

Opinion No. 2012-069

May 7, 2012

Mr. Paul Turney
c/o Assistant Chief Timothy Eads
Jonesboro Police Department
401 W. Washington Avenue
Jonesboro, Arkansas 72401

Dear Mr. Turney:

You have requested my opinion regarding the Arkansas Freedom of Information Act (“FOIA”). The basis for your request is A.C.A. § 25-19-105(c)(3)(B)(i) (Supp. 2011), which 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 concerning the release of such records is consistent with the FOIA.

You state in your letter seeking my opinion that you were terminated from your position as a detective with the Jonesboro Police Department following the completion of an internal affairs investigation. You refer to an email that cites a “Department Policy Violation” as the reason for termination. You report that the JONESBORO SUN has inquired into this incident and you request that the matter be kept private as an “administrative matter.”

RESPONSE

My duty under A.C.A. § 25-19-105(c)(3)(B)(i) is to determine whether the custodian’s decision as to the release of personnel or evaluation records is consistent with the FOIA. Not having seen the JONESBORO SUN’s request or the records at issue, and not having been apprised of the custodian’s decision, I cannot opine definitively concerning the release of any particular record. Rather, the

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discussion must be limited to the applicable tests for the disclosure of employee-related records.¹

The FOIA provides for the disclosure upon request of certain “public records,” which the Arkansas Code defines as follows:

“Public records” means 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 that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is 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

Because the subject of the request is an internal affairs investigation of a former city employee, it seems clear that the requested documents are in all probability “public records” under the definition set forth above. Consideration must be given, however, to the possible applicability of an exemption from disclosure. The FOIA provides for certain exemptions, the most pertinent of which presumably is the exemption from disclosure under specified circumstances for personnel and employee evaluations or job performance records.³

“Personnel records” are open to public inspection and copying under the FOIA, except “to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁴ The FOIA does not define the term “personnel

¹ Records maintained with regard to the employment of a public employee typically comprise both “employee evaluation/job performance records” and “personnel records” within the meaning of the FOIA. It is important for the custodian of the records to classify the records correctly because, as discussed further herein, the standards for releasing these two types of records differ.

² A.C.A. § 25-19-103(5)(A) (Supp. 2011).

³ A.C.A. § 25-19-105(b) (12) and (c)(1) (Supp. 2011).

⁴ *Id.* at (b)(12).

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records.” Whether a particular record constitutes a personnel record within the meaning of the FOIA is, of course, a question of fact that can only be definitively determined by reviewing the record itself. However, this office has consistently opined that personnel records are all records other than employee-evaluation records that pertain to, among others, individual employees and former employees.

Nor does the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy.” But the Arkansas Supreme Court has construed the phrase and adopted a balancing test to determine if it applies. That test requires that one weigh the public’s interest in accessing the records against the individual’s interest in keeping the records private.⁵ If the public’s interest outweighs the individual’s interest, the custodian must disclose the personnel records. As the court noted in *Young*:

The fact that section 25-19-105(b)(10) [now subsection 105(b)(12)] exempts disclosure of personnel records only when a clearly unwarranted personal privacy invasion would result, indicates that certain “warranted” privacy invasions will be tolerated. Thus, section 25-19-105(b)(10) requires that the public’s right to knowledge of the records be weighed against an individual’s right to privacy....Because section 25-19-105(b)(10) allows warranted invasions of privacy, it follows that when the public’s interest is substantial, it will usually outweigh any individual privacy interests and disclosure will be favored.^[6]

In contrast, as the court noted in *Stilley v. McBride*, when there is “little relevant public interest” in disclosure, “it is sufficient under the circumstances to observe that the employees’ privacy interest in nondisclosure is not insubstantial.”⁷ Given that exemptions from disclosure must be narrowly construed, it is the burden of an individual resisting disclosure to establish that his privacy interests outweighed

⁵ *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992).

⁶ *Id.* at 598.

⁷ 332 Ark. 306, 312, 965 S.W.2d 125 (1998).

that of the public's under the circumstances presented.⁸ Further, the requestor's motive in seeking the documents is usually irrelevant to whether the document should be disclosed.⁹

"Employee evaluation or job performance records," on the other hand, are releasable only if certain conditions have been met. Specifically, the Code provides in pertinent part:

[A]ll 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.¹⁰

Similar to personnel records, the FOIA does not define the term "employee evaluation or job performance records." But the Arkansas Supreme Court has recently adopted this office's view that the term refers to any records created by or at the behest of the employer that detail the performance or lack of performance of the employee in question with regard to a specific incident or incidents are properly classified as employee evaluation or job performance records.¹¹ The record must also have been created for the purpose of evaluating an employee.¹² The exemption promotes candor in a supervisor's evaluation of an employee's performance with a view toward correcting any deficiencies.¹³

⁸ *Id.* at 313.

