



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**DUSTIN MCDANIEL**

Opinion No. 2014-106

September 23, 2014

Mr. J. Mark White  
Director, Office of Policy and Legal Services  
Arkansas Department of Human Services  
Post Office Box 1437  
Little Rock, Arkansas 72203-1437

Dear Mr. White:

You have requested an opinion from this office regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made on behalf of the subject of the records in question, 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.

You state in your correspondence that the Department has received a request under the FOIA for "any and all emails sent and received by Leslie Rutledge during her time working at the Department of Human Services, excluding any that deal with confidential information regarding cases she handled." Presumably in recognition of the limited scope of this office's review, you have forwarded certain emails that you have determined are responsive to the FOIA request as it pertains to personnel or employee evaluation records.<sup>1</sup> You have decided that "all of the attached e-mails are personnel records, not job performance or employee evaluation records, and that their disclosure would not constitute a clearly unwarranted invasion of personal privacy."

You ask whether this decision is consistent with the FOIA.

---

<sup>1</sup> As noted above, the scope of this office's authority under the FOIA extends to evaluating the propriety of the custodian's decision with respect to personnel records and employee evaluation records.

## RESPONSE

It is the statutory duty of this office to state whether the custodian's decision is consistent with the FOIA. Based on the face of the documents you have attached, it appears that the custodian's decision is partially consistent with the FOIA. As explained more fully below, this office is unable to determine whether a few of the emails have been properly classified; but it seems clear that some constitute employee evaluation records rather than personnel records. This office agrees that those emails properly classified as personnel records are subject to disclosure. But the custodian has not applied the proper test for disclosure as to those emails constituting employee-evaluation records. Additionally, there is a personal email address that must be deleted from any email that is to be released.

The discussion below sets out the relevant definitions and standards and then addresses the specific records you attached.

## 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 are plainly met in this case. As for the first element, the emails are held by the Arkansas Department of Human Services, 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.<sup>2</sup>

---

<sup>2</sup> A.C.A. § 25-19-103(5)(A) (Supp. 2013).

It is clear from the face of the attached documents that they all relate in some respect to official functions of the Department. Accordingly, they are public records 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.<sup>3</sup> For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"<sup>4</sup> or "employee evaluation or job performance records."<sup>5</sup> The tests for whether these two types of documents may be released differ 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 the 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

---

<sup>3</sup> 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).

<sup>4</sup> 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."

<sup>5</sup> 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."

that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.<sup>6</sup> 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.”<sup>7</sup>

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> The fact that the subject of any such records may consider release of the records an unwarranted

---

<sup>6</sup> See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

<sup>7</sup> A.C.A. § 25-19-105(b)(12) (Supp. 2013).

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

<sup>9</sup> *Id.* at 598, 826 S.W.2d at 255.

<sup>10</sup> *Id.*, 826 S.W.2d at 255.

<sup>11</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

invasion of personal privacy is irrelevant to the analysis because the test is objective.<sup>12</sup>

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.<sup>13</sup>

**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.<sup>14</sup> This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.<sup>15</sup> Documents not created in the evaluation process do not, however, come within the rationale of the provision governing employee evaluation or job performance records.<sup>16</sup>

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.<sup>17</sup>

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);

---

<sup>12</sup> *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

<sup>13</sup> Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

<sup>14</sup> *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.

<sup>15</sup> *Id.*

<sup>16</sup> *See* Op. Att'y Gen. 2001-184.

<sup>17</sup> *Cf.* Op. Att'y Gen. 96-168; *Watkins & Peltz, supra*, at 204.

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).<sup>18</sup>

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.<sup>19</sup>

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,<sup>20</sup> 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.

---

<sup>18</sup> A.C.A. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

<sup>19</sup> Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

<sup>20</sup> *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.”).

### **III. Application.**

We can now apply the foregoing to the documents you have attached, which are Bates stamped for ease of reference. As you can see, 35 of the 52 pages are duplicative. We will therefore only address the 17 non-duplicative pages, by reference to their Bates numbers.

#### **A. The classification decision**

The custodian has classified all of the emails as personnel records. It is the opinion of this office that this decision is mistaken in part. While it seems clear that most of the emails constitute personnel records because they pertain to the individual employee and do not appear to be evaluation or job performance records, we can determine from their face that a few are employee-evaluation records under the above definition, i.e., they detail the employee's performance or lack of performance and they were created by or at the behest of a supervisor for the purpose of evaluating the employee.

We are unable, however, to determine how pages 002 and 003 (and their duplicates, pages 022-024) should be classified. The emails reflected on these pages clearly detail the employee's job performance, at the behest of a supervisor. But it is not clear from their face whether they were created for evaluation purposes so as to constitute employee-evaluation records. A fact question therefore remains regarding the proper classification of these emails.

The remaining non-duplicative pages are properly classified as follows:

- Personnel records: Pages 005, 006, 013, 014, 019, 040-042, 044.
- Employee-evaluation records: Pages 001, 004, 025, 026, 030, 037.

#### **B. The disclosure decision**

Now that the records have been properly classified, the next question is whether the FOIA requires the records be withheld or disclosed. The custodian has decided that all of the emails are personnel records and that they are subject to disclosure because their release would not constitute a clearly unwarranted invasion of personal privacy. This office agrees that those emails properly classified as personnel records – as set out above – are subject to disclosure under

the applicable test. As previously explained, however, it is this office's view that some of the emails were not classified correctly. Accordingly, the proper test was not applied to these other emails, which this office has determined constitute employee-evaluation records. It is therefore the opinion of this office that the custodian must apply the above four-part test to these employee-evaluation records to determine whether the FOIA requires their disclosure.

As a final note, several of the emails include a personal email address. This address must be deleted from any email that is to be released.<sup>21</sup>

The foregoing opinion was prepared by Deputy Attorney General Elisabeth A. Walker in consultation with, and with the concurrence of, former Arkansas Supreme Court Justice Annabelle Imber Tuck.<sup>22</sup>

Sincerely,



ELISABETH A. WALKER  
Deputy Attorney General



ANNABELLE IMBER TUCK  
Public Service Fellow and Jurist-in-Residence  
William H. Bowen School of Law

EAW/AIT:cyh

---

<sup>21</sup> This is in accordance with A.C.A. § 25-19-105(13), which exempts from disclosure “[p]ersonal contact information including without out limitation ... personal email addresses ... contained in employer records....”

<sup>22</sup> Former Justice Tuck was asked to oversee the preparation and issuance of this opinion as a service to the Attorney General's Office. Her assistance is greatly appreciated. In order to avoid any appearance of conflict or impropriety, the Attorney General, Chief Deputy Attorney General and Chief of Staff did not participate in the drafting, review, or approval of this Opinion.