



**THE ATTORNEY GENERAL
OF TEXAS**

September 25, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Colonel Joe E. Milner
Director
Texas Department of Public Safety
P. O. Box 4087
Austin, Texas 78773-0001

Dear Colonel Milner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 2986; this decision is OR89-306.

The delay in our response is due to the fact that the file was assigned to an attorney who is no longer employed by this office. The fact that the file had not been reassigned was discovered just this month. We regret any inconvenience this may have caused you.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

Some time ago, the Texas Department of Public Safety was asked to release certain information in the personnel files of two former employees. You have asked if the Open Records Act, article 6252-17a, V.T.C.S., requires that the department grant these requests. Your first question is whether the department may withhold these employees' social security numbers. Relying on federal case law, you contend that privacy interests protect these numbers.

Your inquiry depends on whether section 3(a)(2) of the act, which excepts information in governmental personnel files if its disclosure would cause a "clearly unwarranted invasion of personal privacy," embraces these numbers. See Open Records Decision No. 298 (1981) (applying section 3(a)(2) to a former employee's personnel file). In Open Records Decision No. 169 (1977), this office reviewed federal and state precedents and held that social security numbers are not within either section 3(a)(2) or section 3(a)(1) of the act. Since this decision was issued, the courts have devised a new test for applying section 3(a)(2). See Hubert v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). The application of this test, however, does not yield a result different from that reached in Open Records Decision No. 169.

The Harte-Hanks case held that section 3(a)(2) claims are to be resolved by inquiring whether the release of information in a personnel file would cause an invasion of privacy under the standards of Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) [hereinafter IAB]. Information may be withheld on privacy grounds if it is highly intimate or embarrassing, such that a reasonable person would object to its release, and it is of no legitimate concern to the public. Id. You rely on federal case law for the proposition that the release of employees' social security numbers would cause a clearly unwarranted invasion of personal privacy. See, e.g., Doyle v. Wilson, 529 F. Supp. 1343 (D. Del. 1982); Swisher v. Department of the Air Force, 495 F. Supp. 337 (W.D. Mo. 1980), aff'd on other grounds, 660 F.2d 369 (8th Cir. 1981). We agree that these authorities, especially Swisher, support this proposition in terms of the federal Freedom of Information Act (FOIA), 5 U.S.C. section 552(b)(6). Information that is protected under the FOIA is not automatically protected under the Texas Open Records Act. See Attorney General Opinion MW-95 (1979).

Regardless of whether the federal act authorizes withholding the information, the Open Records Act does not do so. As Open Records Decision No. 169 observed, social security numbers were among the categories of information requested in IAB, supra, yet the court declined to sanction withholding them on privacy grounds. Therefore, section 3(a)(2) does not embrace governmental employees' social security numbers.

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Your second question is whether the department may withhold the college transcript of one of these former employees. You contend that section 3(a)(14) of the act, which excepts certain "student records" from required disclosure, prohibits the disclosure of this transcript. Although this transcript certainly contains information concerning the former employee's educational background, we conclude that, in the hands of the Texas Department of Public Safety, it is outside the ambit of both section 3(a)(14) and section 14(e) of the act, which also relates to education records. See Klein Indep. School Dist. v. Mattox, 830 F.2d 576 (5th Cir. 1987), cert. denied, 108 S.Ct. 1473 (1988).

The 71st Texas Legislature amended section 3(a)(2) to protect teachers' college transcripts from public disclosure. See art. 6252-17a, § 3(a)(2) (as amended by S.B. 404, Acts 1989, 71st Leg., ch. 110, § 1, at 467); Open Records Decision No. 526 (1989). By its terms, however, this section applies only to teachers' college transcripts.

Your third question concerns the second paragraph of a letter sent to one of the former employees at issue by the director of the Texas Department of Public Safety. In your request letter, you stated:

We have excised [this paragraph] because it relates to a personnel complaint that was never filed and we feel that by releasing it without your guidance, we could be potentially besmirching the reputation of an individual who has retired with many years of honorable service with this agency. His name is mentioned in that paragraph We seek your opinion with regard to that and suggest that there may be some common law right of privacy, thus exempting it under 3(a)(1) of the Act.

