



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-117

November 14, 2016

Holly Gurien
c/o Debbie Smith, Superintendent
Paragould School District
1501 West Court Street
Paragould, AR 72450

Dear Ms. Gurien:

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 and attachments indicate that the Paragould School District has received an FOIA request for records regarding some procedures that took place while you were employed at the District. The District intends to release the records, with certain redactions. You have provided the records and you seek my opinion on whether the District has correctly decided to release them.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the records, it is my opinion that the custodian's decision to release 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. There is no question that the first two elements are met in this case. Thus, I will only analyze the final element—whether there are any exceptions that shield the documents from disclosure.

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.¹ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"² or "employee evaluation or job performance records."³ 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.

¹ 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).

² 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."

³ 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. Employee-evaluation exception.

In my opinion, the records at issue are properly classified as “employee evaluation or job performance records.” I will therefore focus only on that exception. While the FOIA does not define the term “employee evaluation or job performance records,” the Arkansas Supreme Court has held 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.⁴ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.⁵

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., formed a basis); and
4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling public interest).⁶

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.⁷

⁴ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387. 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.

⁵ *Thomas*, 212 Ark. 66, at 9-10, 399 S.W.3d at 392-93. I note in this regard that one of the records is a letter to you that was issued under Ark. Code Ann. § 6-17-1508 (Repl. 2013), which is part of the Teacher Fair Dismissal Act (Ark. Code Ann. § 6-17-1501 *et seq.*). This letter clearly is an evaluation record because it is written notice that must be created by the employer; and pursuant to the statute, it must set out grounds for the disciplinary action. *Accord* Op. Att’y Gen. 2014-110.

⁶ Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2015); Op. Att’y Gen. 2008-065.

⁷ *Cf.* Op. Att’y Gen. 96-168; Watkins & Peltz, *supra* note 1, at 204.

III. Application

a. Level of discipline.

The first question to be addressed in this analysis is whether you suffered a disciplinary suspension. For purposes of the FOIA, suspensions can be classified as disciplinary or non-disciplinary (the latter is sometimes called “administrative leave”). A suspension decision is non-disciplinary when it occurs as a result of a routine, departmental policy that is initiated without any regard for the propriety of the employee’s conduct. For example, it is common for police officers to be suspended with pay after discharging a firearm. During the period of this non-disciplinary suspension, the police department investigates the circumstances. The investigation could result in some kind of disciplinary action. Or it might result in commendation. The key factor is that a non-disciplinary suspension is initiated without regard to whether the employee’s conduct fell below expectations. In contrast, a disciplinary suspension is always initiated precisely because the employee’s conduct allegedly fell below expectations.⁸

Here, it appears clear from the face of the records at issue that you were suspended under the Teacher Fair Dismissal Act.⁹ Such a suspension is clearly disciplinary in nature (thus meeting the first element for the release of employee-evaluation records).¹⁰ As noted above, a document under Ark. Code Ann. § 6-17-1508 clearly would be an evaluation record because it must be created by the employer and, pursuant to the statute, must set out the grounds for the disciplinary action.¹¹

b. Finality.

The next question is whether that disciplinary suspension ever became final. This is a question of fact to be determined by the records’ custodian. Because the custodian has decided to release the records in response to the FOIA request at hand, the custodian presumably has determined that the first, so-called “finality” requirement has been met in this instance. Although I am not a factfinder in

⁸ *Accord* Op. Att’y Gen. 2014-110.

⁹ *See* note 5, *supra*.

¹⁰ *Accord* Op. 2014-110.

¹¹ *Id.*

issuing opinions, this seems to be the case based on the face of the records. It appears from the records you have submitted that you resigned prior to any hearing by the school board. This office has consistently said that when an employee abandons an internal-appeals process before obtaining a ruling, the underlying adverse action is final for purposes of the FOIA.¹² The manner in which the employee abandoned the appeal, —whether by withdrawing the appeal or by resigning, as in this case—is irrelevant. If the rule were otherwise, then an employee could render every adverse employment action non-final (and thus prevent the release of evaluation records) by simply initiating and then, a day later, terminating an internal-appeals process. This office, together with two scholarly commentators on the FOIA, have long opined that when the FOIA uses the term “final,” it refers to the “final decision making step taken by” the employer “regardless of the bureaucratic level at which the decision is made.”¹³

The lack of a school-board ruling, by itself, does not render suspensions non-final because, if it did, then every suspension that was not appealed to the board would also be non-final. Further, this office has already addressed this precise question in the area of Teacher Fair Dismissal.¹⁴ Therefore, in my opinion, your suspension became final when you resigned.

c. Formed a basis.

The issue of whether requested records “formed a basis” for a suspension (or termination) is generally interpreted to mean that the records in question reflect or detail the incidents or conduct that led to the suspension (or termination).¹⁵ This is also a question of fact for the custodian. But again, the custodian has apparently

¹² See, e.g., Op. Att’y Gen. 2005-030 (citing Op. Att’y Gen. 2002-158, and noting that “a resignation subsequent to a suspension has no impact on the question of whether there has been a final administrative resolution of the suspension....That is, the fact that the employee resigns after the initial suspension does not keep the suspension from being “final” for purposes of the release of job performance records and such records may be released if the remainder of the test for release of such records is met.”).

¹³ Ops. Att’y Gen. 2014-110, 2011-083, 2009-095; see also Watkins & Peltz at 212.

¹⁴ Op. Att’y Gen. 2009-095 (opining on a scenario in which a teacher was suspended, initiated an appeal to the school board, and then abandoned the appeal before a ruling and stating: “[F]or purposes of the FOIA, the initial suspension decision is “final” because your administrative remedies are exhausted and the board did not take action to overturn the suspension.”).

¹⁵ See *id.* (and opinions cited therein).

determined that the records at issue formed the basis for the suspension; and that determination appears consistent with the face of the records.

d. Compelling public interest.

As for the “compelling public interest” element, the FOIA does not define this phrase. However, 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.¹⁶

In my opinion, each of these factors weighs in favor of the custodian’s apparent determination in this instance that there is a compelling public interest in the records’ disclosure. This office has consistently opined that the public has a particularly heightened interest in records reflecting the conduct of public school teachers during school hours, during school events, and especially when students are affected by that conduct.¹⁷ Regarding the existence of a “public controversy,” this factor is somewhat difficult to assess because I lack sufficient background facts. But this office has repeatedly opined that, in certain situations, a compelling public interest exists in the disclosure of documents containing certain categories of information.¹⁸ The absence of a public controversy may be of minimal significance in such cases.¹⁹

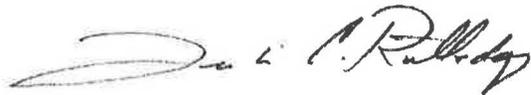
¹⁶ Watkins & Peltz, *supra* n. 3, at 217-18 (footnotes omitted).

¹⁷ See, e.g., Op. Att’y Gen. 2016-083 (and opinions cited therein).

¹⁸ E.g., Ops. Att’y Gen. 2003-072, 2001-343, 98-210, 98-075, 97-400, 92-3 19.

It is my opinion, in conclusion, that all of the conditions for the release of the records are met in this case. Based on a review of the records, I conclude that they are correctly classified as employee-evaluation records and that the custodian has correctly decided to disclose them, as redacted.

Sincerely,

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

LESLIE RUTLEDGE
Attorney General

¹⁹ Op. Att'y Gen. 2014-122.