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October 25, 2013

Sgt. Daniel Grubbs
Fort Smith Police Department
100 S. 10th St.
Fort Smith, AR 72901

Re: FSPD Official AFOIA Response, dated October 24, 2013

Dear Sgt. Grubbs:

Thank you for your effort in compiling the information that I requested pursuant to the Arkansas Freedom of Information Act ("AFOIA"). I have arranged to have the discs picked up from the station today, October 25.

In response to your letter detailing the records that were not released, I am afraid that I find the reasoning insufficient in two specific instances, and I note a potential problem based on the language of your letter generally. I will address each one in turn.

1. Records related to Administrative Action IA No: AA2013-020.

As is relevant to this letter, in denying certain administrative records, you state:

With regards to item (3), a record does not exist for (a.) Major David C. Boyd, Sr.; and current existing records for (b.) Sergeant Gerald Schaefer, (c.) Officer Galen Irving, and (d.) Officer James B. Stanley are directly involved in an ongoing investigation. Therefore, your request is denied.

These records, as noted in my request, were created as part of Administrative Action IA No: AA2013-020, which was closed on July 3, 2013. These statements factored in the evaluation and ultimate termination of Addisen Entmeier from the Fort Smith Police Department. The Arkansas Supreme Court has interpreted “employee evaluation or job performance records” under Ark. Code Ann. § 25-19-105(c) as “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.” *Thomas v. v. Hall*, 2012 Ark. 66, ___ S.W.3d ___. Where the evaluation is complete and results in a termination or suspension, they are subject to disclosure under the AFOIA where there is a compelling public interest. *See* Op. Att’y Gen. No. 2013-104.

I mention all of that to say this: where the employee-evaluation records are otherwise disclosable under Ark. Code Ann. § 25-19-105(c)(1), an agency may not avoid disclosing those records under a separate provision of the AFOIA. These records were created as part of the now-closed Administrative Action, and they were relevant in the ultimate determination to terminate Mr. Entmeier. They are therefore subject to disclosure, and the mere fact that your agency might use them in some other capacity after the fact does not change this. Additionally, the “investigation” exception under Ark. Code Ann. § 25-19-105(b)(6) only applies to undisclosed investigation “of suspected criminal activity.” Thus, to whatever extent these records are being used in an internal, non-criminal investigation, they are not exempt from disclosure.

Furthermore, as legal counsel for Addisen Entmeier, I have a right to all of the documents created in Administrative Action IA No: AA2013-020. *See* Ark. Code Ann. § 25-19-105(c)(2). That provision is one of least ambiguous provisions in the entire AFOIA: “Any personnel or

evaluation records exempt from disclosure under this chapter shall nonetheless be made available to the person about whom the records are maintained or to that person's designated representative."

Addisen Entmeier is the person about whom these records are maintained. "Shall," as used in a statute, indicates mandatory, rather than permissive, action. *See Slusser v. Farm Servs., Inc.*, 359 Ark. 392, 198 S.W.3d 106 (2004) (explaining that a statute's use of the mandatory term "shall" normally creates an obligation impervious to discretion).¹

Based on all of the foregoing, it is clear that the decision to deny my request regarding these statements was in error.

2. Records Related to Investigation of Capt. Haney.

Regarding the records created as part of the investigation and suspension of Capt. Haney, you write:

It is the opinion of this office, backed by the City Attorney's Office, that the record(s), if any, you have requested did not give rise to a compelling public interest. Therefore, your request is denied.

This statement, without more, is insufficient to support a denial of access to records.

The Arkansas Attorney General has explained that whether employee-evaluation records give rise to a "compelling public interest" must be evaluated based on several facts. *See Op. Att'y Gen. No. 2012-149*. The following factors should be considered in determining whether a compelling

¹ I further note that I am the legal representative and designated agent for Sgt. Don Paul Bales, Sgt. Rick Entmeier, and Cpl. Wendall Sampson. Thus, to whatever extent these records are being used in ongoing investigations of any of these men, I am entitled to disclosure of the same under Ark. Code Ann. § 25-19-105(c)(2) in those instances as well.

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. *Id.* Thus, it is perhaps instructive to review the factual background underlying the records that I requested.

Emily Haney was the subject of an internal investigation for actions that need not be recounted in this letter, except to say that some amount of public funds were alleged to be involved. Ms. Haney resigned her position from the FSPD prior to the conclusion of the investigation, and the investigation was closed. Subsequently, Capt. Haney—Emily's husband—improperly accessed certain FSPD computer files related to the investigation of his wife. An internal investigation of Capt. Haney was commenced, and Capt. Haney was ultimately suspended without pay.

Applying these facts to the “compelling public interest” test above, it seems clear that a police captain's improper access of police computer files dealing with his own wife's improper conduct is a breach of the public trust; the public has an expectation that the police will not use their authority and position for personal benefit or to satisfy personal curiosity about matters that are not within their purview. Alan Haney's position within the FSPD also cuts strongly against a determination that there is not a compelling public interest in these records; he is one of the highest-ranking officers within the Patrol Division, which the FSPD website explains as “provid[ing] around the clock police services throughout the city.” As a high-ranking member of the division that interacts most closely with the public on a daily basis, this also supports the idea that Capt. Haney's breach undermines the public trust.

Whether there is “a public controversy related to the agency and its employees” is ambiguous at this point, but that prong of the test is not dispositive. Indeed, given that the stated purpose of the AFOIA is “making it possible for [citizens] or their representatives to learn and to report fully the activities of their public officials,” where the records being requested could in and of themselves create a public controversy, it is antithetical to the AFOIA to hide behind the lack of a current controversy to deny a request.

In short, if the FSPD’s position is that there is no compelling public interest in releasing these records, it takes more than a simple statement of that conclusion to satisfy the disclosure requirements of the AFOIA. Accordingly, the FSPD should either more fully explain the decision not to release the records, or they should provide the records as requested.

3. Other Potential Issues.

While I have not yet reviewed the CDs containing the released records, I note one potential problem with your statement, “Any redacted information from emails are in accordance with exemptions provided by the Arkansas Freedom of Information Act; specifically [...] (12) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.” While the FOIA does not define the phrase “clearly unwarranted invasion of personal privacy,” the Arkansas Supreme Court has provided some guidance. *See Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992). 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. *See id.* The balancing takes place with a thumb on the scale favoring disclosure. Op. Att’y Gen. No. 2013-104.

Importantly, 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. *Id.* The fact that the subject of any such records may consider release of the records an unwarranted invasion of personal privacy is irrelevant to the analysis because the test is objective. *Id.*

To that end, where redaction or non-disclosure of records is based on the privacy interest in personnel records, the FSPD must be able explain why the privacy interest is outweighed by the public’s interest in disclosure. *See generally id.* Hopefully, this will not be an issue when I review the records, but I wanted to bring it to your attention on the front end so that everyone was on the same page.

In conclusion, it is my hope that the FSPD will review the analysis in this letter and correct the failure to disclose certain records as explained herein. Such correction will save everyone involved the time, effort, and expense involved in a judicial review of the decision under Ark. Code Ann. § 25-19-107. I have copied Chief Kevin Lindsey and City Attorney Jerry Canfield on this letter.

Please let me know if I can answer any further questions regarding this matter. I will expect the FSPD’s revised decision, if any, no later than close-of-business on Monday, October 28, 2013.

Sincerely,

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

Matthew D. Campbell

Cc: Kevin D. Lindsey, Chief of Police
Jerry L. Canfield, Fort Smith City Attorney