



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-095

September 3, 2014

Stanley James, Chief Deputy
Jefferson County Sheriff Office
Post Office Box 7837
Pine Bluff, Arkansas 71611

Dear Chief Deputy James:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request 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 indicates that a request has been made under the FOIA for records of a particular incident involving an employee of the Sheriff's Department. You state that following the incident, the employee was placed on administrative leave with pay, pending an internal investigation to determine whether there was any violation of departmental policies and procedures. You state that several witnesses were interviewed, along with the employee, and that the employee resigned shortly after being interviewed. You further report that the investigation will be concluded within a few days.

Regarding the release of the requested records, you state: "It is my understanding that [in the case of] an agency investigation of alleged employee misconduct that didn't result in termination or suspension[,] the records pertaining to [such investigation] are not subject to be disclosed." I take it from this statement that the custodian does not intend to release the records. You have asked for my opinion regarding this decision.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Because I have not seen the particular records at issue, I cannot opine about whether any specific document should be released. Based upon the information provided, however, I can opine generally that the custodian's decision not to release interview records that were generated by or at the behest of the employer is consistent with the FOIA if in fact 1) the administrative leave with pay was pursuant to routine practice and involved no disciplinary measures and 2) the employee voluntarily resigned.

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.¹

I assume from the information you have provided that the requested records were all created or collected during the internal investigation into the specific incident. Accordingly, it can reasonably be assumed that they reflect the performance or

¹ A.C.A. § 25-19-103(5)(A) (Supp. 2013).

lack of performance of official functions. Therefore, in my opinion, the records being sought are public records under the above definition and must be disclosed unless some specific exception provides otherwise.

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.

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

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."

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

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.⁸

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.⁹ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁰

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);

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 For further information regarding this balancing test, see Attorney General Opinion No. 2014-095, available on our website at www.arkansasag.gov. That opinion may also be referenced for guidance regarding discrete pieces of information that must be redacted from otherwise releasable records.

⁹ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Op. Att’y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-038; 2005-030; 2003-073; 98-006; 97-222; 95-351; 94-306; and 93-055.

¹⁰ *Id.*

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).¹¹

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.¹²

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,¹³ which is always a question of fact that must

¹¹ A.C.A. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

¹² Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹³ *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.”).

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.¹⁴

III. Application.

As indicated above, records relating to internal investigations are in many cases properly classified as employee-evaluation records. As one of my predecessors observed:

Although, again, I am not certain what records are contained in the requested internal affairs files, these types of files typically contain records related to an internal investigation of an employee's involvement in a particular event. This office has consistently taken the position that records in an internal affairs file that have been generated at the behest of the employer in the course of investigating a complaint against an employee constitute "employee evaluation/job performance records." Their releasability must therefore be evaluated under the three-part test discussed above....However, records related to an internal investigation that were not created at the behest of the employer (such as an unsolicited complaint) are classified as "personnel records," and their releasability must be evaluated under the test that is applicable to that type of record....¹⁵

I have not been provided the records at issue in this instance, so I cannot determine conclusively whether all of the records that have been requested are properly classified as employee-evaluation records so as to make applicable the four-part test described above. I note, however, that you have referred to several witness interviews, as well as an interview of the employee involved in the incident. Because you have not mentioned any other records, I will limit my discussion to these interview records. These interviews were presumably conducted at the behest of the employer (or supervisor) to evaluate the employee, and consequently

¹⁴ See Op. Att'y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

¹⁵ Op. Att'y Gen. 2007-311.

it can reasonably be presumed that the records of the interviews constitute the former employee's evaluation records.¹⁶ The pertinent inquiry as to these records is whether there has been a "suspension" or "termination" such that the first prong of the above test has been met. My predecessors and I have recognized that a suspension or termination is a threshold requirement for the release of employee evaluation or job performance records.¹⁷

I have previously addressed a similar scenario, involving an employee who was placed on administrative leave with pay pending an internal investigation and who subsequently resigned. In Attorney General Opinion No. 2007-311, I considered the question whether such "administrative leave" might itself indicate that a "suspension" has occurred for purposes of A.C.A. § 25-19-105(c)(1). I concluded that there is no "suspension" where the facts show the administrative leave was granted pursuant to routine departmental policy and the employee was subjected to no loss of benefits or other disciplinary measures.¹⁸

I also addressed the employee's resignation in that case, which – as in the case at hand – occurred after the investigation was instigated but before the results thereof (and thus before any disciplinary action was implemented). In this regard, I noted that a voluntary resignation in the face of a disciplinary challenge does not equate to a suspension or termination.¹⁹

¹⁶ It should be noted that employee-evaluation records of one employee can also constitute either employee-evaluation records or "personnel records" of other employees mentioned in the records. Because you have not indicated that any other employees were involved in the incident that was investigated, I will not further address this point but will refer you instead to Op. Att'y Gen. 2008-049. This opinion explains the possible need for redactions from records relating to other employees.

¹⁷ Op. Att'y Gen. Nos. 2007-025; 2006-150; 2005-267; 2001-125; 97-189 and 97-154.

¹⁸ Op. Att'y Gen. 2007-311 at 5.

¹⁹ *Id.* at 8. See also Op. Att'y Gen. 2013-016 at 5 (noting that "resignation is not a triggering event for the release of evaluation records. That is, an employee's evaluation records will be exempt from disclosure if the employee resigns, as opposed to being suspended or terminated.").

Previous Attorney General opinions leave open the possibility that a coerced resignation might amount to a constructive termination. *Id.* at n. 17. But you have provided no information suggesting the resignation in this case was coerced. You simply say that it occurred shortly after the employee was interviewed; and you appear to assume there was no termination or suspension. I therefore assume the resignation was indeed voluntary.

As explained above, an employee-evaluation record will be subject to disclosure under the FOIA only if, among other things, the document formed a basis for a suspension or termination. Because it appears the employee in this instance was neither suspended nor terminated, the threshold requirement for the release of the interview records as they pertain to this employee has not been met. This of course assumes, as discussed above, that the administrative leave was consistent with regular practice and not disciplinary in nature, and that his resignation was voluntary. With those assumptions in mind, I can opine that the custodian's decision not to release the interview records is consistent with the FOIA.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Dustin McDaniel", written in a cursive style.

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh