STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2021-094

November 17, 2021

Ms. Jessica Looper
Cabot City Attorney's Office
101 North Second Street
Cabot, AR 72023

Dear Ms. Looper:

You have requested my opinion regarding the Arkansas Freedom of Information Act ("FOIA"). Your request, which is made as the custodian of the 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 Cabot ("City") has received a request under the FOIA for records of a former employee. You have attached several documents that you believe are responsive to the request and that you have determined are subject to release under the FOIA. The subject of the records objects to their release. You ask whether your decision to release the records is consistent with the FOIA. Additionally, you ask whether the records' references to certain medical information should be redacted.

**RESPONSE**

Having reviewed the records at issue, it is my opinion, based on the definitions and standards discussed below, that the custodian has properly classified the records as the former employee's evaluation records. The custodian has determined that these evaluation records meet the applicable test for disclosure. From the face of the records, I cannot say that this decision is inconsistent with the FOIA.

As to your question about whether certain medical information should be redacted from the records, it appears that you have not made an initial decision regarding these potential redactions. Therefore, I cannot opine on whether your decision is consistent with the FOIA. However, I can anticipate based on the face of the records that any potential basis for redacting such information would fall outside the scope of my statutory review.

## 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 Cabot, 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.

In this case, the custodian has determined that the records at issue are employee-evaluation records. In my opinion, this determination is consistent with the FOIA. Accordingly, I will limit my discussion to the definitions and standards for records of that type.

The FOIA itself does not define "employee evaluation or job performance records."[7] 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

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

evaluate the employee (3) that detail the employee's performance or lack of performance on the job.[8] This exception includes records generated while investigating allegations of employee misconduct that detail incidents that gave rise to an allegation of misconduct.[9] This office has also long-opined that it includes letters notifying employees of disciplinary action if the letters include the reason(s) for the action.[10]

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.[11]

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).[12]

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

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[8] *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.

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

[10] *E.g.*, Ops. Att'y Gen. 2020-061 (and opinions cited therein).

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

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

> 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.[13]

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,[14] 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.[15]

## III. Application.

The records at issue in this case include a letter of suspension and a notice of termination, as well as supporting documentation detailing the conversations and events leading up to the former employee's termination. This office has opined that letters notifying employees of disciplinary action constitute employee-evaluation records if they contain the reasons for the action.[16] These letters contain such reasons for the disciplinary actions taken; thus, they are properly classified as employee-evaluation records. With respect to the supporting documentation, these records appear to have been generated as a result of an

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

[14] *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").

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

[16] *See supra* n.10.

investigation into the former employee's alleged misconduct.[17] Accordingly, they are also properly classified as employee-evaluation records. Consequently, the disclosure of the records at issue must be evaluated under the above four-part test.

In this instance, it seems clear that the first three elements are met. As for the fourth—the "compelling interest" element—various factors bear on the analysis, including the employee's rank in the hierarchy and the existence of a public controversy. But the very fact that the employee at issue is a firefighter creates a relatively strong public interest in his conduct. This office has previously observed that firefighters constitute a category of public servant very similar to policemen in terms of their direct importance to the general public.[18] I believe consideration must be given to the potential public impact of the misconduct at issue, regardless of the employee's rank within the fire department.

Additionally, the absence of public controversy in some circumstances establishes little with respect to whether a compelling public interest exists.[19] It is far more pertinent to the analysis that disciplinary action resulted from a violation of policies and rules aimed at conduct that could undermine the public trust, compromise public safety, or both.[20] This office has consistently opined that the violation of such a rule in itself gives rise to a compelling public interest in disclosure of employee-evaluation records.[21]

In this case, the former employee's termination was the culmination of a number of infractions, some of which could be described as jeopardizing public safety. Thus, while the existence of a compelling public interest in the release of a particular record is always a question of fact that must be determined in light of all the surrounding circumstances, I believe the policy violations detailed in the records at issue could reflect a degree of misconduct sufficient to generate a compelling public interest in disclosure. Accordingly, I cannot say the custodian's decision to release the records at issue is inconsistent with the FOIA.

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[17] *See supra* n.9.

[18] *See* Ops. Att'y Gen. 2009-020, 2008-065, 2005-175.

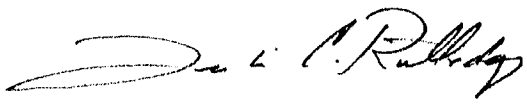
[19] *See* Op. Att'y Gen. 2014-122 (rejecting the notion that the mere absence of public controversy requires that a record be withheld, given that the public may simply be unaware of the underlying episode giving rise to the controversy).

[20] *See* Op. Att'y Gen. 2017-063 (and opinions cited therein).

[21] *Id.*

Finally, you ask whether the records' references to certain medical information should be redacted. I understand this question to be asking about references to medical information in the employee-evaluation records themselves and not to the two attachments mentioned by one of the supporting documents.[22] It appears that you have not made an initial decision regarding whether to redact these references from the records. Therefore, I am unable to opine on whether your decision is consistent with the FOIA. However, I can anticipate based on the face of the records that any potential basis for redacting such information would fall outside the scope of my statutory review.

Sincerely,



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Attorney General

[22] One of the supporting documents states that a medical test and a doctor's note are attached. You have not provided copies of these documents, and I presume the custodian has determined that these documents are medical records that should be withheld from release, pursuant to section 25-19-105(b)(2).