



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-121

October 28, 2014

Mr. Dave Perozek
Education Reporter
The Benton County Daily Record
2540 N. Lowell Road
Springdale, Arkansas 72765

Dear Mr. Perozek:

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 letter indicates that on October 15, 2014, the Bentonville School Board upheld the termination of a teacher who was also the ninth-grade football coach and assistant boys' track team coach. You state that you submitted a FOIA request to the School District for the former employee's "personnel file, including job performance and evaluation records," and that the District on October 21 "provided part of his file, but declined to release any documents that formed the basis of the decision to terminate...." You further report that the District's attorney "deemed those documents exempt [under A.C.A. § 25-19-105(b)(12)], which exempts 'personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.'" In apparent response to this determination, you note that the former employee "interacted with dozens if not hundreds of children daily." And you express your belief that "there is a compelling public interest in disclosure of the records involving his termination."

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Because I have not seen any of the records at issue and do not know the precise factual basis for the custodian's decision, I cannot opine about the disclosure of any specific document. However, I can opine – based upon your statements – that a threshold question likely exists as to the records' proper classification. I believe this will be clear from a review of the relevant tests for determining whether certain employee-related records are releasable under the FOIA. While I lack sufficient information to definitively opine on the classification issue, or the custodian's ultimate conclusion, the discussion below should be of some assistance.

DISCUSSION

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. I will focus my analysis on the third element.

There appears to be no issue regarding the first two elements, and they are presumably met with respect to the records in question.

I. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.¹ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"² or "employee

¹ 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).

² 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."

evaluation or job performance records.”³ 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 FOIA does not define “personnel records,” but this office has consistently opined that this term encompasses all records other than employee evaluation and job performance records that pertain to individual employees.⁴ 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.”⁵ The FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” but the Arkansas Supreme Court, in *Young v. Rice*,⁶ 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.⁷ If the privacy interest is merely *de minimus*, then the thumb on

³ 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.”

⁴ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

⁵ A.C.A. § 25-19-105(b)(12) (Supp. 2013). For a thorough discussion of the balancing test that applies to personnel records, see Op. Att’y Gen. 2014-084.

⁶ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁷ *Id.* at 598, 826 S.W.2d at 255.

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.⁸ The Arkansas Supreme Court has indicated that the public interest is measured by "the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'"⁹ If the public interest in this regard is substantial, it will usually outweigh any privacy interest.¹⁰

b. Employee-evaluation exception.

The FOIA likewise does not define "employee evaluation or job performance records." 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.¹¹ This definition encompasses — among other things — records of disciplinary action and letters detailing the reasons for disciplinary action.¹² This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹³

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;
2. There has been a final administrative resolution of the suspension or termination proceeding;

⁸ *Id.*, 826 S.W.2d at 255.

⁹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125 (1998), quoting *Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994).

¹⁰ *Young v. Rice*, *supra* n. 8.

¹¹ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; see, e.g., Op. Att'y Gen. Nos. 2009-067, 97-222, 95-351, and 93-055.

¹² E.g., Op. Att'y Gen. Nos. 2011-161 (and opinions cited therein); 2003-257.

¹³ *Id.*

3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee; and
4. The public has a compelling interest in the disclosure of the records in question.¹⁴

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.¹⁵

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,¹⁶ 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.

¹⁴ A.C.A. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

¹⁵ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹⁶ *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.”).

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.¹⁷

II. Application.

The first step, as noted above, is to categorize the records. It appears from your letter that the custodian in this instance has decided that the records he or she has declined to release constitute personnel records. You counter that decision with a reference to the former employees' significant daily interaction with children and your belief that there is "a compelling public interest in disclosure of the records involving his termination." As the foregoing discussion makes clear, the existence of a "compelling public interest" is part of the test for the disclosure of *employee-evaluation records*. Accordingly, your statements suggest you believe the records you have been denied access to fall into that category.

Although the basis for your position in this regard is somewhat unclear, you note that the District "declined to release any documents that formed the basis of the decision to terminate" the former employee. I have not seen the records and do not know the precise factual basis for the custodian's decision that they are exempt from disclosure under A.C.A. § 25-19-105(b)(12), the *personnel records* provision. As noted above, this office has consistently opined that § 25-19-105(b)(12) applies to records other than employee evaluation and job performance records that pertain to individual employees. A record that formed the basis for a termination decision could certainly meet this definition. For instance, complaint documents that were not solicited by the employer or generated as part of an investigation into an employee's conduct are generally properly classified as personnel records.¹⁸

On the other hand, a document that formed the basis for an employee's termination might well constitute an employee-evaluation record, assuming it was created by or at the behest of the employer and that it details the employee's job performance.¹⁹ But it should be emphasized in this regard that a document's

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

¹⁸ See Op. Att'y Gen. Nos. 2014-095; 2008-004 (and opinions cited therein). See also Op. Att'y Gen. 2009-095 at n. 1 (noting the possibility that records that formed the basis for disciplinary action may not have been created in the evaluation process).

¹⁹ As the above definition makes clear, the document must also have been created to evaluate the employee.

classification as an employee-evaluation record does not turn on whether it formed the basis for a disciplinary action. The latter inquiry (whether the record formed the basis for the employee's suspension or termination) is not part of the definition of employee-evaluation records. Rather, as noted above, it is one of the four elements that comprise *the test for determining whether an employee-evaluation record is subject to release*.

I cannot resolve this issue as to the documents' proper classification. I am simply not in a position to question the custodian's determination in that regard. Nor can I definitively opine on whether the records are subject to disclosure under the applicable test. I will note, however, that if any of the documents are in fact properly classified as employee-evaluation records, this office has consistently opined that the public has a particularly compelling interest in the conduct of public school teachers and other school authorities during school hours, during school events, and especially when students are impacted.²⁰ It thus seems likely that the "compelling public interest" part of the test will be met in this instance as to any such records, if it is determined by a factfinder that such records exist.

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

Sincerely,



DUSTIN MCDANIEL
Attorney General

DM:EAW/cyh

²⁰ Op. Att'y Gen. 2002-158.