



April 5, 1999

Mr. Stephen L. Enders
Director
West Texas Community Supervision and Corrections Department
County Archives Building
800 East Overland, Suite 100
El Paso, Texas 79901

OR99-0901

Dear Mr. Enders:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123180.

The West Texas Community Supervision and Corrections Department (the "department") received several requests for various documents. You state that you will release certain responsive information to the requestor. You claim, however, that the remaining information is excepted from disclosure by section 552.101. We have considered your arguments and have reviewed the submitted sample information.¹

The Public Information Act does not require a governmental body to make available information which does not exist, nor does it require a governmental body to prepare new information. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 (1992), 362 (1983). Nevertheless, the department must make a good faith effort to relate a request to information it holds. Open Records Decision No. 87 (1975); see Gov't Code § 552.353 (providing penalties for failure to permit access to public information). Based on your statements, we conclude that the department maintains information relating to its terminated employees as well as information relating to employees who have been asked to submit to polygraph examinations. The department should respond to items 4 and 6 of the request by providing the requestor with those responsive documents in its possession.² The department may not deny a request simply because it is a burden to retrieve the requested information.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²We note, however that Texas law prohibits the public disclosure of the results of polygraph examinations. V.T.C.S. art. 4413(29cc).

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses both common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual’s privacy interests against the public’s need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

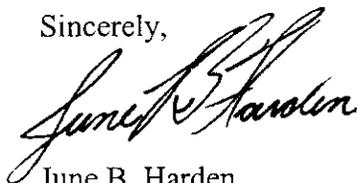
This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), 396 (1983) (financial records of inmates), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987). *See also* Health and Safety Code § 81.103 (making certain test result information confidential); Open Records Decision No. 339 (1982) (sexual assault victim has common-law privacy interest which prevents disclosure of information that would identify them). We have reviewed the submitted documents and have marked the information that must be withheld under constitutional or common-law privacy.

The submitted documents also contain allegations of sexual harassment. 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.*

Based on *Ellen*, we believe that the department must withhold information which would tend to identify the witnesses and victims of any alleged sexual harassment discussed within the documents. We have marked the information which must be withheld. However, we find that the public interest in the statements of the alleged harasser outweighs any privacy interest he may have in that information. Therefore, the department may not withhold his statements from public disclosure.³

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.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

³The submitted documents contain the phone number of a public employee. We note that pursuant to section 552.117 of the Government Code, the department must withhold the *home* phone number of a public employee who elected to have this information withheld from public disclosure under section 552.024 of the Government Code. You may not, however, withhold this information for an employee who made a request for confidentiality under section 552.024 after this request for information was made. *See* Open Records Decision No. 530 (1989). The *work* phone number of a public employee is public information and may not be withheld from disclosure.

Mr. Stephen L. Enders - Page 4

Ref: ID# 123180

Enclosures: Marked documents

cc: Mr. Richard Flores
1508 Dale Douglas
El Paso, Texas 79936
(w/o enclosures)