



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

December 21, 1990

Mr. James A. Collins  
Director  
Texas Department of  
Criminal Justice  
Institutional Division  
P. O. Box 99  
Huntsville, Texas 77342-0099

Open Records Decision No. 579

Re: Whether an investigation  
of a sexual harassment com-  
plaint is excepted from public  
disclosure by the Open Records  
Act, article 6252-17a,  
V.T.C.S. (RQ-2048)

Dear Mr. Collins:

You have received a request for "[t]he final report resulting from the complaint of sexual harassment" filed by a certain employee of the Department of Criminal Justice [hereinafter the "department"]. You ask whether the requested information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

You advise that there is no "final report" regarding this matter. You submit for our inspection, as responsive to the request, an extensive collection of documents reflecting the department's investigation into the complaint. Most of these documents are transcripts of some 58 interviews with department employees, including the complainant, the subjects of the accusations, and other employees. Along with the interviews, the file includes an index thereto and a memorandum dated June 23, 1989, explaining and summarizing the investigation. In addition to these materials, the file includes the sexual harassment complaint itself, documents incidental thereto, and medical reports regarding the complainant. We note that the litigation regarding this matter was settled without any factual findings, and no disciplinary action was taken by the department as a result of the complaint.

At the outset, we may dispose of the medical reports. The medical records and summaries thereof are confidential and may not be released. V.T.C.S. art. 4495b, § 5.08. We therefore restrict our further consideration to the complaint itself, the interviews, the memorandum of June 23, 1989, and information incidental thereto.

You assert that the requested information is excepted from public disclosure by common-law privacy as incorporated

into the Open Records Act by section 3(a)(1). Specifically, you assert that the release of the information will (1) invade the complainant's privacy and that of the interviewed employees by disclosing private facts about them, and (2) tend to place those accused of misconduct by the complainant in a false light.

Public disclosure of private facts.

One branch of the common-law right of privacy has been recognized by the Texas Supreme Court as a basis for exception from public disclosure under section 3(a)(1) of the Open Records Act. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The court found that the kind of information that is protected by tort law regarding the invasion of privacy through "the publicizing of one's private affairs with which the public has no legitimate concern" is the "type of information which the Legislature intended to exempt from mandatory disclosure under section 3(a)(1)." Id. at 682-83, citing Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973). The court held that information is excepted from public disclosure if (1) it contains highly intimate or embarrassing facts about a person's private affairs, the release of which would be highly objectionable to a person of ordinary sensibilities, and (2) it is of no legitimate interest to the public. Industrial Foundation, supra, at 683-85.<sup>1</sup>

In Open Records Decision No. 339 (1982), the attorney general found that common-law privacy protected the name of every victim of a serious sexual offense as well as information which might furnish a basis for identification of the victim.<sup>2</sup> That opinion states, "Although there is certainly a strong public interest in knowing that a crime has been committed, we do not believe that such interest requires the disclosure of the names of the victims." In Open Records Decision No. 393 (1983), the exception for private facts was

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1. The third element of the tort of public disclosure of private facts, publicity, is met by a governmental body making information available for public inspection. Industrial Foundation, supra, at 684.

2. See also the discussion of the confidentiality of the names of rape victims in Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989), a diversity case applying Texas law.

applied to statements of complainants, witnesses, and informants regarding an investigation of sexual abuse. In that decision the attorney general found that information tending to identify the victims was so inextricably intertwined with the remainder of the report as to render separation not feasible. However, in Open Records Decision No. 438 (1986), a city employee made an "application for complaint" (i.e., a request for investigation and prosecution) to the city police concerning an incident involving another city employee which, if true, constituted sexual harassment and assault. The city police recommended against prosecution. However, the employee complained against was administratively disciplined by the city. The attorney general found that, under these facts, common-law privacy would not except from public disclosure the name of the complainant or the allegations in the complaint. In so finding, the opinion states, "While not meaning in any way to downplay the seriousness of these charges, we conclude that they fall far short of alleging the kind of misconduct that must occur to invoke common law privacy under the rationale of Open Records Decision Nos. 393 and 339."

