



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-112

October 28, 2016

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

Dear Ms. Evans:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the 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 someone within the Little Rock Police Department has requested documents under the FOIA relating to an internal City of Little Rock complaint and subsequent investigation. You have attached several documents to your request for my opinion that you believe are responsive to the FOIA request. You state that the records are, in your opinion, employee-evaluation records, but are ones that did not form the basis for a suspension or termination of an employee. You have asked for guidance regarding the records' release. Although you have not explicitly said whether you, as custodian, have decided to release the records, I take it from your statement that there was no suspension or termination decision that you have determined the records are not subject to disclosure under the test for the release of employee evaluation records.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the

FOIA. Based on the face of the records and the limited facts before me, it is my opinion that your decision is in part inconsistent with the FOIA. With the exception of certain portions of the investigative file that pertain *exclusively* to another employee and are determined as a factual matter to be the other employee's evaluation record, the records in question are either the personnel or evaluation records of the employee who has made the records request under the FOIA. As such, with the exception of any evaluations of the other employee, the records must be disclosed to the requestor pursuant to Ark. Code Ann. § 25-19-105(c)(2).¹ This portion of the FOIA states that "[a]ny personnel or evaluation records exempt from disclosure ... shall nonetheless be made available to the person about whom the records are maintained...."²

I will set out all the definitions and standards and then apply them to the records you have attached. I have Bates numbered the records for ease of identification.

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:

¹ Another body of law—the Arkansas Whistle-Blower Act Ark. Code Ann. § 21-1-601 *et seq.* (Repl. 2004 and Supp. 2015)—could possibly come into play in connection with the disclosure of the records at issue. *See id.* at § 21-1-607 (Supp. 2015). This other law is outside the scope of my review under the FOIA, which only extends to the applicability of the exemptions for personnel and employee-evaluation records. *See* Ark. Code Ann. § 25-19-105(c)(3). You may wish to consult your local counsel regarding this other body of law.

² As will be discussed herein, it appears from the face of the records that some portions are also either the personnel or evaluation records of other employees named therein. I do not know what notice has been provided to the subjects of these records, but you should be aware that the FOIA requires the custodian to notify the subject of personnel or evaluation records of the custodian's decision as to whether the records are exempt from disclosure. *See* Ark. Code Ann. § 25-19-105(c)(3)(A).

[W]ritings, 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.³

As I understand it, all the attached documents were created or collected leading to or as part of an informal, internal City of Little Rock investigation. Accordingly, in my opinion, all of the attached documents clearly reflect the performance or lack of performance of official functions. Therefore, in my opinion, these documents 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.⁴ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"⁵ or "employee evaluation or job performance records."⁶ The test for whether these two types of documents may be released differs significantly.

³ Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2015).

⁴ 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).

⁵ 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."

⁶ 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,

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.⁷ Employee-complaint records created on an employee’s own initiative—and not by or at the behest of the employer—are considered personnel records.⁸

Whether a particular record meets the definition of a personnel record 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.”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

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.”

⁷ See, e.g., Op. Att’y Gen. 1999-147; Watkins & Peltz at 187.

⁸ See 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’...”).

⁹ Ark. Code Ann. § 25-19-105(b)(12).

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

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 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

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));

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

¹² *Young*, 308 Ark. 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).

¹⁵ *E.g.*, Ops. Att'y Gen. 2001-112, 2001-022, 94-198.

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

- Marital status of employees and information about dependents (Op. Att’y Gen. 2001-080);
- Dates of birth of public employees (Op. Att’y Gen. 2007-064);
- Social Security numbers (Ops. Att’y Gen. 2006-035, 2003-153);
- Medical information (Op. Att’y Gen. 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. Att’y Gen. 2007-025);
- Insurance coverage (Op. Att’y Gen. 2004-167);
- Tax information or withholding (Ops. Att’y Gen. 2005-194, 2003-385);
- Payroll deductions (Op. Att’y Gen. 98-126); and
- Banking information (Op. Att’y Gen. 2005-194).

b. Employee-evaluation exemption.

