



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-129

October 30, 2015

Chief Kevin Lindsey
Chief of Police
Fort Smith Police Department
100 South 10th Street
Fort Smith, AR 72901

Dear Chief Lindsey:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the custodian of records, is pursuant to 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 on September 16, 2015, the Fort Smith Police Department ("Department") began an internal affairs investigation. You say that "a female officer in training filed a complaint regarding sexual harassment involving her assigned training officer." You say further that the investigation has concluded and that the assigned training officer received a disciplinary suspension of 30 days without pay. Someone has requested the internal investigation case file.

The custodian has classified all the responsive records as employee-evaluation records. You say that it is the Department's "stance that a compelling public interest [in the file] may exist" because the offense occurred in such close proximity to an entirely separate matter involving a different officer. The custodian has determined that the internal-affairs file should be released but that the identity of the complainant (i.e. the female officer) be redacted from all records.

RESPONSE

My statutory duty is to state whether the custodian's decision is consistent with the FOIA. Having reviewed the redacted records, it is my opinion that (1) the custodian properly classified all the responsive records as employee-evaluation records; (2) the custodian correctly concluded—though for the wrong reasons—that the records must be disclosed; and, (3) the custodian's decision to redact the female officer's identity is consistent with the FOIA, though at least four additional redactions should be made.

DISCUSSION

I. General standards governing disclosure

Responsive documents must be disclosed in response to an 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 documents must constitute public records. Third, no exceptions allow the documents to be withheld.

Having reviewed the documents at issue, the first two elements are clearly met. The documents were created by the Department, which is a public entity. Thus, the first element is met. Element two is also met. A document is a public record if (1) it is a writing, recording, or electronic information, (2) that is kept, and (3) that reflects the performance or lack of performance of official functions.¹ The records at issue plainly meet this definition: they are clearly kept, and they reflect both the performance of the Department in its internal-affairs investigation and the performance of both the officer in training and her training officer. Therefore, the records are public records and must be disclosed unless an exception specifically prevents their disclosure.

¹ Ark. Code Ann. § 25-19-103(5) (Supp. 2015).

II. Exceptions to disclosure

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.² For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"³ or "employee evaluation or job performance records."⁴ The tests for whether these two types of documents may be released differ 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.

a. Personnel-records exception

The first of the two most relevant 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

² 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. No. 97-368; John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 187–89 (Arkansas Law Press, 5th ed., 2009).

³ 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."

⁴ 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."

performance records that pertain to individual employees.⁵ 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.”⁶

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,⁷ 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 a thumb on the scale favoring disclosure.⁸

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 minimus* privacy interest.⁹ If the privacy interest is merely *de minimus*, then the thumb on the scale favoring disclosure outweighs the privacy interest. Second, if the information does give rise to a greater than *de minimus* privacy interest, then the custodian must determine whether that interest is outweighed by the public’s interest in disclosure.¹⁰ 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.¹¹ The fact that

⁵ See, e.g., Op. Att’y Gen. No. 1999-147; Watkins & Peltz, *supra* note 2, at 187.

⁶ Ark Code Ann. § 25-19-105(b)(12) (Supp. 2015).

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

⁸ Watkins & Peltz at 191.

⁹ *Young* at 598, 826 S.W.2d at 255.

¹⁰ *Id.*

¹¹ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

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

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 (among other things): dates of birth of public employees (Op. 2007-064); social security numbers (Ops. 2006-035, 2003-153); medical information (Op. 2003-153); any information identifying certain law enforcement officers currently working undercover (Ark. Code Ann. § 25-19-105(b)(10)); tax information or withholding (Ops. 2005-194, 2003-385); and marital status of employees and information about dependents (Op. 2001-080).

b. Employee-evaluation exception

The second relevant exception is for “employee evaluation or job performance records,” which the FOIA likewise does not define. But the Arkansas Supreme Court has held that 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.¹⁴ This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.¹⁵

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);

¹² E.g. Op. Att’y Gen. Nos. 2001-112, 2001-022, 94-198.

