TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2025-130

December 22, 2025

Mr. Adam Fogelman
Pulaski County Attorney
201 South Broadway, Suite 400
Little Rock, Arkansas 72201

Dear Mr. Fogelman:

You have requested an opinion from this office regarding the Arkansas Freedom of Information Act (FOIA). Your request, which is made as the custodian of the records, is based on A.C.A. § 25-19-105(c)(3)(B)(i). This subdivision authorizes the custodian, requester, or the subject of certain employee-related records to seek an opinion stating whether the custodian's decision regarding the release of such records is consistent with the FOIA.

According to correspondence you provided our office, Pulaski County received a FOIA request for "[a]ll complaints filed against any Pulaski County employee, supervisor, or official within the past five (5) years, regardless of whether the complaint resulted in disciplinary termination,"[1] as well as "[a]ny correspondence or documentation indicating that these complaints were forwarded to or processed by the Pulaski County Clerk's Office or Human Resources."

You note that, under the County's Personnel Policy, "any employee having a complaint of discrimination or harassment against a department director or elected officer shall notify the Human Resources Department [(HR)] who shall conduct the investigation." While "complying with the County's adopted Personnel Policy," employees sometimes contact HR "to file a complaint by telephone or email." HR then emails the employee the County's complaint form and asks the employee to complete the form. But "sometimes County employees will comply with the County's adopted Personnel Policy by providing a written complaint that is not on the county's provided form, thus negating the need for the form to be completed."

You have provided both redacted and unredacted copies of two sets of records you intend to release. And you note that these two sets illustrate instances of employees "providing a written complaint that is not on the County's provided form." The first set contains a complaint submitted to HR after HR requested the County's form be completed, as directed by the County's Personnel

[1] The FOIA request specifies that "all complaints" "includes complaints related to harassment, discrimination, retaliation, or any other workplace misconduct."

Policy. In this case, the "employee did not use the form but instead emailed a response to detail incidents" that led to the allegation of misconduct. For convenience, I will refer to this set of records as the "misconduct complaint." The second set contains a complaint, also not on the County's form, submitted to HR as directed by the County's Personnel Policy when the employee believes that he or she has been subjected to harassment by a supervisor or department head. For convenience, I will refer to this second set of records as the "harassment complaint."

In the redacted records provided to this office, you have redacted each document as a mixed record— i.e., more than one person's evaluation, at least one person's evaluation and at least one other person's personnel record, or more than one person's personnel records.[2] You have asked my opinion as to whether your proposed redactions are consistent with the FOIA.

RESPONSE

In my opinion, your decisions are partially consistent with the FOIA. As discussed more fully below, unsolicited complaints regarding coworkers or supervisors are personnel records. A supervisor's incident reports, memoranda, and transcripts of investigations are "preliminary notes and other materials." Thus, they are exempt from disclosure when the four-part test for release of employment evaluations is met. Finally, the County's Personnel Policy is administrative in nature, and employee complaints submitted under that policy are not considered to be "at the behest" of the County.

DISCUSSION

1. General rules. A document must be disclosed in response to a FOIA request if (1) the request was directed to an entity subject to the FOIA, (2) the requested document is a public record, and (3) no exceptions allow the document to be withheld.[3]

The first two elements appear to be met. The request was made to Pulaski County—a public entity subject to the FOIA.[4] And the records at issue appear to be public records.[5] Because these records are held by a public entity, they are presumed to be public records,[6] although that presumption is

[2] Ark. Att'y Gen. Op. 2023-074.

[3] *Harrill & Sutter, PLLC v. Farrar*, 2012 Ark. 180, at 8, 402 S.W.3d 511, 515.

[4] *E.g.*, Ark. Att'y Gen. Ops. 2024-095, 2023-120, 2020-028.

[5] 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 that constitute a record of the performance or lack of performance of official functions … carried out by a public official or employee." A.C.A. § 25-19-103(15)(A).

[6] *Id.*

rebuttable.[7] I have no information to suggest that the presumption can be rebutted here, so I will focus on whether any exceptions prevent the documents' disclosure.

For FOIA purposes, documents in a public employee's file can usually be divided into two distinct groups: "personnel records"[8] and "employee evaluation or job performance records."[9] Personnel records are records that pertain to an individual employee that were not created by or at the behest of the employer to evaluate the employee.[10] Employee evaluation and job-performance records, on the other hand, are 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.[11]

The test for whether these two types of documents may be released differs significantly. When reviewing documents to determine whether to release under the FOIA, the custodian must first decide whether a record meets the definition of either a "personnel record" or an "employment evaluation or job performance record" and then apply the appropriate test for that record to determine whether the record should be released under the FOIA.

