



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-021

June 2, 2015

Mr. Lowell Coomer, Interim Executive Director
Arkansas Home Inspector Registration Board
Post Office Box 251911
Little Rock, Arkansas 72225

Dear Mr. Coomer:

I am writing in response to a request from your immediate predecessor, on behalf of the Arkansas Home Inspector Registration Board, for an opinion on how the Arkansas Freedom of Information Act (FOIA) applies to certain records maintained by the Arkansas Home Inspector Registration Board regarding complaints against inspectors.

As background for the questions posed, it was explained that the "complaint process" usually starts by someone calling the Board's office to complain against an inspector. If the complaint falls within the Board's jurisdiction, the Board's staff ask the complainant to send the Board "(1) the complaint form along with a written description of the complaint; (2) a full copy of the completed home inspection report....; (3) copies of any correspondence with the home inspector; and (4) any appropriate exhibits." Upon receiving these documents, the Board notifies the inspector, conveys to him or her copies of all the documents received from the complainant, and asks for a response to the complaint. Board staff convey all these documents to the Complaint Committee for review.

I have paraphrased the concerns into three questions about the documents generated in this "complaint process":

1. In light of Ark. Code Ann. § 17-52-307 or § 25-19-105(b)(9)(A), must complaints filed against home inspectors be disclosed under the FOIA?

2. In light of Ark. Code Ann. § 17-52-307 or § 25-19-105(b)(9)(A), must the supporting documents attached to complaints be disclosed under the FOIA?
3. If either the complaint or the supporting documents must be disclosed under the FOIA, at which stage in the complaint process must they be disclosed?

RESPONSE

In my opinion, the answer to Question 1 is “yes,” because such complaints are public records and neither statute referenced in your question exempts them from disclosure. The answer to Question 2 is “no,” in my opinion, because section 17-52-307 exempts supporting documents from the definition of “public record.” The answer to Question 3 is that the complaints are subject to disclosure whenever an FOIA requester seeks them, without regard to the pendency or outcome of the Board’s investigation.

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.

Public-Record Analysis

The first element is clearly met because the Board, as a public entity, is subject to the FOIA.

As for the second element, the FOIA defines a “public record” as (1) a “writing...electronic or computer-based information,” (2) that is “kept,” and (3) that “constitute[s] a record of the performance or lack of performance of official functions.” Under this definition, the complaint is, in my opinion, a public record. This is because the complaint form itself is something the Board has developed and the complainant completed the form at the behest of Board staff. This office has long held, in similar contexts, that complaint forms are public records and subject to disclosure.¹

¹ See Op. Att’y Gen. No. 2015-053 (collecting opinions).

In contrast, the supporting documents are not public records because Ark. Code Ann. § 17-52-307(f) expressly exempts them from the FOIA's definition of "public records": "All work papers submitted to the board for action on complaints and disciplinary procedures under this subchapter *shall not be deemed public records* under the Freedom of Information Act of 1967, § 25-19-101 *et seq.*"² Based on the background information you provided, it appears that the supporting documents attached to complaints (i.e. inspection report and correspondence with the inspector) are work papers under this statute.³ Therefore, in answer to Question 2, the FOIA does not require that the supporting documents be disclosed in response to an FOIA request.

Exemption Analysis

The only remaining issue is the third element noted above; namely, whether there are any exemptions that shield the complaint from disclosure. Your correspondence specifically asks me to evaluate two potential exemptions: Ark. Code Ann. §§ 17-52-307 and 25-19-105(b)(9)(A). In my opinion, neither exception shields the complaint from disclosure.

Section 17-52-307, which expressly addresses access to Board records, contains two relevant provisions:

- (c) Any documents submitted to the board as part of an investigation shall:
 - (1) Be considered as confidential documents;
 - (2) Be used only for the purpose for which they are requested;
 - (3) Not be available for public viewing;
 - (4) Not become part of any official file; and
 - (5) Not be revealed to any nonboard members.

* * *

² Ark. Code Ann. § 17-52-307(f) (emphasis added).

³ Because the term "work papers" is not defined in section 17-52-307(f), the term must be given its general, common-sense meaning. In this case, the term appears to refer to documents generated by the inspector or the inspector's client regarding the inspection contract and the performance of that contract.

