



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-071

July 10, 2014

Mike Owens
105 SE 14th Street
Bentonville, Arkansas 72712

Dear Mr. Owens:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the attorney for the subject of the records, 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 correspondence, together with correspondence received from the custodian, indicate that someone has submitted an FOIA request for your client's "personnel file." Though I have not been provided with the actual FOIA request or its wording, I understand that the request specifically seeks, among other things, the following records related to your client: written reprimands, letters of caution, documents supporting a recommendation for suspension or dismissal, letters relating to promotions or demotions, and any resignation letter.

The information I have been presented with indicates that your client was suspended for disciplinary reasons in March 2014. Soon after suffering that suspension, your client resigned. The custodian intends to disclose a 22-page set of documents that, according to the custodian, formed a basis for the March 2014 suspension. Your client objects to the release of these documents. First, you say that you "believe that the disputed documents are exempt from release" because "such an action would constitute an unwarranted invasion of personal privacy." You do not offer any arguments to support this claim. Second, you say that "there was no suspension or termination proceeding, and as such, Ark. Code Ann. § 25-

19-105(c)(1) does not provide a lawful basis for releasing the disputed documents.¹ Third, you say that the records should be withheld from disclosure due to some procedural irregularities associated with the custodian's handling of the underlying FOIA request.

You ask whether, in light of my review of the disputed documents and the foregoing objections, the custodian's decision to release the documents is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. At the broadest level, custodians must make two decisions in this context: first, they must classify the documents as either personnel or employee-evaluation records; and, second, they must then apply the tests for the disclosure of that specific category of employment-related records. Having reviewed the records in dispute, together with correspondence from you and the custodian, it is my opinion (1) that the custodian's ultimate decision to disclose these records is consistent with the FOIA; (2) that the custodian's intermediary decisions regarding classification are only partly consistent with the FOIA; and (3) that the manner in which the custodian has redacted from certain records is probably inconsistent with the FOIA.

DISCUSSION

I will set out the general rules governing all FOIA requests, the general rules governing the classification and disclosure of personnel and employee-evaluation records, and then, with these standards in place, I will assess your objections to disclosure.

¹ You make a third argument for non-disclosure based on some procedural irregularities associated with the handling of the underlying FOIA request. Specifically, you argue that your client was not timely notified of the custodian's decision to release these documents and that, accordingly, the custodian is prohibited from disclosing the records. You do not cite any authority or offer any argument to support the inference to the claim that the records cannot be disclosed. And even assuming that your client did not receive timely notice—something which is not entirely clear to me based on the facts as I understand them—your client was able to avail herself of the review process afforded by subsection 25-19-105(c)(3). Therefore, even assuming a lack of timely notice, there is no harm because the records have not been disclosed and the custodian is awaiting release of this opinion.

I. General standards governing disclosure

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 here and because there is no dispute about them, I will confine my analysis to the third element.

II. Exceptions to disclosure

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.² For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"³ or "employee evaluation or job performance records."⁴ 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 record be disclosed.

² 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).

³ 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."

⁴ 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."

a. Personnel-records exception.

The first of the two most relevant potential exceptions is the one for “personnel records,” which the FOIA does not define. But this office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.⁵ Whether a particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. If a document meets this definition, then it is open to public inspection and copying except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁶

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁷ has provided some guidance. To determine whether the release of a personnel record would constitute a “clearly 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.

The balancing test elaborated by *Young v. Rice* has two steps. First, the custodian must assess whether the information contained in the requested document is of a personal or intimate nature such that it gives rise to a greater than *de minimus* privacy interest.⁸ If the privacy interest is merely *de minimus*, then the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimus* privacy interest, then the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.⁹ Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public’s interests.¹⁰ The fact that

⁵ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

⁶ A.C.A. § 25-19-105(b)(12) (Supp. 2013).

⁷ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁸ *Id.* at 598, 826 S.W.2d at 255.

⁹ *Id.*, 826 S.W.2d at 255.

¹⁰ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.¹¹

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹²

Even if a document, when considered as a whole, meets the test for disclosure, it may contain discrete pieces of information that have to be redacted. Please see Opinion No. 2012-063 for a list of some items that must be redacted.

b. Employee-evaluation exception

The second potentially relevant exception is for "employee evaluation or job performance records," which the FOIA likewise does not define. But the Arkansas Supreme Court has recently adopted this office's view 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.¹³ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁴

If a document meets the above definition, the document *cannot* be released unless all the following elements have 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);

¹¹ *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹² Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

¹³ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Op. Att'y Gen. Nos. 2009-067; 2008-004; 2007; 97-222; 95-351; 94-306; and 93-055.

¹⁴ *Id.*

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).¹⁵

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.¹⁶

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,¹⁷ which is always a question of fact that must be determined, in the first instance, by the custodian after he considers all the relevant information.

¹⁵ A.C.A. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

¹⁶ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹⁷ *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.”).

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.¹⁸

III. Application

We can now apply the foregoing to the disputed documents, which are Bates stamped for ease of reference. I will refer to these Bates numbers below.

