



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 29, 1996

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

OR96-0282

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38299.

Travis County (the "county") received a request for information about four named individuals who are running for sheriff. The requestor seeks specific categories of information contained in "personnel files, employee development files, and internal affairs files for the four named individuals."¹ The county has released to the requestor information from these files "which is clearly public." You have submitted the remainder of the responsive information, Exhibits A through G, for our review.² You contend that portions of this information are excepted from disclosure by section 552.101 of the Government Code.³

As a preliminary matter, we address the presence of employees' social security numbers in several of the documents submitted for our review. Amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), incorporated into the Open Records Act by section 552.101, make confidential social security numbers obtained or

¹The county has been unable to locate a personnel file for one of the named individuals. We therefore do not rule on the required public disclosure of information in any existing personnel file for this individual.

²One category of documents submitted for our review does not appear responsive to the request. We have marked the apparently unresponsive information, and we do not rule here on the disclosure of this information.

³You do not cite to, nor are we aware of, any specific statute that governs the maintenance and release of personnel information held by the Travis County Sheriff's Office.

maintained by authorized persons pursuant to any provision of law enacted *on or after October 1, 1990*. Open Records Decision No. 622 (1994) at 2-3. Thus, if social security numbers found in the requested information were obtained or maintained pursuant to any such provision of law, the numbers are confidential and may not be publicly disclosed. Further, sections 552.024(a) and 552.117(1) provide that current or former public employees may elect to keep private their social security numbers. You must therefore withhold this information for those current or former employees who, at the time the county received the request for information, had elected to keep this information private. Additionally, section 552.117(2) excepts from disclosure the social security number of "a peace officer as defined by Article 2.12, Code of Criminal Procedure."

Exhibits A, B, and C contain internal investigative material related to two complaints of sexual harassment filed against an employee of the Travis County Sheriff's Office and investigative material related to other situations involving the candidates for sheriff. You have marked sections of these documents that you believe implicate the common-law privacy rights of several individuals. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. The common-law right of privacy is incorporated into the Open Records Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d 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.*

From the information concerning sexual harassment you have released to the requestor only the investigator's findings in one incident and the officer's response to the same incident, and portions of the officer's account of the other incident. The information you have released does not adequately summarize the incidents, and therefore does not satisfy the legitimate public interest in the job-related misconduct of a public employee. Because there is no adequate summary of these incidents, the victim's and witnesses' statements may not be withheld under section 552.101. However, based on *Ellen*, the department must withhold the identities of the victim and the witnesses. As for the

information contained in Exhibits A, B, and C that is not related to allegations of sexual harassment, only that information which satisfies the criteria set out in *Industrial Foundation* is excepted from disclosure under section 552.101. We have marked the information that must be withheld.⁴

You also assert that release of some information in Exhibit C by the county would subject the county to liability for libel. You cite no exception for withholding the "defamatory and libelous information," but you are concerned that releasing information that "may or may not be true" might injure the reputations of those individuals named in the records. The cases you cite are not judicial decisions that make such information *confidential* in the hands of a governmental body.⁵ Consequently, only those sections of Exhibit C that are protected by common-law privacy under section 552.101 as discussed above are excepted from disclosure. Of course, the county may also release information that demonstrates whether the allegations recorded in Exhibit C were unfounded.

You maintain that Exhibit D containing "mental health records" is confidential per sections 611.001 *et seq.* of the Health and Safety Code. Section 611.002 provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

The records at issue are a physician's summaries of his psychological evaluations of two patients who, at the time of evaluation, were employed by the county. These records are within the scope of section 611.002. Therefore the county can only disclose the records "to the extent that disclosure is consistent with the authorized purposes for which the [county] obtained the information." Health & Safety Code § 611.004(d).

Exhibit E is "a letter requesting a waiver of the requirement that [an] officer obtain a new declaration of psychological and emotional health." You ask whether section 415.057 of the Government Code renders Exhibit E confidential. Section 415.057 provides in relevant part:

⁴You assert that Exhibit A contains criminal history record information ("CHRI") that is exempt from disclosure pursuant to section 552.101. In *United States Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749 (1989), the U.S. Supreme Court concluded that where an individual's CHRI is compiled or summarized by a governmental entity, the information takes on a character that implicates individual's right of privacy in a manner that the same individual records in an uncompiled state do not. It is not apparent to this office that Exhibit A contains an impermissible compilation of CHRI.

⁵False light privacy is not an actionable tort in Texas. See *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Therefore, a governmental body may not withhold information under section 552.101 of the Government Code merely because it might place a person in a false light. See Open Records Decision No. 579 (1990).

(a) The commission may not license a person as an officer or county jailer unless the person has been:

(1) examined by a licensed psychologist or psychiatrist and declared in writing . . . to be in satisfactory psychological and emotional health . . . ;

...

(b) The agency hiring the person desiring to be licensed as an officer or county jailer shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each of the declarations and shall keep a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

The language of a confidentiality statute controls its scope. Open Records Decision No. 487 (1988). A statutory confidentiality provision must be explicit; a confidentiality requirement will not be implied from the statutory structure. Open Records Decision No. 465 (1987). Section 415.057(b) reaches only the declaration of a physician, psychologist, or psychiatrist. You note that Exhibit E "is not an actual declaration of psychological and emotional health." Exhibit E is not within the scope of section 415.057, nor is it the type of information protected by common-law privacy. Therefore, the county must release Exhibit E to the requestor.

Exhibit F contains a county employee's notice of termination dated January 5, 1981, a list of employment-related training the employee attended, and Texas Commission on Law Enforcement Standards and Education ("TCLEOSE") certification documents. You request a decision on whether section 415.0635 of the Government Code protects the notice of termination in Exhibit F. You make no argument for withholding the other documents, and we are not aware of any provision of law that protects these documents. Therefore, you must release these other documents.

Section 415.0635 directs a law enforcement agency to submit a report to TCLEOSE on a prescribed form when a licensed officer or county jailer resigns or is terminated from employment. Gov't Code § 415.0635(a). Section 415.0635(e) makes such a report confidential and exempt from disclosure under the Open Records Act. The notice of termination form in Exhibit F was developed by TCLEOSE as required by section 415.0635(a). The notice appears to fall within the scope of section 415.0635(a). Consequently, the notice of termination is exempt from disclosure under the Open Records Act in accordance with section 415.0635(c).

Exhibit G is a statement that itemizes an officer's deposits into the Texas County and District Retirement System and shows his designated beneficiary. This office has determined that some personal financial information is highly intimate or embarrassing and thus it meets the first part of the *Industrial Foundation* test. Open Records Decision No. 545 (1990), 523 (1989). Nonetheless, information concerning financial transactions

between an employee and a public employer is generally of legitimate public interest. *Id.* For example, information reflecting mandatory state retirement system contributions are subject to disclosure under the Open Records Act. Open Records Decision No. 600 (1992). However, certain information is protected from disclosure if it relates to an employee's personal financial decisions to allocate portions of his compensation to optional benefits which involve no state funding. *Id.* The financial information in Exhibit G must be disclosed if it reflects the officer's mandatory contributions to the state retirement system. The information is excepted from disclosure if it relates to a voluntary investment that the officer made in an optional benefits plan offered by the state. We have previously determined that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under the right of privacy. *Id.* at 10. Consequently, the beneficiary information in Exhibit G is excepted from required public disclosure under section 552.101.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 38299

Enclosures: Submitted documents

cc: Ken Martin
Editor
In Fact News
P.O. Box 49990
Austin, Texas 78765
(w/o enclosures)