(f) All work papers submitted to the board for action on complaints and disciplinary procedures under this subchapter shall not be deemed public records under the Freedom of Information Act of 1967, § 25-19-101 *et seq.*

A close examination of subsection -307(f) shows that it cannot be a basis for withholding complaints. This is because subsection (f) only exempts from disclosure “work papers.” And “work papers” are clearly distinguished from complaints: “All work papers submitted to the board for action *on complaints*....” Thus, subsection -307(f) is only addressing and exempting “work papers,” not complaints. This conclusion is further buttressed by subsection -307(a), which makes it clear that “work papers” includes such documents as the inspector’s “inspection reports and other documents” that were requested from the inspector by the Board.⁴

A closer question is whether subsection -307(c) exempts the complaints. On an initial reading, the subsection seems very broad because it refers to “[a]ny documents submitted to the board.” But, for the following two reasons, subsection (c) is, in my opinion, best read to mean “any documents submitted to the board *by the inspector*.”

First, it is clear from subsection (c)’s context that subsections (a)–(d) are all addressing documents submitted *by the inspector* at the Board’s request. To see this, note that subsection (a) authorizes the Board to “require an inspector to submit in writing inspection reports *and other documents*.”⁵ Subsection (b) attempts to resolve any confidentiality concerns with the inspector submitting these documents to the Board: “Requests by the board for copies of inspection reports shall supersede any contract of client privacy or confidentiality.” Subsection (c) then uses the phrase at issue—“any documents submitted to the board”—when limiting what the Board may do with those documents after they have been submitted by the inspector. And subsection (d) concludes the matter by explaining what the Board must do with the documents at the investigation’s conclusion: “When the action for which they were requested is completed by the board, *the documents* shall be returned to the inspector at his or her own expense

⁴ Ark. Code Ann. § 17-52-307(a) states, “As part of an investigation or as a condition of renewal, the Arkansas Home Inspector Registration Board may require an inspector to submit in writing inspection reports and other documents to be reviewed by the board.”

⁵ *Id.* (emphasis added).

or destroyed if the inspector requests that the documents be destroyed.”⁶ Thus, when read in context, subsection (c) is referring to documents sent by the inspector, which means complaints are not included in subsection (c).

The second reason leading to this conclusion is grounded in the rules for interpreting FOIA exemptions. That Arkansas Supreme Court has held that the FOIA must be construed in favor of openness,⁷ and exceptions to disclosure must be narrowly construed.⁸ Accordingly, when there is a reasonable doubt about what an exception means, we are required to opt for the interpretation that exempts the fewest records.⁹ Likewise, when there is a reasonable doubt about how an exception applies to a given set of facts, we are required to opt for the application that exempts the fewest records.¹⁰ Thus, even if there were a reasonable doubt about subsection (c)’s meaning and application, one would be required to conclude that the provision does not exempt complaints.

Likewise, Ark. Code Ann. § 25-19-105(b)(9)(A) is not a basis for withholding the complaint. This statute, which establishes the so-called “competitive-advantage exception,” exempts from disclosure all public records “that if disclosed would give advantage to competitors or bidders.” This statute is referring to “trade secrets and other proprietary information that businesses submit to governmental entities to satisfy regulatory requirements.”¹¹ While it is conceivable that a complaint could divulge some proprietary information, it seems unlikely that all or even a large percentage of complaints would do so. Therefore, in my opinion, the competitive-advantage exception is not a basis for withholding all complaints without regard to their contents.

I note, as an aside, that the correspondence submitting the above questions for my opinion does not claim that the complaints do, in fact, convey proprietary information. Rather, the concern seems to be that the competitive-advantage

⁶ Ark. Code Ann. §17-52-307(d) (emphasis added).

⁷ See *Laman v. McCord*, 245 Ark. 401, 404–05, 432 S.W.2d 753, 755 (1968).

⁸ See *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998) (holding that all exceptions to disclosure under the FOIA must be narrowly construed).

⁹ See *id.*

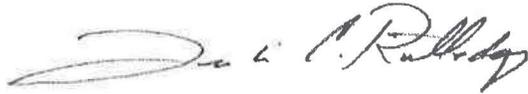
¹⁰ See *id.*

¹¹ John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 164 (Arkansas Law Press, 5th ed., 2009).

exception might apply “due to,” as stated, “the inherently damaging nature of the complaints.” While the complaints, whether substantiated or not, may damage the business reputation of a given inspector, that (by itself) does not amount to a competitive-advantage exception. As noted above, the exception is focused on trade secrets or proprietary information. While any given complaint might contain some kind of proprietary information, there is no reason to think that all complaints do.

In summary, the answer to Question 1 is “yes,” because the kinds of complaints at issue here are public records and they are not shielded from disclosure. The answer to Question 2 is “no,” the supporting documents need not be disclosed because section 17-52-307(f) exempts the supporting documents from the FOIA’s definition of a “public record.” The answer to Question 3 is that the complaint is a nonexempt public record, and consequently, it is available upon request without regard to the pendency or outcome of the Board’s investigation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Leslie Rutledge".

Leslie Rutledge
Attorney General

LR/RO:cyh

cc: Jim Metzger, Chairman