



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-057

May 27, 2015

Mr. Paul M. Gehring
Chief Legal Counsel
Revenue Legal Counsel
P.O. Box 1272, Room 2380
Little Rock, Arkansas 72203-1272

Dear Mr. Gehring:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the custodian's attorney, is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i). 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. This opinion is also intended to respond to the subject's request for my review.

Your correspondence indicates that you have received several FOIA requests for the personnel file of a former employee who was recently terminated. The custodian has collected the responsive documents and divided them into the following seven categories:

1. Category 1—"Personnel records subject to release without redaction of information"
2. Category 2—"Personnel records subject to release with redaction of information"
3. Category 3—"Personnel records not subject to release"
4. Category 4—"Employee evaluation or job performance records subject to release without redaction of information"

5. Category 5—“Employee evaluation or job performance records subject to release with redaction of information”
6. Category 6—“Employee evaluation or job performance records not subject to release because the public does not have a compelling interest in the disclosure of the records in question”
7. Category 7—“Employee evaluation or job performance records not resulting in a final decision to suspend or termination employment and [therefore] not subject to release”

For each category, the custodian provides a fairly detailed analysis of the bases for the categorization and the decision regarding whether the FOIA requires disclosure. Having provided me a complete, redacted copy of the records for category, you ask whether the custodian’s decisions are consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian’s decision is consistent with the FOIA. Having reviewed the records, it is my opinion (1) that the vast majority of the records in all categories have been properly classified; (2) that all the decisions regarding categories three and seven are consistent with the FOIA; (3) that several additional redactions need to be made in categories one, two, four, and five; (4) that some in category five have been mistakenly classified; and (5) that, in my opinion, the records in category six should be released because the public does have a compelling interest in them but, for reasons explained below, the records should be heavily redacted.

DISCUSSION

I. General standards governing disclosure

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.

The first two elements are clearly met in this case because DF&A is a public entity and the documents reflect the performance of official functions of the agency generally or the former employee. The primary issue here is with the third element; namely, whether any exceptions require some or all the documents to be withheld from disclosure. Therefore I will focus my analysis on this issue.

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

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."

a. Personnel-records exception

The first of the two most relevant potential exceptions is the one for “personnel records,” which the FOIA does not define. But this office has consistently opined that “personnel records” are all records other than employee evaluation and job performance records that pertain to individual employees.⁴ Whether a particular record meets this definition is, of course, a question of fact that can only be definitively determined by reviewing the record itself. 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

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” 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 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 Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the

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

⁵ Ark Code Ann. § 25-19-105(b)(12) (Repl. 2014).

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

⁷ *Id.* at 598, 826 S.W.2d at 255.

⁸ *Id.*, 826 S.W.2d at 255.

circumstances, his privacy interests outweigh the public's interests.⁹ The fact that the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.¹⁰

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹¹

Even if a document, when considered as a whole, meets the test for disclosure, it may contain discrete pieces of information that have to be redacted. Some items that must be redacted include: dates of birth of public employees (Op. 2007-064); social security numbers (Ops. 2006-035, 2003-153); medical information (Op. 2003-153); driver's license numbers and photocopies of driver's licenses (Op. 2013-090, 2007-025); insurance coverage (Op. 2004-167); tax information or withholding (Ops. 2005-194, 2003-385); payroll deductions (Op. 98-126); banking information (Op. 2005-194); personal contact information (Ark. Code Ann. § 25-19-105(b)(13)); marital status of employees and information about dependents (Op. 2001-080).

b. Employee-evaluation exception

The second relevant exception is for "employee evaluation or job performance records," which the FOIA likewise does not define. 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.¹² This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹³

⁹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹⁰ *E.g.* Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹¹ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

¹² *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Op. Att'y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-038; 2005-030; 2003-073; 95-351; and 93-055.

¹³ *Id.*

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 (i.e., level of discipline);
2. There has been a final administrative resolution of the suspension or termination proceeding (i.e., finality);
3. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee (i.e., basis); and
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).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

¹⁴ Ark. Code Ann. § 25-19-105(c)(1); Op. Att’y Gen. 2008-065.

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

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.

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

III. Application

We are now in a position to apply the foregoing to the seven sets of records at issue. In my opinion, the custodian’s decisions regarding Categories 3 and 7 are consistent with the FOIA. The decisions regarding Categories 1, 2, 4, and 5 are, in my opinion, largely consistent with the FOIA. There are, however, several additional redactions and reclassifications (noted below) that need to be made throughout these Categories. Finally, though the custodian has correctly classified the records in Category 6 as employee-evaluation records, the test for disclosure has not been correctly applied. In my opinion, there is a compelling public interest in the disclosure of the records in Category 6. But, as explained below, the records should be disclosed with significant redactions.

I have Bates Stamped the pages in each Category for ease of reference.

Category 1

This category contains records that the custodian has classified as personnel records that are subject to release without redaction. I agree with the classification decision, but the FOIA requires the following redactions:

- *Passim*. The former employee’s personnel number, which must be redacted, appears throughout these records. Ark. Code Ann. § 25-19-105(b)(11), § 25-19-105(b)(12).

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.”).

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

- Page 56. This page contains what appears to be personal-banking information. If so, then (for reason explained in Opinion No. 2005-194) this page should be withheld from disclosure.
- Page 57. This page contains the former employee's social security number, which must be redacted. *See Op. Att'y Gen. 2006-035.*

Category 2

This category contains records that the custodian has classified as "personnel records subject to release with redactions." I agree with the classification and disclosure decisions. As for the redactions, because I cannot see what has been redacted, I cannot opine on whether the redactions are consistent with the FOIA. Further, the FOIA requires the custodian to make the following additional redactions:

- *Passim.* The former employee's personnel number, which must be redacted, appears throughout these records. Ark. Code Ann. § 25-19-105(b)(11), § 25-19-105(b)(12).
- *Passim.* The former employee's marital status is frequently referenced in these documents. (Please note, especially, pp. 017, 019, 027, 029 and similar pages.) For reasons explained in Opinion No. 2001-080, a public employee's marital status is not subject to disclosure under the personnel-records balancing test.
- Pages 020, 022, 028. The former employee's "personal address" is visible on these and several other pages. A public employee's personal contact information, including home address, is per se exempt under the FOIA. Ark. Code Ann. § 25-19-105(b)(13).
- Pages 003-016. These pages contain information on family status, dependents, personal finances, and withholdings. For reasons explained in Opinion Nos. 2005-194 and 2001-080, these records cannot be released under the FOIA.

- Pages 063, 064, 078, 080, 081, 094. These records contain redacted photocopies of the former employee's driver's license. For reasons explained in Opinion No. 2013-090, these records cannot be disclosed.
- Pages 067–068. These records appear to contain personal-banking information. If so, then (for reasons explained in Opinion No. 2005-194), these records cannot be disclosed.

Category 4

This category contains seven records, which the custodian has classified as “employee evaluations subject to release without redactions.” In my opinion, pages 002-004 are incorrectly classified—they are properly considered personnel records and must be disclosed. Pages 005-008, though properly classified, cannot be disclosed.

- Page 002. This document is a termination letter that does not state the grounds for the termination. Only when a termination letter states the grounds for the termination does the letter qualify as an employee evaluation. When the termination letter merely states the fact of termination, as this one does, this office has long opined that such a letter is a personnel record that must be disclosed.
- Page 003. The former employee's personnel number, which must be redacted, appears throughout these records.
- Pages 003-004. These documents were not created by the employer *to evaluate the employee*. Rather, they are administrative documents for processing the employee's termination. As such, they cannot be classified as employee-evaluation records. They are more properly considered the former employee's personnel records. Because they do not contain any information whose disclosure constitutes a clearly unwarranted invasion of personal privacy, they must be disclosed.
- Pages 005-008. These documents are properly classified as an employee-evaluation record. But, from a reading of the document, nothing in this record appears to have formed the basis for the recent termination. Accordingly, these pages cannot be disclosed.

Category 5

This category contains records that the custodian has classified as employee evaluations that must be released with redactions. Of the 15 pages in this category, only the first page is properly considered an employee evaluation. The remaining pages were not created “by or at the behest of the employer.” Rather, they were created by an outside organization and later made part of the disciplinary action reflected on the first page. This office has opined that a document that was not initially an employee-evaluation record does not later become one merely because it was made part of an internal investigation or disciplinary matter.

Having classified these 15 pages, the next question is whether the FOIA requires their disclosure. Page 001, though initially a written reprimand, formed at least part of the basis for the subsequent termination. Accordingly, given that the other elements are clearly met, the custodian’s decision to disclose page 001 is, in my opinion, correct. The remaining pages must be disclosed unless doing so constitutes a clearly unwarranted invasion of personal privacy. In my opinion, given the nature of the activity described in the records, the balancing test (described above) does not require that pages 002-015 be withheld.

Category 6

This category contains records that the custodian has classified as employee evaluations that cannot be disclosed because “the public does not have a compelling interest in the disclosure of the records.” This category contains the most sensitive and difficult records. To avoid divulging information about the records, I must refer somewhat cryptically to each record.

As always, the first step in analyzing these records’ disclosure is to classify them. While the custodian is certainly correct to classify these documents as employee evaluations, they are *also* the personnel records of their respective authors. Each one of these five pages is what can be called a “mixed record.”¹⁸ A record is “mixed” when it can be classified as (1) more than one person’s evaluation, (2) more than one person’s personnel record, or (3) at least one person’s evaluation and at least one person’s personnel record. The latter is the case here, for the records are both the employee-evaluation records of the former employee and the personnel records of their respective authors.

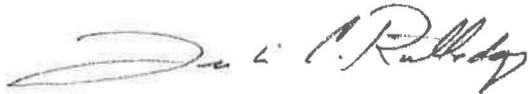
¹⁸ See generally Op. Att’y Gen. Nos. 2011-072, 2011-084.

As the former employee's evaluation records, the documents can only be disclosed if the four-part test (explained above) has been met. The custodian says that the records cannot be disclosed because the final element—namely, the compelling public interest element—has not been met. Given the records' contents and the former employee's role as a manager and supervisor, it is my opinion that the public *does* have a compelling interest in the documents. Therefore, in my opinion the documents must be disclosed.

But, as noted above, the documents are also the personnel records of their respective authors. Given the records' contents, I believe that the personnel-records balancing test requires that each document be extensively redacted. I have enclosed copies of these documents redacted in the manner and to the extent I believe the FOIA requires.

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

Sincerely,

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

LESLIE RUTLEDGE
Attorney General

LR/RO:cyh