



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-111

September 10, 2015

Luther Sutter
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Dear Mr. Sutter:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the attorney for 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.

Your correspondence indicates that someone has requested "a complete copy of" your client's "personnel records file." Your client is a former public employee. The custodian has gathered the records it considers to be responsive to the request and intends to disclose the records. You, on your client's behalf, object to the disclosure of the records because, you claim "the release is an unwarranted invasion of privacy." You ask this office to review the custodian's decision to determine whether it is 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 at issue, it is my opinion (1) that nearly all of the records should be classified as personnel records; (2) that one record should be classified as an employee-evaluation record; and (3) that the custodian's decision to release the personnel records is consistent with the FOIA, but I cannot say whether the employee-evaluation record should be disclosed because I have no information on whether it formed the basis for the former employee's termination.

If it did, then the record should be disclosed (because the other elements for its release are met). If it did not, then the record cannot be disclosed. The custodian must make the determination whether the record formed the basis for your client's termination.

DISCUSSION

I. General standards governing disclosure

Responsive documents 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 documents must constitute a public record. Third, no exceptions allow the documents to be withheld. Because your objection rests on the third element—i.e. whether an exception shields the documents from disclosure—I will limit my analysis to that point.

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.

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

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, custodians must apply the appropriate test to determine whether the FOIA requires that record be disclosed.

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. 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*

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.”

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).

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 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 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); any information identifying certain law enforcement officers currently working undercover (Ark. Code Ann. § 25-19-105(b)(10)); driver's license numbers (Op. 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)); and marital status of employees and information about dependents (Op. 2001-080).

⁷ *Id.* at 598, 826 S.W.2d at 255.

⁸ *Id.*, 826 S.W.2d at 255.

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.

b. Employee-evaluation exception

The second potentially relevant exception is for “employee evaluation or job performance records,” which the FOIA likewise does not define. 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

If the records meet the above definition, they *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.” 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

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.*

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

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

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 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 can now apply the foregoing to the documents in dispute. As noted above, the first step in the analysis is to classify the documents in dispute. In my opinion, all the records (with one exception) qualify as personnel records. The one exception is an email sent on April 3, 2015 at 10:07 a.m. (Please note that I am referring to this single email with this time and date stamp. I am not referring to the "email chain" in which this single email is embedded.) This email qualifies as an

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

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.").

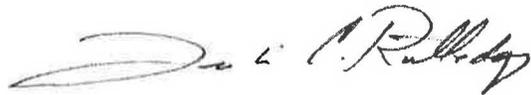
¹⁷ *See Op. Att'y Gen.* 96-168; Watkins & Peltz, *supra*, at 204.

employee-evaluation record because it was (1) created by your client's former employer (2) to evaluate his job performance, (3) with respect to a specific issue.

With the records classified, we simply apply the appropriate tests for disclosure. The employee-evaluation record cannot be disclosed unless the foregoing four-part test is met. Here, three of the four elements are clearly met. The former employee suffered a final termination (elements 1 and 2), and there is a compelling public interest in the records (element 4) due to a public controversy. The only remaining question regarding the email's disclosure is whether it formed a basis for your client's termination. I have no information about this element. If the email did not form the basis for your client's termination, then the email cannot be disclosed. If the email did form the basis for the termination, then the email must be disclosed. The custodian must make this key factual determination.

In my opinion, the remaining records are personnel records. This classification decision appears to be undisputed. Rather, the dispute is whether the disclosure of the remaining records would constitute a clearly unwarranted invasion of your client's personal privacy. In my opinion, the disclosure of the remaining records would not rise to the level of a clearly unwarranted invasion of personal privacy. And I have not been presented with any specific arguments to the contrary. Although you make a general reference to potential embarrassment, you do not provide any specific explanation as to what information would be embarrassing and why. Moreover, in my opinion, your client's privacy interest in the record's contents is minimal. To the extent that your client's privacy interest is greater than *de minimus*, the public's interest outweighs your client's privacy interest because the documents shed significant light on the workings of the custodian's office. Therefore, in my opinion, the custodian's decision to disclose these personnel records is consistent with the FOIA.¹⁸

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹⁸ I should also note that there are at least two redactions that are inconsistent with the FOIA. There is no basis for the custodian to have redacted the date on which your client signed certain forms. The custodian should review the redactions to ensure that such information is unredacted.