



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN McDANIEL

Opinion No. 2014-088

August 8, 2014

Gary McClain, Captain
Jefferson County Sheriff's Office
Post Office Box 7837
Pine Bluff, Arkansas 71611

Dear Captain McClain:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the records' custodian, 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 and attachments indicate that your office has received a FOIA request seeking records of any disciplinary action taken against a particular former employee. You have identified two such records, and you have determined that the records must be disclosed. You state in this regard that it is your "understanding that if the disciplinary action resulted in termination or suspension that the records pertaining to it are not an exemption to release [*sic*]." You ask whether your decision is consistent with the FOIA.

RESPONSE

Having reviewed the records at issue, it is my opinion that your decision to release these disciplinary records is generally consistent with the FOIA. But as explained below, a name should be redacted from one of the records, in my opinion. Additionally, as also explained further below, it appears that you have not undertaken the proper analysis in deciding to release these records.

Before discussing the basis for these conclusions, I must clarify a certain matter referenced in your correspondence. You report that according to the subject of the

records in question, he was told by someone in my office that it was necessary for this office to know why the person making the FOIA request was seeking his disciplinary records. The subject of the records misunderstood the information provided by my office in this respect. He was told that in order to review the custodian's decision, this office would need to know what records the custodian intends to release and the *reason for the custodian's decision*. As custodian, you presumably are aware that a person's motive for seeking public records is generally irrelevant to the question whether the release of records is consistent with the FOIA. Numerous opinions of this office note the long-held view to that effect.¹

DISCUSSION

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.

The first two elements appear met in this case. As for the first element, the documents are held by the county, which is a public entity. As for the second element, the FOIA defines "public record" as:

writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.²

The documents at issue clearly qualify as public records. Therefore, in my opinion, these documents are public records and must be disclosed unless some specific exception provides otherwise.

¹ E.g., Op. Att'y Gen. Nos. 2013-073 (and opinions cited therein); 2009-030; 2008-090; 2002-067.

² A.C.A. § 25-19-103(5)(A) (Supp. 2013).

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.³ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"⁴ or "employee evaluation or job performance records."⁵ 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.

a. Personnel-records exception.

The FOIA does not define "personnel records," but this office has consistently opined that this term encompasses all records other than employee evaluation and job performance records that pertain to individual employees.⁶ 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."⁷ The FOIA does not define the phrase "clearly unwarranted

³ 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).

⁴ 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."

⁵ 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."

⁶ *See, e.g.*, Op. Att'y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

⁷ A.C.A. § 25-19-105(b)(12) (Supp. 2013). For a thorough discussion of the balancing test that applies to personnel records, see Op. Att'y Gen. 2014-084.

invasion of personal privacy,” but the Arkansas Supreme Court, in *Young v. Rice*,⁸ 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.⁹ 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.¹⁰ The Arkansas Supreme Court has indicated that the public interest is measured by “the extent to which disclosure of the information sought would ‘shed light on an agency’s performance of its statutory duties’ or otherwise let citizens know ‘what their government is up to.’”¹¹ If the public interest in this regard is substantial, it will usually outweigh any privacy interest.¹²

b. Employee-evaluation exception.

The FOIA likewise does not define “employee evaluation or job performance records.” 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 definition encompasses — among other things — records of disciplinary action and letters detailing the reasons for disciplinary

⁸ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁹ *Id.* at 598, 826 S.W.2d at 255.

¹⁰ *Id.*, 826 S.W.2d at 255.

¹¹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125 (1998), quoting *Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

¹² *Young v. Rice*, *supra* n. 8.

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

action.¹⁴ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁵

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);
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).¹⁶

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

¹⁴ *E.g.*, Op. Att’y Gen. Nos. 2011-161 (and opinions cited therein); 2003-257.

¹⁵ *Id.*

¹⁶ A.C.A. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

should be sufficient to satisfy the “compelling public interest” requirement.¹⁷

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,¹⁸ 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.

