

Opinion No. 2013-048

May 22, 2013

George Butler, Jr.
Washington County Attorney
280 North College, Suite 501
Fayetteville, Arkansas 72701

Dear Mr. Butler:

You have asked a follow-up question in response to Opinion No. 2012-044, which was issued to you last week, assessing whether a custodian had complied with the Arkansas Freedom of Information Act (FOIA) when deciding not to disclose certain employee-evaluation records.¹

As noted in your last opinion request, someone made an FOIA request for the records of four employees who had been fired. But three of those employees were later “allowed to resign.”² The employer granted the request of the fourth employee to amend her letter of termination to remove any reference to why she

¹ The FOIA is codified at A.C.A. §§ 25-19-101 to 25-19-110.

² As I noted in the last opinion, I assume, for purposes of this opinion, that the decision to allow these employees to resign took place during the time for an administrative appeal, and that they were not forced to resign in the sense described in Op. Att’y Gen. Nos. 2012-019, 2007-061. *See also* John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* (Arkansas Law Press, 5th ed., 2009), pp. 210–212. You say these employees would still have been fired if they had not resigned. Yet you have not stated that these employees were “constructively terminated,” as that term is defined in the foregoing opinions. Therefore, my assumption stands. Additionally, even if they were constructively terminated, and the only remaining question was whether there was a compelling interest in their records, I would still be unable to assess that question for the same reasons (which are explained below) that I am unable to assess that question as it applies to the employee who was actually terminated.

had been fired.³ The custodian refused to disclose the employee-evaluation documents because, in the custodian's view, the public did not have a compelling interest in them. For reasons explained in the earlier opinion, I narrowed the question to the fourth employee who was ultimately fired, and said I lacked sufficient information to assess the custodian's decision. You have written again, supplying additional information.

Nevertheless, I still lack sufficient information to assess the custodian's decision. A custodian's decision about whether there is a compelling public interest (CPI) in employee-evaluation records is highly factual. Your two letters only give snippets of information that you (correctly) believe to be relevant to deciding whether there is a CPI. But there are many other relevant factors that your letters do not touch upon.

On some occasions, the presence of a single fact is sufficient to find a CPI. One such instance occurs when a police officer is disciplined for using excessive force.⁴ Another example occurs when a supervisor sexually harasses a subordinate.⁵ There are many examples.⁶ Looking for these key, dispositive facts makes it easier for one to determine that there *is* a CPI.

But your requests ask me to affirm the custodian's determination that there is *not* a CPI. While the presence of these dispositive facts indicates that there is a compelling interest, their absence does not (necessarily) support a finding that there is no CPI. Your letters simply point out the absence of a few dispositive facts, and then you infer from their absence that there is no CPI. Yet there may be

³ Neither of your two letters make clear how, precisely, the employee's termination letter was changed or whether this change reflects any change in the underlying reasons for her termination. Regarding the amended letter, you state that "her letter of termination [was] amended to state that she was terminated *with no reasons given for the termination....*" The language I have italicized is ambiguous. It could be saying that there were reasons for which she was fired, but those reasons were not stated in the letter. Or it could be that there was no reason at all for which she was fired. Whether her final termination was for cause or without cause is clearly relevant to whether there is a compelling public interest.

⁴ *E.g.*, Op. Att'y Gen. 97-079.

⁵ *E.g.*, Op. Att'y Gen. 2002-095.

⁶ *See* Watkins & Peltz, *supra*, pp. 214–216 (collecting this office's opinions and discussing issues in other jurisdictions).

other facts, of which I am unaware, that when taken together as a whole, indicate there is a CPI. Because I am not aware of all the surrounding facts, I cannot confidently assess the custodian's decision simply based on noting that some of the dispositive facts are absent.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

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