

Opinion No. 2013-012

February 11, 2013

Officer Ralph Breshears
Little Rock Police Department
700 W. Markham Street
Little Rock, Arkansas 72201

Dear Officer Breshears:

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

You report that a fellow member of the Little Rock Police Department (the “Department”) has requested that the Department produce what you characterize as “items specifically related to me and my job performance.” You further report that “[t]he City Attorney has released items about me . . . and has told me that my entire file can be released, with the exception of address and social security number (etc).” You further report that you “have filed a complaint with the City’s HR department for harassment, and that is under investigation.”

You have attached to your request a document whose subject matter is identified as “Hostile workplace complaint” and an FOIA request seeking various documents from the Department’s Public Information Officer. The only direct mention of you in the FOIA request is contained in a demand for production of documents relating to non-Department-sponsored classes you have attended since September 2009.

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).

RESPONSE

As discussed above, it is unclear both what documents the custodian has released relating to you and what as yet unreleased documents would be responsive to a pending FOIA request. I have been provided none of the records at issue. Under the circumstances, I can do no more than set forth the standards that the custodian must apply in classifying and weighing the disclosability of any requested documents not yet released. With respect to the FOIA request attached to your correspondence, I will note that requested documents relating to certain classes you have attended since 2009 appear to constitute personnel records subject to review under the standard set forth below.

Before setting forth the applicable standards for disclosure, I feel obliged to make several preliminary points. First, if, as might be the case, the custodian has already released the records at issue, my ensuing discussion is purely academic. Although you report in your correspondence that the Little Rock City Attorney has released documents relating to you in response to the FOIA request you have provided me, you have not indicated what records were released or whether any records that remain unreleased might fall within the scope of the request. It is unclear whether any provisional decision regarding disclosure remains pending for me to review. In this regard, I must stress that my statutory role is to review the propriety of a custodian's tentative decisions regarding the application of the FOIA, not to second-guess decisions upon which a custodian has already acted.

Secondly, I will note that it is immaterial under the FOIA whether a request for the disclosure of documents is motivated by a desire to harass, as you suggest is the case in this instance. My immediate predecessor offered the following cogent analysis of this issue, with which I fully concur:

With regard to your contention that these records were not requested for the purpose of obtaining information about the workings of government, but rather for the purpose of harassing the employees in question, I must point out the long-held view that the motive of an FOIA requester is ordinarily irrelevant to the analysis. *See, e.g.*, Op. Att'y Gen. No. 2002-067 (“[T]he balancing test under A.C.A. § 25-19-105(b)(12) does not turn upon the particular requester's motive in seeking the record where a public interest nevertheless exists in the information sought.”). *Accord*, Ops. Att'y Gen. Nos. 2002-087; 98-186; 96-309; 92-289 and Watkins, *The Freedom of Information Act*

at 76 (m & m Press, 3rd ed. 1998). This view is supported by U.S. Supreme Court precedent. In *Department of Defense v. FLRA*, 510 U.S. 487 (1994), the United States Supreme Court cited with approval language of an earlier case, *Department of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749 (1989) to this effect: “‘whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made.’” *Reporters Comm.*, 489 U.S., at 771. Because Congress clearly intended the FOIA ‘to give any member of the public as much right to disclosure as one with a special interest [in a particular document]’ [citation omitted] . . . ‘the identity of the requesting party has no bearing on the merits of his or her FOIA request.’” 510 U.S. 487, 496. The Court also stated that “‘all FOIA requestors have an equal, and equally qualified, right to information. . . .’” *Id.* at 499. “‘Thus whether disclosure of a private document . . . is warranted must turn on the nature of the requested document and its relationship to ‘the basic purpose of the Freedom of Information Act to open agency action to the right of public scrutiny’ [citation omitted] rather than on the particular purpose for which the document is being requested.’” *Reporters Comm.*, 489 U.S. at 772. Justice Ginsburg, in her concurrence in *FLRA*, noted the reason for this rule: “[t]his main rule serves as a check against selection among requesters, by agencies and reviewing courts, according to idiosyncratic estimations of the request's or requester's worthiness.” 510 U.S. at 508.³

Because you have not provided me with any of the documents at issue in your request, I can do no more here than set forth the standards the custodian must apply in identifying the nature and determining the disclosability of the records. The only records pertaining to you specifically identified in your correspondence are those relating to non-Department-sponsored classes you have taken since 2009. In my opinion, these documents constitute your personnel records and are subject to disclosure under the standard set forth below. Any other records that might be at issue in your request are subject to classification and disclosure as described below.

³ Op. Att’y Gen. No. 2003-325 (brackets in original); *accord* Ops. Att’y Gen. Nos. 2006-165; 2006-142; 2002-087 and 2002-067.

I. General standards governing disclosure

A document must be disclosed in response to an 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 Little Rock 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.⁴

Although the records itemized in the FOIA request attached to your correspondence would appear to qualify as “public records” under this definition, I could not definitively determine as much without reviewing the actual documents.⁵

⁴ A.C.A. § 25-19-103(5)(A) (Supp. 2011).

⁵ Among the documents requested are email exchanges between two Department lieutenants within a specified time frame. Without actually reviewing these exchanges, I could not determine whether they “constitute a record of the performance or lack of performance of official functions” and hence meet that requirement of a “public record” as defined in the statute just quoted. *See, e.g.*, Op. Att’y Gen. No. 2012-080 (noting that email exchanges must meet this requirement in order to qualify as public records). Moreover, without such a review, I could not determine whether the emails fall within the category either of your personnel records or your employee evaluation/job performance records – a statutory prerequisite for my weighing their disclosability pursuant to a three-day opinion request of the sort you have made. *See* A.C.A. § 25-19-105(c)(3).

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.⁶ These two categories, which are mutually exclusive for purposes of FOIA analysis, are "personnel records"⁷ and "employee evaluation or job performance records."⁸ 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.⁹ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁰ 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

⁶ 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).

⁷ 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."

⁸ 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."

⁹ *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.

¹⁰ *Id.*

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.¹¹

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 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.¹²

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,¹³ 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

¹¹ A.C.A. § 25-19-105(c)(1); Op. Att'y Gen. Nos. 2011-100, 2008-065.

¹² Watkins & Peltz, *supra*, at 217-18 (footnotes omitted).

¹³ *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.").

job performance records that pertain to individual employees.¹⁴ 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.”¹⁵

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,¹⁶ 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 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.¹⁷ If the privacy interest is merely *de minimus*, the thumb on the scale favoring disclosure outweighs the privacy interest. Secondly, 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.¹⁸ 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.¹⁹ 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.²⁰ Whether any particular personnel

¹⁴ See, e.g., Op. Att’y Gen. 1999-147; Watkins & Peltz, *supra*, at 187.

¹⁵ A.C.A. § 25-19-105(b)(12).

¹⁶ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

¹⁷ *Id.* at 598, 826 S.W.2d at 255.

¹⁸ *Id.*, 826 S.W.2d at 255.

¹⁹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

²⁰ 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-

record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.²¹

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. 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.²²

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. Secondly, it must be the case that the information might be kept confidential but for the challenged government action that may disclose it. Thirdly, 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.²³

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

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.

²¹ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

²² *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

²³ *Id.*

government's interest in disclosure. If the privacy interest is weightier, then the material cannot be disclosed.²⁴

As discussed above, it is unclear what documents the custodian has released and what unreleased documents, if any, may fall within the scope of a pending request relating to you. Consequently, I can do no more than advise that he should apply the above standards in classifying and weighing the disclosability of requested documents not yet released.

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

²⁴ *Id.*