



February 15, 2013

Ms. Jennifer Cook
Ms. Tracie Dungan
Ms. Lisa Hammersly
Arkansas Democrat-Gazette
2560 North Lowell Road
Springdale, AR 72764

Dear Ms. Cook, Ms. Dungan, and Ms. Hammersly:

As you are aware, the University of Arkansas has previously declined to release certain records pertaining to University employees in response to recent requests under the Arkansas Freedom of Information Act (FOIA) issued by the Arkansas Democrat-Gazette and other media outlets. Those records have become the subject of a lawsuit filed in Pulaski County Circuit Court, *Dungan v. Diamond*, No. 60CV-13-666.

The University continues to believe that all records withheld, including, but not limited to, the October 19, 2012 memorandum prepared by Ms. Jean Schook, University of Arkansas Associate Vice Chancellor and Treasurer, and the responses of Mr. Brad Choate and Ms. Joy Sharp to Ms. Schook's October 19, 2012 memo, have been correctly identified as "employee evaluation or job performance records," and therefore exempt from disclosure under Ark. Code Ann. § 25-19-105(c)(1), which provides as follows:

(c)(1) Notwithstanding subdivision (b)(12)¹ of this section [pertaining to personnel records generally], *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.

¹ Ark. Code Ann. § 25-19-105(b)(12) exempts "[p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy." This exemption is separate and distinct from the applicable exemption for "employee evaluation or job performance records."

As you know, the Arkansas Supreme Court has identified two primary reasons for this exemption. First, the exemption protects the privacy of individual employees. Second, the exemption promotes and encourages candor and honesty in the assessment of an employee's performance. As explained by leading scholars on FOIA, this exemption "reflects the public interest in maintaining an effective public employee evaluation system as well as the privacy interests of employees." John J. Watkins & Richard J. Peltz, *The Arkansas Freedom of Information Act* at 196 (4th ed. 2004) (footnote to AG Opinions omitted) ("Watkins & Peltz").

"[E]mployee evaluation or job performance records" have been defined in AG opinions and court decisions as "any records that were created by or at the behest of the employer and that detail the performance or lack of performance of the employee in question with regard to a specific incident or incidents" *Thomas v. Hall*, 2012 Ark. 66, 2012 WL 503879 at *8-*9 (Feb. 16, 2012). In particular, the Attorney General has issued numerous opinions identifying "a variety of records" falling within the meaning of a "job performance record," including the following:

[W]ritten reprimands and letters of caution, documents recommending dismissal or suspension or forming a basis for dismissal, documents recommending dismissal or suspension or forming a basis for dismissal, a document containing an employee's rebuttal of reasons advanced for termination, records created in connection with investigations into alleged employee misconduct, letters of commendation, records related to promotion or demotion, and records of disciplinary action.

Watkins & Peltz at 197 (footnotes & citations to AG Opinions omitted). The records at issue, including, but not limited to, Ms. Schook's memo and the responses, fall within the meaning of an "evaluation or job performance record" under FOIA as interpreted and applied as a matter of law.

The records at issue reflect a review undertaken at the request of senior university officials and directly address and assess the performance or lack of performance of Mr. Choate and Ms. Sharp, and Chancellor Gearhart relied on these assessments in evaluating and reassigning these employees' job duties. Moreover, the records at issue have been maintained as part of the employees' personnel records. The records at issue provide candid comments about the performance or lack of performance of these employees.

After reviewing Ms. Schook's memo, the two employees' responses, and other materials at issue, as well as their years of highly commendable and productive service to the University, Dr. Gearhart evaluated their job performance or lack of performance and took all employment actions he believed were necessary and appropriate in response to the matter. Given that neither employee was terminated or suspended, the records at issue are not subject to disclosure under Ark. Code Ann. § 25-19-105(c)(1).

However, Mr. Choate and Ms. Sharp have today notified the University that they authorize the release of all pertinent records. Accordingly, attached to this letter the University is providing records specifically identified in the lawsuit, as well as other records covered by previous FOIA requests, but which were exempt from disclosure (in whole or in part) under the job performance records exemption.

From the beginning of this matter, the University has expressed its desire to be forthcoming regarding the facts and circumstances involving overspending in its Advancement Division. We are pleased that the University can now share these records with you and others who may wish to review them without violating the legal rights of these public employees or the applicable law.

The University's legal counsel is sharing this information with your counsel. Please let me know should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John N. Diamond". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

John N. Diamond
Associate Vice Chancellor
University Relations

Attachments