y Gen. Nos. 2007-255 and 94-391). I have also suggested that the exemption probably does not cover records that do not relate to any matter involving an individual employee’s status as an employee. Op. Att’y Gen. 2008-095.

to personnel records. In this regard, the Arkansas Supreme Court has noted as follows:

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.³¹

In offering this conclusion, I consider it immaterial that the conduct reflected in the Exhibit A documents is summarized at least in part in the investigative documents contained in Exhibit B. The public interest in reviewing personnel records that served as a basis for a disciplinary action in this instance remains of sufficient independent strength that it appears to warrant disclosure under the standard applicable to personnel records.

The question remains whether any portions of the Exhibit A documents might fall within the constitutional exception outlined above, thus possibly warranting the redaction of certain material such as the name of the complainant and the pictures of her and her family. In my opinion, these redactions may indeed be warranted under the constitutional privacy standard discussed above.

One of my predecessors has analyzed this issue in the following terms:

The Arkansas Supreme Court has recognized that the constitutional right of privacy can supersede the specific disclosure requirements of the FOIA, at least with regard to the release of documents containing constitutionally protectable information. *See McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989). The *McCambridge* court held that a constitutional privacy

³¹ *Young*, 308 Ark. at 598.

interest applies to matters that: (1) an individual wants to and has kept confidential; (2) can be kept confidential but for the challenged governmental action in disclosing the information; and (3) would be harmful or embarrassing to a reasonable person if disclosed.³²

As my predecessor pointed out, the question of whether this constitutional right of privacy mandates the redaction of certain information is one of fact that must be determined in the first instance by the custodian of the records.³³ If you as custodian determine that this constitutional protection applies to the name of the complainant, you must then consider whether the public's interest in disclosure under the FOIA outweighs the privacy interest in their nondisclosure. Again, this determination will be a factual one, based upon the information available to you. If you determine that the privacy interest prevails, the name of this non-employee should be redacted before the records are released. This same conclusion applies to the photographs of the complainant and her children,³⁴ as it does to the name of the complainant's ex-husband, which you have likewise provisionally redacted from the Exhibit B documents. With regard to this analysis, I will merely note that the public interest in disclosure of either these names or of the family photographs would appear to be negligible.

Exhibit B documents. As noted above, you have provisionally determined that the documents from the Department's investigative file contained in Exhibit B are disclosable as "employee evaluation or job performance records" under the standard set forth above. Assuming the facts to be as you have summarized them, I concur in this decision.

All of the documents contained in Exhibit B were created by or at the behest of the employer to evaluate an employee's performance or lack thereof. The documents, moreover, formed the bases for a suspension that has been finally resolved at the

³² Op. Att'y Gen. 2008-049, *citing* Op. Att'y Gen. 2008-044.

³³ *Id.*

³⁴ In applying the *McCambridge* analysis to release of the family photographs, it may be significant that these have apparently been posted on Facebook, although it is unclear with what restrictions on general public access. The effect of this posting is a matter you might consider in the course of weighing the strength of the complainant's constitutional privacy interests.

administrative level. The remaining question, then, is whether a compelling public interest exists in the records' disclosure.

As I have previously noted in this regard:

[A] compelling public interest likely exists in information reflecting a violation of departmental rules by a "cop on the beat" in his interactions with the public. If the prior disciplinary records reflect a suspension based on this type of infraction, a strong case for the finding of a compelling public interest exists.³⁵

I have found nothing in the documents you have supplied that might lead me to question your provisional determination that these documents are disclosable.

With respect to possible redactions from these documents, the above analysis relating to the constitutional right to privacy obviously applies. You have apparently determined that these constitutional considerations warrant redacting the names of the complainant and her ex-husband from the record. I am neither situated nor inclined to second-guess this factual determination.

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

³⁵ Op. Att'y Gen. 2010-012, *citing* Op. Att'y Gen. 2006-106.