

Academic Component Institutions:
The University of Texas at Arlington
The University of Texas at Austin
The University of Texas at Brownsville
The University of Texas at Dallas
The University of Texas at El Paso
The University of Texas Pan American
The University of Texas of the Permian Basin
The University of Texas at San Antonio
The University of Texas Institute of Texan Cultures at San Antonio
The University of Texas at Tyler



Health Component Institutions:
The University of Texas Southwestern Medical Center at Dallas
The University of Texas Medical Branch at Galveston
The University of Texas Health Science Center at Houston
The University of Texas Health Science Center at San Antonio
The University of Texas M. D. Anderson Cancer Center
The University of Texas Health Center at Tyler

THE UNIVERSITY OF TEXAS SYSTEM

Office of General Counsel

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Priscilla A. Lozano
Attorney

File # RQ-00687-DM
ID# 26144

RECEIVED

April 15, 1993

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HAND DELIVERY

Opinion Committee

The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Gov
~~FILE # 7016-19868-93~~
~~T.D.# 19808~~

RQ-687

Attn: Opinions Committee - Open Records Section
Subject: Request for Open Records Opinion - Robert Ovetz

Dear General Morales:

The University of Texas at Austin received clarification of an open records request on April 13, 1993, from Mr. Robert Ovetz. In item number 2 of his letter, Mr. Ovetz requests that the University make available to him all files pertaining to the current food franchise project held by the Assistant Vice President for Business Affairs, the Vice President for Business Affairs, Texas Union Board members and management (including Director Andy Smith), any bookstore, former President William Cunningham and/or current President Robert Berdahl, Vice President James Vick, Executive Vice President and Provost Gerhard Fonken, and Associate Vice President Robert Cook. The files Mr. Ovetz requests are composed of bids and related documents for a contract on a branded food outlet for the Texas Union.

The University contends that section 3(a)(4) of the *Open Records Act* is applicable to this request and invokes the exception. Section 3(a)(4) excepts from required public disclosure information which, if released, would give advantage to competitors or bidders. The purpose of 3(a)(4) is to protect the integrity of the competitive bidding process and to preserve the advantages it offers a governmental body. ORD No. 541 (1990). The University has received bids for the contract but no contract has been awarded. Disclosure of the requested information at this juncture in the process, i.e. prior to the decision to award a contract would put the University and current bidders at a significant competitive

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disadvantage. The University is still in the process of voting on a recommended bid. If a bid is not awarded, the University will rebid the project. If the requested information is made public and the University rebids the project, knowledge of the current proposals would undercut the University's ability to obtain more favorable offers and be detrimental to the public interest in obtaining the best bid. Accordingly, the University maintains that the bidding process is still at a competitive stage and that it is not required to release bid documents or cost proposals and related documents prior to the time a contract has been awarded and is in effect. ORD No. 306 (1982); ORD No. 170 (1977).

Mr. Ovetz also requests the University to make available all files pertaining to sexual harassment complaints and formal charges held by the Dean of Students Office, the Executive Vice President and Provost Gerhard Fonken, Vice Provost Patti Ohlendorf, UT Police, and the Equal Employment Opportunity Office.

The University contends that files relating to sexual harassment complaints filed by students are student records which are protected by the *Family Educational Rights and Privacy Act of 1974* (FERPA), 20 U.S.C. §1232g and sections 3(a) (14) and 14(e) of the *Texas Open Records Act*. The release of the requested files is prohibited by the above referenced provisions of the law without the written consent of the affected students since the files are maintained by the University and contain information directly related to students. The required consents have not been provided by the requestor.

The University also maintains files relating to sexual harassment complaints of employees. The University contends that these files are excepted from disclosure by section 3(a)(1) and 3(a)(2) of the Act. The University is aware of the opinion of the Attorney General's Office in ORD No. 579 (1990) that sexual harassment complaints can not be withheld under the provision of 3(a)(1) unless they contain allegations similar to the facts of serious sexual offenses. However, it requests that you reconsider that decision in the light of another area of public interest and concern that was not previous addressed. The University and other state agencies have a need to encourage the reporting of sexual harassment by state employees. This need serves the interest of state agencies as well as that of the citizens of this state.

It has been the University's experience in dealing with such matters that those who come forward with complaints of sexual harassment often do report highly intimate and embarrassing facts and that they fear publication of those facts outside the circle of those who need to know in order to act on the complaint. It has also been the University's experience that fear of public disclosure is one of the most inhibiting factors to coming forward to report instances of sexual harassment.

