

We now address the extent to which the privacy theories discussed above generally apply to the records you have submitted to this office. Item 1 consists of the department's "Incident Report" that details the department's investigation of the operation of the escort service. The incident report contains the names of some of the escort service's clients and employees.¹ No portion of the incident report pertains to "consensual sexual activities that are not illegal." On the contrary, virtually all of the individuals named in the incident report are identified as having been implicated with the prostitution ring. We have identified portions of the report that must be withheld from the public pursuant common-law privacy. None of the remaining information contained in the vice squad's work file may be withheld except for records pertaining to juveniles, *see* Fam. Code § 51.14(d), and criminal history information. *See generally* Gov't Code §§ 411.081-411.127; Open Records Decision No. 565 (1990). All remaining portions of the offense report must be released.

Item 2 consists of a metal box containing index cards with the names, addresses, and telephone numbers of the escort service's clients. You have also supplied this office with an additional card file containing similar information. On the back of each of the client's card files are the names of the service's employees who saw the particular client. Additionally, many of the cards contain notations such as "waste of time," "prank," "wants to barter," or "no checks," but very few of these entries reveal the exact nature of the service rendered by the escort service employee. Also contained in the file box are handwritten records reflecting the escort service's daily operations for a short period of time, broken down by employee, client, and amount paid, as well as a "Directory" of the service's employees and their home telephone and beeper numbers.

We need not address the extent to which the individuals identified as clients would be highly embarrassed to be identified as such so as to invoke their common-law or constitutional right of privacy because of the public interest in knowing the names of individuals who have been identified as being connected with a criminal enterprise.²

¹Several of these individuals, as well as a few of the service's clients, provided statements to the department pursuant to section 43.06(a) of the Penal Code, which allows law-enforcement personnel to require a "party to an offense" of prostitution "to furnish evidence or testify about the offense." Under such circumstances, the "party to the offense . . . may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury." Pen. Code § 43.06(b). Among the statements mentioned in the "Incident Report" is that of an Austin criminal attorney. This statement, however, was not provided to this office for review. We assume that the department's omission of this statement was an oversight and that the department will treat this statement in the same manner as that of the other witness statements discussed above.

²Admittedly, it is conceivable that some of the escort service's clients did not engage in illegal activities when visited by the service's employees in their homes or hotel rooms. However, we must dismiss your argument for withholding the card files under the Open Records Act because of the possible resulting harm to the clients' reputations. The State of Texas does not acknowledge the common-law tort

We have marked the portions of six of the cards that the department must withhold because of their intimate nature. The department may not withhold any other information in Item 2 under either common-law or constitutional privacy.

Item 3 primarily consists of sexually explicit photographs. One package of photographs appears to be a compilation of photographs sent to Mr. Bunch in response to advertisements he had placed in newspapers and "swingers" magazines. If such is the case, these photographs must be withheld under common-law privacy to protect the privacy interests of the correspondents. We believe that most of the remaining photographs in Item 3 are of "Natalie," either by herself or with other individuals. As noted above, because "Natalie" is deceased, any right of privacy she may previously have had has now lapsed. This office is unaware of any legal theory that would now authorize the withholding of these photographs where "Natalie" is shown by herself; accordingly, these photographs are now public. The remaining photographs in Item 3, that is, those of "Natalie" and/or other individuals, presumptively all of whom are still living, must be withheld under common-law privacy, except as discussed below. Finally, Item 3 contains one piece of correspondence to "Natalie" that is purely personal in nature. All information contained in this letter that tends to reveal the correspondent's identity must be withheld under common-law privacy; the remaining portions must be released.

Similarly, Item 4 consists largely of individuals' responses, including those individuals' photographs, to "swingers" advertisements. It is not clear to this office whether or to what extent the advertisements were placed for legitimate purposes.³ It appears from a brief review of these records that at least part of the purpose of these advertisements was to either 1) indirectly solicit prospective clients for the escort service or 2) create a market for the sale of explicit photographs found in Item 3 and elsewhere. Regardless of the actual purpose of the advertisements, this office believes that unless it is clear from the text of the correspondence that the respondent had solicited or had responded to a solicitation of an illegal sexual activity, the department must withhold all information tending to reveal the *identities* of individuals who responded to the "swingers" advertisements in order to protect those respondents' constitutional right of privacy, *see, e.g.*, Open Records Decision No. 428 (1985), or constitutional right of free association. *See generally* Open Records Decision No. 212 (1978). Similarly, all photographs submitted *by the respondents* must be withheld on privacy grounds.

(Footnote continued)

of false light invasion of privacy. *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). This office is aware of no other legal theory that would require the withholding of this information under section 552.101.

³You have not supplied any information to this office in this regard.

On the other hand, this office does not believe that the subjects of the photographs found in Item 3 and elsewhere maintain any privacy interests in those photographs where the photographs have been freely sold through the mail to anyone who requests them. Regardless of whether the photographs were actually sold by the subjects of the photographs or by Mr. Bunch, it is apparent that the subjects of the photographs have waived their right of privacy by making the photographs available for public distribution.⁴ It will be the department's responsibility to determine the identities of individuals who previously consented to the release of their photographs and thus waived their respective privacy interest with regard to the photographs found in Item 3 and elsewhere.

Item 4 also contains copies of letters that Mr. Bunch used to respond to correspondence he received as a result of placing the advertisements.⁵ Most of these letters do not appear to identify the addressee other than by first name, profession, and city of residence. Because these letters generally do not tend to identify specific individuals, we do not believe that these letters implicate anyone's privacy interests and thus must be released. We have marked the portions of one of the letters as representative of the types of information the department must withhold from other similar letters.

Finally, Item 4 also contains correspondence of a purely personal nature both from and received by Mr. Bunch. Although Mr. Bunch no longer has a privacy interest in any of these documents, we nevertheless believe that these letters cannot be effectively "de-identified" in a manner that would adequately protect the other correspondents' privacy interests. Consequently, the department must withhold all of the personal correspondence except to the extent that the information therein pertains to alleged criminal activities or where both of the correspondents are deceased. We have marked one letter as indicative of the types of information the department must release from personal correspondence that Mr. Bunch sent or received. All remaining records in Item 4 must be released.

All of the remaining information submitted to this office is either similar in nature to that discussed above or consists of information not protected by either constitutional or

⁴The only exception to this is where the photographs are of juveniles, who are presumed to have not given informed consent to the release of their respective photographs.

⁵Although it may seem that either women or couples had placed most of the personal advertisements and the form letters were written from a woman's perspective, these letters now appear to have been composed by or under the direction of Mr. Bunch in connection with the course of conducting a criminal enterprise.

common-law privacy. Accordingly, where our previous discussion applies, the department should release or withhold the remaining documents as appropriate. All remaining records must be released.⁶

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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/RWP/rho

Ref.: ID# 34064

Enclosures: Marked documents

cc: Mr. Jim Phillips
Reporter
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)

⁶We note that among the records held by the department are official records of the Department of Human Services. Because you have not briefed us on these records, we assume for purposes of this ruling that the Department of Human Services does not object to the release of these records.