



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion 2014-112

October 6, 2014

Ms. Elizabeth M. Orr
c/o Christopher M Griffin
City Staff Attorney
301 West Chestnut Street
Rogers, Arkansas 72756

Dear Ms. Orr:

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 correspondence indicates that someone has requested copies of “any complaints about and/or investigations of any employee of the . . . Emergency Medical Service providers, including radio operator/911 dispatchers.” It is my understanding that you were formerly employed by the City of Rogers as a supervisor in the 911 Communications Center. In response to the FOIA request, the records custodian has decided to disclose certain records, including several relating to an adverse employment action taken against you. You have forwarded the records to my office and objected to disclosure on the basis that it would be devastating and detrimental to you personally and professionally.

RESPONSE

My statutory duty is to state whether the custodian’s decision is consistent with the FOIA. But it is clear to me that the custodian in this instance has not made a complete decision for me to review, or at least no such decision is discernible from the records or from any other information you have forwarded to my office.

When issuing opinions pursuant to section 25-19-105(c)(3)(B)(i), I am only authorized to assess the custodian's decisions regarding two types of documents that can be exempt from disclosure under the FOIA: "personnel records" and "employee evaluation or job performance records." When custodians assess whether particular records fall under either of these exemptions, 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 particular record be disclosed, either in whole or in part.¹

The custodian apparently has not undertaken the foregoing steps in this case, each of which is critical to generating a decision this office can assess. I have no information to indicate that the records have been categorized, or that the relevant test for disclosure has been applied to each record. My impression that there has been no considered decision with respect to each record is fueled by the fact that many of the documents contain personal identification numbers, which are exempt from disclosure,² and by the fact that a number of the documents appear to be neither personnel nor evaluation records.³ Additionally, although a portion of one of the documents may be an evaluation record as to you, it appears to primarily be the evaluation record of another employee. This further buttresses my impression that the custodian has not made a studied decision regarding each of the records that he or she apparently intends to release. Or if the custodian has made such a decision, that decision either has not been forwarded to you or you have not provided the information to my office.

I am therefore unable to evaluate the custodian's decision. However, to assist you in evaluating your options concerning the release of the records,⁴ please note that I have

¹ These requirements are explained more fully in the enclosed opinion and in the opinions cited therein.

² A.C.A. § 25-19-105(b)(11).

³ I am referring to the records of calls for service. Although these records were created or entered by individual employees, they do not pertain to each employee so as to qualify as personnel records under the FOIA. Nor do they qualify as employee-evaluation records. Consequently, while they may be subject to disclosure, they do not fall within the scope of my review. I will nevertheless note regarding their disclosure that the custodian must take into account a separate statutory exemption for 911 subscriber information when addressing the release of these records. *See* A.C.A. § 12-10-317; *Op. Att'y Gen.* 93-126.

⁴ The FOIA specifically provides a right of judicial review for any citizen who believes their FOIA rights have been violated: "Any citizen denied the rights granted to him or her by this chapter may appeal immediately from the denial to the Pulaski County Circuit Court or to the circuit court of the residence of the aggrieved party...." A.C.A. § 25-19-107(a).

enclosed Attorney General Opinion No. 2012-085, which explains the FOIA standards regarding personnel and employee evaluation records.⁵

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

Sincerely,



DUSTIN McDANIEL
Attorney General

DM:EAW/cyh

Enclosure

⁵ You may also find it helpful to review Op. Att’y Gen. No. 2014-111, which is available on our website at www.arkansasag.gov. That opinion may be referenced for specific guidance regarding the “compelling public interest” prong of the test for the release of employee-evaluation records. In particular, I suggest you review page 7 of this opinion, where it notes the significance of the fact that the employee’s suspension in that case “resulted from the violation of a rule directly designed to avoid any compromise of public safety and order.” The following observation regarding the existence of a “compelling public interest” is particularly instructive (and applies as well in the context of an employee who has been terminated): “This office has consistently held that *the violation of such a rule in itself gives rise to a compelling public interest in disclosure of an investigative file*, assuming the other conditions for release have been met.” (Emphasis added).