



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 21, 1993

Ms. Gretchen Kuehn Bohnert
Assistant City Attorney
City of Houston
P.O. Box 1563
Houston, Texas 77251-1562

OR93-329

Dear Ms. Bohnert:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 19791.

The Affirmative Action Office of the City of Houston (the city) received an open records request for

1. Any and all documents which show the dates of the discrimination complaints detailed in the FY1992 portion of the 1990-1992 Tri-Annual Report. As you know, there were 125 such complaints filed in that year. I want to know, at least by month, when those complaints were filed with your office.
2. Any and all documents including, but not limited to, written decisions on outcomes, which detail how all resolved cases were disposed of. Again, this relates to that three year period covered by the 1990-1992 Tri-Annual Report.
3. The original petitions, i.e., any and all documents relating to the initiation of a complaint, for all resolved cases over the three-year period covered by the 1990-1992 Tri-Annual Report.

You inform this office that approximately 300 discrimination complaints have been filed with the city in the three year period covered by the Tri-Annual Report. In compliance with the past practice of this office, you have submitted to us for review a representative sample of the types of documents at issue. Specifically, you have submitted thirteen complaints (original petitions), portions of which you have highlighted to indicate the information you believe to be "highly confidential." You also have

submitted as representative of the 300 files three complete complaint files, each of which pertain to a different type of discrimination complaint: sex discrimination, race discrimination, and sexual harassment. You contend that these and similar records come under the protection of sections 3(a)(1), 3(a)(2), and 3(a)(3) of the Open Records Act.¹

We initially note that the Eighth Court of Appeals recently has held that the identities and statements of witnesses who were interviewed during a particular sexual harassment investigation were confidential pursuant to common-law privacy. See *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. -- El Paso 1992, writ denied). This office currently is assessing the full impact of that decision on records pertaining to other sexual harassment investigations. Accordingly, we will rule at this time only on the sexual and racial discrimination files. We will issue a ruling on all of the above requested information pertaining to the sexual harassment files at a later date.

You contend that the names of complainants and respondents, employee identification numbers, social security numbers, addresses, and telephone numbers contained in the complaints requested in item 3 above are "highly confidential." We note that section 3(a)(17) requires that the city withhold its employees' home addresses and telephone numbers, but only to the extent that the employees have elected to keep this information confidential in compliance with section 3A of the Open Records Act prior to the city's receipt of the current open records request. Open Records Decision No. 530 (1989). Otherwise the city must release the addresses and telephone numbers. *Id.* We also note that social security numbers are public information. Open Records Decision Nos. 226 (1979); 169 (1977) at 7-8.

You contend that the identities of those who complain of sexual or racial discrimination are protected by the informer's privilege as incorporated in section 3(a)(1) because

[d]iscrimination is prohibited by law, and those who complain to the Affirmative Action Division are reporting violations of the law to administrative agency officials having a duty of law enforcement within the field of discrimination.

For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. See Open Records Decision Nos. 391 (1983); 191 (1978). Because part of the purpose of the privilege is to prevent retaliation against informants, the privilege does not apply when the informant's identity is known to the party of whom the informant has complained. See Open Records Decision No. 208 (1978).

¹Because you have submitted representative samples of the 300 requested files, this ruling must necessarily discuss the applicability of these exceptions in a general manner. Accordingly, this office must rely on the good faith of the city to apply the rationale contained in this ruling to the remaining records at issue.

Based on our review of the records submitted to this office, we do not believe that any of the individuals who filed discrimination complaints with the city did so with the expectation that his or her identity would not become known to the individual about whom he or she has complained.

You seek to withhold the names of those accused of discriminatory actions because those individuals

have not had a chance to clear their names of these alleged violations. To release these names would not only violate common-law privacy, but would also expose the City to potential litigation (and in many cases pending litigation) from those parties who may have been unjustly accused of discriminatory actions.

If you are contending that the release of the information would invade the privacy of respondents by placing them in a false light, we must discount your argument. In Open Records Decision No. 579 (1990), this office discussed false-light invasion of privacy as an aspect of common-law privacy protected under section 3(a)(1) under the act. Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." As noted in that open records decision, 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.²

We also note that section 3(a)(2), which protects the common-law privacy interests of public employees, does not protect this information. The scope of section 3(a)(2) protection is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App. -- Austin 1983, writ ref'd n.r.e.).

The information at issue pertains solely to the employees' actions as public servants, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision Nos. 444 (1986) (public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees);

²We further note that the Texas Supreme Court has recently called into question whether the tort of false-light privacy exists in this state and that, if in fact the tort does exist, it requires a showing of actual malice as an element of recovery. *See Diamond Shamrock Ref. and Mktg. Co. v. Mendez*, 844 S.W.2d 198 (Tex. 1992). This office lacks the fact finding capability to determine whether any complainant in this instance acted with malice when making his or her respective allegations.