⁹ *See, e.g.*, Op. Att'y Gen. 2010-148.

¹⁰ A.C.A. § 25-19-105(c)(1).

¹¹ *Thomas v. Hall*, 2012 Ark. 66, ___ S.W.3d ___ (Feb. 16, 2012); *see, e.g.*, Ops. Att'y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-111; 2006-038; 2006-035; 2005-030; 2004-211; 2003-073; 98-006; 97-222; 95-351; 94-306; and 93-055.

¹² *See, e.g.*, Op. Att'y Gen. No. 2008-004; 2006-038; and 2004-012.

¹³ *See* J. Watkins & R. Peltz, *The Arkansas Freedom of Information Act* (5th ed., Arkansas Law Press 2009), at 204.

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With regard, specifically, to internal investigations, as was noted in Op. Att’y Gen. No. 2007-025:

My predecessors have consistently opined that records in an internal affairs file that have been “generated at the behest of an employer in the course of investigating a complaint against an employee constitute ‘employee evaluation/job performance records’” within the meaning of the FOIA. *See* Ops. Att’y Gen. 2006-106; 2005-267; 2005-094; 2004-178; 2003-306; and 2001-063. It has been opined, however, that “[documents not created in the evaluation process do not come within the rationale behind the 25-19-105(c)(1) exemption.” *See* Op. Att’y Gen. 2007-025; 2005-267, citing Op. Att’y Gen. 2005-094.^[14]

Regarding the “compelling public interest” standard as used in the final prong of the test for disclosure set forth in A.C.A. § 25-19-105(c)(1), the FOIA at no point defines this phrase. However, two leading commentators on the FOIA, referring to this office’s opinions on this issue, 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

¹⁴ It is quite possible that certain records contained within an internal affairs file would not have been generated by or at the behest of the employer specifically in the course of investigating a complaint. Some such records, such as unsolicited complaints or documents that merely contain administrative information about an employee, might properly be characterized as personnel records, as distinct from employee evaluation/job performance records. *See, e.g.*, Op. Att’y Gen. 2010-109 (and opinions cited therein).

should be sufficient to satisfy the compelling public interest requirement.¹⁵

Professors Watkins and Peltz 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.¹⁶ Whether there is a compelling public interest in particular records is a question of fact that must be determined in the first instance by the custodian of the records, considering all of the relevant information. This office has repeatedly opined that, in certain situations, a compelling public interest exists in the disclosure of documents containing certain categories of information.¹⁷ However, neither I nor any of my predecessors have opined that only these categories of information could give rise to a compelling public interest favoring disclosure. In my opinion, regardless of what category of information a document contains, in order to determine whether a compelling public interest exists in its disclosure, the custodian must conduct a detailed review of the document considering the factors discussed above. The existence of a “compelling public interest” in disclosure will necessarily depend upon all of the surrounding facts and circumstances in each case.

It must also be noted that while you report that you have been terminated, you do not indicate whether you have exhausted any administrative appeals that might be available. As noted above, an employee evaluation/job performance record cannot be released so long as an administrative appeal is still available. Assuming no possibility of appeal remains, the pertinent issue will be whether a compelling public interest in disclosure of the requested records exists. As indicated, this is ultimately a factual determination that must be made by the records custodian.

¹⁵ *Id.* at 217-18 (footnotes omitted).

¹⁶ *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.”)

¹⁷ *E.g.*, Op. Att’y Gen. 2009-195, citing Ops. 2007-206 (information reflecting a violation of departmental rules by a “cop on the beat” in his interactions with the public); 2001-144 (use/possession of drugs); 2003-257, 97-190 and 97-177 (arrests and/or convictions); 2003-072, 2001-343, 98-210, 98-075, 97-400 and 92-319 (violation of administrative rules and policies aimed at conduct which could undermine the public trust and/or compromise public safety).

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In sum, although I cannot offer a definitive opinion regarding the release of any particular records, the foregoing discussion should be of assistance in evaluating those at issue.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:EAW/cyh