The facts alleged in the complaint and in the interviews are no doubt somewhat embarrassing to some of the individuals involved. However, as recognized in Open Records Decision No. 438, the kind of conduct described in the interviews is not the sort of profoundly personal intrusion that places the privacy of victims of serious sexual offenses in a special context. Moreover, the information relates to an area of public interest, i.e., the working environment and on-the-job conduct of public employees. The public has a legitimate interest in knowing how its business is being conducted. Accordingly, we do not find the requested information to be excepted from public disclosure under the common-law prohibition against public disclosure of private facts. However, the file also contains a photocopy of a Christmas card apparently sent to a department employee by a former department employee. The message on this card meets the test described above for exception from public disclosure as a public disclosure of private facts. The Christmas card and the page describing the card must be withheld.

False light privacy.

Whether certain information is excepted from public disclosure because its release would place a person in a false light in the public eye was first considered by the attorney general in Open Records Decision No. 308 (1982). That opinion assumed, on the basis of Industrial Foundation, that the Texas Supreme Court would hold that the legislature

intended section 3(a)(1) to encompass the false light branch of invasion of privacy tort law. Without setting a standard for the application of the exception, the opinion found that certain requested information regarding the investigation of a licensee was excepted from public disclosure.<sup>3</sup> The next time "false-light privacy" was considered was in Open Records Decision No. 372 (1983). That opinion established a three-part test for the application of the false-light privacy exception, which has been followed in each subsequent attorney general opinion.<sup>4</sup> Under that test, information has been excepted from public disclosure on the basis of false-light privacy if (1) the release of the information would be highly offensive to a reasonable person, (2) public interest in disclosure is minimal, and (3) there exists serious doubt about the truth of the document.<sup>5</sup>

We now question the basic holding of Open Records Decision No. 308 that the law requires us to apply false-light privacy tort law to determinations under section 3(a)(1). Upon review of Open Records Decision No. 308 and the decision in Industrial Foundation, we find that the open records decision did not have a sound basis for concluding

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3. The facts concerning the excepted information were these: (1) the information was communicated to the governmental body by an anonymous source; (2) the governmental body determined the information to be false; (3) the attorney general found the public interest in disclosure of the excepted information to be minimal.

4. Open Records Decision No. 372 described the information found to be excepted from public disclosure in Open Records Decision No. 308 as scurrilous. Open Records Decision No. 470 (1987), no doubt taking its cue from this description, added a fourth criterion for the false-light exception: that the information be scurrilous. This has not been applied as a criterion in any other opinion.

5. In Kneeland v. National Collegiate Athletic Ass'n 650 F. Supp. 1076 (W.D. Tex. 1986), rev'd on other grounds, 850 F.2d 224 (5th Cir. 1988), the court discusses false-light privacy in the context of the Open Records Act, applying the test set forth in Open Records Decision No. 372. See id. at 1085-86. The court found that the defendants had failed to assert the exception with sufficient specificity.

that the supreme court would apply the false light privacy doctrine to section 3(a)(1) cases.

Open Records Decision No. 308 brought false light under section 3(a)(1) on the basis of Industrial Foundation's discussion of the common-law tort of invasion of privacy and the four distinct privacy interests comprising it. Industrial Foundation at 682. However, as noted above, Industrial Foundation actually concerned only the public disclosure of private facts branch of privacy law; mention of the other torts comprising invasion of privacy seems to have been supplied to illustrate Texas' legal recognition of privacy interests. It is one thing to acknowledge the existence of a tort; it is a different matter to rule that information within the tort is confidential.

There is good reason to believe that the court felt that only the "private facts" branch of privacy law is implicated in section 3(a)(1)'s protection for information deemed confidential by judicial decision. The court's analysis clearly ties the statutory language to the particular elements of the public disclosure of private facts tort:

Defendants assert that, if a governmental unit's action in making its files available to the general public would be an invasion of an individual's freedom from the publicizing of his private affairs, then the information in those records should be deemed confidential by judicial decision under Section 3(a)(1) of the Act. We agree. Webster's . . . defines 'confidential' as 'known only to a limited few': not publicly disseminated: PRIVATE, SECRET.' These are precisely the characteristics which information protected by this branch of the tort of invasion of privacy must have. And, we believe that it is this type of information which the Legislature intended to exempt from mandatory disclosure under Section 3(a)(1) of the Act.

