



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2022-006

January 21, 2022

Thomas M. Carpenter, Esq.
City Attorney
City of Little Rock
500 West Markham, Suite 310
Little Rock, AR 72201-1400

Dear Mr. Carpenter:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the attorney for the custodian of 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.

Your correspondence indicates that the City of Little Rock ("the City") has received several requests under the FOIA for records relating to an officer-involved shooting ("the Incident") involving police Chief Keith Humphrey. You have attached to your correspondence a list identifying the nature of the items that have been requested under the FOIA. You write that the Incident is under criminal investigation by the Arkansas State Police and the Pulaski County prosecuting attorney's office. You state that the purpose of your correspondence "is to request an opinion from [my] office as to the City's duty to release public records, including those which may be deemed personnel records, during an ongoing criminal prosecution."

You report that the City believes that some of the items requested are either exempt or partially exempt from disclosure "because of an ongoing criminal

investigation.”¹ You have listed the items determined to be exempt or partially exempt on that basis. You further state that the City believes several items—which you also list—“are exempt from disclosure because they deal with an employee evaluation that has not resulted in demotion, suspension, or termination, nor has any City administrative process been completed.” Finally, you list other requested items that the City believes are subject to disclosure under the FOIA.

According to your correspondence, the chief deputy prosecuting attorney—citing ethical concerns and the need to protect the integrity of the investigation—has asked that no information pertaining to the investigation be released. You acknowledge the prosecutor’s ethical concerns and you ask whether those concerns “impact any AFOIA obligation of the City to disclose information?”

RESPONSE

My duty under Ark. Code Ann. § 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. I have not been given any specific statutory charge to review the decision of a custodian of records outside the context of personnel or evaluation records. I must, therefore, address a preliminary point regarding the scope of this opinion. My review pursuant to § 25-19-105(c)(3)(B) does not generally extend to the provision regarding undisclosed and ongoing law enforcement investigation records, codified at Ark. Code Ann. § 25-19-105(b)(6) (Supp. 2021).² Thus, to the extent you are asking me to evaluate the correctness of the City’s decision that some of the records at issue are exempt or partially exempt based on § 25-19-105(b)(6), because of an ongoing criminal investigation, that request will not be addressed herein. I will, however, address the general law regarding that provision, and its possible applicability to personnel or evaluation records.

As for the records the City believes are exempt based on § 25-19-105(c)(1) (because, you say, they deal with an employee evaluation that has not resulted in disciplinary action), it is my opinion, based on your general identification of the requested items, that the City’s decision in all likelihood is only partly consistent with the FOIA. As explained further below, the employee-evaluation exception

¹ Arkansas Code Annotated § 25-19-105(b)(6) exempts from disclosure records of “[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity.”

² See Op. Att’y Gen. 2020-051.

only applies to documents that were created by or at the behest of the employer for the purpose of evaluating the employee. Not having seen any of the records, however, I cannot definitively opine on the releasability of any specific document. I can only set out the legal standards the custodian must apply to determine whether certain employee-related records must be disclosed. It is the responsibility of the custodian, in the first instance, to properly classify the responsive records and apply the applicable test for disclosure.

Likewise, regarding the records the City believes are subject to disclosure, you have not indicated which, if any, of the listed items qualify as records falling within the scope of my review pursuant to § 25-19-105(c). Based on their general description in your correspondence, it seems likely that some are properly classified as personnel records that are disclosable under the relevant test discussed below. However, others may be simply non-exempt public records that are subject to disclosure. But again, because I have not seen the records or been apprised of their classification, I lack sufficient information to definitively critique the City's decision that they should be disclosed.

Finally, with regard to the concerns expressed by the prosecutor and his desire that no records be released, I believe those concerns and request are beyond your consideration as custodian or my authority to review—at least with respect to items not covered by § 25-19-105(b)(6), § 25-19-105(c), or any other statutory exception.

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 City of Little Rock, which is a public entity and is subject to the FOIA. Moreover, the request appears to pertain to public records.³ Because the records are held by a

³ 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

public entity, they are presumed to be public records,⁴ although that presumption is rebuttable.⁵ 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.

