



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-108

August 31, 2015

Mr. Bill Sadler
Public Information Officer
Arkansas State Police
One State Police Plaza Drive
Little Rock, Arkansas 72209

Dear Mr. Sadler:

I am writing in response to a request for my review of the record custodian's decision regarding a records request under the Arkansas Freedom of Information Act (FOIA). The request for my review, which is from the subject of the records, 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.

It is my understanding that someone has requested a copy of records relating to an internal-affairs investigation of a former Arkansas State Police employee. It is also my understanding that the custodian at Arkansas State Police intends to disclose these records after making some unspecified redactions. The FOIA requires me to render my opinion on whether this decision is consistent with the FOIA.

RESPONSE

Having reviewed the records at issue, it is my opinion (1) that the attached records are the former employee's employee-evaluation records; and (2) that the custodian's decision to disclose the records is not consistent with the FOIA because (for reasons explained below) there is no compelling interest in the disclosure of the records.

DISCUSSION

I. General Rules 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. Because only the third element is in question here, I will focus my analysis solely on that point.

Under certain conditions, the FOIA exempts two types of records 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.

In the current matter, the relevant exception is for "employee evaluation or job performance records," which the FOIA does not define. But the Arkansas Supreme Court

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."

has held 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.⁴ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.⁵

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).⁶

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

⁴ *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.

⁵ *Id.*

⁶ Ark. Code Ann. § 25-19-105(c)(1); Op. Att'y Gen. 2008-065.

the agency who commits a serious breach of public trust should be sufficient to satisfy the “compelling public interest” requirement.⁷

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,⁸ 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.

II. Application

We are now in a position to apply the foregoing rules to the documents at issue. The first step is to classify the documents. All the records are clearly the former employee’s employee-evaluation records because they were created by the employer to evaluate an allegation about the former employee’s conduct. Records created as part of an internal-affairs investigation are properly classified as employee-evaluation records.⁹

The attached records clearly indicate that the former was terminated (thus meeting element (1)); that termination has been final for about 15 years (thus meeting element (2)); and that the records clearly formed a basis for the termination (thus meeting element (3)). Thus, the only question regarding whether these records should be disclosed is whether there is a compelling public interest in their disclosure.

In my opinion, after applying the factors outlined above, the public does not have a compelling interest in these documents. There are several bases that jointly establish this conclusion:

- The former employee’s position at the time of the infraction was very low ranking (i.e. a recruit). The fact that the former employee was not yet a certified law enforcement officer also means that the usual presumption in favor of finding a compelling interest does not apply to these records.¹⁰

⁷ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

⁸ *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.”).

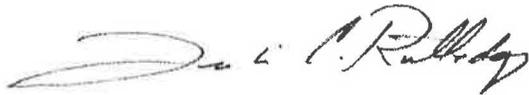
⁹ See generally Op. Att’y Gen. Nos. 2015-077, 2015-049.

¹⁰ See generally Op. Att’y Gen. 2015-077 (“[T]he public has a special and weighty interest in the job performance of law-enforcement officials due to their unique position of public trust.”).

- The infraction that lead to the subject's termination did *not* involve (a) misuse of state money or resources, or (b) interactions with the public.
- Further, to the extent that there was serious breach of public trust, the significant passage of time since the breach (i.e. 15 years) reduces any interest that may have existed in these records. In general, and given the circumstances, the passage of time can reduce the extent to which there is a compelling public interest. I hasten to add, however, that the passage of time—by itself—is seldom a sufficient basis to find that no compelling public interest exists. But given the nature of the infraction reflected in these records and the low-level ranking of the subject at the time of the infraction, I believe that, to the extent there ever was a compelling interest, that interest has significantly degraded over time to be less than compelling now.

Any one of these factors—when considered individually—is not dispositive. But the factors—when considered together—have a cumulative effect indicating that the public lacks a compelling interest in the records. This means that the final element for the release of employee-evaluation records has not been met in this case. Therefore, in my opinion, the custodian's decision to disclose the internal-affairs file is not consistent with the FOIA.

Sincerely,



Leslie Rutledge
Attorney General

LR:cyh