Industrial Foundation at 682-83 (emphasis added).

The court held that public disclosure privacy belonged under section 3(a)(1) because the purpose of that tort is to protect confidential information -- secrets -- and so fits the section 3(a)(1) mandate to protect information deemed confidential. On the other hand, the purpose of false light tort law is not to protect private information, but to protect an individual from the dissemination of false

information or impressions concerning herself, whether or not related to the individual's private life. Open Records Decision No. 308 acknowledges this distinction, quoting Prosser:

'the interest protected (by false light) is clearly that of reputation, with the same overtones of mental distress as in defamation.' 'False light' information differs from private information 'in that one involves truth and the other lies, one private or secret facts and the other invention.'

Id. at 2. The gravamen of a false light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, an exception to the Open Records Act focused on the confidentiality of information does not embrace this particular tort doctrine.

Our conclusion that the legislature did not intend this office to make section 3(a)(1) determinations based on false light privacy doctrine is fueled by the difficulties this office has encountered in applying the concept. No open records decision has actually applied the doctrine to close information since Open Records Decision No. 308. Information covered by the tort must place the individual in a "false light." In adjudicating a lawsuit, a court applies the elements of the tort retrospectively to acts of the defendant complained of by the plaintiff. If the plaintiff has alleged a complaint upon which relief may be granted, the court may proceed to determine the relevant facts. In the process of rendering decisions under section 7 of the Open Records Act, however, the attorney general must attempt to apply the elements of the tort prospectively, to determine if a release of information would result in an invasion of privacy. Yet this office lacks both the mandate and the tools to determine the falsity of information in the records of governmental bodies. We do not have use of a discovery system, nor can we simply rely on the findings of the governmental body. To do so would create a serious conflict of interest, in that the governmental body might have an incentive to close up embarrassing information by finding it unfounded, when indeed some evidence supports it. In short, we cannot make the threshold determination that the information at issue places an individual in a false light. If we are not in a position to make such a determination, the legislature cannot have intended that we do so.

A further problem with use of false light privacy under section 3(a)(1) is that, under Texas law, it is irrelevant whether the public has a legitimate interest in the

material. The standard this office has used since Open Records Decision No. 372 does include a public interest prong, but that standard does not conform to the elements of the common law tort in Texas. We believe that Industrial Foundation requires that determinations under section 3(a)(1) excepting information as confidential by judicial decision be made according to the elements of the common law tort. See Industrial Foundation at 683; Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). If false-light privacy law were deemed to control the disclosure of information under the act, much information of legitimate public concern might well be withheld for fear that it could be false. Yet we feel that the purpose of the act is best served by the disclosure of even doubtful information, even if embarrassing, if it relates to the conduct of the public's affairs. If, as in the case before us, the information is uncertain or contradictory, the Open Records Act allows the public to review the evidence and come to its own conclusions, rather than allowing the governmental body to determine the weight of the evidence itself, evidence that may reflect poorly on that very body. In Industrial Foundation, in the context of public disclosure of private facts, the court discusses the difficulty of reconciling competing interests in public disclosure and personal privacy:

The public's right to be informed about the affairs of government may thus conflict with the right of the individual to control access to information concerning his own affairs. The balance between these two competing interests has not yet been struck with clarity, and the nature and extent of each interest is yet to be satisfactorily determined. We believe, however, that, except in unusual circumstances, the task of balancing these interests must be left to the Legislature.

Industrial Foundation, supra, at 676. In cases involving the public disclosure of private facts, the tort test resolves these warring interests in favor of the public's right to know; even private, highly offensive information may be disseminated if there is a legitimate public interest in knowing it. Thus, open records determinations hinging on this tort law seem consonant with the legislature's intent in creating the act and the exceptions to it. Because the Texas common law of false-light privacy makes no provision for the conflict between individual rights and the public's right to know, we cannot say without more explicit direction

from the legislature that the legislature intended to include the false-light as well as the public disclosure of private facts branch of privacy law under the section 3(a)(1) exception.

