



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 18, 1993

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P. O. Box 99
Huntsville, Texas 77342-0099

OR93-338

Dear Mr. Peck:

This office previously held in Open Records Letter OR93-247 (1993) that because you failed to request an open records decision from this office in a timely manner with regard to records held by the Texas Department of Criminal Justice -- Institutional Division (the department) pertaining to particular individuals' personnel files and the department's investigations of sexual harassment, there existed a legal presumption that the requested information was public. See V.T.C.S. art. 6252-17a, § 7(a). We further held that because you neither demonstrated compelling reasons for withholding the information nor submitted copies of the requested documents to this office for review, we were unable to determine whether any of the act's exceptions to required public disclosure were applicable to the information and accordingly ordered the department to release the requested information in its entirety. You now present to us a representative sample of the records at issue¹ and your "compelling" arguments for withholding the information. Your letter was assigned ID# 20374.

You contend that there exist compelling reasons for withholding investigations of sexual harassment under both sections 3(a)(1) and 3(a)(8) of the Open Records Act. You contend that the privacy interests of departmental employees named in the sexual harassment investigations are implicated for three reasons:

First of all, in many of the cases, the matter at issue was intensely embarrassing to the complainant. Making their situation a matter of public knowledge is both intrusive into a reasonable zone of privacy, but is a discouragement to any future person naive enough to

¹Because you have submitted as representative of individuals' personnel files only records that pertain to disciplinary actions, this office assumes that all other information contained in the personnel files, except for information protected by section 3(a)(17)(B), has been released to the requestor.

complain about sexual harassment. Second, the matters were excruciatingly embarrassing to the accused. Third, the common knowledge of universal publicity is likely to chill the candor of witnesses, who are likely to be working with the accused and the accuser in the future.

The Eighth District Court of Appeals has recently discussed the privacy interests of public employees who were the victims of sexual harassment or who, under threat of discipline, were required to provide statements regarding allegations of sexual harassment in the work place. In *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App. -- El Paso 1992, writ denied), the court held that the identities of those who have been subjected to sexual harassment and any witnesses who, as a condition of employment, were required to provide statements regarding the harassment come under the protection of common-law privacy. Further, because the harassment in *Ellen* occurred in a relatively small division of the Abilene Police Department, the court held that the content of the victim's and witnesses' statements "would probably disclose their identities to any reasonably diligent investigator" and thus should also be withheld on privacy grounds. *Id.*

In the instance case, this office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities. However, given the fact that the department's 38 prison units are spread throughout the state, we do not believe that these persons' identities would be revealed or easily obtainable by the public from the content of their statements alone, especially if the name of the prison unit and other identifying information is withheld.² Cf. Open Records Decision No. 165 (1977) (de-identifying student records). We further note that, unlike the situation in *Ellen* where a board of inquiry's findings of sexual harassment had been released to the public, there has been no similar public notice of the details of the department's investigations in the cases at issue here. We have marked a representative sample of the types of information the department must withhold in order to protect the privacy interests of the victims and witnesses.³

However, the court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity or the content of his statement and we decline to extend such protection to these individuals here. We note that sexual harassment by public employees may constitute official oppression punishable as a Class A misdemeanor. See Pen. Code § 39.02(c), (d); *Bryson v. State*, 807 S.W.2d 742 (Tex. Crim. App. 1991). We believe there is a

²We further note that the court in *Ellen* held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Ellen* at 525.

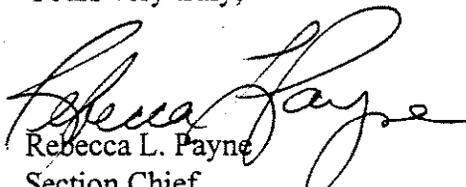
³We note that the department must also withhold the identities of all prison inmates in compliance with the *Ruiz* settlement. See generally Open Records Decision No. 560 (1990) (protecting "sensitive information").

legitimate public interest in the identity of public employees accused of sexual harassment in the workplace, even where the department subsequently determines that the allegations against the employees are unfounded or not sustained. *See, e.g.*, Open Records Decision Nos. 484 (1987), 400 (1983).

We next consider your arguments for withholding pursuant to section 3(a)(8) the names of employees accused of sexual harassment and other actions warranting disciplinary actions. Your first concern pertains to the impact the release of this information may have on prison guards vis-a-vis the inmate population. Your second concern pertains to the impact the release of this information may have on employee relations within the prison. This office has previously noted in prior rulings to the department that the applicability of section 3(a)(8) to particular information must be reviewed on a case-by-case basis. Attorney General Opinion MW-381 (1981). Because you failed to request a decision from our office within the ten day deadline required by section 7(a) of the act, these records are presumed open and may not be withheld absent a showing of compelling reasons. Open Records Decision Nos. 552 (1990); 452 (1986). We do not believe here that your arguments under section 3(a)(8) are sufficiently compelling to overcome the presumption of openness. Accordingly, we find that section 3(a)(8) does not protect any of the information you have submitted to this office. The department must therefore release all of the information at issue except as discussed above.

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,



Rebecca L. Payne
Section Chief
Open Government Section

RLP/RWP/jmn

Ref.: ID# 20374
ID# 20378
ID# 20757

Enclosures: Marked documents

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