

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS

VI DIVISION

MATTHEW CAMPBELL

FILED
FT. SMITH DIST.

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Jusi Hammett
CLERK SEB. CO.
PLAINTIFF

CV-13-1051

No. CV-13-_____

FORT SMITH POLICE DEPARTMENT;

DEFENDANTS

CHIEF KEVIN LINDSEY, in his official capacity as chief
of police; AND

JERRY L. CANFIELD, in his official capacity as city attorney
for the City of Fort Smith

AFOIA COMPLAINT AND REQUEST FOR HEARING

1. This is an appeal from a denial of rights under the Arkansas Freedom of Information Act ("AFOIA") pursuant to Arkansas Code Annotated § 25-19-107(a).

Parties, Jurisdiction, and Venue

2. Plaintiff Matthew Campbell is an adult citizen of the State of Arkansas, whose address is [REDACTED]; he brings this appeal as a matter of right under Arkansas Code Annotated § 25-19-107.
3. Defendant Fort Smith Police Department ("FSPD") is a governmental agency or other public office duly existing under the law of Arkansas, with headquarters located at 100 S. 10th St., Fort Smith, AR 72901; FSPD is tasked with providing, upon proper request, access to public records as defined in Arkansas Code Annotated § 25-19-103(5)(a), subject to any

exclusions in Arkansas Code Annotated § 25-19-105(b) and/or limitations in Arkansas Code Annotated § 25-19-105(c) or other statutory provisions. *See* Ark. Code Ann. §§ 25-19-105(d)(1) to -105(d)(2).

4. Defendant Kevin Lindsey is, and was at all times relevant to this Complaint, the Chief of Police for the FSPD, exercising supervisory control over the release of public records by the custodian of records; he may be served in his official capacity at 100 S. 10th St., Fort Smith, AR 72901.
5. Defendant Jerry L. Canfield is, and was at all times relevant to this Complaint, the city attorney for Fort Smith, and his advice to Defendants FSPD and Lindsey was relevant in the decision to deny a portion of Plaintiff's AFOIA request.
6. It is the standing practice of the FSPD to have Sergeant Daniel Grubbs respond to AFOIA requests, making Grubbs a custodian of records as defined Arkansas Code Annotated § 25-19-103(1)(A).
7. This court has subject-matter jurisdiction pursuant to Arkansas Code Annotated section 25-19-107(a).
8. Venue lies in Sebastian County, Arkansas. *See* Ark. Code Ann. § 25-19-107(a).

Factual Background

9. Emily Haney, wife of FSPD Captain Alan Haney, previously worked for the FSPD as a dispatcher, a role in which she served in a supervisory capacity for other dispatchers.
10. On information and belief, Plaintiff asserts that, in February or March of 2011, Ms. Haney's supervisor noticed that Ms. Haney had been engaging in a questionable use of overtime for

herself and other employees in the dispatch unit, including, but not limited to, personally approving overtime for herself and others without getting approval from a supervisor and claiming overtime hours for work done during normal working hours; Ms. Haney's supervisor informed his supervisors about this use of overtime.

11. On May 25, 2011, an internal investigation was opened against Ms. Haney due to an argument with another FSPD dispatch employee, Kelly Smalley. On information and belief, Plaintiff asserts that Ms. Smalley's complaint about Ms. Haney and/or Ms. Smalley's statement made during the investigation of the complaint referenced Ms. Haney's inappropriate use of overtime hours.
12. During the investigation of Ms. Haney, a number of officers and employees of the FSPD were interviewed regarding Ms. Haney's behavior, and, on information and belief, Plaintiff asserts that at least one of the interviewed officers referenced Ms. Haney's profligate use of overtime for herself and certain other employees.
13. The investigation of Ms. Haney was closed as "Not Sustained" on July 1, 2011; despite the "Not Sustained" finding on the internal investigation, Ms. Haney resigned barely three weeks later on July 25, 2011.
14. Subsequent to her resignation, Captain Haney, in his private capacity, submitted an AFOIA request for the records related to the investigation of Emily Haney, and this request was denied by FSPD.

