



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-057

May 13, 2016

Jimmy G. Foreman
c/o Stacey Witherell, SPHR CLRP
Director of Human Resources
City of Little Rock Human Resources Department
500 West Markham, Suite 130W
Little Rock, AR 72201

Dear Mr. Foreman:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request 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 someone has submitted a FOIA request to the City of Little Rock for your personnel file. You have forwarded several documents that the custodian of records has determined are subject to release, with redactions; and you have asked for my opinion on whether the custodian's decision is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. The custodian has determined that all the records constitute personnel records and that all are subject to release, with certain redactions, under the test for disclosure of personnel records. Having reviewed the records, it is my opinion that (1) with one exception, the records are properly classified as personnel records; (2) one record is an employee evaluation record, rather than a personnel

record; and (3) each of the records is subject to release, as redacted by the custodian.

It is therefore my opinion that although one of the records was classified incorrectly, the custodian's decision to release all the records, as redacted, 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 documents are held by the City of Little Rock, 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

Therefore, in my opinion, the documents 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.² For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"³ or "employee

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

evaluation or job performance records.”⁴ 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.⁵ 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.”⁶

² 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).

³ 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.”

⁴ 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.”

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

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

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

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.⁹ 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.¹⁰ 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.¹¹ 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.¹²

Whether any particular personnel record’s release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹³

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

⁸ *Watkins & Peltz*, *supra* note 4, at 191.

⁹ *Id.* at 598, 826 S.W.2d at 255.

¹⁰ *Id.*, 826 S.W.2d at 255.

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

¹² *E.g.*, Op. Att’y Gen. Nos. 2001-112, 2001-022, 94-198.

¹³ Op. Att’y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

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);
- 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.¹⁴ This exception includes records generated while investigating allegations

¹⁴ *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.

of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁵

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).¹⁶

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.¹⁷

¹⁵ *Id.*

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

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

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,¹⁸ 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.¹⁹

III. Application.

We can now apply the foregoing to the attached documents. An email from the custodian of records, dated May 10, 2016, states that no employee performance records are included in the records to be released. In my opinion, however, one record, dated March 25, 2015, is an employee-evaluation record. This office has consistently opined that a letter detailing the reasons that served as a basis for disciplinary action is an employee-evaluation record for purposes of the FOIA.²⁰ The March 25, 2015 letter clearly falls into this category. As an employee-evaluation record, the letter cannot be released unless all four of the conditions outlined above are met. It appears that the first three conditions are met in this case.²¹ This leaves open only the question whether the circumstances prompting the disciplinary action are of compelling public interest.

This office has repeatedly opined that, in certain situations, a compelling public interest exists in the disclosure of documents containing certain categories of information.²² The absence of a public controversy may be of minimal

¹⁸ *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.”).

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

²⁰ Op. Att’y Gen. Nos. 2014-129, 2012-041, 2011-068, 2009-210, 2006-026, 95-171.

²¹ With regard to the “formed a basis” element, a letter detailing disciplinary action, although written contemporaneously with the disciplinary action, has been classified by this office as forming a basis for the action where it reflects or details the incident(s) or conduct that led to the discipline. *See* Op. Att’y Gen. 2005-030, n. 3. *Accord* Op. Att’y Gen. 2006-026 (regarding a letter of termination).

²² *E.g.* Op. Att’y Gen. Nos. 2003-072, 2001-343, 98-210, 98-075, 97-400 and 92-319 (violation of safety rules).

significance in these cases.²³ Additionally, with regard specifically to employee-evaluation records of law enforcement personnel, this office has previously observed that the public has a strong interest in a law enforcement officer's official conduct.²⁴ There is "a strong case for the finding of a compelling public interest" where disciplinary records reflect "a violation of departmental rules by a 'cop on the beat' in his interactions with the public."²⁵

The March 25, 2015 letter reflects that the discipline occurred as a result of violation of rules aimed at this type of conduct or behavior. Accordingly, it is my conclusion that the "compelling public interest" standard is met with respect to this record. Because the other conditions under Ark. Code Ann. § 25-19-105(c)(1) for release of the record have also been met, it is my opinion that the custodian's decision to release the record is consistent with the FOIA.

The remaining documents are properly classified as personnel records, in my opinion. Whether the release of any particular personnel record would constitute a clearly unwarranted invasion of personal privacy is a question of fact.²⁶ Having reviewed the records at issue, it is my opinion that disclosure of the records, as redacted, would not rise to the level of a clearly unwarranted invasion of personal privacy.

In conclusion, therefore, it is my opinion that although one of the records was classified incorrectly, the custodian's decision to release all the records, as redacted, is consistent with the FOIA.

Sincerely,



LESLIE RUTLEDGE
Attorney General

²³ Op. Att'y Gen. 2014-122.

²⁴ *Id.* (quoting Watkins & Peltz, *supra*, at 217: "[T]he public has a great interest in the [job] performance of police officers").

²⁵ Op. Att'y Gen. 2007-206.

²⁶ Op. Att'y Gen. Nos. 2016-044, 2006-176, 2004-260, 2003-336 and 98-001.