

Opinion No. 2014-038

April 4, 2014

George R. Spence  
121 South Main Street  
Bentonville, Arkansas 72712

Dear Mr. Spence:

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.

Your request relates to a recently issued Attorney General Opinion—No. 2014-027. After I issued that opinion, you received two additional FOIA requests. Both requesters seek an unredacted copy of the settlement agreement that was partially addressed in Opinion No. 2014-027. One of the requesters also seeks “copies of all documents hard copy or email that reference [a certain public employee] during the period of Oct. 31 to the time that this request is processed.” The other requester seeks access to the “[s]ettlement terms and emails documenting the discussion between Superintendent Dr. Paul Hines and” the public employee.

In response to these requests, you have gathered two sets of records, which you have attached to your request for my review. As to the first, you intend to disclose the settlement agreement in redacted form. This settlement agreement was

addressed in Opinion No. 2014-027 where I opined that the custodian had correctly categorized the document as a whole as the employee's personnel record. But I questioned a redaction from the Settlement Agreement. You have now submitted an unredacted copy for my review. You continue to believe that the originally redacted portion of the record must remain redacted, though your basis for this belief has changed. Originally, you cited the personnel records balancing test, but you have now added a citation to A.C.A. § 25-19-105(b)(2), which exempts from disclosure all public records that qualify as "education records" under the Family Education Rights and Privacy Act of 1974 ("FERPA").

The second set of records is presumably responsive to the request for "copies of all documents...that reference [the employee]." You have gathered the records you believe to be responsive to this request, attached them to your correspondence, indicated which records you believe to be wholly exempt, and you have helpfully indicated in highlights which discrete pieces of information you believe should be redacted from records that are otherwise disclosesable.

You ask whether the foregoing decisions are consistent with the FOIA.

## **BRIEF RESPONSE**

Before directly and briefly assessing the custodian's two decisions, I must make two preliminary points. First, pursuant to A.C.A. § 25-19-105(c)(3)(B)(i), I am statutorily obligated to review a custodian's decision with respect to the release of "personnel records" and "employee evaluation records." Second, with respect to the Settlement Agreement, the custodian has relied on the exception for personnel records (i.e., A.C.A. § 25-1-105(b)(12)) *and* the exception for education records (i.e., A.C.A. § 25-19-105(b)(2)). Given the scope of my review, I am unable to assess the propriety of the custodian's decision regarding the education-records exception.

Having reviewed the unredacted records you have attached, I conclude (1) that the personnel-records exception does not require that the custodian redact the provision in the Settlement Agreement; and (2) that, with regard to the remaining records, though the custodian has clearly made a thorough and conscientious effort

to apply the relevant exceptions to disclosure, a few decisions are, in my opinion, inconsistent with the FOIA.

## **DISCUSSION**

In the interest of brevity, I will refrain from setting out all the FOIA's definitions and tests related to personnel records and employee evaluations. Instead, I will direct your attention to Opinion No. 2014-027 for a discussion of those topics. I will move straight to applying those rules to the custodian's decisions, supplementing that application with additional discussion of the FOIA rules as needed.

### ***The Settlement Agreement***

As I noted in the prior opinion, the custodian, in my opinion, has correctly classified the Settlement Agreement, as a whole, as a personnel record. In the earlier opinion, I questioned the custodian's decision to redact a paragraph in the Settlement Agreement based on the personnel-records balancing test. The custodian continues to assert his view that the paragraph should be redacted under the personnel-records balancing test and (now adds) under A.C.A. § 25-19-105(b)(2), which exempts from disclosure certain education records. As noted above, my review under section 25-19-105(c)(3)(B)(i) extends to the applicability of the exemptions for personnel records (i.e., -105(b)(12)) and employee evaluations (i.e., -105(c)(1)).<sup>1</sup> Therefore, I make no assessment of whether the custodian's reading of -105(b)(2) is correct. Instead, I will focus solely on the custodian's determination regarding the personnel-records exception.