2. Personnel records. A personnel record is open to public inspection except "to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy."[12] While the FOIA does not define the phrase "clearly unwarranted invasion of personal privacy," the Arkansas Supreme Court has provided some guidance. In *Young v. Rice*, the Court applied a balancing test that weighs the public's interest in accessing the records against the individual's interest in keeping

[7] *See Pulaski Cnty. v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435, 440–41, 260 S.W.3d 718, 722 (2007) ("[T]he presumption of public record status established by the FOIA can be rebutted if the records do not otherwise fall within the definition found in the first sentence, i.e., if they do not 'constitute a record of the performance or lack of performance of official functions.'" (quoting Ark. Att'y Gen. Op. 2005-095)).

[8] A.C.A. § 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").

[9] *Id.* § 25-19-105(c)(1) ("[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] *See, e.g.*, Ark. Att'y Gen. Ops. 2015-072, 1999-147.

[11] *Thomas v. Hall*, 2012 Ark. 66, at 8–9, 399 S.W.3d 387, 392; *see also Davis v. Van Buren Sch. Dist.*, 2019 Ark. App. 466, 7–8, 572 S.W.3d 466, 471 (noting that "[o]ur supreme court has approved" the definition of employee-evaluation records developed by the Attorney General's office); Ark. Att'y Gen. Ops. 2015-057, 2009-067, 2006-038, 2003-073, 1995-351, 1993-055.

[12] A.C.A. § 25-19-105(b)(12).

them private.[13] The balancing test, which takes place "with the scale tipped in favor of public access," has two steps.[14]

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 minimal privacy interest.[15] If the privacy interest is minimal, then disclosure is required. Second, if the information gives rise to a greater than minimal privacy interest, then the custodian must determine whether that privacy interest is outweighed by the public's interest in disclosure.[16]

Because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, the employee's privacy interests outweigh the public's interests.[17] The fact that the subject of the records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.[18]

Even if a document, when considered as a whole, meets the test for disclosure, it may contain discrete pieces of information that must be redacted.[19] For instance, the FOIA exempts the personal contact information of certain public employees from disclosure, including their personal telephone numbers, personal email addresses, and home addresses.[20]

3. Employee-evaluation records. The second relevant exception is for "employee evaluation or job performance records," which "includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct."[21]

If a document qualifies as an employee-evaluation record, 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);

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[13] 308 Ark. 593, 826 S.W.2d 252 (1992).

[14] John J. Watkins et al., *The Arkansas Freedom of Information Act* 208 (6th ed. 2017).

[15] *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

[16] *Id.*

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

[18] *E.g.*, Ark. Att'y Gen. Ops. 2016-055, 2001-112, 2001-028, 1994-198; Watkins et al., *supra* note 14, at 207.

[19] A.C.A. § 25-19-105(f).

[20] *See id.* § 25-19-105(b)(13).

[21] *E.g.*, Ark. Att'y Gen. Op. 2015-057 (collecting citations).

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., relevance); and

4. The public has a compelling interest in the disclosure of the records in question (i.e., compelling interest).[22]

The primary purpose of this exception is to preserve the confidentiality of the formal job-evaluation process to promote honest exchanges between employees and their employers.[23]

4. "Preliminary notes and other materials." As part of the employee-evaluation exception, A.C.A. § 25-19-105(c)(1) also exempts "preliminary notes and other materials" from disclosure when the four-part test is met. This office has opined that the intent of A.C.A. § 25-19-105(c)(1) is to exempt "not only of the 'end product'—i.e., the evaluation itself—but also other documents from which the evaluation report was prepared."[24] Thus, supervisors' incident reports, memoranda, transcripts of investigations—including witness statements, and other reports on which employee evaluations are based—are exempt when the four-part test is satisfied.[25] In contrast, "documents *routinely* created by employees in the course of their duties do not [fall within the employee-evaluation exemption]."[26] And these routinely created documents do not later become employee evaluations simply because they are used in an investigation of the employee.[27]

5. "At the behest." Employees making their original, unsolicited complaints against a coworker or supervisor under the County's Personnel Policy are not acting "at the behest" of the County for two reasons.

First, in construing a phrase, I must give "the words their ordinary and usually accepted meaning in common language."[28] The ordinary and usually accepted meaning of "behest" is "a command or directive" or "an earnest or strongly worded request."[29] The meaning of "behest" suggests

[22] A.C.A. § 25-19-105(c)(1); *e.g.*, Ark. Att'y Gen. Op. 2008-065.

[23] *E.g.*, Ark. Att'y Gen. Op. 1996-168.

[24] Ark. Att'y Gen. Op. 1993-076.

[25] *Thomas*, 2012 Ark. at 10, 399 S.W.3d at 393 (internal citations omitted); Ark. Att'y Gen. Op. 1994-127.

[26] *Thomas*, 2012 Ark. at 10, 399 S.W.3d at 393 (internal citations omitted) (emphasis in original).

[27] *Id.* at 11, 399 S.W.3d at 393 (quoting Ark. Att'y Gen. Op. 2005-032).

[28] *Wickham v. State*, 2009 Ark. 357, 5–6, 324 S.W.3d 344, 347 (2009) (internal citations omitted).

