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OPINION NO. 96-07

TO: Jan Graziano, City Clerk

FROM: Steve Kemp, City Attorney

DATE: October 8, 1996

SUBJECT: Employee Appraisal Form

QUESTION:

You have inquired as to whether an employee appraisal form prepared by a former supervisor but never formally presented to the employee constitutes a public record of the City subject to the official record keeping requirements for retention and disposition.

OPINION:

For purposes of this Opinion, the following factual background is provided. The City Clerk's Office had a position of secretary that is subject to supervision by the Deputy City Clerk. A prior Deputy City Clerk prepared a performance appraisal in accordance with the City's Personnel Administrative Regs for the secretary. Prior to giving the performance appraisal to the secretary, the Deputy City Clerk resigned and relocated out-of-state. There was some period of time before a new Deputy City Clerk was recruited. Subsequently, after the recruitment of the new Deputy City Clerk, the performance appraisal prepared by the prior Deputy City Clerk was reviewed with the secretary but never presented as a formal

performance appraisal.
You then inquired from the Human Resources Department as to the proper method of this appraisal to be handled. The Human Resources Department indicated that the appraisal should be transferred for placement in a sealed confidential file. Recently, based on discussions with the Deputy City Manager, you requested removal of the document from Human Resources and have placed the document in the City's Executive Session confidential minutes safe.

The unpresented performance appraisal has been the subject of two grievances and numerous correspondence back and forth between the City Clerk, Deputy City Clerk, Councilmembers and the Deputy City Manager and City Manager. It has also been referred to by documentation prepared by the employee during the current evaluation process and the grievance process. At this time, the employee has now requested that the document be destroyed and not retained as a public record.

The starting place for any public records determination is the definition of a public record. Arizona Law does not provide for a specific definition of a public record. However, Arizona court decisions have held a public record is a document or memorandum prepared by a public employee in the course of performing their official duties.

The question of whether a document is a public record is critical, for if a document is a public record, it may be subject to specific retention standards established by the Department of Library Records and Archives for the State of Arizona and implemented by the City. If a document is not a public record, then it is not subject to these retention requirements and may be handled as any document that the City may create for non-public record purposes. In essence, the document may be destroyed or retained as the City deems appropriate.

The first question that arises is whether this document constitutes a valid performance appraisal. If the answer is yes, then a performance appraisal must be retained in the personnel file in the manner required by the Department of Library Records and Archives under the City's retention schedule.

The City's Personnel Administrative Regulations provide for performance appraisals that they must be completed by the supervisor or department head, presented to the employee, the employee given an opportunity to comment on the performance appraisal and then the performance appraisal be transmitted to the personnel file for record keeping. In this case, based on the circumstances that the supervisor who prepared the performance appraisal is unavailable and that the performance appraisal was

never presented to the employee, it would be our opinion that the document does not constitute a valid performance appraisal and therefore is not required to be retained under the retention schedule for public records of the City as a performance appraisal.

The question then becomes whether a document constitutes some other form of public record. In this case, the only type of public record that this document would appear to be would be supervisory notes. Although the City's Personnel Administrative Regulations do not specifically refer to supervisory notes, it would be anticipated in the normal course of supervising employees that a supervisor, in performing their duties, would establish one or more notes documenting certain actions or performance of an employee. These supervisory notes are generally not transmitted to Human Resources but maintained in a separate departmental file on the employee. The City's Personnel Regulations do not address departmental or supervisory personnel files other than to indicate that official City documents must be filed in the Human Resources file on the employee.

The concept of individual supervisory files or departmental files is generally recognized as an appropriate mechanism since there are many supervisory notes which do not constitute City-wide documents but may be relied upon by a supervisor in their ongoing supervision of an employee. The practice is not much different than the concept of making a variety of individual notes for memoranda on a variety of official duties an individual may have to perform. Such memoranda serves the purpose of simply documenting or reminding the individual regarding particular aspects of a matter which they may be responsible for but not documenting the official actions taken.

Therefore, it would be our opinion that a performance appraisal that was created by a supervisor who is no longer available, but not presented to the employee, would constitute a form of supervisory notes. The question then becomes whether such notes may be retained or destroyed in accordance with the Public Records Law. In reviewing the City's records retention schedule, there is no specific reference to supervisory notes under the personnel records section. Nor is there any specific reference to notes or memoranda in general.

It would be the opinion of this office that the creator of such documents may retain or destroy such documents as they determine to be appropriate in the course of their official duties provided the document does not make specific reference to an official act which they are responsible for taking. The problem in this case becomes whether a document that is referred to in several other public records becomes a source document for those public records

and therefore must be maintained. The definition of a source document is a document that contains the basic information and material on which the public record is created. The test for whether an item becomes a source document to a public record that requires it be maintained in the same manner as a public record is a case by case analysis.

The fundamental starting point is whether the source document so central to the existence of the public record that the governmental function served by the maintenance of the public record would be significantly impacted by the non-existence of the source document. It must be concluded that if the official duty to be memorialized by the public record cannot be done without the maintenance of the source document, then the source document must be maintained.

Therefore, the question becomes for this matter whether the official duty in preparing a performance appraisal, in resolving grievances and in reviewing the various memorandum sent to the City Manager and City Council as part of the grievance process can be done without the maintenance of this incomplete performance appraisal of the source document, then it would be our opinion that the incomplete performance appraisal does not constitute a public record.

[1]

In this case, prior evaluation would not appear to be needed to maintain the record on the grievance or the subsequent evaluation, both of which would speak for themselves. Therefore, it would be our conclusion that the incomplete evaluation would constitute a supervisory note which absent any provisions in the City's Records Retention Schedule, may be retained or destroyed by the supervisor as the supervisor deems appropriate.

[2]

Therefore, the disposition of the supervisory notes in this case, the incomplete performance evaluation is within the discretion of the City Clerk. If you have any further questions, please feel

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[1] Obviously, if the incomplete performance appraisal were attached as an attachment to a grievance or to an official public record.

[2] No position is taken on the wisdom of destroying supervisory notes versus retention for reference purposes in the event of subsequent litigation. Generally, it would be our position that such notes should be retained for such purposes.

free to contact us.

cc: Honorable Mayor and Council

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