In Open Records Decision No. 308 (1982), this office addressed the question of whether section 3(a)(1) prohibited the disclosure of parts of an investigative report prepared by the Texas Board of Registration for Professional Engineers. The board sought to withhold these parts because they contained scurrilous information about a particular individual which had been communicated to the board by an anonymous source. The decision concluded that neither constitutional nor common law privacy protected the

information. It then noted, however, that the "common law privacy" interest recognized in IAB is but one of four protected privacy interests. The other three interests protect against intrusions upon an individual's seclusion or solitude, or into his private affairs; publicity which places an individual in a false light in the public eye; and the impermissible appropriation of an individual's name or likeness. Id. at 2. The second of these interests, "false light privacy," was the focal point of Open Records Decision No. 308. The decision held:

Unlike a court, we cannot ordinarily determine the truth or falsity of particular information, but where, as here, (1) the information is communicated to a public body by an anonymous source; (2) the agency makes a determination that the information is not in fact true; and (3) the public interest in disclosure is minimal, we will presume its falsity.

Id.; Open Records Decision No. 372 (1983).

In our opinion, none of these interests protects the information at issue here. The paragraph about which you are concerned merely advises the former employee that if he wishes to file a formal complaint against a certain departmental peace officer, he must fill out a particular form. Public disclosure of this statement would not cause any impermissible intrusion into the solitude or seclusion of the individual in question nor would it entail any appropriation of his name or likeness. As for whether common law privacy embraces this statement, we note that Open Records Decision No. 308 refused to sanction the withholding, on common law privacy grounds, of statements that were not only much more derogatory than this one, but were also communicated by an anonymous source and were arguably untrue. If the statements at issue in that decision were not protected by common law privacy, the statement at issue here certainly is not. Finally, no false light privacy issue is implicated here. It is axiomatic that, to be withheld on false light privacy grounds, information must be false. Nothing in the paragraph in question is even arguably false.

Your final question concerns a request for "[i]nformation concerning complaints filed against employee and resulting investigation." You state that the department will

advise the requesting party of the facts and circumstances surrounding this complaint, but at this point, we decline to release the actual letter assessing the disciplinary action because it relates to an extramarital relationship this man had with a woman who lived in Bowie. He was disciplined on the basis of this matter becoming public knowledge and destroying his effectiveness in the community. We think now some two and one-half years later, that this is the kind of information that constitutes a clearly unwarranted invasion of personal privacy of both former trooper Grant and the lady mentioned in the letter.

The privacy interests implicated by your third question are also at stake here. We have examined the letter in question, and we conclude that the facts stated therein, as well as the facts which you have provided, require us to conclude that none of these interests protect this letter from disclosure. The letter identifies the extramarital affair in which the former employee was involved as the source of a complaint filed against the employee, identifies the woman in question, and states: "This relationship became public knowledge in Bowie." It then recites the departmental policies that were violated by this conduct and advises the employee of applicable disciplinary procedures.

Central to our conclusion that the department may not withhold this letter on privacy grounds is the fact that the details of this affair, which you do not indicate are false, are already publicly known. Once information has been publicly disseminated, it can hardly be argued that privacy interests may be invoked to protect that information from further disclosure. As for whether there is any basis for withholding the fact that this affair precipitated the department's decision to take disciplinary action against the former employee, numerous decisions have held that the details of disciplinary action taken against a public employee are not excepted from disclosure on privacy grounds. See, e.g., Open Records Decision Nos. 350 (1982) (final determination of complaint against police officer and

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letters advising him of disciplinary action not excepted by section 3(a)(2)); 230 (1979) (investigative report regarding allegations of misuse of school district employees and materials not excepted by section 3(a)(2)); 208 (1978) (name of complainant against police officer, name of officer, and disposition of the matter not excepted by section 3(a)(2)). These decisions emphasize the legitimate public interest in obtaining information of this nature. If the details of this extramarital affair were not publicly known, a different question would be presented. The facts of this case, however, do not warrant the conclusion that the disclosure of this letter would infringe any legitimate privacy interest.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-306.

Yours very truly,

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of the Opinion Committee
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Prepared by Jennifer S. Riggs
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JSR/bc

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