



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-052

May 21, 2014

Mr. George E. Butler, Jr.
Washington County Attorney
Washington County Courthouse
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.

The record at issue is a letter of termination. You have provided a copy of the letter with the subject's name redacted. You state that the custodian has determined that this record is subject to disclosure under the FOIA's test for the release of job evaluation records. I assume this means the custodian intends to release the termination letter as redacted.

RESPONSE

As indicated above, my statutory duty under A.C.A. § 25-19-105 (c)(3)(B)(i) is to state whether a custodian's decision regarding the disclosure of certain employee-related records is consistent with the FOIA. In my opinion, the custodian's decision in this instance is partly consistent with the FOIA. The decision to classify this particular termination letter as an employee evaluation record is consistent with the act. And I agree that the letter meets the test for release of such a record. But in my opinion, the decision to redact the subject's name is inconsistent with the FOIA. Additionally, I note that the custodian apparently

does not intend to shield the identity of the other person referenced in the letter. But in my opinion, that information is in all likelihood protected on constitutional grounds.

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. Because the first two elements are clearly met in this case, I will confine my analysis to the third element.

This office has opined that letters of termination constitute employee-evaluation records if they contain the reasons for the termination.¹ Because the termination letter in question recounts the reasons for the termination, the letter qualifies as an employee-evaluation record, in my opinion.

Accordingly, it can only be released if the following four-part test for the disclosure of employee-evaluation records has been met:

1. The employee was suspended or terminated (i.e., level of discipline);
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).²

¹ *E.g.*, Op. Att’y Gen. 2001-276 (and opinions cited therein). If, however, the letter merely reflects the fact of termination, without elaboration, this office has opined that the letter is properly classified as a “personnel record” under A.C.A. § 25-19-105(b)(12), which sets out a different test for the release of such a record. *See* Op. Att’y Gen. 2006-147 (and opinions cited therein).

² A.C.A. § 25-19-105(c)(1) (Supp. 2013).

The first three elements have been met.³ Thus, the only question regarding the release of this termination letter is whether there is a “compelling public interest” in its disclosure. The FOIA does not define 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.⁴

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.⁵ But this conclusion is tempered in the context of law enforcement: “the public has a great interest in the [job] performance of police officers and other law enforcement officials, and in this case the ‘cop on the beat’ is just as important as the chief of police.”⁶

³ With regard to the “formed a basis” prong, a termination letter—although written contemporaneously with the termination—has been deemed by this office to form a basis for the termination. *See* Op. Att’y Gen. 2006-026 and 2005-030, fn. 3.

⁴ John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* (Arkansas Law Press, 5th ed., 2009), pp. 217–18 (footnotes omitted).

⁵ *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.”).

⁶ *Id.* at 217.

Turning to the record at issue, it appears that of the three factors identified above, the first and third are met. As for the second, you have noted that there is no public controversy. But in my opinion, the first and third factors are sufficient under the circumstances to conclude that the public has a compelling interest in the termination letter. The letter reflects that this law enforcement officer's termination occurred as a result of the violation of rules aimed at conduct which manifestly could undermine the public trust. Based on the specific facts of the incident giving rise to the termination letter, I conclude that there is a compelling public interest in the letter's disclosure. Therefore, in my opinion, the custodian's decision to release it is consistent with the FOIA.

In my opinion, however, the decision to redact the subject's name is inconsistent with the FOIA. The exception for employee evaluation and job performance records makes no provision for redacting individuals' names.⁷ Indeed, as I have previously observed:

[T]o the contrary, the identity of the individual would seem central to the determination of whether a compelling public interest exists. Accordingly, redacting the name of the subject of the record would seemingly largely negate the public's interest and frustrate the purpose of the requirement to release qualified employee evaluations and job performance records. Consequently, if the ... documents meet the test for the disclosure of evaluation/job performance records, then the records must likely be disclosed in their entirety with no redactions.⁸

It must also be noted, however, that the constitutional right to privacy can conceivably be implicated with respect to evaluation and job performance records.⁹ Specifically, parties who may be identified from such employee-related records can have a constitutionally-protected privacy interest in those records.¹⁰ The Arkansas Supreme Court has recognized that the constitutional right of privacy can supersede the specific disclosure requirements of the FOIA, at least with regard to the release of documents containing constitutionally protectable

⁷ *E.g.*, Op. Att'y Gen. 2005-233.

⁸ Op. Att'y Gen. 2009-026 (citing Op. 2005-233).

⁹ *E.g.*, Op. 2009-026 at n. 3.

¹⁰ *Id.*

information.¹¹ The *McCambridge* court held that a constitutional privacy-interest applies to matters that: (1) an individual wants to and has kept confidential; (2) can be kept confidential but for the challenged governmental action in disclosing the information; and (3) would be harmful or embarrassing to a reasonable person if disclosed. The question whether certain information is constitutionally protected under the right to privacy is a highly factual decision the custodian of records must initially make. If the custodian determines that the records contain constitutionally protectable information (i.e., information that meets the *McCambridge* test), then the custodian must consider whether the governmental interest in disclosure (i.e., the public's legitimate interest in the matter) outweighs the privacy interest in withholding them. As always, the person claiming the right will have the burden of establishing it.¹²

While this is ultimately a factual determination for the custodian, I believe the *McCambridge* test for protectable constitutional privacy is likely met in this instance insofar as the identity of the other person referenced in the termination letter is concerned. In my opinion, that person's identity is in all likelihood protected on constitutional grounds and thus should probably be redacted prior to the record's release.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN MCDANIEL
Attorney General

DM:EAW/cyh

¹¹ *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

¹² *Accord*, Ark. Ops. Att'y Gen. Nos. 2007-001; 2006-141; 2001-122.