

Opinion No. 2014-007

January 28, 2014

Kent McLemore
Buckley, McLemore & Hudson, P.A.
123 North Block Avenue
Fayetteville, Arkansas 72701

Dear Mr. McLemore:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). The FOIA 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, as the subject’s attorney, request such an opinion.

Your letter indicates that your client, a former police officer, was the subject of an internal-affairs investigation. The custodian of those records intends to release them (in redacted form) in response to a journalist’s FOIA request for them.

While you object to their release, you apparently do not object to the custodian’s determination that the records are “public records” under the FOIA. Nor do you object to the custodian’s determination that the FOIA requires the records be disclosed pursuant to the test for employee-evaluation records under A.C.A. § 25-19-105(c)(1). Nor do you object regarding the custodian’s redactions. Instead, your objection is solely based on the claim that, because your client is facing a pending criminal trial, the release of these records “will prejudice his constitutional right to a fair trial.”

You ask me to determine whether, in light of your objection, the custodian’s decision to release the records is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. When performing this duty, I typically explain the FOIA's requirements pertaining to the release of employee-related public records. But since there is no dispute here regarding those requirements, such a discussion is not called for.

Your objection is entirely grounded in the federal constitution. Accordingly, the merits of your objection fall outside the scope of my review under subsection 25-19-105(c)(3)(B)(i), which limits my review to evaluating custodian's interpretation and application of A.C.A. §§ 25-19-105(b)(12) (for personnel records) and 25-19-105(c)(1) (for employee-evaluation records). Because your objection is based on an interpretation and application of something other than those two FOIA provisions, I am unable to evaluate it.¹

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:RO/cyh

¹ Your objection essentially amounts to two assertions: (1) that the FOIA's disclosure requirements yield when a disclosure would jeopardize the subject's right to a fair trial; and (2) that—given all the circumstances—the disclosure of your client's information would, in fact, jeopardize his right to a fair trial. Accordingly, you may wish to refer to *Ark. Gazette Co. v. Goodwin*, 307 Ark. 204, 801 S.W.2d 284 (1990). As *Goodwin* makes clear, only a trial court is in a position to conduct the balancing tests required to evaluate your objection to the records' release in this instance.