[29] *Behest*, *Random House Webster's Unabridged Dictionary* 189 (2nd ed. 2001).

urgency, as well as ramifications if the person commanded does not comply with the directive.[30] As you have described it, the Personnel Policy does not impose urgency or ramifications for failing to file a complaint. So the unsolicited complaints at issue here are not "at the behest" of the County.

Second, this office has long held that original, unsolicited complaints are personnel records and not employee evaluations.[31] Because an employee initiated the complaint process, the complaint was "not created for evaluation purposes."[32] Further, unsolicited complaints are "not created as a part of an investigation into a complaint."[33] Finally, when "an unsolicited oral complaint [is] placed in writing as a routine administrative act, and not as a result of a decision to investigate the particular complaint, the complaint document … cannot be said to have been created as a result of a decision to investigate or evaluate the employee."[34] As you have described it, the Personnel Policy is administrative in nature and, therefore, the unsolicited complaints were not made "at the behest" of the County. Instead, they are properly classified as personnel records.

6. The misconduct complaint. In this example, an employee and a supervisor had a heated exchange that resulted in the employee receiving a reprimand and the employee contacting HR to begin an investigation regarding possible misconduct. This sample contains two emails from the employee to HR, the reprimand, and a memo to file.

As discussed above, the emails are best classified as personnel records because they were not created by the employer to evaluate an employee.[35] A coworker's complaint about a public employee is a personnel record.[36] It is not transformed into an employee-evaluation record because of a subsequent investigation.[37] As personnel records, the emails must be released when the public's interest in the records outweighs the employee's privacy interest. The custodian has also correctly redacted discrete pieces of information that would be a "clearly unwarranted invasion of

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[30] *See id.* (synonyms for "behest" are "order, bidding, decree, dictate, mandate").

[31] Ark. Att'y Gen. Ops. 2025-099, 2001-191, 1998-001, 1996-257.

[32] Ark. Att'y Gen. Op. 1996-257 (opining that the records "were not created for evaluation purposes … [but] they were initiated by the employees and created on their behalf").

[33] Ark. Att'y Gen. Op. 1998-001 (opining that "this type of document was not created as a part of an investigation into a complaint, [so] it does not constitute an [employee evaluation]").

[34] Ark. Att'y Gen. Op. 2001-191.

[35] *See*, *e.g.*, Ark. Att'y Gen. Ops. 2001-123, 1998-001. The emails are personnel records as to both the employee and the supervisor. But the distinction as to who's personnel records they are does not change the analysis here.

[36] Ark. Att'y Gen. Op. 1998-001 (opining that an "original complaint document" alleging sexual harassment by a coworker "is not an 'employee evaluation/job performance record'" because it "was not created as part of an investigation into a complaint").

[37] *Thomas*, 2012 Ark. at 11, 399 S.W.3d at 393 (quoting Ark. Att'y Gen. Op. 2005-032).

privacy" to the employee, as well as a reference to a separate employee evaluation. Thus, the custodian's decision to release the emails, as redacted, is consistent with the FOIA.

But the reprimand and the memo to file are best classified as employee evaluations because they were created by the employer to evaluate either the employee or the supervisor. These documents detail performance or lack of performance by the employee or the supervisor. Finally, the four-part test for release of these employee-evaluation records has not been met because neither party was suspended or terminated. So the custodian's decision to withhold these documents is consistent with the FOIA.

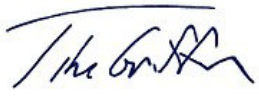
7. The harassment complaint. In this example, an employee contacted HR to begin an investigation of a supervisor or department head regarding possible harassment. This sample contains three documents of multiple emails, but for clarity, I will discuss each email separately. On March 28, 2021, an employee submitted an email complaint to the general HR email address regarding a supervisor or department head. On March 29, 2021, the general HR email address forwarded the complaint to the HR Director, who then forwarded it to the County Judge. On April 6, 2021, the HR Director notified the employee that HR was beginning an investigation. The employee responded to the HR Director with additional information on April 8, 2021.

The emails dated March 28-29, 2021, are best classified as personnel records because they were not created by the employer to evaluate an employee.[38] As personnel records, the emails must be released when the public's interest in the record outweighs the employee's privacy interest. And the custodian has correctly redacted discrete pieces of information that would be a "clearly unwarranted invasion of privacy." Thus, the custodian's decision to release the emails, as redacted, is consistent with the FOIA.

But the emails dated April 6-8, 2021, are best classified as employee evaluations because they were created as part of the investigation of the supervisor or department head. These documents detail performance or lack of performance by the supervisor or department head. Finally, the four-part test for release of these employee-evaluation records has not been met because supervisor or department head was not suspended or terminated. Therefore, the custodian's decision to withhold these documents is consistent with the FOIA.

Assistant Attorney General Jodie Keener prepared this opinion, which I hereby approve.

Sincerely,



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[38] *See*, *e.g.*, Ark. Att'y Gen. Ops. 2001-123, 1998-001. Strictly speaking, the emails are personnel records as to both the employee and the supervisor. But the distinction as to who's personnel records they are does not change the analysis here.