Open Records Decision No. 336 (1982) (section 3(a)(2) does not except names of employees taking sick leave and dates thereof). Section 3(a)(2) was not intended to protect the type of information at issue here. Consequently, the city must release the complaint information.³

We next address the extent to which the city must release information contained in the complaint files. Because section 3(a)(3) is the most inclusive of the exceptions you claim, we will discuss this section first. Section 3(a)(3) of the Open Records Act, known as the litigation exception, excepts from required public disclosure:

information relating to litigation of a civil or criminal nature and settlement negotiations, to which the state or a political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 437 (1986); 331, 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You have provided this office with two lists of complaint files that you contend come under the protection of section 3(a)(3): a list of eight cases which pertain to pending litigation against the city and a list of twenty-seven complaints against the city that have been filed with the Equal Employment Opportunity Commission (EEOC). This office believes that you have met your burden under section 3(a)(3) with regard to the cases currently in litigation. Please note, however, that absent special circumstances, once all parties to the litigation have obtained information, through discovery or other means, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Consequently, to the extent that the complainant has seen or had access to any of the information in these records, the city cannot now justify withholding that information from the requestor pursuant to section 3(a)(3).

With regard to the files pertaining to complaints the city employees have filed with the EEOC, you inform us that that agency has resolved all of those complaints.

³We also dismiss your claim that the release of this information would open the city to litigation as entirely too speculative to invoke the protection of section 3(a)(3). See *infra* (discussing section 3(a)(3)).

However, you have not specified whether the EEOC has sustained any of those allegations. Although this office previously has held that the *pendency* of a complaint before the EEOC indicates a substantial likelihood of litigation and is therefore sufficient to satisfy the requirements for section 3(a)(3) protection, *see, e.g.*, Open Records Decision Nos. 386 (1983); 336, 326 (1982), we do not believe that the mere fact that records pertain to a closed EEOC investigation is sufficient to evoke the protection of this exception. Because you have not provided this office with any additional information that suggests that the city reasonably expects to become a party to litigation with respect to these files, we find that you have not met your burden under section 3(a)(3) and that this exception is inapplicable here.

We note that you also contend that section 3(a)(11) protects from required public disclosure all memoranda in these files. Section 3(a)(11) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." You have not explained, however, how this exception applies to the memoranda contained in these files. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body fails to show how an exception applies to the records, it ordinarily will waive the exception unless the act deems information confidential. *See* Attorney General Opinion JM-672 (1987). Because you have not met your burden under section 3(a)(11), you have waived the protection of this exception.

As discussed above, the city must release the identities of complainants and respondents in these files. You also contend that the city may withhold the names of all witnesses interviewed during the city's investigation of the discrimination allegations because the release of these records "would have a chilling effect on future witnesses." You have not, however, raised any of the act's exceptions to disclosure in regard to this argument. Further, because neither of the complaint files reviewed by this office pertain to complaints that meet the *Industrial Foundation* test for common-law privacy, we must dismiss your contention that the release of witnesses' names would violate those individuals' right of privacy.⁴

We note, however, that one of the files that you have submitted to this office contains references to an employee's personal affairs in which the public has no legitimate interest. Because this information is highly intimate, this office believes the city should withhold this information pursuant to common-law privacy. We have marked the information that the city must withhold from this file. If the city believes that other files contain highly intimate or embarrassing information of a personal nature in which the public has no legitimate interest, you must submit that information to this office for review.

⁴Although you cite *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. -- El Paso 1992, writ denied) as authority for withholding witnesses' names under privacy, we note that that decision concerned allegations of sexual harassment. We thus distinguish that case from the type of investigations here.

To summarize, the city may withhold pursuant to section 3(a)(3) only those records pertaining to pending litigation to which the plaintiff has not had previous access. The city also must withhold pursuant to section 3(a)(17) city employees' home address and telephone numbers if, prior to the city's receipt of the open records request, those employees elected to keep this information confidential in compliance with section 3A. Finally, the city must withhold the information that we have marked as coming under the protection of common-law privacy. The city must release all remaining information contained in the complaints and their accompanying files unless you believe that the information implicates an individual's privacy interests as discussed above.

Finally, the requestor seeks

4. Any and all documents which detail how many of the complaints filed with your office between 1990-1992 (as covered by the Tri-Annual Report) have resulted in investigations.

You have submitted to this office several lists that appear to contain, at least in part, the requested information. With regard to these lists, you explain that the city personnel office

has informed us that the information requested is not existent prior to October 1991 but that after that date, there were no investigations of the complaints on the lists . . . if:

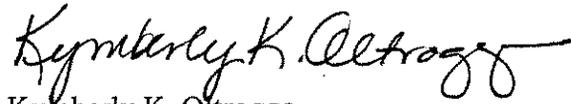
- 1) the complaint was withdrawn;
- 2) the complainant terminated his or her employment with the City; or
- 3) the complaint was closed administratively.

Assuming the city possesses no other documents that contain the requested statistics for the period from January 1990 to October 1991, this office agrees that the Open Records Act does not require the city to create a new document in response to the request. Open Records Decision No. 445 (1986). You do not contend that the lists you have submitted to this office are excepted from required public disclosure except for the names of the complainants and respondents. Because this information is public, the city must release the names of the individuals involved in the complaints, along with the remaining information contained in the lists.⁵

⁵The city may withhold, however, the names of the complainants and respondents in sexual harassment investigations until this office issues a subsequent ruling on those types of files.

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 contact our office.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

KKO/RWP/le

Ref.: ID# 19791
ID# 19817
ID# 20046

Enclosures: Submitted documents

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