15. Following the denial of the AFOIA request, Captain Haney accessed the FSPD computer files containing the records he had previously requested, and he did so without authorization from the FSPD.
16. On March 16, 2012, an internal investigation was commenced regarding Captain Haney's unauthorized access of the computer files; this investigation was closed on April 3, 2012, and Captain Haney was suspended without pay as a result of the investigation.
17. On October 17, 2013, Plaintiff submitted via facsimile (Exhibit 1) an AFOIA request to Defendant FSPD, in care of Defendant Lindsey's office, requesting, *inter alia*, "Copies of all reports, memoranda, and other documentation related to the investigation of Capt. Alan Haney's unauthorized access of computer records related to the investigation of Emily Haney."
18. On October 20, 2013, Sergeant Grubbs, in his official capacity as custodian of records, contacted Plaintiff and informed Plaintiff that the AFOIA request had only been "discovered" in the fax system that day; Plaintiff allowed an additional two days for compliance with the request, making all materials due to Plaintiff by October 24, 2013.
19. On October 24, 2013, Sergeant Grubbs informed Plaintiff that the records were available for pick up, and he sent Plaintiff, via email (Exhibit 2), a letter detailing the reasons for denial of a portion of Plaintiff's request.
20. In Sergeant Grubbs' letter, he stated with respect to the requested records regarding Captain Haney:

According to A.C.A. 25-19-105 - Examination and copying of public records: (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. 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.

21. Plaintiff responded via letter (Exhibit 3) to Sergeant Grubbs, Defendant Lindsey, and Defendant Canfield the following day, explaining Plaintiff's position regarding the "compelling public interest" and pointing the parties in the direction of certain Opinions of the Arkansas Attorney General in support of Plaintiff's position.

22. Sergeant Grubbs contacted Plaintiff via telephone later that day, reiterating Defendants' position that there was no compelling public interest in records related to a police captain's unauthorized access of FSPD computer files regarding the investigation and termination of his wife, and Sergeant Grubbs said that Defendant Canfield had again agreed with this determination.

23. On October 29, 2013, Plaintiff, acting in his official capacity as attorney for certain current and former FSPD officers, contacted Defendant Lindsey and inquired as to whether Defendant Lindsey or Defendant FSPD planned to investigate the allegations regarding Emily Haney and possible misuse of state funds through improper use of paid overtime; Defendant Lindsey stated, in pertinent part:

I'm not gonna go back two years on something like that. The employee's no longer here, the prosecutor won't do anything if there's any criminal activity, and it's not worth my time or trouble to go back two years on an internal complaint like that.

24. No other explanation was given by Sergeant Grubbs, Defendant Lindsey, or Defendant Canfield for their position that there was not a “compelling public interest” in the requested records.

Claim: Failure to Properly Disclose Records under the AFOIA.

25. Plaintiff restates and realleges the facts and allegations contained in the preceding paragraphs as if fully set out herein.

26. For nearly forty-five years, Arkansas courts have liberally construed the AFOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner, and they have broadly construed the AFOIA in favor of disclosure. *See Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004); *see also Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (wherein the Arkansas Supreme Court had “no hesitation in asserting our conviction that the Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved”).

27. In the context of releasing employee-evaluation records under Arkansas Code Annotated § 25-19-105(c)(1), 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 factors to be evaluated, generally speaking, are (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.*

28. Importantly, the Attorney General has explained, “[t]he public has a great interest in the performance of police officers and other law enforcement officials, and in this case the ‘cop on the beat’ is just as important as the chief of police.” *See* Op. Att’y Gen. No. 2008-065 (citing Watkins & Peltz, “The Arkansas Freedom of Information Act” (4th ed. M&M Press, 2004) at 207).
29. There is clearly a violation of the public trust where, as here, a police captain uses his position within the department to gain unauthorized access to records that he was already denied access to under the AFOIA; 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.
30. Captain 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 describes 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 and that the public has a compelling interest in knowing of such behavior. *See* Op. Att’y Gen. No. 2008-065.

31. Whether there is “a public controversy related to the agency and its employees” is a question of fact, but “the burden does not fall on the requester to prove the existence of such an interest.” *See* Op. Att’y Gen. No. 1998-210.
32. The Attorney General has explicitly noted that a “compelling public interest” is likely to exist where a police officer violates “administrative rules and policies aimed at conduct which could undermine the public trust and/or compromise public safety.” *See* Op. Att’y Gen. Nos. 2006-158 & 2006-106; *see also* Op. Att’y Gen. No. 2004-212 (noting that the public has a compelling interest in knowing about misconduct by a public employee exercising law-enforcement powers, as it does in knowing how quickly and forcefully the department responded to the misconduct).
33. Moreover, 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. *See* Ark. Code Ann. § 25-19-102.

