



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2019-054

August 23, 2019

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Dear Ms. Worsham:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the custodian's attorney, is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Supp. 2017). 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 the Riverview School District ("District") has received a FOIA request for the following records:

1. A copy of all personnel records for teachers who were recommended for non-renewal from the District for the years 2009-2019.
2. A copy of all personnel records for teachers who were recommended for termination from the District for the years 2009-2019.
3. A copy of all records "related to the suspension or termination" and "employee evaluation and job performance records" for all teachers recommended or non-renewal or termination from the District for the years 2009-2019.

You state that in all but two cases, the District keeps no records that would be responsive to the request. With respect to those two cases, you state that the District has determined that the records in one case are subject to disclosure, but are not subject to disclosure in the other case. Furthermore, you make several assertions regarding the disclosability or non-disclosability of the types of records that have been requested but that you state the District has no responsive records. You ask whether these decisions are consistent with the FOIA.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Because I have not been provided any of the records that have been deemed to be responsive to the FOIA request, I am unable to opine about the releasability of any specific document or whether any specific piece of information should be redacted from an otherwise releasable document. Thus, I can only set out the legal standards the custodian must apply to determine whether certain employee-related records must be disclosed.

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 seem to be met. The request was made to the Riverview School District, which is a public entity subject to the FOIA. Moreover, the request appears to pertain to public records. The FOIA defines public records 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 ... carried out by a public official or employee"¹

Because the records the District has determined to be responsive to the request are held by a public entity, they are presumed to be public records, although that

¹ Ark. Code Ann. § 25-19-103(7)(A) (Supp. 2017).

presumption is rebuttable.² The custodian appears to have determined that they are public records. Not having seen any of the records in question, I cannot definitively opine as to that determination. But if we presume, as we must, that the records are public records as defined in the FOIA, the analysis then proceeds to the third element, that is, whether any exceptions preclude disclosure.

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.

² See Op. Att'y Gen. 2010-044.

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-Steele & Robert Steinbuch, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 205-06 (Arkansas Law Press, 6th ed., 2017).

⁴ 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."

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."

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.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 the definition of a personnel record, 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 the scale tipped in favor of 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

⁶ See, e.g., Ops. Att’y Gen. 2015-072, 99-147; Watkins, *et al.*, at 202.

⁷ Ark. Code Ann. § 25-19-105(b)(12) (Supp. 2017) (emphasis added).

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

⁹ Watkins, *et al.*, at 208.

¹⁰ *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

¹¹ *Id.*, 826 S.W.2d at 255.

circumstances, his privacy interests outweigh the public's interests.¹² The fact that the subject of records may consider release of the records an unwarranted 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));
- 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);
- 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 number and photocopy of driver's license (Op. Att'y Gen. 2017-125, 2013-090);
- 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).

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

¹³ *E.g.*, Ops. Att'y Gen. 2016-055, 2001-112, 2001-022, 94-198; *Watkins, et al.*, at 207.

¹⁴ Ops. Att'y Gen. 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 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

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).¹⁷

As for the final prong, the FOIA never defines the key phrase “compelling public interest.” But the 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

¹⁵ *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.

¹⁶ *Thomas*, 2012 Ark. 66, at 9-10, 399 S.W.3d at 392-93.

¹⁷ Ark. Code Ann. § 25-19-105(c)(1); Op. Att’y Gen. 2008-065. (Emphases added.)

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.¹⁸

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,¹⁹ 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.²⁰

III. Application.

Because I have not reviewed the records that have been determined to be responsive to the request, I am unable to definitively opine on whether the custodian’s decisions are consistent with the FOIA. Nor can I opine on the determination whether the District has any responsive records. However, I have some concerns regarding some of the assertions made about certain types of records the District may have and an understanding of the FOIA more generally.

At the outset, I must point out that I cannot provide answers to hypothetical or general questions regarding the FOIA in the context of an opinion required under Ark. Code Ann. § 25-19-105(c)(3)(B)(i). I am tasked, instead, with reviewing the custodian’s decision on whether particular personnel or employee-evaluation records are subject to disclosure. That said, there are some aspects of your letter that I believe I must address.

¹⁸ Watkins, *et al.*, at 238-39 (footnotes omitted).

¹⁹ *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”).

²⁰ *Cf.* Op. Att’y Gen. 96-168; Watkins, *et al.*, at 223.

The first has to do with the bald statement that letters given to teachers whose contracts will not be renewed for the next school year are job-performance records, the release of which must be judged by the test for employee-evaluation records discussed above. In my opinion, it is not absolutely clear that that would be so. We must remember that the classification of an employee-related record—be it a personnel record or an employee-evaluation record—is wholly dependent on the record's content.

While I agree with my predecessor, whose opinion you cite, that the mere fact that a teacher's contract will not be renewed is not tantamount to or the equivalent of a termination,²¹ it does not necessarily follow that the non-renewal letter is a job-performance record. I understand that under the Fair Teacher Dismissal Act,²² a notice of recommended nonrenewal must include a statement by the superintendent setting forth the reasons for the nonrenewal.²³ However, in order to qualify as an employee-evaluation record, at least some of those reasons would have to include evaluations of the employee, detailing the employee's performance or lack of performance on the job.²⁴ If the reasons given for nonrenewal do not involve an evaluation of the employee, then the nonrenewal notice could well be classified as the teacher's personnel record. Again, the content of the notice is critical in making that determination.

In your second question, you refer to “an unwarranted invasion of personal privacy” [*sic*] in the context of what appears to be a discussion of an employee-evaluation record. The decision to withhold or disclose evaluation records does not hinge on whether there would be an invasion of privacy against the employee, as discussed above.²⁵

Finally, you appear to state that if a school board discusses in a public hearing a teacher's evaluation records that are exempt from disclosure under the FOIA, then the records can be disclosed by virtue of their having been discussed in an open hearing. In my opinion, this is an incorrect interpretation of the statute. Whether an employee-related record must be disclosed or withheld is judged based on the

²¹ Op. Att'y Gen. 2008-113.

²² Ark. Code Ann. §§ 6-17-1501 – 1510 (Repl. 2018).

²³ *Id.* at § 6-17-1506(b)(1)(B).

²⁴ *Supra* note 15 (and accompanying text).

²⁵ Compare *supra* text accompanying notes 6-12, with *supra* text accompanying notes 15-20.

particular test applicable to the record. That an exempt record may have been discussed during an open meeting does not change that record's status into one that must be disclosed. And the same would be true for non-exempt records discussed in a private meeting—that fact would not convert a record subject to disclosure into one that is exempt from disclosure.

You cite Op. Att'y Gen. 87-284 in support of the District's position that the discussion of exempt employee-evaluation records in a public hearing renders those records subject to disclosure. However, in that same opinion, my predecessor wrote the following, with which I concur:

If the governing body in question here relied upon employee evaluations or other job performance records in reaching their decision, the records would remain shielded from public view. The [statutory] language is clear in that it contemplates the release of performance records only when the decision is to suspend or terminate. Since the decision here is to place the employee on probation, the criteria for release [have] not been met.²⁶

In sum, not having seen the records at issue, I cannot definitively opine as to the custodian's decisions regarding them. However, I believe your letter in behalf of the District contained some misunderstandings regarding the FOIA.

Sincerely,



LESLIE RUTLEDGE
Attorney General

²⁶ Op. Att'y Gen. 87-284 (reasoning that while minutes of the meeting and otherwise non-exempt documents used to arrive at the decision to place the employee on probation are open to the public, the employee's evaluations and job-performance records must still be withheld because the level of discipline prong of the test had not been reached).