STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-110

October 2, 2014

Mr. Clayton Blackstock
Mitchell Blackstock Ivers Sneddon, PLLC
1010 West Third Street
Little Rock, Arkansas 72201

Dear Mr. Blackstock:

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 and attachments indicate that someone has submitted an FOIA request for "any documentation or correspondence, including e-mail, regarding termination procedures that took place under the Springdale School District for [your client]…." The district superintendent (pursuant to A.C.A. §§ 6-17-1507 and -1508) notified your client in writing that he was immediately suspended and recommended for termination. You say that your client made a timely appeal to the board for a hearing on the adverse employment action.[1] But your client resigned before the board was able to take any action.

The custodian has determined that the records at issue constitute employee-evaluation records and that the test for the disclosure of such records has been met. You appear to give three reasons for your objection to the custodian's decision to disclose the letter of suspension and recommendation for termination. First, though you grant that your client was suspended, you seem to argue that the

[1] A teacher who is suspended or recommended for termination has the right to request a hearing before the school board. *See* A.C.A. §§ 6-17-1508.

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suspension was not disciplinary in nature. Second, you argue that the suspension never became final because the school board never ruled on your client's appeal after he abandoned it. Third, you argue that records related to the suspension are not encompassed in the language of the underlying FOIA requester.

In light of these objections, you ask whether the custodian's decision is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Not having seen the records at issue, I cannot opine about the disclosure of any specific record. But I can address whether your objections show that the custodian's release decision is inconsistent with the FOIA. It is my opinion that the custodian has properly classified the superintendent's written notice of suspension as an employee-evaluation record and that your client clearly suffered a disciplinary suspension that became final when he abandoned his appeal by resigning. And given the nature of disciplinary action under A.C.A. § 6-17-1508, the custodian has properly construed the FOIA request as encompassing documents related to the suspension. Therefore, I am not persuaded that the custodian's decision is inconsistent with the FOIA.

DISCUSSION

I. General Rules 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. There is no question that the first two elements are met in this case. Thus, I will only analyze the final element: whether there are any exceptions that shield the documents from disclosure.

a. 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

[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

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 the record be disclosed.

b. Employee-Evaluation Records

Because the records at issue have been classified as "employee evaluation or job performance records," and because that classification is uncontested,[5] I will only focus on that exception. While the FOIA does not define the term "employee evaluation or job performance records," the Arkansas Supreme Court has held 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.[6] This exception includes records generated while

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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] Though you regularly refer to "personnel records" throughout your letter, it seems that you mean "employee-evaluation records." For example, you call the documents personnel records and then say they should not be released because they fail the test for disclosing evaluation records: "Personnel records may be made available to the public...'only upon final administrative resolution of the suspension or termination proceedings at which the records form a basis for the decision to suspend or terminate the employee....'" Thus, I will assume that your references to "personnel records" are typographical errors. In any case, a letter under section 6-17-1508 clearly would be an evaluation record because it must be created by the employer and, pursuant to the statute, must set out the grounds for the disciplinary action.

[6] *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Ops. Att'y Gen. Nos. 2009-067; 2008-004; 2005-030; 2004-211; 2003-073; and 93-055.

investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.[7]

The custodian has determined that records in dispute qualify as the former employee's employee-evaluation records. Not having seen the records, I cannot say whether that decision is correct. But I will assume, for the foregoing reasons, that it is.

Having settled the question whether the records meet the definition of an employee evaluation record, we must move to the question whether the FOIA requires that the record be withheld from disclosure. The FOIA states that employee evaluation records *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).[8]

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.[9]

Application

We are now in a position to apply the elements of the foregoing test to the type of facts as they have been conveyed to me.

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[7] *Id.*

[8] A.C.A. § 25-19-105(c)(1) (Supp. 2013); Op. Att'y Gen. 2008-065. For further discussion of this final element, please see Watkins & Peltz, *supra* note 2, at 217–18.

[9] *See* Op. Att'y Gen. 96-168; Watkins & Peltz, *supra* note 2, at 204.

You make three objections to the custodian's decision. First, you seem to make a two-pronged argument that your client did not suffer the kind of suspension that would satisfy Elements 1 and 2, above. Your arguments to support this objection incorrectly collapse Elements 1 and 2, above. The clearest way to address your objection is to simply move sequentially through the four steps.

The first question is whether your client suffered a disciplinary suspension. He clearly did. For purposes of the FOIA, suspensions can be classified as disciplinary or non-disciplinary (the latter is sometimes called "administrative leave"). A suspension is non-disciplinary when it occurs as a result of a routine, departmental policy that is initiated without any regard for the propriety of the employee's conduct. For example, it is common for police officers to be suspended with pay after discharging a firearm.[10] During the period of this non-disciplinary suspension, the police department investigates the circumstances. The investigation could result in some kind of disciplinary action. Or it might result in commendation. The key factor is that a non-disciplinary suspension is initiated without regard to whether the employee's conduct fell below expectations. In contrast, a disciplinary suspension is always initiated precisely because the employee's conduct allegedly fell below expectations.