¹³ Op. Att’y Gen. Nos. 2006-176, 2004-260, 2003-336, 98-001.

¹⁴ *Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387; *see also*, Op. Att’y Gen. Nos. 2009-067; 2008-004; 2007-225; 2006-038; 2005-030; 2003-073; 95-351; 93-055.

¹⁵ *Id.*

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).¹⁶

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.¹⁷

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

¹⁶ Ark. Code Ann. § 25-19-105(c)(1); Op. Att’y Gen. No. 2008-065.

¹⁷ Watkins & Peltz, *supra* note 2, at 217–18 (footnotes omitted).

“compelling public interest” exists,¹⁸ 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.¹⁹

III. Application

We are now in a position to apply the foregoing standards to the records at issue. As noted above, the first step in analyzing these records’ disclosure is to classify them. While the custodian is certainly correct to classify these documents as employee evaluations, they are *also* the personnel records of the complainant. Each one of the records is what can be called a “mixed record.”²⁰ A record is “mixed” when it can be classified as (1) more than one person’s evaluation, (2) more than one person’s personnel record, or (3) at least one person’s evaluation and at least one person’s personnel record. The latter is the case here, for the records qualify as the supervisor’s employee-evaluation records, *and* the records qualify as the personnel records of the complainant because they pertain to her.

Having classified the records, one must apply the relevant test for disclosure. Because the records qualify as the supervisor’s employee-evaluation records, they *cannot* be released unless the foregoing four-part test is met. Because the test is met, the records must be released. The records at issue formed the basis for the final suspension (thus meeting Elements 1, 2, and 3). Further, this office has opined that a compelling-public interest exists when (a) a supervisor sexually harasses a subordinate²¹ and (b) when a law-enforcement official violates

¹⁸ *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.”).

¹⁹ See Op. Att’y Gen. No. 96-168; Watkins & Peltz at 204.

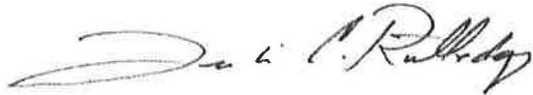
²⁰ See Op. Att’y Gen. No. 2015-057, n.18 (and accompanying text).

²¹ See Op. Att’y Gen. Nos. 2013-048, 2002-095, 91-003.

policies.²² Either scenario is sufficient to determine that a compelling public interest exists. Since both scenarios are present here, a compelling public interest exists, (thus meeting Element 4). Therefore, the records must be disclosed.

But the records also qualify as the complainant's personnel records. Therefore, her identity must be disclosed unless doing so constitutes a "clearly unwarranted invasion" of her personal privacy. The first step in assessing whether that is the case here is identifying and weighing any privacy interests at stake. Given the highly sensitive nature of being the victim of sexual harassment, there is clearly a very high privacy interest. The public also has a very strong interest in knowing the details of the improper conduct that gave rise to the complaint and subsequent discipline. As in *Young v. Rice*, this interest is satisfied by disclosing the details of the event while redacting the complainant's identity. Therefore, the custodian has properly decided to redact the complainant's identity. I will note, however, that at least four necessary redactions have been overlooked.²³ The custodian should take special care to redact, not just her name, but any information that could identify her.

Sincerely,

A handwritten signature in cursive script, appearing to read "Leslie Rutledge".

LESLIE RUTLEDGE
Attorney General

²² See generally Op. Att'y Gen. No. 2015-077 (and opinions cited therein).

²³ The additional redactions are: (1) the complainant's name appears twice on a document dated September 29, 2015 and entitled "Suspension Letter"; (2) the file contains screenshots of text messages, at least one of which contains part of the complainant's name; (3) the screenshots of the text messages also contain pictures that should be redacted if they could identify the complainant; and (4) details of a past sexual relationship, both in the audio and text files. The custodian should also carefully evaluate the references to the complainant's family members on page 3 of an undated document entitled "Investigator Notes."