The second potentially relevant exemption is for “employee evaluation or job performance records,” which the FOIA likewise does not define. But the Arkansas Supreme Court has 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

Additionally, some employee-related records constitute “mixed records,” i.e., records that constitute (1) more than one person’s evaluation, (2) at least one person’s evaluation and at least one person’s personnel record, or (3) more than one person’s personnel record.¹⁹

¹⁷ *Thomas v. Hall*, 2012 Ark. 66, at 8-9, 399 S.W.3d 387, 392. See also Ops. Att’y Gen. 2009-067; 2008-004; 2007-225; 2006-038; 2005-030; 2003-073; 98-006; 97-222; 95-351; 94-306; and 93-055.

¹⁸ *Thomas*, 2012 Ark. 66, at 9-10, 399 S.W.3d at 392-93.

¹⁹ See Ops. Att’y Gen. 2015-129, 2015-057.

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).²⁰

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.²¹

These commentators also note that “the status of the employee” or “his rank within the bureaucratic hierarchy” may be relevant in determining whether a

²⁰ Ark. Code Ann. § 25-19-105(c)(1); Op. Att’y Gen. 2008-065.

²¹ Watkins & Peltz, *supra* note 4, at 217–18 (footnotes omitted).

“compelling public interest” exists,²² 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.²³

III. Application.

I can now apply the foregoing to the documents you have sent. As noted above, the first step in analyzing these records’ disclosure is to properly classify them.

- (Bates numbers 002-019, 023-029) In my opinion, based on the face of these investigation records, these records are employee evaluations. With the exception of certain portions of these records that pertain *exclusively* to another employee who was also the subject of the investigation, the records must be made available to the requestor pursuant to Ark. Code Ann. § 25-19-105(c)(2). Because there was no suspension or termination decision, the test for the release of evaluation records has not been met with respect to those portions pertaining to the other employee. Those portions must therefore be redacted as follows:
 - Bates number 014: the final full paragraph.
 - Bates number 015, in the paragraph immediately following the first italicized subheading: The first, second, seventh, and 13th sentences. Also, the final full paragraph.
 - Bates number 016: In the first paragraph, the first six sentences and the final three sentences. In the second paragraph, the first sentence. In the third paragraph, sentences two through five.
 - Bates number 027 in its entirety.

²² *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.”).

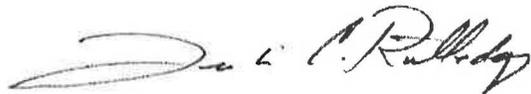
²³ *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz at 204.

- (Bates numbers 20-22) I have no factual information regarding your apparent determination that it is an evaluation record, and I am unable to definitively classify this record from its face. Assuming it is properly classified as an evaluation record, then it must be disclosed to the requestor, pursuant to Ark. Code Ann. § 25-19-105(c)(2), after redacting portions that constitute only the evaluation record of the other employee who was subject of the investigation.

If, on the other hand, it is a personnel rather than an evaluation record under the test set out above, then, in my opinion, it is subject to disclosure to the requestor in its entirety. This is because the requestor is entitled (pursuant to Ark. Code Ann. § 25-19-105(c)(2)) to the portions of this record that constitute his own personnel record. And in my opinion, the disclosure of the portions that are the other employee's personnel record does not constitute a clearly unwarranted invasion of personal privacy under the *Young* test discussed above.

In conclusion, based on the face of the records and the limited facts before me, it is my opinion that your decision is in part inconsistent with the FOIA. With the exception of certain portions of the investigative file that pertain *exclusively* to another employee and are determined as a factual matter to be the other employee's evaluation record, the records in question are either the personnel or evaluation records of the employee who has made the records request under the FOIA. As such, with the exception of any evaluations of the other employee, the records must be disclosed to the requestor pursuant to Ark. Code Ann. § 25-19-105(c)(2).

Sincerely,



LESLIE RUTLEDGE
Attorney General