



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 11, 1993

Ms. Tamara Armstrong  
Assistant County Attorney  
Travis County  
County Courthouse  
P.O. Box 1748  
Austin, Texas 78767-1748

OR93-521

Dear Ms. Armstrong:

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# 17942.

The Travis County Sheriff's Department (the "department") has received eight requests for information relating to internal affairs investigations of certain department employees. Specifically, the requestor seeks internal affairs investigation files and personnel files for Kathy Conti; Vivian Rowe; Rose Quinn; Dan Richards; Charlie Littleton; Melissa Caldwell; and Jimmie Davenport. In addition, the requestor seeks travel and expense vouchers turned in by Rose Quinn and Dan Richards in the last two years; "any documents related to sexual harassment complaints against any employee in the Travis County Sheriff's Department in the last two years"; and "personnel list[s] that include[] rank and pay scale of each employee of the Travis County Sheriff's Department" as of June 30, 1992, and October 30, 1992. You advise us that most of the requested information has been made available to the requestor. You have submitted the remaining information to us for review, however, and claim that sections 3(a)(1) and 3(a)(2) of the Open Records Act except it from required public disclosure.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that Exhibit A contains information, which you have marked, that is excepted from required public disclosure by the privacy interests of department employees. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 3(a)(1) of the act by the Texas Supreme Court in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly

See Open Records Decision Nos. 343 (1982); 262 (1980). However, a public employee's job performance does not generally constitute his private affairs. Open Records Decision No. 470 (1987).

We have reviewed the information in Exhibit A that you seek to withhold under common-law privacy doctrine. This information generally relates to a work place incident in which a department employee assaulted other employees. The cause for such behavior appears to be attributed to work-related emotional and mental distress. Although this information may be highly intimate or embarrassing, the emotional or mental distress of a public employee, particularly when such results in an incident in the work place, as is the case here, is of legitimate concern to the public. See *generally id.* at 4. Some of the information, however, is of no legitimate concern to the public. This information has been marked and must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act. We conclude, however, that the remaining information marked in Exhibit A is not protected by a common-law right to privacy.

Section 3(a)(1) also incorporates the right of privacy guaranteed by the United States Constitution. Constitutional privacy protects two related interests: (1) the individual's interest in independence in making certain kinds of important decisions, and (2) the individual's interest in avoiding disclosure of personal matters. See Open Records Decision No. 478 (1987) at 4. The first interest applies to the traditional "zones of privacy," *i.e.* marriage, procreation, contraception, family relationships, and child rearing and education. See Open Records Decision No. 447 (1986) at 4. The second protects information by employing a balancing test that weighs the privacy interest against the public interest in disclosure. Open Records Decision No. 478 at 4. It protects against "invasions of privacy involving the most intimate aspects of human affairs." Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (5th Cir. 1985)). We conclude that the remaining information at issue in Exhibit A does not fall within any of the "zones of privacy," nor does it involve the most intimate of human affairs. Accordingly, we conclude that it is not protected by constitutional privacy and thus may not be withheld from required public disclosure under section 3(a)(1) of the Open Records Act.<sup>1</sup>

You also seek to withhold the records submitted as Exhibit B under section 3(a)(1) of the Open Records Act. Exhibit B contains psychological evaluations of two department employees. Section 611.002 of the Health and Safety Code provides in part that "[c]ommunications between a patient and a professional, and records of the identity,

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<sup>1</sup>You also seek to withhold this information under section 3(a)(2) of the Open Records Act. Section 3(a)(2) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1). *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.); see also Open Records Decision No. 441 (1986). Accordingly, our discussion of section 3(a)(1) here resolves the applicability of section 3(a)(2) as well.

diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." See also Health and Safety Code § 611.001 (defining "professional"). The records in Exhibit B are clearly "records of the identity, diagnosis, evaluation, or treatment of a patient that are created . . . by a professional." Accordingly, we conclude that the records in Exhibit B must be withheld in their entirety under section 3(a)(1) of the Open Records Act.

