



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-103

September 16, 2014

Waylon Harris
The Jonesboro Sun
518 Carson Street
Jonesboro, Arkansas 72401

Dear Mr. Harris:

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), which 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 is a timely follow-up request to Opinion No. 2014-096. In that opinion, which I issued to the subject of the records, I noted that there were six documents in dispute. Though the custodian's decision (on how to classify those documents and whether to disclose them) was not clear, it seemed clear to me from the face of the documents that, with one exception, they were all employee-evaluation records. You do not challenge that conclusion, nor has the custodian contacted my office to challenge it or provide any additional facts.

You seek this follow-up opinion because you believe that some important facts were not considered when rendering the prior opinion:

I am writing to request an...opinion regarding whether the employee evaluation records and personnel file of a public employee who acknowledges being forced to resign from his paid position...are accessible to the public pursuant to the [FOIA], given that his forced

resignation amounts to a termination of employment according to Arkansas AG Opinion No. 2007-322 and 2005-030.

You have attached an email that is dated August 20, which is the day after the subject of the records tendered his written resignation. The email, which is addressed to the mayor, asks several questions. One of them says, “Can I apply for unemployment based on the rules that my resignation was basically forced not volunteer. [*sic*] This is just a question I do not anticipate using it.”

Based on the foregoing email, you say, “Mr. Adams clearly states that his resignation was forced to avoid his employment with the city being terminated. I am under the opinion that because Mr. Adams was forced to resign, his discontinued employment with the municipality was essentially a termination of employment....”

You ask whether, in light of the email from Mr. Adams, the custodian should disclose the five employee-evaluation records at issue in the prior opinion.

RESPONSE

For reasons explained in the prior opinion, the five documents in dispute appear to be employee-evaluation records. Accordingly, the FOIA prohibits their release unless, among other things, the subject of the records was suspended or terminated. In this case, the subject of the records resigned. You say that the employee was forced to resign and that this essentially means he was terminated for purposes of the FOIA. The FOIA requires the custodian make that determination. To my knowledge, the custodian has not said whether the former employee suffered a coerced resignation.

DISCUSSION

To address your question, we need to understand (*a*) the definition and test for the disclosure of employee-evaluation records; (*b*) the definition and significance of a “coerced resignation”; and (*c*) the person whom the FOIA charges with making certain key factual determinations.

Employee-evaluation records—their definition and test for disclosure

When custodians receive FOIA requests for employment-related records, they must make *two* determinations. First, they must determine whether the record

being requested meets the definition of a personnel record or an employee-evaluation record. 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. To date, we have not been apprised of the custodian's conclusions regarding these two decisions.

The custodian must examine the definitions of personnel records and employee-evaluation records and apply them to the records in dispute. For the reasons explained in the prior opinion, the documents in dispute appear to be best classified as employee-evaluation records.

The only remaining question is whether the FOIA requires these five employee-evaluation records to be disclosed. The FOIA requires that employee-evaluation records be *withheld* from disclosure *unless* all four of the following elements are satisfied:

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).¹

You say that Mr. Adams's resignation was coerced and that his resignation amounts to a constructive termination satisfying the level-of-discipline element.

“Coerced resignation”—its definition and significance

Neither the FOIA nor Arkansas's appellate courts have addressed the question whether a so-called “coerced resignation” is tantamount to a termination for purposes of the FOIA. This office has, nevertheless, consistently opined that, for purposes of the FOIA, a “coerced resignation” can, in principle, amount to a constructive termination that would satisfy the level-of-discipline element under the foregoing four-part test. This office has defined a “coerced resignation” as one

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

in which a resignation “is tendered in the face of certain, impending termination....”²

The legislature anticipated that there would be many issues such as this that were unaddressed by the FOIA and that the courts had not had occasion to settle. Foreseeing this, the legislature has tasked the Office of the Attorney General with offering guidance in the areas of personnel and employee-evaluation records: “[G]uidance from the Attorney General and additional enforcement mechanisms...are necessary to implement the provisions of this Act regarding [personnel and evaluation] records....”³ This office’s opinions regarding “coerced resignations” or “constructive terminations” are in furtherance of this task.

The Custodian’s Obligations

But who decides whether a given resignation was tendered in the face of certain, impending termination? As this office has noted many times, such a determination is not left to the former employee; nor is it left to the person who makes the FOIA request; nor does this office have the authority or resources to make such a determination.⁴ Rather, that determination is left to the custodian. In fact, in one instance when a custodian who had made such a determination asked me to evaluate it, I declined because I lack the authority and resources necessary to investigate such a claim:

[W]hether any given resignation is actually a “coerced resignation” is a question of fact that must be decided by the custodian. While you say these three officers were “forced to resign,” I have no way of knowing whether you are using that term in the sense described above. And I lack both the resources and the authority to investigate the factual question whether the three officers suffered a “coerced resignation” as that term is used in this office’s opinions. Consequently, I cannot definitively opine on whether the custodian has properly determined that the level-of-discipline element has been met in this case.⁵

² E.g., Op. Att’y Gen. Nos. 2013-016, 2011-078, 2008-044, 2007-322.

³ Act 49 of 1987, emergency clause; *see also Thomas v. Hall*, 2012 Ark. 66, 9, 399 S.W.3d 387, 392.

⁴ *See, supra*, note 2.

⁵ Op. Att’y Gen. 2013-144.

Likewise, I recognized that Mr. Adams said he was “basically forced” to tender his resignation. But I am not in a position to investigate whether Mr. Adams was referring to the kind of resignation defined above. It is the task of the custodian—not this office—to determine whether the resignation in fact constituted a termination under the particular facts and circumstances.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Dustin McDaniel". The signature is fluid and cursive, with the first name "Dustin" and last name "McDaniel" clearly distinguishable.

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh