



STATE OF ARKANSAS
THE ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-077

July 9, 2015

Stephen R. Cobb
City Attorney, Sherwood
7506 Highway 107
Sherwood, Arkansas 72120

Dear Mr. Cobb:

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.

Your letter indicates that someone has made a FOIA request to the Sherwood Police Department. The requester seeks, among other things, "access to documentation of any officer employed by the Sherwood Police Department regarding any and all actions involving Internal Affairs. This request includes but is not limited to the following individual [*sic*]: all currently employed Sherwood Police Department officers." You report that "the custodian has determined that approximately 16 officers that are still employed with the City have received some type of suspension as a result of internal affairs investigations." You further report (1) that the custodian has classified the "internal investigation reports" as employee-evaluation records and (2) that the custodian has determined that the records must be disclosed. Six of the 16 officers have objected to the disclosure of these records because, you say, they believe that "this FOI request is invasive...and will be damaging to them professionally if any of this information is disclosed." You ask, on behalf of the custodian, whether (in light of the employees' objections) 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. Because I have not been provided with any of the specific records at issue, I cannot opine about the disclosure of specific records. Instead, I can opine more generally about the classification and disclosure of records generated by an internal affairs investigation of a police officer. As explained more fully below, it is my opinion that the kinds of records at issue here are properly classified as employee-evaluation records and that they must be disclosed.

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.

The first two elements are clearly met in this case. As for the first element, the documents are held by Sherwood Police Department, which is a public entity. As for the second element, the FOIA defines "public record" as:

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.¹

This office has consistently opined that records of an internal affairs investigation qualify as public records because the records reflect the performance of the official functions of both the department and the officer(s) being investigated.² Therefore, the records at issue here must be disclosed unless a specific exception provides otherwise.

¹ Ark. Code Ann. § 25-19-103(5)(A) (Repl. 2014).

² See generally Op. Att'y Gen. 2010-078.

The relevant exception is the one for employee evaluations. When determining whether the employee-evaluation exception requires certain records to be withheld from disclosure, custodians must make two separate determinations. First, they must determine whether the record meets the definition of an employee-evaluation record: namely, a record created by or at the behest of the employer to evaluate the employee.³ This office has consistently opined that records created during an internal-affairs investigation of a police officer qualify as the officer's employee evaluations.⁴

Having addressed the classification question, a custodian must move to the second question—whether the test for employee-evaluations records requires disclosure. Employee evaluations *cannot* be disclosed 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).⁵

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

³ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see, e.g.*, Op. Att’y Gen. 2015-034.

⁴ *Id.*

⁵ Ark. Code Ann. § 25-19-105(c)(1); Op. Att’y Gen. 2015-034.

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.⁶

The custodian has determined that the foregoing four-part test requires the release of the internal-affairs records. Because I have not seen the specific records at issue, I cannot say whether this decision is correct regarding any specific record. But I can say that this decision is usually the correct one regarding internal-affairs investigations generally. The custodian has determined that the records formed the basis for the final suspension of the six officers who object to disclosure. Thus, Elements 1, 2, and 3 appear met. The custodian is also most likely correct in determining that Element 4—i.e. the compelling public-interest prong—is met. This is because, as this office has consistently opined, the public has a special and weighty interest in the job performance of law-enforcement officials due to their unique position of public trust.⁷ Therefore, in my opinion, the test for the disclosure of internal-affairs investigations is met under these circumstances.⁸

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

Sincerely,



LESLIE RUTLEDGE
Attorney General

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⁶ John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 217–18 (Arkansas Law Press, 5th ed., 2009).

⁷ See generally Op. Att'y Gen. 2010-055.

⁸ The custodian should be aware that even if a record, when considered as a whole, meets the test for disclosure, the record may contain discrete pieces of information that have to be redacted. Please consult Opinion No. 2015-057, which provides a representative sampling of common redactions.