STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2021-097

December 3, 2021

Patrick Claggett
c/o Tess Bradford, Legal Counsel
Arkansas State Police Headquarters
One State Police Plaza Drive
Little Rock, AR 72209

Dear Mr. Claggett:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the subject of the requested records, is based on Ark. Code Ann. § 25-19-105(c)(3)(B)(i) (Supp. 2021). This subdivision authorizes the custodian, requester, or the subject of certain employee-related 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.

You indicate that the Arkansas State Police ("ASP") has received a request under the FOIA for your personnel file and for any records relating to your separation from employment. The ASP records custodian has determined that the requested records are subject to release pursuant to the FOIA, with sensitive personal information redacted. You object to the release of your records on the grounds that their release would be an invasion of your privacy. Additionally, you have stated that you believe there is no "compelling public interest" in the release of your employee-evaluation records. You ask whether the custodian's decision to release the records is consistent with the FOIA.

RESPONSE

My duty under subdivision 25-19-105(c)(3)(B) is to state whether the custodian's decision as to the release of "personnel or evaluation records" is consistent with the FOIA. Because I have not seen any records that the ASP has determined to be

responsive to the instant FOIA request, I cannot opine about the releasability of any specific document or the need to redact any specific piece of information from an otherwise releasable document.

However, I will set out the legal standards the custodian must apply to determine whether certain employee-related records must be disclosed. As explained below, these records can include both "personnel" and "employee evaluation or job performance" records. Properly classifying a record is critical so that the appropriate test for disclosure can be applied. This is the responsibility of the custodian in the first instance.

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 appear to be met. The request was made to the ASP, which is a public entity and is subject to the FOIA. Moreover, the request appears to pertain to public records.[1] Because the records are held by a public entity, they are presumed to be public records,[2] although that presumption is rebuttable.[3] Accordingly, given that I have no information to suggest that the presumption can be rebutted, the analysis proceeds to the third element, that is, whether any exceptions preclude disclosure.

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[1] 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 ...." Ark. Code Ann. § 25-19-103(7)(A) (Supp. 2021).

[2] *Id.*

[3] *See Pulaski Cty. v. Ark. Democrat-Gazette, Inc.*, 370 Ark. 435, 440-41, 260 S.W.3d 718, 722 (2007) ("the 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,'" citing Op. Att'y Gen. 2005-095).

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.[4] For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"[5] or "employee evaluation or job performance records."[6] 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.

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 or job performance records" that pertain to individual employees.[7] Whether a particular

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[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."

[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.

record meets this definition is 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]

The balancing test elaborated by *Young v. Rice* has two considerations the custodian must take into account. 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 records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective.[14]

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[8] Ark. Code Ann. § 25-19-105(b)(12).

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

[10] Watkins, *et al.*, at 208.

[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.

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.[15] Additionally, a requester's identity or motive for making a request under the FOIA is generally irrelevant as to whether a non-exempt public record must be released.[16] Again, the test under the FOIA for the release of personnel records asks whether, *as an objective matter*, the records in question shed light on the workings of government for the general public.[17] This ordinarily precludes the custodian from considering any subjective motives or the identity of a requester when making the determinations whether a record must be disclosed or withheld.[18]

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);

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

[16] Ops. Att'y Gen. 2019-036, 2018-125, 2014-094, 2012-014, 2011-107.

[17] *See* Ops. Att'y Gen. 2019-047, 2018-061.

[18] *See* Ops. Att'y Gen. 2018-087, 2018-061; *see also* Op. Att'y Gen. 2014-094 (noting that "neither the Arkansas Legislature nor our appellate courts have allowed custodians to consider the subjective motive of the requester."). While the requester's *subjective* motive cannot be the basis for the decision, it can be considered by the custodian to determine whether it supplies a previously unseen *objective* public interest. Op. Att'y Gen. 2014-094 at n.8.

It should also be noted that the Legislature has not seen fit to include a generalized "harassment" exemption to the release of otherwise disclosable employee-related records. Op. Att'y Gen. 2019-047 (and opinions cited therein).

- 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 (Ops. 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).

b. Employee-evaluation exception.

The second potentially relevant exception is for "employee evaluation or job performance records," which the FOIA likewise does not define.[19] 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.[20] This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.[21]

Additionally, some employee-related records constitute "mixed records," i.e., records that constitute (1) more than one person's evaluation, (2) at least one person's evaluation and at least one other person's personnel record, or (3) more than one person's personnel record.[22]

If a document meets the above definition, the document *cannot* be released unless all the following elements have been met:

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[19] I will refer to this group of records as "employee-evaluation records."