In my opinion, the custodian has incorrectly determined that the personnel-records exception requires the paragraph at issue to be redacted. As explained in Opinion No. 2014-027, after classifying a document as a personnel record, a custodian must disclose the document unless doing so constitutes a clearly unwarranted invasion of personal privacy. According to the Arkansas Supreme Court, to determine whether the release of a personnel record would constitute a "clearly

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<sup>1</sup> A.C.A. § 25-19-105(c)(3) (making clear that my review extends to the custodian's decision regarding a "request for the examination or copying of personnel or evaluation records").

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 takes place with a thumb on the scale favoring disclosure. You have not given any indication about why you think this balancing test tips in favor of nondisclosure.

The first step of the test is to determine whether the information at issue is of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest.<sup>2</sup> I think there is no question that there is a greater than *de minimus* privacy interest in the paragraph at issue.

Thus, we must move to the next step in the analysis which assesses whether the privacy interest is outweighed by the public’s interest in disclosure.<sup>3</sup> The public’s interest is measured by the extent to which disclosure of the information sought would “shed light on a[] [public entity’s] performance of its statutory duties’ or otherwise let citizens know ‘what their government is up to.’”<sup>4</sup> Further, as I indicated in Opinion No. 2014-027, the General Assembly has indicated that the public has a significantly increased interest in the terms of a settlement agreement to which a public entity is a party.<sup>5</sup>

There is no question that the settlement agreement sheds light on the workings of a public entity. This is also true of each term of the settlement agreement. Additionally, in light of A.C.A. § 25-8-401, the public has an extremely high interest in this settlement agreement/personnel record. As I noted in Opinion No. 2014-027, it is theoretically conceivable that this public interest could be

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<sup>2</sup> *Id.* at 598, 826 S.W.2d at 255.

<sup>3</sup> *Id.*, 826 S.W.2d at 255.

<sup>4</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998), quoting *Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

<sup>5</sup> See A.C.A. § 25-18-401 (“No public official...acting in behalf of...[an] agency wholly or partially supported by or expending public funds shall...[a]gree or authorize another to agree that all or part of a litigation settlement agreement to which the agency is a party shall be kept secret, sealed, or otherwise withheld from public disclosure.”).

overcome by some extremely private information. But the paragraph at issue here, though it is sensitive, does not contain the kind of humiliating, extremely embarrassing, or extremely personal information that (in my opinion) would be weighty enough to overcome the significant public interest that is grounded in section 25-18-401.

Therefore, in my opinion, the personnel-records exception is not a basis for redacting the paragraph at issue.

### ***The Remaining Records***

Most of the custodian's decisions regarding these records are consistent with the FOIA. In what follows, I will point out the few decisions that I believe to be inconsistent with the FOIA. I have Bates stamped the 135 pages of records for easier reference. When discussing specific pages, I will refer to the Bates numbers I have applied to the documents.

As will be clear in what follows, some of the records are employee evaluation records. This includes any record created by or at the behest of the employer to evaluate an employee. Such records cannot be disclosed unless, among other things, the employee being evaluated was suspended or fired.<sup>6</sup>

- Page 4: This page contains the cell phone number of a public employee. Personal cell phone numbers are not disclosable under the FOIA. So you should ensure this is a work cell phone before releasing the number.
- Page 21: This page contains an unredacted copy of the personal email address of a public employee. It should be redacted pursuant to A.C.A. § 25-19-105(b)(12) and -105(b)(13). This same address should also be redacted (while leaving the name) each time it occurs on page 22.
- Pages 60–69: These are employee evaluations because they were all clearly created by the employer to evaluate the employee. Because the employee

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<sup>6</sup> Please see Op. Att'y Gen. No. 2013-155 for further discussion and citations to authority.

was not suspended or fired, the records should be withheld from disclosure pursuant to the employee-evaluation exception.

- Pages 73–78: The custodian should consider whether these records were created by the employer or at the employer’s behest. If so, then the records are employee evaluations of the employee being complained about; and they are exempt from disclosure because the threshold test for disclosure of such records (i.e. suspension or termination) is not met.
- Page 79: I cannot opine on the propriety of the redactions on this page because, unlike the other proposed redactions, I cannot determine what has been redacted.
- Page 108: As far as I can determine from the face of this record, there is no basis for these two redactions.
- Page 131: I cannot determine from the face of this record what it is or how to classify it.

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

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/RO:cyh