



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-111

October 31, 2016

Shella Atlas
Labor and Employee Relations Manager
City of Little Rock Human Resources Department
500 West Markham, Suite 130W
Little Rock, AR 72201-4496

Dear Ms. Atlas:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as custodian of the records, 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 a FOIA request has been made to the City of Little Rock for "copies of all statements from the investigation" of a particular "internal harassment complaint." As the custodian, you have determined that the requested documents are employee-evaluation records that are not releasable at this time because the investigation has not been completed. You have provided the records for my review and have asked whether your decision to withhold them is consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. In my opinion, your decision is consistent with the FOIA. The statements taken during the internal investigation are properly classified as employee-evaluation records because they were generated by or at the behest of an employer in the course of investigating a complaint against an employee. Suspension or

termination is a threshold requirement for the release of such records. Because you state that the investigation is not yet complete, I assume that there has been no final administrative resolution resulting in suspension or termination of any personnel. If this is accurate, you have correctly determined that the records are not releasable at this time.¹

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.²

¹ In reaching this conclusion, it is my assumption—based on the face of the statements at issue—that the records were not created for the purpose, in whole or in part, of evaluating the person who has submitted the FOIA request. However, you should be aware of a section of the FOIA—Ark. Code Ann. § 25-19-105(c)(2)—that makes personnel or evaluation records that are otherwise exempt from disclosure (to the public) available to “the person about whom the records are maintained.” You, as custodian, must make the factual determination whether the statements in this case are also evaluation records of the requester, such that the requester is entitled to access under this Code section.

² Ark. Code Ann. § 25-19-103(7)(A) (Supp. 2015).

In my opinion, the records at issue are 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 groups of items normally found in employees' personnel files.³ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"⁴ or "employee evaluation or job performance records."⁵ 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

³ 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).

⁴ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2015): "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."

⁵ 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."

performance records that pertain to individual employees.⁶ 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.”⁷

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁸ 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.⁹

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.¹⁰ 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.¹¹ 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.¹² The fact that the subject of any such records may consider release of the records an unwarranted

⁶ See, e.g., Op. Att’y Gen. No. 1999-147; *Watkins & Peltz, supra*, at 187.

⁷ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2013).

⁸ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁹ *Watkins & Peltz, supra* note 4, at 191.

¹⁰ *Id.* at 598, 826 S.W.2d at 255.

¹¹ *Id.*, 826 S.W.2d at 255.

¹² *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

invasion of personal privacy is irrelevant to the analysis because the test is objective.¹³

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁴

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).

¹³ *E.g.*, Op. Att'y Gen. Nos. 2001-112, 2001-022, 94-198.

¹⁴ Op. Att'y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

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.¹⁵ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁶ More specific to the request at hand, it includes transcripts of internal investigations, including witness statements.¹⁷

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).¹⁸

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

¹⁵ *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.

¹⁶ *Id.*

¹⁷ *See* Op. Att’y Gen. 2002-095 (and opinions cited therein).

¹⁸ Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2013); Op. Att’y Gen. 2008-065.

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.¹⁹

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,²⁰ 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.²¹

III. Application.

As noted above, the first step in analyzing the records' disclosure is to classify them. According to my review, the records requested are statements taken during the course of the internal investigation. As such, in my opinion, they are properly classified as employee-evaluation records. Your decision in this respect is therefore consistent with the FOIA.

¹⁹ Watkins & Peltz, *supra*, at 217-18 (footnotes omitted).

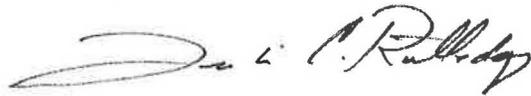
²⁰ *Id.* at 216 (noting that "[a]s a practical matter, such an interest is more likely to be present when a high-level employee is involved than when the [records] of 'rank-and-file' workers are at issue.").

²¹ *Cf.* Op. Att'y Gen. 96-168; Watkins & Peltz, *supra*, at 204.

Shella Atlas
Labor and Employee Relations Manager
Opinion No. 2016-111
Page 8

As explained above, suspension or termination is a threshold requirement for the release of evaluation records. You have stated that the internal investigation is not yet complete in this case. I thus assume for purposes of this opinion that there has been no final administrative resolution resulting in suspension or termination of any personnel. It is therefore my opinion that you have correctly decided that the records are not releasable at this time.

Sincerely,

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

LESLIE RUTLEDGE
Attorney General