II. Exceptions to disclosure.

Under certain conditions, the FOIA exempts two groups of items normally found in employees' personnel files.⁶ For purposes of the FOIA, these items can usually be divided into two mutually exclusive groups: "personnel records"⁷ or "employee evaluation or job performance records."⁸ My duty under Ark. Code Ann. § 25-19-105(c)(3)(B) is to determine whether the custodian's decision as to the release of

functions ... carried out by a public official or employee" Ark. Code Ann. § 25-19-103(7)(A) (Supp. 2021).

⁴ *Id.*

⁵ 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).

⁶ 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).

⁷ 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."

⁸ 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."

these kinds of records is consistent with the FOIA. 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.⁹ Whether a particular 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.”¹⁰

While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court, in *Young v. Rice*,¹¹ 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.¹²

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*

⁹ See, e.g., Ops. Att’y Gen. 2015-072, 99-147; *Watkins, et al.*, at 202.

¹⁰ Ark. Code Ann. § 25-19-105(b)(12).

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

¹² *Watkins, et al.*, at 208.

privacy interest.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

Whether any particular personnel record's release would constitute a clearly unwarranted invasion of personal privacy is always a question of fact.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

¹³ *Young*, 308 Ark. at 598, 826 S.W.2d at 255.

¹⁴ *Id.*, 826 S.W.2d at 255.

¹⁵ *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

¹⁶ *E.g.*, Ops. Att'y Gen. 2016-055, 2001-112, 2001-022, 94-198; *Watkins, et al.*, at 207.

¹⁷ Ops. Att'y Gen. 2006-176, 2004-260, 2003-336, 98-001.

¹⁸ Ops. Att'y Gen. 2019-036, 2018-125, 2014-094, 2012-014, 2011-107.

¹⁹ *See* Ops. Att'y Gen. 2019-047, 2018-061.

²⁰ *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 an *objective* public interest previously unseen. 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).

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 (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.²¹ 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.²² This exception includes records generated while investigating

²¹ I will refer to this group of records as “employee-evaluation records.”

²² *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.

allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.²³

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.²⁴

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).²⁵

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

²³ *Thomas*, 2012 Ark. 66, at 9-10, 399 S.W.3d at 392-93.

²⁴ *See* Op. Att’y Gen. 2020-037 (and opinions cited therein).

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

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.²⁶

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,²⁷ 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.²⁸

III. Application.

As explained above in my initial response, your request to some degree does not fall within the specific charge given me in the FOIA with regard to the issuance of opinions in connection with personnel and evaluation records. The City has decided that some of the records at issue are exempt or partially exempt based on § 25-19-105(b)(6), because of an ongoing criminal investigation. Your correspondence itemizes these records requests on pages 7 and 8. Given the limited scope of my review, I am unable to conclusively evaluate the correctness of that decision.

Nevertheless, I will note that the law enforcement investigation exemption²⁹ protects records that are part of a continuing, ongoing investigation.³⁰ Depending

²⁶ *Watkins, et al.*, at 238-39 (footnotes omitted).

²⁷ *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”).

²⁸ *Cf. Op. Att’y Gen. 96-168; Watkins, et al.*, at 223.

²⁹ *See supra* n.1.

³⁰ *See Dep’t of Ark. State Police v. Keech*, 2017 Ark. 143, *3, 516 S.W.3d 265, 267 (2017) (observing that “[f]or almost twenty-eight years, this court has held that the purpose of this statutory exemption is to protect ‘ongoing investigations[.]’” citing *McCambridge v. City of Little*

upon their content and the surrounding facts, documents originating as personnel or evaluation records may come within the § 25-19-105(b)(6) exemption if they are being used as part of a criminal investigation.³¹ Records must, however, be “sufficiently investigative in nature to qualify for the exemption.”³² Thus, the mere fact that records relate somehow to an ongoing criminal information will not, alone, support withholding nonexempt public records. The Arkansas Supreme Court has made clear that not all documents connected with law enforcement are “sufficiently investigative” in nature to qualify for the law enforcement investigation exemption.³³ Additionally, some portions may be subject to inspection and copying under the FOIA, and some portions may be properly withheld under the law enforcement exemption.³⁴

I believe it is apparent from this discussion that the disclosability of the items listed on pages 7 and 8 of your correspondence will depend heavily on certain factual considerations that only the custodian is situated to determine. It is the responsibility of the custodian of records to make these determinations, subject of course to judicial review.