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The University requests that it be allowed to redact the names of the complainants and other identifying information from the documents in its sexual harassment files prior to releasing them. If this were allowed, the public's interest identified above would be served without undermining an equally important public interest in promoting and encouraging the reporting of sexual harassment in the workplace.

The University under separate cover will provide copies of files as samples. The University would note that Mr. Ovetz has not limited the time period for which he seeks the files and accordingly will ask him for further clarification.

Mr. Ovetz further requests to review the Woodruff Report and all files pertaining to the report. The University contends that the report is an open record except for the "recommendation" portions of the report which are excepted from disclosure by 3(a)(11). Attached for your consideration are the unedited and edited versions of the report. The University further contends that any related intra-agency memoranda are excepted from disclosure by 3(a)(11) of the Act. The University will provide under separate cover copies of the documents in question.

In accordance with the Act, an opinion regarding the release of the requested information is requested.

Sincerely,



Priscilla A. Lozano

Attachments

xc: Mr. Lee Smith

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Opinion Committee

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Priscilla A. Lozano
Attorney

April 23, 1993

~~FILE # MC 1986 93~~
~~ID # 1986 93~~

HAND DELIVERY

The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, Texas 78711

~~MC 1986 93~~

Attn: Opinions Committee - Open Records Section
Subject: Amended Request for Open Records Opinion - Robert Ovetz

Dear General Morales:

The University of Texas at Austin received clarification of an open records request on April 13, 1993, from Mr. Robert Ovetz. In item number 2 of his letter, Mr. Ovetz requests that the University make available to him all files pertaining to the current food franchise project held by the Assistant Vice President for Business Affairs, the Vice President for Business Affairs, Texas Union Board members and management (including Director Andy Smith), any bookstore, former President William Cunningham and/or current President Robert Berdahl, Vice President James Vick, Executive Vice President and Provost Gerhard Fonken, and Associate Vice President Robert Cook. The files Mr. Ovetz requests are composed of bids and related documents for a contract on a branded food outlet for the Texas Union.

The University contends that section 3(a)(4) of the *Texas Open Records Act*, Article 6252-17a, *Texas Revised Civil Statutes Annotated* is applicable to this request and invokes the exception. Section 3(a)(4) excepts from required public disclosure information which, if released, would give advantage to competitors or bidders. The purpose of 3(a)(4) is to protect the integrity of the competitive bidding process and to preserve the advantages it

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offers a governmental body. ORD No. 541 (1990). The University has received bids for the contract but no contract has been awarded. Disclosure of the requested information at this juncture in the process, i.e. prior to the decision to award a contract would put the University and current bidders at a significant competitive disadvantage. The University is still in the process of evaluating the bids. If none of the bids is acceptable, the University will rebid the project. If the requested information is made public and the University rebids the project, knowledge of the current proposals would undercut the University's ability to obtain more favorable offers and be detrimental to the public interest in obtaining the best bid. Accordingly, the University maintains that the bidding process is still at a competitive stage and that it is not required to release bid documents or cost proposals and related documents prior to the time a contract has been awarded and is in effect. ORD No. 306 (1982); ORD No. 170 (1977).

Mr. Ovetz also requests the University to make available all files pertaining to sexual harassment complaints and formal charges held by the Dean of Students Office, the Executive Vice President and Provost Gerhard Fonken, Vice Provost Patti Ohlendorf, UT Police, and the Equal Employment Opportunity Office.

The University contends that files relating to sexual harassment complaints filed by students are student records which are protected by the *Family Educational Rights and Privacy Act of 1974* (FERPA), 20 U.S.C. §1232g and Section 3(a)(14) and Section 14(e) of the *Texas Open Records Act*. Section 3(a)(14) exempts from required public disclosure student records at educational institutions funded wholly, or in part, by state revenue. Section 14e incorporates into the *Texas Open Records Act* the provisions of 20 U.S.C. § 1232g prohibiting the release of student records without the consent of the student. The attached files labeled Exhibit A are the files pertaining to sexual harassment complaints and formal charges relating to students held by the Dean of Students Office. The attached files labeled Exhibit B are sexual harassment complaints and formal charges relating to students held by the University's Equal Employment Office (EEO). The files cover the time period of the last two years and are representative samples submitted for your review. These files contain information directly related to students. Even if the names of the students were deleted the context of the letters could identify students. The release of these files is prohibited by the above referenced provisions of the law without the written consent of the affected students. The required consents have not been provided by the requestor.