A. The classification decision

The custodian seems to have classified all these records as employee-evaluation records. I say “seems to” because the custodian says that “[a]lternatively, if the records are viewed as personnel records,” they should still be disclosed. You do not dispute the custodian’s general determination that the records qualify as employee-evaluation documents.

Based on my review of the documents, I have determined (1) that most of the documents are employee-evaluation documents; (2) that some of the documents are personnel records that were later drawn into a disciplinary investigation; and (3) that I lack sufficient information to assess the classification of one record.

The following records are, in my opinion, employee-evaluation records:

- Record 0002, provided that (as appears to be the case) the record was created by the subject’s supervisor;
- Records 0003, 0004–0005, and 0007 because other documents make clear that these documents were created at the employer’s behest (records 0006 and 0011–0013 appear to be duplicates of these records); and
- Records 0008–0010, 0016, and 0018 because these were created by the subject’s supervisor to evaluate her; and

The following records are, in my opinion, personnel records:

¹⁸ Cf. Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

- Record 0001 because this document, which is a letter accepting your client's resignation, does not detail any of the grounds for the resignation or its acceptance (this office has opined,¹⁹ that such records are personnel records);
- Records 0014–0015 (receipts) and 0022 because these documents are records of your client's conduct; and
- Records 0019–0021 because these records clearly pertain to the conduct of your client (but the handwriting on record 0019 appears to qualify as an evaluation record).

Perhaps part of the reason why the custodian is unclear on how to categorize some of these records is due to a misunderstanding. This office has opined that a document that was not an employee-evaluation record when created cannot be transformed into a one simply because it was later made part of a disciplinary investigation or because it formed the basis for a disciplinary action.²⁰

I lack sufficient information to classify record 0017. This record should be classified as an employee-evaluation record if it was created *at the employer's behest*. If not, then it is a personnel record. I have not been provided with any information about the record's creation, nor is such information apparent on the face of the document.

B. The disclosure decision

Now that the records have been classified, the next question is whether the FOIA requires the records to be withheld or disclosed. Your only specific objection to the release of the evaluation records is that "there was no suspension or termination proceeding." Thus, you essentially object to the disclosure because, you argue, your client was never suspended or terminated, which would mean that the first element for the disclosure of evaluation records is not met. But the custodian says that your client suffered the disciplinary action of being "placed on administrative leave, which was a suspension." Whether this leave was a disciplinary suspension is a question of fact. I have no way to look behind the custodian's determination that the leave was, in fact, a disciplinary suspension,

¹⁹ See, e.g., Op. Att'y Gen. 2012-019, note 1 (collecting opinions).

²⁰ See Op. Att'y Gen. 2012-080.

and you do not offer any reasons to think that the leave was not disciplinary in nature. Further, the records offer some support for the custodian's statement. Therefore, based on the information available to me, the custodian's decision to disclose the evaluation records is, in my opinion, consistent with the FOIA.

Regarding the personnel records, you assert that the release of any personnel records would constitute an unwarranted invasion of your client's personal privacy. But you do not give any reason or argument to support that assertion. Further, based on a review of the records at issue, there is, in my opinion, no reason to think that the release of these personnel records would constitute a clearly unwarranted invasion of personal privacy. There is little to no privacy interest in the conduct recorded in these documents. And even if there were a greater than *de minimus* privacy interest in this conduct, there is a significant public interest in the documents because they shed a great deal of light on how the custodian has handled the matters discussed in the documents. Therefore, in my opinion, the decision to disclose these records is consistent with the FOIA.

As I noted above, I lack sufficient information to assess the classification of record 0017. If it is an evaluation record, then it should be disclosed for the same reasons that apply to the other evaluation records at issue here. Similarly, if it is a personnel record, then it must be disclosed for the same reasons that apply to the other personnel records at issue. This rule is due to the definition of an employee evaluation document: a public record that was *created* by or at the behest of the employer. The rule is also due to the rationale for the employee-evaluation exception: to preserve the confidentiality of the formal job-evaluation process in order to promote honest exchanges in the employee/employer relationship.²¹

C. Redactions

I should note that the custodian has redacted some information on records 0003 and 0007 (and, of course, their duplicates). The propriety of redactions must be evaluated according to both the merits and the manner of the redaction. I cannot evaluate the merits of the redactions because I have not seen unredacted copies. But the manner of the redactions is problematic. When custodian's make redactions, the FOIA requires that the redactions be made in such a way that one can see both the "amount" and "place" of the redaction.²² The surest way to comply with these requirements when redacting from paper documents is to use a

²¹ See, *supra*, note. 18.

²² A.C.A. § 25-19-105(f)(3).

black marker to redact the material. The manner of redaction at issue here—which appears to be White-Out—is not in compliance with the FOIA.

D. Summary

In summary, the custodian's ultimate decision to disclose these records is consistent with the FOIA. But the intermediary decisions regarding classification and manner of redaction are, in my opinion, not consistent with the FOIA.

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

Sincerely,

A handwritten signature in black ink, appearing to read "DM/CP", written over the printed name of Dustin McDaniel.

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh