



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-045

April 20, 2016

Steve R. Glass
Senior Engineer/City Planner
City of Rogers, Arkansas
301 W. Chestnut Street
Rogers, AR 72756

Dear Mr. Glass:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request is based on A.C.A. § 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 City of Rogers has decided to release a record of several interview conversations, in response to a FOIA request. It is my understanding that the record in question was created by or at the behest of your employer to evaluate you. It is my further understanding that as a result of the evaluation, you were suspended for three days and the record at issue was relied upon to support the suspension decision. You have provided a copy of the record, which has several redactions. You state that "the reason for the redaction is because other employees are mentioned in the document, and they did not receive a suspension or termination." You object to the release of the record, citing your belief that there is no compelling public interest in the disclosure. You also express concern that "if this document were released, due to the nature of the conversations recorded, it would reveal the identity of individuals that reported the incidents to the City's Human Resources Department in confidence, thereby exposing them to risk."

You ask whether the custodian's decision to release the redacted record is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. It is my opinion, based on the information before me, that the custodian's decision is consistent with the FOIA.

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 appear met in this case. As for the first element, the document is held by the City of Rogers, 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

The document at issue clearly qualifies as a "public record" under this definition and must be disclosed unless some specific exception provides otherwise.

¹ A.C.A. § 25-19-103(5)(A) (Supp. 2015).

Under certain conditions, the FOIA exempts from disclosure two distinct types of employee-related records: “personnel records”² and “employee evaluation or job performance records.”³ The test for whether these two types of records 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.

I will focus only on the employee-evaluation exception which, given the information before me, is the most relevant exception.

The FOIA does not define “employee evaluation or job performance records.” However, the Arkansas Supreme Court has adopted this office’s view that this 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 office has consistently taken the position that any records that were created at the behest of an employer and that detail the performance or lack of performance of an employee with regard to a specific incident or incidents are properly classified as employee evaluation or job performance records.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 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)(i): “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.”

⁴ *Thomas v. Hall*, 2012 Ark. 66, **8-9, 399 S.W.3d 387. For prior applications of this test by this office, see, e.g., Op. Att’y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-111; 2003-073; 98-006; 97-222; 95-351 and 93-055.

⁵ E.g., Op. Att’y Gen. Nos. 98-006; 97-222; 95-351; 94-306; 93-055.

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., relevance); 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 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

⁶ Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2011); Op. Att’y Gen. 2008-065.

⁷ John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT*, 217-18 (Arkansas Law Press, 5th ed., 2009) (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.”)

be determined in the first instance by the custodian after he considers all the relevant information.

II. Application.

We can now apply the foregoing to the document at issue. As always, the first step in analyzing the employment-related records' disclosure is to classify them. The information before me indicates that the record in question constitutes your employee-evaluation record under the above definition. You object to its release because you believe there is no compelling public interest in disclosure (the last of the four elements in the above test)—thus indicating that the first three elements for disclosure are met. However, the custodian evidently has determined, based upon your supervisory position coupled with the nature of the conduct at issue, that this part of the test is met and disclosure is required. Based on the information before me, I see no reason to conclude that this is inconsistent with the legislative intent under Ark. Code Ann. § 25-19-105(c)(1). I therefore conclude that the conditions for the release of the record as your employee-evaluation record have been met.⁹

With regard to your concern that the identity of individuals who reported the incidents will be revealed if the record is released (due to the nature of the conversations recorded), I must note that this concern does not justify withholding the employee-evaluation record where the test is met for the release of the latter record.¹⁰

In summary, based on the information before me, it is my opinion that the record you have submitted for my review is an employee-evaluation record and that the custodian's decision to disclose the record is consistent with the FOIA.

Sincerely,



LESLIE RUTLEDGE
Attorney General

⁹ I note that a number of names have been redacted from the record. You have stated that these redactions were made because the employees “are mentioned in the document, and they did not receive a suspension or termination.” I cannot determine from this statement precisely why these redactions were made. The statement might suggest that the record or some portion thereof is also an evaluation record of another employee. However, I lack sufficient information to further address or comment on these redactions. The custodian must apply the relevant standards, as discussed above, to decide what information to redact.

¹⁰ See *id.*, at 208-09, and opinions cited therein (discussing the proper approach when a record that is subject to disclosure as to one employee also contains information pertaining to another employee).