

Opinion No. 2013-144

November 18, 2013

George Butler, Jr.  
Washington County Attorney  
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. 2013). 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.

You say that someone has made an FOIA request to the Washington County Sheriff’s office for records related to four law enforcement officers, only one of whom is still a current employee. You report that the sheriff’s office conducted an internal investigation that resulted in disciplinary action against these four officers. You have attached to your letter several documents that, in the custodian’s judgment, are “job evaluation records” that “were the basis for the forced resignations [of three officers] and the suspension [of one officer]. Further, the custodian has determined that there is a compelling public interest in the disclosure of these records.

You ask whether the custodian’s decisions regarding the records’ classification and release are consistent with the FOIA.

## **RESPONSE**

The custodian's decision to classify the attached records as "employee evaluation or job performance records" is, in my opinion, consistent with the FOIA. Further, based on the information provided to me, the custodian's decision to release the records of the suspended officer is consistent with the FOIA. I am unable to definitively comment on the decision to release the records of the officers who resigned. The propriety of that decision turns on a key factual question that I am neither authorized nor equipped to investigate when issuing opinions.

## **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. There is no question that the first two elements are met in this case. Thus, I will only analyze the final element: whether there are any exceptions that shield the documents from disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.<sup>1</sup> For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"<sup>2</sup> or "employee

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<sup>1</sup> 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).

<sup>2</sup> A.C.A. § 25-19-105(b)(12): "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."

evaluation or job performance records.”<sup>3</sup> 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.

Because the attached records so clearly qualify as “employee evaluation or job performance records,” I will only focus on that exception. While the FOIA does not define the term “employee evaluation or job performance records,” the Arkansas Supreme Court has held 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.<sup>4</sup> This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.<sup>5</sup> Because each of the attached records clearly meets each of these definitional elements, it is my opinion that the custodian has properly classified the records as the respective employees’ employee evaluation records.

Having settled the question whether the records meet the definition of an employee evaluation record, we must move to the question whether the FOIA requires that the record be withheld from disclosure. The FOIA states that employee evaluation records *cannot* be released unless all the following elements have been met:

1. The employee was suspended or terminated (i.e., level of discipline);

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<sup>3</sup> A.C.A. § 25-19-105(c)(1): “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.”

<sup>4</sup> *Thomas v. Hall*, 2012 Ark. 66, \_\_\_ S.W.3d \_\_\_ (Feb. 16, 2012); *see, e.g.*, Ops. Att’y Gen. Nos. 2009-067; 2008-004; 2005-030; 2004-211; 2003-073; and 93-055.

<sup>5</sup> *Id.*

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., basis); and
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).<sup>6</sup>

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:

[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.<sup>7</sup>

These commentators also note that “the status of the employee” or “his rank within the bureaucratic hierarchy” may be relevant in determining whether a

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<sup>6</sup> A.C.A. § 25-19-105(c)(1) (Supp. 2011); Op. Att’y Gen. 2008-065.

<sup>7</sup> Watkins & Peltz, *supra* note 1, at 217–18 (footnotes omitted).

“compelling public interest” exists.<sup>8</sup> The latter determination is always a question of fact that must be determined by the custodian after considering all the relevant information.

The primary purpose of this exception is to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship.<sup>9</sup>

We are now in a position to apply the elements of the foregoing test to the attached records. The basis and compelling-interest elements seem clearly met.<sup>10</sup> Further, I assume (though you do not say) that the disciplinary action against the suspended officer is complete such that the finality element is also met. The only remaining question is whether the level-of-discipline element is met. More specifically, the question is whether the remaining three officers—who were (as you say) “forced to resign”—were “terminated” for purposes of this element.

As this office has used the term, a “forced resignation” or “coerced resignation” refers to “a resignation tendered in the face of certain, impending termination.”<sup>11</sup> This office has opined that a coerced resignation can, in principle, amount to a constructive termination that would satisfy the level-of-discipline element. But whether any given resignation is actually a “coerced resignation” is a question of fact that must be decided by the custodian. While you say these three officers were “forced to resign,” I have no way of knowing whether you are using that term in the sense described above. And I lack both the resources and the authority to investigate the factual question whether the three officers suffered a “coerced resignation” as that term is used in this office’s opinions. Consequently, I cannot

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<sup>8</sup> *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.”).

<sup>9</sup> *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra* note 1, at 204.

<sup>10</sup> This office has repeatedly opined that the public has a compelling interest in the disciplinary records of law enforcement officials who were disciplined for violating administrative policies aimed at conduct that could undermine the public trust and/or compromise public safety. *E.g.*, Op. Att’y Gen. Nos., 2009-195, 2003-072, 2001-343, 98-210, 98-075, 97-400 and 92-319.

<sup>11</sup> *See, e.g.*, Op. Att’y Gen. 2011-084 (and opinions cited therein).

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definitively opine on whether the custodian has properly determined that the level-of-discipline element has been met in this case.

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

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM:RO/cyh