With regard to the records the City believes are exempt based on § 25-19-105(c)(1) (items 15 and 16 on page 9 of your correspondence), it is not clear from their description that records responsive to these requests qualify as employee-evaluation records. As explained above, records do not fall into that category unless they were created by or at the behest of the employer for evaluation

Rock, 298 Ark. 219, 233, 766 S.W.2d 909, 916 (1989) and *Martin v. Musteen*, 303 Ark. 656, 659, 799 S.W.2d 540, 542 (1990)). The question of whether any particular investigation is complete is a question of fact that must be determined on a case-by-case basis, taking into consideration the views of all authorities involved in the investigation, including both the police and the prosecutor. See Op. Att’y Gen. 2005-094 (and opinions cited therein).

³¹ See Ops. Att’y Gen. 2007-272, 2002-005, 97-079, 95-351.

³² *Hengel v. City of Pine Bluff*, 307 Ark. 457, 463, 821 S.W.2d 761, 764 (1991). See also *Holladay v. Glass*, 2017 Ark. App. 595, 534 S.W.3d 173 (2017).

³³ *Id.* See Op. Att’y Gen. 2006-094 (discussing *Hengel* and the extent to which an incident report might be exempt from disclosure under § 25-19-105(b)(6)).

³⁴ See Op. Att’y Gen. 2006-094 (noting that “partial release of information contained in public records is consistent with the mandate contained in the FOIA that ‘any reasonably segregable portion of a record shall be provided after deletion of the exempt information.’ A.C.A. § 25-19-105(f)(2). . . .”).

purposes. I lack sufficient information to further evaluate the City's decision in this regard. I will simply note that depending upon the circumstances surrounding their creation and their content, records regarding an employee's administrative leave/suspension and complaints involving public employees may constitute either employee-evaluation records or personnel records.³⁵ The custodian must properly classify the responsive records and apply the appropriate disclosure test(s).

As for records the City plans to disclose (in response to requested item 7 at the bottom of page 7 and items 8 through 14 on page 8 (except for the items in bold type), and items 17 through 23 on pages 9-10 of your correspondence), you have not classified these records. While it seems likely, based on the requests, that many of the responsive records in this regard constitute personnel records, I cannot definitively opine to that effect. Moreover, several of the requested records may simply be public records that are not subject to any exemption.

As for disclosure, while I have no reason to question the City's determination that the records responsive to these requests are subject to public release, I lack sufficient information to definitively comment on the legal basis for that decision. The proper classification of these records is necessary to determine the applicable test for their release. This will involve factual considerations, and I lack sufficient facts to definitively critique the City's determination.

Finally, regarding the prosecutor's ethical concerns and his request that no information pertaining to the investigation be released until the case is closed, the ongoing law enforcement investigation exemption under § 25-19-105(b)(6) is intended, in part, to avoid disclosures that would be detrimental to the accused. As explained by the Arkansas Supreme Court:

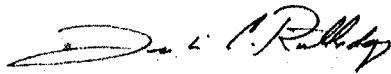
The need for subsection (b)(6), the basic exemption, is obvious; for example, disclosure of such records would hamper the police in investigating a crime before formal charges had been filed *and could be detrimental to persons under investigation but subsequently exonerated of all wrongdoing*.³⁶

³⁵ With regard to complaints, see Op. Att'y Gen. 2018-133 (and the opinions cited therein). It may also bear noting that the later use of an unsolicited complaint in an internal investigation of an employee does not transform the record into an employee-evaluation record. Op. Att'y Gen. 2012-001.

³⁶ *Johninson v. Stodola*, 316 Ark. 423, 426, 872 S.W.2d 374(1994) (emphasis added), quoting J. Watkins, ARKANSAS FREEDOM OF INFORMATION ACT at 86 (m&m Press, 2d ed., 1994).

The City lacks authority, moreover, to exempt records absent specific statutory authority.³⁷ Thus, at least with respect to items not covered by § 25-19-105(b)(6) (law enforcement investigation exemption), § 25-19-105(c) (employee-evaluation and personnel records exemptions), or any other statutory exception, I believe the prosecutor's concerns and request are beyond your consideration as custodian or my authority to review.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge", written in a cursive style.

LESLIE RUTLEDGE
Attorney General

³⁷ See *Watkins, et al.*, *supra* n.6, at 116 (noting that “entities to which the [FOIA] applies—including local governments—may not exempt records via ordinance or administrative regulation absent specific statutory authority to do so”).