[20] *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.

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

[22] *See* Op. Att'y Gen. 2020-037 (and opinions cited therein).

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).[23]

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 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.[24]

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,[25] which is always a question of fact that must

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[23] Ark. Code Ann. § 25-19-105(c)(1); Op. Att'y Gen. 2008-065.

[24] Watkins, *et al.*, at 238-39 (footnotes omitted).

[25] *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").

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.[26]

III. Application.

When dealing with employment-related records, custodians must make two determinations in the first instance: (1) whether the records meet the definition of the two kinds of employment records discussed above; and (2) if so, whether under the specific circumstances, the FOIA requires the employment records be released based on the applicable test for disclosure discussed above. Because I have not seen the records at issue in this instance, I cannot definitively opine about either of these determinations.

However, I do not believe that your first stated objection to the records' release—invasion of privacy—would, as a general matter, be a legally sufficient reason to withhold records that are subject to disclosure under the FOIA. Personnel records of public employees are subject to disclosure except "to the extent that disclosure would constitute a *clearly* unwarranted invasion of personal privacy."[27] Thus, as to your personnel records, the custodian must apply the balancing test for personnel records discussed above by determining (1) whether information in the records gives rise to a greater than *de minimus* privacy interest, and (2) whether that interest outweighs the public's interest in disclosure, keeping in mind that the balancing test is weighted in favor of disclosure. As the subject of the records, you bear the burden of showing that your privacy interest is greater than the public's interest in disclosure.

As to any records the custodian has classified as employee-evaluation records, such records cannot be released unless all four elements of the test for disclosure have been met.[28] You do not dispute that the first three elements of this test have

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[26] *Cf.* Op. Att'y Gen. 96-168; Watkins, *et al.*, at 223.

[27] Ark. Code Ann. § 25-19-105(b)(12) (emphasis added). *See supra* nn.7-14 (and accompanying text).

[28] *Supra* n.23 (and accompanying test).

been met, but you maintain that the fourth element—a compelling public interest in the records' disclosure—has not been satisfied. Whether a compelling public interest in an employee's evaluation records exists is a question that must be answered in the first instance by the custodian after taking into consideration all of the surrounding facts and circumstances.

Various factors bear on this analysis. First, as noted above, an employee's rank in the hierarchy may bear on the strength of the public's interest in his performance. As this office has previously opined, however, a compelling public interest can be more easily found in the records of "rank-and-file" employees in public-safety positions, such as law enforcement.[29]

Far more pertinent to the analysis may be the kind of misconduct that led to the disciplinary action taken against you. With respect to allegations of misconduct by law enforcement officers, this office has consistently opined that a compelling public interest likely exists in information reflecting a violation of department rules aimed at conduct that could undermine the public trust, compromise public safety, or both.[30] Additionally, this office has consistently held that the violation of rules of conduct regarding honesty gives rise to a compelling public interest in disclosure of employee-evaluation records.[31]

In sum, I have not reviewed the actual records at issue and, therefore, I cannot definitively opine on whether the custodian's decisions in this matter are consistent with the FOIA. However, your objection to the records' release on privacy grounds would generally not appear to serve as a sufficient reason for the custodian to withhold records that are otherwise subject to disclosure. Regarding your employee-evaluation records, the custodian has determined that the foregoing four-part test requires the release of these records. You maintain that the fourth element of the test—the compelling public interest prong—is not met. While I cannot specifically opine as to whether this element has been met, I can state that this office's has consistently opined that the public has a special and weighty interest in the job performance of law enforcement officials due to their unique

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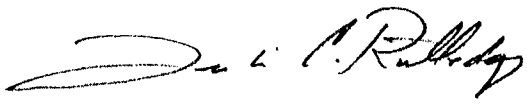
[29] *See, e.g.*, Ops. Att'y Gen. 2014-111, 2012-112, 2011-161. *See also* Watkins, *et al.*, at 238.

[30] *E.g.*, Ops. Att'y Gen. 2014-088, 2008-090 (and opinions cited therein).

[31] Op. Att'y Gen. 2014-122 (and opinions cited therein).

position of public trust.[32] Thus, I have no reason to believe the custodian's determination regarding the release of your employee-evaluation records is inconsistent with the FOIA.

Sincerely,



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[32] *See generally* Op. Att'y Gen. 2010-055.