



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-122

October 29, 2014

The Honorable George Butler, Jr.
Washington County Attorney
280 North College, Suite 501
Fayetteville, AR 72701

Dear Mr. Butler:

I am writing in response to your request for my opinion regarding the application of the Arkansas Freedom of Information Act (the "FOIA").¹ The FOIA authorizes the custodian, requester, or the subject of personnel or employee evaluation records to seek an opinion from this office determining the legal propriety of the custodian's decision regarding the release of requested records.²

You report that an inmate at the Washington County Detention Center has made an FOIA request for all documents relating to "charges" and "complaints" filed against a deputy in the Washington County Sheriff's Department (the "Department") from January 1, 1999 through the present.³ You have asked me to review one responsive document, which the custodian has classified as a "job evaluation record." You report the following regarding this record:

The employee has objected to the release of this record, and the custodian has determined, in light of the fact that this record was generated back in 2001 and no controversy existed at the time of its

¹ A.C.A. §§ 25-19-101 – 110 (Repl. 2002 and Supp. 2013).

² A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2013).

³ You have not addressed the standing of this inmate to make the request. In this regard, A.C.A. § 254-19-105(a)(1)(B) (Supp. 2013) denies any inmate of a correctional facility access to documents under the FOIA if the inmate "has pleaded guilty to or been found guilty of a felony." My inquiries reveal that this disqualification does not apply to the inmate/requester in this instance.

issuance, nor does any such controversy now exist, that there is no compelling public interest in its disclosure.

RESPONSE

In my opinion, based upon my review of the single document at issue – a record captioned “Letter of Reprimand” but imposing various sanctions, including a suspension – the custodian was correct in classifying the document as an employee evaluation/job performance record. Applying the standard applicable to such documents, I question that she was correct in withholding the document based only on her findings that the incident giving rise to the investigation occurred several decades ago and has never been the subject of public controversy. I am unaware of the circumstances that generated the internal investigation and hence cannot assess the gravity of the misconduct investigated. The document you have submitted, however, reflects significant misconduct by the deputy *in the course of the investigation itself* – a fact that may well have prompted the disciplinary measures, including an unpaid suspension, imposed by the Department. Given this background, as well as the subject’s status as a law enforcement officer, I believe the records contained in this file are indeed of compelling public interest. Accordingly, I do not believe the custodian’s decision to withhold this file is consistent with the FOIA.

DISCUSSION

I. The standard governing disclosure

A document must be disclosed in response to an FOIA request if three conditions are met: first, the FOIA request is directed to an entity subject to the act; second, the requested document constitutes a “public record”; and third, the document does not fall within an express exception to disclosure requirements.

The first element is clearly met in this case, inasmuch as the Department is clearly a public entity.

With respect to the second element, the FOIA defines the term “public records” as follows:

“Public records” means 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.⁴

Based upon my review of the record here at issue, I conclude that it clearly qualifies as a “public record” under this definition.

The FOIA exempts from disclosure documents falling within either of two categories of documents normally found in employees’ personnel files.⁵ These two categories, which are mutually exclusive for purposes of FOIA analysis, are “personnel records”⁶ and “employee evaluation or job performance records.”⁷ The tests for determining whether documents falling within either group may be released differ significantly.

The custodian in this case has determined that the document at issue is “employee evaluation or job performance records” – a category the FOIA does not define. The Arkansas Supreme Court has recently adopted this office’s view that this term refers to any records (1) created by or at the behest of the employer (2) to evaluate

⁴ A.C.A. § 25-19-103(5)(A) (Supp. 2013).

⁵ 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).

⁶ A.C.A. § 25-19-105(b)(12) (Supp. 2013): “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.”

⁷ A.C.A. § 25-19-105(c)(1) (Supp. 2013): “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.”

the employee (3) that detail the employee's performance or lack of performance on the job.⁸ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.⁹ Based upon my review of the Department document you have submitted, I agree that it constitutes an employee evaluation/ job performance record under this definition.¹⁰

If a document meets the above definition, the document **cannot** be released unless **all** of the following conditions are met: (1) the employee was suspended or fired; (2) the suspension or termination has been finally resolved administratively; (3) the records formed a basis for the decision to suspend or terminate the employee; and (4) a compelling public interest exists in the records' disclosure.¹¹

With regard to the final prong, the FOIA does not define the term "compelling public interest." The two leading commentators on the FOIA, however, based upon 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

⁸ *Thomas v. Hall*, 2012 Ark. 66, **8-9, 399 S.W.3d 387; for prior applications of this test by this office, see, e.g., Op. Att'y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-111; 2003-073; 98-006; 97-222; 95-351 and 93-055.

⁹ *Id.*

¹⁰ See, e.g., Op. Att'y Gen. 2012-112 ("Records generated as part of an internal investigation are typically categorized as employee-evaluation records."); accord Ops. Att'y Gen. 2007-272; 2007 -025; 2006-106; 2005-267; 2005-094; 2004-178; 2003-306; and 2001-063..

