



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-125

October 22, 2015

Jason A. Stuart, Esq.
Stuart Law Firm
Plaza West Building
415 N. McKinley Street
Little Rock, AR 72205

Dear Mr. Stuart:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the attorney for the subjects of the records, is pursuant to Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Supp. 2015). 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 the Department of Human Services (DHS) intends to release—in response to a FOIA request—certain documents that identify your clients, after redacting exempt information such as Social Security number, home address, and medical records. Your clients object to the release and you have submitted a number of specific questions to my office concerning the prospective release and DHS's role or authority in this regard.

Most of the questions you have posed fall outside the scope of my authority to review. Although official Attorney General opinions are issued on questions of state law to various state officials pursuant to other statutory directives, my authority to opine under Ark. Code Ann. § 25-19-105 is limited to reviewing the custodian's decision as to "whether [particular personnel or employee-evaluation]

records are exempt from disclosure.”¹ I am not otherwise authorized to address specific questions posed by the custodian, the subject, or the requestor.²

While I must therefore respectfully decline to address most of the matters you have raised, I will address the following questions concerning a document or information that “formed a basis, in whole or in part, for adverse employment action”:

1) Is DHS permitted or required to release documents which identify, reference or have as the subject a current or former DHS employee for whom the document is included in their personnel file and the document or information formed a basis, in whole or in part, for adverse employment action or contains references to information which formed a basis, in whole or in part, for adverse employment action or contains references to information which formed a basis, in whole or in part, for adverse employment action?

2) Is DHS permitted or required to release documents which identify, reference or have as the subject a current or former DHS employee for whom the document is included in their personnel file and the document or information formed a basis, in whole or in part, for adverse employment action or contains references to information which formed a basis, in whole or in part, for adverse employment action, even if the current or former DHS employee has not yet initiated administrative action in connection with such adverse employment action?

RESPONSE

My statutory duty is to state whether the custodian’s decision is consistent with the FOIA. Because I have not seen the specific documents at issue,³ I cannot opine about the disclosure of specific documents. Instead, I can opine more generally about the classification and disclosure of documents containing information that formed a basis, in whole or in part, for adverse employment action.

¹ Ark. Code Ann. § 25-19-105(c)(3)(A) (Supp. 2015).

² See Op. Att’y Gen. No. 2006-071 (and opinions cited therein).

³ In addition to not seeing the documents, I have been provided no information explaining what the documents consist of or contain, nor any information surrounding their creation.

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.⁴ Third, no exceptions require the document to be withheld.

The first two elements are presumably met in this case. DHS is a public entity, and documents such as those described in the questions above (“formed a basis, in whole or in part, for adverse employment action”) presumably reflect the performance or lack of performance of official functions of the agency generally or the current or former employee. Thus, the primary issue 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.⁵ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: “personnel records”⁶ or “employee

⁴ A document qualifies as a “public record” if it is (1) a writing, recorded sound, film, tape, electronic or computer-based information, or data compilation in any medium; (2) that is kept; and (3) that *constitutes a record of “the performance or lack of performance of official functions which are or should be carried out by...any other agency wholly or partially supported by public funds or expending public funds.”* Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2015) (emphasis added).

⁵ 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. No. 97-368; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT 187–89* (Arkansas Law Press, 5th ed., 2009).

⁶ 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.”

evaluation or job performance records.”⁷ The test for whether these two types of documents may be released differs 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.

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.⁸ 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.”⁹

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,¹⁰ 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.

⁷ 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.”

⁸ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra* note 4, at 187.

⁹ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2015).

¹⁰ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

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.¹¹ 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.¹² 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.¹³ 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.¹⁴

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 Att'y Gen. No. 2007-064); Social Security numbers (Op. Att'y Gen. Nos. 2006-035, 2003-153); medical information (Op. Att'y Gen. No. 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. Att'y Gen. No. 2007-025); insurance coverage (Op. Att'y Gen. No. 2004-167); tax information or withholding (Op. Att'y Gen. Nos. 2005-194, 2003-385); payroll deductions (Op. Att'y Gen. No. 98-126); banking information (Op. Att'y Gen. No. 2005-194); personal contact information (Ark. Code Ann. § 25-19-105(b)(13)); and marital status of employees and information about dependents (Op. Att'y Gen. No. 2001-080).

b. Employee-evaluation exception

The second potentially relevant exception is for "employee evaluation or job performance records," which the FOIA likewise does not define. But in 2012, the

¹¹ *Id.* at 598, 826 S.W.2d at 255.

¹² *Id.*, 826 S.W.2d at 255.

¹³ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹⁴ *E.g.* Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

Arkansas Supreme Court 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.¹⁵ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁶

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).¹⁷

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.

¹⁵ *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; 98-006; 97-222; 95-351; 94-306; and 93-055.

¹⁶ *Id.*

¹⁷ Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2015); Op. Att'y Gen. No. 2008-065.

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.¹⁸

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,¹⁹ 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.²⁰

III. Application

I have not seen the actual document(s) in question, and I lack sufficient information to specifically opine as to their proper classification. A document that—as stated in the above questions—contains information that “formed a basis, in whole or in part, for adverse employment action” may or may not be an employee-evaluation record of the subject of the employment action. As explained above, to be classified as an employee-evaluation record, the document must have been created by or at the behest of the employer to evaluate the employee.

Whether—as stated in your questions—DHS is “permitted or required” to release the documents will depend upon the applicable test for release, as explained above. Exemptions are mandatory, so DHS is not permitted to release exempt documents or information. If the particular document(s) at issue are in fact employee-evaluation records, then they cannot be released unless, among several other elements, there has been a final administrative resolution of a suspension or termination proceeding. In response to Question 2, therefore, the fact that the

¹⁸ Watkins & Peltz, *supra* note 4, at 217–18 (footnotes omitted).

¹⁹ *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.”).

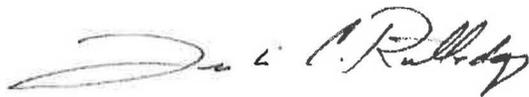
²⁰ *Cf.* Op. Att’y Gen. No. 96-168; Watkins & Peltz at 204.

current or former employee has not yet initiated administrative action would be relevant to a decision regarding the disclosure of an employee-evaluation record, as long as 1) the current or former employee was either suspended or terminated and 2) an administrative remedy remains available to the current or former employee. An employee-evaluation record cannot be released if there has been no final administrative resolution of an employee's suspension or termination.

The other possibility is that the document(s) at issue do not constitute employee-evaluation records, but instead are personnel records under the above definition (all records other than employee-evaluation records that pertain to individual employees). In that case, I must note that the mere fact that the employee has not initiated an administrative action is an insufficient basis to conclude that a personnel record is exempt from disclosure.²¹ Any personnel record must instead be evaluated under the test that is applicable to that type of record, as discussed above.

I cannot opine further in response to the questions you have posed, in the absence of the documents themselves and further information surrounding their creation.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge". The signature is fluid and cursive, with a large initial "L" and "R".

LESLIE RUTLEDGE
Attorney General

LR:cyh

²¹ Compare Op. Att'y Gen. 2011-152 ("There is no basis for withholding a citizen complaint pending an investigation.").