Prayer for Relief

WHEREFORE, based on the foregoing, Plaintiff prays that this Court will:

34. Find that Defendants failed to comply with the AFOIA with respect to the records of the investigation of Captain Alan Haney, as referenced in Plaintiff’s October 17, 2013 request.
35. Order that Defendant fulfill Plaintiff’s request as required by state law.

36. Fix and assess a day the petition is to be heard within seven (7) days of the date of this application, and hear and determine the case as required by Arkansas Code Annotated section 25-19-107(b).

37. Order any other relief that this Court deems proper.

Respectfully submitted,

Pinnacle Law Firm, PLLC
212 Center St., 11th Floor
Little Rock, AR 72201
(501) 396-9246

By: 

Matthew D. Campbell, ABA #2009032
Attorney for Plaintiff

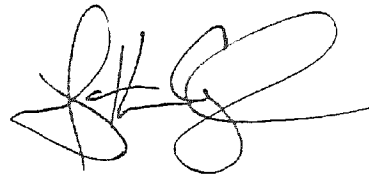
CERTIFICATE OF SERVICE

I, Matthew D. Campbell, hereby certify that a true and correct copy of this complaint and a summons will be served via U.S. Mail, return receipt requested, upon the following parties as of the date of issuance of the summons by the Clerk of this Court:

Fort Smith Police Department
c/o Chief Kevin Lindsey
100 S. 10th St.
Fort Smith, AR 72901

Chief Kevin Lindsey
Fort Smith Police Department
100 S. 10th St.
Fort Smith, AR 72901

Mr. Jerry Canfield
Fort Smith City Attorney
58 S. 6th St.
Fort Smith, AR 72901

A handwritten signature in black ink, appearing to be 'MDC', written over a horizontal line.

Matthew D. Campbell

PINNACLE LAW FIRM
A PROFESSIONAL LIMITED-LIABILITY COMPANY
212 CENTER ST., 11TH FLOOR
LITTLE ROCK, ARKANSAS 72201

Matthew D. Campbell
matt@pinnaclelawfirm.com



P: (501) 396-9246
F: (501) 421-0189

October 17, 2013

Chief Kevin D. Lindsey
Fort Smith Police Department
100 South 10th Street
Fort Smith, AR 72901
Fax: 479-783-2356

VIA FACSIMILE

Re: Freedom of Information Request

Dear Chief Lindsey:

Pursuant to the Arkansas Freedom of Information Act ("AFOIA"), Ark. Code Ann. § 25-19-101 to -110, I request copies of the following public records held by the Fort Smith Police Department:

1. Electronic copies of all emails sent or received between March 1, 2013, and October 15, 2013, by:
 - a. Chief Kevin Lindsey
 - b. Patrol Major David Chris Boyd, Sr.
 - c. Patrol Captain Edward Smalley
 - d. Sergeant Brandon Bird
 - e. Patrol Captain Alan Haney
 - f. Patrol Sergeant Dewey Young
 - g. Patrol Sergeant Gerald Schaefer
 - h. Patrol Sergeant Chris Harris
2. Electronic copies of all documents related to Administrative Action IA No: AA2013-020, including, but not limited to:
 - a. Entmeier March 28 (doc)
 - b. Entmeier June 7 (doc)
 - c. Entmeier Milan Special training session (docx)
 - d. EntmeierBird bad arrest (doc)

- e. Crystal Cunningham arrest part 1 (doc)
 - f. Crystal Cunningham narrative (doc)
 - g. Entmeier June 21 (doc)
 - h. Bird's Memo (docx)
 - i. Young's Memo (docx)
 - j. Sergeant Harris' Memo (DOC)
3. Copies of any other statement, whether electronic, written, or recorded, provided by the following Fort Smith Police Department personnel regarding Administrative Action IA No: AA2013-020:
- a. Major David C. Boyd Sr.
 - b. Sergeant Gerald Schaefer
 - c. Officer Galen Irving
 - d. Officer James B. Stanley
4. Copies of all cell phone records for Department-issued cell phones from March 1, 2013, to October 15, 2013, for the following:
- a. Major Chris Boyd, Sr.
 - b. Major Mark Hallum
 - c. Captain Alan Haney
 - d. Captain Jarrard Copeland
 - e. Sergeant Gerald Schaefer
 - f. Sergeant Dewey Young
 - g. Sergeant Brandon Bird
 - h. Detective Corporal Greg Smithson
5. Copies of any and all statements, reports detailing statements, and recordings of Addisen Entmeier that Mr. Entmeier provided to the Office of Professional Standards regarding an investigation of Emily Haney.
6. Copies of any and all recordings of all counseling sessions of Addisen Entmeier, including the counseling session on June 10, 2013, as well as the session on June 7, 2013. (A release for Mr. Entmeier's personnel file and other records is enclosed.)
7. Copies of all "L3" Video & Audio recordings made by Addisen Entmeier on March 25, 2013.
8. Copies of all reports, memoranda, and other documentation related to the investigation of Capt. Alan Haney's unauthorized access of computer records related to the investigation of Emily Haney.