¹¹ A.C.A. § 25-19-105(c)(1); Op. Att'y Gen. Nos. 2011-100, 2008-065.

should be sufficient to satisfy the “compelling public interest” requirement.¹²

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,¹³ 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.

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.¹⁴

II. Application

You report that the custodian in this case has decided to withhold the document because no compelling public interest exists in its disclosure. All other conditions for disclosure under the standard set forth above appear to have been met. The question arises, then, whether the circumstances prompting the suspension indeed are of compelling public interest.

Various factors bear on this analysis. First, as noted above, an employee’s rank in the hierarchy may bear on the strength of the public’s interest in his performance. Although the employee in this instance was a rank-and-file deputy sheriff, the very fact of his being a law-enforcement officer creates a strong public interest in his official conduct. As I have previously observed in rejecting the argument that a patrol officer’s relatively low rank barred record disclosure:

The opinions from this office, and the views of the leading commentators on the FOIA, indicate that rank within the hierarchy “may be relevant” to determining whether a compelling public interest exists. But, as the commentators note, this conclusion is tempered in the context of law enforcement: “[T]he public has a great interest in the [job] performance of police officers . . . , and in

¹² Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

¹³ *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.”).

¹⁴ See Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

this case the ‘cop on the beat’ is just as important as the chief of police.”^{15]} So, in my view, the custodian’s emphasis on the employee’s rank is overblown. Rank “may be relevant,” but given the circumstances here, it seems to be of minimal weight.¹⁶

Given the circumstances of this particular case, I consider it of minimal significance that the employee was a relatively low-ranking law-enforcement officer at the time of the incident at issue.

As further noted above, the existence of a public controversy relating to an incident of official misconduct *may* reflect that a compelling public interest exists in disclosure of related, otherwise disclosable disciplinary records. Conversely, assuming the public is aware of the incident, the absence of public controversy relating thereto *may* support withholding an otherwise disclosable job performance record relating to a disciplinary action. As reflected in my use of the highlighted conditionals, however, neither principle is inevitable or invariably dispositive – a qualifier the custodian in this instance appears to have overlooked in suggesting that the absence of publicity flatly forecloses disclosure.

As suggested in my previous paragraph, the existence of a public controversy presupposes public awareness of the underlying episode giving rise to the controversy. But absent such awareness, the public will remain simply ignorant of the underlying episode of misconduct. Under such circumstances, the absence of public controversy establishes little with respect to whether a compelling public interest in disclosure exists.¹⁷ Nevertheless, the custodian in this case appears mistakenly to have concluded that the mere absence of public controversy *requires* that the record be withheld. If such is the case, I consider this conclusion a misapplication of the FOIA.

¹⁵ Watkins & Peltz, *supra* at 217; *cf.* Op. Att’y Gen. 2013-104 (in addressing the similarly strong “position of trust” held by teachers, noting that “the public has a particularly *heightened* interest in records reflecting the conduct of public school teachers *during school hours*, during school events, and especially when students are affected by that conduct”).

¹⁶ Ops. Att’y Gen. 2012-112 and 2014-111.

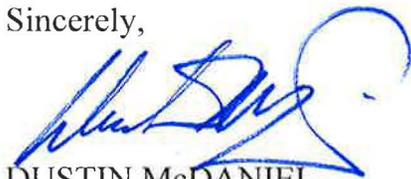
¹⁷ I appreciate that certain official misconduct may be so egregious that its occurrence will be publicly known by its consequences alone. Nothing suggests, however, that only misconduct rising to this level will raise a compelling public interest in the disclosure of records relating to consequent disciplinary actions.

Far more pertinent to the analysis in this case is the fact that the misconduct in this instance involved official deception – i.e., a betrayal of the public trust – leading to disciplinary action that involved not only a suspension, but also various other significant punitive sanctions for the misconduct. The investigation regarding the underlying incident, whose details are not explored in the record provided, was extended in this case to include the subject’s lack of candor in the course of the internal investigation itself. The suspension in this instance thus appears to have resulted from the violation of a rule directly designed to avoid any compromise of public safety and order. 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.¹⁸

Lack of candor by an officer in a law-enforcement internal investigation might properly be characterized as “compelling” in its own right, whatever may have been the import of the episode that prompted the investigation. In my opinion, this conclusion alone would support release of the record. I consider the fact that the infraction occurred years in the past only a minor mitigating factor with respect to this incident, particularly in light of the fact that the subject of the discipline remains a deputy sheriff. To the extent, moreover, that the custodian based her decision to withhold the record largely upon the fact that the discipline generated no public controversy, I believe she acted inconsistently with the FOIA.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

¹⁸ See Ops. Att’y Gen. 2010-055 (deeming a compelling public interest to exist when records “reflect that the suspensions occurred as a result of the violation of rules aimed at conduct which manifestly could undermine the public trust and/or compromise public safety and the safety of other Department employees”); 97-400 (“[I]t is my opinion that the nature of the problem that led to the suspension compels disclosure in this instance where the activities detailed in the records violated administrative rules and policies aimed at conduct which could undermine the public trust and/or compromise public safety.”).