Finally, we address the information submitted to us for review that relates to sexual harassment complaints against department employees (Exhibit C). You claim that sections 3(a)(1) and 3(a)(2) except this information from required public disclosure. Under sections 3(a)(1) and 3(a)(2), although information relating to a disciplinary action against a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the reasons why such actions were taken. Open Records Decision No. 444 (1986). In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. -- El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the nature of the information, *i.e.* the names of witnesses and their detailed affidavits regarding allegations of sexual harassment, was exactly the kind specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*<sup>2</sup>

Exhibit C contains documents relating to numerous sexual harassment investigations, including complaints, reprimands, investigation records, witness statements, and summary investigation reports. We think that the holding in *Ellen* is controlling on these documents. In accordance with the holding in *Ellen*, we conclude that the following records must be released, provided that information identifying or tending to identify the complainants and witnesses is redacted:

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<sup>2</sup>Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think that in the cases you have submitted for our review the public's interest in disclosure of the information outweighs the accused's privacy interest. See *Ellen* at 525.

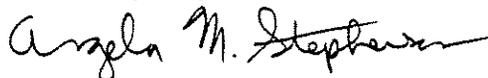
1. Memorandum dated February 5, 1992, from Jimmie Davenport to Doug Whitehead regarding sexual harassment complaints;
2. Sexual harassment investigation materials involving other complaints against Doug Whitehead, including handwritten notes; memorandum dated February 6, 1992, from R.C. Ames to Jimmie Davenport; undated handwritten memorandum from T. Birdwell to A. Cardenas; and other related investigation materials;
3. Undated memorandum from Doug Whitehead to Donna Parker regarding transfer;
4. Internal Affairs investigation report dated February 13, 1991, from Art Cardenas to Doyne Bailey regarding a complaint against Gary Irwin;
5. Memorandum dated February 21, 1991, from Jimmie Davenport to Gary Irwin regarding Internal Affairs investigation;
6. Letters dated February 27, 1991, from Doyne Bailey to citizens regarding Gary Irwin investigation;
7. Policy statements issued by the department regarding employee conduct;
8. Undated handwritten memorandum from Gary Irwin to Art Cardenas;
9. Law Enforcement Code of Ethics;
10. Copies of Texas criminal laws;
11. Internal Affairs investigation report dated September 16, 1991, from Art Cardenas to Doyne Bailey regarding allegations of sexual harassment against David Ayers;
12. Statement of David Ayers dated September 9, 1991;
13. Memorandum dated September 19, 1991, from Jamie Page to David Ayers regarding Internal Affairs investigation;
14. Supplement dated September 24, 1991 to Internal Affairs report regarding David Ayers, from Art Cardenas to Doyne Bailey;

15. Memorandum dated September 25, 1991, from D. Ayers to Chief Deputy Littleton regarding resignation;
16. Additional supplement dated September 26, 1991 to Internal Affairs report regarding David Ayers, from Art Cardenas to Doyne Bailey;
17. Handwritten memorandum dated September 26, 1991, from D. Ayers to Art Cardenas regarding sexual harassment;
18. Letters dated October 15, 1991 from Doyne Bailey to citizens regarding David Ayers investigation;
19. Undated memorandum from Doug Pierce to David Bradberry regarding complaint of sexual harassment; and
20. Memorandum dated June 15, 1992, from David Bradberry, Internal Affairs, to Doyne Bailey regarding sexual harassment allegation against D. Pierce.

We have marked the information contained in the foregoing documents that identifies or tends to identify complainants and witnesses and thus must be withheld from required public disclosure in accordance with the holding in *Ellen*. As was the case in *Ellen*, disclosure of the foregoing documents provides sufficient information concerning the various investigations to serve the public interest. Accordingly, we conclude that the remaining information contained in Exhibit C must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act in conjunction with the holding in *Ellen*. For your convenience, we have separated and enclosed the documents you submitted as Exhibit C into two categories, those that must be released with certain marked information redacted and those that must be withheld.

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 this office.

Yours very truly,



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Open Government Section

ID# 18264

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