



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-053

May 15, 2015

Sergeant James T. Sloan
Little Rock Police Department
FOIA Unit
700 West Markham
Little Rock, Arkansas 72201-1329

Dear Sergeant Sloan:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Repl. 2014). 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 the Little Rock Police Department has received an FOIA request for "a listing of [the names of] Little Rock Police Department sworn personnel who have been relieved of duty, for whatever reason, within the last five years." You have such a list and believe that it must be disclosed. You are seeking my opinion because you are less certain about your decision as it applies to "officers that may have been relieved of duty but later exonerated subsequent to a departmental investigation." By the term "relieved of duty" I understand that you are referring to an employee being administratively suspended from all duties or temporarily reassigned to different duties while allegations of misconduct are investigated.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Not having seen any of the records at issue, I cannot opine about the release of any specific record. Instead, I can opine generally about how the FOIA applies

to the specific types of documents at issue. A public record that merely lists personnel who have suffered adverse employment action and that does not give any further detail about the reason for the adverse action is properly considered a personnel record that should be released. Therefore, in my opinion, your decision to disclose this list is consistent with the FOIA.

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. Because the only element at issue is whether any exceptions apply, I will focus my analysis only on that element.

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 evaluation or job performance records."³ The tests for the disclosure of these two types of documents may be released differ significantly.

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 Ark. Code Ann. § 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."

³ Ark. Code Ann. § 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."

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.

As I understand it, the list that you intend to disclose contains only the names of the personnel together with the fact that they were relieved of duty at some point in the last five years. This list is, in my opinion, most analogous to a letter that states the fact that an employee suffered an adverse employment action without also going into the reasons for the adverse action.⁴ This office has opined that such records qualify as personnel records.

As a personnel record, the list must be released unless doing so “constitutes a clearly unwarranted invasion of personal privacy.”⁵ This office has further opined that records akin to this list must be released because their disclosure does not rise to the level of a clearly unwarranted invasion of personal privacy. The test for the disclosure of personnel records is a balancing test, which requires custodians to weigh the employee’s privacy interest in the record against the public’s interest in obtaining the record.⁶ The public’s 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.’”⁷

In my opinion, the test requires that the list be disclosed. The public-interest side of the scale is weighty. This is because the public has a strong interest in the list at issue because the list clearly sheds light on the Department’s performance of its official duties. The privacy side of the scale is comparatively very light. This is because the personnel on the list have little to no privacy interest in the mere fact

⁴ *E.g.*, Op. Att’y Gen. Nos. 2013-155, 2006-147.

⁵ Ark. Code Ann. § 25-19-105(b)(12).

⁶ Please see Op. Att’y Gen. 2015-034, which goes into greater detail on the definitions and tests regarding personnel records.

⁷ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998) (*quoting Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994)).

that they suffered an adverse employment action. This is true even for those who were later exonerated and, presumably, restored to full duty. This office has previously noted that the mere fact that law-enforcement personnel are later “cleared of any wrong doing” does not, standing alone, give rise to a privacy interest sufficient to outweigh the public’s interest.⁸ This office has also noted in similar contexts that citizen complaints or allegations are subject to disclosure under the personnel-records balancing test, even if the complaint or allegation is unsubstantiated or later determined to be unfounded.⁹ I recognize that it may seem unfair to release a record reflecting adverse employment action if the employee was later exonerated and fully restored to duty. The solution under the FOIA is for the employee to obtain his or her own exonerating records pursuant to section 25-19-105(c)(2) and release them as he or she sees fit.

In conclusion, it is my opinion that your decision to disclose the list is consistent with the FOIA.

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

Sincerely,



LESLIE RUTLEDGE
Attorney General

LR/RO:cyh

⁸ Op. Att’y Gen. 2013-002; *see also* Op. Att’y Gen. Nos. 2011-152 (noting that there is no exemption under the FOIA for an unfounded complaint); 2000-179 (“[t]he fact that the employee was not disciplined as a result of the investigation will not be a factor in determining the record’s disclosability”).

⁹ *See* Op. Att’y Gen. 2013-002 (and opinions cited therein).