Exhibit C contains additional files maintained by the University EEO relating to sexual harassment complaints and formal charges involving University rather than students. The University contends that these files are excepted from disclosure by section 3(a)(1) of the *Open Records Act*. The University is aware of the opinion of the Attorney General's Office in ORD No. 579 (1990) in which you found that a sexual harassment file of an agency should be released pursuant to the *Open Records Act* because it did not contain "the

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sort of profoundly personal intrusion that places the privacy of victims of serious sexual offenses in a special context"; however, it asks that you reconsider that Opinion which was based on *Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W. 2d 668 (Tex. 1976), and ORD - 438 in light of post *Industrial* court decisions and additional public interests not addressed in ORD - 579.

Since the *Industrial* decision, The United States Supreme Court and the Fifth Circuit Court of Appeals have broadened an individual's constitutional privacy rights to be free from the government disclosing private facts about its citizens.

In *Industrial Foundation of the South*, supra, the Texas Supreme Court recognized two kinds of privacy afforded protection by section 3(a)(1) of the *Open Records Act*: 1) constitutional privacy which protects information within one of the "zones of privacy" such as matters relating to marriage, procreation, contraception, family relationships, and child rearing and education and 2) common law privacy which protects highly intimate or embarrassing facts about a person's private affairs, the disclosure of which would be highly objectionable to a person of ordinary sensibilities and are not of legitimate concern to the public. The Court recognized that constitutional privacy encompasses the right of an individual to prevent unlimited disclosure of information held by the government; however, it determined that this limitation pertained only to information within one of the "zones of privacy". Since *Industrial*, supra, however, the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized that the privacy interest in avoiding disclosure of personal matters extends beyond information within the "zones of privacy". *Whalen v. Roe*, 97 S.Ct. 869 (1977); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978); *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981). These cases have extended the right of citizens to be free from the government disclosing private facts or "personal matters".

The standard of review for governmental disclosure of "personal matters" under these more recent cases is a balancing analysis.

Unlike the test articulated in *Industrial*, supra, if information is encompassed by constitutional privacy, whether it can be divulged is determined by balancing the legitimate state interest against the right of individual privacy. *Plante*, supra at 1134. One might argue that the Texas Constitution protects personal privacy even further than the U.S. Constitution and that the right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means. *State Emp. Union v. Dept. of Mental Health*, 746 S.W.2d 203 (Tex. 1987). However, at a minimum a balancing analysis should be utilized.

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Files pertaining to sexual harassment complaints and formal charges are the type of "personal matters" that are entitled to constitutional privacy protection.

Court decisions have determined that the kind of information that constitutes "personal matters" encompasses information about a person, which if made public may evoke irritations or embarrassment. *Plante, supra*. The *Plante* court determined that financial information was the kind of "personal matter" protected by the constitutional right of privacy. It stated:

Financial privacy is important not only for the reasons the California Supreme Court accepted: the threat of kidnapping, the irritation of solicitations, the embarrassment of poverty. *City of Carmel-by-the-Sea v. Young*, 1970, 2 Cal.3d 259, 85 Cal.Rptr. 1, 9, 466 P.2d 225, 233. When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages. Privacy of personal matters is an interest in and of itself, protected constitutionally, as discussed above, and at common law.

Plante, supra at 1135.

That one has been subjected to or considers herself or himself to be a victim of sexual harassment rises to at least the same level of intimate human affairs as does financial information. The information contained in a report of sexual harassment concerns one's feelings and perceptions regarding interpersonal relations. The potential damage caused by the release of such reports would be to peace of mind, possibly already strained work relations, and may extend to family relations. Moreover, there is a legitimate expectation that these reports will not be made public. Complainant's often request that the information be kept in strictest confidence. See attached affidavit of Peggy A. Kruger.

The public interest in open government is outweighed by countervailing public interests in encouraging reporting of sexual harassment incidents as well as the complainant's right of privacy.

The interest in disclosure of these records as stated in the declaration of policy in the *Open Records Act* is that all persons are entitled to full and complete information regarding the affairs of their government. However there is another public and governmental interest in nondisclosure that does not seem to have previously been considered: the public and governmental interest to encourage reporting of sexual harassment complaints to provide a more acceptable workplace for all individuals, and to comply with equal employment laws.