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.¹⁹

III. Application.

We can now apply the foregoing to the documents you have attached. The first step, as noted above, is to categorize the documents. You have categorized these disciplinary records as employee-evaluation records. In my opinion, this is for the most part consistent with the FOIA, given that it appears the records were either created by supervisors or at the behest of supervisors to evaluate the employee or to report the disciplinary action and communicate to the employee the reasons for such action.²⁰

Additionally, however, it is my opinion that a portion of one of the documents likely constitutes the personnel record of its author, who is also a department employee. The document I am referring to is the narrative report of one of the matters that led to disciplinary action. I have confirmed your categorization of this report as an employee-evaluation record under the assumption that it was created at the direction of the author’s supervisor for the purpose of evaluating the subject of the report. However, a portion of the report recounts a statement made by the subject regarding one of the author’s family members. In my opinion, this portion is properly categorized as a personnel record of the author.

¹⁷ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹⁸ *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.”).

¹⁹ *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

²⁰ See notes 9 and 10, *supra*.

The next step is to apply the applicable test for disclosure of each of the records. With regard to the portion of the report that constitutes a personnel record, we must apply the above balancing test in order to determine whether release would constitute a “clearly unwarranted invasion of personal privacy.” In this regard, I note that the author likely has a greater-than *de minimus* privacy interest in the information contained in this portion of the report. But the public interest is probably significant and in my opinion generally outweighs the privacy interest, with the exception of the actual name of the author’s family member. I believe the public interest can be satisfied without reference to this name. Accordingly, it is my opinion that the family member’s name should be redacted before this report is released.

Turning to the employee-evaluation records, you have stated: “It is my understanding that if the disciplinary action resulted in termination or suspension that the records pertaining to it are not an exemption to release [*sic*].” This statement fails to take into account the four elements set out above, each of which must be met before employee-evaluation records can be released.²¹ The fact of termination or suspension is not alone determinative. Based upon my review of the records involved, it is my determination that your decision to release them is consistent with the FOIA. But please be advised of the importance of properly applying the applicable test for the release of employee-related records.

To elaborate, in this particular instance, it seems clear the first three elements are met.²² As for the fourth—the “compelling interest” element—this office has consistently opined that, with respect to allegations of misconduct by law enforcement officers, a compelling public interest likely exists in information reflecting a violation of departmental rules aimed at conduct which could undermine the public trust and/or compromise public safety.²³ Moreover, an enhanced interest in disclosure exists in instances of law enforcement misconduct

²¹ It also fails to take into account the definition of “employee evaluation or job performance records,” set out above. A record does not constitute an evaluation record simply because it pertains to disciplinary action. Rather, as stated above, the record must have been created by or at the behest of the employer to evaluate the employee, and it must detail the employee’s performance or lack of performance on the job.

²² With regard to the so-called “basis” element, i.e., whether the requested evaluation records “formed a basis” for a suspension or termination, this office has concluded on various occasions that any record up to and including a notice of suspension or termination that details the conduct that led to such disciplinary action and the reasons for such action should be deemed to have “formed a basis” for that action. *E.g.* Op. Att’y Gen. Nos. 2009-023; 2006-106.

²³ *E.g.*, Op. Att’y Gen. 2008-090 (and opinions cited therein).

in interactions with the public.²⁴ Thus, while the existence of compelling public interest in the release of particular records is always a question of fact that must be determined in light of all the surrounding circumstances,²⁵ I believe the records at hand reflect a degree of misconduct sufficient to generate a compelling public interest in disclosure.

I therefore conclude that with the exception of the one required redaction noted above, your decision to release these disciplinary records is consistent with the FOIA, although it appears you may not have properly analyzed the records under the applicable test for disclosure.

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

Sincerely,



DUSTIN MCDANIEL
Attorney General

DM:EAW/cyh

²⁴ *E.g.* Op. Att'y Gen. 2007-206.

²⁵ *See* Op. Att'y Gen. 2006-026 (and opinions cited therein).