



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2017-100

September 25, 2017

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Dear Dr. Evans:

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 cover letter states that you received, as custodian of records for the City of Little Rock, a request under the FOIA for "a copy of all emails, files, correspondence, and notes concerning [an] investigation" of Firefighter Anthony Natali. You explain that this FOIA request was made by Mr. Natali as well as Richard Morehead, in his capacity as President of the Little Rock Fire Fighters' Local 34. You enclosed an email that you received from Mr. Natali, in which he identified Mr. Morehead as "my representative," and stated that Morehead "has my permission to FOI my records."

According to your cover letter, the "requests made by Richard Morehead ... and Anthony Natali do not meet the test to disclose ... because this is an open investigation," and an "administrative resolution has not been issued." You also state that the requested documents should not be disclosed because you "don't know if the[] documents will form the basis for suspension or termination."

RESPONSE

I have not seen the records at issue, and I cannot offer a definitive opinion as to whether a specific document should be disclosed in whole or in part. However, based on the correspondence forwarded for my review and summarized in your cover letter, I believe it is inconsistent with the FOIA to withhold all of the responsive records on grounds that an “investigation” is ongoing.

Mr. Morehead, acting as Mr. Natali’s representative, has requested “emails, files, correspondence, and notes concerning the ... results” of an investigation about Mr. Natali. Some of these documents undoubtedly qualify as Mr. Natali’s personnel records or evaluation records. While such records may be exempt under the FOIA from disclosure to a given Arkansas citizen, “[a]ny personnel or evaluation records exempt from disclosure ... shall nonetheless be made available to the person about whom the records are maintained or to that person’s designated representative.”¹ This rule applies whether or not an investigation of the employee has reached a final administrative resolution, and it applies whether or not the records at issue formed the basis for the employee’s suspension or termination. Because it appears that an employee’s designated representative has requested records relating to an investigation of “the person about whom the records are maintained,”² it is likely that some of the responsive records must be disclosed to Mr. Morehead, as Mr. Natali’s representative. As custodian, however, you must ensure that any personnel or evaluation records of individuals *other* than Mr. Natali (which may be exempt from disclosure under the applicable tests) are redacted prior to releasing records to Mr. Morehead.

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: (1) the request has been directed to an entity subject to the FOIA, (2) the requested document is defined as a public record, and (3) no exemptions require the document, in whole or in part, to be withheld.

¹ Ark. Code Ann. § 25-19-105(c)(2).

² *Id.*

The first two elements appear to be satisfied. First, the responsive documents are held by the City of Little Rock, a public entity. As for the second element, my understanding is that the documents were created or collected for purposes of an internal investigation. And the FOIA defines “public record” as:

[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

I have not been provided any of the investigative documents responsive to the FOIA request. But I believe that such documents would generally reflect the performance or lack of performance of official functions. I therefore gather that the investigative documents at issue are public records that must be disclosed unless a specific exemption under the FOIA provides otherwise.

II. Exceptions to disclosure.

The FOIA exempts two types of documents normally found in employees’ personnel files,⁴ if certain conditions apply. The first type is “personnel records,”⁵

³ Ark. Code Ann. § 25-19-103(7)(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-Steele & Robert Steinbuch, *THE ARKANSAS FREEDOM OF INFORMATION ACT 205-06* (Arkansas Law Press, 6th ed., 2017).

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.”

and the second is “employee evaluation or job performance records.”⁶ These types of documents are mutually exclusive, and the test for whether they may be released differs significantly. When custodians assess whether either of these exemptions apply, they must determine whether a particular record meets the definition of either “personnel record” or “employee evaluation or job performance record.” Assuming the record does meet one of the definitions, custodians must use the appropriate test to determine whether the FOIA requires that the record be disclosed, despite the exemption.

a. Personnel records.

The first of the two most relevant potential exemptions 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 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.”⁸

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁹ 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 the scale tipped in favor of disclosure.¹⁰

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, 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., Ops. Att’y Gen. 2015-072, 99-147; Watkins, et al., at 202.

⁸ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2015).

⁹ 308 Ark. 593, 826 S.W.2d 252 (1992).