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In *Meritor Sav. Bank, FSB v. Vinson*, 106 S.Ct. 2399 (1986), the Supreme Court stated:

Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability.... Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward. Emphasis added. *Id.* at 2408.

Thus the Supreme Court told employers that to comply with the law they must encourage victims of harassment to come forward.

Following the guidance of the Supreme Court and the Equal Employment Commission, employers have been advised to adopt a strict, clear policy, to give notice of the policy to their employees, and to provide alternative courses for reporting sexual harassment. Individuals knowledgeable in the field state that when developing policies and setting up its procedure for handling sexual harassment complaints, the University must carefully avoid deterring or punishing the victim. They state further that sexual harassment procedures should afford the victim anonymity, at least in the early stages of the processing of the complaint since victims are frequently reluctant to press claims. Finally, they state that although a victim must eventually reveal his or her identity to the harasser if the matter is pursued, the University must ensure both the victim and the harasser that the proceedings will remain confidential. *The Journal of College and University Law*, Vol. 15, No. 4, page 381, Spring 1989; affidavit of Peggy A. Kruger.

In conclusion, when we balance the interest in open government against the interest in complying with the law by encouraging sexual harassment reporting and an individual's interest in not having intimate facts made public, the balance overwhelmingly tilts in favor of confidentiality. (The University has furnished Mr. Ovetz with information regarding the numbers and types of sexual harassment complaints that does not raise the kinds of concerns articulated herein). Further, each of the files in Exhibit C contain the name of the complainant, the name of the university departments, the names of witnesses, some files contain the names of co-workers, and some files contain handwritten statements. In short, each of the files contain abundant information which could easily furnish a basis for identification of the complainant. The identifying information is so extensive and inextricably intertwined that it would not be feasible to attempt to separate the remainder and make it available. Moreover, the nonidentifying information would, if separated, be devoid of meaning. Accordingly, the University contends that the entire files must be

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withheld from public disclosure or in the alternative that all identifying information must be deleted.

The University also maintains that the files labeled C-2 are protected by the informer's privilege recognized by section 3(a)(1) which protects the identity of persons who report violations of the law. Sexual harassment is of course a violation of both federal and state law. 42 U.S.C. § 2000e; *Vernon's Texas Civil Statutes*, article 5221K. Complainants have reported violations to the University office responsible for investigating and enforcing the law. These individuals reported violations with the expectation that the alleged harasser would not know. Further, disclosure might subject the individual to intimidation, harassment, or harm future cooperation with responsible University officials. See affidavit Peggy A. Kruger. The oral reports were recorded and contain facts that could reveal the identities of the informants. Moreover, the information is so intertwined that it is unreasonable to attempt to separate allegations that may reveal the identity of the informant from those which would not. ORD - 549 at 5 (1990).

Finally, documents extracted from Exhibit C and identified as C-3 are excepted from disclosure by section 3(a)(11) of the *Open Records Act* as advice, opinion, and recommendation.

Exhibit D contains the pertinent files requested by Mr. Ovetz maintained in the offices of the Executive Vice President and Provost and the Vice Provost. Exhibits D-1, D-2 and D-3 are a litigation file and files maintained in anticipation of litigation respectively. These files are excepted from public information by Section 3(a)(3) of the *Open Records Act*. Exhibit D-1 contains the pleadings in a pending lawsuit. Exhibit D-2 contains various documents that indicate that there is an ongoing investigation, that attorneys of all parties are involved and that all have made reference to vigorously pursuing the remedies available to them. Exhibit D-3 is a file maintained in anticipation of litigation. As evidenced by D-3 there are numerous letters that have been referred to the individual's attorney and the University has been asked by the individual to forward information to the attorney. University attorneys have reviewed these files and determined that it would not be in the University's best legal interest to release them at this time. Moreover they are excepted from disclosure by Sections 3(a)(14) and 14(e) of the Act since each pertains to a student. As student records their release is prohibited.

Mr. Ovetz further requests to review the Woodruff Report and all files pertaining to the report. The University contends that the report is an open record except for the "recommendation" portions of the report which are excepted from disclosure by 3(a)(11). Privously provided were unedited and edited versions of the report.

Honorable Dan Morales
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In accordance with the Act, an opinion regarding the release of the requested information is requested.

Sincerely,



Priscilla A. Lozano

Attachments

xc: Mr. Ovetz (w/o attachments)
Mr. Lee Smith