



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2016-084

July 28, 2016

Mr. Frank Baker  
c/o Justin Sparrow, Director  
West River Valley RSWMD  
24087 Highway 164  
Clarksville, AR 72830

Dear Mr. Baker:

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 request indicates that someone has submitted a FOIA request to West River Valley Regional Solid Waste Management District (RSWMD) for your personnel file. The custodian has decided that your personnel file—including a letter notifying you of certain employment action—is subject to release with redactions. You object to the release of the letter, although you have not stated any basis for the objection. You have provided a copy of the letter and you have asked for my opinion regarding the custodian's decision to release this record.

**RESPONSE**

My statutory duty is to state whether the custodian's decision regarding certain employee-related records is consistent with the FOIA. Having reviewed the letter at issue, it is my determination that (1) based on its content, the letter constitutes an employee evaluation record; and (2) the custodian's decision to release the letter is consistent with the FOIA, but your personal contact information must be redacted prior to the letter's release.

## 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 West River Valley RSWMD, 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>

Therefore, in my opinion, the document submitted is a public record 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

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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).

be divided into two mutually exclusive groups: “personnel records”<sup>3</sup> or “employee 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.

Based upon my review of the record at issue, I conclude that the relevant exemption is the one for employee-evaluation records.<sup>5</sup> This office has consistently opined that a letter addressing the reasons that served as a basis for employment action taken with respect to a particular employee constitutes an employee-evaluation record for purposes of the FOIA.<sup>6</sup> The letter you have provided for my review falls into this category.

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<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.”

<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> I use the term “employee-evaluation records” to encompass employee evaluation and job performance records, as the test for the release of such records is the same; and the FOIA uses the term “evaluation records” to refer to both evaluations and job performance records. *See* A.C.A. § 25-19-105(c).

<sup>6</sup> *E.g.*, Ops. Att’y Gen. 2012-041; 2011-068; 2009-210; 2006-026; 95-171. If, however, a letter merely reflects the fact that some employment action was taken, without elaboration, this office has opined that such a the letter is properly classified as a “personnel record” under A.C.A. § 25-19-105(b)(12), the release of which is subject to that separate test. *See, e.g.*, Op. Att’y Gen. 2006-147.

*a. Employee-evaluation exception*

If a document qualifies as an employee-evaluation record, the document *cannot* be released unless *all* of 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).<sup>7</sup>

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>8</sup>

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<sup>7</sup> A.C.A. § 25-19-105(c)(1) (Supp. 2015); Op. Att’y Gen. 2008-065.

<sup>8</sup> Watkins & Peltz, *supra* note 2, 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,<sup>9</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>10</sup>

### III. Application.

I can now apply the foregoing to the document at issue. It appears from the face of the letter that the first three elements listed above are met. The only remaining question is whether the public has a compelling public interest in the letter’s disclosure. Turning to the three factors noted above that were explained by Watkins and Peltz, the first factor—the nature of the infraction that led to the employment action—weighs in favor of disclosure.<sup>11</sup> The second factor—the existence of a public controversy related to the agency and its employees—is difficult to assess because I lack sufficient background facts. The third factor—the employee’s position within the agency—also weighs in favor of disclosure.

This office has previously concluded that a “compelling public interest” existed with regard to the release of records pertaining to high-ranking employees when viewed in conjunction with the nature of the particular infraction leading to a suspension or termination.<sup>12</sup> Although the content of the letter in this case does not provide detailed information as to the nature of the infraction, it is my opinion based on your position in the RSWMD, coupled with the reason for the

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<sup>9</sup> *Id.* at 206 (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.”)

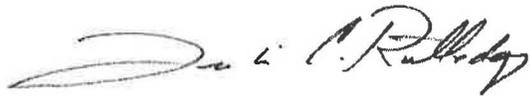
<sup>10</sup> *See* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

<sup>11</sup> *See, e.g.*, Op. Att’y Gen. Nos. 2008-090 (violating administrative rules or policies aimed at avoiding conduct that undermines the public trust).

<sup>12</sup> *See, e.g.*, Op. Att’y Gen. 95-242 (records pertaining to assistant city manager gave rise to compelling public interest); 96-258 (records pertaining to vice-president of Arkansas Development Finance Authority gave rise to compelling public interest).

employment action, that the custodian's decision to release the letter is consistent with the FOIA. Please note, however, that your personal contact information must be redacted prior to the letter's release, in accordance with Ark. Code Ann. § 25-19-105(b)(13) (Supp. 2015).<sup>13</sup>

Sincerely,

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

LESLIE RUTLEDGE  
Attorney General

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<sup>13</sup> This Code section exempts from public disclosure “[p]ersonal contact information, including without limitation home or mobile telephone numbers, personal email addresses, and home addresses of nonelected state employees, nonelected municipal employees, nonelected school employees, and nonelected county employees contained in employer records....”).