Where electronic copies are requested, this request is made pursuant to Ark. Code Ann. § 25-19-105(d)(2)(B), which provides, "A citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible

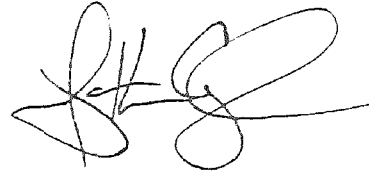
with the custodian's existing software." Those electronic copies may be provided via email or on a CD or flash drive.

If this request, or any portion thereof, is denied, please cite the specific provision of the AFOIA that you rely upon as a basis for that denial. Prior to denying any of the requests, especially the records referenced in number 8, I strongly suggest you review the Attorney General's opinions regarding AFOIA exemptions in order to avoid any protracted .

I further request that all of this information be provided within the time-frame defined in Ark. Code Ann. § 25-19-105(e), which provides for immediate disclosure of available records and three-day disclosure of records that are "in active use or storage and therefore not available at the time" of a request.

These records may be faxed to (501) 421-0189 or emailed to matt@pinnadelawfirm.com, or I will arrange to have them picked up when they are ready. If there are any questions regarding this request, please contact me at (501) 396-9246.

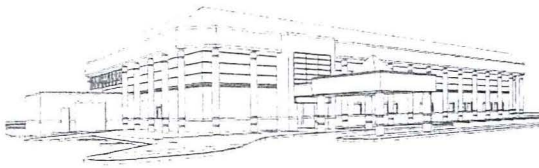
Sincerely,

A handwritten signature in black ink, appearing to read 'Matt Campbell', with a stylized, cursive script.

Matthew D. Campbell

Encl.: A. Entmeier release

Cc: Scott Lauck
Chet Lauck
Addisen Entmeier



Fort Smith Police Department
100 South 10th Street
Fort Smith, Arkansas 72901
Phone: (479) 785-4221
Fax: (479) 783-2356

EXHIBIT

2

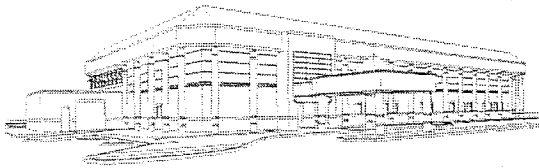
October 24, 2013

Pinnacle Law Firm
Matthew D. Campbell
212 Center Street, 11th Floor
Little Rock, Arkansas 72201

Dear Mr. Campbell:

This letter is in response to your request, dated October 17, 2013, and received by my office on October 22, 2013, in which you requested; "...copies of the following public records held by the Fort Smith Police Department:

1. *Electronic copies of all emails sent or received between March 1, 2013, and October 15, 2013, by:*
 - a. *Chief Kevin Lindsey*
 - b. *Patrol Major David Chris Boyd, Sr.*
 - c. *Patrol Captain Edward Smalley*
 - d. *Sergeant Brandon Bird*
 - e. *Patrol Captain Alan Haney*
 - f. *Patrol Sergeant Dewey Young*
 - g. *Patrol Sergeant Gerald Schaefer*
 - h. *Patrol Sergeant Chris Harris*
2. *Electronic copies of all documents related to Administrative Action IA No: AA2013-020, including, but not limited to:*
 - a. *Entmeier March 28 (doc)*
 - b. *Entmeier June 7 (doc)*
 - c. *Entmeier Mila[m] Special Training session (docx)*
 - d. *Entmeier Bird bad arrest (doc)*
 - e. *Crystal Cunningham arrest part 1 (doc)*
 - f. *Crystal Cunningham narrative (doc)*
 - g. *Entmeier June 21 (doc)*
 - h. *Bird's Memo (docx)*
 - i. *Young's Memo (docx)*
 - j. *Sergeant Harris' Memo (DOC)*
3. *Copies of any other statement, whether electronic, written, or recorded, provided by the following Fort Smith Police Department personnel regarding Administrative Action IA No: AA2013-020:*
 - a. *Major David C. Boyd Sr.*