Here, the custodian says your client was suspended, and you concede that your client was "technically suspended." So the critical question for purposes of Element 1 is whether the suspension was disciplinary (thus meeting the element). Suspensions under A.C.A. § 6-17-1508 are clearly disciplinary in nature: "Whenever a superintendent has ***reason to believe*** that ***cause exists*** for the termination of a teacher and that immediate suspension for the teacher is necessary, the superintendent may suspend the teacher without notice or a hearing."[11] Under section -1508, the suspension arises from the same state of affairs that—in the superintendent's mind—justifies the termination recommendation.[12] An action under section -1508 is clearly disciplinary in nature.[13]

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[10] *See, e.g.*, Op. Att'y Gen. 2014-095.

[11] A.C.A. § 6-17-1508(a) (emphasis added).

[12] You appear to acknowledge this in your letter when you state that "section 6-17-1508 makes clear that when a superintendent suspends a teacher in conjunction with a recommendation for termination ***for the same reason***...." (Emphasis added.)

[13] Another section of the Teacher Fair Dismissal Act refers to suspension as being a disciplinary act. *See* A.C.A. § 6-17-1503(c) ("A nonrenewal, termination, ***suspension, or other disciplinary action***...shall be void unless the school district substantially complies with all provisions of this subchapter....") (emphasis added).

The only basis for your claim that the suspension was not disciplinary is that your client continued to be paid:

> "[H]e continued to be paid, and thus lost no benefit of employment. Without any indicia of adverse action, this type of suspension is not the type considered to be relevant to disclosures of [employee-evaluation records] under the FOIA."

This view of the matter is deficient for two reasons. First, it incorrectly identifies the dispositive fact. The fact that the suspension was with pay—though relevant in some cases—is not dispositive. Rather, the critical question is whether the suspension was due to performance that failed to meet performance criteria or policies. Second, the argument fails to acknowledge that a suspension under A.C.A. § 6-17-1508 is itself "indicia of adverse action."

Therefore, in my opinion, and contrary to your objection, Element 1 is met—your client clearly suffered a disciplinary suspension.

The next question is whether that disciplinary suspension ever became final. It clearly did. This office has consistently said that when an employee abandons an internal-appeals process before obtaining a ruling, the underlying adverse action is final for purposes of the FOIA. The manner in which the employee abandoned the appeal—whether by withdrawing the appeal or by resigning, as in this case—is irrelevant. If the rule were otherwise, then an employee could render every adverse employment action non-final (and thus prevent the release of evaluation records) by simply initiating and then, a day later, terminating an internal-appeals process. This office, together with two scholarly commentators on the FOIA, have long opined that when the FOIA uses the term "final," it refers to the "final decision-making step taken by" the employer "regardless of the bureaucratic level at which the decision is made."[14]

You argue that the suspension never became final because the school board never had a chance to rule on it. But this is irrelevant. The lack of a school-board ruling, by itself, does not render suspensions non-final because, if it did, then every suspension that was not appealed to the board would also be non-final. Further, this office has already addressed this precise question in the area of Teacher Fair Dismissal. In Opinion No. 2009-095, I opined on a scenario in which a teacher

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[14] Op. Att'y Gen. 2009-095, page 3; *see also* Watkins & Peltz, *supra* note 2, at 212.

was suspended, initiated an appeal to the school board, and then abandoned the appeal before a ruling. I said that these facts indicated that, "for purposes of the FOIA, the initial suspension decision is 'final' because your administrative remedies are exhausted and the board did not take action to overturn the suspension." Therefore, in my opinion, and contrary to your objection, Element 2 is met—your client's suspension became final when he resigned.

The custodian has determined that Elements 3 and 4 are satisfied, and you do not contest those determinations.

Therefore, Elements 1–4 being met, it is my opinion that the custodian's decision is consistent with the FOIA.[15]

In summary, based on the information before me, it is my opinion that the custodian has correctly classified the records as employee-evaluation records and correctly decided to disclose the record.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM:RO/cyh

[Note: An earlier version of this opinion contained a typo in the final paragraph that incorrectly identified the custodian's decision. That typo has been corrected.]

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[15] Your final objection seems to be that the custodian has gathered records that are not responsive to the request. The scope of my review under section 25-19-105(c)(3)(B)(i) does not extend to determining whether a custodian has properly identified responsive documents. *See* Op. Att'y Gen. 2006-163. I will nevertheless note that the FOIA request in this instance seeks records "regarding termination procedures," and that it is apparent from A.C.A. § 6-17-1508 that an immediate suspension is an integral part of termination procedures. Accordingly, to the extent the custodian has identified records relating to the suspension as falling within the scope of the FOIA request, that decision appears proper.