



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2016-055

May 10, 2016

Michael W. Frey, Esq.  
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Dear Mr. Frey:

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) (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 local news outlets have requested copies of records relating to a former employee. You have attached several documents that the custodian of records believes are responsive to the request and has determined to be subject to release under the FOIA. You ask whether the custodian's initial release decision is compatible with the FOIA.

Your request does not indicate how the custodian classified any of the records; *i.e.*, whether the custodian deems a particular document to be a personnel record, an employee evaluation or job performance record, or neither. In addition, it may be that the custodian is in possession of facts which were not recounted to me but were deemed relevant in the custodian's classification of the documents. Without knowing the custodian's reasoning with respect to each of the records, and (possibly) without knowledge of all facts relevant to each document's classification, it is impossible for me to opine definitively on each record's appropriate classification and resulting treatment under FOIA. I will, however, state herein my supposition of the custodian's classification of each document and

render my opinion with respect to each of the documents based on that supposition and on the basis of the facts contained in the documents and in your request for my opinion.

## **RESPONSE**

My statutory duty is to state whether, with respect to personnel records and employee evaluation or job performance records, the custodian's decision is consistent with the FOIA. Having reviewed the records submitted and your request for my opinion, it is my opinion, based solely on the facts set forth in the records submitted and in your request:

1. One of the records is neither a personnel record nor an employee evaluation or job performance record. Because my statutory duty and authority to render opinions in this context are limited to such records, I express no opinion with respect to a record submitted that is neither a personnel record nor an employee evaluation or job performance record.
2. Some of the records are personnel records, and there appears to be no significant danger that the disclosure of such records will constitute a clearly unwarranted invasion of personal privacy. Accordingly, the custodian's decision to release these records is consistent with the FOIA.
3. The remaining record is an employee evaluation or job performance record. The documents submitted to me indicate that the former employee resigned from the City's employ. There is no indication in the documents submitted that the former employee was suspended or terminated. Because employee evaluation or job performance records are subject to public disclosure only following an employee's suspension or termination, the custodian's decision to release this record is inconsistent with the FOIA.

I will set out relevant definitions and standards, then apply them to the records submitted.

## **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 documents are held by the City of Camden, 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.<sup>1</sup>

In my opinion, all the documents you submitted are public records and must be disclosed unless some specific exception provides otherwise.

## **II. Exceptions to disclosure.**

Under certain conditions, the FOIA exempts two groups of items normally found in employees’ personnel files.<sup>2</sup> For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: “personnel records”<sup>3</sup> or “employee

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<sup>1</sup> Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2015).

<sup>2</sup> 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).

<sup>3</sup> 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.”<sup>4</sup> 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.<sup>5</sup> 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.”<sup>6</sup>

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,<sup>7</sup> 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.<sup>8</sup>

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<sup>4</sup> 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.”

<sup>5</sup> See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra*, at 187.

<sup>6</sup> Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2013).

<sup>7</sup> *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

<sup>8</sup> Watkins & Peltz, *supra* note 4, at 191.

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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.<sup>13</sup>

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:

- Personal contact information of public employees, including personal telephone numbers, personal e-mail addresses, and home addresses (Ark. Code Ann. § 25-19-105(b)(13));
- Marital status of employees and information about dependents (Op. 2001-080);
- Dates of birth of public employees (Op. 2007-064);
- Social security numbers (Ops. 2006-035, 2003-153);

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<sup>9</sup> *Id.* at 598, 826 S.W.2d at 255.

<sup>10</sup> *Id.*, 826 S.W.2d at 255.

<sup>11</sup> *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

<sup>12</sup> *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

<sup>13</sup> Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

- 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); and
- Payroll deductions (Op. 98-126); banking information (Op. 2005-194).

**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 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.<sup>14</sup> This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.<sup>15</sup>

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

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<sup>14</sup> *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.

<sup>15</sup> *Id.*

4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).<sup>16</sup>

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.<sup>17</sup>

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,<sup>18</sup> 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.<sup>19</sup>

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<sup>16</sup> Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

<sup>17</sup> Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

<sup>18</sup> *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.”).

<sup>19</sup> *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

### **III. Application.**

I apply the foregoing rules to the documents submitted as follows:

Document captioned “ASSISTANT MAYOR,” bearing the page number “103” (one page). Because the custodian determined that this document is subject to disclosure, and because it is included in your request for my opinion, which is limited to personnel records and employee evaluation or job performance records, I presume that the custodian classified this document as a personnel record.