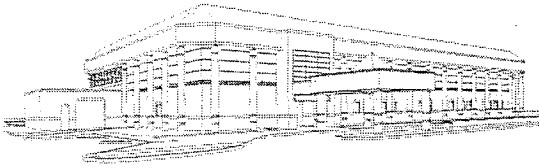


Fort Smith Police Department
100 South 10th Street
Fort Smith, Arkansas 72901
Phone: (479) 785-4221
Fax: (479) 783-2356

- b. *Sergeant Gerald Schaefer*
- c. *Officer Galen Irving*
- d. *Officer James B. Stanley*
- 4. *Copies of all cell phone records for the Department-Issued cell phones from March 1, 2013, to October 15, 2013, for the following:*
 - a. *Major Chris Boyd, Sr.*
 - b. *Major Mark Hallum*
 - c. *Captain Alan Haney*
 - d. *Captain Jarrard Copeland*
 - e. *Sergeant Gerald Schaefer*
 - f. *Sergeant Dewey Young*
 - g. *Sergeant Brandon Bird*
 - h. *Detective Corporal Greg Smithson*
- 5. *Copies of any and all statements, reports detailing statements, and recordings of Addisen Entmeier that Mr. Entmeier provided to the Office of Professional Standards regarding an investigation of Emily Haney.*
- 6. *Copies of any and all recordings of all counseling sessions of Addisen Entmeier, including the counseling session on June 10, 2013, as well as the session of June 7, 2013.*
- 7. *Copies of all "L3" Video & Audio recordings made by Addisen Entmeier on March 25, 2013.*
- 8. *Copies of all reports, memoranda, and other documentation related to the investigation of Capt. Alan Haney's unauthorized access to computer records related to the investigation of Emily Haney."*

The information you requested has been researched and provided in cooperation with the Office of Professional Standards and the Office of Public Affairs. With regards to item(s) (1), all available records have been provided electronically as requested. The records were supplied, per our phone conversation on Tuesday, October 22, 2013 at 12:00 pm, to only include emails during the specified time frame involving: Addisen Entmeier, Rick Entmeier, Don Paul Bales, Wendell Sampson, and Emily Haney. Regarding item (2), all associated records have been provided electronically as requested. 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. Regarding item (4), all available associated records have been provided electronically as requested, with the exception of records for October, which have not been released by our wireless provider. Regarding item (5), all associated records have been provided electronically as requested. Regarding item (6), recordings of counseling sessions for June 7th and June 10th do not exist. The only recorded counseling session occurred on June 21st, and has been provided electronically as requested. Regarding item (7), all associated records have been provided electronically as requested.

With regards to item (8), According to **A.C.A. 25-19-105 - Examination and copying of public records: (c)(1) Notwithstanding subdivision (b)(12) of this section, all employee**



Fort Smith Police Department
100 South 10th Street
Fort Smith, Arkansas 72901
Phone: (479) 785-4221
Fax: (479) 783-2356

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. 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.

Any redacted information from emails are in accordance with exemptions provided by the Arkansas Freedom of Information Act; specifically, (6) Undisclosed investigations by law enforcement agencies of suspected criminal activity, (12) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy, and (c) (1) 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. All other redactions are in accordance with Federal and State Privacy Laws, i.e., date of birth, drivers' license number, and social security numbers.

Please submit a check made payable to the City of Fort Smith in the amount of \$24.00 (16 CD's / disks @ \$1.50 each). If you have any questions, please contact me.

Thank you.

Sincerely,

Sergeant Daniel Grubbs
Office of Public Affairs
479-709-5141

PINNACLE LAW FIRM
A PROFESSIONAL LIMITED-LIABILITY COMPANY
212 CENTER ST., 11TH FLOOR
LITTLE ROCK, ARKANSAS 72201

Matthew D. Campbell
matt@pinnaclelawfirm.com

P: (501) 396-9246
F: (501) 421-0189

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.

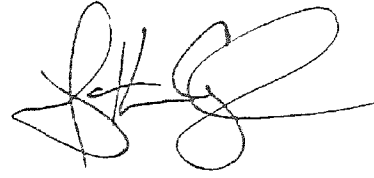
Importantly, because the exceptions must be narrowly construed, the person resisting disclosure bears the burden of showing that, under the circumstances, his privacy interests outweigh the public’s interests. *Id.* The fact that the subject of any such records may consider release of the records an 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 black ink, appearing to read 'M. D. Campbell', with a stylized, cursive script.

Matthew D. Campbell

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