Informer's privilege.

You further assert that the witness statements are excepted from required public disclosure by the informer's privilege as incorporated in the Open Records Act by section 3(a)(1). See, e.g., Open Records Decision Nos. 549 (1990); 515 (1988). The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. If the contents of the informer's statement would tend to reveal the identity of the informer, the privilege protects the statement itself to the extent necessary to preserve the informer's anonymity. Moreover, the basis for the informer's privilege is to protect informers from the fear of retaliation and thus encourage them to cooperate with law enforcement efforts. Id.

The identity of the complainant is already well known to the persons complained of. Accordingly, the informer's privilege is inapplicable to the complaint itself or to the statements of the complainant.

We are concerned here with an employee grievance, not a reported crime. The witness statements were taken from employees responding to questions presented to them in the scope of their employment. You point out that some of the behavior complained of and described in some witness statements, e.g., "shooting" rubber bands at individuals, could, if true, be construed as criminal. See Penal Code § 22.01(a)(3). However, it is apparent from the interviews themselves that the witnesses do not consider themselves to be reporting criminal or illegal behavior. We do not see the requested records as appropriately within the informer's privilege.

Interference with law enforcement.

You also assert that the requested information is excepted from public disclosure under section 3(a)(8) of the Open Records Act. Section 3(a)(8) of the Open Records Act excepts information held by a law enforcement agency from required public disclosure if release of the information "will unduly interfere with law enforcement and crime prevention." Ex parte Pruitt, 551 S.W.2d 706, 710 (Tex. 1977); Open Records Decision No. 531 (1989). No showing has been made that any further action is contemplated with respect to this investigation that would in any way be

compromised by the release of the requested information, nor does the requested information reveal any law enforcement technique or procedure in a way that would compromise any law enforcement function. Accordingly, the information may not be withheld under section 3(a)(8).

Finally, you advise that during the civil litigation with respect to this matter, the plaintiff's attorney and the assistant attorney general representing the department entered into an agreement to exchange documents. As a result of this agreement, the requested information was made available to the plaintiff's attorney. You ask whether this would be considered a voluntary release under section 14(a) of the Open Records Act, which reads as follows:

This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person. (Emphasis added.)

We do not think that exchanging information among litigants in "informal" discovery is in any meaningful sense a "voluntary" release of information for purposes of section 14(a). Such exchanges of information are routinely made in litigation, either in exchange for information from the other side or to avoid the expense and waste of judicial resources of forcing the use of formal discovery procedures when counsel for the governmental body feels that it is unnecessary. The Texas Supreme Court and Court of Criminal Appeals have recently promulgated The Texas Lawyer's Creed - A Mandate for Professionalism, a set of guidelines aimed at abolishing abusive or uncooperative litigation practices. These guidelines provide, in part:

I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

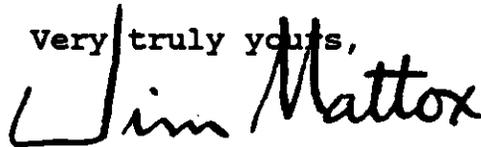
We do not believe the legislature intended in adopting the language in section 14(a) to force attorneys representing governmental bodies to resist every discovery request or to refuse to resolve discovery issues by informal agreement between litigants. That said, in the instant case we do not find any of the requested information to be excepted from public disclosure except for the medical records and the Christmas card and the description of it. These documents are "deemed confidential by law" within the meaning of section 3(a)(1) of the Open Records Act, and consequently are not within the scope of section 14(a).

S U M M A R Y

An investigative file concerning a specific sexual harassment complaint is not excepted from required public disclosure (1) as a public disclosure of private facts, (2) by the informer's privilege, or (3) as information the release of which would unduly interfere with law enforcement. Information actionable under the tort doctrine of false-light privacy is not within section 3(a)(1) protection of information deemed confidential by law. Open Records Decision Nos. 308, 372, and their progeny are overruled to the extent that they conflict with this decision.

An exchange of information among litigants in "informal" discovery is not a "voluntary" release of information for purposes of section 14(a).

Very truly yours,



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