¹⁰ Watkins, et al., at 208.

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.¹¹ 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.¹² 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.¹³ 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.¹⁴ Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁵

Finally, even if a document 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));
- Employee personnel number (Ops. Att'y Gen. 2014-094; 2007-070);
- 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);

¹¹ *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

¹² *Id.*, 826 S.W.2d at 255.

¹³ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹⁴ *E.g.*, Ops. Att'y Gen. 2016-055, 2001-112, 2001-022, 94-198; *Watkins, et al.*, at 207.

¹⁵ Ops. Att'y Gen. 2006-176, 2004-260, 2003-336, 98-001.

- 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 evaluations.

The second potentially relevant exemption applies to “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.¹⁶ These include records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁷

If a document meets the above definition, it 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

¹⁶ *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.

¹⁷ *Thomas*, 2012 Ark. 66, at 9-10, 399 S.W.3d at 392-93.

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 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, because that concern, at least theoretically, always exists. 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

¹⁸ Ark. Code Ann. § 25-19-105(c)(1) (Supp. 2015); Op. Att’y Gen. 2008-065.

¹⁹ Watkins, et al., at 238-39 (footnotes omitted).

²⁰ *Id.* at 237 (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, et al., at 223.

III. Application.

With the caveat that I have not seen any of the actual records in this case, I believe you were incorrect to deny the request from Mr. Natali's representative in its entirety on grounds that the investigation at issue is ongoing. The primary error was failing to recognize that the "person about whom the records are maintained [and] ... that person's designated representative"²² are entitled to obtain the person's personnel and evaluation records. This is true regardless of whether or not the tests for personnel-records or employee-evaluation records would require disclosure to another Arkansas citizen.²³

The tests for disclosing employee-evaluation and personnel records are not necessarily triggered when the employee himself (or his representative) makes the FOIA request. Here, Mr. Natali designated Mr. Morehead to request on his behalf certain records pertaining to an investigation of Mr. Natali. Mr. Morehead is therefore entitled to disclosure of the records that qualify as Mr. Natali's evaluation or personnel records.²⁴

However, I must emphasize the possibility that some of the requested documents may qualify as personnel records or employee-evaluation records of persons *other than* Mr. Natali. I note in particular that it appears that a third party filed a complaint against Mr. Natali and an additional person. The responsive records could include documents that are properly classified as personnel or evaluation records of that additional person. Likewise, the responsive records could include documents that qualify as personnel or evaluation records of the third-party complainant.²⁵ Mr. Natali (and Mr. Morehead, as Mr. Natali's representative) would be entitled to disclosure of the personnel or employee-evaluation records of

²² Ark. Code Ann. § 25-19-105(c)(2).

²³ Certainly, if the request had been made by an Arkansas citizen other than Mr. Natali or his representative, then the finality of the internal investigation and whether a suspension or termination had resulted would be relevant to the disclosure of any employee-evaluation records. *See* Ark. Code Ann. § 25-19-105(c)(1).

²⁴ *See, e.g.,* Op. Att'y Gen. 2000-058 (noting that a "complaint ... must generally be made available to the officer against whom the allegations were made.").

²⁵ Some of these records might constitute what this office refers to as a "mixed record." *See* Op. Att'y Gen. 2017-034 ("A record is mixed when it can be classified as (1) more than one person's employee evaluation record, (2) more than one person's personnel record, or (3) at least one person's evaluation and at least one person's personnel record.").

other persons to the same extent that an Arkansas citizen requesting such records would be under the FOIA. As the custodian, you must properly classify the documents responsive to Mr. Morehead's request and apply the appropriate test for disclosure.

CONCLUSION

I have not reviewed the actual records at issue. But I can state based on the correspondence sent to my office that the custodian should not withhold from Mr. Natali or his representative the "emails, files, correspondence, and notes concerning the investigation results," if such records are the personnel or employee-evaluation records of Mr. Natali. In determining whether Mr. Natali or his representative is entitled to the personnel or employee-evaluation records of other persons, you, as the custodian, must properly classify the documents and apply the appropriate disclosure test.

Sincerely,



LESLIE RUTLEDGE
Attorney General