In my view, however, this document does not purport to evaluate any particular employee’s performance or otherwise pertain to any particular individual. Rather, both the typewritten bulk of the document and the handwritten annotations to describe generally the responsibilities of whoever holds the job of Assistant Mayor from time to time. Accordingly, in my view, this document is neither a personnel record nor an employee evaluation or job performance record. Because my statutory duty and authority to render opinions in this context are limited to personnel records and employee evaluation or job performance records, I express no opinion with respect to the custodian’s decision to release this record. I will say, however, that nothing I have seen in connection with this matter is inconsistent with the notion that this document is simply a non-exempt public record and therefore subject to disclosure.

Document beginning with the words “All of the duties of the Assistant to the Mayor” (two pages). While this document – like one discussed above – is mostly simply a description of the responsibilities of whoever holds the job of Assistant Mayor from time to time, it also states that certain named City employees and officials met on a date specified to discuss such job responsibilities with the employee (now former employee) at issue. Accordingly, the document pertains to that individual. The document does not, however, contain statements evaluating that individual’s job performance. In my view, accordingly, this document is a personnel record. From the information submitted, I see no indication that release of this record would result in a clearly unwarranted invasion of personal privacy. In my opinion, then, the custodian’s presumed classification of this document as a personnel record, and the custodian’s decision to release this document, are consistent with the FOIA.

Document captioned “IN RESPONSE TO JOB DESCRIPTION MEMO FROM MAYOR 03/17/16” (four pages). This document was prepared by the former employee and submitted to the mayor. While the document contains the former

employee's statements about his job performance, there is no indication that the document was prepared "by or at the behest of the employer." Rather, it appears that the former employee gratuitously prepared the document and submitted it to the mayor. As the document was not prepared by or at the behest of the employer, it is not an employee evaluation or job performance record. The record does, however, pertain to a particular employee, namely the one who prepared it. The record is, accordingly, a personnel record.<sup>20</sup> From the information submitted, I see no indication that release of this record would result in a clearly unwarranted invasion of personal privacy. In my opinion, then, the custodian's presumed classification of this document as a personnel record, and the custodian's decision to release this document, are consistent with the FOIA.

A few words have been redacted from the copy of this document submitted to me. It appears that the redactions are of individuals' names. I assume the custodian made the redactions and proposes to release the document in this form. Because I do not know precisely what was redacted, or why, I am unable to express an opinion with respect to the propriety of the redactions.

Email dated May 2, 2016 (one page). Because the custodian determined that this document is subject to disclosure, I presume that the custodian classified this document as a personnel record.

In my view, however, because this document was prepared by the employer and makes statements about the employee's job performance, it is very likely an employee evaluation or job performance record. As discussed above, such records are not subject to disclosure under the FOIA unless the employee was suspended or terminated (and other tests are met). The records submitted indicate that the former employee resigned from the City's employ. There is no indication in such records that the former employee was suspended or terminated. Accordingly, based solely on the facts contained in the records submitted and in your request for my opinion, the custodian's decision to release this record appears to be inconsistent with the FOIA. It may be, however, that the custodian is in possession of additional facts that would indicate the record is not an evaluation or job performance record, but rather is a personnel record. If that were the case, release would be justified, in my opinion.

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<sup>20</sup> See generally Op. Att'y Gen. 2002-326 ("[A] document generated at an aggrieved employee's own instigation and subsequently conveyed to the employer constitutes a 'personnel record'....").

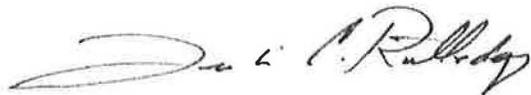
The custodian should revisit the classification and decision to release this record in light of this opinion.

Document captioned "NOTICE OF TERMINATION" (one page). Because the custodian determined that this document is subject to disclosure, I presume that the custodian classified this document as a personnel record.

I note, however, that this document contains a statement by the mayor about the employee's job performance. In my view, that statement indicates that the document is an employee evaluation or job performance record. Such records are subject to release only following a suspension or termination. Notwithstanding this document's caption, the handwritten entries on the form indicate – twice – that the employee resigned. There is no indication he was suspended or terminated. Accordingly, based solely on the facts of which I am aware, the custodian's decision to release this record appears to be inconsistent with the FOIA. It may be, however, that the custodian is in possession of additional facts that would indicate the record is not an evaluation or job performance record, but rather is a personnel record. If that were the case, release would be justified, in my opinion.

The custodian should revisit the classification and decision to release this record in light of this opinion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Leslie Rutledge".

LESLIE RUTLEDGE  
Attorney General