



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-095

September 2, 2016

Mr. Bobby Walraven
114 Little River 725
Ashdown, AR 71822

Dear Mr. Walraven:

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 you have submitted a FOIA request to the Sheriff of Little River County for "records that pertain to the sexual harassment, or any other kind of harassment, of employees of the Little River County Sheriff's Department and of any other person" by a former employee of the Little River County Sheriff's Department. You specified that the records should include all communications, complaints, images, and statements. The sheriff has denied your request, stating: "If any of these records pertaining to sexual harassment exist, they are exempt from the [FOIA], covered under [Ark. Code Ann.] § 25-19-105(b)(12) [and] (c)." You state that you were advised that "certain parties had provided statements to the sheriff complaining about [the former employee]," but that the statements "would be potentially embarrassing to the complaining parties if ... released."

You object to the sheriff's response, stating that it is "overly broad" and does not sufficiently explain the reason given for not providing the records. You note that "any such statements [by complaining parties] may have certain and limited information redacted and still be in compliance with the FOIA." You also say that

records of any investigation regarding the matters complained of “are now subject to disclosure since [the former employee] ... has now resigned....”

You have asked for an opinion regarding the custodian’s decision to deny your request.

RESPONSE

My statutory duty is to state whether the custodian’s decision is consistent with the FOIA. That determination depends upon the content of any records that are responsive to your request and the proper application of the relevant FOIA test for disclosure. Because I have not seen any records that may be at issue, I cannot opine regarding the release of any particular records. I can, however, explain the tests that apply to the types of records you are seeking. I can also make several observations regarding your particular objections to the Sheriff’s decision to deny your request. I will make those observations and then proceed to a discussion of the tests.

First, as two recognized commentators on the FOIA have observed, “nothing in the FOIA itself requires an agency denying a request in whole or in part to explain its decision,” but “the Attorney General has opined that the exemption relied upon as the basis for denying access should be provided.”¹ The correspondence you provided to my office indicates that the Sheriff cited the FOIA exemptions for personnel and employee evaluation records (discussed below) in denying your records request. It appears that the FOIA does not itself require the Sheriff to provide any further explanation. This office has previously observed, however, that “as a practical matter this information will most likely have to be forthcoming in the event of an appeal of the [agency’s] decision.”²

Second, the FOIA requires that any “reasonably segregable portion of a record” be provided after deleting exempt information.³ This means, as to employee-related records (discussed below), that a blanket denial of access to such records is

¹ John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 271 (Arkansas Law Press, 5th ed., 2009) (citing Op. Att’y Gen. Nos. 95-108 and 84-79).

² Op. Att’y Gen. 95-108 (citing Ark. Code Ann. §§ 25-19-104 and -107, the two methods under the FOIA for challenging a custodian’s decision).

³ Ark. Code Ann. § 25-19-105(f)(2) (Supp. 2015).

ordinarily inconsistent with the FOIA.⁴ The custodian must instead apply the applicable test and determine whether the records must be released after deleting any exempt information. I cannot specifically opine in this regard as to the records you have requested. I can only note that if the records contain exempt information that can reasonably be segregated, then the record(s) must be provided after the redactions are made.

Finally, regarding your statement that any investigation records must be disclosed because the subject has resigned, the FOIA actually establishes a rule to the contrary for any such records that qualify as employee evaluation records. As explained further below, suspension or termination is a threshold requirement for the release of those kinds of employee-related records.

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 Little River County Sheriff's Department ("Department"), 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.⁵

⁴ See, e.g., Op. Att'y Gen. Nos. 2010-152, 2007-258, 2001-130, 2000-232.

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

If the records you are seeking are kept by the Department, it seems clear, given their subject matter (alleged harassment by a former employee), that they qualify as “public records” under this definition. Accordingly, they must be disclosed unless some specific exception provides otherwise.

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two kinds of employee-related records: “personnel records”⁶ and “employee 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.

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.”

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.”

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 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.¹¹

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 minimis* privacy interest.¹² If the privacy interest is merely *de minimis*, then the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimis* privacy interest, then the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.¹³ 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.¹⁴ The fact that

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

⁹ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2013).

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

¹¹ *Watkins & Peltz, supra* note 4, at 191.

¹² *Id.* at 598, 826 S.W.2d at 255.

¹³ *Id.*, 826 S.W.2d at 255.

¹⁴ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

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.¹⁵

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁶

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.¹⁷ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁸

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).¹⁹

¹⁵ E.g., Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹⁶ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

¹⁷ *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.

¹⁸ *Id.*

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

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.²⁰

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,²¹ 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.²²

²⁰ Watkins & Peltz, *supra*, at 217–18 (footnotes omitted).

²¹ *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.”).

²² *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

III. Application.

I have not seen any of the records that are responsive to your FOIA request and therefore cannot address any specific records. I will note generally, however, that most complaints against public employees are either the personnel records or the employee evaluation records of the person being complained about; and complaints by public employees are also usually the personnel records of the complainants.²³ Additionally, as indicated above, records generated as part of an internal investigation typically are properly classified as employee evaluation records.²⁴

The custodian must first apply the above definitions to any records that are responsive to your request in order to properly classify the records, and then determine whether, and to what extent, the records are subject to release based on the appropriate test for disclosure.

You should also be aware that any party who is identifiable from any of the requested records may have a constitutionally protected privacy interest in those records. The Arkansas Supreme Court has recognized that the constitutional right of privacy can supersede the specific disclosure requirements of the FOIA, at least with regard to the release of documents containing constitutionally protectable information.²⁵ The question of whether information is protectable under the constitutional right of privacy is one of fact that must be determined in the first instance by the custodian of the records, on the basis of the particular facts of the case.

Sincerely,



LESLIE RUTLEDGE
Attorney General

²³ See, e.g., Op. Att’y Gen. Nos. 2014-122 (and opinions cited therein).

²⁴ See, e.g., Op. Att’y Gen. Nos. 2012-112, 2007-272, 2007-025, 2006-106, 2005-267, 2005-09, 2004-178, 2003-306, and 2001-063.

²⁵ See *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).